Avoiding a full criminal trial: Fair trial rights, diversions, and shortcuts in Dutch and international criminal proceedings
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5.1 Introduction

In this Chapter, the diversions and shortcuts that have been described in Chapter 3 and Chapter 4 are evaluated. The participatory model of proof, as described in Chapter 2, is the normative framework. Each diversion and shortcut is analysed with the four elements of the participatory model as guidelines: non-compulsion, informed involvement, the ability to challenge the evidence and the element of a reasoned judgement. In this Chapter, the elements are discussed in more detail, related to the particular diversions and shortcuts described in the previous chapters. The main question is whether the accused is able to participate effectively when the full criminal trial is avoided.

Certain elements of the participatory model, viewed in isolation, do not fit easily (or, not at all) to particular diversions or shortcuts. For example, the element of the reasoned judgement does not fit easily with diversions in which the decision is not handed down by the court.¹ Similarly, the element of non-compulsion does not seem to be a proper point of view when analysing the use of facts of common knowledge: the fact that the court identifies such facts proprio motu does not infringe in any way on the element of non-compulsion. It is precisely in these circumstances that the overall

¹ The international practice on plea-bargaining provides for an interesting exception.
notion of participation is of the essence: certain elements may be not applicable or infringed, but it is vital that, overall, the accused is able to participate effectively.\textsuperscript{2}

The European Court of Human Rights itself shows a flexible approach to the different elements of the model (for example by the Court’s approach to jury trials and the right to a reasoned judgement). This testifies to the Court’s holistic approach in the determination of whether the proceedings were fair: the Court considers the proceedings as a whole to determine whether the right to a fair trial has been infringed.

As the Court’s Grand Chamber held in \textit{Al-Khawaya and Tahery}:

The Court recalls that the guarantees in paragraph 3(d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of the proceedings,\textsuperscript{3}

and,

the Court has always interpreted Article 6 § 3 in the context of an overall examination of the fairness of the proceedings.\textsuperscript{4}

\textsuperscript{2} Jackson and Summers make a similar point when they observe: ‘The ECtHR has given states considerable leeway in translating these principles into national law in an attempt to accommodate established procedures within the two prevailing traditions. It may seem, for example, that jury trial offends against the principle of a reasoned judgment, but the ECtHR has accepted that one way of compensating for the lack of a reasoned judgment is by a carefully framed direction from the judge. It is also true that each principle may not in isolation measure up to the degree of participation permitted in one or other of the established traditions. For example, the right to examine witnesses in the adversarial tradition has not been confined only to decisive witnesses. By contrast, however, the second principle requiring informed defence participation before trial goes much further than traditional adversarial or inquisitorial procedure. Collectively, it may be said that the principles extend the boundaries of participation beyond those that have been traditionally permitted within each of the traditions and the established procedures have had to be realigned upon a more participatory footing.’ J. D. Jackson, S.J. Summers, \textit{The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions}, Cambridge University Press, Cambridge 2012, p. 104.

\textsuperscript{3} ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, \textit{(Al-Khawaya and Tahery v. United Kingdom)}, par. 118.

\textsuperscript{4} ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, \textit{(Al-Khawaya and Tahery v. United Kingdom)}, par. 143. See also \textit{Ibrahim and Others v. United Kingdom}, in which the Fourth Section of the Court held: ‘The guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair hearing set forth in Article 6§ 1 which must be taken into account in that evaluation. Their intrinsic aim is to contribute to ensuring the fairness of the criminal proceedings as a whole. But they are not an end in themselves; compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole, and not on the basis of the isolated consideration of one particular aspect or incident.’ ECtHR, 16 December 2014, App. No.: 50541/08; 50571/08; 50573/08 and 40351/09, \textit{(Ibrahim and Others v. United Kingdom)}, par. 191 (references omitted).
Evaluating the fairness of diversions is particularly relevant, because the number of such out-of-court settlements is on the rise. This is not only the case in The Netherlands: this trend can be discerned all over the Continent. Similarly, a substantial number of guilty pleas have been concluded before the international criminal tribunals. At first sight, it seems odd to take the case law of the European Court of Human Rights as the normative framework, particularly the Court’s interpretation of Article 6. The Article protects the right to a fair trial: it does not protect the right to a fair out-of-court settlement. Nowadays, however, criminal law is to a very significant extent enforced outside the traditional trial context. In a state that promotes the rule of law, it is unacceptable to have diversions operate in a normative vacuum.

Regarding the Dutch context, Keulen argued that the rise of out-of-court settlements (predominantly in the form of punitive orders) may infringe on one of the fundamental pillars of the criminal justice system: accurate fact-finding. The accuracy of the factual basis of out-of-court settlements is indeed important. A recent study conducted by the Procurator General of the Dutch Supreme Court concluded that punitive orders do not contain the means of proof on which they are based. This is troubling because it impedes the accused from determining easily whether the punitive order was issued correctly. Concerns regarding the use of plea-bargaining in the international context have been raised over the years: is it really desirable to avoid the trial context in case of international crimes?

An important question is which procedural guarantees exist regarding diversion mechanisms. If the state (or an international court) wishes to exercise its ius puniendi, the accused should be able to derive protection from the basic and fundamental concept of fairness. Seen this way, the manner in which the Court has developed its ‘trial concept’ of fairness over the past decades reflects only in part what actually occurs in the member states regarding the enforcement of criminal law. Or, more specifically: the protection that the concept of fairness provides, does not apply to a significant part of the criminal justice system. A solid normative framework is indispensable be-

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5 See Jaarbericht 2013 OM. In 2013, a substantial number of cases result in a punitive order (34,300), a transaction (17,600) or conditional dismissal (9,800). In the same year, the first-instance courts processed 110,050 cases. Weigend observed on the rise of out of court-se


7 Procureur-Generaal bij de Hoge Raad der Nederlanden, Beschikt en gewogen. Over de naleving van de wet door het openbaar ministerie bij het uitvaardigen van strafbescikkingen, The Hague 2014, p. 31. The report was conducted pursuant to Article 122 (1) of the Judiciary Organisation Act. This article gives the Procurator General the authority to inform the Minister of Security and Justice when the Procurator General finds that the prosecution service does not conduct its work properly.

cause of the lack of transparency and public scrutiny of diversion mechanisms. We can evaluate such mechanisms by using the participation model and apply it by analogy: instead of asking ourselves to what extent the accused has been able to participate effectively during the trial proceedings, we ask ourselves how effectively the accused has been able to participate in the ‘proceedings’ resulting in the diversion from the full criminal trial.

5.1.1 Waiving Rights

One could argue that a normative framework for diversions already exists: the criteria for a valid waiver of the right to have the case brought before an independent and impartial tribunal protect the accused from undue interference by the prosecutor. When the accused disagrees with the prosecutor on the facts of the case, the manner in which he is treated or the sentence that the prosecutor wants to impose, the accused may bring the case to court. In other words, the accused has a significant say regarding the use of the diversion mechanism: by not complying or by actively opposing the diversion mechanism, he can force the prosecutor to reconsider his intention to punish the accused. Should the prosecutor want to pursue the case, he must bring it to court, which means that all fair trial guarantees are applicable. Seen this way, the right of access to a court should then provide the necessary procedural guarantees for the diversion mechanism. Complying with the terms of the diversion mechanism, in this view, is then to be regarded as a waiver of the fair trial guarantees that are applicable during trial proceedings.

Although the practice of diversion mechanisms has to comply with the Court’s case law on waiving the right to access to a court and other fair trial rights, as a normative framework it does not suffice. Waiving the right of access to a court is the culmination of a process in which both the prosecutor and the accused operate in the shadow of trial proceedings. To focus solely on the final agreement of the parties ignores the process that has preceded it. The participatory model provides the normative framework for diversions already exists: the criteria for a valid waiver of the right to have the case brought before an independent and impartial tribunal protect the accused from undue interference by the prosecutor. When the accused disagrees with the prosecutor on the facts of the case, the manner in which he is treated or the sentence that the prosecutor wants to impose, the accused may bring the case to court. In other words, the accused has a significant say regarding the use of the diversion mechanism: by not complying or by actively opposing the diversion mechanism, he can force the prosecutor to reconsider his intention to punish the accused. Should the prosecutor want to pursue the case, he must bring it to court, which means that all fair trial guarantees are applicable. Seen this way, the right of access to a court should then provide the necessary procedural guarantees for the diversion mechanism. Complying with the terms of the diversion mechanism, in this view, is then to be regarded as a waiver of the fair trial guarantees that are applicable during trial proceedings.

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mative framework required because it enables us to look at the process as a whole instead of looking at a single procedural moment.

5.1.2 Outline

The Chapter is divided into two parts. In the first part, the manner in which the full criminal trial is avoided in the Dutch context is evaluated. The second part of the Chapter is concerned with the international context.

5.2 Diversions and Shortcuts in Dutch Law of Criminal Procedure

5.2.1 Diversions and the Participatory Model of Proof

5.2.1.1 The Punitive Order

When the prosecutor wants to issue a punitive order consisting of community service, the prohibition to drive motor vehicles, the payment of a sum exceeding 2,000 € (either as a fine or damages) or when the prosecutor wants to impose a measure, it is mandatory to hear the accused.\(^\text{11}\) Hearing the accused aims, \textit{inter alia}, to improve the quality of the prosecutor’s decision. Although hearing in this regard is not the same as an interrogation where the accused is under arrest, the accused must be warned that he has the right to remain silent during the hearing.\(^\text{12}\) In this regard, the accused cannot be forced to incriminate himself, or, considering the character of the hearing, to contribute actively to the correct imposition of the punitive order. The recent report of the Procurator General shows that in almost all cases that were analysed, the accused was informed of his right to remain silent during the hearing.\(^\text{13}\) The right of access to a lawyer before the hearing is respected in virtually all cases that were analysed.\(^\text{14}\)

When the accused files a notice of disagreement against the punitive order, the case will be sent to court (unless the prosecutor withdraws the punitive order), and the provisions in the Code of Criminal Procedure on regular first-instance proceedings will apply. It is not uncommon that the prosecutor, when the case is sent to court, demands a higher sentence than the one stated in the punitive order. In the directive on the punitive order, issued by the Board of Procurator Generals, it is stated that the prosecutor may seek a higher penalty (with a maximum of 20% above the initial sanc-

\(^{11}\) Art. 257c CCP. In case of the payment of a sum exceeding 2,000 € the accused must be accompanied by a lawyer.

\(^{12}\) Kamerstukken I, 2005/06, 29849, C, p. 31.


\(^{14}\) Procureur-Generaal bij de Hoge Raad der Nederlanden, \textit{Beschikt en gewogen. Over de naleving van de wet door het openbaar ministerie bij het uitvaardigen van strafbeschikkingen}, The Hague 2014, p. 34.
tion in the punitive order) in cases where the accused has not formulated the reasons for the complaint and fails to appear in court.\textsuperscript{15} Similarly, when an accused does appear in court but refuses to explain the reasons for his complaint, the prosecutor may demand a higher penalty.

How does this relate to the element of non-compulsion? Kooijmans emphasised that the prosecutor is entrusted with the determination of the appropriate sentence for the accused. This requires him to ensure that the charge can be proven, that there are no legal impediments and that the accused cannot invoke any justification or excuse. Moreover, the initial sentence imposed by the prosecutor in the punitive order must be in conformity with standard sentencing guidelines.\textsuperscript{16} Seen this way, to strive for a higher sentence because the accused files a complaint is not in conformity with the task the prosecutor has been entrusted with: imposing sentences.

Compared with the other diversions, the punitive order requires an active attitude from the accused. Whereas the transaction and conditional dismissal can only function properly when the accused agrees with the terms of both mechanisms, the punitive order becomes binding when the accused remains passive and does not file a notice of disagreement. The active attitude is closely related to the next element of the participatory model of proof: informed involvement.

The active attitude requires that the accused is sufficiently informed about the consequences of the issuance of the order. He has to be properly informed about his rights and the consequences of every procedural choice he may wish to make. Article 6 (3) (a) of the Convention contains the right to be informed promptly of the nature and cause of the accusation. According to Article 257a (6) (b) CCP, the punitive order must contain the factual and legal aspects of the charge. ‘Charge’ has the same meaning as ‘charge’ in regular trial proceedings.\textsuperscript{17} The Court has held that: ‘in criminal matters the provision of full, detailed information concerning the charges against a defendant is an essential prerequisite for ensuring that the proceedings are fair’.\textsuperscript{18} This encompasses both the factual basis and the legal characterisation of the offence.\textsuperscript{19} The right to be informed, however, is not concerned with providing the accused with information regarding his procedural rights. Nevertheless, Article 257 (6) (f) CCP states that the

\textsuperscript{15} Aanwijzing OM-beschikking, par. 4.1., Stcr. 2015, 8971. See also Kamerstukken II, 2004/05, 29849, 3, p. 42.

\textsuperscript{16} T. Kooijmans, in: Melai/Groenhuijsen e.a., Wetboek van Strafvordering, aant. 5.6., artt. 257a-257h Sv, (online, revised 18 September 2012).

\textsuperscript{17} Article 257a (6) (b) CCP refers to Article 261 (1) and (2) CCP on the requirements for charging the accused.


\textsuperscript{19} ECtHR (GC), 25 March 1999, App. No.: 25444/94, (Péllissier and Sassi v. France), par. 51. The Court observed in par. 54 that ‘(...) as regards the complaint under Article 6 § 3 (b) of the Convention, the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused’s right to prepare his defence.’
punitive order must provide the accused with information on how to file a notice of disagreement against the punitive order. When the punitive order consists of a fine, the prosecutor (or a police officer) must inform the accused that the payment of the fine results in waiving the right to file a notice of disagreement.\textsuperscript{20} When the accused is sufficiently informed of the consequences of paying and voluntarily decides to do so, he has validly waived his right to file a notice of disagreement. In response to the report of the Procurator General to the Supreme Court, the prosecution service decided to provide accused persons with a leaflet in which the legal framework of the punitive order is explained.\textsuperscript{21} The accused is informed that he can only pay the fine or start with community service after he has consulted a lawyer, unless he waives his right to do so. Moreover, the accused is informed that when he pays, he can no longer file a notice of disagreement.

In case the punitive order is of a more serious character, the accused must be heard. He must also be informed explicitly of his right to a lawyer. In the most serious cases, a lawyer must accompany the accused when the prosecutor interrogates him. This way, the accused is provided with sufficient information on his procedural rights.

An important element concerns the factual basis of the punitive order: what is the evidence the prosecutor relies on?\textsuperscript{22} And, more importantly, does the accused have access to the case file, and is he able to challenge any incriminating evidence? The right to challenge evidence is typically exercised during proper trial proceedings, where the prosecutor presents the evidence against the accused. Subsequently, the accused may challenge the evidence presented against him. Regarding the punitive order, no typical procedural moment is envisaged in which the evidence is presented with the possibility to challenge it: on the contrary, if the accused wishes to challenge the evidence, he should opt for the full criminal trial (in which the regular fair trial guarantees apply). Article 33 CCP states that as soon as the punitive order has been issued, the accused has the right to get acquainted with the case file.\textsuperscript{23}

\textsuperscript{20} Aanwijzing OM-strafo scheikking, bijlage 2. Stc. 2013, 33003. These procedural guarantees are left out the most recent directive on the punitive order. This probably has to do with the reaction to the Procurator General’s report on punitive orders. The Board of Procurators General decided that punitive orders that consist of a fine, may not be paid immediately any longer. https://www.om.nl/actueel/nieuwsberichten/@88117/reactie-rapport/ (last visit: 1 January 2016).
\textsuperscript{21} https://www.om.nl/actueel/nieuwsberichten/@91271/aangepaste-werkwijze/ (last visit: 1 January 2016).
\textsuperscript{22} In the report of the Procurator General examples are given of cases in which a considerable percentage (8%) of the handled cases are based on an insufficient factual basis. Procureur-Generaal bij de Hoge Raad der Nederlanden, Beschikt en gewogen. Over de naleving van de wet door het openbaar ministerie bij het uitvaardigen van strafbeschikkingen, The Hague 2014, p. 59-60.
\textsuperscript{23} Article 27c (3) (d) CCP states that accused that are arrested shall be notified of their right of access to the case file prior to the first interrogation. However, punitive orders may be issued without having arrested the accused. See also the directive on the punitive order, concerning the right to get acquainted with the case file. Aanwijzing OM-afdoening, Stc. nr. 11374, 29 April 2013.
The prosecutor determines independently whether the accused is in fact guilty of the crime or infraction for which the punitive order is imposed. Thus, the prosecutor is obliged to disclose the incriminating evidence he has in his possession: the disclosure guarantees of Article 6 apply by analogy.\footnote{‘In addition Article 6 (1) requires (...) that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.’ ECtHR (GC), 16 February 2000, App. No.: 28901/95, \textit{(Rowe and Davis v. United Kingdom)}, par. 60. See also ECtHR, 16 December 1992, App. No.: 13071/87, \textit{(Edwards v. United Kingdom)}, par. 36.} According to the Court, it is a ‘requirement of fairness [...] that the prosecution authorities disclose to the defence all material evidence for or against the accused’.\footnote{ECtHR, 16 December 1992, App. No.: 13071/87, \textit{(Edwards v. United Kingdom)}, par. 36.} This aspect of fairness is often linked to the principle of equality of arms and the right to have adequate time and facilities to prepare one’s defence.\footnote{Cf. ECtHR (GC), 16 February 2000, App. No.: 28901/95, \textit{(Rowe and Davis v. United Kingdom)}, par. 60.} The obligation to provide the accused with all the relevant evidence after the punitive order has been issued was underlined by the Minister of Justice during the parliamentary debates on the punitive order.\footnote{Kamerstukken II, 2004/05, 29849, 3, p. 64.} In order to be effective, the evidence should be provided before the term to file a notice of disagreement has expired (that is, normally, within two weeks).

The final element of the participatory model of proof concerns the right to a reasoned judgement that can be challenged. In the case of the punitive order it is more appropriate to speak of the right to a reasoned decision. There are multiple rationales for a reasoned decision. First, a reasoned decision allows the parties to verify whether the prosecutor has taken the decision in accordance with the applicable rules. Second, the requirement to account for the findings ensures that the prosecutor accounts for his findings: he has to explain how he determined the guilt of the accused. Third, reasoned decisions demonstrate to the public that criminal law is enforced in a proper and transparent manner. Finally, in case the accused has formulated objections against particular elements of the case, the prosecutor must explain why the objection was found unpersuasive.

One of the conclusions in the Procurator General’s report concerned the contents of the punitive order. Article 257a (6)(b) CCP states that the punitive order must contain the facts of the case, including when and where the fact was committed. The Procurator General concluded that the factual description in the punitive order is normally rather brief and sometimes even cryptic.\footnote{Procureur-Generaal bij de Hoge Raad der Nederlanden, \textit{Beschikt en gewogen. Over de naleving van de wet door het openbaar ministerie bij het uitvaardigen van strafbeschikkingen}, The Hague 2014 p. 58.} This may leave the accused in the dark as to which particular fact the punitive order was issued. This is also problematic with regard to the \textit{ne bis in idem} rule. When the fact for which the punitive order is
issued cannot be identified with sufficient precision, the protection of the *ne bis in idem* rule may be jeopardised.\textsuperscript{29}

The Minister of Justice stated during the parliamentary debates on the punitive order that it is within the prosecutor’s discretion to provide a reasoned punitive order.\textsuperscript{30} Article 257a CCP does not contain an obligation to do so. Only when the accused has specifically addressed certain issues during the hearing is the prosecutor obliged to provide reasons, if he disagrees with the accused. If, however, the prosecutor has given the reasons orally, there is no obligation to put them in writing.\textsuperscript{31}

In order for the right to file a notice of disagreement to be effective, the accused has to be able to participate effectively: only when the accused has full knowledge of the reasons for issuing the punitive order (more specifically, the incriminating evidence the prosecutor relies on) and is fully aware of his procedural rights, he can determine freely whether or not to file a notice of disagreement.

5.2.1.2 The Transaction

The transaction is a diversion mechanism characterised by consensus: unlike the punitive order, a sentence is not imposed but agreed to by the accused. When discussing the transaction, it is important to make a clear distinction between transactions that are offered for minor offences and so-called special transactions.\textsuperscript{32} The latter category consists of all transactions above 500,000 € and transactions above 50,000 € that are not included in the internal prosecutorial directive. Transactions that are offered in controversial cases, such as cases that have attracted substantial media coverage or which concern ethical issues, are also labelled as special transactions. With the implementation of the punitive order, it was envisaged that the transaction would be abolished gradually. It still remains unclear, however, whether the transaction will indeed be abolished completely: particularly in complex cases (such as fraud cases involving corporations), the transaction enables the prosecutor to reach an out-of-court settlement, thereby avoiding costly and lengthy trial proceedings with an uncertain outcome. In case of minor offences, the transaction has been replaced by the punitive order.

The transaction is based on consensus between the accused and the prosecutor and on the actual enforcement of the conditions contained in it: the accused has to consent to the conditions of the transaction, and those conditions have to be ful-

\textsuperscript{30} Kamerstukken II, 2004/05, 29849, 3, p. 69.
\textsuperscript{31} Article 257c (3) CCP.
filled.\textsuperscript{33} The legal character of the transaction itself presupposes voluntariness: the prosecutor cannot enforce the transaction unilaterally but has to seek the cooperation or consent of the accused. Although in cases concerning minor offences the transaction was often perceived as an ordinary fine that is imposed, this perception should not detract from the consensual character of the transaction. Especially in more controversial cases, the consensual character of the transaction will be acknowledged by the accused: he will normally be assisted by counsel, who informs the accused of this consensual character.

Considering the element of non-compulsion, it can be concluded that the transaction does not have a compulsory character. Although some pressure will exist due to the mere fact that someone is accused of a criminal offence, the transaction is based on voluntariness and consensus. The accused can simply ignore the transaction, in which case the prosecutor must initiate regular trial proceedings and bring the case to court. The major difference with the punitive order is the fact that a passive attitude of the accused will not lead to the enforcement of the conditions in the transaction (whereas remaining passive in the framework of the punitive order will lead to the enforcement of the punitive order).

Considering the element of informed involvement, it is again important to distinguish clearly between transactions offered for minor offences (which have been replaced by the punitive order) and the transactions with a special character. The latter category is of primary interest when the element of informed involvement is discussed: it is common practice that such transactions are concluded after negotiations have been conducted between the prosecutor and the accused (often represented or assisted by counsel). It is safe to assume that an accused who enters into negotiations with the prosecutor is well aware of his legal position and of the consequences that his procedural choices may have.

Closely related is the element of challenging the evidence. The fact that transactions are offered or negotiated \textit{inter partes} without any public scrutiny makes it hard to determine to what extent the accused is able to get acquainted with incriminating evidence and whether he is in a position to challenge such evidence.\textsuperscript{34} However, it seems safe to assume that the prosecutor will present the evidence (or a summary thereof) he relies on during the negotiations: if he does not do so, he will probably not convince the accused that he has a case that can be brought successfully before the court. The result will be that the negotiations fail.


\textsuperscript{34} It should be noted though, that special transactions are, as a rule, accompanied by a press release, in which the prosecutor explains with whom he has reached a transaction. The press release includes the factual basis for the transaction, as well as the amount of money the accused has to pay to avoid trial proceedings. Cf. Aanwijzing hoge transacties en bijzondere transacties, par. 4.
The element of a reasoned judgement that can be challenged is practically absent: there is no judgement that is pronounced in public (the press release for special transactions cannot be equated with a fully reasoned judgement). Moreover, there is no incentive for either party to bring the case to court, which means the transaction cannot be challenged. It is instructive in this regard to recall the rationale of reasoned judgements. The Court has stated that the reasoned judgements are a ‘vital safeguard against arbitrariness’. Moreover, the accused must be able to understand the reasons for his conviction. The Court, however, also held that the ‘extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case.’ In a jury trial where no reasons for the conviction are given, the Court held that the trial proceedings as such and the manner in which the jury answered the questions put to them complied with the right to a reasoned judgement. As long as the parties are aware of the ‘framework on which the decision had been based’, there will be no violation of the right to a reasoned judgement. This entails that the proceedings as such, instead of the final judgement, can provide the reasons for the outcome.

It is clear that these judgements of the Court are concerned with proper trial proceedings, in which the applicant complained that the court failed to provide him with a reasoned judgement. Nevertheless, the rationale the Court discerns for providing reasons is instructive for out-of-court settlements as well. The Court allows for a differentiated approach regarding the obligation to provide reasons; this depends on the nature of the decision and the procedure that has been chosen. Although the Court is concerned here with decisions within the trial context, this should not detract us from the fundamental importance of avoiding arbitrariness and providing the accused with sufficient reasons for offering a transaction. The obligation for the prosecutor to provide reasons can then be regarded as a legitimate alternative for providing the accused with a reasoned decision.

In the leading textbook on Dutch criminal procedure, Borgers argued in favour of judicial supervision for special transactions: the court should approve such transactions after a public hearing. This way, both the quality of the transaction (is there sufficient evidence, has the prosecutor acted in conformity with all the applicable rules and regulations?) and the public scrutiny of the enforcement of criminal law is guaranteed. This resembles the practice of plea-bargaining of the international tribunals, which is described in Chapter 4. Such judicial approval would ensure that the procedural guarantees have been observed and that sufficient evidence has been col-

35 ECtHR (GC), 16 November 2010, App. No.: 926/05, (Taxquet v. Belgium), par. 90.
36 ECtHR (GC), 16 November 2010, App. No.: 926/05, (Taxquet v. Belgium), par. 92.
38 ECtHR (GC), 16 November 2010, App. No.: 926/05, (Taxquet v. Belgium), par. 86.
lected. Considering the importance of the rights of the accused and transparent criminal law enforcement, judicial approval of special transactions is to be welcomed.40

5.2.1.3 The Conditional Dismissal

Similar to the transaction, conditional dismissals are based on consensus: the prosecutor stipulates the conditions the accused has to comply with, and the accused consents to those conditions. The analysis on the conditional dismissal resembles the analysis on the transaction.41

The dismissal is based on the notion that the accused complies voluntarily with the conditions stipulated by the prosecutor. The prosecutor cannot enforce the conditional dismissal. In case the accused refuses to comply, he must bring the case to court if he wishes to have the conditions imposed on the accused.

If the accused complies with the conditions of the conditional dismissal, the prosecutor forfeits the right to bring the case to court. Seen in the light of the element of non-compulsion: the accused may at any time refuse to comply, or refuse to comply any longer, with the conditions. The prosecutor has no enforcement mechanisms to ensure the (continued) cooperation of the accused: the only possibility left is to initiate regular trial proceedings.

Similar to the transaction, the degree of informed involvement depends on the manner in which the prosecutor informs the accused of his procedural rights. In case of a non-represented accused, the prosecutor should make sure the accused is well aware of the non-coercive character of the dismissal. In addition to his procedural rights, the accused should also get acquainted with the incriminating evidence. This enables him to make an informed decision as to whether or not to comply with the dismissal: if the accused believes that the evidence is insufficient, unreliable or illegally obtained, he may choose to refuse to comply. Normally this would result in regular trial proceedings in which the accused can contest the incriminating evidence.

In regard to the ability to challenge the evidence before the case goes to court, the law is silent. However, it seems reasonable to assume that the prosecutor will inform the accused about the evidentiary basis for the dismissal. One could argue that merely facilitating the participation of the accused, in the sense that the accused is given the opportunity to put forward his arguments, does not suffice: the prosecutor must ensure that the accused can participate effectively and should, therefore, bring the incriminating evidence to the attention of the accused. Within the trial context,

Jackson and Summers argued that ‘in order to ensure effective defence participation, it is not enough to facilitate defence participation. Steps must be taken to see that it is exercised effectively and the court has an important role to play in this regard.’ It is argued that the prosecutor has a similar responsibility: in the context of diversion mechanisms, he is the one that must enable the accused to participate effectively.

Similar to the transaction, no reasoned decision will be handed down. The legitimacy of the dismissal mechanism is based on the manner in which the prosecutor provides the accused with sufficient information and reasons during the process of issuing the dismissal. Again, to avoid arbitrariness it is vital that the prosecutor provides sufficient information to the accused in order for him to make an informed and voluntary decision.

5.2.2 Shortcuts and the Participatory Model of Proof

As was described in the Introduction, shortcuts to proof are used during the trial proceedings to speed up the proceedings. The principle of *nulla poena sine iudicio* is fully adhered to: there is direct judicial supervision on the use and fairness of the shortcut to proof. The shortcuts that were discussed in Chapter 3 are evaluated in light of the participatory model of proof: was the accused able to participate effectively when the shortcut to proof was used?

5.2.2.1 Facts of Common Knowledge

The use of facts of common knowledge can have detrimental consequences for the manner in which the accused is able to participate during the proceedings. Although no issue arises concerning the element of non-compulsion (the accused is not in any way compelled to provide or to challenge facts of common knowledge), the other elements of the participatory model of proof may be infringed.

The element of informed involvement may be infringed when the accused does not expect the court will consider the use of a fact of common knowledge to ‘prove’ a part of the *probandum*. Normally, the accused can easily determine to which part of the charge the means of proof relate: for example, witness statements relate to specific parts of the *probandum*, a DNA match relates to the identification of the accused and the statement of the accused may relate to the accused’s *mens rea*. If, however, the court does not require formal proof for the existence of a particular fact, the accused may not be properly informed about the evidence the court relies on. This is particularly the case when the accused is confronted with a fact of common knowledge for the first time in the judgement. As discussed in Chapter 3, in several cases the use of facts of common knowledge to prove contextual facts, such as the existence and

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character of an armed conflict, was revealed to the accused for the first time in the judgement.

Closely related is the right to challenge the evidence. It is evident that the accused is not in a position to properly challenge the existence of facts of common knowledge when he is confronted for the first time with such facts in the judgement. The Supreme Court held in the A.C.A.B.-case that, when the court is not sure whether a fact is indeed of common knowledge, the court is obliged to discuss such a fact with the accused and the prosecutor. This enables the parties to comment on or challenge such facts. If one of the parties seriously doubts that the fact is of common knowledge and provides reasons for this view, the court is obliged to specifically respond to such arguments when it still finds the fact to be of common knowledge.

The obligation for the court to provide reasons regarding why it deemed a particular fact to be of common knowledge is, in fact, triggered by the parties. The nature of facts of common knowledge implies that, normally, the court is under no obligation to account for the use of facts that are not controversial and are undisputed. Accordingly, it suffices for the court to identify facts of common knowledge and include them in the judgement. This explains why the parties can be surprised when the judgement is handed down and they learn how the court has made use of facts of common knowledge.

From a procedural point of view, a distinction can thus be made between two types of facts of common knowledge: facts that are patently indisputable and facts that are most likely to be of common knowledge but which have to be discussed during the proceedings. From an epistemological point of view this distinction is absurd: a fact is either of common knowledge or it is not. Procedurally, however, it makes sense to distinguish between the two types. In the latter category, the court is obliged to account specifically for the conclusion that certain facts are of common knowledge. When we take the example of the post WWII cases, as described in Chapter 3, the contextual fact of the state of war has been regarded as a fact of common knowledge by the extraordinary courts and the Extraordinary Court of Cassation. Even in cases in which the accused explicitly argued that no state of war existed when he committed his acts, the courts held that the state of war was of common knowledge. In the more recent prosecutions under the Criminal Law in Wartime Act and the International Crimes Act, contextual elements have been proven (in part or in whole) by facts of common knowledge. The District Court in Joseph M., and to a lesser degree in Yvonne B., based the finding that a non-international armed conflict existed in Rwanda on the ICTR’s conclusion that the existence and nature of an armed conflict are facts of common knowledge. On the basis of the judgements, it cannot be verified whether the court discussed these facts with the prosecution and the defence during the proceedings.

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Neither can it be verified whether the defence challenged the existence and nature of the armed conflict.

The Supreme Court ruling in the A.C.A.B.-case is primarily concerned with facts that are not *prima facie* of common knowledge. However, even if certain facts are *prima facie* of common knowledge, it can still be important to identify and discuss these facts with the parties. This is particularly the case when such facts relate directly to important contextual facts. The argument that the existence and nature of an armed conflict in Rwanda in 1994 is a notorious historical fact not subject to reasonable dispute is true but irrelevant in this regard: procedural justice demands that such facts are discussed (briefly or *in extenso*, when the parties or the court wishes to do so) with a view to adversarial argument (*‘un débat contradictoire’*). It is the fundamental right of the accused to participate effectively in the proceedings and challenge every piece of evidence and facts of common knowledge he wishes.

The examples above illustrate why it is important to identify facts of common knowledge as soon as possible. It provides the accused with the possibility to challenge such facts and to participate effectively in the proceedings. This is of paramount importance when facts of common knowledge are used to prove contextual elements. The final element of the participatory model of proof, the right to a reasoned judgement, does not apply as such to the use of facts of common knowledge: the court is, normally, not obliged to explain why a particular fact is of common knowledge.

This is not problematic with regard to the *prima facie* facts of common knowledge: it would be pointless to account for facts that are beyond dispute. The other category, however, requires more reasoning: the court must account for why a particular fact is of common knowledge, for example, by referring to reliable and publicly accessible sources.

5.2.2.2 Chain Evidence

Chain evidence allows the court to rely on the evidence or conviction regarding other charges in proving a particular charge. The use of chain evidence in criminal proceedings and the compatibility of this shortcut to proof with the right to a fair trial, in particular the right to examine witnesses, has been addressed by the Court in the case of Scheper *v. The Netherlands*. Before we turn to the elements of the participatory model, this case will be discussed first.

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44 This is the situation in which a *factum probandum* is proven by a fact of common knowledge, instead of a *factum probans*.

45 It is recalled that the use of facts of common knowledge aims to expedite proceedings and to limit the reasoning in the judgement.

46 An example of what such reasoning may look like, can be found in the Karemera case. Reasons were given by the ICTR Appeals Chamber for why a particular fact was of common knowledge, with references to public sources. ICTR, *Prosecutor v. Karemera*, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, Case No.: ICTR-98-44-AR73(C), A. Ch., 16 June 2006.
The accused in this case faced three charges of rape. The victims, drug-addicted street prostitutes, all stated that they had been raped in a very aggressive, painful and even bizarre manner. The rapes were committed in three different towns, but, considering the similar *modus operandi*, the police were able to arrest the accused. The accused admitted that he had sexual intercourse with the three women but denied that he had raped them. As is not uncommon in sexual assault cases, the evidence consisted mainly of the statements of the victims. The defence requested to have the three witnesses testify in open court in order to challenge their statements. Attempts to locate the witnesses and have them appear in court were, however, fruitless.\(^{47}\) The defence argued that the right of the accused to examine the witnesses against him, protected under Article 6 (3) (d) of the Convention, had been violated. The Court concluded that the fair trial rights of the accused in this particular case were not violated, because the statements were not the sole or decisive evidence against the accused. The Court held:

> Indeed, the Court observes that the applicant’s conviction of the rape of Ms A., Ms B. and Ms C. did not rest solely on the statements made by them to the police. A number of leads, with which these witnesses had provided the police, had been followed up and had resulted in supporting evidence. Bearing in mind that it concerned three nearly identical incidents with a similar modus operandi by the perpetrator and which occurred within a relatively short time span in three different towns, and having regard to all the material used in evidence against the applicant, including his own statements made before the police and the trial courts, the Court holds that the applicant’s conviction cannot be said to have been based only or to a decisive extent on the statements given by Ms A., Ms B. and Ms C. to the police.\(^{48}\)

Consistent with its established case law, in particular the fourth instance-doctrine, the Court did not assess the evidence that was presented before the domestic courts.\(^{49}\) The statements were not regarded by the Court as the only or decisive evidence against the accused because of the similar *modus operandi*. The Court, in determining whether the witness statements were the sole or decisive evidence against the accused, took into account the similarities between these statements. When we look at the three charges in isolation, however, it appears that the statements of the three women were the decisive evidence regarding each particular charge. Decisive evidence, according to the Court’s definition, is ‘evidence of such significance or importance as is likely to be determinative of the outcome of the case’.\(^{50}\)

\(^{47}\) Ms. A did appear before the Court of Appeal, but the defence was not able to question her: she stated that she believed she was called as an injured party and not as a witness. After a short adjournment of the proceedings, Ms. A did not return: she was too traumatised to give evidence. ECtHR, 5 April 2005, App. No.: 39209/02, (*Scheper v. The Netherlands*), p. 2-3.


\(^{49}\) ECHR, 12 July 1988, App. No.: 10862/84, (*Schenk v. Switzerland*).

\(^{50}\) ECHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (*Al-Khawaya and Tahery v.*
In the case of Ms A., the evidence consisted of her statement that she had been raped in Arnhem; the statement of the accused that he had sexual intercourse with Ms A.; a medical report of Ms A.; a police report on similar rapes in Groningen and Amsterdam; the statement of a witness who identified the accused from a number of photos; and, finally, the identification of the accused by Ms A. from a number of photographs. It is evident that the statement of Ms A. and her identification of the accused were decisive evidence for the outcome of the case.

In the case of Ms B., the evidence consisted of the statement of Ms B.; a police report on the similar rape of Ms C. and the statement of the accused that he had sexual intercourse with a prostitute in Groningen. Similar to the case of Ms A., the statement of Ms B. has to be regarded as decisive evidence.

In the case of Ms C., the evidence consisted of the statement of Ms C. that she had been raped in a car in an aggressive and very painful manner and the statement of the accused that he had sexual intercourse with a prostitute in Amsterdam. Ms C. was able to provide the police with the license plate of the car, which matched the license plate of the car of the accused. Again, the statement of Ms C. is the decisive evidence in her case.

When the cases would have been analysed in isolation, it would have resulted in the conclusion that the right to examine the witnesses was violated: decisive witness statements have not been challenged, and no counterbalancing measures were taken. The Court held, however, that due to the similarities between the three cases, the statements of the women were not decisive evidence. In fact, each statement corroborated the other two statements. From an epistemological point of view this is a solid line of argument. Nevertheless, the accused has been deprived of the right to examine the witnesses against him. The right to challenge the evidence and participate effectively in the proceedings were not counterbalanced by any procedural measures. The reasoning of the Court is problematic because in cases in which the evidence consists predominantly of statements of vulnerable witnesses that do not testify in open court, chain evidence can be used as a remedy for not being able to examine the witnesses. This can hardly be regarded as a proper way of compensating the defence. As the Court held in Al-Khawaya and Tahery, when the conviction is based:

solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. (...) The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would

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United Kingdom), par. 131.

51 ECtHR, 5 April 2005, App. No.: 39209/02, (Scheper v. The Netherlands), p. 4-5.
52 ECtHR, 5 April 2005, App. No.: 39209/02, (Scheper v. The Netherlands), p. 5.
permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.\textsuperscript{54}

In Scheper, such an assessment of the reliability of the unchallenged witness statements did not occur: the Court held that the statements were not decisive evidence.\textsuperscript{55} The reasoning of the Court is not persuasive: the unchallenged statements are, as such, decisive evidence. This is not altered by the fact that the statements are regarded as chain evidence in order to support each other. The perils of using chain evidence are exemplified by the reasoning of the Court: by using the statements as chain evidence, the domestic court was not obliged to provide for counterbalancing measures. This means that the accused was not able to challenge the evidence against him effectively: he has not had the opportunity to challenge the witnesses directly, and it is uncertain whether he has had the opportunity to comment on the use of the statements as chain evidence.

When the use of chain evidence is examined in light of the participatory model of proof, it becomes evident that the right to effectively challenge the evidence is infringed when the use of chain evidence is not explicitly discussed during the proceedings. Chain evidence is normally used in proceedings in which there is insufficient evidence to prove each charge separately.\textsuperscript{56} The evidence in such cases consists predominantly of the specific \textit{modus operandi} regarding the different charges.

From the perspective of the accused, it is important that the potential use of chain evidence is discussed during the proceedings and not \textit{in camera} after the close of the proceedings. The prosecutor, when he presents the case, often requests the court to consider the use of chain evidence.\textsuperscript{57} The court itself can also discuss the use of chain evidence during the proceedings. The accused is then enabled to challenge any perceived similarities between the different charges. When the court concludes that the accused acted in a particular \textit{modus}, it will have to provide sufficient reasons for

\textsuperscript{54} ECtHR (GC), 15 December 2011, App. No.: 26766/05 and 22228/06, (Al-Khawaya and Tahery v. United Kingdom), par. 147.

\textsuperscript{55} This does of course not mean that the domestic courts did not assess the reliability of the statements as such: the reliability of each statement has to be assessed by the court. However, when the evidence exists solely or decisively of unchallenged witness statements, the court must 'subject the proceedings to the most searching scrutiny.' Arguably, this entails more than the general obligation of courts to assess the reliability of witness evidence.


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this conclusion in the judgement. However, when the prosecutor does not specifically request the court to use chain evidence, it is unlikely that the court will bring up the possibility of chain evidence *proprio motu*. There is no rule that obliges the court to discuss the use of chain evidence: the court is not obliged to provide the parties during the proceedings with information on how it will reason in the judgement.\(^{58}\) Chain evidence in this respect has to be regarded as a particular way of providing reasons for the use of the evidence in the judgement; it has, therefore, more to do with the manner in which the judgement is drafted than with the manner in which the court discusses the evidence during the proceedings.

The fact that the court is not obliged to inform the parties before the drafting of the final judgement on the possible use of chain evidence, means that the accused may be confronted for the first time with chain evidence in the judgement. Thus, the accused can only challenge the use of chain evidence when there is the possibility of an appeal.\(^{59}\) In order to successfully challenge the use of chain evidence during the appeal proceedings, it is essential that the first-instance court provides the accused with a reasoned judgement that specifically addresses the use of chain evidence. Dutch judgements in which chain evidence has been used are, in general, properly reasoned and specifically address the use of chain evidence.\(^{60}\) This means that in case of first-instance judgements, the accused is able to specifically challenge the use of chain evidence during the appeal proceedings. Most importantly, he is able to question the court’s conclusion that the charges are characterised by a similar *modus operandi*.\(^{61}\)

5.2.2.3 Confessions and Cases *Ad informandum*

The archetypical way of avoiding a full criminal trial is the confession. Depending on the characteristics of a particular criminal justice system, the confession is regarded as either a diversion or a shortcut to proof. Thus, when we evaluate confessions and *ad informandum* cases, it is important to distinguish clearly between the character of confessions in Dutch criminal proceedings and the character of confessions in in-

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\(^{58}\) Cf. B. De Wilde, ‘Schakelconstructies in bewijsmotiveringen’, *Delikt en Delinkwent*, 2009-6, note 74.

\(^{59}\) Although the accused can also complain before the Supreme Court on the use of chain evidence, the chances of success are greater during the appeal proceedings: the accused can challenge the factual and legal conclusions of the court. Before the Supreme Court, the accused can only file legal objections against the appeal judgement.


\(^{61}\) More specifically: he may question the intra-individual and inter-individual variation of the behavior. See Chapter 3 for a more detailed discussion of these two notions.
ternational criminal proceedings. In the terminology of the Dutch Code of Criminal Procedure, a confession, as such, does not exist: Article 341 (1) CCP holds that the statement of the accused can be used as evidence. In international criminal law, a confession is to be regarded as a procedural fact: the accused waives his right to trial proceedings and diverts the case from the court. Provided that the court regards the confession of the accused as a valid guilty plea or admission of guilt, the proceedings enter into the sentencing stage. As described in Chapter 3, the difference has important procedural consequences: in general, a guilty plea or an admission of guilt will significantly change the procedural context. In Dutch trial proceedings, the procedural context remains the same (although the proceedings will, most likely, no longer be concentrated on the determination of the guilt of the accused). Accordingly, the confession is regarded as a shortcut to proof in the Dutch context.

Confessions and the element of non-compulsion constitute a well-known pair and have attracted considerable scholarly attention. The Court itself has often ruled on the question of whether or not an accused has been compelled to testify. In the famous Gäfgen case, the Court held that:

> As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court reiterates that these are generally recognised international standards which lie at the heart of the notion of fair procedures under Article 6.\(^{62}\)

As long as the coercion does not infringe the very essence of the right to self-incrimination, the use of coercive measures is allowed. In Jalloh, the Court held that in order to determine whether any compulsion was improper, it took into account the nature and the degree of the compulsion, the existence of any procedural safeguards and the use to which any material so obtained was put.\(^{63}\) In case of confessions obtained during the investigations, issues may arise regarding the right not to be compelled to provide self-incriminatory statements.

Considering confessions and the participatory model of proof, the following observations can be made. First, as was stated above, it is important to verify that the accused was not in any way forced or compelled to confess to the charges. Regarding the element of informed involvement, it is important that the accused is fully aware of the consequences of his confession. This is particularly the case with regard to the other two elements: the ability to effectively challenge the evidence and the right to a reasoned judgement. Normally, the accused does not want to challenge any incriminating evidence: by confessing to the charges, he implicitly waives the right to chal-

\(^{62}\) ECtHR (GC), 1 June 2010, App. No.: 22978/05, (Gäfgen v. Germany), par. 168.

\(^{63}\) ECtHR (GC), 11 July 2006, App. No.: 54810/00, (Jalloh v. Germany), par. 101.
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Challenger the evidence against him. This waiver, however, can be withdrawn during the proceedings: if the accused wishes to alter his confession or to challenge particular pieces of evidence, the court will have to conduct more rigorous fact-finding. According to Article 359 (3) CCP, in cases in which the accused has confessed, it suffices to just list the means of proof instead of giving a fully reasoned judgement. This is an example of a ‘contest-orientated’ approach: when the accused acknowledges his guilt, there is no contested issue left, which obviates the need for the court to provide a fully reasoned judgement.

Regarding the *ad informandum* cases, the following observations can be made. It is highly unlikely that in such cases issues will arise regarding the element of non-compulsion. The accused is informed before the start of trial proceedings of the *ad informandum* cases, and he has to acknowledge in court that he has committed those facts. In general, the accused will have an incentive to do so: the cases are dismissed, no formal proceedings can be initiated for these facts anymore and the sentence will be more moderate than when the fact would be prosecuted separately. In Chapter 3, the situation was discussed in which, in the absence of the accused, the court could nevertheless take the *ad informandum* cases into consideration. Considering the element of non-compulsion, the Code of Criminal Procedure explicitly states that the accused may not be compelled to provide self-incriminatory statements. This applies to the investigation phase and to the trial proceedings.

Considering the element of informed involvement, it is important to emphasise that cases *ad informandum* are not formal charges. This means that the provisions on the indictment are not, as such, applicable. Article 6 (3) (a) ECHR states that the accused must be informed in detail of the nature and cause of the accusation against him. However, when this provision is considered together with the right to a fair hearing and the right to prepare a defence, it follows that the accused must be informed in detail of the nature and cause of the proceedings initiated against him. Although

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64 For a case law analysis, see M.J.A. Duker, ‘De verkorte bewijsmotivering bij bekennende verdachten: is er nog een toekomst?’, *Delikt en Delinkwent*, 2012-53.
65 This resembles the manner in which appeal proceedings are conducted: the proceedings are normally concentrated on contested issues. Cf. *Kamerstukken II*, 2003/04, 29255, 3, p. 7.
66 See also, for example, HR, 24 March 2009, *ECLI:NL:HR:2009: BH1784*, par. 2.4.
67 Article 29 (1) and Article 271 (1) CCP.
68 On the relationship between Article 6 (3) (a) and Article 6 (1) see, *inter alia*, the Grand Chamber’s judgement in *Péllissier and Sassi v. France*: ‘Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization given to those acts. That information should, as the Commission rightly stated, be detailed. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention [...]’. The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential pre-
these are not formal charges, the accused is expected to comment on them during the proceedings and, when he confesses, the court will take the *ad informandum* cases into account in sentencing. This means that the accused must be informed in sufficient detail of those facts. The accused has to be informed of the *ad informandum* case, but this may be done in a very rudimentary manner (such as a short description of the fact, with an indication of the time and place). When the accused is not willing to confess to the fact, the court cannot take it into account in sentencing. When the accused is not present during the proceedings, the court can still take the *ad informandum* case into consideration. This is possible when the accused has confessed at an earlier stage, for example during police interrogation, that he has committed the *ad informandum* case. The Supreme Court held that the *Salduz* criteria, as such, do not apply for such ‘out-of-court confessions’: the court may take these cases into consideration regarding the sentence, even if the accused has not been able to consult a lawyer.\(^69\) From an informed involvement perspective, this is unacceptable: the accused is not sufficiently informed about the possible consequences of his out-of-court confession. In his advisory opinion, the Advocate General to the Supreme Court argued that such out-of-court confessions would have been excluded from the evidence when the prosecutor would have filed formal charges.\(^70\) Consequently, the protection that the accused derives from *Salduz* is circumvented when the out-of-court confessions are used to present a case *ad informandum*.

Considering the possibility to challenge the evidence, the accused can simply deny the facts or remain silent. This way, the court cannot take the *ad informandum* facts into consideration. Moreover, the prosecutor will not present any evidence, which means that challenging the evidence is pointless. It is important for the accused to have the *ad informandum* cases mentioned in the judgement (or in the transcript of the proceedings). Only in this way will he be able to demonstrate that the cases have been disposed of. Should the prosecutor initiate formal proceedings for such cases, the accused can invoke the protection of due process considerations and the *ne bis in idem*-principle.

The final element of the participatory model of proof, the right to a reasoned judgement, is, as such, not applicable to *ad informandum* cases. Such cases are only mentioned in the judgement, more specifically in the part on sentencing.\(^71\) The court does not provide reasons for taking these cases into account, but merely refers to the confession of the accused. This resembles the abbreviated judgement when the ac-

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\(^{69}\) HR, 22 May 2012, ECLI:NL:HR:2012:BW6174, par. 2.3.3.


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5.2.2.4 Appeal Proceedings

Appeal proceedings provide for a full review of both conviction and sentence: the court of appeal is not bound by any part of the first-instance judgement and conducts fact-finding autonomously.\(^72\) However, the findings of the court of first instance and the objections of the parties against the first-instance judgement are relevant to the manner in which the appeal proceedings are conducted. The court of appeal may take into account the transcript of the first-instance proceedings.\(^73\) It was concluded in Chapter 3 that appeal proceedings are significantly influenced by the case strategy of the parties, in particular by the objections they file against the first-instance judgement. When the accused, with or without the assistance of defence counsel, objects to particular elements of the first-instance judgement, the court of appeal will normally focus the proceedings on those elements. The same holds true for the prosecutor: he can direct the court of appeal to those elements of the judgement he disagrees with. Although the court of appeal can, out of its own motion, direct the proceedings to elements of the case it deems relevant itself, the parties have a significant say in the course of the appeal proceedings. More than in the first-instance proceedings, the appeal stage requires an active attitude from the accused: he must specifically challenge the legal and factual elements of the judgement he disagrees with.

The character of the appeal proceedings has the following consequences for the ability of the accused to participate effectively. First, it is noted that the element of non-compulsion is not applicable here: there is no compulsion whatsoever to initiate and participate in the appeal proceedings.\(^74\) The element of informed involvement, however, is essential with regard to appeal proceedings: the accused must be informed of the manner in which appeal proceedings are conducted and how he can challenge the evidence effectively. When he does not formulate his objections against the first-instance judgement at the moment he files his appeal, nor presents his objections at the beginning of the appeal proceedings, the court of appeal may declare the

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\(^72\) It is noted that it is not possible to file an appeal against a conviction for an infraction, when the sentence does not exceed 50 € (Article 404 (2) CCP). See Article 404 (3) CCP for an exception to this rule. Cases consisting of infractions or crimes punishable by a maximum of 4 years require a leave to appeal when the sentence does not exceed 500 € (Article 410a CCP). In all other cases, an appeal can be filed, except for an accused who was acquitted in the first-instance proceedings (Article 404 (1) CCP).

\(^73\) Article 422 (2) CCP.

\(^74\) Except in case the court of appeal orders that the accused should be present during the proceedings (Article 278 (2) CCP, which applies also in the appeal stage, pursuant to Article 415 (1) CCP). However, even in such cases, the accused is not forced to participate: he may remain silent during the proceedings.
case inadmissible.\textsuperscript{75} This normally means that the court of appeal will not consider
the evidence: the first-instance judgement becomes final and can no longer be challenged.\textsuperscript{76}

The character of the appeal proceedings requires an active attitude of the ac-
cused. Apart from the requirement that objections are filed timely, the accused must
also file requests for new evidence in a timely manner. Article 414 CCP states that new
evidence may be presented during the appeal proceedings: both the prosecutor and
the accused may request the hearing of new witnesses and expert witnesses. Other
means of proof may also be included in the appeal proceedings.\textsuperscript{77} It is important to
file requests to hear (new) witnesses and expert witnesses as soon as possible: when
the request is filed together with the appeal brief, the court will determine whether
hearing the witness is in the interest of the defence. When such a request is made at
the beginning of the appeal proceedings, the court of appeal will determine whether
hearing the witness is necessary. Although a clear distinction between these two cri-
tera is hard to make in practice, it is common understanding that the court has more
discretion to refuse to hear the witness under the last criterion.\textsuperscript{78} This entails that, in
order to be able to challenge witness statements effectively, the accused should file
his request to do so as soon as possible. Before the start of the appeal proceedings, the
accused can request the investigating judge to conduct further investigations.\textsuperscript{79} This
enables the accused, when the request is granted, to obtain new evidence that can be
taken into account in the appeal proceedings.

The need for an active attitude of the accused is particularly important with re-
gard to the possibility for the accused to challenge the evidence: it is not necessary

\begin{itemize}
\item \textsuperscript{75} The court of appeal may, \textit{proprio motu}, consider the evidence in case no objections against
the first-instance judgement were filed or presented. However, in the majority of cases in which no
objections are filed, the court of appeal declares the case inadmissible. The Supreme Court leaves
the courts of appeal considerable discretion to declare inadmissible cases in which no objections
were filed. HR, 2 October 2010, \textit{ECLI}:NL:HR:2010:BK0910.
\item \textsuperscript{76} According to Article 416 (2) CCP, the court of appeal may declare the appeal inadmissible.
When the court concludes that the appeal proceedings should be continued, although no objections
have been filed, it is free to do so. This happens only in cases where the court of appeal identifies a
fundamental defect in the first-instance judgement.
\item \textsuperscript{77} The Supreme Court held that the court of appeal, when deliberating on the admission of new
evidence, should determine whether admission of the new evidence is in conformity with the principle
of due process. The nature of the new evidence is relevant in this regard. When the new evidence
consists of incriminating evidence, regard must be had to the type of case and the timing of
the request. HR, 29 June 2010, \textit{ECLI}:NL:HR:2010:BL7709, par. 2.3.
\item \textsuperscript{78} This was acknowledged by the Supreme Court in HR, 19 June 2007, \textit{ECLI}:NL:HR:2007:AZ1702.
The two criteria have resulted in detailed case law on the applicability of each criterion in particular
phases of the proceedings. The Supreme Court has recently clarified the applicability of each
riterion in several distinct phases of the trial and appeal proceedings. HR, 1 July 2014, \textit{ECLI}:NL:
\item \textsuperscript{79} Article 411a CCP (further investigations may be conducted by the investigating judge or justice).
\end{itemize}
to discuss particular pieces of evidence again when none of the parties, or the court of appeal itself, requires it. In Chapter 3, it was concluded that the court of appeal will, in general, direct the appeal proceedings to the objections of the accused (or the prosecutor) against particular elements of the first-instance judgement. During the parliamentary debates on the new appeal proceedings it was envisaged that when an appeal is filed (either by the accused or the prosecutor), the complaints against the first-instance judgement would be sent to the court of appeal.  

The European Court of Human Rights has held that, in order to determine whether appeal proceedings are in conformity with Article 6 of the Convention, the character of the appeal proceedings should be taken into account. This means, for example, that the right to a hearing before the appellate court may be restricted when a hearing has taken place before the first-instance court. The guarantees of Article 6 during appeal proceedings have to be seen in light of the proceedings as a whole, including the manner in which trial proceedings were conducted. The Court acknowledged that the trial stage can influence the application of Article 6 during the appeal proceedings. The Court did, however, make a distinction between appeal proceedings concerning questions of law and proceedings concerning questions of fact. Restrictions on the right to be present during the appeal proceedings are permissible in case of leave-to-appeal proceedings and in case of appeal proceedings that involve questions of law (provided, however, that there has been a hearing before the trial court). In case the accused wishes to challenge the factual conclusions of the trial court and the appeal proceedings allow for such questions of fact to be considered, the court of appeal must enable the accused to effectively challenge the conclusions of the trial court.

Dutch appeal proceedings allow for a full review of the facts: the trial judgement can be challenged on both factual and legal issues. Considering the character of the appeal proceedings, it is essential that the accused is able to participate effectively and to be able to challenge the evidence. In this regard, the elements of informed involvement and the ability to challenge the evidence interact: when the accused wishes to challenge the factual conclusions of the court of first instance effectively, he must be sufficiently aware of the particularities of the appeal proceedings. This applies in

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80 Kamerstukken II, 30320, 2005/06, 3, p. 11.
82 ECtHR, 26 May 1988, App. No.: 10563/83, (Ekbatani v. Sweden), par. 27: ‘The manner of application of Article 6 to proceedings before courts of appeal does, however, depend on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.’
particular to the right to call (new) witnesses and experts, to have additional investigations conducted and the manner in which objections against the trial judgement have to be formulated.\textsuperscript{84}

The right to a reasoned judgement has to be respected at the appeal stage as well: Article 415 (1) CCP provides that the provisions on the obligation to provide reasons are also applicable to appeal proceedings. The obligation for the domestic courts to state reasons requires that they must ‘indicate with sufficient clarity the grounds on which they based their decision.’\textsuperscript{85} Thus, the accused is able to verify whether his arguments have been taken into account by the court. This is important for the decision to make use of any available remedy.\textsuperscript{86}

The Court has specifically addressed the right to a reasoned judgement in appeal proceedings. Courts of appeal are not obliged to give a detailed answer to every argument (nor are courts of first instance, for that matter) and they may endorse the findings of the courts of first instance\textsuperscript{87} as long as the essential issues of the case have been addressed by the court of appeal.\textsuperscript{88} More generally, Article 6 (1) obliges the domestic courts to ‘conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision.’\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{84} This is essential: appeal proceedings are often the final stage of the proceedings. Cassation proceedings, which are focused on points of law, are not the forum to address factual complaints of the accused (although the Supreme Court can, to a certain extent, address factual issues via the obligation to provide sufficient reasons for the judgement). Cf. Crijns and Schoep, who emphasise that courts of appeal should be aware of the fact that they are often the final court in the proceedings. J.H. Crijns, G.K. Schoep, ‘De motivering in strafzaken in hoger beroep’, in: Kempen van, P.H.P.H.M.C., et al. (eds.) \textit{Hoger beroep: renovatie en innovatie. Het appel in het burgerlijk, straf- en bestuursprocesrecht}, Kluwer, Deventer 2014, p. 259.
\item \textsuperscript{85} ECHR, 16 December 1992, App. No.: 12945/87, (Hadjianastassiou v. Greece), par. 33.
\item \textsuperscript{86} ECHR, 22 February 2007, App. No.: 1509/02, (Tatishvili v. Russia), par. 58.
\item \textsuperscript{87} ECHR (GC), 21 January 1999, App. No.: 30544/96 (Garcia Ruiz v. Spain), par. 26; ECHR, 19 April 1994, App. No.: 16034/90, (Van de Hurk v. The Netherlands), par. 61.
\item \textsuperscript{88} ECHR, 19 December 1997, App. No.: 157/1996/776/977, (Helle v. Finland), par. 60: ‘[...] the Court would emphasise that the notion of a fair procedure requires that a national court which has given sparse reasons for its decisions, whether by incorporating the reasons of a lower court or otherwise, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court.’ See also par. 27 of ECHR, 9 December 1994, App. No.: 18064/91, (Hiro Balani v. Spain), in which the Court emphasised that the obligation to provide reasons is case specific: ‘The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgements.’
\item \textsuperscript{89} ECHR, 19 April 1993, App. No.: 13942/88, (Kraska v. Switzerland), par. 30.
\end{itemize}
The court of appeal may, according to Article 423 (1) CCP, confirm or quash the first-instance judgement, either in whole or in part. When it confirms the judgement, the court of appeal may also adopt the reasons the first-instance court provided. When the court of appeal disagrees with the reasoning, it can replace it with its own reasoning. This article exemplifies that the appeal proceedings are not trials de novo (although every aspect of the case may become part of the proceedings), but a second stage of the proceedings. Considering the importance that is attached in the appeal proceedings to the objections against the first-instance judgement, the court of appeal will have to respond to those objections (in particular, when the court of appeal disagrees with them). The Supreme Court endorsed this view.

Regarding the participatory model of proof and appeal proceedings, it is essential that the accused is properly informed about the manner in which appeal proceedings are conducted. The accused must be aware of the procedural outlook of the appeal proceedings, in particular of the manner in which he can challenge the evidence.

5.3 Diversions and Shortcuts in the Law of International Criminal Procedure

5.3.1 Introduction

Diversions and shortcuts in international criminal proceedings are important tools to avoid or speed up the trial proceedings. A full criminal trial, in which all the evidence is presented in open court and challenged by the defence, will last for years. Criticism on the effectiveness of international criminal proceedings often involves the length and costs of the proceedings. Any mechanism that can facilitate a more expeditious trial or which obviates the need to conduct a trial at all is to be welcomed, as long as the accused is still provided with a fair determination of his criminal responsibility. The diversions and shortcuts that are used by the ad hoc Tribunals and the ICC will be evaluated in this Chapter. The elements of the participatory model of proof will

91 During the parliamentary debates on the new appeal proceedings, the Minister of Justice argued that the new appeal proceedings are based on the idea of a contest (‘oppositie’). This implies, he argued, that the court of appeal is obliged to respond to the objections. Kamerstukken II, 2005/06, 30320, 3, p. 30. See also J.H. Crijns, G.K. Schoep, ‘De motivering in strafzaken in hoger beroep’, in: Kempen van, P.H.P.H.M.C., et al. (eds.) Hoger beroep: renovatie en innovatie. Het appel in het burgerlijk, straf- en bestuursprocesrecht, Kluwer, Deventer 2014, p. 261.
function as guidelines to answer the question of whether the accused was able to participate effectively.

5.3.2 Diversions and the Participatory Model of Proof

5.3.2.1 Guilty Pleas and Admissions of Guilt

The guilty plea is the archetypical diversion from the full criminal trial: by pleading guilty, the accused does not contest the charges, which obviates the need for a contested trial altogether. When the prosecutor and the accused agree on the factual basis of the plea and the legal characterisation of the facts, there is no need for a detailed presentation and discussion of the evidence in open court. The guilty plea is typically regarded as a procedural fact: the accused does not wish to challenge the evidence collected and waives his right to a trial before an independent and impartial court. In such an approach to pleading guilty, the notion of voluntariness is prominent: when the accused, out of his own free will, decides not to have the prosecutor prove his guilt before a court, this is to be respected. It should not come as a surprise that the practice of guilty pleas is often associated with contract law theories, in which the notion of party autonomy is very prominent. Although instructive, such an approach does not do justice to the public law character of criminal law. Therefore, it cannot function as a proper normative framework.

The normative framework in which agreements are reached on the guilt of the accused (in particular when the plea involves international crimes) is not just a matter for the parties involved: there is a clear public interest in the manner in which such agreements are reached. This explains why the plea agreement must be submitted to the Chamber for judicial approval. This entails that the normative framework for plea-bargaining cannot be the fact that the bargaining process is conducted in the shadow of full trial proceedings. In such a view, the fairness of the bargaining process is guaranteed by the fact that the accused is always able to bring the case to court. This prospect, the argument goes, will ensure that the prosecutor acts in a fair and decent manner: he acts as if he were a judge himself. From a rule of law perspective, this is an untenable approach, though: as an organ of an international court, the prosecutor cannot operate in a normative vacuum in which the possibility of trial proceedings functions as the required framework.

96 The same holds true for a prosecutor acting as an agent of the state: a prosecutor is not a random party that enters into an agreement with an accused to avoid trial proceedings.
The first element to be discussed is the element of non-compulsion: the accused may not be forced to enter into plea negotiations with the prosecutor or compelled to enter a guilty plea. In other words, entering a plea must be voluntary. At the ICC, an admission of guilt can only be made by the accused after sufficient consultation with defence counsel. In their Separate Opinion to the *Erdemovic* Appeals Chamber’s judgement, judges McDonald and Vohrah argued that voluntariness consists of two elements: first, the accused must be mentally competent to enter a plea. Second, the plea must not be the result of threats or inducements, other than a reduced sentence. The expectation of a moderate sentence after a guilty plea or admission of guilt may well function as a strong inducement to confess: it is not in the interest of the accused to opt for a contested trial, which may result in a higher sentence. The ‘discount’ that the accused receives is sometimes regarded as an improper way of forcing an accused to comply with the conditions in the plea agreement.

In most cases, the Trial Chamber sentences within the sentencing range recommended by the prosecutor. This means that the accused can predict fairly accurately what the outcome of the sentencing hearing will be. In case the accused opts for a contested trial, he remains in uncertainty for a prolonged period of time on the sentence that will be imposed. Normally, Trial Chambers do not indicate the scope of the sentence reduction after the accused entered a guilty plea. This makes it hard to say anything concrete on the inducement that the prospect of a reduced sentence may entail. In the plea agreement itself, the prosecutor normally emphasises that the Trial Chamber is not in any way bound by the recommended sentencing range and can impose a sentence of life imprisonment. In the agreement, no references are made to sentences that have been imposed in similar cases in which the accused contested the charges. This would have allowed for a fruitful comparison of sentences handed down after contested trials and after a plea agreement has been submitted. Unlike some domestic criminal justice systems, no sentencing guidelines exist that stipulate the credit an accused receives when he pleads guilty to the charges.

Although the precise extent of the sentence reduction is unknown, the mere fact that the sentence is normally reduced is an important inducement for the accused to plead guilty. Inducing the accused with the expectation of a lower sentence does not

97 Article 65 (1)(b) ICC Statute.
98 ICTY, Joint Separate Opinion of Judge McDonald and Judge Vohrah, **Prosecutor v. Erdemović**, Case No.: IT-96-22, A. Ch., 7 October 1997, par. 10.
100 The exceptions are discussed in Chapter 4.
mean that he is compelled to enter into negotiations with the prosecutor.\textsuperscript{102} Of significant importance is whether the accused is able to predict whether a Trial Chamber would convict him after a contested trial: in other words, is there sufficient evidence in the case file for a conviction? This refers to the element of informed involvement. Weigend and Turner argued that a plea can only be regarded as informed when the accused had ‘access to all evidence that is exculpatory or otherwise material to his defence.’\textsuperscript{103} These authors refer solely to the right of the accused to get acquainted with exculpatory evidence. However, the decision to plead guilty is only truly informed when the accused knows which incriminatory evidence the prosecutor has obtained.\textsuperscript{104} This allows the accused to determine the strength of the case and to make an informed choice between a diversion and a contested trial.\textsuperscript{105}

At the \textit{ad hoc} Tribunals, the element of informed involvement regarding a guilty plea is often related to the question of whether the accused understands the nature of the charges and the consequences of pleading guilty. It is indeed important that the accused is fully aware that by pleading guilty he waives the right to a contested trial in which he can challenge the evidence. Informed involvement does, however, not only entail knowledge of the procedural consequences of pleading guilty but also of the factual basis underlying the charges. This entails that the accused must be provided with the evidence the prosecutor has collected, or a summary thereof. Only in this way can the accused make a truly informed decision regarding his plea.

When the accused is provided with the incriminatory evidence against him, the question arises as to what extent he can challenge or comment upon such evidence. At first sight, this seems an anomaly: diversions of the full criminal trial are mechanisms to avoid the contested trial in which the evidence can be challenged. In order to be able to challenge the evidence, one must opt for regular trial proceedings. However, in the context of plea-bargaining, the possibility to become acquainted with the evidence and to comment upon such evidence may be indispensable. The prosecutor presents his case in order to persuade the accused to plead guilty: without any incriminating material there is no incentive for the accused to enter into plea negotiations in the first place. Challenging particular pieces of evidence allows the accused to par-

\textsuperscript{102} Considering the ECtHR’s position in Deweer, the mere expectation of a moderate sentence does not mean that the accused is compelled to waive his fair trial rights. ECtHR, 27 February 1980, App. No.: 6903/75, (Deweer v. Belgium).
\textsuperscript{104} Turner refers to plea bargaining practice in Germany and Bulgaria, where the accused is provided with the entire case file. J.I. Turner, \textit{Plea Bargaining Across Borders}, Aspen Publishers, 2009, p. 116, 152.
\textsuperscript{105} Normally, accused are assisted by counsel when they enter into a plea agreement in order to make an informed decision. Article 65 (i)(b) ICC Statute even requires that an admission of guilt is made after ‘sufficient consultation’ with defence counsel. The legal framework of the \textit{ad hoc} Tribunals does not contain a similar provision.
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In fact, such participation is required to avoid a ‘take-it-or-leave-it’ situation in which the prosecutor merely presents a plea agreement to be signed by the accused.

When the parties reach an agreement, the result is submitted to the Chamber for judicial approval: as described in Chapter 4, the parties do not have a determinative say as to whether the full criminal trial will be avoided. When the criteria for a valid plea have not been observed, when there is no factual basis for the plea, or when a full contested trial would be in the interest of justice (more particular: in the interest of the victims) the agreement will not be approved. The approval of the Chamber cannot in any way be equated with independent fact-finding in the setting of a contested trial. When the agreement is approved, the accused is provided with an abbreviated reasoned judgement in which the Chamber sums up the facts and legal qualifications that have been agreed upon. Most importantly, the Chamber accounts for the sentence that it imposes: the aggravating and mitigating circumstances and the recommended sentencing range are discussed. Regarding the possibility to challenge the sentencing judgement of the Chamber, the accused has normally waived his right to appeal the sentencing judgement when the sentence falls within the recommended sentencing range.

Diverting a case from the full criminal trial, in which evidence is properly presented and challenged, comes at a price: the accused must be provided with a decent and fair out-of-court procedure in which he can determine freely to consent to the diversion of his case. This means that the accused must be enabled to participate effectively during the plea negotiations: this includes providing the accused with sufficient information regarding the procedural consequences and allowing him to present his arguments regarding the evidence.

5.3.3 Shortcuts and the Participatory Model of Proof

5.3.3.1 Agreed Facts

The use of agreed facts occurs within the trial context: the nulla poena sine iudicio principle is fully adhered to. There are, however, similarities between agreed facts as a shortcut to proof and the manner in which Chambers have considered the validity of guilty pleas. In order to accept the plea of the accused, thereby diverting the case from a full criminal trial, several criteria have to be fulfilled. These criteria are based on the rich common law case law on guilty pleas: a plea must be made voluntarily, the accused must be sufficiently informed on the content and consequences of the plea.

106 This possibility seems inevitable in case of factual and charge bargains.
107 It rarely occurs that plea agreements are not approved by the Chamber, however.
108 This is the reason why no judicial notice may be taken of facts that are based upon a plea agreement: such facts have not been truly adjudicated.
and the plea must not be equivocal. Moreover, in international criminal proceedings, the Chamber can only accept the plea when there is a sufficient factual basis for the crimes involved.

An agreement on particular facts can be regarded as a partial guilty plea, particularly when the prosecutor and accused agree on the existence and accuracy of incriminating facts. Agreements on factual issues are normally regarded as sufficient proof for the existence and accuracy of the facts concerned. In this way, parts of the probandum are proven based on the consensus of the parties: whereas in case of a guilty plea the accused pleads guilty to all facts contained in the probandum, an agreement of fact concerns only a part of the probandum. The similarities between agreed facts and guilty pleas can be discerned in the reasoning of the Trial Chamber in *Blagojevic & Jokić*. In an interlocutory decision, the Chamber held that, as the ‘guarantor of the rights of the accused’, it must ensure that the accused has entered into the agreement voluntarily and is aware of the consequences of such an agreement.109

Considering whether the accused has been able to participate effectively regarding this shortcut to proof, one has to take into account both the number and the character of the agreed facts. In cases in which only a modest number of facts is agreed upon and where those facts relate to uncontroversial issues, such as the place and date of birth of the accused, no issue arises regarding the ability to participate. In such cases, it is completely clear that the parties agree on rather trivial issues that do not even remotely bear upon the criminal responsibility of the accused. If, however, the facts stated in the agreement concern parts of the probandum, it is vital that the rights of the accused are respected. As mentioned in Chapter 4, the Trial Chamber in *Stanišić & Simatović* noted that the parties agreed on the existence of an armed conflict throughout the period in which the accused had, allegedly, committed their crimes.110 The agreement, together with adjudicated facts, resulted in conclusive proof of the chapeau element of the existence of an armed conflict. When the agreed fact is an important and even indispensable fact that has to be proven in order to convict, the guarantees discussed regarding a guilty plea apply fully. The accused must agree voluntarily that the particular fact occurred after being sufficiently informed on any evidence regarding the fact and of the consequences the agreement in terms of probative value may have.

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In the case of *Nourain & Jerbo Jamus*, concerning war crimes committed against African Union peacekeepers in Darfur, the prosecutor and the defence agreed that only three issues remained contested between them:

i) Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;

ii) If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and

iii) Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.\(^{111}\)

ICC Trial Chamber IV noted the agreement and stated that the agreement would significantly narrow the contested issues at trial, which is in the interest of an expeditious trial.\(^{112}\) In such cases, it is vital that the accused is sufficiently informed on the consequences of the agreement in terms of the scope of the trial proceedings.

Before an agreement on factual issues is submitted to a Chamber, the parties have negotiated about the precise wording and number of facts they agree upon. In such negotiations, the evidence upon which the prosecutor relies can be disclosed to the accused.\(^{113}\) Thus, he is informed of parts of the case against him and can make an informed decision regarding whether or not to agree to the accuracy of the facts. When the accused challenges, for example, the probative value of the disclosed evidence, he is able to comment upon the evidence and to decide whether or not to agree on the accuracy of the fact. The agreed facts that are noted by the Chamber are normally included in the judgement: no additional evidence is required, and the facts are regarded as proven.

The use of agreed facts is, as was already shown in Chapter 4, rather limited at the *ad hoc* Tribunals. Considering the extensive use that has been made at these tribunals of the possibility to notice adjudicated facts (which does not require the consent of the parties), there is simply no strong incentive to agree on factual issues. At the ICC, however, the use of agreements of factual issues may become an important shortcut in order to speed up the trial proceedings. The legal framework of the ICC does not provide for taking judicial notice of adjudicated facts, which has functioned as an effective tool to speed up the trial proceedings at the ICTY.\(^{114}\) Compared to the *ad hoc* Tribunals, the number of *Serienprozesse* will be modest at the ICC: both the ICTY and

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114 At the ICTR, much less use has been made of adjudicated facts, probably because of the liberal use that has been made of noticing facts of common knowledge.
ICTR deal with cases that often involve the same crime base, which means that the number of adjudicated facts that can be noticed by the Chambers is substantial. At the ICC, it is unlikely that a similar number of cases will be processed *seriatim*. Thus, the use of agreements as to evidence may become an indispensable shortcut to proof.

Agreements on the facts of the case, similar to the criteria for a valid guilty plea, must be entered into voluntary, based on sufficient information and be concluded in a setting in which the accused is able to comment upon the evidence the prosecutor has collected.

### 5.3.3.2 Facts of Common Knowledge

In Chapter 4, the use of facts of common knowledge in international criminal proceedings was discussed. It was shown that such facts are sometimes used to prove contextual elements, in particular in cases conducted before the ICTR. This is similar to the manner in which several Dutch courts handled cases in the post-WWII period. How does the use of facts of common knowledge in international criminal proceedings relate to the participatory model? Is the accused able to participate effectively in the proceedings when facts of common knowledge are included in the Chamber's judgement?

Trial Chambers must take judicial notice of facts of common knowledge: they have no discretion to refuse to take judicial notice of facts that are indisputable. The provisions in the Rules of Procedure and Evidence of the *ad hoc* Tribunals and the ICC Statute oblige the Chamber to act *proprio motu*.\(^{115}\) In practice, however, it is normally the prosecutor who files a motion in which the Trial Chamber is requested to take judicial notice of particular facts of common knowledge. This is advantageous for the accused: he is able to file a response in which he can object to the prosecution’s motion. Chambers may also take judicial notice of facts pursuant to Rule 94 (A) *proprio motu* without hearing the parties on the particular facts. In *Dragomir Milošević*, for example, the Trial Chamber considered first whether the facts for which the prosecutor requested judicial notice be taken pursuant to Rule 94 (B) could be noticed pursuant to Rule 94 (A).\(^{116}\) Consequently, the accused was not able to comment upon the notoriety of the facts included in the prosecution’s motion.

To take judicial notice of facts of common knowledge after a motion has been filed has two important procedural consequences. First, the accused is properly informed of the facts the prosecutor deems to be of common knowledge. Considering the probative value that is attributed to facts of common knowledge after they are ju-

\(^{115}\) The wording in the ICC Statute is a bit ambiguous and less imperative than Rule 94 (A) of the Rules of Procedure and Evidence of the *ad hoc* Tribunals: ‘The Court shall not require proof of facts of common knowledge but may take judicial notice of them.’

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dially noticed (i.e. conclusive evidence, without the possibility to present evidence in rebuttal), it is vital that the accused is fully aware of those facts. Second, considering that the accused cannot present evidence in rebuttal after the Chamber has decided to notice such facts, the accused can only challenge these facts by filing a response to the prosecutor’s motion or file a motion for reconsideration (this seems, however, a mere theoretical possibility: it would require the accused to present such an amount of credible evidence that the Chamber will have to reconsider its earlier decision).

Facts of common knowledge must, according to Rule 89 (C) ICTY and ICTR RPE, be relevant to the proceedings: the basic criterion of relevancy applies also to facts that are deemed indisputable. As the Appeals Chamber held in *Semanza*, judicially noticed facts may not clutter the evidentiary record with irrelevant facts. This approach makes sense and prevents the Chamber from having to decide on facts that are unrelated to the case at hand. The relevancy criterion does, however, also have a reverse side: when a fact of common knowledge is relevant to the proceedings, the question must be asked whether the particular fact relates in any (remote) way to the criminal responsibility of the accused. In other words: does the fact of common knowledge prove a part of the *probandum*?

In this respect, the important decision of the Appeals Chamber in *Karemera* must be mentioned here again. In this interlocutory decision, the Appeals Chamber declared the context in which the accused committed his acts to be common knowledge. The Appeals Chamber held that ‘it is not relevant that these facts constitute elements of some of the crimes charged and that such elements must ordinarily be proven by the Prosecution. There is no exception to Rule 94 (A) for elements of offences.’

A significant part of the *probandum* is proven this way: the contested issue left for the Chamber to decide on is the personal involvement of the accused in the atrocities. It is important to understand that the Appeals Chamber ruled that the facts of common knowledge can also refer to legal terms:

It is true that ‘widespread and systematic attack against a civilian population’ and ‘armed conflict not of an international character’ are phrases with legal meanings, but they nonetheless describe factual situations and thus can constitute ‘facts of common knowledge’. The question is not whether a proposition is put in legal or layman’s terms (so long as the terms are sufficiently well defined such that the accuracy of their application to the described situation is not reasonably in doubt). The question is whether the proposition can reasonably be disputed.

118 For the facts of which the Appeals Chamber took judicial notice pursuant to Rule 94 (A), see Chapter 4.
120 ICTR, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, *Prosecutor
This is the crucial difference with Rule 94 (B): judicial notice of legal characterisations cannot be taken pursuant to this Rule. Thus, the Chamber has to decide for itself whether the facts constitute, for example, an armed conflict or a widespread and systematic attack. Judicial notice of contextual elements pursuant to Rule 94 (A) means that, similar to the Dutch post-WWII cases, the context in which the accused operated is conclusively proven by indisputable facts of common knowledge. The Appeals Chamber held in *Semanza* that to proceed in this way is just an alternative manner of proving the charges.\(^{121}\)

The accused is, in practice, only able to challenge the facts of common knowledge in a response to a motion of the prosecutor.\(^{122}\) At the ICTR, however, filing a response can be futile: the Appeals Chamber has held that facts that are considered to be of common knowledge by the Appeals Chamber must be noticed by the trial chambers, when the fact is relevant to the proceedings.\(^{123}\) At the Special Court for Sierra Leone, which operates under similar Rules of Procedure and Evidence as the ICTR, Judge Robertson commented on the probative value of facts of common knowledge and the manner in which a judicially noticed fact can be reversed:

> The only exception – and it will rarely if ever arise – is if fresh information subsequently comes into the hands of a party or to the notice of the court suggesting that the fact is questionable after all. Were such a situation ever to arise, the chamber should exercise its inherent power to reconsider its original decision.\(^{124}\)

When the prosecutor requests judicial notice of facts that have already been noticed by the Appeals Chamber, filing a response is superfluous: the fact is already conclusively established. Should a Chamber take judicial notice of a fact *proprio motu*, the accused cannot challenge the fact at all: it is likely that such a fact will be mentioned for the first time in the judgement after the close of the proceedings. The determination of a fact of common knowledge is a legal question, which entails that the accused

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\(^{121}\) *v. Karemera et al.*, Case No.: ICTR-98-44-73(C), A. Ch., 16 June 2006, par. 29.  

\(^{122}\) ‘The Appeals Chamber finds that these judicially noticed facts did not relieve the Prosecution of its burden of proof: they went only to the manner in which the Prosecution could discharge that burden in respect of the production of certain evidence which did not concern the acts done by the Appellant. When determining the Appellant’s personal responsibility, the Trial Chamber relied on the facts it found on the basis of the evidence adduced at trial.’ ICTR, Judgement, *Prosecutor v. Semanza*, Case No.: ICTR-97-20-A, A. Ch., 20 May 2005, par. 192.  


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Can request the Appeals Chamber to determine whether the Trial Chamber correctly applied the criteria for taking judicial notice. 125

Considering the possibility to participate effectively and to challenge the evidence, the accused may be unable to challenge facts that are used to prove the charges. In case of this particular shortcut to proof, the court declares parts of the probandum proven by relying on facts of common knowledge. In this way, the court effectively reduces the number of contested issues in the case. The decisions in which notice is taken are, in general, duly reasoned: the accused is provided with reasons as to why the Chamber considered a particular fact to be common knowledge. When the Trial Chamber grants certification, the decision is open to interlocutory appeal: the accused can try to challenge the decision of the Trial Chamber. 126

Taking judicial notice of facts of common knowledge obviates the need to admit evidence in order to prove patently indisputable facts. This is the main rationale for judicial notice of this category of facts. Typically, facts of common knowledge include basic factual notions, such as the names of geographical regions, the laws of nature or historical facts. The type of facts that have been noticed by the ICTR is unprecedented, though: legal terms that are part of the charges and that refer to the core crimes in the Statute itself, are regarded as indisputable and cannot be challenged by the accused. This should not be misunderstood: the argument is not that no atrocities, including genocide, were committed in Rwanda in the spring and early summer of 1994. However, in a legal forum in which the right to a fair trial is respected and in which the accused should be able to challenge the charges and the evidence presented, there is no place to declare important contextual facts as indisputable facts.

From the perspective of the accused and his ability to participate effectively, the Appeals Chamber should have required formal evidence or should have noticed the facts pursuant to Rule 94 (B) instead. This would allow the accused to challenge these facts: during the regular trial proceedings, by filing a response or by filing a motion of reconsideration. It is noted that judicial notice of adjudicated facts is prohibited if the facts contain, or consist of, legal characterisations. Chambers should carefully select which facts may be judicially noticed, without importing legal conclusions from other trials. 127

To conclude, Chambers should be cautious when they use this shortcut to

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125 ICTR, Decision on Motion for Reconsideration, Prosecutor v. Karemera et al., Case No.: ICTR-98-44-AR73(C), A. Ch., 1 December 2006, par. 8; ICTR, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, Prosecutor v. Karemera et al., ICTR-98-44-AR73(C), A. Ch., 16 June 2006, par. 23.

126 According to Rule 73 (B) ICTY and ICTR RPE, the Trial Chamber may grant certification ‘if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.’ The wording of Article 82 ICC Statute on interlocutory appeals is similar.

127 Although the distinction between factual and legal terms is rather blurred, as was discussed in Chapter 4.
proof: the adversarial character of the full criminal trial may be infringed by declaring facts indisputable.

5.3.3.3 Judicial Notice of Adjudicated Facts

At the ICTY and ICTR, judicial notice can be taken of adjudicated facts and documentary evidence. The Chamber can do so \textit{proprio motu} or at the request of one of the parties. This shortcut to proof allows the Chamber to rely on the factual conclusions of another Chamber. Evidence does not have to be presented and discussed extensively: the full criminal trial is avoided by importing facts from other, related, cases.

The accused may request the Trial Chamber to take judicial notice of certain adjudicated facts. Thus, the accused can import exonerating facts that have been established in other cases and which are relevant for his case. Not much use has been made of this possibility: it does not occur often that exonerating facts are proven in the context of another case. The accused is, of course, in no way compelled to provide the Chamber with exonerating facts from other cases: the presumption of innocence is infringed when the accused must provide the Chamber with exonerating evidence.

In order to be able to challenge the evidence effectively, the accused must be well informed: he must know which adjudicated facts the prosecutor or the Chamber want to have judicially noticed. Therefore, the accused must be provided with a detailed description of the facts, including the sources for these facts. In the case law of both the ICTY and ICTR this requirement is encapsulated in several of the criteria for judicial notice:

\begin{itemize}
\item[(b)] The fact must be distinct, concrete, and identifiable;
\item[(c)] The fact, as formulated by the moving party, must not differ in any substantial way from the formulation of the original judgement;
\item[(d)] The fact must not be unclear or misleading in the context in which it is placed in the moving party’s motion. In addition, the fact must be denied judicial notice ‘if it will become unclear or misleading because one or more of the surrounding purported facts will be denied judicial notice’;
\item[(e)] The fact must be identified with adequate precision by the moving party.\footnote{ICTY, Decision on Accused’s Motion for Judicial Notice of Adjudicated Facts Related to Count One, \textit{Prosecutor v. Karadžić}, ICTY-IT-95-5/18-T, T. Ch., 21 January 2014, par. 6.}
\end{itemize}

These criteria ensure that the facts for which judicial notice is requested by the prosecutor, or proposed by the Chamber, are identified in detail. This enables the accused to file a detailed response to the prosecutor’s motion on judicial notice: the accused can formulate his objections against a particular fact before the Chamber has noticed the fact.

It is important that the accused is also aware of the consequences when facts are judicially noticed. The effect in terms of probative value and the role such facts have can be significant.
can play in the final judgement is considerable: judicially noticed facts are regarded as well-founded presumptions for the accuracy of these facts, and they may become conclusive evidence in the final judgement. Therefore, the accused must be informed of the possibility to challenge these facts during the proceedings by presenting evidence in rebuttal. In the interlocutory decisions of the Chambers, reference is normally made to the possibility for the defence to challenge the facts by ‘introducing reliable and credible evidence’. This allows the accused to challenge any incriminating evidence: the Chamber has concluded that the judicially noticed facts are presumably accurate, but it is willing to hear any evidence to the contrary.

Although the possibility to present exonerating evidence exists, it can be questioned whether the accused is able to challenge the facts effectively in practice. The number of judicially noticed facts has risen over the years, resulting in cases in which thousands of facts are imported via Rule 94 (B). Trial Chambers have acknowledged that the ‘volume or type of evidence the Accused can be expected to present in rebuttal may place such significant burden on him that it jeopardises his right to a fair trial.’

Normally, the accused challenges the facts in its response to the motion of the prosecutor: particular facts for which the prosecutor requests judicial notice are challenged on the basis of the admissibility requirements for Rule 94 (B). The hearing requirement ensures that the parties are enabled to express their views on the matter. Moreover, accused often refer to the discretionary power of the Chamber to refuse judicial notice in the interest of justice. However, these responses are not often successful: in general, Chambers take judicial notice of the facts presented by the prosecutor. This means that those facts will, in principle, not be discussed anymore during the proceedings. The prosecutor does not have to present evidence for these facts. If the defence does not specifically challenge these facts by presenting evidence in rebuttal, the facts will be left uncontested.

In the case law, references are made to the fair trial implications of taking judicial notice of adjudicated facts. The importance of the right to challenge the adjudicated

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130 See, for example: ICTY, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Documents, Prosecutor v. Hadžić, ICTY-04-75-T, T. Ch., 23 May 2013, par. 10.

131 In Stanišić and Župljanin, judicial notice was taken of more than 1,000 facts; in Karadžić the Trial Chamber took notice of more than 2,300 facts. See K.C.J. Vriend ‘Commentary’ in: Klip/Sluiter, Annotated Leading Cases of International Criminal Tribunals, Vol. XXX, 2012, p. 175-180.

132 ICTY, Decision on Prosecutor’s Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B), Prosecutor v. Tolimir, ICTY-IT-05-88/2-PT, T. Ch.II, 17 December 2009, par. 32. See also Prosecutor v. Mejakić et al., in which the Trial Chamber held: ‘Considering that this Trial Chamber has recently held that, in the exercise of its discretion pursuant to Rule 94 (B), factors that may be taken into account include: (a) whether the facts, when taken together, will result in such a large number as to compromise the principle of a fair and expeditious trial;’ ICTY, Decision on Prosecution Motion for Judicial Notice pursuant to Rule 94 (B), Prosecutor v. Mejakić et al., Case No. IT-02-65-PT, T. Ch., 1 April 204, p. 5.
fact by presenting evidence in rebuttal is referred to by Judge Shahabuddeen in his Separate Opinion to an interlocutory decision in Milošević:

If there is no right of rebuttal, the consequence is that, as a result of the judicial notice, the opposing party would be bound by the adjudicated fact without an opportunity to dispute it with new evidence. The undesirability of this, particularly in a criminal case, cannot be overstated. The adjudicated fact may be important for the outcome of the case. As is sought to be shown below, it may well relate to a matter which is in reasonable dispute between the parties. There would, therefore, be ground for objecting that there is an encroachment on the presumption of innocence.133

The accused can exercise this right to rebuttal by requesting the Chamber to reconsider its earlier decision on judicial notice.134 He may also present evidence during the proceedings that would render the previously noticed fact disputable: the Chamber is then invited to make its own factual finding, based upon the evidence presented. It is necessary, however, to provide the Chamber with sufficient evidence to reconsider its earlier decision: a mere objection against particular facts or the concept of judicial notice as such will not suffice. The accused must, in other words, substantiate his request for reconsideration.135

Considering the element of being able to effectively challenge the evidence, the number of judicially noticed facts in certain cases is of particular concern. It is doubtful whether the accused is truly able to participate effectively when he has to present evidence in rebuttal regarding thousands of facts that were established in other trials, before other judges. It is recalled here that the facts of which judicial notice is taken have been established in other proceedings in which the accused might not have had a particular interest in challenging these facts. Although the fact is ‘adjudicated’ (another Chamber has indeed weighed the evidence regarding the fact), this does not necessarily mean that the fact was truly contested. When the accused wants to challenge only a small number of judicially noticed facts in his case, no issues arise regarding the fairness of the proceedings. The accused is allowed to present his views

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133 ICTY, Separate Opinion of Judge Shahabuddeen Appended to the Appeals Chamber’s Decision Dated 28 October 2003 on the Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Milošević, IT-02-54-AR73.5, A. Ch., 31 October 2003, par. 14-15.

134 E.g. ICTY, Decision on Three Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, Prosecutor v. Karadžić, IT-95-5-/18-T, T. Ch., 4 May 2012;

135 Cf. the observations of the Trial Chamber in Mladić: ‘The Chamber […] considers that even if the challenging party notifies the proposing party of its intention to challenge certain judicially noticed facts, the proposing party may still rely on the legal effect of being relieved of its initial burden to produce evidence on the point, until the moment that the challenging party puts the adjudicated fact into question by introducing evidence to the contrary.’ ICTY, Fourth Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Concerning the Rebuttal Evidence Procedure, Prosecutor v. Mladić, Case No. IT-09-92-T, T.Ch.I, 2 May 2012, par. 17 (emphasis in original).
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on the facts when the motion for judicial notice is heard, and he can present evidence in rebuttal afterwards. In this way, the accused can properly participate and challenge the evidence against him. However, the sheer number of facts that are imported by Rule 94 (B) does raise an issue regarding the ability of the accused to effectively challenge those facts. The Trial Chamber in Krajišnik acknowledged this: the Chamber held that a high number of adjudicated facts might be ‘oppressive’ to the defence. 136

It is a distinctive feature of international criminal proceedings that the narrative of a particular armed conflict, a genocidal campaign or other atrocities is written over the years: only after a certain number of trials have been conducted and completed does a detailed version of the historical events emerge. The factual conclusions of the early trials function as the basis upon which subsequent trials are founded. Accused that enter the dock after proceedings against others (often low-ranking officials) have been concluded, find themselves in a procedural setting in which a lot of the relevant factual background to the conflict has been established already. Accused often claim that they are tried under a ‘presumption of guilt’, which means that the judges are only trying to place the accused within the context of a war or genocidal campaign. The burden of proof shifts from the prosecutor to the accused, who has to demonstrate his innocence, the argument goes. 137

What should be made of this? It is important that Chambers, when they consider a judicial notice motion from the prosecutor, carefully assess whether the facts do not touch upon the personal criminal responsibility of the accused. This is one of the admissibility criteria developed in the Tribunals’ case law and it is worth emphasising: facts that are rather remote in proceedings against low-ranking officials (such as facts regarding a country’s military or political structure) can be essential for cases in which high-ranking accused stand trial. Moreover, the cumulative effect of taking judicial notice of adjudicated facts may be detrimental to the case at hand. The discretionary power of the Chamber to refuse notice in the interest of justice allows the Chamber to refuse the import of a huge number of facts, when this would be too oppressive to the accused.

The Chamber should provide solid reasoning regarding the use of adjudicated facts: not only in the interlocutory decisions on judicial notice, but also in the final judgement. It was shown in Chapter 4 that not all judicially noticed facts are included in the final judgement: it is important that the Chamber indicates why this is the case and accounts for the adjudicated facts that are included in the judgement. Thereby,

137 Cf. ICTY, Response to First Prosecution Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Karadžić, Case No.: IT-96-05/18-PT, T. Ch. III, 30 March 2009; ICTY, Professor Vojislav Šešelj’s Response to the Prosecution’s Motion to Take Judicial Notice of Documentary Evidence Pursuant to Rule 94 (B) With Annex A., Prosecutor v. Šešelj, Case No.: IT-03-67-PT, T.Ch.III, 2 November 2007; ICTY, Response of General Miletic to the Prosecution Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Popović et al., Case No.: IT-05-88-PT, T. Ch. II, 30 June 2006;
the accused is enabled to determine whether he can successfully challenge these factual conclusions during the appeal proceedings. Detailed references to the original judgements from which the adjudicated facts are derived, are essential in this regard. In international criminal proceedings accused are often standing trial consecutively regarding the same factual basis. However, the individual criminal responsibility of the accused differs. Military and political structures are mirrored in the charges: some accused are charged with having committed the atrocities themselves (e.g. murder, looting, rape etc.), while others are charged for their role as superiors (either military or political). The accused operated in the same context in which the atrocities were committed: it would indeed be a waste of time and resources to establish in every single case the factual background from scratch. The proceedings should be focused on their personal involvement in the crimes. Judicial notice of adjudicated facts facilitates clearly focused proceedings in which evidence is presented and challenged regarding the personal involvement of the accused.

‘Well-founded’ presumptions of fact are, both from an epistemological perspective as well as from the perspective of the law of criminal evidence, something to be suspicious about. The standard of proof is not met by presumptions, but by facts that are established convincingly and conclusively. Accurate fact-finding requires the Chamber to be sure about the factual conclusions it draws from the evidence presented. In other words, a solid justification has to be provided for this shortcut to proof. How do we justify that the factual conclusions of a Trial Chamber have a wider scope than the proceedings before the Chamber itself?

It is argued that the distinctive character of international criminal proceedings justifies the use of this shortcut. The tribunals are specialised courts that were set up to try persons regarding atrocities committed in a particular region during a particular period of time. Specifically the ad hoc Tribunals are handling cases that are similar to others regarding the factual context in which the accused operate. No other criminal courts have been confronted with this prolonged display of Serienprozesse: a tailored approach for processing huge quantities of evidence, regarding a very complex and detailed factual context is inevitable. The accused must be allowed to challenge the adjudicated facts by presenting evidence in rebuttal and be provided with a carefully reasoned judgement in which the Chamber accounts in detail for the use of the adjudicated facts. Finally, it is essential that Chambers are aware of the use other Chambers can make of their factual conclusions: this underlines the importance of accurate fact-finding.

5.3.3.4 Appeal Proceedings

Taking judicial notice of adjudicated facts is a shortcut to proof that allows Chambers to rely on the factual conclusions of other Chambers. There is a striking similarity with the manner in which appeal proceedings are conducted: the appeals chambers
in international criminal proceedings rely to a significant extent on the factual conclusions of trial chambers. Appeal proceedings are not trials *de novo*, but a second stage in the proceedings in which errors of fact will only be remedied when they have resulted in a miscarriage of justice. This means that appeal proceedings are another example of a shortcut: not all the evidence is presented and discussed before the second trier of fact. Appeal proceedings are regarded as corrective, which allows for a more deferential standard of review. Consequently, the primary responsibility for accurate fact-finding lies with the Trial Chamber:

Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber.\(^{138}\)

The ICC Appeals Chamber held in this regard:

Regarding factual errors, the Appeals Chamber has held that it will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the “misappreciation of facts”, the Appeals Chamber has also stated that it ‘will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.’\(^{139}\)

As was discussed in Chapter 4, the parties have a significant say in the manner in which the appeal proceedings are conducted: the Appeals Chamber will normally concentrate the proceedings on the issues that the parties deem relevant for their case.

The relationship between the Trial Chamber and Appeals Chamber regarding questions of fact and the manner in which appeal proceedings are conducted are important to understand the position of the accused during the appeal proceedings. The European Court of Human Rights has held that the specific features of a particular appeal procedure may influence the scope and applicability of Article 6 of the Convention: appeal proceedings must indeed be fair, but in the determination of fairness, the Court takes into account the proceedings as a whole.\(^{140}\) This means that the trial


\(^{139}\) ICC, Judgement on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction, *Prosecutor v. Thomas Lubanga Dyilo*, Case No.: ICC-01/04-01/06 A 5, A. Ch., 1 December 2014, par. 21.

\(^{140}\) ‘The manner in which paragraph 1, as well as paragraph 3 (c), of Article 6 is to be applied in relation to appellate or cassation proceedings depends upon the special features of the proceedings involved. Account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein.’ ECtHR, 2 March 1987, App. No.:
proceedings are relevant for the assessment of the fairness of the proceedings as a whole.

The Statutes of the ad hoc Tribunals and the ICC allow for appeals on both errors of law and errors of fact.\textsuperscript{141} The latter category is of particular interest here: how can the accused address alleged errors of fact made by the Trial Chamber? In order to effectively challenge the factual findings of the Trial Chamber, it is vital that the accused is provided with a duly reasoned trial judgement, where the manner in which the evidence has been weighed is accounted for in detail. Trial judgements often consist of a general part in which the approach to certain categories of evidence is described (such as statements of traumatised witnesses or statements and reports of expert witnesses).\textsuperscript{142} The Appeals Chamber held that it must ‘lend some credibility’ to the methods the Trial Chamber used to assess the evidence presented to it. Only in case the Trial Chamber assessed the evidence in an unreasonable way, the Appeals Chamber will have to consider the evidence itself and indicate the proper method of assessing the evidence.\textsuperscript{143}

The factual findings are generally presented as a narrative with footnotes referring to the particular sources from which the facts are derived. Issues that have been addressed explicitly during the trial proceedings will be accounted for in the judgement. The judgements must provide the accused with sufficiently detailed reasons in order to formulate well-reasoned grounds of appeal and to prepare for the appeal proceedings.

The amount of evidence that the trial chambers have to weigh is immense: if the Chamber should have to account for each and every piece of evidence that has been presented in proceedings that have lasted for several years, the judgments would become even longer and more detailed. It can be seriously doubted whether an extremely detailed analysis provides more solid reasoning as to why the accused was found guilty or not.\textsuperscript{144} Trial Chambers weigh the evidence holistically: every piece of evidence is assessed in light of the entire body of evidence. The ICC Appeals Chamber

\textsuperscript{141} Article 25 ICTY Statute; Article 24 ICTR Statute; Article 81 ICC Statute.

\textsuperscript{142} Cf. ICC, Judgement Pursuant to Article 74 of the Statute, Prosecutors v. Thomas Lubanga Dyilo, Case No.: ICC-01/04-01/06, T. Ch. I, 14 March 2012, par. 102-123.

\textsuperscript{143} ICTR, Appeal Judgement, Prosecutors v. Kayishema and Ruzindana, Case No.: ICTR-95-1-A, A. Ch., 1 June 2001, par. 119. In a similar manner: ICC, Judgement on the Prosecutors Appeal Against the Decision of Trial Chamber II entitled “Judgement pursuant to Article 74 of the Statute”, Prosecutors v. Mathieu Ngudjolo Chui, Case No.: ICC-01/04-02/12 A, A. Ch., 7 April 2015, par. 18-27.

\textsuperscript{144} Cf. the Trial Chamber in Perišić: ‘The Trial Chamber underline that the right of an accused to a reasoned opinion in writing, as set forth in Article 23(2) of the Statute and Rule 98ter(C), in no way imposes an obligation to explain every detail of its assessment of the evidence adduced during the trial.’ ICTY, Judgement, Prosecutors v. Perišić, Case No.: IT-04-91-T, T. Ch. I, 6 September 2011, par. 23.
emphasised that any other approach to the evidence by the Trial Chamber would be ‘incorrect’.\textsuperscript{145}

This has consequences for the reasoning of the Chamber in the judgement because no detailed analysis is provided for the assessment of each and every piece of evidence. The general framework at the beginning of the judgement provides, however, some guidance regarding the assessment of the evidence by the Trial Chamber. This general framework on how a Chamber has assessed the evidence is to be welcomed, because it allows the accused during the appeal proceedings to challenge the particular method the Trial Chamber has chosen regarding a certain category of evidence and the manner in which the method was applied. The Trial Chamber in Perišić, for example, stated that in the assessment of expert evidence it considered the:

- professional competence of the expert, the material at his disposal, the methodology used, the credibility of the findings made in light of these factors and other evidence,
- the proximity of the expert to the party offering him or her as an expert, as well as whether the opposing party opposed some of the expert evidence and/or reports.\textsuperscript{146}

When the accused wants to challenge a particular witness or expert, he has to be aware of the fact that the Appeals Chamber will only reverse the factual findings of the Trial Chamber when the misinterpretation of the witness or expert statement has resulted in a miscarriage of justice. In other words, the accused must substantiate his grounds of appeal regarding factual issues: the disqualification of a particular witness or expert as such does not suffice.

To participate effectively during the appeal proceedings, it is essential that the accused is able to challenge the evidence on which the Trial Chamber relied, including any additional evidence that is presented before the Appeals Chamber.\textsuperscript{147} Similar to the Dutch appeal proceedings, an active attitude is required from the accused: he has to draw the attention of the Appeals Chamber to particular factual elements in the trial judgement with which he disagrees.\textsuperscript{148} In order to do so it is vital that the accused

\textsuperscript{145} ICC, Judgement on the Appeal of Mr Thomas Lubanga Dyilo against his conviction, \textit{Prosecutor v. Thomas Lubanga Dyilo, Case No.: ICC-01/04-01/06 A 5, A. Ch.}, 1 December 2014, par. 22.

\textsuperscript{146} ICTY, Judgement, \textit{Prosecutor v. Perišić, Case No.: IT-04-91-T, T. Ch. I}, 6 September 2011, par. 48.


\textsuperscript{148} Cf. the ICC Appeals Chamber in \textit{Lubanga Dyilo}: ‘Appellants alleging factual errors need to set out in particular why the Trial Chamber’s findings were unreasonable. In that respect, repetitions of submissions made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation of the evidence.’ ICC, Judgement on the Appeal of Mr Thomas Lubanga Dyilo against his conviction, \textit{Prosecutor v. Thomas Lubanga Dyilo, Case No.: ICC-01/04-01/06 A 5, A. Ch.}, 1 December 2014, par. 33. The Appeals Chamber in \textit{Limaj et al.} held: ‘In order for the Appeals Chamber to assess a party’s arguments on
is informed in detail about the scope and character of the appeal proceedings. In virtually all cases, the accused is represented or assisted by counsel during the appeal: competent counsel will have informed the accused about the procedural outlook of the appeal proceedings.

The ability to participate effectively in the appeal proceedings depends to a significant degree on the manner in which the Trial Chamber has provided detailed reasons for its factual conclusions. Only in this way can the accused effectively challenge the facts before the Appeals Chamber: normally, evidence will not be reheard before the Appeals Chamber. As the Appeals Chamber held in Kupreškić, this deference to the Trial Chamber’s factual conclusions is ‘tempered by the Trial Chamber’s duty to provide a reasoned opinion.’\(^{149}\) In other words, the discretion the Trial Chamber enjoys must be accounted for.\(^{150}\)

When additional evidence has been presented before the Appeals Chamber of the ad hoc Tribunals, the Appeals Chamber will determine first whether a reasonable trier of fact could have reached a finding of guilt based on the trial record. If this is the case, the Appeals Chamber will assess whether it is itself convinced of the guilt of the accused, taking into account both the trial record and the additional evidence presented during the appeal.\(^{151}\) At the ICC, the Appeals Chamber has not formulated detailed criteria for the admissibility and weighing of additional evidence on appeal. It has, however, indicated that, regarding the similarities between the legal frameworks of the ICC and the ad hoc Tribunals, the case law of those tribunals may provide guidance in this respect.\(^{152}\)

Finally, the question as to what extent the Appeals Chamber is obliged to provide reasons in the appeal judgement is of interest. Rule 117 (B) ICTY RPE, Rule 118 (B) ICTR RPE and Article 83 (4) ICC Statute state that the appeal judgement must contain

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\(^{150}\) Judge Ušacka observed in her Dissenting Opinion to the appeals judgement in \textit{Lubanga Dyilo}: ‘Although the Trial Chamber is not required to articulate every step of its reasoning or to address every piece of evidence for each particular finding, a conviction decision nevertheless must enable both the convicted person and the Appeals Chamber to understand how the Trial Chamber made its findings based on the evidence before it, to ensure that the accused can exercise his or her right to appeal and for the Appeals Chamber to conduct a meaningful review.’ ICC, Dissenting Opinion of Judge Anita Ušacka to the Judgement on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, \textit{Prosecutor v. Lubanga Dyilo}, Case No.: ICC-01/04-01/06A 5 A. Ch., 1 December 2014, par. 26 (emphasis in original).


\(^{152}\) ICC, Judgement on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, \textit{Prosecutor v. Lubanga Dyilo}, Case No.: ICC-01/04-01/06A 5 A. Ch., 1 December 2014, par. 27, 53.
tain the reasons on which it is based. The European Court held that appellate courts are allowed to simply endorse the findings of the trial court as long as the ‘essential issues which were submitted to its jurisdiction’ have been addressed.153 This means that grounds of appeal that have been presented by the accused must be specifically addressed in the appeal judgement. The Appeals Chamber held in Kunarac:

It becomes evident from the appeal judgements of the ad hoc Tribunals and the ICC that the appeal chambers provide detailed reasons regarding the grounds of appeal in relation to alleged factual errors.155 In practice, the Appeals Chamber will only address factual errors when the Chamber has been invited to do so by one of the parties in a duly reasoned notice or brief of appeal.

5.4 Conclusion

In this chapter, the diversions and shortcuts that have been identified in the Dutch and international criminal justice systems were evaluated. The question was asked to what extent the accused is able to participate effectively when his case is diverted from the full criminal trial altogether, or when a shortcut to proof is used. The ability of the accused to participate depends on the extent to which the (out-of-court) proceedings allow for adversarial argument (‘débat contradictoire’). In this respect it is important to emphasise that the prosecutor, in case of diversions, and the court, in case of shortcuts, are responsible for ensuring that the accused is encouraged and invited to present his views on his case. In other words, the prosecutor and court should

154  ICTY, Judgement, Prosecutor v. Kunarac et al., Case No.:IT-96-23 & IT-96-23/1-A, A. Ch., 12 June 2002, par. 42.
155  See for example the reasoning of the ICC Appeals Chamber in Lubanga Dyilo and Ngudjolo Chui. ICC, judgement on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, Prosecutor v. Lubanga Dyilo, Case No.: ICC-01/04-01/06A 5 A. Ch., 1 December 2014; ICC, Judgement on the Prosecutor’s Appeal against the Decision of Trial Chamber II entitled “Judgement pursuant to Article 74 of the Statute, Prosecutor v. Ngudjolo Chui, Case No.:ICC-01/04-02/12 A, A. Ch., 7 April 2015. Similar judgements have been handed down by the ICTY and ICTR Appeals Chamber. E.g ICTY, Judgement, Prosecutor v. Talimir, Case no.:IT-05-88/2-A, A.Ch., 8 April 2015; ICTR, Judgement, Prosecutor v. Gatete, Case No.: ICTR-00-61-A, A. Ch., 9 October 2012.
stimulate an adversarial setting in which the accused can exercise his fair trial rights to the best of his abilities.