Manual on International Criminal Defence

ADC-ICT Developed Practices
Second Edition

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FORWARD

The first edition of this Manual was collaboratively published in 2011 by the United Nations Interregional Crime and Justice Research Institute (UNICRI) and the Association of Defence Counsel Practising Before the International Criminal Tribunal for the former Yugoslavia (ADC-ICTY), within the framework of the War Crimes Justice Project, funded by the European Union and implemented by UNICRI in cooperation with the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the International Criminal Tribunal for the former Yugoslavia (ICTY).

The Manual was drafted by members and associates of the ADC including Colleen Rohan (focal point for the ADC-ICTY/UNICRI Manual project and chapter author); Gregor Guy-Smith; Slobodan Zečević; Tatjana Savić; Edina Residović; Eugene O’Sullivan; Anya Marinkovich; Deirdre Montgomery; Gillian Higgins; Cindy Nesbit; Dominic Kennedy; Alex Paredes-Penades; Asa Solway (chapter authors).

This second edition updates the international criminal law jurisprudence and practice which has occurred since the first edition and expands beyond the ICTY to include other international courts and tribunals.

Invaluable additional support in the production of the Manual was provided by tireless interns working with the ADC, including, for the first edition: Isabel Düsterhöft, Lisa Scott, Ece Aygün, Jasna Sajkov, Jovana Paredes, Taylor Olson, and Matt Odgers, and for the second edition: Omer Akif, Alexandre Chao Viso, Alex Cull, Leah Evans, Karl Kemp, Jennifer King, Grace Ko, Joshua Minchin, Sean Shun Ming Yau, Michelle Thiry, Tanishtha Vaid.

One of the ultimate purposes of this Manual is to contribute to the creation of a vibrant community of criminal Defence practitioners, regardless of their disparate cultural and legal backgrounds, who are willing and able to share their skills, knowledge and experiences. The practice of international criminal defence is a challenging and dynamic one. A strong Defence community will be, by definition, a community able to function as a resource for its members both in improving the representation of individual accused and in providing valuable contributions to the continuing development of fair and balanced substantive and procedural jurisprudence which recognizes and protects the rights of victims, the international community and the accused.
INTRODUCTION

The International Criminal Tribunal for the Former Yugoslavia (ICTY) which was established in 1993, officially closed its doors in December of 2017. During its nearly 25 years of existence it produced an impressive body of law arising from resolution of the factual, procedural and legal issues which arose in the cases tried before it; cases which involved allegations of war crimes, crimes against humanity and genocide arising from the armed conflict in the former Yugoslavia. Other tribunals concerned with different conflicts were established after the ICTY. The International Criminal Tribunal for Rwanda (ICTR) began operations in November 1994 and closed in December 2015. The Special Court for Sierra Leone (SCSL) was established in January of 2002 and closed in December 2013. The Special Tribunal for Lebanon (STL) began operating in March 2009 and is still functioning. The International Criminal Court was established by the signing of the Rome Statute in July 2002 and it is intended to be a permanent court. Finally, in anticipation of the closing of the ICTY and ICTR the International Residual Mechanism for Criminal Tribunals (IRMCT) began operating parallel to the ICTY and ICTR in July 2012. Its role is to carry out the essential functions of the ICTY and ICTR after the closing of those tribunals regarding any remaining proceedings including the arrest and trial of fugitives, issues involving convicted individuals serving periods of incarceration and related matters. In carrying out such functions the IRMCT maintains the legacies of the ICTY and ICTR and strives to continue to reflect the best practices of those institutions.

Although a significant number of excellent analyses and commentaries have been published over the years regarding the jurisprudence at the ICTY as well as the other international criminal courts, the literature has with rare exception overlooked the unique role and experiences of the Defence in international criminal proceedings.

Defence counsel who have represented accused before the international courts have developed, as a group, a body of written work, practical experience, and courtroom skills which, like the jurisprudence at the various international criminal courts, can be of benefit to counsel in domestic war crimes courts as well as the international courts.

The Association of Defence Counsel Practising Before the International Criminal Tribunal for the former Yugoslavia (ADC-ICTY) decided in 2011 to preserve and share this unique expertise with other legal professionals working on war crimes cases. The first edition of this Manual attempted to capture the practical knowledge the ADC-ICTY and its members had acquired, arising from their day-to-day functioning as defence counsel in an international criminal court. Although the ICTY is now closed the ADC has continued as an active defence association. It is now the recognized representative of counsel at the IRMCT and is known as the Association of Defence Counsel Practicing Before the International Courts and Tribunals (ADC-ICT).

Since the work at the ICTY up to the time of its closing in 2017 was concerned solely with cases from the countries of the former Yugoslavia, the first edition of this Manual necessarily focused on those cases and
issues related to defense practice at the ICTY. However the ADC, in creating the Manual, always had the broader aim of providing useful information to legal practitioners from all national and international jurisdictions, particularly as a vehicle for inspiring creative thought about the role of the Defence in the mixed civil/common law systems which are utilized in many domestic and international criminal courts. In keeping with that goal, this second edition of the Manual has been updated to include practices and jurisprudence from international criminal courts other than the ICTY. The Manual is not an exhaustive review of all such practice and jurisprudence but is intended to alert counsel to and provide counsel with guidance on differing practices between the existing international criminal courts as one means to strengthen the effectiveness of defense practice in all the courts.

This Manual is, as with the first edition, a practically oriented work which reflects the considered views of the authors of its various chapters, presented as a resource for Defence counsel new to the profession and in search of guidance on fundamental aspects of legal practice in the international courts as well as for seasoned practitioners seeking new or innovative approaches to the factual and legal issues which will arise in their own domestic or international practice. The Manual also constitutes a contribution to the preservation of the work that has been achieved at the ICTY and the ongoing legacy of the ADC-ICTY/ADC-ICT.
METHODOLOGY

The ADC-ICT Manual of Developed Practices was drafted and produced by members and associates of the ADC who have served either as Defence counsel or in some other capacity on a Defence team in one or more cases tried before the ICTY. The primary aim of this Manual is to provide other practitioners in the criminal Defence community — in particular those faced with the challenge of representing accused in cases involving war crimes, crimes against humanity and/or genocide — with the benefit of the knowledge and experience gained by Defence counsel at the ICTY in the course of representing accused charged with similar crimes.

The opinions and views of the individual authors who wrote chapters for this Manual do not necessarily represent and are not intended to represent the views of the ADC as an organization or the views of UNICRI or the United Nations at large. The analyses, legal interpretations and practice tips contained in the individual chapters illustrate commonly held attitudes and concerns of the Defence community. However, not all counsel agree on how to go about presenting particular legal or procedural issues and not all counsel agree on interpretations of the procedural and substantive law. The choice as to the specific contents of the individual chapters, therefore, reflect, in some circumstances, the personal views and experiences of their authors.

This latter point underlines the manner in which this Manual may be used and hopefully will be used as a resource for other criminal defence practitioners. The individual chapters are meant to provide an overview of the subjects covered, including both legal analysis and practical advice when applicable. No claim is made that they constitute exhaustive treatments of their subjects. This Manual is a practice-oriented work. It is intended to be used as a reference work for practitioners interested in learning the practices and experiences of Defence counsel as a means for developing their own approach to similar issues in international or domestic criminal cases.

The Manual begins with a chapter on the presumption of innocence and burden of proof as these concepts are the most important and pervasive principles, substantively and procedurally, which underlie the entirety of criminal proceedings. This subject is addressed in the first chapter of the Manual since every step taken by Defence counsel from the beginning of a case to its completion, including the analysis of the indictment and disclosure, decisions regarding investigation of the case, the structuring of direct and cross-examination and the nature or purpose of motions and briefs filed throughout the case, must be continuously assessed in light of the principle that the Prosecution always bears the burden of proof; a burden which never shifts to the accused.

That chapter is followed by a discussion of affirmative defences to illustrate and clarify how principles regarding the presumption of innocence and burden of proof apply throughout the trial proceedings and to describe the interplay of these principles with various affirmative defensive defences which may be available in a given case.
The subsequent chapters loosely follow the sequence of various stages of the criminal proceedings at the international courts and tribunals from the filing of the indictment and initial disclosure at the beginning of a case through the completion of the appellate process and post-conviction issues. The exception is Chapter IX on Plea Agreements. As that chapter explains, plea agreements may be negotiated at almost any point during the proceedings.

Finally, Chapter XIV provides a detailed description of the structure and activities of the ADC and highlights the significant improvement in the working conditions for the Defence at the ICTY after this organized Defence association, authorized to speak collectively on behalf of all Defence counsel, came into being. The Defence was not recognized as a pillar of the ICTY, despite its critical role in proceedings there, as is the Prosecution, Chambers and the Registry. The creation of the ADC was a fundamental and necessary step for the development of an effective Defence voice. The ADC was successful in achieving Defence participation in resolution of issues involving Defence resources and other matters which directly impacted on the Defence function at the ICTY. This is a role which the ADC continues to undertake at the UN International Residual Mechanism for Criminal Tribunals.

The Manual emphasizes practical considerations in a number of ways. Some chapters contain practice tips intended to alert practitioners to various ways in which they can improve or streamline legal skills, for example, in the presentation of written or oral arguments. The Manual also contains case boxes which illustrate points made in the body of a chapter by direct reference to jurisprudence at the Tribunal and/or specific examples from ICTY trials, such as portions of direct or cross-examination.

This Manual, in addition to serving as a practical research and reference tool, is also meant to encourage and facilitate communication between members of the Defence community in the international and domestic courts. As this Manual illustrates, there is a wealth of information and practical advice available among counsel in the Defence community. Cases tried in the regional courts of the former Yugoslavia usually arise from the same or similar facts and circumstances as cases which have already been tried at the ICTY. At times the same witnesses, lay and expert, are called in related cases. Given that overlap counsel are encouraged to directly contact their colleagues in the Defence community when questions arise about upcoming witnesses, difficulties with disclosure or obtaining access to court records including prior testimony.

The ADC hopes that this Manual, as part of its legacy, will assist individual practitioners in defending those accused of war crimes, crimes against humanity and genocide and, in doing so, will preserve the internationally recognized rights of individuals accused of criminal charges and facing prosecution.
I. BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

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1. The presumption of innocence is a principle acknowledged in all major legal systems and has been
   specifically and consistently articulated throughout international documents and their provisions guiding
   the conduct of international criminal proceedings. Such a presumption impacts many fundamental rights
   of the accused, including the right to silence and the assumption that an accused is innocent until
   proven guilty.

2. Section A of this chapter outlines the burden of proof and the presumption of innocence, including its
   importance as a central component of criminal law and the theory behind the presumption of innocence.
   Section B sets out the law governing reasonable doubt at the international ad hoc Tribunals. Section C
   sets out the requirements necessary to prove guilt beyond a reasonable doubt. Such a requirement
   applies not only to the final judgement but also to the underlying facts of the case. Section D describes
   the analytic process required of the Trial Chamber when determining whether guilt beyond a reasonable
   doubt has been proven. Section E discusses the role of the burden of proof in relation to predicate facts
   and circumstantial evidence. Section F analyses a constituent principle, or corollary, to the burden of
   proof, known as in dubio pro reo which requires that ambiguities be resolved in favour of the accused.

* This chapter was authored by Gregor D. Guy-Smith, co-founder of the (ICLB) International Criminal Law Bureau; former President of the ADC-ICTY; former Chair of the ADC-ICTY Disciplinary Council; Member of the Rules Committee; Chair of the Ad-Hoc Post Tribunal Matters Committee. He has practised as defence counsel for over 30 years and served as counsel on the following ICTY cases: Prosecutor v. Limaj et al.; Prosecutor v. Haradinaj et al. and Prosecutor v. Perišić.

1 Article 21(3), ICTY Statute; Article 20(3), ICTR Statute; Article 17(3), Article 19(3), IRMCT Statute; Statute of the Special Court for Sierra Leone (SCSL Statute); Article 66, Rome Statute of the International Criminal Court (ICC Statute).

2 In Prosecutor v. Ntaganda, ICC-01/04-02/06, Appeal from Decision Denying Leave to File a “No Case to Answer Motion,” 27 June 2017, para. 17, the Chamber expressed that “[t]he vast majority of adversarial systems, either by legislation or practice, vindicate the right to silence by ensuring that the Accused can know whether or not a prima facie case has been made out requiring a defence.”

3 In Prosecutor v. Mladić, IT-09-92-T, Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, 19 May 2016, para 8, the Chamber stated that in criminal law, the right to a presumption of innocence until proven guilty was a fundamental right.
Section G discusses motions for judgement of acquittal under Rule 98 bis of the ICTY RPE. Finally, Section H describes the different burden of proof placed upon the defence for affirmative defences.

A. The Presumption of Innocence and Burden of Proof

3. To fully appreciate the burden of proof required to obtain a conviction against an accused, it is essential to understand and recognize that the presumption of innocence specifically entails that:

- the burden to prove that the accused is guilty of the crimes with which he is charged always remains on the Prosecution;
- the accused does not have to prove his innocence;
- in order to find the accused guilty of the crimes charged, the Court must find that the charges brought by the Prosecution have been proved by the Prosecution beyond a reasonable doubt.

4. The foregoing fundamental rights are articulated in all major human rights conventions, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights (ACHR).\footnote{See, e.g., Article 11, UDHR (“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”); Article 14(2), ICCPR (“Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.”); Article 6(2), ECHR (“Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.”); Article 8(2), American Convention on Human Rights (“Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.”); Article 7(b), African Convention on Human Rights (“Every individual shall have the right to have his cause heard. This comprises . . . the right to be presumed innocent until proven guilty by a competent court or tribunal”); Article 40(2)(b)(i), Convention on the Rights of the Child (recognizing the right of every child “[t]o be presumed innocent until proven guilty according to law”).}

5. This principle operates as a foundation stone in the context of international criminal proceedings and as such ensures that an accused has the right to remain silent and not to supply incriminatory information, if such exists, from the outset of an investigation.\footnote{Rule 42(A)(iii), ICTY Rules of Procedure and Evidence (ICTY RPE); Rule 40(A)(iii), IRMCT Rules of Procedure and Evidence (IRMCT RPE).} The right to silence is seen as a corollary to the presumption of innocence and protects an accused from being required to give a statement in the investigation phase or evidence in the trial phase in court. This is because the burden to prove the guilt of an accused always lies with the Prosecution.\footnote{Articles 66 and 67 of the ICC Statute touches upon three aspects of this standard of proof: Article 66(1) and the fact that every accused shall be presumed innocent until proved guilty; Article 66(2) and the fact that the prosecution bears the burden of proof throughout the trial; and Article 66(3) and the fact that the court must be convinced beyond reasonable doubt that the accused is guilty.} That requirement prevents the Prosecution or its agents from forcing an accused to assist in his or her own Prosecution by supplying information to prosecuting authorities at any level.\footnote{In Prosecutor v. Musema, ICTR-96-13-T, Trial Judgment, 27 January 2000, para. 108, the Trial Chamber held that “the alibi defence does not carry a separate burden of proof.”} The Prosecution is required to prove its case and the law requires nothing of...
the accused. An accused has the right to refuse to answer questions. Obviously, if an accused was compelled to do so the presumption of innocence would be a nullity. The accused has no obligation to present any evidence at all during the trial because the burden to prove the charges always remains with the Prosecution. Finally, the accused himself has no obligation to give evidence in court and no adverse inference can be drawn from the decision not to testify.9

6. In the context of international criminal proceedings, an understanding that the accused is covered by a mantle of innocence is the basis for the application of the criminal standard of “proof beyond a reasonable doubt,” and this guides the Chambers’ deliberations at the conclusion of trial.10

7. Proof beyond a reasonable doubt is the highest standard of proof that must be met in any trial. Reasonable doubt has been defined as a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence, or lack of evidence, in a case.11 Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that one would be willing to rely and act upon it without hesitation in the most important of one’s own affairs. However, it does not mean an absolute certainty.12

8. There are lower standards or burdens of proof that are applied in litigation. It is important to recognize that these standards have no place in international criminal proceedings.13 The burden of proof beyond a reasonable doubt that must be met before a finding of guilt can be made is not proof by a preponderance of the evidence, which simply means that one side has more evidence in its favour than the other, even by the smallest degree. It is not proof by clear and convincing evidence.14 It is not proof by a balance of probabilities.

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9 Article 21(4)(g), ICTY Statute; Rule 85(c), ICTY RPE; Article 19(4)(g),IRMCT Statute; Rule 102(c),IRMCT RPE; Prosecutor v. Delalić et al., IT-96-21, Appeal Judgement, 20 February 2001, para. 783; Prosecutor v. Hallović, IT-01-48-T, Trial Judgement, 16 November 2005, para. 13; Prosecutor v. Haradinaj et al., IT-04-84-T, Trial Judgement, 3 April 2008, para. 21; Prosecutor v. Limaj et al., IT-03-66-T, Trial Judgement, 30 November 2005, para. 22; Prosecutor v. Milutinović et al., IT-04-84-T, Trial Judgement, 26 February 2009, Vol.1, para. 41.; Prosecutor v. Gaddafi and Al-Senussi, ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, 31 May 2013, para. 27: Regarding the standard of proof and the adequacy of domestic proceedings, the Court stated that “[...]an evidentiary debate on the State’s unwillingness or inability will be meaningful only when doubts arise with regard to the genuineness of the domestic investigations or prosecutions. Depending on the circumstances, the Chamber may seek additional evidence [...] The Chamber will determine, in light of its own assessment, whether it is satisfied that the State is conducting genuine investigations or prosecutions on the basis of the submissions and the evidence received in response.” The Pre-Trial Chamber essentially held that a State asserting that a case is inadmissible also bears the burden of proof, just as the Prosecution does.

10 Rule 87(A), ICTY RPE; Rule 104(A),IRMCT RPE.

11 Rutaganda v. Prosecutor, ICTR-96-3-A, Appeal Judgement, 26 May 2003, para. 488: “The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.”

12 See Prosecutor v. Chui, ICC-01/04-02/12 A, Prosecution’s Document in Support of Appeal, 3 April 2013, para 41: “[T]he standard does not require proof ‘beyond a shadow of a doubt’, ‘beyond all possible doubt’, or ‘absolute certainty’ or ‘moral certainty.’”

13 See Prosecutor v. Stakić, IT-97-24-T, Appeal Judgement, 31 July 2003, para. 219: “A Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime (as defined with respect to the relevant mode of liability) beyond a reasonable doubt.”

B. Reasonable Doubt as Defined in the ICTY, IRMCT and ICC Decisional Law

9. The Delalić et al. case (also known as the Čelebići case), seminal in certain respects concerning the evolution of international jurisprudence, considered both the English and American formulations of the definition of reasonable doubt used in those jurisdictions. It ultimately adopted the following definition:

“It need not reach a certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, ‘of course it is possible, but not in the least probable’, the case is proved beyond a reasonable doubt, but nothing short of that will suffice.”

10. Additionally, Delalić et al. held that “[…]the Prosecution is bound in law to prove the case against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.”

11. These standards have been consistently followed by the ad hoc Tribunals without deviation. At the IRMCT, the same standard is applied.

C. Requirements Necessary for a Finding of Guilt Beyond a Reasonable Doubt

12. The ICTY RPE and IRMCT RPE, as well as the ICC Statute, provide that a finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond a reasonable doubt. The ICTY Appeals Chamber has made it clear that this standard of proof beyond a reasonable

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16 Ibid., para. 601.
17 See, e.g., Prosecutor v. Halilović, IT-01-48-T, Trial Judgement, 16 November 2005, para. 24: “The Trial Chamber interprets the standard ‘beyond a reasonable doubt’ to mean a high degree of probability; it does not mean certainty or proof beyond the shadow of a doubt.” Prosecutor v. Halilović, Appeal Judgement, IT-01-48-A, 16 October 2007, [296], adopting the same interpretation as the Trial Chamber; Prosecutor v. Limaj et al., IT-03-66-T, Trial Judgement, 30 November 2005, para. 10; Prosecutor v. Haradinaj et al., IT-04-84-T, Trial Judgement, 3 April 2008, para. 7; Prosecutor v. Ntagerura, ICTR-99-46-A, Appeal Judgement, 7 July 2006, para.170; Prosecutor v. Brima et al., SCSL-04-15-T, Trial Judgement, 20 June 2007, para. 98; Prosecutor v. Milutinović et al., IT-05-87-T, Trial Judgement, 26 February 2009, paras. 4, 62, 63. See also Article 67(1)(i), ICC Statute which provides that the accused is entitled “not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”
18 Ngirabatware v Prosecutor, No. IRMCT-12-29-A, Appeal Judgement, 18 December 2014, at para. 20. The standard “beyond reasonable doubt” connotes that the evidence establishes a particular point and it is beyond dispute that any reasonable alternative is possible.
19 Rule 87(A), ICTY RPE; Rule 104(A), IRMCT RPE.
20 Article 66(3), ICC Statute.
doubt is not limited solely to the ultimate question of guilt—it also applies to the underlying facts. Courts have consistently rejected Prosecution arguments that the standard of proof beyond a reasonable doubt applies only to the ultimate question of guilt and not to any of the underlying, predicate facts essential to reaching a finding of guilt.

13. A Trial Chamber must necessarily weigh and analyse the entirety of the evidence presented to it in order to objectively and rationally arrive at a reasonable, fair and proper determination of the liability of the accused, if any. As noted by the Appeals Chamber in Tadić:

"[A] tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. The converse also holds true."

14. In making this observation, however, the Tadić Appeals Chamber did not address the standard of proof applicable to any particular underlying fact which, if found to be proved at trial, would support or would undermine the strength of the Prosecution case. To the contrary, the recognized duty of the Trial

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23 Rule 89(C), ICTY RPE and Rule 105(C) IRMCT RPE establish that “[a] Chamber may admit any relevant evidence which it deems to have probative value.” This means that for any type of evidence to be admissible, every party has to illustrate its relevance and probative value. In Prosecutor v. Kordić and Cerkez, Decision on Appeal Regarding Statement of a Deceased Witness, IT-95-14/2-AR73.5, 21 July 2000, paras. 22-28, in Prosecutor v. Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence, IT-95-14/1-AR73, 16 February 1999, para. 15, and at the ICTR in Prosecutor v. Akayesu, ICTR-96-4, Appeal Judgement, 1 June 2001, para. 286, it is apparent that the reliability of a statement made out of court can still be a relevant factor for a Trial Chamber to take into account when determining the admissibility of evidence, again, only if it contains probative value.
Chamber to consider all the evidence “does not relieve it from the duty to apply the required standard of proof to any particular fact.”

15. Therefore, a discussion as to which underlying facts must be proved beyond a reasonable doubt before a final evaluation of the totality of the evidence can result in a criminal conviction is necessary.

16. Before a finding of guilt can be made beyond a reasonable doubt, the Trial Chamber must find:

   1. that each element of each of the charged crimes has been proved beyond a reasonable doubt;
   2. that each element of any charged mode of liability has been proved beyond doubt; and,
   3. that any fact which is indispensable to or aimed at obtaining a conviction, must also be proved beyond a reasonable doubt.

17. As a general matter, facts falling within categories (1) and (2), dealing with the elements of the charged crimes and the elements of the charged modes of liability for those crimes are usually readily identifiable. Thus, each fact produced at trial which goes directly to proof of the actus reus and mens rea of each of the charged crimes must itself be established beyond a reasonable doubt before a conviction can be properly returned.

18. Documentary evidence may be tendered to prove both the actus reus and mens rea relating to the charged activity of an accused. In such instances, the authenticity of such documents may itself constitute a predicate fact, which must be proved beyond a reasonable doubt, before such evidence may form the basis for a criminal conviction.

19. Identifying those facts “which are indispensable to” or “aimed at” a conviction can be a subject of dispute. Each case depends on its own particular facts. However, a useful illustration of “facts indispensable to a conviction” arises from the Limaj et al. case where the issue of the accuracy and reliability of eyewitness identification was of critical importance.

20. In Limaj et al. the three accused were charged, under various forms of liability, with offences alleged to have taken place in a makeshift prison camp in Kosovo during the armed conflict there in 1998,

30 All references to Kosovo refer to Kosovo under UNSC Resolution 1244/1999. All references to Kosovo institutions refer to the Provisional Institutions of Self Government.
including the murders of several detainees from the camp.\textsuperscript{31} A number of trial witnesses during pre-trial interviews with the Prosecution were asked to attempt to identify one or more of the three accused as the perpetrators of the charged crimes from photo-board line-ups shown to them. The \textit{Limaj et al.} Trial Chamber held that the individual eyewitness identifications had to be proved beyond a reasonable doubt:

\begin{quote}
"With particular regard to the evidence of the visual identification of each of the Accused by various witnesses, it is to be emphasized that, like all elements of an offense, the identification of each Accused as a perpetrator as alleged must be proved by the Prosecution beyond a reasonable doubt."
\end{quote}

21. It was not sufficient for the Prosecution in \textit{Limaj et al.} to simply present evidence that the accused had been identified by certain witnesses as the perpetrators of the charged crimes. The Prosecution was required to prove that the identifications were reliable and accurate beyond a reasonable doubt as the identifications themselves were essential to a conviction.\textsuperscript{32} Since the burden of proof remains with the Prosecution throughout trial, the accused had no burden to affirmatively disprove the accuracy of the identifications (see case box \textit{Kupreškić et al.} - Identifying the facts indispensable to a conviction).

\textbf{D. The Analytic Process Required from the Trial Chamber}

22. The Appeals Chamber has explained the process through which a Trial Chamber must go in evaluating whether the Prosecution has met its burden of proof; a process which can assist in determining which facts are “predicate” facts,\textsuperscript{34} i.e. indispensable to a conviction or aimed at a conviction:

\begin{quote}
"At the first stage, the Trial Chamber has to assess the credibility of the relevant evidence presented. This cannot be undertaken by a piecemeal approach. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows the original evidence lacks credibility.

Only after the analysis of all the relevant evidence can the Trial Chamber determine whether the evidence, upon which the Prosecution relies, should be accepted as establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish...
\end{quote}

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{31} \textit{Prosecutor v. Limaj et al.}, IT-03-66-T, Trial Judgement, 30 November 2005, para.1.
\item \textsuperscript{32} \textit{Ibid.}, para. 20.
\item \textsuperscript{33} In fact, two of the accused in \textit{Limaj et al.} were acquitted based, in significant part, on the finding that the reliability of the eyewitness identifications of them as perpetrators of certain of the charged crimes were not proved beyond a reasonable doubt. \textit{Ibid.}, paras. 530-565, 672-688.
\item \textsuperscript{34} A “predicate fact” has been defined as a fact from which a presumption arises or from which an inference can be drawn. It is also sometimes termed a “foundational” fact or an “evidentiary” fact. See \textit{Prosecutor v. Halilović}, IT-01-48-A, Appeal Judgement, 6 October 2007, para. 112.
\end{itemize}
\end{footnotes}
the facts forming the elements of the crime or the form of responsibility alleged against the accused as well as with respect to the facts which are indispensable for entering a conviction.

At the final stage, the Trial Chamber has to decide whether all of the constituent elements of the crime and the form of responsibility alleged against the accused have been proven. Even if some of the material facts pled in the indictment are not established beyond a reasonable doubt, a Trial Chamber might still enter a conviction provided that, having applied the law to those material facts, it did accept beyond a reasonable doubt all the elements of the crime charged and of the mode of responsibility are established by those facts. Therefore, not every factual finding in a trial judgement must be established beyond reasonable doubt."

23. However, and most importantly, the law at the Tribunal is unequivocal in holding that “[t]he standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt.”

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37 Ibid.
E. Predicate Facts and Circumstantial Evidence

24. The issue of determining what constitutes a predicate fact is of particular importance regarding matters which can only be proved by circumstantial evidence; that is, evidence of facts surrounding an event or offence from which a secondary fact may be reasonably inferred.  

25. The jurisprudence of the ad hoc Tribunals provides that each fact, in a circumstantial evidence analysis, which forms the basis for the ultimate conclusion drawn from the totality of such evidence, must itself be proved beyond a reasonable doubt. Such facts clearly constitute predicate or foundational facts in this context. A finding based on circumstantial evidence cannot be proved beyond a reasonable doubt if the facts it rests upon have not themselves been established beyond a reasonable doubt. In addition, when applied to circumstantial evidence determinations, the requirement that the underlying facts themselves have been proved beyond a reasonable doubt is mandatory so as not to violate the principle of in dubio pro reo.

26. The Trial Chamber in Haradinaj et al. emphasized the importance, in addition, of the fact-finder exercising extreme caution when drawing an inference of guilt beyond a reasonable doubt based upon seemingly persuasive circumstantial evidence theories (see case box Haradinaj et al. case—Proof requirements of circumstantial evidence).

F. The Principle of In Dubio Pro Reo

27. An important corollary to the presumption of innocence and the requirement of proof beyond a reasonable doubt is that any ambiguity or doubt arising from the trial evidence must be resolved in favour of the accused in accordance with the principle of in dubio pro reo. The principle of in dubio pro reo is essentially one material element required to prove guilt beyond a reasonable doubt.  


40 Prosecutor v. Delalić et al., IT-96-21-A, Appeal Judgement, 20 February 2001, para. 458 (“A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him [...]. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.”).

41 Prosecutor v. Limaj et al., IT-03-66-A, Appeal Judgement, 27 September 2007, para. 21; Prosecutor v. Naletilić and Martinović, IT-98-34-A, Appeal Judgement, 3 May 2006, para. 120 (each element of mens rea must be proved beyond a reasonable doubt); Prosecutor v. Delalić et al., IT-96-21-T, Trial Judgement, 16 November 1998, para. 601 (“at the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offense has been proved”); Prosecutor v. Akayesu, ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 319 (“the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected”).

42 Prosecutor v. Limaj et al., IT-03-66-A, Appeal Judgement, 27 September 2007, para. 21; At the ICC, in Prosecutor v. Bemba Gombo, ICC-01/05-01/09, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 369, Pre-Trial Chamber II specifically emphasized the importance of the principle in dubio pro reo. It stated that
28. This principle provides that when it is possible for a Trial Chamber to draw one or more inferences from facts which have been established by either direct or circumstantial evidence, it must consider whether any such inference reasonably open under the facts is inconsistent with the guilt of the accused. If so, the onus and the standard of proof, which always remains with the Prosecution, requires that the inference favourable to the accused must be the inference that is adopted. Accordingly, a Trial Chamber can return a verdict of guilt only if the finding of guilt was the only reasonable inference available on the evidence (see case box Naletilić and Martinović case—Applying the principle of in dubio pro reo).

29. This approach is consistent with the jurisprudence of the international ad hoc Tribunals and is a logical one given that, in the context of issues of fact the principle is simply one aspect of the requirement that guilt cannot be found except upon proof beyond a reasonable doubt.

30. As noted by the Appeals Chamber in Delalić et al.:

“[I]t is not sufficient that [a finding by the Trial Chamber] is a reasonable conclusion available from the evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably available on the evidence and which is consistent with the

the Chamber “is guided by the principle in dubio pro reo as a component of the principle of presumption of innocence, which as a general principle in criminal procedures applies, mutatis mutandis, to all stages of the proceedings, including the pretrial stage.”; See also Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Trial Judgment, 21 March 2016, para. 218.

43 Prosecutor v. Limaj et al., IT-03-66-T, Trial Judgement, 30 November 2005, para. 10; see also Prosecutor v. Brima et al., SCSL-04-15-T, Trial Judgement, 20 June 2007, para. 98. See also Katanga case, Trial Chamber: Judgment (7 March 2014) at para. 53.


innocence of the Accused, that conclusion must be adopted and the Accused must be acquitted.”

31. The principle of in dubio pro reo applies to substantive crimes and modes of liability. When the underlying facts are susceptible of more than one interpretation, one of which is objectively and reasonably inconsistent with the guilt of the accused, then the standard of proof beyond a reasonable doubt requires that the interpretation consistent with the innocence of the accused must be adopted and an acquittal returned.

32. The right to be presumed innocent is guaranteed not only to accused persons but also to those with respect to whom a warrant of arrest or summons to appear has been issued, before their surrender to the court.

G. Motions for Judgement of Acquittal pursuant to Rule 98 bis of the ICTY RPE

33. The question of whether the Prosecution has met its burden of proof is ever constant in proceedings at the ad hoc Tribunals. Indeed, at the close of the Prosecution’s case-in-chief, the Defence may if it chooses bring a motion for a judgement of acquittal pursuant to ICTY Rule 98 bis. Rule 98 bis provides that “[a]t the close of the Prosecutor’s case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.”

34. The standard to be applied at this phase of the proceedings therefore “is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence (if accepted) but whether it could.” This requires the Trial Chamber “to assume that the prosecution’s evidence was entitled to credence unless incapable of belief.”

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48 Prosecutor v. Limaj et al., IT-03-66-T, Trial Judgement, 30 November 2005, para. 10; See also in ICC Jurisprudence Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Trial Judgement, 14 March 2012, para. 111.
49 Prosecutor v. Mbarushimana, ICC-01/04-01/10, Pre-Trial Chamber Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, 31 January 2011, para. 8.
50 Rule 98 bis, ICTY Rules of Procedure and Evidence.
51 Ibid. The Rome Statute of the ICC does not specifically provide for the filing of a “no case to answer” motion. ICC decisions on the issue are also inconsistent. In the Ntaganda case the Trial Chamber refused to even allow the filing of such a motion much less determine its merits. Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgement on the Appeal of Mr. Bosco Ntaganda against the Decision on Defence Request for Leave to file a “no case to answer” motion, 5 September 2017. In the Ruto et al case, on the other hand, the Trial Chamber allowed the motion and granted it thereby terminating Ruto’s prosecution. Prosecutor v William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, 5 April 2016.
53 Ibid.
35. Thus, if the Defence believes that the Trial Chamber upon consideration of all relevant evidence submitted by the Prosecution in its case-in-chief would conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction beyond reasonable doubt, the Defence may choose to make a submission for a judgement of acquittal.54

36. There are obvious advantages and disadvantages to bringing a motion for judgement of acquittal at the close of the Prosecution’s case. If the Trial Chamber agrees that “there is no evidence capable of supporting a conviction” the indictment as a whole or those counts where there is insufficient evidence will be dismissed, thereby ending the case or reducing the remaining charges and focusing the Defence case. On the other hand, if the Trial Chamber disagrees and, considering the lower standard of proof necessary to withstand a motion for judgement of acquittal such is usually the case, the Defence may well prematurely telegraph actual Defence analysis, arguments and evidence to its future detriment.

37. Additionally, assuming the Trial Chamber finds that the evidence is insufficient, the Prosecution is entitled to lodge an interlocutory appeal from the Trial Chamber decision granting a judgement of acquittal in whole or in part.55 The additional focus, time and expenditure of resources required to resist an interlocutory appeal from the Prosecution, while preparing for the Defence case are all factors to take into consideration in moving for a judgement of acquittal.

38. Ultimately, the decision to pursue or not pursue a judgement of acquittal requires careful consideration and thought in line with the strategic, legal and factual considerations of the specific Defence case.

H. Affirmative Defence Evidence and the Reasonable Doubt Standard

39. The presumption of innocence places the burden of establishing the guilt of the accused upon the Prosecution.56 That burden never shifts to the accused. Moreover, if the accused does choose to testify, the election to give evidence does not mean that he or she has accepted any onus to prove his or her innocence.57 The Rome Statute makes this point very clear by specifically mandating that an accused may not have “imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”58

54 Ngirabatware v Prosecutor, No. IRMCT-12-29-A, Judgement, 18 December 2014, para. 18.
57 Prosecutor v. Vasiljević, IT-98-32-T, Trial Judgement, 29 November 2002, para. 13. Both the ICC and ICTY provide for a hybrid procedure that allows the accused to make a statement at trial without offering sworn testimony. At the ICTY, at the discretion of the Trial Chamber and “under the control” of the Trial Chamber, an accused may make an unsworn statement after the opening statement of the parties or, if the Defence defers an opening statement, after the opening statement of the Prosecution. The accused may not be examined about the content of this unsworn statement and the Trial Chamber decides what probative value, if any, the statement should have (Rule 84 bis, ICTY RPE). The Rome Statute provides that the accused has the right to “make an unsworn oral or written statement in his or her defence ...” (Article 67(1)(h), ICC Statute [emphasis added]). No limitation appears to exist as to when such a statement may be made.
58 Article 67(1)(i), ICC Statute.
40. Though the accused bears no burden whatever to prove that he or she is not guilty, the accused in the vast majority of cases at the ICTY have presented some form of affirmative defence evidence. The ICTY and ICTR RPE do not specify or define the types of affirmative defences which might be presented. They do require, as to certain defences, that the accused must notify the Prosecution, within a time limit set by the Trial Chamber or the pre-trial judge, of the intent to present those specific defences.59

41. In the case of the ad hoc Tribunals, the Delalić et al. Trial Chamber was, again, among the first to seek to describe the burden of proof the Defence must meet to successfully establish an affirmative defence.60 As described in Delalić et al.:

“Whereas the Prosecution is bound to prove the allegations against the accused beyond a reasonable doubt, the accused is required to prove any issues which he might raise on the balance of probabilities. In relation to the charges being laid against him, the accused is only required to lead such evidence as would, if believed and uncontradicted, induce a reasonable doubt as to whether his version might not be true, rather than that of the Prosecution. Thus the evidence which he brings should be enough to suggest a reasonable possibility. In any case, at the conclusion of the proceedings, if there is any doubt that the Prosecution has established the case against the accused; the accused is entitled to the benefit of such doubt and, thus, acquittal.”61

42. In sum, what burden of proof the accused bears, if any, when he or she chooses to present an affirmative defence, depends on the nature of the Defence evidence which is to be presented. For example, one form of affirmative defence is a plea of diminished responsibility and limited physical capacity.62 In Delalić et al., an accused pled such a special or affirmative defence, claiming a lack of mental capacity.63 The Trial Chamber found that the facts proving such diminished responsibility would need to be proved by the Defence and that the accused “is to rebut the presumption of sanity”.64 If the accused presents an affirmative defence such as diminished capacity or insanity, the accused need only establish the facts in support of that defence by a simple preponderance of the evidence to be entitled to acquittal; i.e. that it is more probable than not that the facts presented in support of the defence are true.65 Thus, the requirement placed on the Defence is distinct from the burden of proof imposed upon the Prosecution. The Defence is never required to prove an affirmative defence beyond a reasonable doubt. The Prosecution is always required to prove its case beyond a reasonable doubt.

59 Rule 67 of both the ICTY and ICTR RPE, and Rule 72 IRMCT RPE, require such notification regarding the defence of alibi and “any special defence” including that of “diminished or lack of mental responsibility.” The rule does not define what constitutes a “special defence” in addition to diminished or lack of mental responsibility.
61 Ibid.
64 Ibid., para. 1158.
43. If the Defence evidence is directed towards undermining the credibility, reliability or strength of the Prosecution case, then the Defence need only raise a reasonable doubt as to the credibility or reliability of the Prosecution evidence in order to be entitled to an acquittal because the raising of a reasonable doubt perforce reveals the Prosecution’s failure to meet its burden to prove its case.

44. It is important to recognize that not all Defence evidence presented to challenge the Prosecution case places a burden of proof on the accused. The jurisprudence concerning alibi is instructive in this regard. As the Delalić Appeals Chamber explained:

“[I]t is a common misuse of the word to describe an alibi as a ‘defence.’ If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a defence in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.”

45. Similarly, in Limaj et al. the Trial Chamber emphasized that: “So long as there is a factual foundation in the evidence for an alibi, the Accused bears no onus to establish that alibi; [...]” Hence, the accused does no more than require the Prosecution to carry its burden of proof by eliminating, if it can, the reasonable possibility that the accused was not present at the time of the charged crimes.

46. Furthermore, an ultimate finding that alibi evidence is false does not establish the opposite—that the accused was, in fact, present at the scene of the charged conduct, an important observation which may well be applicable to other grounds for excluding criminal responsibility or other defences. This is in keeping with the proper allocation of the burden of proof at trial. The Prosecution must not only rebut the validity of an alibi but must also independently establish beyond a reasonable doubt the guilt of the accused as alleged in the indictment.

47. Ultimately, of course, upon examination of the entire record, the accused is entitled to the benefit of any reasonable doubt raised in the evidence, regardless of whether a specific affirmative defence was successfully established or not.

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71 Prosecutor v. Limaj et al., IT-03-66-T, Trial Judgement, 30 November 2005, para. 11; Prosecutor v. Brima et al., SCSL-04-15-T, Trial Judgement, 20 June 2007, para. 120.
Conclusion

48. One of the cornerstones of contemporary international criminal justice is the presumption of innocence. Ensuring fair, reasonable, respected, and universally understood criminal trials given the seriousness of the allegations and societal effect requires application of the highest standard of proof: that of “proof beyond a reasonable doubt”. A fundamental function of a tribunal concerning itself with criminal charges is to determine the guilt or innocence of individual accused. Given the very important interests at stake in international criminal trials, the principle of the presumption of innocence and application of the standard of proof beyond a reasonable doubt at trial must remain inviolate. These principles serve as the foundations upon which a system of justice will continue to be built.
II. AFFIRMATIVE DEFENCES IN INTERNATIONAL CRIMINAL TRIALS

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1. There are a number of affirmative defences to the crimes which are tried at the ICTY: war crimes, crimes against humanity and genocide. Those defences will be described in this chapter. Before discussing them, however, two points must be emphasized.

2. The first is that it is extremely important to keep in mind that the Prosecution always bears the burden of proof at trial. The Defence has no burden to “disprove” the Prosecution case.1 When the Defence does decide to present an affirmative defence case, the goal, regardless of the nature of the defence, is to raise a reasonable doubt that the Prosecution has met its burden to prove its case.

3. The second point is that this chapter does not discuss all existing ICTY case law related to every possible defence. The existence of or viability of a particular defence always rests on the facts and the evidence presented during trial. Defence counsel must be thoroughly familiar with the facts of the case and the applicable law before making the choice to proceed with a particular affirmative defence. That choice, by definition, will be made on a case by case basis. The rules, principles and law discussed in this chapter

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1 See Chapter I, “Burden of Proof and Presumption of Innocence”, in which the subject of the burden of proof during international criminal trials is discussed in detail.
are offered as a means to provide Defence counsel with a sound basis from which to begin to consider factual and legal research of potential assistance given the particular circumstances of the case in question.

A. To Present a Defence or Not to Present a Defence

4. In every case counsel must begin any assessment of potential defences by first examining in detail the specific legal and factual allegations which are alleged in the indictment.

5. At the ICTY the crimes over which the Tribunal has jurisdiction are listed in the Statute of the ICTY. Those crimes include conduct which constitutes a grave breach of the Geneva Convention of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. Each of these crimes is comprised of a series of elements and each element of each crime must be proved by the Prosecution beyond a reasonable doubt. If each individual element is not proved beyond a reasonable doubt, the Prosecution has failed to meet its burden of proof and the accused is entitled to an acquittal.

6. Article 7 of the ICTY Statute describes the various forms of individual criminal responsibility which may form the basis for criminal liability for an individual accused. It provides:

7. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of crime referred to in articles 2 and 5 of the present Statute, shall be individually responsible for the crime.

8. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

9. The fact that any of the acts referred to in articles 2 and 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that

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2 The Rome Statute, the Statute of the ICTR and the statutes of all other international criminal courts also all list the crimes over which that court exercises jurisdiction. These statutes vary, sometimes significantly as the international criminal legal “system” is not consistent between the various international criminal courts. Counsel must always, at the outset of a case, read and become familiar with the specific statutes and rules of evidence and procedure governing the court before which Counsel is appearing.

3 Article 2, ICTY Statute.

4 Article 3, ICTY Statute.

5 Article 4, ICTY Statute.

6 Article 5, ICTY Statute.

7 Prosecutor v. Limaj et al., IT-03-66-T, Trial Judgement, 30 November 2005, para. 5. The ICTY Statute also lists the rights of the accused (See Article 21, ICTY Statute). They include the right to the presumption of innocence, which is the foundation for the requirements that the prosecution bears the burden of proof at trial and that the burden of proof never shifts to the accused.

the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.9

10. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

11. As with the crimes defined in the ICTY Statute, each mode of liability codified in Article 7 is comprised of a series of individual elements. Counsel must research and learn all elements of all mode(s) of liability charged in an individual case before determining what factual or legal defences may or may not be available to the accused.

12. Once a trial has begun, counsel must continually assess the actual proof which has been produced in evidence during the Prosecution case-in-chief. If, at the close of the Prosecution case-in-chief, the evidence fails to establish beyond a reasonable doubt any individual element of the crimes alleged or any individual element of the modes of liability alleged, the Prosecution has failed to meet its burden of proof and the accused is entitled to an acquittal. In those cases, in which the Prosecution evidence is ambiguous or subject to more than one reasonable interpretation, any ambiguity or doubt must be resolved in favour of the accused in accordance with the principle of in dubio pro reo (or, “when in doubt, for the accused”).10

13. When the Prosecution evidence fails to meet its burden of proof, the Defence may choose not to present any affirmative defence evidence and to rest on the strength (or lack of strength) of the Prosecution case. This is what happened in the Haradinaj et al. case tried at the ICTY in 2007.11 The three accused, all charged in a 37 count indictment, presented no affirmative defence case, arguing instead that the Prosecution had failed to meet its burden to prove the charges beyond a reasonable doubt. The Prosecution failure of proof in that case resulted in two of the accused being acquitted of all charges. One accused was convicted of only three charges.

14. Although the result in the Haradinaj et al. case is a rare one in ICTY history, it illustrates a fundamental principle for any counsel considering whether or not to present an affirmative defence case. That principle is the importance of realistically and carefully assessing the substance of the Prosecution evidence as it goes in at trial. That assessment must be done taking into consideration the legal principles which apply to the Trial Chambers determination of the weight to assign to individual items

9 This section establishes “command responsibility” as a form of criminal liability.
10 Prosecutor v. Naletilić and Martinović, IT-98-34-A, Appeal Judgement, 3 May 2006, para. 120 [each element of mens rea must be proved beyond a reasonable doubt]; Prosecutor v. Akayesu, ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 319 (“the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected”). See also Chapter I “Burden of proof and presumption of innocence”, Section F. “The principle of in dubio pro reo”; see also Article 22(2) of the Rome Statute (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).
of evidence as well as the relative credibility of the witnesses. These decisions involve difficult judgement calls and, as with any important decision regarding case strategy, should be made in consultation with the accused. When the evidence is deficient, however, it is both reasonably sound and ethically proper to forego presenting an affirmative defence.

15. Counsel in all cases must also determine whether the anticipated affirmative defence case will serve the purpose of raising a reasonable doubt regarding the strength of the Prosecution case. Counsel should be forewarned, particularly in multiple-accused cases where different accused may wish to present different defences, of the danger that affirmative defence evidence may sometimes serve the counter-productive purpose of filling in factual or legal gaps in the Prosecution case. If there is a danger that will occur, counsel, again in consultation with his client, must carefully balance the potential efficacy and/or credibility of the proposed defence against the possibility that facts revealed in the course of presenting that defence may assist the Prosecution in obtaining a conviction.

B. The Principle of Nullum Crimen Sine Lege

16. The principle of *nullum crimen sine lege* provides that an individual can be charged with a crime only if the actions which form the basis for the criminal charge were crimes at the time the accused engaged in those actions. Although the principle does not require that the individual actor was aware of the specific crime at the time he acted, it does require that the crime or mode of liability for the crime was reasonably foreseeable at the time the charged crime was committed.

17. This principle is not properly characterized as an affirmative defence so much as a jurisdictional challenge to the legality of a prosecution. It is not likely to commonly arise in cases involving war crimes, crimes against humanity or genocide, given the nature of the underlying offences alleged in most such cases. Nonetheless it is mentioned here briefly to emphasize the importance of counsel remaining aware of the principle and keeping it in mind when examining the indictment and considering what defences may be available to his client.

18. The concept of joint criminal enterprise, for example, has become a familiar part of international criminal law since the *Tadić* appeal in 1999. Despite the broad acceptance in international law of the extended form of joint criminal enterprise liability, commonly known as JCE III, the propriety of relying on it as a mode of liability was successfully challenged at the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2010. Given the timing and history of the crimes brought before that court, the Pre-Trial Chamber found it was not able to identify any law, applicable at the relevant time and place,
which could have given reasonable notice to the accused that they could be punished under this extended form of JCE. The Pre-Trial Chamber held the principle of legality required that the ECCC could not rely on a JCE III mode of liability in the proceedings before it.  

19. Defence counsel, in assessing the complex factual and legal issues which arise in war crimes cases, must never lose sight of their obligation to creatively and continually insist that the Prosecution do its job correctly; that is, to meet its burden of proof and to do so according to all applicable legal principles.

C. Affirmative Defences

20. The ICTY Statute does not, with the exception of superior orders, refer to specific defences to crimes falling within the jurisdiction of the ICTY. It has been left to the Trial and Appeals Chambers to apply existing international humanitarian law regarding the acceptance of various kinds of defences.  

16 In fact, the procedural rules and jurisprudence of the ICTY recognize a number of factual and legal defences, most of which will be familiar, at least in part, to legal practitioners around the world.

21. Many of these defences are offered through the presentation of affirmative defence evidence during an affirmative defence case. This is not always required however. The factual basis for an affirmative defence can also be elicited at trial through cross-examination of Prosecution witnesses when such witnesses are in possession of the facts at issue.

22. Regardless of how an affirmative defence is presented, if it exists, the accused must raise it during trial. With the exception of newly discovered evidence, an accused generally cannot raise a defence for the first time on appeal.

23. Though the burden of proof always remains with the Prosecution throughout trial, there are provisions regarding pre-trial disclosure which require the accused to reveal the general nature of his likely defence. The relevant procedural rules at the ICTY provide that after the submission of the Prosecution pre-trial brief, within various time limits set by the Rules, the accused must file a Defence pre-trial brief. That brief must “in general terms” state the nature of the accused’s defence, the matters with which the accused takes issue in the Prosecutor pre-trial brief, and the reason why he takes issue with

15 Ibid.
17 See Chapter VIII “Direct, Cross-Examination and Re-Examination” for examples of the use of cross-examination to elicit affirmative defence evidence. Rule 90(H)(i), ICTY RPE specifically provides that a witness may be cross-examined “where the witness is able to give evidence relevant to the case for the cross-examining party.”
18 See Chapter XI “Appeals”, Section E. “New Evidence on Appeal”.
20 The evidence at trial can, of course, turn out to be quite different from what was anticipated by the prosecution and/or the defence prior to trial. An accused may decide to alter or withdraw a defence at trial which was previously alluded to in a defence pre-trial brief.
21 Rules 65ter (F) et seq., ICTY RPE.
those matters.\textsuperscript{22} The Defence pre-trial brief may be filed no later than three weeks before the pre-trial conference; a conference which generally takes place within a few days of the beginning of the trial itself.

24. These rules establish a pre-trial protocol wherein the accused will first be provided with a detailed Prosecution pre-trial brief; a brief which reflects the Prosecution theory of its case, the names of its expected witnesses, and summaries of their statements and a list of proposed trial exhibits. The Defence pre-trial brief, filed in response, need only reveal any potential defence in “general terms.”

25. There are certain, limited exceptions to this protocol. When the accused intends to rely on an alibi at trial or any “special defence” such as diminished responsibility or lack of mental capacity, the accused must provide more detailed pre-trial disclosure to the Prosecution regarding the nature and factual basis for such defences, beyond that normally required in a Defence pre-trial brief.\textsuperscript{23} The Trial Chamber will set a time limit within which the Defence must notify the Prosecution of its intent to offer such a defence.\textsuperscript{24}

26. In the case of alibi, the accused must specify the place or places at which he was present at the time of the alleged crime and the names and addresses of witnesses and any other evidence he intends to rely on to establish the alibi.\textsuperscript{25} If the defence will be one of diminished or lack of mental responsibility, the accused must tell the Prosecutor the names and addresses of witnesses and any other evidence he intends to rely on to establish that “special defence”.\textsuperscript{26} The Prosecutor, in turn, after notification of such a defence, must tell the accused the names of the witnesses the prosecutor intends to call to rebut this Defence evidence.\textsuperscript{27}

27. If the accused does not duly notify the Prosecution of his intent to rely on alibi or a “special defence,” his failure to do so does not limit his right to testify to such a defence.\textsuperscript{28} It may, however, limit his right to call any witnesses, other than himself, to present that defence; a problematic choice if the accused’s desire is to exercise his right to remain silent at trial or if the defence at issue requires presentation of medical or other expert opinion.

28. The rules regarding alibi and special defences, however, also provide that if either party discovers additional evidence or material which should have been disclosed earlier under the rules related to these defences, that party must immediately disclose that evidence or material to the other party and the Trial Chamber.\textsuperscript{29}

\textsuperscript{22} Rules 65ter (F) et seq., ICTY RPE.
\textsuperscript{23} Rule 67(B), ICTY RPE.
\textsuperscript{24} Rule 67(B)(i), ICTY RPE.
\textsuperscript{25} Rule 67(B)(i)(a), ICTY RPE.
\textsuperscript{26} Rule 67(B)(i)(b), ICTY RPE.
\textsuperscript{27} Rule 67(B)(ii), ICTY RPE.
\textsuperscript{28} Rule 67(C), ICTY RPE.
\textsuperscript{29} Rule 67(D), ICTY RPE.
29. This provision appears to constitute an arguable basis for seeking leave to present an alibi or a special defence in cases where the needed evidence only became available after trial began. Given the accused has the fundamental right to prepare and present a defence,30 no procedural rule, designed to facilitate efficient pre-trial preparation, should have primacy over the fundamental rights of the accused when there is a sound, credible reason for the accused’s prior inability to comply with such procedures.

C.1 Alibi

30. The public at large tends to speak of an alibi—evidence that the accused was not physically present at the time the charged crimes occurred—as a “defence.” In fact it is a common misuse of the word to describe it as a “defence.” Rather an alibi serves the purpose of raising a reasonable doubt that the Prosecution case against the accused has been proved.31 (see case box Limaj et al. case - Alibi and burden of proof).

31. Likewise, when an alibi is raised the accused bears no burden to prove the alibi is true. The burden of proof is on the Prosecution, and always remains on the Prosecution, to eliminate any reasonable possibility that the evidence of alibi is true.32 As the Vasiljević Trial Chamber emphasized:

“It is not sufficient for the Prosecution merely to establish beyond a reasonable doubt that the alibi is false in order to conclude that his guilt has been established beyond a reasonable doubt. Acceptance by the Trial Chamber of the falsity of an alibi cannot establish the opposite to what it asserts. The Prosecution must also establish that the facts alleged in the Indictment are true beyond a reasonable doubt before a finding of guilt can be made against the accused.”33

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30 Article 14, ICCPR; Article 6, ECHR; Article 21, ICTY Statute.
32. If an accused intends to assert an alibi as to all or part of the charges in the indictment, there must be some evidence in the trial record to support it. However, even if the alibi is rejected, that does not change or shift the Prosecution’s burden of proof. The Prosecution must still affirmatively prove the accused’s guilt beyond a reasonable doubt.

33. At the ICC the Defence need not wait until trial to put on evidence of alibi. Under rule 79 of the Rome Statute, an alibi may be raised at the pre-trial stage of ICC proceedings or the trial stage. According to Rule 79, the Defence should notify the Prosecutor of the existence of the alibi to enable the Prosecutor to prepare adequately and to respond. If raised at the pre-trial stage, the Chamber may engage in weighing competing versions of the evidence. However, similar to the views at the ICTY, if the Defence fails to timely notify the Prosecutor of the existence of an alibi pursuant to rule 79(1)(a) the Chamber retains the discretion to consider the merits of the alibi anyway, so long as the Prosecutor does not suffer undue prejudice.

34. In considering whether the Prosecutor has suffered prejudice, the Chamber must weigh the competing interests at stake and “take a balanced approach that considers the rights of both parties.” Again, the accused has the fundamental right to present a defence at trial. Any “competing interest” asserted by the Prosecution as a reason to exclude alibi evidence must be compelling if the consequence is to deny the accused a fundamental right at trial.

C.2 “Special Defences”

35. The phrase “special defence” is not defined in the ICTY RPE. It is best described as a defence which is based on facts that are peculiarly within the accused’s knowledge and, as a result, should be or must be established by the accused. Although the ICTY RPE place no limit on what might constitute a “special defence” the primary ones which have been raised in ICTY cases involve proof of a condition of mind or body which may serve to negate the mens rea element of a criminal charge or serve to mitigate the culpability of the accused.

36. The essential point for counsel to bear in mind, depending on the applicable procedural rules, is that the intention to present a “special defence”, at least in the mixed common and civil law systems

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35 See Rule 79, governing the presentation of evidence of alibi and the conditions to present such evidence.
36 Ibid., para. 106.
37 Ibid., para. 107.
38 Ibid., para. 107.
39 Ibid., para. 108.
40 Prosecutor v. Delalić et al., IT-96-21-T, Trial Judgement, 16 November 1998, para. 1158. “A special defence is one apart from the general defence open to accused persons and is peculiar to the accused in the circumstances of a given case.”
employed in the international criminal courts, generally requires prior notice to the opposing party of the specifics of that defence.

C.2.1 Insanity/Diminished Responsibility

37. For every criminal act it is presumed that the person alleged to have committed the offence was sane at the time of its commission. Every person charged with an offence is presumed to be of sound mind and to have been of sound mind at all relevant times unless and until the contrary is proven. Hence the burden is on the accused to rebut the presumption of sanity.41

38. There are two recognized defences related to this principle; the defence of insanity and the defence of diminished responsibility.42 Both require proof that the accused was suffering from an abnormality of the mind at the time of the commission of the charged crime. Thus, both defences also require that the accused go forward with affirmative evidence at trial in support of the claimed lack of mental capacity. The accused bears the burden to prove these defences, but only by a preponderance of the evidence.43

39. There are differences between the two defences. In the case of a plea of insanity the accused must establish that - more probably than not - at the time of the commission of the charged crime he was labouring under such a defect of reason, due to a disease of the mind that he did not know the nature or quality of his acts or, even if he did know, he was incapable of forming a rational judgement as to whether his actions were right or wrong.44 A successful plea of insanity is a complete defence to the charged crime since it negates mens rea and, as such, must result in an acquittal.45

40. By contrast the plea of diminished responsibility is based on the premise that despite recognizing the wrongful nature of his actions, the accused, due to his abnormality of mind, was unable to control his behaviour.46 This defence requires affirmative proof that the accused suffered from an abnormality of the mind which substantially impaired his responsibility for his acts or omissions. The abnormality must have arisen from a condition of arrested or retarded development of the mind or an inherent cause, such as disease or injury. It is also an essential element of this defence that the accused’s abnormality of mind substantially impaired his ability to control his actions; a matter which is distinct from the ability

42 The defence of insanity or diminished capacity, which relates to the mental state of the accused at the time of the commission of the charged offence, must not be confused with the issue of whether or not an individual accused is competent to stand trial at the time the trial is scheduled to commence. Incompetence to stand trial is not an affirmative defence to the charges. When an accused, found to be incompetent to stand trial, is treated and returned to competency the accused will still face trial on the original charges.
46 Prosecutor v. Delalić et al., IT-96-21-T, Trial Judgement, 16 November 1998, para. 1156; but see Prosecutor v. Vasiljević, IT-98-32-T, Trial Judgement, 29 November 2002, para. 283 (apparently combining all of these concepts, despite the dichotomy recognized in Delalić, by finding that an accused suffers from diminished mental responsibility where there is an impairment to his capacity to appreciate the unlawfulness of or the nature of his conduct or to control his conduct so as to conform to the requirements of the law).
to form a rational judgement. These categories illustrate that proof of this defence is restricted to conditions which can be supported by objective medical evidence.

41. Crimes which are motivated by or triggered by strong emotions, such as jealousy, rage, hate, or other forms of provocation, are not subject to the defence of diminished responsibility.

42. The Trial Chamber in the Delalić et al. case was of the view that proof of diminished responsibility constituted a complete defence since the provisions of Rule 67(A)(ii)(b) of the ICTY RPE, recognizing “special defences”, are without qualification or limitation. That view was rejected on appeal.

43. The Delalić et al. Appeals Chamber opined that the description of diminished mental responsibility in Rule 67(A)(ii) as a “special defence” was insufficient to establish it as a complete defence. It held that under general principles of law in both common and civil law systems proof of an accused’s diminished mental responsibility is not a complete defence to the charged crime, but rather can serve only to mitigate sentence. That view is the generally accepted one in ICTY jurisprudence.

C.2.2 Intoxication

44. In general voluntary intoxication is not a defence or a factor in the mitigation of sentence at the ICTY even when the argument is made that the level of intoxication amounted to the accused functioning with a diminished mental capacity. To the contrary, when a state of intoxication is voluntary, Trial Chambers have considered that fact to be an aggravating circumstance. As pointed out in the Kvočka et al. case: “Indeed, the Trial Chamber considers that, particularly in contexts where violence is the norm and weapons are carried, intentionally consuming drugs or alcohol constitutes an aggravating rather than a mitigating factor.”

45. When mental capacity is diminished due to the use of alcohol or drugs, account will be taken, however, as to whether the person voluntarily subjected himself to such a diminished state. A state of intoxication could constitute a mitigating circumstance relevant to sentencing if the intoxication was forced or coerced.

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48 Ibid., paras. 1166, 1170.
49 Ibid., para. 1166.
50 Ibid., para. 1164.
55 Ibid.
C.3 Duress

46. The defence of duress generally requires proof that the accused committed a charged criminal act only because:

- he was under an immediate threat of severe and irreparable harm to his own life;
- there was no adequate means of avoiding that threat;
- the crime the accused committed was not disproportionate to the threat to the accused, and,
- the situation leading to the duress was not voluntarily brought about by the accused.  

47. This defence was raised for the first time at the ICTY in the Erdemović case. Erdemović surrendered to the ICTY and pled guilty to one count of committing a crime against humanity for his participation in the execution of approximately 1,200 unarmed men in the aftermath of the fall of Srebrenica. Erdemović believed that he had personally killed about 70 people. He told the Trial Chamber that he participated in this crime as a result of his obligation to obey orders from his military superior and the physical and moral duress stemming from his fear for his own life and that of his family if he disobeyed those orders.

48. The Trial Chamber considered whether the combination of these factors could not only mitigate penalty but be regarded as a complete defence to the offence itself. It ultimately concluded, however, that proof of the specific circumstances which would fully exonerate the accused had not been provided. The Defence had not produced any testimony, evaluation or other evidence to corroborate the accused’s version of the events.

49. The question subsequently arose in the Appeals Chamber as to whether proof of duress could be a complete defence to a criminal offence or serve only to mitigate sentence. The majority held it could not be a complete defence at the ICTY, noting that: “duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives.” However, one judge was of the view that duress could be a complete defence except when the crime committed under duress is “a heinous crime, for instance, the killing of innocent civilians or prisoners of war.” In that case, duress could only be a ground of mitigation of punishment.

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58 Prosecutor v. Erdemović, IT-96-22-A, Sentencing Judgement, 29 November 1996, para. 14. Factors other than duress were taken into consideration as mitigating evidence by the sentencing court, including Erdemović’s remorse, his early surrender to the ICTY, his admission of guilt and his cooperation with the Office of the Prosecutor.
50. The majority also observed that, in refusing to take the circumstance of duress into account in mitigation of Erdemović’s sentence, the Trial Chamber appeared to require corroboration of Erdemović’s testimony as a matter of law. In this regard, two judges pointed out that “[t]here is [...] nothing in the Statute or the Rules which requires corroboration of the exculpatory evidence of an accused person in order for that evidence to be taken into account in mitigation of sentence.”

51. The minority took the view that duress could operate as a complete defence; noting that the majority had relied on policy considerations based in the common law, while disregarding those of civil law countries and other systems of law. The minority opined that, with regard to war crimes and crimes against humanity, no special rule of customary international law had evolved on this issue and it therefore followed that duress could amount to a defence provided that its strict requirements were proved. In fact, according to the minority, duress was a recognized defence in the former Yugoslavia where the law allowed that duress may be a total defence for any crime, including murder.

52. In a similar vein, dissenting Judge Stephen opined that the aim to protect innocent life in conflicts such as those in the former Yugoslavia is not achieved by the denial of a just defence to one who is in no position to effect, by his own will, the protection of innocent life. As Judge Stephen stated:

“[t]he stringent conditions always surrounding [the] defence [of duress] will have to be met, including the requirement that the harm done is not disproportionate to the harm threatened. The case of an accused, forced to take innocent lives which he cannot save and who can only add to the toll by the sacrifice of his own life, is entirely consistent with that requirement.”

53. The Erdemović case was returned to a different Trial Chamber for resentencing after appeal. The new Trial Chamber considered duress as a mitigating factor, among others, in imposing sentence. Subsequent ICTY judgements have considered proof of duress as a potential factor in mitigation of sentence, not as a complete defence.

54. A broad lesson to be drawn from the Erdemović case for practitioners in domestic war crimes courts is that domestic legal tradition, particularly regarding the availability of recognized legal defences to

63 Ibid., para. 12.
64 Ibid., para. 65.
66 Prosecutor v. Erdemović, IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, paras. 17, 20. (The duress in Erdemović was severe. The Trial Chamber found there was “a real risk that the accused would have been killed had he disobeyed the order [to kill the unarmed detained men]. He voiced his feelings but realized that he had no choice in the matter: he had to kill or be killed.”) See Chapter XII “Sentencing”, Section D.4. “Mitigating Circumstances” regarding duress as a mitigating circumstance.
criminal acts, should always be raised when suggested by the facts of a case regardless of international law on the subject. Although the ICTY ultimately adopted the view that duress could not operate as a complete defence in international crimes cases, there was a principled and significant split of opinion among the judges as to whether that view was a proper one.

55. While the Trial Chamber and Appeals Chamber at the ICTY regarded duress only as a mitigating factor, the Rome Statute of the International Criminal Court specifically recognizes duress as a complete defence when all the requirements constituting the defence are met.  

56. Article 31(1)(d) of the Rome Statute provides that a person shall not be held criminally responsible if:

“(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
(i) Made by other persons; or
(ii) Constituted by other circumstances beyond that person’s control.”

57. Although the Statute does not explicitly recognize rank, or a superior-subordinate relationship as an important factor in assessing duress, superior-subordinate relationship is often an important factor when it comes to establishing duress. Judge Cassese, in the Erdemović case, noted that the fact that Erdemović was a low-ranking soldier was an important factor in determining the viability of the defence. There has been less reliance on duress as a defence at the ICC perhaps due to the identities of the accused tried there thus far - individuals of high military rank or individuals who otherwise wielded significant political or military power - unlikely to have acted due to duress. One exception is the case of Dominic Ongwen who came before the ICC in 2016.

58. Ongwen is a former child soldier prosecuted at the ICC for committing crimes against humanity and war crimes after he was forcibly conscripted into the Lord’s Resistance Army. Ongwen was nine years old when he was abducted by the LRA from his hometown. Thereafter Ongwen voluntarily rose in rank in the LRA ultimately attaining a position as one of Joseph Kony’s four highest commanders.

59. During Pre-Trial confirmation of charges proceedings Ongwen raised a duress defence arguing that he had essentially been under a state of duress since his abduction into the LRA and therefore should be

68 Article 31(1)(d), ICC Statute.
69 Ibid.
72 Prosecutor v. Ongwen, Pre-Trial Chamber, Decision on the Confirmation of Charges against Dominic Ongwen, 23 March 2016, para. 151.
excluded from criminal responsibility.\textsuperscript{73} While there is no procedural rule precluding the Defence from raising duress at the stage of confirmation of charges at the ICC, the Pre-Trial Chamber determined that, “considering the nature and purpose of confirmation of charges proceedings, duress may only lead to the non-confirmation of charges when the evidence is so clear that it negates even the low evidentiary standard applicable. Otherwise, a trial is appropriate in order to resolve this question.”\textsuperscript{74} The Chamber found that this standard had not been met in Ongwen’s case for a number of reasons.

60. The Chamber noted that the Defence had not shown that Ongwen was under a continuing threat of imminent death or serious bodily harm while in the LRA or that he was acting so as not to cause a greater harm than the one he sought to avoid.\textsuperscript{75} The Chamber emphasized that Ongwen had not demonstrated that his continued participation in the LRA was involuntary or otherwise against his will, noting evidence that, in fact, escapes from the LRA were not rare. The Chamber also pointed out that “. . . Ongwen could have chosen not to rise in hierarchy and expose himself to increasingly higher responsibility to implement LRA policies.” Due to his continued stay with the LRA and his rise to a leadership position, the Chamber found that “Ongwen shared the ideology of the LRA, including its brutal and perverted policy with respect to civilians it considered as supporting the government.”\textsuperscript{76}

61. The Chamber pointed out that there was also no reasonable explanation as to why Ongwen’s criminal activities were necessary to avoid the alleged threat to him. The charged crimes committed against the civilian population were, in the Chambers view, disproportionate to any such threats in any event.\textsuperscript{77} Thus, the Pre-Trial Chamber found there was no adequate basis from which it could conclude that Ongwen should be excluded from criminal responsibility due to duress.\textsuperscript{78}

62. Although Ongwen did not succeed with the evidence of duress presented during pre-trial proceedings, the Defence is pursuing a duress defence at trial which is, as of the date of this writing, still ongoing at the ICC.\textsuperscript{79}

C.4 Necessity

63. Many legal traditions recognize the defence of necessity—which must be differentiated from the defence of duress. The defence of necessity may be a complete defence to a criminal act if the crime charged was committed by the accused in order to avert an even greater or more serious harm. Unlike duress, it

\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid.
\textsuperscript{75} Ibid., para. 152.
\textsuperscript{76} Ibid., para. 154.
\textsuperscript{77} Ibid., para. 155.
\textsuperscript{78} Ibid., para. 156.
does not require a specific threat to the accused. It can potentially apply to any situation in which the accused knowingly commits one criminal act so as to prevent a greater harm to himself or to others.

64. The defence has not had success in the ICTY jurisprudence and has only been very rarely raised. In the *Aleksovski* case, for example, the accused argued that the fact he detained civilians in Kaonik prison prevented those civilians from suffering serious injury or death in the armed hostilities taking place in the area. He argued his proof was that none of the detained individuals were killed or wounded. The idea was that the concept of extreme necessity justifies the accused’s unlawful acts (here the detention of several individuals) when those actions are motivated by the intent to avoid a worse violation.

65. Notwithstanding these arguments the Appeals Chamber viewed Aleksovski’s position as “entirely misplaced”. Aleksovski was not charged with the unlawful detention of the prisoners; he was charged with mistreating them. As the Appeals Chamber noted, “the appellant [was] in effect submitting that the mistreatment the detainees suffered [...] should have been interpreted [...] as somehow having been justified by the assertion that they would have suffered even more had they not been treated the way they were while in detention.”

66. The Appeals Chamber, in light of the facts in *Aleksovski*, declined to decide whether necessity constitutes a defence under international law or whether it is the same as the defence of duress.

67. The *Aleksovski* case illustrates, however, the importance of defence counsel thoroughly researching the facts and the law, and carefully examining the charges brought in the indictment, before going forward with a particular affirmative defence. Suffice it to say that the necessity defence, based on the public record of the facts in Aleksovski, simply did not apply to his case.

68. There is, however, a clear difference between the defence of duress and the defence of necessity and both defences may be available under domestic law. The fact that the ICTY has not had occasion, based on a proper case, to reach that issue does not mean the necessity defence is not available in war crimes courts.

C.5 Superior Orders

69. It is not unusual for an accused to take the position that he would not have engaged in the conduct charged against him in an indictment, but for the fact that he was following orders from a superior officer. Obedience of orders from a superior office is not a defence to the commission of war crimes, crimes against humanity and genocide at the ICTY and does not excuse the accused of criminal

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responsibility for his actions done in conformance with superior orders. At most, proof the accused acted only because he was forced to do so by order of a superior officer may justify a reduced penalty for the crime or crimes that ensued.\textsuperscript{85}

70. Indeed, Article 7(4) of the ICTY Statute provides that “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”

71. There are a number of very important caveats to this general rule. First, the ICTY has tended to show more leniency in cases where the accused had a low rank in the military or civilian hierarchy.\textsuperscript{86} Second, a subordinate defending himself on the grounds that he acted only in response to superior orders may be subject to a less severe sentence only in cases where the order of the superior effectively reduces the degree of [the accused] guilt. If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist.\textsuperscript{87} Third, a subordinate may be granted mitigation where he executed an order when the order was not manifestly illegal.\textsuperscript{88}

72. The \textit{Mrđa} case is an excellent illustration of the latter two principles. Mrđa plead guilty to killing over 200 unarmed men in August 1992 at Korićanske Stijene.\textsuperscript{89} He said he did so only in compliance with orders issued by his superiors which were accompanied by a threat of death; a circumstance he asserted as sufficient evidence of duress to serve to mitigate his punishment.\textsuperscript{90} The Trial Chamber did not find any “convincing evidence of any meaningful sign” that the defendant wanted to dissociate himself from the massacre at the time of its commission.\textsuperscript{91} It also found no cause to mitigate Mrđa’s punishment as

\begin{quote}
\textbf{Erdemović case – Superior orders or duress?}

Judge Cassese pointed out in the Erdemović case:

“Superior orders may be issued without being accompanied by any threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance. Equally duress may be raised entirely independently of superior orders, for example, where the threat issues from a fellow serviceman.”

\end{quote}

\textsuperscript{86} \textit{Ibid.}, para. 53.
\textsuperscript{87} \textit{Ibid.}
\textsuperscript{89} \textit{Ibid.}, paras. 1, 10.
\textsuperscript{90} \textit{Ibid.}, para. 65.
\textsuperscript{91} \textit{Ibid.}, para. 66.
“the orders were so manifestly unlawful that [he] must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity.”

73. Similar standards have been adopted by the Rome Statute of the ICC, however at the ICC following superior orders may operate not just as a factor in mitigation of sentence, but, depending on the evidence, as a complete defence.

74. Article 33 of the Rome Statute provides that when a crime is committed pursuant to an order of a Government or a superior, whether military or civilian, that fact will not relieve the accused of criminal responsibility unless:

- the person was under a legal obligation to obey orders of the Government or the superior in question;
- the person did not know that the order was unlawful; and
- the order was not manifestly unlawful.

75. This article is written in the conjunctive; meaning that all three conditions must be met before an accused can be relieved of criminal responsibility for his actions. Article 33 of the Rome Statute also provides, however, that orders to commit genocide or crimes against humanity are “manifestly unlawful.”

76. These provisions, taken as a whole, potentially create a basis for arguing that an individual who acts only pursuant to a superior order, which is not on its face “manifestly unlawful” may have a complete defence to certain kinds of war crimes. Obviously, each case will depend upon its facts as well as the reasonableness of the contention that the accused did not, at the time he was acting, believe the superior order was anything other than in conformance with the accepted laws of war.

77. A final word should be added regarding the potential interplay between a claim of duress accompanied by a claim that the accused acted only pursuant to superior orders. The two claims are legally distinct and even though they may arise from the same set of circumstances, there is no necessary connection between the two (see case box Erdemović case - Superior orders or duress?).

C.6 Self-Defence

78. As mentioned early on in this chapter the ICTY Statute does not provide for specific defences, however many defences form part of general principles of criminal law which the ICTY takes into account in

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92 Ibid., para. 67; see also Prosecutor v. Češić, IT-95-10/1-S, Sentencing Judgement, 11 March 2004, paras. 97, 109 (where defence of superior orders, combined with duress, was also rejected).
93 Article 33(1)(a)-(c), ICC Statute.
94 Article 33(2), ICC Statute.
deciding the cases before it.\textsuperscript{95} The concept of self-defence falls within that category.\textsuperscript{96} It is an affirmative defence which the accused must demonstrate by a preponderance of the evidence. The absence of self-defence is not an element of a crime which the Prosecution must prove beyond a reasonable doubt.\textsuperscript{97}

79. The notion of self-defence may be broadly defined as providing a complete defence to a person who commits a criminal act—such as assault or murder—as a means to protect his own life or property or the lives or property of third persons. To constitute self-defence (or defence of others) the acts must be reasonable, necessary and reflect a proportionate response to the initial attack under all the relevant circumstances at the time.\textsuperscript{98}

80. The principle of self-defence is affirmatively codified in Article 31(1)(c) of the Rome Statute. That article provides that a person shall not be criminally responsible if, at the time of the person’s conduct, he acted reasonably to defend himself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.\textsuperscript{99}

81. An important exception is provided in Article 31(1)(c) of the Rome Statute relevant to war crimes. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility. That exception has been applied at the ICTY.\textsuperscript{100} Similarly military operations conducted in self-defence do not provide a justification or defence for the commission of serious violations of international humanitarian law.\textsuperscript{101} In relation to the specific circumstances of war crimes, the provision also takes into consideration the principle of military necessity.\textsuperscript{102}

82. The principle of self-defence is a familiar one to criminal defence practitioners. Suffice it to say that any argument raising self-defence must be assessed on its own facts and the specific circumstances relating to each charge.

\textsuperscript{95} Prosecutor v. Kordić and Čerkez, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 449.
\textsuperscript{96} Ibid., para. 451.
\textsuperscript{98} Prosecutor v. Kordić and Čerkez, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 449.
\textsuperscript{100} Prosecutor v. Kordić and Čerkez, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 827.
\textsuperscript{101} Ibid., para. 452.
\textsuperscript{102} Ibid., para. 451.
C.7 Mistake of Fact/Mistake of Law

83. Although not expressly provided in the ICTY Statute, the ICTY jurisprudence seems to suggest that mistake of fact may be considered as a defence in the Tribunal’s international criminal trials though the jurisprudence thus far appears to have rejected the defence of mistake of law.

84. In the recent Hartmann contempt case, the Defence raised mistake of fact and mistake of law to allegations that the accused was in contempt of court for revealing allegedly confidential information in a book written by the accused. It argued that public discussions in the media, prior to the publication of the accused’s book, of the information she was charged with improperly disclosing thereafter, could have reasonably led the accused to believe that the information in question was no longer confidential. Hence the Defence argued the accused was not aware that her conduct was illegal.103

85. The Trial Chamber rejected the claim of mistake of law as a matter of law. It stated that a person’s “misunderstanding of the law does not, in itself, excuse a violation of it”; noting (in reliance on the Jović case) that “if mistake of law were a valid defence [...] orders would become suggestions and a Chamber’s authority to control its proceedings, from which the power to punish contempt in part derives, would be hobbled.”104

86. It also rejected the accused’s defence of mistake of fact, however it did so on the merits of the case, based on its findings as to the knowledge and intent of the accused in publishing the confidential information in violation of an order.105

87. Mistake of fact is, in sum, apparently a viable defence at the ICTY, though it is questionable how often such a defence would be relevant and/or effective in cases involving war crimes, crimes against humanity or genocide.

88. A similar view has been taken at the ICC. Article 32(1) of the Rome Statute provides that a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mens rea of the charged crime.106 Mistake of law, on the other hand, which entails whether a particular type of conduct is a crime, is not a ground for excluding criminal responsibility under Article 32 of the Rome Statute unless it serves to negate the mental element of the charged crime.

103 In the Case Against Florence Hartmann, IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009, para. 63.
104 Ibid., para. 65.
105 Ibid., para. 67.
106 Article 32(1), Rome ICC Statute.
Conclusion

89. All criminal law practitioners know that the substantive merits of each case depend upon its own particular facts and circumstances. Keeping that in mind it is always important for counsel, charged with the responsibility to defend an individual accused of criminal conduct, to remain open not only to interpreting existing domestic and international defences, but to working creatively with both whenever possible; not only as a means of defending individual accused but also to fulfil counsel’s duty to assure that the rights of the accused are respected and enforced in the day to day business of our international and domestic courts.
III. DEVELOPING A CASE THEORY AND A DEFENCE STRATEGY

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1. In cases before an international tribunal, the Defence must ensure that all necessary measures are taken to establish the facts, gather evidence that favours the accused, and protects the rights of the accused. This includes, primarily, discovery of facts and evidence that dispute the allegations in the indictment and may lead to the acquittal of the accused or that may raise doubts about the allegations. Such facts and evidence include those which relate to both the factual and the legal allegations identified in the indictment.

2. Practice in international tribunals also shows that it is important to conduct a detailed analysis of the indictment to gain an understanding of the Prosecution’s case and of the forms of responsibility alleged against the accused.

3. As part of this process it is important to develop a “theory of the case”; a concept that is not necessarily a notion with which all lawyers are familiar. Quite simply, the theory of the case represents all the important elements, both objective and subjective, of the criminal case alleged against the accused,
which the Prosecution has to prove in order for the accused to be found guilty. Additionally, the theory of the case represents the Defence’s response to the Prosecution’s case.

4. This chapter begins by examining what can be called the theory of the Prosecution case and the theory of the Defence case. This is followed by considerations regarding the elements of a defence strategy, such as: relations with the client, setting up a Defence team, obtaining and analysing relevant information for the case, filing preliminary and other motions, formulating an investigative plan and method as well as other relevant strategic considerations.

A. Theory of the Prosecution Case

5. The Prosecution’s theory of the case consists of all the important elements which the Prosecution must prove during the proceedings if the Trial Chamber is to find the accused guilty. This includes all the elements of the relevant criminal act: the facts that represent the incriminating act, the position of the accused, his alleged liability, and the applicable laws. In cases at the ICTY, the Prosecution is permitted to charge cumulatively, which means, for example, that the same alleged “murder” can be charged a number of different ways: as a “Grave Breach of the Geneva Conventions of 1949” (Article 2, ICTY Statute),\(^1\) as a “Violation of the Laws and Customs of War” (Article 3),\(^2\) as a “Crime Against Humanity” (Article 5(a)),\(^3\) as “Persecution as a Crime Against Humanity” (Article 5(h)),\(^4\) and as “Genocide” (Article 4).\(^5\)

6. The required elements of murder under Articles 2-5 of the ICTY Statute are the same:

- the victim is dead;
- the death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
- the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention to kill or to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.\(^6\)

*Chapter co-authored by Eugene O'Sullivan and Edina Rešidović. Eugene O'Sullivan, Defence Counsel at the ICTY for Zejnil Delalić (Čelebić case), Milojica Kos, Biljana Plavšić, Miodrag Jokić, Milan Milutinović, and legal consultant for Mićo Stanišić. Edina Rešidović is an international criminal lawyer, Partner and Founder of the Law Office Rešidović Edina - Sabrihažović Džemil - Milanović-Lalić Mirna - Sabrihažović Dino, based in Sarajevo (Bosnia and Herzegovina). She has vast experience as a criminal lawyer in both domestic and international jurisdictions and has served as Lead Counsel at the ICTY for Enver Hadžihasanović, Ljube Boškoski and Zejnil Delalić.

\(^1\) Article 2, ICTY Statute.
\(^3\) *Ibid.*, Article 5(a).
7. There are however important differences between a charge of murder under each of these provisions of the ICTY Statute, which must be proven before a conviction can be entered:

- Under Article 2, it must be proven that the murder occurred during an “international armed conflict” and that the victim was a “protected person”;\(^7\)
- Under Article 3, it must be proven that the murder occurred during an “armed conflict” and that there is a “nexus” between the murder and the armed conflict;\(^8\)
- Under Article 4, it must be proven that the crime of genocide was committed with the specific intent to destroy the targeted group, in whole or in part;\(^9\)
- Under Article 5(a), it must be proven that the murder occurred during an “armed conflict”, during a widespread or systematic attack directed at a civilian population to convict as a “crime against humanity”.\(^10\)
- Under Article 5(h), an additional element of persecutorial intent on political, racial, and/or religious grounds must be proven to convict for “persecution, as a crime against humanity”.\(^11\)

8. In addition, an accused may be charged cumulatively under Article 7(1) and Article 7(3), which set out the different modes of personal liability. For instance, for the charge of “murder”, the accused may be charged with planning, instigating, ordering, committing (as a direct perpetrator or as a participant in a joint criminal enterprise), or aiding and abetting pursuant to Article 7(1) and as a superior authority pursuant to Article 7(3).

9. It is important to understand the theory of the Prosecution case, that is, to understand which elements the Prosecution intends to establish in order for the accused to be found guilty, for the following reasons:

- without knowing the Prosecution’s theory of the case, the Defence cannot develop its own theory, which is vital to effectively respond to the allegations in the indictment or to raise a reasonable doubt regarding the Prosecution’s case;
- familiarity with the Prosecution’s case theory allows the Defence to identify preliminary and other objections in a timely and efficient manner during the proceedings;
- a sound knowledge of the Prosecution’s case theory allows the Defence to properly develop a defence case strategy;
- a thorough understanding of the Prosecution’s case theory and a comprehensive analysis of the indictment is necessary in order for the Defence to present to the Trial Chamber a version of events that raises a reasonable doubt about the accused’s responsibility and ultimately may lead to his acquittal.

\(^7\) Article 2, ICTY Statute.
\(^8\) Ibid., Article 3.
\(^9\) Ibid., Article 4.
\(^10\) Ibid., Article 5(a).
\(^11\) Ibid., Article 5(h).
10. The Prosecution is responsible for articulating the legally relevant or “material” facts in the indictment, i.e. those factual allegations which underlie each charge in the indictment. Thorough analysis of the indictment enables the Defence to assess whether the Prosecutor has alleged all the facts which, if proved, would fulfil every element of both the crime and the mode of liability upon which the accused’s responsibility is allegedly based.

B. Theory of the Defence Case

11. A correct understanding of the Prosecution’s case theory is always necessary for the proper development of the Defence theory. Further, a complete and proper Defence theory identifies the strategy of the Defence. Insufficiently detailed attention to the theory of the Prosecution’s case will result in omissions by the Defence that may impact the accused’s ability to effectively respond to the charges.

12. The first task for the Defence is to analyse in detail the indictment and the evidence that supports it. The Defence must, in the development of the Defence theory, start its analysis from the most favourable position for the Prosecution. For every factual and legal allegation raised by the Prosecution, the Defence must attempt to provide an alternative answer which suggests the innocence of the accused or undermines the credibility of the Prosecution evidence. In the end, the goal of the Defence’s case theory is to convince the court of the correctness of the Defence’s version of events. For this reason, the theory of the Defence should be simple, persuasive, and credible. It must contain an explanation of why the Prosecution’s theory is incorrect.

13. In analysing the Prosecution’s theory of the case as set forth in the indictment, the Defence should pay attention to the following issues:

- Has the event specified in the indictment even occurred? One approach for the Defence is to challenge whether the alleged events occurred;
- Does the specified event, if it took place, constitute a criminal offence or a crime according to international humanitarian law? The Defence may seek to argue that it does not constitute a criminal offence or a crime according to international humanitarian law (for example, the act is not related to an armed conflict when the element of an armed conflict is a requirement for that offence; victims do not have the status of non-combatants, etc.);
- Assuming the act took place and that it constitutes a criminal offence under international humanitarian law, was the accused criminally responsible for the act in question? The accused, for example, is not criminally responsible if he acted in self defence, was not present, has an alibi, did not hold the position alleged in the indictment, had no legal obligation to act as the indictment alleges, had no criminal intent, etc.
- Was the accused in a position of superiority in relation to the perpetrators of the crime? It may be that the accused is not responsible, as he did not hold the alleged position either de jure or de
facto, did not have effective control over the perpetrators, did not have knowledge or notice of
the alleged acts, and finally, did not have the material means to investigate and punish those who
actually committed the crimes.

14. It is crucial to develop a thorough Defence theory of the case by taking all the elements of the crimes
(i.e., contextual elements, actus reus and mens rea) that the Prosecution will have to prove and
assessing them in light of the facts alleged by the Prosecution. For each of these facts, challenges to
the admissibility or probative value of certain evidence and witnesses have to be considered and new
facts that are exculpatory have to be identified in relation to the relevant elements of the crimes, modes
of liability and facts as alleged in the indictment.

C. The Importance of Continual Communication with the Accused

15. Before finalising the theory and the strategy of the Defence's case, counsel must interview the accused.
It is important for Defence counsel to obtain the accused's entire understanding of the events and his
involvement in those events, if any. In cases dealing with superior responsibility it is important to know
what the accused's position, duties, rights, and obligations were at the time of the events of the case.
Especially relevant is the accused's de jure position; the responsibilities held by the virtue of his rank,
his relations with other alleged actors, his actual knowledge, if any, about the charged incident before
or after its occurrence, and other questions of importance in accordance with Article 7(3) of the ICTY
Statute.

16. It is important to discuss with the accused not only the direct basis for the charges in the indictment
but also all other facts that arise in the evidence presented with the indictment. This is particularly
important in relation to an allegation that the accused was a de facto superior under Article 7(3) or in
relation to an allegation that the accused is guilty by omission (for example, aiding and abetting by
omission).

17. There has to be continual communication with the client throughout the proceedings; pre-trial and at
trial. It is especially important to examine all material disclosed to the Defence by the Prosecution as
well as material obtained through defence investigative work. On the basis of information acquired this
way, it may become apparent that other relevant documents and material may be in the possession of
the Prosecution and should be requested.

18. Furthermore, Defence counsel have a duty to discuss the possibility of negotiating a plea agreement as
a means to resolve the matter in lieu of going to trial. Over time, as the evidence disclosed by the
Prosecution and Defence investigation progresses, discussions with the client may move towards the
likelihood of mounting a successful defence at trial or the alternative of pursuing a plea agreement for
certain charges. This will depend on the relative strengths and weaknesses of the evidence which is
likely to be presented at trial. Developing a working relationship of trust between the accused and
counsel is fundamental to resolving these issues in a manner which will be acceptable to the accused and consistent with counsel’s duty to effectively represent his client.

D. **Building up the Defence Strategy**

19. The strategy adopted by the Defence is based on the Defence's theory of the case. Experience shows that the defence strategy should include:

- establishing a Defence team;
- filing of preliminary and other motions;
- analysing the evidence in support of the indictment and all other evidence disclosed by the Prosecution in accordance with Rule 66;
- analysing materials disclosed to the Defence in accordance with Rule 68 and Rule 66(B);
- informing the Prosecutor of special defences in accordance with Rule 67; and,
- formulating an investigation plan and method.

D.1 **Establishing the Defence Team**

20. Due to the complexities of criminal acts that constitute violations of international humanitarian law, experience indicates that the defence should not be conducted by just one counsel. The practice before the ICTY, ICTR, ICC, and other courts has included lead counsel forming a team that can respond to all factual and legal questions which are raised during the proceedings.\(^\text{12}\) For example, at the ICTY it has proven to be a good practice to compose teams of lawyers from common law and continental systems, that is, lawyers from the former Yugoslavia and those that have experience in common law countries and/or practicing before the ICTY.\(^\text{13}\)

21. In courts where there is both a domestic and international component—i.e. judge, prosecutors, defence counsel—and where the trial proceeding itself is essentially adversarial in nature (as is true in the international courts and in some domestic courts) with rules of procedure which incorporate elements of both the continental and adversarial practice, a “mixed” Defence team can be very effective and therefore very important strategically.

22. The Defence team should include investigators and legal assistants, where the law allows. It is important that Defence investigators are familiar with facts related to the events, the region where the acts allegedly took place, and the context of these events. Experience also shows the importance of the

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\(^{12}\) See, eg., Chapter XIV “Defence Organisations at the International Courts and Tribunals”, Section B. “Setting up a Defence Team”.

\(^{13}\) For example, for Zejnil Delalić, lead counsel from BiH, co-counsel from Canada; for Enver Hadžihasanović, lead counsel from BiH, co-counsel from Canada; for Ljube Boškoski, lead counsel from BiH, co-counsel from Switzerland; for Naser Orić, lead counsel from BiH, co-counsel from Great Britain; for Momčilo Perišić, lead counsel from Belgrade, co-counsel from the United States.
investigators understanding the languages spoken by potential witnesses, so that they do not have linguistic difficulties in locating and examining relevant documents or speaking with witnesses. Legal assistants should analyse the evidence and research the necessary domestic and international legal authorities relevant to the proceedings in the international court where the case is pending. In case investigators or legal assistants are not familiar with the language, it is important to also hire a translator.

23. The complexity of the criminal cases dealing with violations of international humanitarian law frequently requires the hiring of consultants for various factual or legal questions in the case—members of the military and/or police, constitutional experts, forensic or demographic experts—so that the Defence can intelligently counter the evidence of the Prosecution. These consultants may work as a part of the Defence team or they may be retained to provide expert reports and testimony at trial for the Defence. It is important, however, not to use the same person both as consultant (team member) and as an expert witness. Strategically, the objectivity of the expert who works as a member of the Defence team is potentially compromised and the value of the expert opinion may be accordingly diminished.

D.2 Filing of Preliminary and Other Motions

24. Based on the analysis of the indictment and supporting evidence, the Defence must decide which preliminary motions should be made immediately and which objections should be filed during the proceedings.

25. Considering that preliminary motions are made within a narrow deadline at the outset of the case, and that failure to meet the deadline means loss of the right to file such motions, the Defence must take advantage of that right and file the preliminary objections in a timely manner.

26. One of the essential guarantees of a fair trial is the right of the accused to file preliminary motions to challenge the aspects of Prosecution’s allegations against him and the Prosecution’s theory of the case. Before the ICTY, the accused must file such motion within 30 days after the Prosecution files the materials in support of the indictment by submitting a written motion to the Pre-Trial Chamber.14 Pursuant to Rule 72 of the ICTY RPE, the accused may file preliminary motions which:

i. challenge jurisdiction;

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14 Rule 72, ICTY RPE; Rule 79, IRMCT RPE (30 days); Rule 72, ICTR RPE (60 days).
ii. allege defects in the form of the indictment;
iii. seek severance of counts or separate trials, and objections joinder or severance of the proceedings; or,
iv. raise objections based on the refusal of a request for assignment of counsel.\textsuperscript{15}

27. The time frame for filing preliminary motions is triggered by disclosure by the Prosecution to the Defence following the initial appearance of the accused. Pursuant to Rule 66(A)(i), the Prosecution must make available to the Defence in a language which the accused understands, within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as prior statements obtained by the Prosecution from the accused.\textsuperscript{16} Pursuant to Rule 72(A), all preliminary motions must be in writing and brought no later than thirty days after disclosure by the Prosecution to the Defence of all material and statements referred to in Rule 66(A)(i).\textsuperscript{17} It is important to note that pursuant to Rule 72(B), only motions challenging jurisdiction carry with them the right of appeal.\textsuperscript{18} All other preliminary motions under Article 72(A) and other motions under Article 73 may only be appealed, if a Trial Chamber grants a request for certification pursuant to Rule 73(C).\textsuperscript{19}

D.2.1 Motions Challenging Jurisdiction

28. Jurisdictional challenges can be made under the claim that the Tribunal lacks jurisdiction:

- rationae personae (personal);\textsuperscript{20}
- rationae territoriae (territorial);\textsuperscript{21}
- rationae temporis (temporal); or,\textsuperscript{22}
- rationae materiae (subject matter).\textsuperscript{23}

29. The legality of the Tribunal can also be subject to a jurisdictional challenge; however it is unlikely to succeed. In 1995, the first decision of the Appeals Chamber dismissed a challenge to jurisdiction.\textsuperscript{24} The Appeals Chamber found that the ICTY was duly created as a legal institution, properly established by law by the UN Security Council under Chapter VII of the UN Charter.

\textsuperscript{15} Since at the ICTY there have been no preliminary motions raising objections based on the refusal of a request for assignment of counsel, this type of preliminary motion will not be addressed in further details.
\textsuperscript{16} Rule 66(A)(i), ICTY RPE.
\textsuperscript{17} Rule 72(A), ICTY RPE.
\textsuperscript{18} Rule 72(B), ICTY RPE.
\textsuperscript{19} Rule 73(C), ICTY RPE.
\textsuperscript{20} As indicated in Articles 1, 6, 7 and 9, ICTY Statute.
\textsuperscript{21} As indicated in Articles 1, 8 and 9, ICTY Statute.
\textsuperscript{22} As indicated in Articles 1, 8 and 9, ICTY Statute.
\textsuperscript{23} As indicated in Articles 2, 3, 4, 5 and 7, ICTY Statute.
\textsuperscript{24} See Prosecutor v. Tadić, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.
30. Alleged defects in the form of the indictment is a matter that is often raised as a preliminary motion by the accused. The indictment must:

- Describe with sufficient detail the acts, places, and times of the crimes charged;
- Identify the acts for which the accused is charged as a direct offender and those charges as a superior authority;
- Cite the relevant provisions which describe the alleged criminal responsibility of the accused.

31. Factual questions, however, are a matter for determination at trial. A challenge to the form of the indictment cannot be used to argue that an indictment is defective because there is a disagreement between the parties concerning the facts. The accused have the right to notice of the nature of the charges which will be brought at trial. The Prosecution, therefore, must give the accused notice in a summary manner of the nature of the crimes charged and the factual basis for the accusations in the indictment so that the accused has sufficient information to enable him to begin to prepare a defence.

32. This means that the indictment must specify:

- the identity of the victims;
- the places and approximate dates of the alleged crimes; and,
- the means used to perpetrate the crimes.

33. As noted earlier, the ICTY allows for cumulative charging, which means that an accused may be charged with two different crimes based on one act or omission.

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25 See Prosecutor v. Delalić et al., IT-96-21-PT, Decision on the Motion by the Accused Zejnil Delalić based on Defects in the Form of the Indictment, 2 October 1996.
D.2.3 Severance of Trials

34. The ICTY RPE relevant to the issue of separate trials must be interpreted in relation to the definition of “transaction” in Rule 2 and Rule 82(B). Rule 2 defines “transaction” as a “number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan”. The same transaction may be found to exist even where the alleged crimes of the relevant accused are different or are carried out in different geographical areas or over different periods of time, so long as there are other factual allegations in the indictment that are sufficient to support a finding that the alleged acts or omissions form a part of a common scheme, strategy or plan.

35. When co-accused are jointly charged in one indictment under Rule 48, with acts which are allegedly committed in the same transaction under Rule 2, a Trial Chamber may order the accused to be tried separately if one of two requirements of Rule 82(B) are fulfilled; namely, to avoid a conflict of interest that might cause serious prejudice to an accused at trial or to protect the interests of justice.

36. When deciding whether joinder is warranted, a Trial Chamber should consider and weigh the following factors:

i. protection of the rights of the accused pursuant to Article 21 of the ICTY Statute;
ii. avoidance of any conflict of interests that might cause serious prejudice to an accused;
iii. protection of the interests of justice.

37. In order to assess the interests of justice, a Trial Chamber may consider: avoiding the duplication of evidence, promoting judicial economy, minimizing hardship to witnesses and increasing the likelihood that they will be available to give evidence, and ensuring consistency of verdicts.

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27 Prosecutor v. Pandurević and Trbić, IT-05-86-AR73.1, Decision on Vinko Pandurević’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 24 January 2006, para. 17.
28 Prosecutor v. Gotovina et al., IT-01-45-AR73.1; IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 17; Prosecutor v. Mico Stanišić and Stojan Župljanin, IT-04-79-PT; IT-99-36/2-PT, Decision on Prosecution’s Motion for Joinder and for Leave to Consolidate and Amend Indictments, 23 September 2008, para. 25.
31 Prosecutor v. Gotovina et al., IT-03-73-AR73.1; IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 17; Prosecutor v. Stanišić and Župljanin; Prosecutor v. Karadžić, IT-08-91-PT; IT-95-5/18-PT, Decision on Stojan Župljanin’s Motion for Joinder, 6 January 2009, para. 7; Prosecutor v. Mejakić et al., IT-95-4, Decision on
38. In other words, an important factor, with regard to the second prong of the test in Rule 82(B), is whether separate trials would result in multiple trials that would cause considerable delays, especially for the accused who are not tried first. Another factor is that separate trials require the judges to hear the same witnesses giving the same evidence more than once and, on each occasion, require the judges to try to consider the evidence with minds unaffected by their prior conclusions regarding that same evidence reached on the earlier occasions.

39. According to the ICTY jurisprudence, the possibility of “mutually antagonistic defences” among co-accused does not constitute a conflict of interest capable of causing serious prejudice to an accused within the meaning of Rule 82(B). However, in Kovačević, the Trial Chamber denied a Prosecution motion for joinder citing this ground. One of the accused was charged with a different crime which would require the introduction of different evidence at trial. The Trial Chamber ruled that concurrent presentation of evidence against all four accused would lead to a conflict of interest in their defence strategies, which would substantially prejudice the accused right to a fair trial. In Delalić et al., a Defence motion for separate trials was denied. In a trial with four accused, one accused was charged with superior authority, while other co-accused were charged with direct perpetration of crimes. The Trial Chamber found that the presentation of evidence against the direct perpetrators would not result in serious prejudice to the accused charged as a superior authority on the basis that “[t]here is no provision in the Rules for separate trial of distinct issues arising in one indictment.” Moreover, the fact that one accused is a member of the military forces and his co-accused are members of the civilian authorities, does not constitute a conflict of interest.

40. Finally, in the Dokmanović case the accused was indicted together with three co-accused. However, none of the three co-accused was in the custody of the ICTY. The Trial Chamber ordered that Dokmanović be tried separately from the three co-accused in order to protect his right to be tried without undue delay.

the Prosecution’s Motion to Joint Trials, 14 April 2000; Prosecut or v. Delalić et al., IT-92-21-T, Decision on the Motion by the Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998.
33 See Prosecutor v. Delalić et. al., IT-96-21-PT, Decision on Motions for Separate Trial filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić, 25 September 1996.
Prosecutor v. Gotovina et al. IT-03-73-AR73.1; IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 45; and Prosecutor v. Dokmanović, IT-95-13a, Decision of Trial Chamber II Concerning Separation of Trials, 28 November 1997.
D.2.4 Other Requests

41. Submission of other requests pursuant to ICTY RPE 54 bis allows the Defence, during the pre-trial stage, to investigate other factual issues that are important for the Defence and for trial preparation.  

D.2.4.1 Requests for Access to Confidential Material from Other Cases

42. An accused is entitled to seek material from any source to assist in the preparation of his case, provided that the material sought has been identified or described by its general nature and that a legitimate forensic purpose for such access has been shown. The relevance of the material sought by an accused may be determined by showing the existence of a nexus between the accused’s case and the case from which such material is sought. The accused must show that the material sought is likely to be of assistance to his case or that there is at least a good chance that it may assist the defence of the accused. The existence of a nexus between the two cases can be shown if the cases arise from the same charges or stem from events alleged to have occurred in the same geographical area and at the same time.  

D.2.4.2 Requests to Issue Binding Orders to States, International Organizations or Bodies

43. Pursuant to Article 29 of the ICTY Statute, States are required to cooperate and provide judicial assistance to the Tribunal. Under Rule 54 bis, the Defence may seek an order to direct the States to produce relevant documentation. Such requests, called a request for a binding order, must set out why the requested documents are deemed relevant and necessary for the accused’s trial. The relevance and necessity requirements serve the purpose of shielding States from requests which will not result in useful information for the party or the Trial Chamber. Moreover, the party seeking an order that a State produce documents or information must “explain the steps that have been taken by the applicant to secure the State’s assistance.”  

44. If a State, an international organization or an NGO objects that legitimate security interests are implicated by the document or information being sought, the Trial Chamber may provide for the document in question to be produced by the State under appropriate conditions to protect its interests.

38 Rule 54 bis, ICTY RPE.  
40 Ibid., para. 15.  
43 Rule 54 bis (A) (iii), ICTY RPE.  
44 Rule 54 bis (F), (G), (I), ICTY RPE.
However, States are not allowed to simply claim generalized national security interests to withhold documents and other evidentiary material requested by the Tribunal.\textsuperscript{45}

**D.2.4.3 Provisional Release of the Accused**

45. Another motion that consistently is brought by the Defence during the pre-trial and, less often, during the trial phase is a motion for the provisional release of the accused.\textsuperscript{46} The release of the accused during the pre-trial phase in particular is consistent with the presumption of innocence and is important to enable the accused to participate in the proper and adequate defence preparation and case conduct.

46. Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR) provides that it “shall not be the general rule that persons awaiting trial shall be detained in custody”.\textsuperscript{47} However, the Rules at the ICTY envisage the detention of the accused as an automatic consequence of his arrest. Pursuant to Rule 65, an accused who is in the custody of the Tribunal, may apply for provisional release, however.\textsuperscript{48} In doing so, the accused must show:

   i. that he is not a flight risk; and,
   ii. that he will not pose a danger to any victim, witness or other person.\textsuperscript{49}

47. Even if these two criteria are satisfied, a Trial Chamber still retains discretion to deny a request for provisional release. Factors relevant to granting of provisional release include, but are not limited to:

   - the seriousness of the offence;
   - the likelihood of a long prison term upon conviction;
   - security guarantees made by the country to which the accused is requesting release;
   - cooperation, if any, by the accused with the Prosecution;

\textsuperscript{45} See *Prosecutor v. Blaškić*, IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 October 1997; and see Chapter IV “Defence Investigations”, Section G. for a further discussion on binding orders directed to states, NGOs and international organizations.

\textsuperscript{46} Rule 65, ICTY RPE (“Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.”); Rule 65 ICTR RPE (“Provisional release may be ordered by a Trial Chamber only after giving the host country and the country to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.”); Rule 68 IRMCT RPE (Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by the Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness, or other person.”); Article 60(2), Rome Statute (“A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.”).

\textsuperscript{47} Rule 9(3), ICCPR.

\textsuperscript{48} Rule 65, ICTY RPE. Motions for provisional release are also permitted at the ICTR and ICC. They are thus far irrelevant at the STL where all the accused have been tried in absentia.

\textsuperscript{49} Rule 65(B), ICTY RPE.
• whether the accused voluntarily surrendered to the Tribunal;
• the conduct of the accused while in detention;
• the senior position of the accused in government;
• the existence of national legislation concerning cooperation with the Tribunal;
• the reasonableness of the detention.

48. Even though exceptional circumstances are not necessary to be granted provisional release, humanitarian grounds, such as very serious health conditions or to attend the funeral of a close relative can be a basis for granting provisional release. However, in cases where the application for provisional release is done at a late stage of proceedings, the jurisprudence at the ICTY indicates that the application will only be granted “when serious and sufficiently humanitarian reasons exist.”

49. The ICTY has held that a party who is challenging the Trial Chamber’s provisional release decision has the burden of proof to show that the Trial Chamber committed a discernable error in that it:

• misdirected itself as to the principle applied;
• misdirected itself as to the law which is relevant to the exercise of discretion;
• gave weight to extraneous or irrelevant considerations;
• failed to give weight or sufficient weight to relevant considerations;
• made an error as to the facts upon which it has exercised its discretion; or
• rendered a decision so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.

50. The Appeals Chamber will overturn a Trial Chamber’s decision on the issue of provisional release only when the decision is found to be:

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50 But See Prosecutor v Kalamanzira, No. ICTR-05-88-I, Decision on Defence Motion for Provisional Release, 5 June 2007, para. 4 (denying provisional release because “[t]he Chamber is not convinced that at the time of his surrender, the Accused was fully aware of the seriousness of [his] charges”).

51 Prosecutor v. Bemba, ICC-01/05-01/13, Decision on “Mr Bemba’s Request for provisional release”, 23 January 2015 (granting Bemba’s request for provisional release because “the reasonableness of the duration of the detention has to be balanced inter alia against the statutory penalties applicable to the offences at stake in these proceedings and that, accordingly, the further extension of the period of the pre-trial detention would have resulted in making its duration disproportionate”).

52 See Prosecutor v. Bemba, ICC-01/05-01/08, Decision on the Defence requests for Mr Jean-Pierre Bemba to attend his Stepmother’s Funeral, 12 January 2011, para. 16 (granting Bemba’s temporary release to attend his stepmother’s funeral). But see Prosecutor v. Gbagbo, ICC-02/11-01/11, Decision on the urgent request of the Defence for Mr. Gbagbo to attend his mother’s funeral, 29 October 2014, para. 27 (rejecting Gbagbo’s request to attend his stepmother’s funeral because of serious risk of “endangering the populace in Côte d’Ivoire, Court staff and Mr. Gbagbo himself”).


54 Prosecutor v. Popovic et al., No. IT-05-88-AR65.1, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic’s Motion for Provisional Release, 24 January 2006.
• based on an incorrect interpretation of governing law;
• based on a patently incorrect conclusion of fact; or
• so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.\textsuperscript{55}

D.3 Analysis of the Evidence Related to the Indictment and Other Evidence Provided by the Prosecution

51. The Defence must always keep in mind that the burden of proof lies entirely with the Prosecution. The guilt of the accused must be proven beyond a reasonable doubt by the Prosecution. Indeed, the accused is not required to prove anything. He or she is not required to say anything, ask any question to Prosecution witness, or call any Defence evidence.

52. In addition, pursuant to Rule 98 bis,\textsuperscript{56} the accused may, at the close of the Prosecution case, request that the Trial Chamber enter a judgement of acquittal on any count in the indictment, if there is no evidence capable of supporting a conviction. The standard to be applied at this phase of the proceedings is not whether the trier of fact would arrive at a conviction beyond a reasonable doubt based on the Prosecution evidence if accepted, but whether it could do so as a matter of law. This requires the Chamber to give full credence to the evidence presented by the Prosecution unless such evidence is incapable of belief.\textsuperscript{57} Although the burden of proof required at the Rule 98 bis stage of a trial is lower than the proof beyond a reasonable doubt standard used to determine guilt or innocence at the end of the trial, the Defence must analyse all potential evidence related to the indictment in this light when developing a case theory and defence strategy.

53. Practice indicates that in preparation for the trial the Defence must always be in communication with the Prosecution and request that the Prosecution fulfils its obligation of timely disclosure, translation of evidentiary documents and provision of all relevant information to the Defence. Of special importance to the Defence is its ability to timely familiarize itself with all the evidence—both inculpatory and exculpatory.

54. Pursuant to Rule 68, the Prosecution has a duty to disclose exculpatory and other material to the accused.\textsuperscript{58} Rule 68(i) specifies that the Prosecution must disclose material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility


\textsuperscript{56} See, Chapter I “Burden of Proof and Presumption of Innocence”, Section G. for an explanation of the Motion for Acquittal Pursuant to Rule 98 bis.


\textsuperscript{58} Rule 68, ICTY RPE. At the ICC the prosecution has the duty not just to provide exculpatory evidence when it is found but to investigate for it. Article 54(1)(a) of the Rome Statute.
of Prosecution evidence. This obligation to disclose is a continuing one, which must be fulfilled in the pre-trial and trial phases and extends to the post-trial stage, including appeals.

55. Disclosure from the Prosecution begins within thirty days of the initial appearance of the accused, when the accused enters a plea of guilty or not guilty. Pursuant to Rule 66(A)(i), the accused must receive copies of the “supporting material” which accompanied the indictment when confirmation was sought as well as all statements obtained by the Prosecution from the accused. This is followed by more extensive and ultimately full disclosure pursuant to Rule 66(A)(ii) and Rule 65 ter. The Trial Chamber or the Pre-Trial Judge prescribes a deadline by which the Prosecution must disclose all statements and material (i.e. exhibits) which the Prosecution intends to rely upon at trial. Additionally, pursuant to Rule 65 ter (E), the Prosecution must prepare a pre-trial brief which sets out:

1. the Prosecution case in detail;
2. a summary of the evidence the Prosecution intends to present at trial;
3. the name or pseudonym of each witness;
4. a summary of facts on which each witness will testify, and,
5. a list of exhibits.

56. It should be noted that the Chamber or the Pre-Trial Judge may order that a preliminary pre-trial brief be prepared by the Prosecution, with a “final version” required not less than six weeks before the Pre-Trial Conference. It is a matter of discretion and trial management when the Trial Chamber or Pre-Trial Judge issues such orders, but the Defence should request the Prosecution pre-trial brief as early as possible.

57. In addition, pursuant to Rule 66(B), the Defence may request inspections of any books, documents, photographs and tangible objects in the Prosecution’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecution as evidence at trial or were obtained from or belonged to the accused. The Defence must make a sufficiently specific request for this material.

58. Careful drafting of a request under Rule 66(B) is essential and it must specifically identify the items sought, demonstrate prima facie that the requested items are material to the preparation of the defence.

59 Rule 68, ICTY RPE.
61 Rule 47, ICTY RPE.
62 See, e.g., Rule 42 and Rule 43, ICTY RPE. Although, pursuant to Rule 66(A)(i), the Prosecution must disclose “all” prior statements obtained by the Prosecutor from the accused not just those given by the accused to the Prosecution.
and that the requested items are in the custody and control of the Prosecution. A request under Rule 66(B) is *inter partes* between the Defence and the Prosecution. The Trial Chamber will only become involved under Rule 66(B), if the Defence believes that the Prosecution is failing to comply with a request without justification.

59. In addition, pursuant to Rule 68(ii), an Electronic Disclosure System (EDS) was instituted at the ICTY which provides the Defence access via the internet to evidentiary materials in electronic format collected by the Prosecution. This is an important means for the Defence to conduct its own independent research into matters for preparation of the case.

60. Rule 68 *bis* provides that sanctions may be imposed on a party who fails to perform its disclosure obligations pursuant to the rules. These matters are dealt with on a case by case basis. Depending on the severity and frequency of the violations, the remedy may vary from ordering an adjournment to allow the aggrieved party time to review the information to declaring a mistrial in the case of repeated, blatant, and intentional violations of the disclosure rules, though this remedy has never been invoked at the ICTY.

61. The Prosecution’s duty to disclose may be limited under Rule 66(C) and Rule 70. Pursuant to Rule 66(C), the Prosecution may apply *in camera* to the Trial Chamber for relief from disclosing to the accused information that:

- may prejudice further or ongoing investigations; or
- for any other reasons may be contrary to the public interest; or,
- affect the security interests of any State.

62. The Prosecution is required to provide this information to the Trial Chamber when making this application. It is important to note that the *in camera* procedure is done *ex parte*, so the accused not only is not present, he is not informed that the Prosecution has made the request. In fact, pursuant to Rule 70, the Prosecution is not required to disclose information to the accused which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence. This information cannot be disclosed to the accused without the prior consent of the provider. This provision overrides the disclosure obligations under Rules 66, 67, and 68.

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64 See *Prosecutor v. Boškoski et al.*, IT-04-82-T, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66(B), 31 January 2008.

65 Such procedures can be abused however as occurred in *Prosecutor v Thomas Lubanga*, the first case tried at the ICC. In *Lubanga* the prosecutor failed to disclose exculpatory evidence, including witness statements, because it had promised the providers of the evidence it would not disclose it under the confidentiality provisions of Rule 54. The Trial Chamber held such agreements - when related to exculpatory evidence - violated the fundamental fair trial rights of the accused. *Prosecutor v Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference of 10 June 2008, ICC-01/04-01/06, 13 June 2008. The Trial Chamber held the prosecution had no legal authority
63. There is no judicial review concerning non-disclosure similar to the procedure under Rule 66(C). Indeed, under the terms of Rule 70, the Prosecution may not inform anyone, including the Trial Chamber, that it has obtained information confidentially. Pursuant to Rule 70(B), this information is to be used “solely for the purpose of generating new evidence”. However, if the Prosecution is allowed by the provider to introduce the initial information into evidence, its admission is subject to Rule 70(C)(D)(E)(G). The powers of the Trial Chamber to order additional evidence, to require the attendance of a witness, or to compel a “Rule 70” witness to answer questions are limited. The Trial Chamber always retains the discretion, however, to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

64. The Defence may also use the provisions of Rule 70. However, contrary to the Prosecution, the Defence is required to apply under Rule 70(F) for an order in relation to specific information in the possession of the accused, which is decided on a case-by-case basis by a Trial Chamber in the interests of justice.

65. Careful and proper use of the rules governing disclosure can greatly assist the Defence in understanding the theory of the Prosecution case and the development of the Defence theory of its case. With the disclosure of the witness statements from the Prosecution, and other material, serious and methodical defence investigations, and the early filing of the Prosecution Pre-Trial Brief, the Defence can effectively use the EDS, Rule 54 bis requests, Rule 66(B) requests, and Rule 68 exculpatory material to build a defence. This requires, as described above, a well-organised Defence team and constant supervision and review by counsel.

66. Despite the above-mentioned framework for disclosure and in particular the rules pertaining to time limits for disclosure which are set by the Trial Chambers and the Pre-Trial Judge, disclosure of material under Rule 66(A)(ii) frequently continues on a regular basis during the pre-trial and trial phases of proceedings. It is also often the case that Rule 68 material is disclosed late; just prior to the testimony of a Prosecution witness, or sometimes, just after the witness has finished testifying. In general, the only remedy that the Trial Chambers grants the Defence is an adjournment to review the material or to recall a witness for further examination after review of the material disclosed in an untimely matter. The real prejudice for the accused is the number of times the disclosure rules are violated and the cumulative effect of those violations on a fair trial. These violations must be made a part of the record by oral or written application to preserve the point for the appeal process.

66 See also the discussion of Rule 70 and limits on the cross-examination of Rule 70 witnesses in Chapter 7, “Witnesses”.
67 See, e.g., Prosecutor v. Milutinović et al., IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65ter list, 20 April 2007.
D.4 Notifying the Prosecution About a Special Defence

67. If the Defence theory of its case is that the accused has an alibi in relation to the crimes concerned, or diminished or lack of mental capacity, the Defence must inform the Prosecution, prior to trial and prior to the presentation of the Prosecution case, of its intention to present such a defence.68

68. Pursuant to Rule 67(A), notice of alibi should be provided as soon as practicable so that the Prosecution can investigate the alibi and present relevant evidence in its case-in-chief if need be.69 The Notice must provide a certain degree of specificity, i.e. the claimed whereabouts of the accused at the relevant time,70 but it need not include the addresses of alibi witnesses at the time of the event.71 The Prosecution bears the burden of eliminating any reasonable possibility that the evidence of alibi is true.72 The finding that an alibi is false does not itself establish the opposite of what it asserts. The Prosecution must not only rebut the validity of the alibi, but also establish beyond reasonable doubt the guilt of the accused.73

D.5 Formulating the Investigation Plan and Method

69. The Defence should formulate an investigation plan as early as it can, based upon its understanding of the case. Using this plan, the investigation will attempt to answer basic questions relevant to the case by gathering credible and reliable evidence. The investigators should be given clearly formulated investigative areas to pursue, and these should be further clarified as necessary as information is gathered and analysed. The Defence, if it wishes to attain the desired results, must give proper guidance, follow the course of the investigation, analyse the results obtained and if necessary, amend the investigation plan.74

Conclusion

70. Nothing is more important in a criminal case than case preparation. This chapter examined some of the essential steps counsel can take when they begin to develop a case theory and defence strategy when representing an accused charged with war crimes, crimes against humanity and genocide. Preparing a defence to these kinds of criminal cases presents many challenges both legal and logistic. Counsel must

68 For additional discussion of special defences, see Chapter II “Affirmative Defences in International Criminal Trials”.
71 Ibid., para. 11.
73 Prosecutor v. Limaj et al., IT-03-66-T, Trial Judgement, 30 November 2005, para. 11.
74 A more detailed discussion on investigation plan and method is contained in Chapter IV “Defence investigations”, Section B. “Creating an investigative plan”.

68
understand the large and growing body of law and jurisprudence in the international criminal law courts. In what can be very complex cases, counsel representing individuals charged with international criminal offences must organise a defence team and begin work analysing material relevant to the case with the assistance and input of the accused and members of the Defence team. A crucial part of this work requires counsel to learn about and to use all legal and procedural mechanisms which are available to obtain information relevant to and supportive of the Defence theory of its case.
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1. Once the Defence sets up its theory of the case and determines how to present it at trial, it must identify
   the appropriate means to achieve such a task. This necessarily includes a thorough investigation
   conducted by the Defence team. Practically speaking the Defence always has relatively limited
   resources for its investigations compared to the ICTY Office of the Prosecutor (ICTY OTP). Regardless of
   that limitation, the Defence investigation is an important part of case preparation. This chapter explains
   the overall process of Defence investigations, including planning, selection of investigators, tasks,
   methods and resources used for this important part of case preparation.

2. In adversarial systems the Defence is usually obliged to conduct investigations on its own. Most countries
   provide for certain mechanisms to assist the Defence in obtaining documents and contacting potential
   witnesses. Nonetheless, in many cases the Defence will come across various obstacles. The purpose of

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this chapter is to assist Defence counsel in learning creative ways in which to overcome these obstacles and to discuss ways in which to perform investigations in the most efficient manner.

3. Legal reforms in the countries of the former Yugoslavia have been undertaken with the aim of introducing aspects of the adversarial system into criminal proceedings conducted in the region. They include the Defence conducting its own investigation of the accused’s case. One of the most significant aspects of defence preparations during such investigations is obtaining exculpatory evidence and making contact with witnesses who can provide relevant testimony in support of the Defence case. The ICTY has extensive regulations and jurisprudence on the right of the Defence to disclose and provides for certain assistance to the Defence in contacting witnesses, which will be discussed in further sections of this chapter.

A. Identifying and Hiring Investigators

4. As mentioned at the beginning of this chapter, Defence resources for investigation purposes are relatively limited. This fact requires thorough planning of the investigation process by the Defence so as to maximize the use of the limited resources which are available.

5. In general, the main elements to be considered when planning an investigation are:

- determining the primary focus of the Defence investigation, including the gathering of documents and identifying potential witnesses;
- ascertaining the territory where the likelihood of finding either documents or witnesses is the greatest;
- assessing the means available for gathering of the documents or location of potential witnesses; and,
- realistically identifying which investigators are most suitable to achieve the desired result.

6. When the Defence has a clear idea of what needs to be achieved during its investigation, it must then embark on the sensitive and important task of finding an investigator. The basic requirements to look for when choosing an investigator is that he or she has a working knowledge of the statutory elements of the crimes and possesses basic investigative skills and techniques.

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1 See Rule 54, ICTY RPE, which provides: “At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”. Similar regimes exist at the IRMCT Rule 55 RPE and at the ICC. Article 57(3)(b) and Article 67(2), Rome Statute; Rule 20, ICC RPE.

2 See Prosecutor v. Ratko Mladić, IT-09-92-T, Trial Judgment, 22 November 2017 ("Trial Judgment"), paras. 109-110. Where Pre-Trial Chamber indicated that the Court prefer evidence be tendered through witnesses because they provide a contextualization generally absent from bar table submissions. The Chamber went on to alert counsel that bar table submissions would only be accepted in extraordinary circumstances.

3 Such fundamental attributes include interview skills, witness management, crime scene documentation, analysis, weaponry, and security, among others.
7. In some countries, investigators have licences to perform this type of work. Where a list of licensed investigators can be obtained, it makes selection of a qualified investigator much easier. Where such a list is not available and Defence counsel has no prior experience in working with investigators, it is advisable to consult with other colleagues who have worked with investigators to get their recommendations.

8. The person hiring an investigator must perform certain “investigations” on the investigator himself. It is necessary to check the investigator’s background, professional qualifications, and work results, where available. After a short list of candidates is made, it is necessary to interview all potential investigators in order to make the final decision as to whom to hire.

9. There are three main categories of investigators:

- **Private investigators** - In a perfect case, the Defence team would be able to hire professional investigators to conduct the investigation on behalf of the Defence. This may often be a problem due to a lack of resources and the fact that private investigators are scarce in the region where the war crimes took place. In war crimes cases, the investigator must have at least a basic knowledge of international humanitarian law. Trials for international crimes before the now extant international criminal courts are still relatively new and only a limited number of people have experience in this field. This problem can be overcome by providing the investigator with very specific tasks outlining in detail what the charges in the indictment are and what is expected to be the outcome of the investigation; that is, what kind of documents to search for and the specific facts to pursue when questioning potential witnesses.

- **Professionals from the respective field** - If unable to hire private investigators, the Defence can opt for professionals who have substantial knowledge in the field that is to be investigated (former police officers, former members of the military).

- **Experienced private investigators** - Experienced private investigators usually have useful connections and have established ways to conduct investigations which are efficient. On the other hand, professionals from their respective fields may have better knowledge on the topic they are asked to investigate, and the final result of the investigation may be more useful.

- **Member of the Defence team** - In Defence investigations it will often be counsel who must conduct investigations themselves due to a lack of resources. When this is the case counsel should always be accompanied by a third party, particularly when questioning witnesses, so that, depending on the outcome of the investigation, counsel does not inadvertently put him or herself in the position of being a witness to the matters investigated at the subsequent trial.
10. A major problem for counsel is obtaining sufficient funds for the remuneration of the investigator. In the case of private investigators, counsel can be faced with the problem of the investigator’s previous obligations for other clients, or new clients appearing in the course of defence investigation, which may undermine the achievement of the results or meeting the timeline set. Professionals from respective fields are in this respect preferable as usually they are involved in only the case at hand and can devote full time to conduct any requested investigation. At the ICTY money paid for investigative work is set by directives which provide for specific, though often inadequate, remuneration for the work of investigators on ICTY cases.4

11. It is always preferable to assign a member of the defence team to participate in the investigation as they will be informed about the particulars of the case. It is also important to have an experienced member of the team with a legal background present during the contacts with potential witnesses to avoid any later allegations of perceived witness intimidation or any other accusations of improprieties.5

B. Creating an Investigative Plan

12. The first step in an effective investigation is to develop a plan.6 The investigation plan then becomes a framework that can be used throughout the investigation to focus each subsequent step. Although each case has its own particulars and each investigation will be different from any other, the investigation team should engage in basic planning to determine the scope and focus of its investigative effort, to allocate resources effectively, and to obtain useful evidence.

13. The outline of the investigative plan should include:

- Allegations: Brief outline of allegations in the indictment for the investigator’s reference, such as: the scope and gravity of the crime, the number of victims, the length of the attack, the extent of the destruction, the role of the accused (especially his position in the political and military hierarchy), the accused’s scope of authority and alleged involvement in the commission of the criminal act as set out in the indictment. If the accused is a superior (under Article 7(3) of the Statute), the defence must also investigate the basis of the crime and the issues relating to the direct perpetrators, because the responsibility of the accused depends on the answers to those questions;

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4 Defence Counsel - Pre-Trial Legal Aid Policy, available at http://www.icty.org/sid/169. Before the ICC, a Defence team also has a fixed budget available for the investigation. See “Guide for applicants to the ICC List of Counsel and Assistants to Counsel”, available at https://www.icc-cpi.int/iccdocs/PIDS/docs/ICC_GuideForApplicants_ENG.pdf


6 See also Chapter III “Defence Strategy”, Section D.5. “Formulating an investigative plan”.

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• Topics: A list of main topics so as to focus the investigation on certain types of documents including documents from certain authorities/organs; documents with certain topics of interest; the specific recipient of the documents; time span etc. The main topics to be discussed with the potential witnesses such as the witness’s role or status at the time, whether they have firsthand knowledge or hearsay evidence, etc.;

• Background: General background information of the case for the investigators;

• Existing evidence (documents, witnesses): Overview and summary on certain topics/allegations by groups of witnesses and/or groups of documents;

• Potential evidence list: List of potential witnesses to be located and interviewed. List of potential documents with a general outline of expected content to be found in those documents or the authority that issued the document;

• Contacts: Institutions and agencies that can provide required documents and contact with potential witnesses;

• Issues to be discussed with each witness: Clear instructions, outline of questions and interview plan;

• Administrative matters checklist: If necessary, notification of the Prosecution; notification of respective institutions about interviewing their employees, etc.;

• Travel plan/ itinerary; and,

• Progress report deadlines: List of dates when progress reports must be submitted. This is essential for counsel’s control of the investigation process.

C. Considerations Regarding Use of Resources

14. Sufficient resources are necessary in order to conduct a thorough investigation. Since Defence teams generally must function with very limited resources and time constraints, detailed planning on how to conduct investigations without putting an unnecessary burden on those scarce resources is crucial for success. It is in the interest of all members of the Defence team to work together to focus investigations on the key issues, to examine the evidence pertaining to those issues and to seek early resolutions.

15. In this regard, Defence counsel should:
• Identify priorities (focus on charges where the Prosecution’s case seems to be the strongest). Prior to starting its own investigation, the Defence needs to thoroughly review the indictment and material supporting the indictment, including all documents and witness statements provided by the Prosecution. In the process of that review, the Defence needs to identify what counts of the indictment seem to be supported by the most credible and probative evidence and to focus on identifying evidence that could sufficiently challenge that Prosecution’s evidence;

• Identify documents that can be obtained through third parties (disclosure from the Prosecution or through cooperation with state institutions or other means without using manpower to avoid travel costs);

• Identify limited information requests that can be accomplished without using many resources. Saving time and resources is very important for the Defence. The Defence must evaluate what is the most efficient and cost-effective way of obtaining evidence and conducting investigation. For example, if the Defence is aware of the existence of a certain document and what institution it can be obtained from, a written request to that institution is preferred over sending an investigator to review their archives;

• Determine reliable sources of information. Throughout the preparation phase, the Defence must make sure that the most credible evidence is chosen. For example, the Defence will probably be able to find several witnesses that can discuss the same topic. Before spending time and manpower in interviewing all the witnesses, the Defence must determine who are the most credible witnesses that the Trial Chamber is likely to believe and whose credibility is likely not to be diminished during the cross-examination;

• Consider telephone interviews and interviews via the internet. Video allows the Defence to get an impression of the demeanour of a witness when giving testimony. It can also be effectively used for updates from investigators and other members of the Defence team, which is cost effective as it saves resources for travel.

• Put in place an efficient management system for organizing evidence as it is gathered. In cases involving war crimes, crimes against humanity and genocide, it is likely that the amount of evidence provided by the Prosecution and gathered by the Defence will be overwhelming. Efficient management of evidence can significantly reduce the time necessary for preparation of the Defence case. All evidence obtained must be sorted by topic and by the witness the Defence plans to tender it through. Creating a timeline of available evidence will be useful in identifying documents at a later stage of the proceedings.

• Perform periodic review and discussions. The Defence team must periodically review the progress of investigations and determine future plans and tasks for each of the team members. Defence
meetings for review of the progress and analysis of gathered documents are essential for case preparation as well as effective use of resources.

- Avoid overlapping. Any overlapping of work is a waste of precious time. Each member of the Defence team must have specific tasks making sure that those tasks do not overlap with other team members. In reality, various sources may result in obtaining the same or similar information. Timely coordination and periodic discussion of the investigation progress between team members will diminish the chances of or prevent overlapping of time and resources.

- Make use of technology to conserve resources, mixing innovative and traditional investigative tools.

16. Careful planning, taking into consideration all the aforementioned priorities, should lead to a successful investigation, resulting in the most probative and relevant documents being collected as well as in the selection of the most credible witnesses. It is crucial that thorough investigation is conducted in the pre-trial phase and that further investigation is limited to new issues that arise during the trial.

17. Properly conducted investigation in the pre-trial phase enables Defence counsel not only to successfully challenge evidence tendered by the Prosecution but to also effectively present the defence case theory, whenever possible, during the Prosecution’s phase of the trial.

D. Interviewing Witnesses and Obtaining Statements

18. Preparation is the key to successful witness interviews. Defence counsel must prepare an interview plan, consider the place of the interview, study the various interview processes and decide whether or not it is advisable to interview Prosecution witnesses.

D.1 Interview Plan

19. The Interview Plan lists the witnesses the Defence team plans to interview, the order of the interviews, the issues to be discussed, and the questions that need to be asked. It is likely that information can be obtained from several witnesses. As a part of the interview plan, the Defence must determine who are the most credible witness that can provide the most accurate account of events. After selection of witnesses is made, an interview plan for each of the witnesses needs to be prepared. Interviewers must consider different interview approaches depending on the type of witness he or she is to interview.

20. The Interview Plan should include:

- Witness Profile: basic information about the witness: e.g. name, address, phone number, occupation;
- comments about the witness's personality or demeanor: e.g. friendly, neutral, hostile; and about the type of witness they are: victim, eyewitness, character witness;

- other identify factors: e.g. religion, culture, race, or any type of impairment (psychological, physical)

- Tentative questions for each witness:

- Generally, the interviewer should start with open-ended, general questions leading to more specific inquiries. The interviewer needs to decide whether to write down a list of specific questions to ask the witness or whether to draw up a general outline of topics to discuss with the witness. Writing down specific questions may be desirable if there are technical issues to be discussed. In all other cases, a general outline is usually preferable as it prevents the interviewer from focusing on reading the questions instead of on the answers provided by the witness and decreases the likelihood that the interviewer will fail to ask necessary follow-up questions;

- Document Lists:
  - a list of documents the Defence expects to obtain from the witness; and,
  - a list of documents the Defence intends to show to each witness; and,
  - a list of questions or issues to be covered during the interview, if any, related to those documents.

21. Prior to interviewing a witness, an investigator needs to obtain all relevant information about the witness.\(^7\) If the witness has been interviewed by the police or Prosecution, review of his previous statements is essential in preparation for the interview. The investigator should never assume that the information contained within previous witness statements is completely accurate, especially if the statement is not signed. Very frequently, these statements have been reduced to what the previous interviewer found to be “essential information”.

D.2 Place of Interview

22. The choice of venue may be important for the interview. If necessary and available, the crime scene is the best place to interview witnesses that can provide information about concrete crimes, especially if eyewitnesses are being interviewed. Interviews at the scene of the crime allow the interviewer to gain a deeper understanding of what occurred and may trigger better recall on the part of the witness. The interviewer should remain cognizant, however, if the witness is a victim, of the possible effect returning

\(^7\) This can include witness statements, exhibits, and any other supporting documents.
to the scene may have. In any case, the investigator should try to interview a witness outside his home or workplace, unless the witness insists otherwise.

D.3 Interview Process

23. The interview should start with a full introduction of the investigator to the witness in order to build rapport, a short explanation of the purpose of the interview and the structure that the interview will take. Any information given to the witness about the case should be limited to the minimum necessary in order to avoid influencing the witness’s statement.

24. Throughout the course of the interview, the investigator must remain professional and treat the witness with respect, no matter what the witness claims in his or her statements. The investigator should never give false information to the witness. Special attention is to be paid to interviewing victims of a crime. The investigator should find a proper balance between the need to extract as much information as possible and the need to avoid upsetting the witness by making him or her relive the past trauma. The witness should be given an opportunity to speak freely with as little interruption as possible. A witness should be interrupted with questions only when it is necessary to clarify his statement. Witnesses are often unable to determine what is important and relevant for the investigation. If the witness veers too far from relevancy, the investigator should politely try to refocus the witnesses’ statement and let him or her talk about irrelevant issues only if it seems extremely important to the witness and may therefore further the course of the interview.

25. The investigator should let the witness talk and listen to what the witness is saying without undue interruptions. It is important to also pay attention to non-verbal communication. During the interview, the investigator must assess:

- bias;
- personal interest in the case;
- frankness, attitude towards the accused; and,
- anything else that could potentially impact the credibility of the witness.

26. All observations by the investigator should be entered into a witness evaluation sheet shortly after the interview. The witness’s demeanor may influence the legal team’s decision about calling the witness to testify before the court. Whether or not the investigator takes notes during the interview is a stylistic choice that hinges on whether the interviewer feels that the benefits of taking notes during the interview outweighs the risk that the investigator may alienate the witness with note-taking, miss information or fail to notice the demeanor of the witness as he or she speaks.
D.4 Interviewing Technique

27. The investigator may decide to ask a witness to write down a statement and ask follow-up questions later. This may make the witness more comfortable and save time for the investigator. However, just collecting a written statement deprives the investigator of the ability to evaluate the witness’s demeanor, control the information entered into the statement as well as the opportunity to streamline the witness’s statement.

28. Defence counsel and investigators should opt for the interview of witnesses and not the interrogation of witnesses. Interviews are cooperative, informal meetings where the interviewer approaches the witness as an equal and encourages their cooperation, allowing him or her to talk without interruption or intimidation. By contrast, “interrogation” implies some form of unequal questioning process done on a formal or authoritative level.

29. Interviews should not be done by more than two interviewers. One-on-one interviews make witnesses more comfortable as they give the impression of a conversation rather than an interrogation. The presence of two interviewers is desirable if the interview is not tape recorded or filmed where one can take notes and intervene only if something is omitted by the main interviewer. Using two interviewers will minimise the likelihood that the investigator and the witness will disagree as to what happened during the interview after it is completed. The investigators may also decide to switch roles as topics change.

30. At the end of the interview the interviewer can ask the witness to sign a statement. This is not an obligation. However, by signing a statement the witness confirms that the information contained therein is truthful and to the best of his or her knowledge, which may be important in the course of the later trial. This is specifically important if the witness changes his or her testimony, as it permits the witness to be confronted with the previous statement and asked to explain the reasons for any changes in the trial testimony.

D.5 Interview of Prosecution Witnesses

31. Interviewing Prosecution witnesses is recommended whenever the witness agrees to be interviewed by the Defence. By conducting such interviews, the Defence gets a much better picture of what the witness will testify to in court. In addition, and perhaps more importantly, it provides the Defence with the opportunity to assess the witness’s demeanor and choose the appropriate strategy for approaching the witness during cross-examination.
32. While interviewing Prosecution witnesses the Defence sometimes learns that the witness for the opposing party actually reinforces the defence theory of the case. This usually occurs because the Prosecution followed an essentially interrogatory approach when interviewing witnesses rather than an open interview. Such an approach often results in the witness concentrating only on questions posed by the Prosecution, instead of just telling his or her whole story. When the witness is given the opportunity to speak in a relaxed manner and explain his views on certain issues, it is often the case that the witness has information beneficial for the Defence theory of the case; information the Prosecution simply overlooked. It goes without saying that such an opportunity should not be missed.

E. Identifying and Working with Expert Witnesses

33. Defending a case involving international crimes before the ICTY or any other tribunal is a very complex task. One of the major problems that the parties are faced with is the specialized knowledge relevant for the case, tried before international judges. This is the case, for example, with the constitutional and legal systems in the conflict zones at issue or police and military structures, all of which requires access to specialized expert knowledge.

34. The ICTY RPE regulates expert testimony in Rule 94 bis. The decision of the Defence team to call an expert witness at trial is, as with most trial issues, dependent on the specifics of the case and the Defence theory of the case. Identifying expert witnesses can be a complicated task. Since the subject is also addressed in other parts of this Manual, the most important qualifications and conditions required for an expert witness will be listed here with brief explanation on each:

- Knowledge: An expert must possess relevant specialized knowledge required through education, experience or training in the proposed field of expertise;

- Assistance: An expert must be able to “assist the Chamber to understand or determine an issue in dispute and the context in which it took place;”

- Impartiality: Expert witnesses must be impartial evaluators of the facts. If an expert “is too close to the team, in other words to the Prosecution presenting the case,” he or she should not be regarded as an expert due to a lack of impartiality.” An unfortunate precedent has been created before ICTY in this respect, however. In a number of cases the Trial Chambers accepted employees

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8 Rule 94bis, ICTY RPE. And see Rule 116,IRMCT RPE. Similarly, ICC regulates expert witnesses through Regulation 44, ICC Regulations.
9 See Chapter VII “Witnesses”, Section C. “Expert Witnesses”.
10 See Prosecutor v. Brima, SCSL-04-16-T-365, Decision on Prosecution request for leave to call an additional witness (Zainab Hawa Bangura) pursuant to Rule 73 bis (E), and on joint Defence notice to inform the Trial Chamber of its position vis-à-vis the proposed expert witness Mrs Bangura) pursuant to Rule 94bis, 5 August 2005; Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Decision on Defence preliminary challenges to Prosecution’s expert witnesses, 9 February 2016.
11 Prosecutor v. Milutinović et al., TC Decision, 13 July 2006; Appeal Denied by TC on 30 August 2006.
or former employees of the ICTY OTP\textsuperscript{12} as expert witnesses despite seemingly clear indicia of prosecution bias and repeated objections by the Defence.\textsuperscript{13}

35. The background, training, and professional qualifications of an expert witness are the key elements needed to ensure the quality and objectivity of the expert opinion. The expert must be carefully chosen by the Defence after consultations concerning the work, writings, and experience both practical and academic in his or her given field of expertise. This will involve both meeting the expert and reading his or her publications. If the expert has previously testified, the trial transcripts and expert reports filed in those proceedings must be analysed.

36. The practical benefit for the Defence in calling an expert witness is not only the expert trial testimony regarding findings and conclusions reached which support the Defence theory of the case, but also that relevant documents referred to in the expert’s written reports will be admitted in evidence if the report itself is offered and admitted in evidence.

F. Prosecution Disclosure

37. Disclosure by the Prosecution is a key part of the Defence investigation.\textsuperscript{14} Disclosed information will provide the Defence with documents it would otherwise have taken a large amount of time and resources to find and also will be a starting point for the Defence investigation itself. However, it is essential for the Defence to check the validity of Prosecution evidence. Never simply assume it is all correct, reliable or authentic.

38. The Defence investigation is hindered by the fact that, although the Defence can request further disclosure from the Prosecution, there is no mechanism by which it can find out which documents are in the possession of the Prosecution. This makes it difficult for the Defence to be able to request documents that may aid its investigation.

39. At the ICC, Rule 121(3) requires the Prosecution to provide all relevant disclosure in its possession 30 days before the date of confirmation of charges. Despite this rule in practice Defence counsel have had to consistently deal with late Prosecution disclosure at the ICC, at times leaving the Defence teams

\textsuperscript{12} Prosecutor v. Mićo Stanišić and Stojan Župljanin, IT-08-91, Written Reasons for the Trial Chamber’s Oral Decision Accepting Dorothea Hanson as an Expert Witness, 5 November 2009.

\textsuperscript{13} One of the very few decisions in favour of the Defence was rendered in the Milutinović case: Prosecutor v. Milutinović et al., Oral Decision. T: 840-844, 13 July 2006. The Trial Chamber held that the Prosecution expert called at trial “is too close to the team, in other words to the Prosecution presenting the case, to be regarded as an expert.”; also see “Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo’s Expert Report”, 30 August 2006. This case is also discussed in Chapter VII, “Witnesses.”.

\textsuperscript{14} For further discussion on Prosecutor disclosure, see Chapter III “Defence Strategy”.

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without sufficient time to conduct an effective Defence investigation and without effective means for remedying that situation.  

40. At the ICTY prosecution disclosure is governed by Rule 66 (A) and (B) (Disclosure by the Prosecutor) and Rule 68 (Disclosure of Exculpatory and Other Relevant Material).  

41. Rule 66(A) provides that material in support of the indictment and any prior statements of the Accused must be provided to the Accused within 30 days of the Accused’s initial appearance. Other Prosecution evidence, such as statements of all witnesses the Prosecution intends to call at trial, transcripts and written statements the Prosecution will seek to admit at trial and copies of statements from additional witnesses must be provided according to dates set by the Trial Chamber.  

42. Because the Accused has the right to know the case against him or her and the right to adequate time and facilities to prepare a defense, an essential element of Rule 66(A)(ii) is that disclosure is timely. When the Prosecution violates Rule 66(A)(ii), the Defence can move the Chamber to exclude the evidence in question or request that any affected witnesses should not be allowed to give evidence, if the failure of disclosure resulted in prejudice to the Accused so as to jeopardize the right to a fair trial. At the ICC the Prosecution’s willful failure to disclose exculpatory evidence resulted in the stay of all trial proceedings in the Lubanga case, although this kind of remedy has been exceedingly rare. The mere fact of late disclosure, however, is not reason to impose sanctions on the Prosecution absent a showing of prejudice to the Accused.  

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15 Prosecutor v. Bahar Idriss Abu Garda, ICTY-02/05-02/09, Prosecution’s Communication of Incriminating Evidence Disclosed to the Defence on 14 and 17 September 2009, 18 September 2009. The DCC and final substantive Prosecution disclosure in Mr. Abu Garda’s case took place a few days before the prescribed deadline. The PTC viewed this delay very critically in the subsequent case against Mr. Banda. See Prosecutor v. Banda, ICTY-02/05-03/09, Transcript of Status Conference, 14, 23 June 2018.  

16 Similar provisions exist in the criminal procedure codes of the countries of the former Yugoslavia (Criminal Procedure Code of BH, Article 47(1), Criminal Procedure Code of BH, Article 14(1), Criminal Procedure Code of Serbia, Article 170(5); Criminal Procedure Code of Montenegro, Article 72; Criminal Procedure Code of Croatia, Article 68). See Rule 71(B) and 73, IRMCT RPE. At the ICTC, the relevant provisions are Article 67 (2) of the Rome Statute (Disclosure by the Prosecutor), Rome Statute; and Rule 76 and 77 of the ICC RPE (Disclosure of Exculpatory and Other Relevant Material), ICC RPE.  


18 Prosecutor v. Stanisic & Zupljanin, IT-08-91-PT, Decision on Joint Defence Motion Requesting Preclusion of Prosecution’s New Witnesses and Exhibits, 31 August 2009.  

19 Ibid, at para. 19. Because “[t]he purpose underlying Rule 66(A)(ii) is to enable the Defence to confront witnesses with all their prior statements and transcripts and because “the provision is of fundamental importance to the Accused’s right to a fair trial,” the Trial Chamber threatened to exclude the Prosecution’s Rule 65 ter lists and stated it was considering whether to allow them to give evidence at all after the Prosecution failed to disclose the outstanding material on time without any legal justification.  

20 Rule 89(D), ICTY RPE. Prosecutor v. Karadzic, IT-95-5/18-T, Oral Decision on Accused’s Twenty-Sixth Disclosure Violation Motion, 3 November 2010, paras. 26-8.  

21 See Prosecutor v. Thomas (Lubanga Case), ICC-01/04-01/06-2582, Appeals Chamber: Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 entitled Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143, 8 October 2010, para. 58, where the Appeals Chamber found that “If a Trial Chamber loses control of such a significant and fundamental part of proceedings because of the Prosecutor’s refusal to comply with its orders, it would indeed be impossible to ensure a fair trial, and a stay of proceedings would then be justified.”  

43. Probably one of the most contentious issues at the ICTY is related to the Prosecution’s disclosure obligation under Rule 66(B) of the ICTY RPE.\(^\text{23}\) This issue goes to fundamental rights of the accused guaranteed by the Statute,\(^\text{24}\) as well as the integrity and fairness of the proceedings against the accused. According to the ICTY jurisprudence,\(^\text{25}\) in order to meet the criteria set forth in Rule 66(B), to obtain disclosure in the possession of the Prosecution which does not fall under other provisions of Rule 66(A) or Rule 68 (regarding exculpatory evidence), the Defence must:

i. demonstrate that the material sought is in the custody or control of the Prosecution;
ii. establish *prima facie* the materiality of the documents sought to the preparation of the Defence case;\(^\text{26}\) and,
iii. specifically identify the requested material.

44. The consequence of this jurisprudence is that it leaves ambiguity as to what level of specificity a Defence request is required to contain. It can put the Defence in the awkward situation between the need to be specific in its request for disclosure and the fact that the Defence does not know what documents in fact exist in the Prosecution’s database. These circumstances require very careful drafting of the request for disclosure based on rule 66(B). It is good practice to make the specified request early on, during the pre-trial phase so as to have ample time to deal with these issues at length. The most common situation is that the Defence request is denied by the Prosecution as too broad and not specific enough for it to identify which documents to look for.

45. Rule 68 imposes a strict obligation on the Prosecution to disclose to the Defence all exculpatory material. This obligation can be a burden for the Prosecution as it requires them to conduct periodic searches of its evidentiary data base for exculpatory documents. Rule 68(ii) provides that the Defence may have access via the internet to collections of material held by the Prosecution in electronic form, through the Electronic Disclosure System (EDS) at the ICTY and ICTR. The Prosecution may satisfy its Rule 68 obligations by placing material on the EDS in a separate folder and notifying the accused of material posted there.\(^\text{27}\) Nevertheless, the existence of the EDS system or other electronic databases does not relieve the Prosecution of its duty to timely disclose exculpatory material to the Defence.\(^\text{28}\)

\(^{23}\) Rule 66(B), ICTY RPE. Rule 71(B), IRMCT RPE. Rule 77, ICC RPE.

\(^{24}\) Article 21, ICTY Statute. Article 19, IRMCT Statute.

\(^{25}\) See, i.e., *Prosecutor v. Boškoski*, IT-04-82, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66(B), 31 January 2008. The ICC, under Rule 77, has adopted three requirements: first, documents are material to the preparation of the defence; second, documents are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial; or third, documents were obtained from or belonged to the person; see also, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses, 12 November 2010.

\(^{26}\) *Prosecutor v. Nizeyimana*, ICTR-2000-55C-PT, Decision on Urgent Pre-Trial Motion for Disclosure re Binaifer Norwojee, 11 January 2011, para. 5.


46. The remedies available for the Defence for violations of Rule 68 are provided for in Rule 68 bis of the ICTY RPE. From the Defence perspective one meaningful sanction in case of late disclosure from the Prosecution would be to prohibit the Prosecution from using documents which were not timely disclosed during cross-examination of any effected Defence witness. However, Counsel should carefully consider the consequences of any remedy which is sought as the Defence might risk that the judges will see this as a way to protect the credibility of the witness based on a technicality, rather than actual concern for the fair trial rights of the Accused.

47. It is also possible that the Prosecution may assert the certain evidence, regardless of its probative value, cannot be disclosed pursuant to Rules 66(C) and Rule 70 of the ICTY RPE. Under these rules items of evidence may be withheld by the Prosecution if their disclosure would:

- prejudice further or ongoing investigations;
- be contrary to the interest of justice; or,
- affect the security interest of a state.

48. In such a case the Defence can request application of Rule 54 bis, which is discussed in the next section of this chapter, and seek the Trial Chamber’s intervention in obtaining release of the evidence.

49. At the ICC the practice has developed to disclose witness statements and other crucial trial evidence only in redacted form so as to protect the identities of protected witnesses or “others at risk on account of the activities of the Court.” This can result in the production of witness statements, for example, that are nearly useless or of very limited value for investigative purposes since the names of all witnesses, the location of alleged crime scenes or other identifying information has been removed from the disclosed documents. The trend at the ICC is that such redactions are lifted by the Prosecution only in a piecemeal fashion, over an extended period of time, further delaying any effective Defence investigation. The Defence has raised and continues to repeatedly raise objections to these procedures.

50. Where the Prosecutor intentionally fails to disclose material through significant redactions, the Chamber can issue a stay of proceedings. While a stay of proceedings is drastic remedy, as it halts proceedings

29 Rule 68 bis, ICTY RPE. Rule 74,IRMCT RPE.
30 See Chapter III “Defence Strategy” Section D.3 and Chapter 7 “Witnesses”, Section E. for a discussion on Rule 70 witnesses.
31 Prosecutor v. Katanga, ICC-01/04-01/07, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, 13 May 2008. A similar practice was followed at the ICTY and ICTR to protect the identities of protected witnesses up to the time such witnesses would be called to testify at trial. In general, although not always, such redactions were lifted within 30 days of the date upon which the witness would testify at the ICTY.
33 See Prosecutor v. Thomas (Lubanga Case), ICC-01/04-01/06-2582, Appeals Chamber: Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I of 8 July 2010 entitled Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143, 8 October 2010, para. 55.
and potentially frustrates the objective of the trial itself, “[t]he Appeals Chamber has held that ‘[w]here a fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial.”34 “If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.’”35 While this avenue of action is a possibility to be kept in the back pocket of Defence counsel, because such a high threshold is attached to an imposition of a stay on proceedings, easier forms of recourse should first be pursued.36 “A Trial Chamber faced with a deliberate refusal of a party to comply with its orders [to disclose] which threatens the fairness of the trial should seek to bring about that party’s compliance through the imposition of sanctions under Article 71 before resorting to a stay of proceedings.”37

**G. Obtaining Archival and Other Documents**

51. In cases before the ICTY, should a public authority refuse access to information, the defence investigation may apply directly to the Tribunal for an order that a State produce documents, pursuant to Rule 54 bis of the ICTY RPE.38

52. This Rule has been applied in a number of ICTY decisions.39 A request is made by the Defence to a State for documents which the State refuses to produce. The Defence then refers the request to the ICTY, which makes a binding order.

53. Under Rule 54 bis, the ICTY may order a State to produce evidence if the Defence:

1. identified as far as possible the documents or information to which the application relates; and,
2. indicated how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter.

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34 Ibid.
35 Ibid.
36 Ibid. The Trial Chamber will issue a stay for the Prosecutor’s failure to disclose where defence can show that “it be impossible to piece together the constituent elements of a fair trial” without the redacted information.
37 Id. at para. 59. See also Chapter 12 “Contempt of Court”, where Article 71 sanctions and prosecutorial compliance are covered in greater depth.
38 Rule 54 bis, ICTY RPE. Rule 56, IRMCT RPE. Under the Rome Statute, Article 57 (3) and 93 allow the Defence to request the Court to ensure that a State co-operates in producing documents.
39 See, Prosecutor v. Karadzic, IT-95-5/18-PT, Decision on the Accused’s Application for Binding Order Pursuant to Rule 54 bis (Austria), 15 October 2009; Decision on the Accused’s Application for Binding Order Pursuant to Rule 54 bis (Federal Republic of Germany), 19 May 2010; Decision on Accused’s Motion (The French Republic), 30 June 2010. The ICC has also sought co-operation from States where the Defence is unable to procure documents in the first instance. See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)”, 25 April 2008. The ICC has also sought co-operation from States where the Defence is unable to procure documents in the first instance.
54. In applying Rule 54 bis, the Tribunal has interpreted the requirements by holding that the requesting party must define the documents with sufficient clarity to enable easy identification by the State. This does not require that the documents be defined by date, title or author.\(^{40}\) It has also held that the requesting party need only make a reasonable effort before the Trial Chamber to demonstrate the existence of the documents.\(^{41}\) The requesting party only needs to show that it has exercised due diligence in attempting to find the documents and has been unsuccessful.\(^ {42}\) However, the prerequisite for implementation of these provisions is that the Defence must approach the State institution or other organization with the proper request for disclosure and take all reasonable steps to obtain the document(s) requested.\(^{43}\) Further the Defence must establish why certain document(s) are relevant for the proceedings in question.\(^ {44}\)

55. Usually it suffices that the Trial Chamber issues an invitation for cooperation with the Defence and disclosure of certain materials to the State in question.\(^ {45}\) The States can claim national security interests or the “originator principle” when such motion is filed and then obtain protective measures or even a refusal to issue a binding order to produce documents in its possession that was shared with it by another State. In such a case the Defence may seek variation of protective measures and request disclosure of that material, which may be subject to certain redactions in the interest of State security. It is important that the Defence explains to the Trial Chamber that it is in the interest of justice that such documents are disclosed to the Defence and that the State security can be preserved by those documents being used only during closed session proceedings.

56. Practice at the ICTY indicates that the Defence must first use all the available means in searching for and attempting to gather documents, and only then should it turn to the court to seek issuance of binding orders. When the Defence has to request a binding order from the Chamber, it usually results in significant delays to the Defence investigations, and frequently the request cannot be fulfilled, in totality or partially, even with the court's support.

\(^{43}\) *Ibid.*, at para. 32.
\(^{45}\) *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Joint Defence Motion for Issuance of an Order of Mandamus, 13 May 2019, p. 3.
**Conclusion**

57. As discussed above, Defence investigation is the key phase for preparation of the Defence case. The investigation starts as soon as the Defence team is established and lasts throughout the pre-trial and trial phase. It may continue even through the appeals stage of the proceedings.

58. The final outcome of the investigation and subsequently the Defence case largely depend on detailed planning of the investigation process. Well-performed investigations will result in the selection of the most credible witnesses, documents and other material that can support the Defence theory.

59. Defence counsel must make sure that he selects the most qualified and efficient investigators. The investigators must provide counsel with regular reports on their work so necessary adjustments can be made in a timely fashion.

60. Throughout the investigation phase the Defence is likely to come across various obstacles (difficulties in finding witnesses, documents, obstruction by the Prosecution or State authorities etc.). When that occurs counsel will have to, as discussed in this Chapter, resort to the most efficient way of overcoming these obstacles.
V. STRUCTURING A LEGAL ARGUMENT

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1. Defence counsel practising before the ICTY play a fundamental role in safeguarding the rights of the accused by ensuring that the accused’s interests are represented at trial; a role that has proven particularly important due to the complex and novel legal theories developed by the ICTY in the area of international criminal law. In fact, it is often the case that Defence counsel is faced with judges and/or opposing counsel who, despite long and distinguished careers in the law, are new to the hybrid system of the ad hoc Tribunals and the methodology of developing customary international law.

2. In this regard, Defence counsel’s ability to craft persuasive legal argument has proven essential not only for the effective representation of the accused, but also for the development of substantive and procedural legal standards that will have a lasting impact on the field of international criminal law. Indeed, when addressing arguments to judges that are trained in a particular domestic legal context, be that civil or common law, counsel must be especially skilled in presenting well-organized arguments that are clear and convincing. While the need for this skill has been especially important in relation to less-developed standards of international criminal law, it remains the essential skill for any Defence counsel looking to best represent his or her client’s position, regardless of the legal problem at hand.

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3. The ultimate goal in persuasive argument is, of course, persuading the Chamber that the legal position taken is the correct one. In order to be persuaded, the Chamber must be able to follow the argument’s logical progression in such a way that at the point a conclusion is reached, it is understood to be the only logical conclusion. As such, the structure and organization of legal argument is essential to convincing the Chamber of the legal position being put forth.

4. This chapter will first give some general notes on researching and preparing a legal argument, introducing the argument to the Chamber, and stating the facts upon which the argument is based. The chapter will then proceed to outline a recommended, basic organizational structure for a legal argument, better known as “IRAC” (Issue, Rule, Analysis, Conclusion). Finally, the chapter will show how this basic argument structure has been put into practice at the ICTY, using specific examples from motions, briefs, and various forms of oral argument.

A. Research and Preparation

5. It goes without saying that it is essential to know the law in order to argue a particular interpretation of the law. Conducting in-depth legal research to see how the law has been developed and applied in other cases is not only essential to making sound legal arguments, but also to displaying the confidence and thoroughness that is necessary to persuade the Chamber. More importantly, knowing the legal standard, and all its elements, is necessary to be able to identify the relevant facts and the legal issues presented by those facts. Thus, the first step in preparing legal argument is to conduct the necessary legal research.

6. After completing the necessary research, the relevant legal standard, whether it be a legal test based on case law or a statutory provision, should be used to give context to drive the organization of the argument. For instance, the law of superior responsibility, codified in Article 7(3) of the ICTY Statute, has three essential elements:

   • the existence of a superior-subordinate relationship;
   • knowledge of the superior/accused that his subordinate had committed or was about to commit an act proscribed by the Statute; and,
   • the failure of the superior/accused to prevent or punish the act.

7. Thus, the main issues that need to be addressed in any argument involving allegations of superior responsibility will be whether there was a superior-subordinate relationship, whether the superior possessed the requisite knowledge, and whether the superior failed to prevent or punish the alleged crime of the subordinate. The most logical organization of this analysis would be to follow the statutory provision. This is true not only because the statutory or jurisprudential construction will likely already be organized in the most logical way, but also because the Chamber will expect counsel to follow the
same organization and may get lost if counsel chooses to rearrange the issues. Additionally, if one of these elements is not adequately addressed, the failure to do so will undermine the overall legal argument.

8. Each legal element will likely include sub-elements or factors that have been developed in the case law which should similarly dictate the internal organization of the legal argument. Using again the law of superior responsibility as an example, the ICTY jurisprudence has developed a list of factors that indicate the existence of a superior-subordinate relationship; the first element of that is the mode of liability. While it is often a safe approach to stick with the organization of the factors as laid out in the case law, there may be more flexibility here in terms of the order in which each factor is addressed. In general, the best approach is to organize the factors by placing the strongest arguments first, which is where the Chamber will focus most of its attention.

9. Weaker arguments can be addressed thereafter, followed by a reiteration of the stronger arguments and how they relate back to the larger issue and constitute support for the main position. This final step is crucial because the Chamber will need to constantly be reminded of the ultimate legal position and how each section relates to it.

B. Introducing the Argument to the Chamber

10. It is essential in any pleading to first introduce the general issue and structure of the argument to the Chamber. Not only does this serve to prepare the Chamber for what is to follow, but it can also serve as a useful benchmark for counsel that can be revisited in order to ensure that the argument is progressing logically.

11. The two basic components of the introduction should be a thesis statement and a roadmap. The thesis statement is essentially the conclusion to which the legal argument will lead and that counsel wants the Chamber to reach based on the submission. It is necessary to state the thesis clearly at the very outset so that the Chamber hears the subsequent argument with this ultimate proposed conclusion in mind from
the very beginning. This will also aid the Chamber in understanding counsel’s argument as to each new issue and analysis in the context of the overall thesis.

12. The roadmap, on the other hand, is merely an organizational tool to aid the Chamber in navigating counsel’s legal and/or factual analysis as well as to assist counsel in staying on track. It consists of a brief overview of the organizational breakdown of the argument which will serve as a set of guideposts for the Chamber as the argument progresses.

C. Stating the Facts

13. An effective statement of facts is a crucial step in creating a persuasive argument because it can be crafted in such a way to begin convincing the Chamber of counsel’s ultimate legal position, even before the legal argument itself is laid out. Hence, the statement of facts should include those facts that are relevant to the legal argument. It should present the facts in such a way that the reader, be it the Chamber or others, will be convinced of and share counsel’s view of the overall factual scenario. In terms of organization, the relevant facts should be presented chronologically. Chronological organization permits the Chamber to understand and follow the facts as a story. However, while telling the story, counsel should craft the language, whenever possible, to subtly reinforce the overall factual scenario that will most strongly support the legal argument to follow. Facts which are relevant to the case but adverse to counsel’s position cannot be left out or ignored. Leaving out adverse, yet relevant, facts only highlights their seeming importance to the discerning judge. Counsel also has an ethical obligation not to mislead the Chamber as well as the duty to assist the Chamber in finding the truth. The key to an effective argument is to include relevant, adverse facts, but to present them in such a way as to diminish their importance and to highlight facts that are supportive of the accused’s defence.

14. There are many ways to craft a persuasive statement of facts. In addition to a careful choice of words, there are structural devices that allow certain facts to be emphasized while others are diminished. Although the statement of facts should always follow a chronological progression, there is flexibility within this structure. The goal always remains the same: to persuade the Chamber of the legal position being advocated.

15. Many examples can be given to show how the order of sentences and even the internal structure of a sentence can be used to effectively and honestly present a summary of the facts most sympathetic to counsel’s legal argument. Overall, the goal is to emphasize the facts most helpful to the argument at issue, while remaining both frank and thorough. Although adverse facts cannot simply be avoided, a careful choice of wording and syntax can diminish their impact thereby contributing to the
persuasiveness of counsel’s argument even before the analysis of those facts under the applicable law is presented.

D. Applying the Law to the Facts: IRAC

16. The clearest and most effective way to structure a legal argument, especially for those who are new to legal writing of this kind, is to follow the “IRAC” organization, which stands for Issue, Rule, Analysis, and Conclusion. This step-by-step organizational scheme will not only help to make sense of the often complex web of law and facts at issue in a case, but will also enable counsel to present his or her thoughts to the Chamber in a logical progression that can be easily followed. This organization also aids in parsing out the key issues and the relevant facts so that the Chamber can more easily digest difficult, complex legal and factual issues in a fashion which persuades them to view the case from counsel’s perspective.

D.1 Issue

17. The first element of the IRAC organizational scheme is the identification of the relevant issues to be discussed and the presentation of those issues in a manner which reflects counsel’s view of the problem even before the analysis is explained. Thus, the “I” in IRAC can be broken down into two essential steps: identifying the relevant issues (based on the legal standard being addressed) and presenting them in a persuasive manner. The identification of the issues that need to be addressed will depend on the law and as discussed above, conducting thorough legal research is the first step to any analysis. The issues must then be organized according to the legal elements so that the analysis follows a logical progression that clearly addresses each legal element.

18. The second step is merely a matter of asking the question (presenting the issue) so that it suggests the desired answer (the conclusion). A typical example can be seen in the way that the same issue might be presented by the appellant and the respondent in an appeal. Thus, in a situation where the Trial Chamber has ruled favourably for the Prosecution and the Defence seeks to appeal that decision, the Defence would present the issue as one which reflects that the Trial Chamber erred in deciding the legal issue outside of its proper exercise of discretion, whereas the Prosecution, addressing the same issue, would likely characterize it as a decision which rightly fell within the broad discretionary powers of the Trial Chamber. The difference is subtle, but effective.

D.2 Rule

19. The next step in the IRAC organization is presenting the applicable law. Here, again, the key is to present the law in such a way as to support the interpretation of the law that is being advocated as well as its application to the particular facts of the case (which will follow in the Analysis). If the applicable law includes a statutory rule, the rule is most often included in its entirety, using the exact wording of the
rule as presented in the Statute. However, rules can also be paraphrased, as long as the essence and true meaning of the rule is not distorted. For example, at the ICTY motions are often based, at least in part, on Article 21 of the ICTY Statute which delineates the “Rights of the Accused”. While the Article itself includes four general requirements, with the fourth requirement containing seven specific elaborations, these are often summarily referred to as Article 21 “fair trial rights” and/or “equality of arms.” A lengthy or very commonly used article or rule like this can, when appropriate and when conducive to the argument at hand, be referred to in this kind of abbreviated form. Not every provision of every rule needs to be quoted in full. In general, it is more effective if the wording of the specific parts of a rule on which the argument is based are set forth verbatim. This is sufficient to present a well-grounded argument and assists the Chamber by directing its focus to those parts of the rule upon which counsel is relying.

20. Similar guidelines may apply to rules derived from case law. It is important to use the exact wording as much as possible when relying on specific provisions established by case law (while, of course, respecting all necessary quotation rules). Paraphrasing legal holdings can sometimes result in incorrect characterizations which then open the door to easy refutation by opposing counsel. This highlights again the need for thorough research into the applicable law, so that the best case law supporting the legal position can be identified, correctly cited, and elaborated upon in the analysis. When a case is relied upon only for broad or widely accepted legal standards then a short summary of those standards may be most effective so that the overall argument can maintain its focus on the more important issues which are actually in dispute or potentially dispositive of the case.

21. In terms of the optimal internal organization of this section, i.e. the order in which to present the relevant statutory provisions and case law, it is usually best to start with the overarching legal standard, and then move into the particularities of the law based on sub-sections of the statute or jurisprudential nuances.

D.3 Analysis

22. The analysis section of the IRAC organization represents the real substance of the argument. This is where the legal rule expounded in the preceding section is applied to the factual scenario also set forth earlier, in terms most favourable to the legal position which counsel seeks to have the Chamber adopt. Counsel must, of course, address all the legal and factual issues which may be potentially outcome determinative of a case. Likewise, counsel should let the Chamber know what issues, if any, are not in
dispute. If a factual or legal issue is truly not in contention or counsel is comfortable conceding the issue because it plays no role in the ultimate determination of the defence case, then there is no reason not to just concede that issue so that the Chamber does not waste time on it and the focus of the case remains on those issues which are actually in contention.

23. One of the main considerations in structuring the analysis section of the argument is how to use examples from the relevant case law to support the desired factual and legal interpretation of the issues in the case at hand. Hence, the analysis section should include examples, when possible, of how the relevant law has been applied to the facts of other cases similar to the case at hand. Previous cases in which there have been decisions that support the position presently being argued should be likened to the facts of the present case as much as possible. Cases that have unfavourable decisions (in relation to the present argument) should be contrasted with the facts of the present case with an eye towards convincing the Chamber that the unfavourable decisions are factual or legally different or distinguishable from the case at issue.

D.4 Conclusion

24. Finally, each section should end with a conclusion that ties the analysis back into the overall argument and states the remedy which counsel is hoping to obtain for the Accused. These conclusions should be as clear and precise as possible, and read together, they should form the building blocks of the legal position being advocated. Showing how each element of the argument ties back into the overall legal position will not only aid the Chamber in following the argument, but will also reinforce the legal position presented and help persuade the Chamber that the position advocated by counsel is the correct one.

25. The most important part of the conclusion will be the last one or two sentences, which should consist of a clear statement of the “relief requested”. This informs the judges of the exact remedy that counsel is asking for. In formal motions this section is usually entitled, “Relief Requested,” and often begins with the phrase, “For the reasons stated above, the Defence respectfully requests that the Trial Chamber[...]”. This request should be very carefully crafted to indicate no more and no less than the precise relief sought by counsel and should be included in both oral and written submissions. It is common practice at the ICTY, and good practice before all the international courts, to describe the specific relief requested in a separate, short section, which will usually be the final section of the argument.

E. Written Submissions

26. There are any number of written submissions which might be made to a Trial or Appeals Chamber during the course of the litigation of a criminal case. The content and purpose of such submissions are only limited by the facts of the case, the legal issues raised by those facts, any requests made by the

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1 The specific kinds of briefs filed on appeal are discussed in Chapter XI, “ Appeals”. The structure of the legal arguments contained in appellate briefs should be essentially the same as that discussed here for trial brief though the contents of appellate briefs may be different.
Chamber, and the imagination of counsel. The basic types of written submissions commonly filed at the ICTY are explained below.

**E.1 Motions**

27. The basic guidelines governing motions at the ICTY can be found in Rules 72 and 73 of the ICTY Rules of Procedure and Evidence. Rule 72 relates to the submission of “Preliminary Motions”, i.e. those motions made at the outset of the proceedings that “(i) challenge jurisdiction; (ii) allege defects in the form of the indictment; (iii) seek the severance of counts [...] or seek separate trials; or (iv) raise objections based on the refusal of a request for assignment of counsel.” These motions may be essential tools in Defence counsel’s arsenal, as it is often the outcome of these preliminary motions which will set the parameters of an indictment or decide key issues in dispute prior to trial - issues which may directly affect the eventual outcome of the trial.²

28. For instance, the result of a successful challenge to the court’s jurisdiction is the dismissal of the case - a rare occurrence, but an issue which must be litigated by means of filing a preliminary motion. Similarly, successful challenges to the indictment can have varied results, including narrowing the scope of the relevant facts (and thus increasing manageability of the information), reformation of the indictment so that the factual and legal allegations are clearer and easier to respond to, and even the dismissal of some counts. In short, the ability of Defence counsel to present clear and convincing arguments in preliminary motions can have a major impact on the outcome of a trial.

29. All other motions are governed by Rule 73, which states that “either party may at any time move [...] for appropriate ruling or relief.”³ The extremely broad language of this rule demonstrates just how important motion work is to the trial process and to the effective representation of the accused. Motions have been filed under this rule on issues ranging from the language of interpretation in the courtroom, to the existence of certain substantive legal standards in customary international law, to the cutting of funds for a defence team. If it can be argued that the issue is one affecting the fair trial rights of the accused, entrusted to the Trial Chamber under Article 20(1) of the ICTY Statute, then the formal method of seeking relief is by way of written motion. Commonly recurring motions at the ICTY include motions for provisional release, motions to compel disclosure, motions seeking or opposing protective measures and video link testimony, motions for acquittal under Rule 98 bis, and motions for the admission of documentary evidence.⁴

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² Rule 72, Rule 73, ICTY RPE.
³ Rule 73, ICTY RPE.
⁴ *Prosecutor v Milosevic*, No. IT-02-54-T, Decision on Prosecution Motion for Certification Regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005; *Prosecutor v Milosevic*, No. IT-98-29/1-T, Decision on Defence Request for Certification of Oral Decision of 23 July 2007, 21 August 2007; *Prosecutor v Popovic et al.*, No. IT-05-88-PT, Decision on Joint Defence Motion Seeking Certification of the Trial Chamber’s Decision on the Joint Defence Motion Seeking the Trial Chamber to Order the Registrar to Provide the Defence with BCS Transcripts of Proceedings in Two Past Cases before the International Tribunal, 23 March 2006.
30. At the ICTY, the practice has developed to organize written motions into four sections: introduction, applicable law, argument, and conclusion. Although the labels used for these various sections differ from those discussed above, the principles remain the same. For instance, the introduction often contains a thesis statement, a roadmap, and a brief statement of facts (including the relevant procedural history). The “applicable law” section lays out the relevant legal provisions and case law that will be applied to the facts in the next section, which contains the “argument”. The argument section is usually organized using an IRAC structure, with clear headings indicating the movement from one issue to the next, concise reiterations of the legal standard applicable to the issues, and an analysis of the facts under that standard. Finally, the application of the law to the facts leads to a conclusion, often discussed in conjunction with the “relief sought” – a brief and straightforward reiteration of the action requested of the Trial Chamber. 

E.2 Responses and Replies

31. Responses to motions by opposing counsel are allowed as a matter of right at the ICTY, whereas counsel must seek permission from the Trial Chamber to reply to a response. Typically, permission is requested in the Reply itself, at the outset of the submission. However, if the ability to file a Reply is critical (for example when opposing counsel has mischaracterized the facts or miscited the applicable law in a material way), counsel is well advised to file a short request seeking permission to file a Reply Brief and briefly listing the reasons a reply is needed to maximize the likelihood that permission will be granted. Additionally, the practice regarding filing reply briefs varies from Chamber to Chamber. Some Chambers will permit a reply so long as it is timely filed; others require that counsel seek formal permission, as described above, to file a reply brief.

32. In the broad sense, the IRAC structure is an effective and logical way to organize the legal argument in responses and replies as well. However, these submissions differ from original motions as the arguments contained therein will be directly responding to the arguments put forth in the original motion. The organization of the arguments will usually be driven by that circumstance. Most importantly, the argument being responded to should be clearly identified, followed by a statement of why that argument is not persuasive and should be rejected. This is, in a sense, the “issue” statement in a response.

33. After defining the issue being addressed in the response or reply (i.e. that the original motion contains an argument that is unfounded, misinterprets the applicable law, distorts the facts, or is otherwise wrong), the rule-analysis-conclusion structure explained above applies equally to the rest of the legal argument. In order to persuade the Chamber that the original motion’s conclusion is incorrect, it is necessary to either show that there is alternative applicable law that is more authoritative or explain

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5 The DVD which accompanies this Manual contains a number of written motions, all of which are examples of how such arguments might be structured.
6 On appeal, as described in Chapter XI, Reply Briefs are permitted as a matter of right.
why the application of the applicable law in the original motion is incorrect under the present facts or circumstances (i.e. bring a challenge to the original analysis).

E.3 Final Briefs

34. The developed practice at the ICTY is for each party to submit, after the close of trial proceedings, a final trial brief that puts forth the party’s overall case theory based on the evidence that has been adduced during trial. It is also accepted practice that both the Prosecution and Defence file their final briefs simultaneously. This presents an interesting challenge for Defence counsel since the Prosecution’s theory of its case may well have shifted from the position put forth in its Pre-Trial Brief based on what the Prosecution actually proved at trial and what evidence, if any, was put forth by the Defence. While each party is given the chance to respond to the opposing party’s briefs during closing arguments, the practice of simultaneous filing of the written final briefs has made it more important than ever for Defence counsel to anticipate the arguments that will be made by the Prosecution and include preemptive counter-arguments in the Defence final briefs. Counsel must anticipate how the Prosecution’s theory may have changed since the filing of the indictment and highlight the existence of these changes in the Defence brief itself, as they often form the basis for very persuasive argument that the Prosecution has failed to prove its case.

35. For the Defence, the general goal in a final trial brief is to show how the evidence put forth by the Prosecution failed to prove guilt beyond a reasonable doubt of the crimes alleged. The organization of the IRAC argument, therefore, will be based on the legal requirements for each of the alleged crimes (each element of each crime and each element of each mode of liability). This, once again, highlights the importance of crafting a persuasive statement of the facts, particularly where the legal analysis that follows is based primarily on facts which were in dispute at trial as opposed to interpretations of the law in light of the undisputed facts.

36. The legal arguments will be easier to follow and most effective if they methodically go through each element which the Prosecution must prove and explain how an element or elements have not been proven based on the facts presented at trial. Again, if counsel believes it is reasonable to concede any issues because they do not affect the outcome of the case or undermine the defence theory of the case, then this is the place to do it. The exercise of well-informed, reasonable judgements in this regard can not only enhance the Chamber’s focus on the real issues in dispute but also enhance counsel’s credibility and reliability in the presentation of the defence case.
F. Oral Arguments

37. Oral pleadings are, on a substantive level, no different than written pleadings. The IRAC organizational scheme may be equally effective during oral argument; in particular the need to provide an initial thesis statement at the beginning of argument and (for longer submissions) a brief roadmap of the argument to follow. This alerts the Chamber from the outset of what issues are at stake and will be argued and what issues are not. It is essential that the oral advocate keep in mind the overall organizational scheme to keep the attention of the Chamber focused on the most important aspects of the argument and to assist counsel as well in the course of presenting the oral submissions. The key is thorough preparation and knowledge of the law. It is usually most helpful for counsel to prepare and organize an outline of the argument, which counsel can refer back to as the oral argument progresses. This allows counsel to remain focused on the points to be made and to avoid overlooking matters that counsel wishes to address.

38. Oral argument requires mental flexibility because the argument can and most likely will be interrupted by questions from the Bench. For this reason, counsel is very strongly advised not to simply read or memorize the oral submission. The best oral argument is not a speech, but rather a dialogue with the Chamber. When there are questions from the bench, Defence counsel must answer them at the time they are asked regardless of counsel’s plan for the presentation of legal or factual issues. If counsel does not, he or she risks annoying the Chamber or losing credibility by putting off discussion of an issue the Chamber clearly wants addressed. Worse, counsel may get caught up on subsequent submissions and forget to address the question at all at a later point in argument. Oral argument, if it is to be interesting and therefore more likely to be persuasive, should also never be or appear to be overly rehearsed. Instead, it is essential to have a clear outline and a clear understanding of how each fact and issue relate to the overall legal argument.

39. Finally, it is always good practice to use transitional phrases that will indicate to the Chamber when counsel is departing from the original organization and/or returning to a previous point. This permits the Chamber to know what issue counsel will be raising next, which facilitates the Chamber’s ability to
follow the argument and therefore enhances counsel’s ability to present a coherent and persuasive argument.

**F.1 Oral Submissions during Trial**

40. On occasion issues arise at trial, such as objections to the introduction of evidence by the opposing party, which require counsel to respond immediately with an oral submission in support of counsel’s position on the matter. Sometimes counsel can anticipate certain issues that will arise at trial and submissions regarding those issues can be planned ahead of time. When that is the case counsel should take the opportunity to think through the issue, research the applicable law and consider potential arguments so that when the time comes counsel is prepared to give the best argument to the Chamber. In many cases, however, in-court submissions arise on the spot and cannot be foreseen, for example, a response to a submission made by opposing counsel or to a question from the Chamber. Under these circumstances, it is still useful to remember the IRAC structure at least as an internal thought process in making any oral submission. This will ensure that the argument is presented in a clear and logical fashion, wherein the applicable rule is explained, and the application of that rule to the situation at hand effectively presented.

**F.2 Opening Statements**

41. Opening statements by the Defence are sometimes presented at the beginning of trial, right after a similar opening statement has been given by the Prosecution and before the presentation of any evidence. They are more often presented, however, after the Prosecution has completed its case, just before the presentation of the Defence case when affirmative Defence evidence will be offered at trial.

42. Opening statements are the most structured form of oral submission, as the opening statement is not an argument, but rather is intended to provide the Chamber with an outline of the Defence case that will follow. When an opening statement is presented after the Prosecution’s case, it may be loosely analogous to a response brief in that it may address the case the Prosecution has put forward by asserting that when all the evidence is heard and assessed, including the Defence case, the Prosecution case will fail to meet the burden of establishing proof beyond a reasonable doubt of the crimes charged.

43. The primary purpose of the Defence opening statement, however, is to provide an overview of the Defence evidence such as the witnesses who will be called and the nature of the information they are expected to present. In this context, Defence counsel can use the opening statement—which is not meant to be argumentative—as a means to in effect argue that the Prosecution did not and cannot meet its burden of proof at trial.⁷

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⁷ Examples of portions of opening statements are included on the DVD which accompanies this Manual.
F.3 Closing Arguments

44. Closing arguments are presented at the end of the case after all the evidence has been presented. At the *ad hoc* Tribunals the Prosecution presents its closing argument first, in which it summarizes the facts of its case and argues that the facts, in light of the law, prove beyond a reasonable doubt that the accused is guilty of the charged crimes. Thereafter the Defence presents its closing argument to affirmatively rebut legal and factual claims made by the Prosecution. The Prosecution is permitted, as a matter of right, to present a rebuttal argument which is in keeping with the fact that the Prosecution always bears the burden of proof at trial. With leave of the Trial Chamber, and based upon some showing of good cause, the Defence may be permitted to present a response to that rebuttal, called a sur-rebuttal argument.  

45. During the closing argument Defence counsel has, of course, the liberty to structure the argument in any form counsel considers to be the most effective. Counsel should address all the important facts of the case, including the adverse evidence, and construct an argument which highlights the evidence favourable to the accused while diminishing the importance or relevance, when possible, of unfavourable evidence. The extent to which procedural or substantive rules and case law are discussed in the closing argument differs widely based on the particularities of a case, but where a specific rule is discussed, it is often effective to follow it with an analysis of the facts, in light of that rule, which is supportive of the defence theory of the case.

46. The ultimate goal, in any Defence closing argument is to focus the Trial Chamber on that evidence which raises a reasonable doubt as to the ultimate persuasive value of the prosecution’s evidence and its theory of the case. Much like the opening statement, the IRAC structure can provide a loose organizational tool for closing argument, however the overriding issue in a Defence closing argument, regardless of how it is structured, will always be to thoroughly review the evidence and, in the course of doing so, persuasively argue that the prosecution has failed to meet its burden to prove its case.

**Conclusion**

47. The most important thing to remember in structuring a written or oral legal argument is that its object is to persuade the Chamber to rule in favor of counsel’s position. An argument presented in a logical, organized fashion, such as the IRAC system suggested here, can maximize that outcome because it is clear, focused on the important issues and assists the Chamber is learning the factual and legal issues at hand. The IRAC system is not, needless to say, the only way to structure a legal argument. Different counsel will always have different views of what works most effectively for them. It is, however, an approach which can be used in any pleading, no matter the form, and will always serve to develop legal and factual arguments in a comprehensible and persuasive fashion.

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8 Similar procedures are followed at all the international criminal courts regarding presentation of closing arguments.
VI. EVIDENTIARY ISSUES AT TRIAL

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1. This chapter examines the rules, procedures and practices governing the presentation, admission and evaluation of documentary evidence at the ICTY, IRMCT and ICC. The unique and difficult challenges of managing evidence in international criminal trials at an institution that has adopted a “hybrid” procedural system have led to numerous additions and amendments to the ICTY Rules of Procedure and Evidence (ICTY RPE) and the IRMCT Rules of Procedure and Evidence (IRMCT RPE) over the years. Trial Chambers enjoy significant discretion in determining what will be admitted on a case-by-case basis, and the weight to be afforded to evidence at the end of a trial. In recent cases, Trial Chambers have taken to issuing guidelines on the admission of evidence and conduct of counsel for individual trials. This has not, however, assured consistency or harmonisation of approaches between the various chambers. Moreover, the pressure to ensure trials were completed within the time frame envisioned under the

* Chapter authored by Deirdre Montgomery, LL.B, LL.M, Attorney-at-Law. Defence Legal Assistant, ICTY, on the cases of Slobodan Milošević, Milorad Trbić, Milan Milutinović, Momčilo Perišiće and Mićo Stanišić.
“Completion Strategy” at the ICTY and ICTR increasingly took preference over a principled approach to the admission of evidence and the ability of the accused to challenge that evidence.

2. A significant development in recent years is the increased preference for the admission of witness statements over live, in-court, testimony. A corollary to this is the growing practice of wholesale admission of documentary evidence as part of statements and transcripts admitted under Rules 92 bis, 92 ter, and 92 quater ICTY RPE and bar table motions. It is now the case that exhibits which may not be admissible when tendered through a witness can easily make it into the trial record through a bar table motion. Similarly, dozens of exhibits which may or may not be relevant to the case at hand are often attached to 92 bis, 92 ter and 92 quater statements and may be admitted in evidence even though they are never shown to the testifying witness or otherwise identified during the current trial proceedings.

3. It is crucially important for practitioners in proceedings where ICTY, IRMCT or ICC evidence is used to understand the circumstances in which exhibits are admitted into evidence, so that they themselves can be prepared to challenge such evidence in their own subsequent proceedings.

4. This chapter explains the general principles on the admission and evaluation of evidence. Specific categories of evidence are discussed, including the admission of written statements and transcripts in lieu of testimony or cross-examination, the admission of statements of the accused, intercept evidence, and general documentary evidence, including the admission of “stand-alone” documents from the “bar table.” Some practical, strategic considerations for challenging evidence are offered, and finally an overview of issues related to judicial notice of adjudicated facts.

A. General Principles on the Admission of Evidence

5. The general admissibility of evidence, whether in oral or written form, was governed by Rule 89 of the ICTY RPE. The core provision on the admission of evidence was Rule 89(C) ICTY RPE which provided that a Chamber may admit any relevant evidence which it deems to have probative value. This provision was subject to Rule 89(D) which provided that evidence will not be admitted if its probative value substantially outweighs the need to ensure a fair trial. Under Rule 89(F) evidence may be admitted in written form where the interests of justice allow. The Trial Chambers of the ICTY have tended to favour an inclusive approach, whereby any evidence which is prima facie relevant, reliable and probative will be admitted, the weight of which will be determined at a later stage. However, a Trial Chamber has the

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10 Rules 110, 111, and 112 IRMCT RPE.
11 Rule 105 IRMCT RPE.
12 Rule 105(C) IRMCT RPE.
13 Rule 105(D) IRMCT RPE.
14 Rule 105(F) IRMCT RPE.
discretion to restrict or exclude otherwise admissible evidence, so long as such restrictions have a legitimate purpose. In addition to Rule 89(D\textsuperscript{15}) evidence may be excluded in two specific instances:

i. Rule 95 (Rule 117 IRMCT RPE) stated that no evidence shall be admissible if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of the proceedings; and,

ii. Rule 96(iv) (Rule 118(iv) IRMCT RPE) stated that prior sexual conduct of the victim shall not be admitted in evidence. Such evidence may be redacted from the record if such evidence is elicited from or offered by a witness.

6. At the ICC, Article 69 of the Rome Statute governs the admission of evidence. At the outset, Article 69(3) allows parties to “submit evidence relevant to the case” and the Court to request such submission when necessary. There are no exclusionary rules at the ICC. However, Article 69(4) provides a wide discretion of the Court to “rule on the relevance or admissibility of any evidence” taking into account the probative value and prejudice to a fair trial. In Katanga Trial Chamber accordingly stated that:

“In ruling on the admissibility of a piece of evidence, the Chamber employed a three-tiered approach. Firstly, it examined the relevance of the item; it then assessed its probative value; and lastly it weighed the probative value against any prejudice which might result from its admission into evidence.”\textsuperscript{16}

7. Rule 63(2) of the ICC RPE further underlines the Court’s “authority [...] to assess freely all evidence”.\textsuperscript{17} Unlike at the ICTY, the Rome Statute and the ICC RPE specifically prescribed for the non-application of national law regarding evidence.\textsuperscript{18} Overall, however, the discretion of the Court is limited by two fundamental principles: first, its obligation to ensure a fair and expeditious trial and, second, due regard for the protection of victims and witnesses.\textsuperscript{19}

A.1 Relevance, Probative Value and Reliability

8. A number of basic requirements must be satisfied for the admission of any evidence. These include relevance, probative value, and reliability. To establish that evidence is relevant and of probative value, it must be shown that:

i. there is a connection between the evidence sought to be admitted and the proof of allegations sufficiently pleaded in the indictment; and

\textsuperscript{15} Rule 105(D) IRMCT RPE.

\textsuperscript{16} Prosecutor v. Germain Katanga, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07, 7 March 2014, para. 76.

\textsuperscript{17} Prosecutor v. Bemba, Article 74 Judgment, para. 235 (“the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence”).

\textsuperscript{18} Article 69(8), Rome Statute; Rule 63(5), ICC RPE. See also Prosecutor v. Bemba, Article 74 Judgment, para. 235 (‘It is of particular note that Rule 63(5) mandates the Chamber not to “apply national laws governing evidence”.’)

\textsuperscript{19} Prosecutor v. Gbagbo and Ble Goude, partially dissenting opinion of Judge Henderson.
ii. the evidence tends to prove or disprove an issue.20

9. Evidence is relevant if it relates to a material issue at the trial.21 The material issues are found in the indictment.22 As the criteria for the admission of evidence are cumulative, evidence may be rejected for admission solely on the grounds of absence of relevance.23 The ICC has adopted a substantively similar test.24

10. Reliability is a factor in the assessment of relevance and probative value but is not itself a separate requirement.25 It is, however, an inherent and implicit component of each element of admissibility. For evidence to be relevant, and to have a nexus between it and the subject matter, such evidence must be reliable. The same is true for evidence which is said to have probative value. Accordingly, reliability is the “invisible golden thread” which runs through all the components of admissibility.26 It is sufficient that a prima facie case of authenticity be made out for a document to be deemed reliable. An assessment

20 Prosecutor v. Karemera et al., ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Certain Exhibits from Other Trials, 30 October 2007, para. 9; Prosecutor v. Karemera et al., ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nizirorera and Mathieu Ngitumpatse, 2 November 2007, para. 2; Prosecutor v. Galić, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para 35 (“evidence is admissible only if it is relevant and it is relevant only if it has probative value”); Prosecutor v. Milutinović et al., IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 32. (Evidence is relevant if there is a connection between it and one or more allegations against an accused). The ICC has defined relevant evidence as that which “makes the existence of a fact at issue more or less probable”; Prosecutor v. Katanga and Ngudjolo Chui, Decision on the Prosecutor’s Bar Table Motions, ICC-01/04-01/07-2635 (ICC TC II, Dec. 17, 2010) para 16; applied in Prosecutor v. Bemba, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, ICC-01/05-01-08-2012-Red (ICC TC III, Feb. 09, 2012).
21 See Prosecutor v. Jelisić, IT-95-10-A, Decision on Additional Evidence, 15 November 2000 (citing Rule 115 of the RPE: “CONSIDERING that the admission of evidence is in the interests of justice if it is relevant to a material issue, if it is credible and if it is such that it would probably show that the conviction or sentence was unsafe.”).
22 Prosecutor v. Prlić et al., IT-04-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para. 17. See also Prosecutor v. Nyiramasuhuko et al., No. ICTR-98-42-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahobali on the Decision on Defence Urgent Motion to Declare Parts of Evidence of Witnesses RZ and ABZ Inadmissible, 2 July 2004, para. 15 (In order to establish that evidence is relevant, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment).
24 Prosecutor v. Ruto and Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, para. 66 (“Relevance requires a nexus between the specific piece of evidence and a charge or a fact of the case to be proven ... the Chamber shall establish the extent to which this evidence is rationally linked to the fact that it tends to prove or to disprove.”) citing Pre-Trial Chamber II, Bemba Confirmation of Charges Decision, ICC-01/05-01-08-424, para. 41.
25 Prosecutor v. Prlić et al., IT-04-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration on the Decision on the Admission of Documentary Evidence, 3 November 2009, para. 33. The ICC has not expressly directed that reliability should be considered within relevance; see [n] 3. It has treated reliability as part of the assessment of the probative value of evidence. Prosecutor v. Lubanga, ICC-01/04-01/06-1399-Corr, Decision on the admissibility of four documents (including Annexes & Corrigenda), 20 January 2011 paras. 28-31; cf Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-717, Decision on the confirmation of charges (including Corrigenda), 30 September 2008, para. 77 where the Pe-Trial Chamber adopted the “alternative approach” to the Tribunals, stating that reliability should go to the weight given to evidence rather than be an inherent or separate component to admissibility.
26 Prosecutor v. Delalić et al., IT-96-21-T, Decision on Prosecutions Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, 19 January 1998, para. 32.
of the *prima facie* reliability of a document could include the provision of such basic *indicia* of reliability as the source or provenance of a document, or the dates of the documents.\(^{27}\)

11. Authenticity relates to whether a document is what it professes to be in terms of origin or authorship, and thus *indicia* of authenticity may be relevant to an inquiry regarding *prima facie* reliability.\(^{28}\) Absolute proof of authenticity is not required for admissibility.\(^{29}\) The ICC in this regard has followed the ICTY jurisprudence to require similar indicia for prima facie authenticity and reliability.\(^{30}\)

12. When a challenge has been made to the authenticity or reliability of a document, the Trial Chamber can admit the document and decide what weight to give it during its deliberations.\(^{31}\) Unlike the ICTY and the IRMCT, the Chambers at the ICC need not rule on the admissibility of evidence at the time of its submission. They are, however, obliged to rule on admissibility of evidence “at some point in the proceedings”.\(^{32}\) This means the ICC

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\(^{27}\) *Prosecutor v. Prlić et al.*, IT-04-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration on the Decision on the Admission of Documentary Evidence, 3 November 2009, para. 27.


\(^{30}\) *Prosecutor v. Germain Katanga ad Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para. 112.


\(^{32}\) *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 76.

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chambers have the discretion to only recognise the submission and consider its relevance and probative value “as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.”

13. The onus of establishing the admissibility of a particular piece of evidence is on the party seeking to tender it. The opposing party does not have to establish that it should not be admitted, although in practice it is often the case that the Trial Chamber will admit a document into evidence unless the other party objects and puts forth a valid basis to exclude its admission. While the ICTY RPE were not explicit on this matter, an exhibit may be admitted during a trial at any convenient time, once it is established that the Trial Chamber can be satisfied that there is sufficient basis for admission under Rule 89(C) (Rule 105(C) IRMCT RPE). As a general rule, it will be necessary for the Chamber to receive evidence from one or more witnesses, who can speak about a proposed exhibit, before the Chamber can be satisfied that there is sufficient apparent relevance and reliability to justify the admission of an exhibit. Evidence can be received by way of written statement admitted pursuant to Rules 89(F), 92 bis, 92 ter, 92 quater, 92 quinquies, (Rules 105(F) and 110-113 IRMCT RPE) tendered through live witnesses, or from the “bar table”.

14. At the ICC, in terms of the timing of objection, Rule 64(1) of the ICC RPE requires that any issues relating to relevance or admissibility be raised at the time of the evidence’s submission or, exceptionally, immediately after the issue is known.

A.2 Hearsay Evidence

15. In trials at the ICTY hearsay evidence was usually deemed admissible pursuant to Rule 89(C). Hearsay evidence is “the statement of a person made otherwise than in the proceedings in which it is being...
tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what that person says.” A hearsay statement can be in the form of oral testimony or a document. For example, a witness may give an account of information provided to him by another person (“first hand hearsay”) or an account of information that has passed between two or more persons, before being conveyed to the witness who appears in court (“second hand hearsay or more remote”). A wide variety of documents which contain statements or information which are prima facie relevant to live issues at trial are hearsay, if no witness testifies to the authenticity of the document or the truth of its contents.

16. In determining whether to admit hearsay evidence, the Trial Chamber would consider the content of the statement and the circumstances under which the evidence arose. The Chamber must be satisfied that the evidence is reliable “in the sense of being voluntary, truthful and trustworthy, as appropriate.” The probative value of hearsay evidence also depends on the context and character of the evidence itself and its source. By definition, hearsay cannot be tested by cross-examination since the declarant of the statement does not appear in court to face questioning. However, the lack of opportunity to cross-examine the hearsay declarant and the fact that the hearsay is “first-hand” or more remote are all factors going to the weight and probative value of the evidence. In most circumstances, hearsay evidence will receive less weight than testimony given under oath and tested by cross-examination.

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40 See, for example, documents admitted by way of the bar table submission where the document may be admitted as a free-standing document. Prosecutor v. Aleksovski, IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admission of Evidence, 16 February 1999, para. 15; Prosecutor v. Limaj et al., IT-03-66-T, Decision on the Prosecutor’s Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, para. 17.
42 Prosecutor v. Aleksovski, IT-95-14/1-A, Decision on Prosecutor’s Appeal on Admissibility of Evidence Appeals Chamber, 16 February 1999, para. 15. ICC: see Prosecutor v. Lubanga, ICC-01/04-01/06-1399-Corr, Decision on the admissibility of four documents (including Annexes & Corrigenda), 20 January 2011, para. 28 where the Chamber cited Aleksovski with approval.
43 Prosecutor v. Tadić, IT-94-1-T, Separate opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, page 3. ICC: See Prosecutor v. Lubanga, ICC-01/04-01/06-1399-Corr, Decision on the admissibility of four documents (including Annexes & Corrigenda), 20 January 2011, para. 28. In Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-717, Decision on the confirmation of charges (including Corrigenda), 30 September 2008, para. 141, the Chamber observed that the probative value of hearsay “is to be analysed on a case by case basis taking into account factors such as the consistency of the information itself and its consistency with the evidence as a whole, the reliability of the source and the possibility for the Defence to challenge the source.”

44 An example of “firsthand” hearsay would be A testifying about something B told A he had seen. More removed hearsay would be A testifying about something B said C had told him about D.
45 Prosecutor v. Tadić, IT-94-1-T, Separate opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, pages 3-2; See also, Prosecutor v. Milutinović et al., IT-05-87-T, Trial Judgement, 26 February 2009, Vol.1, para.38, holding that it treated hearsay evidence of unavailable witnesses with a “greater level of circumspection than percipient evidence.”; Prosecutor v. Aleksovski, IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admission of Evidence, 16 February 1999, para. 15; Prosecutor v. Milutinović et al., IT-05-87-T, Decision Denying Prosecution’s Second Motion for Admission of Evidence Pursuant to Rule 92 bis, 13 September 2006, para. 5. ICC: See Prosecutor v. Bemba, ICC-01/05-01/08-2012-Red, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, para. 69: “...as is generally the case, if the Chamber finally concludes that the procès-verbaux are hearsay evidence, the Chamber will ascribe less probative value to the procès-verbaux than testimony or other evidence that is testable in court ...” See also Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12-3, Judgment pursuant
reports are a most notorious form of hearsay. One purpose for which media reports are used by the Prosecution in war crimes trials is to establish proof of notice of events, where, for example, the accused is alleged to have had a duty to prevent and punish the commission of crimes. In these circumstances, the media report of alleged crimes may provide evidence to show the accused had notice of those crimes and should have acted to initiate an investigation rather than as proof of the actual commission of the crimes themselves.

17. At the ICC the rules governing the admissibility of hearsay evidence are not yet settled. At the outset, there is no procedural bar to the admissibility or reliance on hearsay evidence in the legal framework of the Court. Whether hearsay evidence is afforded less weight ultimately "depend[s] upon the infinitely variable circumstances which surround hearsay evidence". That said, the ICC Appeals Chamber has noted that although the fact that evidence is hearsay does not necessarily deprive it of probative value, it "does indicate that the weight or probative value afforded to it may be less." Even in cases of anonymous hearsay, the Trial Chamber in Katanga did not rule out the evidence ab initio, but evaluated its probative value on the basis of the context and conditions in which it was obtained, and with due consideration of the impossibility of cross-examining the information source.

18. No binding determination is made at the stage of admission of hearsay evidence as to the genuineness, authorship or credibility of evidence. The issue of the reliability of hearsay evidence is only fully considered during final deliberations, when the weight to be attributed to this evidence is evaluated. The weight and probative value to be afforded to hearsay evidence will usually be less than that given to the testimony of a witness who has given evidence under oath and who has been cross-examined. Additionally, in assessing the weight, if any, to assign hearsay evidence, the Trial Chamber must consider

to article 74 of the Statute, 18 December 2012, para. 496: "...The Chamber also wishes to emphasise that this evidence, which is based on hearsay, must be considered with the greatest circumspection, especially as it relates to a crucial point in the Prosecution’s case. ..." 

46 Prosecutor v. Bemba et al., ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, para. 874.


48 Ibid.


51 Prosecutor v. Delalić et al., IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 31. ICC: See Prosecutor v. Bemba, ICC-01/05-01/08-2012-Red, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, para. 18; Prosecutor v. Bemba, ICC-01/05-01/08-2721, Decision on the admission into evidence of items deferred in the Chamber’s “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”, 27 June 2013, para. 9.

that “the source has not been the subject of a solemn declaration and that its reliability may be affected by a potential compounding of errors of perception and memory.”

19. In assessing the weight and probative value of documentary evidence, an important factor is whether the author of the document, or a person with personal knowledge of its contents, appears as a witness. Otherwise, the contents of a document remain unauthenticated and not subject to the kind of scrutiny which comes with the cross-examination of a witness. A Trial Chamber may consider a hearsay document unreliable and attach no weight to it.

A.3 Evaluation of Evidence

20. The criteria for admissibility of evidence must not be confused with the Chamber’s ultimate determination of the weight to assign any particular item of evidence. Weight refers to the qualitative assessment of probative value that a Chamber will give a piece of evidence in relation to the facts at issue in a case. Weight can be determined by numerous factors, and evidence can be given whatever weight the Trial Chamber deems appropriate. Moreover, a Chamber has discretion, if the circumstances merit it, to give no weight to evidence which it had initially deemed to be admissible, in light of the record as a whole (see case box Gotovina et al. case - Ascribing Weight to Evidence).

21. At the ICC, questions of admissibility and the determination of weight may be done at the same stage. Upon the submission of an item of evidence, trial chambers have the discretion to rule on the relevance and/or admissibility of such item by recognising it as “submitted” within the meaning of article 74(2), and assess its weight at the end of the proceedings as part of its holistic assessment. However, when deemed appropriate, trial chambers may also recognise the submission without a prior ruling and defer its assessment to the end of the proceedings.

B. Specific Categories of Evidence

22. Below is an overview of the different categories of evidence that have been admitted in trials before the ICT, as well as certain issues counsel should be alert to when dealing with these categories of evidence.

54 Prosecutor v. Milutinović et al., IT-05-87-T, Trial judgement, Vol. 1, para. 36.
55 Ibid., paras. 36, 56-61.
56 Prosecutor v. Bemba et al., ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kiolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute, Appeals Chamber, 8 March 2018, para. 598.
B.1 Written Statements and Transcripts *in lieu* of Oral Testimony

23. Rule 92 *bis*57 governed the admission of written evidence in the form of written statements and transcripts in lieu of oral evidence, and provided a general test for their admission.58 The test to be applied was whether the written statement or transcript sought to be admitted went to proof of a matter other than the acts and conduct of the accused as charged in the indictment. The two leading Appeals Chamber decisions concerning Rule 92 *bis* were rendered in Galić and Milošević.59 Both these decisions examined the purpose of this provision and the circumstances in which it is appropriate for a written statement to be admitted into evidence in lieu of oral testimony. In Galić, the Chamber noted that the intention of Rule 92 *bis* was to qualify the previous preference in the Rules for “live, in court” testimony. It was interpreted to mean that if its provisions were satisfied, and the material had probative value within the meaning of the case law interpreting Rule 89(C),60 it was in principle in the interests of justice under Rule 89(F)61 to admit the evidence in written form.62 Its general aim was to make trials more expeditious. While not preventing examination and cross-examination of the

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57 Rule 110 IRMCT RPE.
58 See Chapter VIII “Direct, Cross-Examination and Re-Examination”
60 Rule 105(C) IRMCT RPE.
61 Rule 105(F) IRMCT RPE.

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In the Popović Case, the Prosecution moved for the admission of a number of witness statements pursuant to Rule 92 *bis*. In relation to one group of the tendered statements the Chamber held the following:

“... With one exception, the Trial Chamber observes that the evidence of these fourteen witnesses does not go to the acts or conduct of the Accused. Witness No. 56 testified in both Krstić and Blagojević, and was subjected to extensive cross-examination on both occasions. Among other things, this witness testimony describes the conditions in Potočari at the time the Srebrenica enclave fell and the state of the refugees there. What is of concern to the Trial Chamber, however, is that the witness... also describes his participation in two meetings at the Hotel Fontana with General Mladić and other officers, occurring on 11 and 12 July 1995. Although the witness does not name any of the Accused, the Trial Chamber observes that the Prosecution alleges Popović was present at the second of these meetings. Thus, without naming him, the witness describes an event in which Popović participated. These meetings appear to play a prominent role in the Prosecution’s theory of this case. This surely implicates the acts or conduct of one of the Accused. Accordingly, the witness’s testimony is not appropriate for admission pursuant to Rule 92 *bis*. The remaining thirteen Bosnian Muslim Witnesses do not mention any of the Accused by name. Nor do any of them describe acts or conduct of unidentified persons that could be the Accused. Nor do they appear to describe specific individual events at which the Prosecution alleges any of the Accused was personally present at the time described. Accordingly, the evidence of all thirteen is admissible pursuant to Rule 92 *bis*.” *
witness as such, Rule 92 bis(A)\(^{63}\) stated that a Trial Chamber “may dispense” with the attendance of a witness in person.\(^{64}\)

24. “Acts and conduct of the accused” is understood as a “plain expression” that “should be given its ordinary meaning: deeds and behaviour of the accused.”\(^{65}\) Rule 92 bis excluded a written statement that goes to proof of any act or conduct of an accused upon which the Prosecution relies to establish that the accused:

- committed any of the crimes charged;
- planned, instigated or ordered the crimes;
- otherwise aided and abetted the alleged perpetrators;
- was the superior of the perpetrators;
- knew or had reason to know those crimes had been committed or were about to be committed by his subordinates; or,
- failed to take reasonable steps to prevent such acts or punish those who carried out these acts.\(^{66}\)

25. The Galić decision further found that where the Prosecution charges the accused with participation in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92 bis(A) also excludes any written statement which goes to proof of any act or conduct of the accused upon which the Prosecution relies to establish:

- that he had participated in that joint criminal enterprise, or
- that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.

26. Those are the “acts and conduct of the accused as charged in the indictment,” not the acts and conduct of others for which the accused is charged in the indictment with responsibility.\(^{67}\)

27. Rule 92 bis(A)(i) provided a non-exhaustive list of factors in favour of the admission of written evidence in the form of written transcripts or statements while Rule 92 bis(A)(ii) gave a non-exhaustive list of factors which militate against their admission. Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:

\(^{63}\) Rule 110(A) IRMCT RPE.
\(^{64}\) Prosecutor v. Prlić, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcripts of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 43.
\(^{65}\) Prosecutor v. Milošević, IT-02-54-T, Decision on Prosecution’s Request to have Written Statements Admitted Under Rule 92 bis, 21 March 2002, para. 22.
\(^{66}\) Prosecutor v. Galić, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para. 10
\(^{67}\) Ibid.
• is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
• relates to relevant historical, political or military background;
• consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
• concerns the impact of crimes upon victims;
• relates to issues of the character of the accused; or,
• relates to factors to be taken into account in determining sentence.

28. Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:

• there is an overriding public interest in the evidence in question being presented orally;
• a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or,
• there are any other factors which make it appropriate for the witness to attend for cross-examination.

29. Further, while a written statement or transcript which goes to proof of a matter other than the acts and conduct of the accused is not inadmissible per se, pursuant to Rule 92 bis the Chamber must determine, as a matter of discretion, whether or not it will admit the proposed written statement or transcript. Where the evidence is pivotal to the Prosecution case, or where the person whose acts and conduct the written statement describes is closely proximate to the accused, the Chamber may have been persuaded that it would not be fair to the accused to permit the evidence to be given in written form.68

30. Nevertheless, according to Rule 92 bis(C)69 the Chamber also had discretion to require a witness, whose written statement or transcript is admitted, to appear in court for cross-examination. This discretion was to be exercised bearing in mind the overriding obligation of the Chamber to ensure a fair trial under Articles 20 and 21 of the ICTY Statute.70 At the IRMCT, it was decided that a conviction cannot be based solely on evidence of a witness whom the accused has had no opportunity to examine or to have examined during the investigation or trial.71 An important consideration in this regard is whether the evidence in question relates to a “critical element of the Prosecution’s case, or to a live and important

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69 Rule 110(A) IRMCT RPE.
issue between the parties, as opposed to a peripheral or marginally relevant issue.”

A Trial Chamber may also consider the cumulative nature of the evidence, whether the evidence is "crime-base" evidence or whether it relates to the acts and conduct of subordinates for which the accused is allegedly responsible; the proximity of the accused to the acts and conduct described in the evidence (see case box Popović et al. case - Application of criteria for admission of 92 bis statements).

31. Regarding the admission of written statements in lieu of attendance in person by a witness, Rule 92 bis (B) required the author of the written statement to make a declaration that "the contents of the statement are true and correct", that such a declaration is attached to the statement, and that this declaration be verified "in writing" by "an authorized person".

32. In addition, ICTY jurisprudence has noted that Rule 92 bis is directed to written statements prepared for the purposes of legal proceedings which are proposed to be admitted into evidence for the truth of their contents. The limitation on the nature and scope of the evidence admissible under Rule 92 bis reflects a concern for the reliability of the material prepared by a party for the purposes of trial proceedings, instead of oral evidence from the makers of the statements. The Appeals Chamber observed that any documents made in relation to pending or anticipated legal proceedings, involving a dispute as to any fact which the documents might tend to establish, must be approached with caution. This concern recognized the potential for fabrication and misrepresentation by the makers of such documents and for them to be carefully devised by lawyers or others to ensure that they contain only the most favourable version of the facts stated.

33. At the IRMCT, it was decided that testimony from another trial would be admissible without need for cross-examination where the evidence did not go to the acts and conduct of the accused and was cumulative. At the ICC, a similar test has been adopted. Rule 68(2)(c) does not prohibit the introduction of prior testimony which goes to the acts and conduct of the accused but rather, it stipulates that it “may be a factor” against its introduction. In Ongwen, the Trial Chamber defined “acts and conduct of the accused” as the personal actions and omissions of the accused, thereby excluding acts of others.

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72 Prosecutor v. Slobodan Milošević, IT-02-54-T, Decision on Prosecutions Request to have Written Statements Admitted Under Rule 92 bis, 21 March 2002, paras. 24-25.
73 Ibid., para. 23.
74 Ibid.
75 Prosecutor v. Galić, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para. 15.
76 Rule 110(B) IRMCT RPE.
77 Prosecutor v. Galić, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para. 28.
78 Ibid., para. 28. See also Prosecutor v. Slobodan Milošević, IT-02-54-AR73.2, Decision on Admissibility of Prosecution’s Investigator’s Evidence, Appeals Chamber, 30 September 2002, para. 18(3).
79 Prosecutor v Stanisic and Simatovic, MICT-15-96-T, Decision on Prosecution Motion for Admission of Evidence of Witness RFJ-160 pursuant to Rule 111.
80 Ntaganda, Trial Chamber, Decision on Prosecution Application under Rule 68(c)(2) for Admission of Prior Recorded Testimony of Witness P-0016, 24 February 2017, para. 26.
attributable to the accused.\textsuperscript{81} These acts and conduct must appear exclusively in the description of the charges against the accused or be the basis upon which to establish the accused’s criminal responsibility.\textsuperscript{82}

35. Despite the clear presumption for oral evidence at trial, the Court can also receive written statements or transcripts so long as they are not prejudicial to or inconsistent with the rights of the accused.\textsuperscript{83} The principle of orality requires a trial chamber to conduct a cautious item-by-item assessment pursuant to article 69(2) of the Rome Statute.\textsuperscript{84} Prior statements which qualify as “testimony” cannot be admitted from the bar table unless the accused has waived his or her right to cross examine the witness.\textsuperscript{85} With regard to post-testimony statements, they may be admitted at the request of the defence given no prejudice to the accused and that the chamber would benefit from the information contained in the statements.\textsuperscript{86}

**B.2 Written Statements and Transcripts in lieu of Examination in Chief**

36. Under Rule 92\textit{ter}\textsuperscript{87} of the ICTY RPE,\textsuperscript{88} a statement or transcript that goes to proof of the acts and conduct of the accused may be admitted into evidence. This stands in contrast to Rule 92\textit{bis}, where matters concerning the “acts and conduct of the accused” that are contained in a prior written statement or transcript are not admissible. However, Rule 92\textit{ter} required the witness to appear in court, adopt his statement or prior testimony as being accurate, and be prepared to answer questions under cross-examination or from the Chamber.

37. This Rule was intended to foster “judicial economy” meaning that evidence the witness would give during “examination-in-chief” orally may be admitted either in whole or in part in written form, thus saving time in court. The witness must simply attest to the accuracy of his previous statement and acknowledge the same answers would be given, if asked the same questions. In addition, the Prosecution may be permitted to ask a limited number of questions in direct examination, to clarify matters contained in the tendered 92\textit{ter} evidence, or to give additional evidence on matters which are not contained in those statements or transcripts.

\textsuperscript{81} Prosecutor v. Ongwen, Trial Chamber, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, para. 11.

\textsuperscript{82} Ibid., para. 12.

\textsuperscript{83} Prosecutor v. Lubanga, Trial Chamber, Decision on the Prosecution’s Application for Admission of Documents Related to Witness 297 Pursuant to Article 64(9), 12 November 2010, para. 12.

\textsuperscript{84} Prosecutor v. Bemba, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 81.

\textsuperscript{85} Prosecutor v. Katanga, Trial Chamber, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, para. 50.

\textsuperscript{86} Prosecutor v. Lubanga, Trial Chamber: Decision on the Defence Request for the Admission of 422 Documents, 17 November 2010, para. 50.

\textsuperscript{87} Rule 111 IRMCT RPE.

\textsuperscript{88} See also Chapter VIII “Direct, Cross-Examination and Re-Examination”, Section E.2. for further discussion on Rule 92\textit{ter}, ICTY RPE.
38. This procedure will shorten the time used in court to hear the evidence of the witness, but it may nonetheless result in substantial amount of evidence being admitted through the witness. For example, the witness may have provided numerous prior statements or may have testified at trial on numerous occasions in the past, or both. The previous declarations which may be admitted under Rule 92ter could very well be hundreds of pages long if the witness testified extensively in one or more previous trials. In addition, if the witness has testified in previous proceedings, there may be hundreds of exhibits associated to this testimony which will be tendered along with the transcript. It should also be noted that some Trial Chambers have now adopted a practice of admitting “amalgamated statements” under Rule 92ter. This is essentially a consolidated version of all a witness’s prior statements on which the Prosecution intends to rely on in the current trial. Counsel should be wary of amalgamated statements as they are yet another level removed from the words actually spoken by a witness, and are close to being a witness summary prepared by the Prosecution. While this may be a more concise manner of dealing with the evidence in court, counsel must still thoroughly review all the prior statements and transcripts in preparation for cross-examination.

39. Chamber nonetheless has discretion whether to allow a witness to testify pursuant to Rule 92ter. “Judicial economy” is not necessarily the only parameter which will guide a Chamber in determining the mode of testimony for a witness. Factors, such as the number of previous statements - perhaps not given under oath and which may be inconsistent - may be relevant in making such a determination. These matters will arise on a case-by-case basis. However, relying on the “best evidence rule” and the need to ensure a fair and expeditious trial, a Chamber may decide that it is the interests of justice to hear a witness’s testimony firsthand.

40. At the IRMCT, it was decided that documents which were not referred to in the witness’ testimony could not be admitted as associated exhibits.

B.3 Evidence of Unavailable Witnesses

41. Rule 92 quater of the ICTY RPE allowed for the admission in writing form of the evidence of “unavailable persons”. According to the jurisprudence of the ICTY, for a statement to be admitted pursuant to Rule 92 quater, the Trial Chamber must satisfy itself that:

i. the witness is unavailable;
ii. the statement is reliable;

89 Prosecutor v. Karadžić, IT-95-5/18-T, Order on the procedure for the conduct of trial, 8 October 2009, Appendix A.
90 Prosecutor v. Mićo Stanišić and Stojan Župljanin, IT-08-91-T, Decision Denying Prosecution’s Motion for Admission of Evidence of Pregrad Radulović Pursuant to Rule 92 ter, 1 April 2010.
92 Rule 112 IRMCT RPE.
93 See also Chapter VIII “Direct, Cross-Examination and Re-Examination”, Section E.1 for further discussion on Rule 92quater, ICTY RPE.
iii. the statement is relevant and of probative value; and
iv. whether the statement goes to the acts and conduct of the accused or involves critical evidence.  

42. A Trial Chamber must first determine if the witness is unavailable, meaning that on a balance of probabilities that a witness is dead or can no longer be traced with reasonable diligence. Then, the Chamber must decide whether the evidence is reliable, whether to admit the evidence in the exercise of its discretion, including whether the information goes to the acts and conduct of the accused, goes to a core issue in the case, and whether the cross-examination in the prior proceeding adequately addressed interests relative to the accused in current case. For example, the first trial may relate entirely to the responsibility of military officials for the alleged crimes, and the second trial may relate to the responsibility of police officials or political figures for those crimes. Additionally, it should be borne in mind that defendants in other cases would have had significantly less incentive to contest certain elements of the evidence than they would for facts related to their own actions and, in some cases, such defendants might affirmatively choose to allow blame to fall on others.

43. In addition, the general requirements of admissibility of evidence under Rule 89 must be satisfied, namely that the evidence is relevant and has probative value, and that the probative value is not substantially outweighed by the need to ensure a fair trial.

44. The following factors are relevant to the assessment of the reliability of the statement:

   i. whether the statement was made under oath;
   ii. whether it was signed with an acknowledgement that it was true;
   iii. whether it was taken with the assistance of an interpreter qualified by the Registry;
   iv. whether the statement was subject to cross-examination;
   v. whether there is other evidence relating to the same events; and,
   vi. other factors such as manifest inconsistencies in the statement.

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94 Prosecutor v. Prlić et al., IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 quarter of the Rules (Hasan Rizvić), 14 January 2008, paras. 10-13; Prosecutor v. Milutinović et al., IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter, 16 February 2007, paras. 3, 6; Prosecutor v. Milutinović et al., IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter, 5 March 2007, para. 6. At the ICC, the Chamber must also be satisfied of the witness’s unavailability and that the testimony has sufficient indicia of reliability (Rule 68(2)(c)(i)). It may also be a factor against admission if the pre-recorded testimony proposed for submission under Rule 68(2)(c) goes to the acts or conduct of the accused; see Rule 68(2)(c)(ii) RPE.


96 Prosecutor v. Prlić et al., IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 bis and quarter of the Rules, 27 October 2006, paras. 9-12.

97 Rule 105 IRMCT RPE.


99 Prosecutor v. Milutinović et al., IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter, 5 March 2007, para. 7; Prosecutor v. Rasim Delić, IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter, 9 July 2007, page 4; Prosecutor v. Haradinaj et al., IT-04-84-T, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 quarter and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 8.
45. A statement or transcript admitted without cross-examination cannot support a conviction by itself unless the statement is otherwise corroborated. The Trial Chamber will also consider the absence of cross-examination when determining how much weight to give to the statement.

46. During the IRMCT Stanišić and Simatović case, several guidelines were established in relation to how to deal with cross-examination or the lack thereof of an unavailable witness, especially in the context of a re-trial:

i. While the cross-examination may reflect a defence strategy which differs from the interests of the Accused in the present case, these differences do not preclude the admission of the prior testimony. Any deficiencies in previous cross-examination, particularly on issues central to the responsibility of the Accused in the present case, will be considered when assessing the weight to be attributed to the evidence.

ii. Where the Defence had previously cross-examined the deceased witness during the original trial, the Trial Chamber would not be prevented, de jure, from relying on the witness’ evidence even in the absence of corroboration.

iii. Prior testimony of a deceased witness would be admissible even when it went to the acts and conduct of the accused, where the Defence would have an opportunity to question other witnesses on these issues.

iv. Prior testimony of a deceased witness would be admissible at retrial despite going to acts and conduct of the accused, where the witness testified at the first trial of the case.

47. In the exercise of their discretion to admit testimony under Rule 92quater (Rule 112 IRMCT RPE), ICTY and IRMCT Trial Chambers have ruled as follows:

- Testimony of a witness in a previous trial was admitted where it was reliable and where other live witnesses had addressed the same topics.

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101 Prosecutor v. Milutinović et al., IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter, 16 February 2007, para. 13.


105 Prosecutor v. Stanišić and Simatović, MICT-15-96-T, Decision on Prosecution Motion for Admission of Evidence of Witness RFJ-142 pursuant to Rule 112, 9 October 2018, para. 3.

106 Prosecutor v. Milutinović et al., IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter, 5 March 2007.
• Testimony of a witness in a previous trial and statements given to Prosecutor were admitted where they did not go to fundamental issues of the case.\(^\text{107}\)

• Testimony about a critical issue in the Prosecution’s case was not admitted.\(^\text{108}\)

• Direct examination of witness who fell ill before being cross examined was not admitted where the testimony was not sufficiently reliable or corroborated by other witnesses.\(^\text{109}\)

• A deceased witness who had signed his statement with an “X” in the presence of a representative of the Registry was sufficient proof of the reliability of the method under which the statement was taken.\(^\text{110}\)

• Although a statement of a deceased witness went to the acts and conduct of the accused, it was cumulative to other testimony which had been subject to cross-examination and could be admitted.\(^\text{111}\)

• At the IRMCT, although a plea agreement may be relevant to the circumstances under which a statement or testimony was given and recorded, the existence of such an agreement is itself enough to merit the exclusion of the evidence under Rule 112.\(^\text{112}\)

48. Rule 92 *quinquies*\(^\text{113}\) was the latest rule permitting written witness statements to be admitted into evidence without any testing by cross-examination.\(^\text{114}\) It provides, in essence, that a prior written statement of a witness may be admitted *in lieu* of that witness’s oral testimony if the failure to testify has been, *inter alia*, “materially influenced by improper interference including threats, intimidation, injury, bribery, or coercion”.\(^\text{115}\) Rule 92*quinquies* specifically provides that written statements admitted under the Rule “*may* include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.”\(^\text{116}\) However, the Rule did provide that in determining whether to admit a written statement “the interests of justice” include an assessment of the reliability of the statement or transcript of the witness having regard to:

• the circumstances in which it was made and recorded;\(^\text{117}\)


\(^{108}\) *Prosecutor v. Slobodan Milošević*, IT-98-29/1-T, Decision on Prosecution’s Motion for Admission of Witness Statements Pursuant to Rule 92 quarter, 19 April 2007, paras. 16-17.

\(^{109}\) *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Reasons for Trial Chamber’s Decision to Exclude the Evidence of Witness 55 Under Rule 89(D) and to Deny His Testimony Pursuant to Rule 92 Quarter, 14 December 2007, para. 16.

\(^{110}\) *Prosecutor v. Haradinaj et al.*, No. IT-04-84-T, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 quarter and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 9.


\(^{112}\) *Prosecutor v. Stanislić and Simatović*, MICT-15-96-T, Decision on Prosecution Motion for Admission of Evidence of Milan Babic pursuant to Rule 112, 17 January 2018, para. 11.

\(^{113}\) Rule 113 IRMCT RPE.

\(^{114}\) This rule was enacted in late 2009.

\(^{115}\) Rule 92 *quinquies*, ICTY RPE, enacted 10 December 2009. ICC Rule 68(2)(d) RPE does not expressly include interference by injury or bribery.

\(^{116}\) Rule 92 *quinquies*(B)(iii), ICTY RPE. ICC Rule 68(2)(d) does not include this provision.

\(^{117}\) Rule 92 *quinquies*(B)(ii)(a), ICTY RPE. ICC Rule 68(2)(d) does not include this provision.
• the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference;\textsuperscript{118} and,
• whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment.\textsuperscript{119}

49. An important point to note regarding the admission of Prosecution witness statements introduced in evidence during ICTY trials is that they were gathered, usually prior to trial and sometimes many years prior to trial, by Prosecution investigators or Prosecution counsel as part of the Prosecution’s investigation of its own case. The ICTY did not adopt the system, familiar in many civil law jurisdictions, of creating a dossier of the case prepared by a judicial officer before trial who is required to seek out exculpatory and inculpatory evidence with equal determination, and who is expected not to favour either the Prosecution or the Defence.\textsuperscript{120} With extremely rare exception, no one representing the interests of the accused is present at the time such statements are obtained.

50. At the ICC, Rule 68(2)(c) of the ICC RPE regulates the admission of the prior recorded testimony of unavailable witnesses. The Rule considers a person as unavailable if he or she “has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally”.\textsuperscript{121} In these situations, prior recorded testimony can be admitted if the Chamber is satisfied that it has sufficient indicia of reliability, and the necessity of pre-trial investigative measures could not be anticipated. However, the fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction.\textsuperscript{122}

51. Beyond the textual criteria set out in Rule 68(2)(c), the Chambers would also consider the impact of any request on the fairness of the proceedings more generally, on a case-by-case basis.\textsuperscript{123} In addition, Article 69 - in particular paragraphs 2 and 4 on the relevance and probative value of the prior recorded testimonies - is relevant and should be assessed against any prejudice caused by the admission to a fair trial or to a fair evaluation of the testimony of a witness.\textsuperscript{124}

\textsuperscript{118} Ibid. at (B)(ii)(b). ICC Rule 68(2)(d) does not include this provision.

\textsuperscript{119} Ibid. at (B)(ii)(c). In this sense the fact a statement goes to the acts and conduct of the accused might be a factor weighing against admission of the statement, but it is not cause to prevent its admission. See ICC Rule 68(2)(d)(iv) RPE; [n] 61.

\textsuperscript{120} See Prosecutor v. Slobodan Milošević, IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, 21 October 2003, para. 6.

\textsuperscript{121} See, e.g. Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Red-Corr, 19 August 2015, para. 134 ff.

\textsuperscript{122} This happened in Trial Chamber I, Prosecutor v. Gbagbo and Blé Goudé, Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), ICC-02/11-01/15-573-Red, 9 June 2016, paras 15-18 (considering that “the evidence ... relates to issues that are materially in dispute, and not mere background information. ... In these circumstances, the Chamber considers that it is appropriate that the witnesses appear before the Chamber to be questioned, at least, by the Defence.”).

\textsuperscript{123} Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, ICC-01/05-01/08-1386, para. 78.

\textsuperscript{124} Prosecutor v. Bosco Ntaganda, Trial Chamber VI, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, ICC-01/04-02/06-1029, 20 November 2015, para. 15.
B.4 Statements of the Accused

52. Statements or interviews of an accused with the ICTY Prosecution have also been held to be admissible. The test for admissibility is two-pronged:

   i. whether the procedural safeguards set forth in Rules 42 and 43\(^{125}\) are satisfied;\(^{126}\) and,
   ii. whether the admissibility test laid down in Rules 89(C) and 89(D) is met.\(^{127}\)

53. Statements made by the accused in the presence of counsel are presumed to be made with the awareness of the right to remain silent.\(^ {128}\) The Prosecution bears the burden of establishing all factors relating to the reliability of a statement of the accused which it offers in evidence.\(^ {129}\) At the ICTY, the testimony of an accused in another trial at the ICTY had been deemed admissible in the accused's own trial, where he had been advised of his rights prior to giving the testimony and waived them.\(^ {130}\) An accused cannot invoke his right against self-incrimination to block admission of a statement freely given after being advised of his right to remain silent.\(^ {131}\)

54. In 2007, in the Prlić et al. case\(^ {132}\) and the Popović et al. case,\(^ {133}\) the Appeals Chamber ruled that suspect interviews between an accused and the Prosecution are also admissible for use against the co-accused, including as evidence of the acts and conduct of those co-accused. With respect to the rights of the accused in multi-defendant trials, this break with past jurisprudence is yet another unfortunate move away from the right of the accused to confront the evidence offered against them at trial. Prior to Prlić et al., this issue was governed by jurisprudence emanating from the Blagojević case, where the Trial Chamber held, pursuant to Rule 89, that a Prosecution interview of one accused could not be admitted against the co-accused because it violated the co-accused’s right to cross-examination.\(^ {134}\) This takes into account factors such as the ultimate truthfulness of such an interview when a suspect being interviewed in these circumstances by the Prosecution may attempt to minimize his role in any criminal activities while highlighting or even exaggerating the role of others. This risk was noted by the Chambers in Prlić et al.\(^ {125}\) Rules 40 and 41, IRMCT RPE.

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\(^{125}\) Rules 40 and 41, IRMCT RPE.
\(^{126}\) Rules 42 and 43, ICTY RPE (dealing with the rights of suspects and the recording of suspect interviews during investigations).
\(^{128}\) Prosecutor v. Halilović, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 15.
\(^{129}\) Prosecutor v. Orić, IT-03-68-T, Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89(D) and 95, 7 February 2006, para. 22.
\(^{130}\) Prosecutor v. Šešelj, IT-03-67-PT, Decision on Prosecution’s Motion to Admit into Evidence Transcripts of Vojislav Šešelj’s Testimony in the Milošević Case, 30 October 2007.
\(^{131}\) Prosecutor v. Halilović, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 15.
\(^{132}\) Prosecutor v. Prlić et al., IT-04-74-AR73.6, Appeals Chamber, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007.
\(^{133}\) Prosecutor v. Popović et al., IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovcanin's Questioning Appeals Chamber, 14 December 2007.
\(^{134}\) Prosecutor v. Vidoje Blagojević and Dragan Jokić, IT-02-60-T, Transcript, 22 May 2003, T: 735-736.
et al. and Popović et al., however, the Appeals Chamber has held that the transcripts of such interviews may be introduced into evidence even if the co-accused are not able to cross-examine the maker of that statement, since as a matter of principle, nothing bars the admission of evidence that is not tested or might not be tested through cross-examination.

55. It is difficult to see how the fundamental problems with using statements of an accused against a co-accused can be reconciled with the threshold requirements for the admissibility of hearsay evidence; namely, when sought to be admitted to prove the truth of its contents, there must be an “indicia of reliability” that the out-of-court statement was voluntary, truthful, and trustworthy.

56. Nevertheless, untested evidence relating to the acts and conduct of the accused, which is admitted into the trial record, must be corroborated by other evidence in order to form a basis for a conviction of an accused.

B.5 Intercept Evidence

57. The position under existing case law at the ICTY and IRMCT is that evidence obtained illegally in breach of domestic law is not *per se* subject to being excluded from evidence at trial. This has meant that intercepts taken in violation of domestic laws or documents seized in violation of local procedural requirements are routinely admitted in evidence at the ICTY and IRMCT.

58. The Brdanić Trial Chamber, in response to Defence objections that there should be a universal exclusion from evidence of information obtained illegally or unlawfully, held:

“It is clear from the review of national laws and international law, and the Rules and practice of this International tribunal, that before this Tribunal, evidence obtained illegally is not, a priori, inadmissible, but rather that the manner and surrounding circumstances in which

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136 Prosecutor v. Prlić et al., IT-04-74-AR73.6, Appeals Chamber, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, paras. 53, 55-57; Prosecutor v. Popović et al., IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovcanin’s Questioning Appeals Chamber, 14 December 2007, para. 48.

137 Prosecutor v. Prlić et al., IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, Appeals Chamber, 23 November 2007, paras. 53, 55-57; Prosecutor v. Popović et al., IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovcanin’s Questioning Appeals Chamber, 14 December 2007, para. 48.

138 See e.g. Prosecutor v. Brdanić, IT-99-36-T, Decision on Defence ‘Objection to Intercept Evidence’, 3 October 2003, para. 53; see also Prosecutor v. Lubanga, ICC-01/04-01/06-1981, Decision on the Admission of Material From the “Bar Table” (including Annexes), 24 June 2009, para 36.

evidence is obtained, as well as its reliability and effects on the integrity of the proceedings, will determine its admissibility. Illegally obtained evidence may, therefore, be admitted under Rule 95 since the jurisprudence of the International Tribunal has never endorsed the exclusionary rule as a matter of principle.”

59. The Chamber went on to say that admitting illegally obtained intercepts into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings. Rather, such intelligence may actually prove to be essential in uncovering the truth, particularly in situations of armed conflict. As such, the ICTY will only exclude evidence if the integrity of the proceedings would indeed be seriously damaged. Ultimately, the Brđanin Trial Chamber held that in light of the “gravity of the charges brought against the accused and the jurisdiction that this Tribunal has to adjudicate serious violations of international law, intercepted evidence, even where obtained in a pre-armed conflict period in violation of the applicable domestic law, should be admitted into evidence.” As with any other evidence, intercept evidence will be analysed and granted its appropriate weight in the context of the entire trial, and will be subject to the same interrogation as every other piece of evidence, such that evidence not proved to be authentic beyond a reasonable doubt will be granted no weight at the end of a trial.

60. Following the 2011 Bemba Appeals Judgment on the admission of evidence, the ICC has adopted a general rule where it will not rule on the relevance, probative value and potential prejudice (‘standard evidentiary criteria’) at the point of submission. These criteria are instead discussed at deliberation of judgment pursuant to Article 74(2) of the Rome Statute, while the Chambers simply recognise the formal submission. However, the Chambers will rule upfront on certain issues related to the admissibility of evidence, “when this is deemed appropriate”, particularly when it has been disputed that procedural bars may foreclose consideration of the evidentiary criteria, so as to render an exclusion of the evidence.

140 Prosecutor v. Brđanin, IT-99-36-T, Decision on Defence Objection to Intercept Evidence, 3 October 2003, para. 55; see Article 69(7), ICC; Prosecutor v. Lubanga, ICC-01/04-01/06-1981, Decision on the admission of material from the “bar table” (including Annexes), 24 June 2009, paras 34-37 (holding that the ICC Statute prescribes a similar approach: evidence may be deemed inadmissible if it has been obtained by a violation of international human rights standards (or the Statute) and either this violation creates doubts about the reliability of the evidence, or admission would seriously damage the integrity of proceedings).
141 Ibid.
142 Ibid.
143 Ibid. see fn 82 (The ICC provides that evidence would also be inadmissible if, having been obtained through violations of international law, the violation created doubt as to the reliability of the evidence).
144 Ibid., para. 63(8).
145 Ibid., para. 68; Prosecutor v. Popović et al., IT-05-88-T, Decision on Admissibility of Intercepted Conversations, 7 December 2007, paras. 76-77; see Prosecutor v. Lubanga, ICC-01/04-01/06-1981, Decision on the admission of material from the “bar table” (including Annexes), 24 June 2009, para. 49.
146 Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-1386, OA 5 OA 6, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, para. 37.
61. With regard to intercept evidence, the ICC Appeals Chamber in *Bemba et al.* has made a number of legal findings on the implications arising from (i) the alleged legal professional privilege and (ii) the alleged illegality under Article 69(7) of the Rome Statute.

62. On whether intercept evidence may breach the legal professional privilege between the client and the lawyer, the Appeals Chamber found that the definition of “privilege” does not cover “communications effected in furtherance of crime or fraud”, which was an exception to the privilege principle. On whether intercept evidence may be excluded under Article 69(7) for its potential violation of the Rome Statute or internationally recognised human rights, the Appeals Chamber took the position that national law is inapplicable according to Article 69(8). The question of violation hinges on the test of necessity and proportionality, i.e. whether the intercept evidence was an interference with the right to privacy disproportionate to the necessity of investigative activities.

### B.6 Evidence Tendered from the Bar Table

63. As a general rule, documents are not admitted except in connection with the testimony of witnesses. However, in some circumstances, the relevance and reliability of a document is sufficiently apparent to

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148 *Prosecutor v. Bemba et al.*, ICC-01/05-52-Red2, Pre-Trial Chamber II, Decision on the Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70, 29 July 2013, para. 4 (single judge); *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, paras. 414ff.

149 *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, paras. 327-28.

150 *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, paras. 330-31.
justify its admission without the need for any evidence relating to the document. Under this standard, some documents have been admitted from the “bar table”.\textsuperscript{151} A document may be admitted without an authenticating witness, but the party seeking the admission of a document without using a witness runs the risk that the probative value will be lessened or the document will be excluded.\textsuperscript{152}

64. It is not necessary that a document be authenticated by a witness for it to be admitted. However, an exhibit which has not been presented to a witness has less probative value than one which has.\textsuperscript{153} When documents are sought to be admitted from the bar table, the offering party must be able to demonstrate with clarity and specificity when and how each document fits into its case.\textsuperscript{154} This method of tendering evidence is now commonly used by both the Prosecution and the Defence at the ICTY and IRMCT.

B.7 Other Documentary Evidence

65. The following, non-exhaustive, observations emanate from the practice and jurisprudence of the ICTY concerning the admissibility of documentary evidence, whether through a witness or from the bar table:

- Documents that have not been translated into a working language of the ICTY, but which have been dealt with during the examination of a witness may either be marked for identification pending translation or be deemed inadmissible.\textsuperscript{155}
- Documents that have not been dealt with during the testimony of the witness through whom they are sought to be tendered are generally inadmissible.\textsuperscript{156} However, exceptions may be made for documents whose reliability and relevance have been demonstrated in another manner.\textsuperscript{157}

\textsuperscript{151} Prosecutor v. Boskoski and Tarkulovski, IT-04-82-T, Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table, 14 May 2007, paras. 10, 13.


\textsuperscript{153} Prosecutor v. Orić, IT-03-68-T, Trial judgement, 30 June 2006, para. 29; Prosecutor v. Đorđević, IT-05-87/1-T, Decision on Prosecution’s Motion to Admit Exhibits from Bar Table, 28 April 2009, para. 5; see also Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-2635, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010 (holding that the ICC has not expressly stated that there will be less probative value).

\textsuperscript{154} Prosecutor v. Rasim Delić, IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 9; Prosecutor v. Rasim Delić, IT-04-83-T, Decision on Defence Motion for the Admission of Documentary Evidence, 5 March 2008, para. 5; Prosecutor v. Milutinović et al., IT-05-87-T, Decision on Prosecution’s motion to admit documentary evidence, 10 Oct 2006, para.18; The ICC applies the same three-pronged test for admission of evidence from the bar table as for other evidence: relevance, probative value and whether admission would cause undue prejudice. See Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-2635, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, para. 14; Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-3184 Decision on the Bar Table Motion of the Defence of Germain Katanga, 21 October 2011, para.16; Prosecutor v. Bemba, ICC-01/05-01/08-2012-Red, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011, para. 13; See also Prosecutor v Stanisic and Simatovic, MICT-15-96-T, Decision on Prosecution Motion for Admission of Documents underlying Expert Report of Christian Nielsen, 5 March 2018, para. 10 (stating that overwhelming the trial record with large number of documents, often of cumulative nature, will neither expedite the proceedings, nor facilitate the fair adjudication of the case).

\textsuperscript{155} Prosecutor v. Slobodan Milošević, IT-02-54-T, Order on admission of documents (including exhibits of witnesses Kosta Mihajlović and Čedomir Popov) and Decision on Prosecution motion regarding exhibits and other practicalities during the defence case, 7 February 2005, p. 3.

\textsuperscript{156} Ibid.

\textsuperscript{157} Ibid.
Generally, entire books and other similarly lengthy documents should not be admitted into evidence. Rather, only relevant portions of those materials should be tendered.\(^\text{158}\) However, when only part of a document is tendered, the opposing party has the right to see the entire document and make use of sections relevant to its case.\(^\text{159}\)

Letters written contemporaneously to the events they describe may provide valuable evidence.\(^\text{160}\)

Videos\(^\text{161}\), photographs, and tape-recordings\(^\text{162}\) may be admissible, assuming they meet the standards of relevance and reliability.

Contemporaneous diaries may be admitted. For example, the Kordić Trial Chamber admitted a war diary into evidence, stating that it carried “its own authenticity, being written in several hands and, having every sign of being what it purports to be”.\(^\text{163}\)

Military orders and reports are also generally admissible, as “[t]hey speak for themselves”, particularly when accompanied by a signature and stamp or seal.\(^\text{164}\)

C. Strategic Considerations on Tendering and Challenging Evidence

66. The decision whether to admit a document as an exhibit, or the weight given to an exhibit in final deliberations, may be influenced by any objections made to its admission. It is essential that counsel are prepared to challenge any evidence that is prejudicial to the accused or detrimental to the defence case theory. This will require counsel to be well prepared ahead of time for challenges to the admissibility of certain proposed exhibits, or alternatively to challenge the relevance and reliability of exhibits in cross-examination of prosecution witnesses or through defence witnesses who testify during the defence case. Being prepared for such challenges will require counsel to review all proposed prosecution exhibits with the defence case theory in mind; identify problematic documents; determine whether there are any valid bases to challenge admissibility; conduct any necessary preparation

\(^{158}\) Ibid., p.7; Prosecutor v. Perišić, IT-04-81-T, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008, paras. 24-25.

\(^{159}\) May, Richard and Marieke Wierda, International Criminal Evidence (2002), 244.

\(^{160}\) May, Richard and Marieke Wierda, International Criminal Evidence (2002), 246-47; For instance, in the Bagilishema case, the defence tendered a letter written by the accused, contemporaneous to the time of the alleged offences, into evidence. One of the judges wrote in a separate opinion that “the accused certainly could not have envisaged facing a trial of this nature at the time he wrote the letter. Hence it enhances the credibility of the matters urged therein.” Prosecutor v. Bagilishema, ICTR-95-1A-T, Judgement, Separate Opinion of Judge Asoka de A. Gunawardana, 7 June 2001, para.19; see Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-2635, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, paras.32-33.

\(^{161}\) See, Prosecutor v. Kovačević, IT-97-24, (holding that a video showing the first visit from Western journalists to concentration camps in Prijedor was admissible). The ICC explicitly provides for the admissibility of video evidence as prior recorded testimony through Art.69(2) Rome Statute and Rule 68 RPE; see Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-2635, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, para 24(d) (showing that outside of testimony, video evidence may be admissible “as evidence that speaks for itself” if originality and integrity is established).

\(^{162}\) See Prosecutor v. Krstić, IT 98-33, (court holding that the tape-recording of a telephone conversation between one of the accused and a military commander was admissible).

\(^{163}\) Prosecutor v. Kordić and Čerkez, IT-95-14/2-T, Decision on Prosecutor’s submissions concerning “Zagreb exhibits” and presidential transcripts, 1 December 2000, para. 44; see Prosecutor v. Lubanga, ICC-01/04-01/06-1399-Corr, Decision on the admissibility of four documents (including Annexes & Corrigenda), 20 January 2011, paras. 36-42 (admitting logbooks recording the involvement of children in armed conflict).

\(^{164}\) Ibid., para. 43.
(investigation, forensic examination, etc.); research any relevant legal issues, and prepare both legal and factual arguments for written motions or oral objections.

- Counsel should consider the purpose of challenging the admission of evidence, how to prepare, and the timing of evidentiary objections. Objections must be timely and can be done either orally or in writing. Reasons for challenging the admission of evidence include:
  - seeking to exclude a prejudicial piece of evidence;
  - obtaining information pertaining to a document, such as provenance, or the purpose for which it is being tendered;
  - to preserve on the trial record issues related to the document. Even if these objections are not sufficient to have a document excluded, they may be relevant to the weight given to the document at the end of trial; and,
  - to prevent claims of waiver on appeal.

67. Objections to groups of documents (such as intercepts), bar table motions, and proposed adjudicated facts, and other situations involving numerous or voluminous documents, are typically done by motion in response to prosecution motions to admit those documents or facts. Responding by written motion allows for full ventilation of all the relevant objections and supporting jurisprudence. Objections to individual documents can be done either in writing or orally, and usually depends on the circumstances surrounding the tendering of the document. It is important that counsel think strategically about the timing of their objections. In some situations, objecting too early may put the prosecution on notice of potential problems with the admissibility of a document and give them time to remedy such problems. Objecting too late to admission, when a party has long been on notice of issues relating to documents, may result in the Chamber overruling any objections as being untimely raised. Commonly, objections to individual documents that are being tendered in court through a witness will be done orally. For example, an objection based on the fact that a party is tendering a document through a witness who has no knowledge of or connection to the contents of the document would usually be made at the moment the prosecution seeks to tender the document. The Chamber may need to evaluate in each case whether it is necessary or preferable to hear some or all of the anticipated evidence relevant to a document, which is the subject of an objection, before admitting it as an exhibit.\(^{165}\)

68. Ultimately, to effectively defend a case and protect the rights of the accused during trial, counsel must master the applicable rules of procedure and evidence and remain alert to any potential issues related to proposed evidence. These issues often arise on a case-by-case basis, and the following are only some of the potential grounds on which proposed evidence may be challenged:

\(^{165}\) Prosecutor v. Boskoski and Tarkulovski, IT-04-82-T, Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table, 14 May 2007, para. 12.
69. It is desirable that a witness speaks to the origins and/or contents of a document being offered into evidence, to enable the Chamber to properly assess the relevance, authenticity, and reliability of that document in a meaningful way in its overall consideration of the evidence. Counsel must also bear this in mind when they are seeking to tender documents through their own defence witnesses.

70. Where a document has no basis for exclusion, cross-examination can be used to undermine the reliability or relevance of a document. Documents which challenge a witness’ credibility may be admitted even where the witness states that he or she has no knowledge of the document or rejects its contents. In such a case, the fact that a document goes to the witness’ credibility may constitute sufficient nexus between the witness and the document to make it admissible, assuming it is otherwise authentic and

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166 See Prosecutor v. Delalić et al., IT-96-21-T, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, 2 September 1997, para. 43 (exclusion of accused statement due to the absence of counsel during the interview); Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-2635 Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, paras 50-51, 63-65 (exclusion of statements when witness not available for examination as trial as unduly prejudicial to the right of the accused to examine adverse witnesses; exclusion of accused statement due to inadequate legal advice prior to interrogation, see [n] 68).


168 See Prosecutor v. Milutinović et al., Decision on Prosecutions Third Request for Admission of Documents from the Bar Table, 23 March 2007, para. 6 (“Chamber denied admission from the bar table of a Report of the Humanitarian Law Centre in Belgrade. The Chamber was not satisfied of the authenticity and reliability of the report for several reasons (1) the report does not provide a list of sources used by the Humanitarian Law Centre to compile the information nor does it footnote such sources when referring to specific cases of violations of rights; (2) it does not explain the methods by which the collection of data was achieved nor does it address the manner in which this data was analysed (3) the very first page of the report provides that it is to be used for internal purposes of the organisation only, implying that it is not an official publication. Accordingly, the Chamber was unable to assess the reliability of the document and was therefore of the view that the report lacked probative value.”); Prosecutor v. Lubanga, ICC-01/04-01/06-1399-Corr, Decision on the admissibility of four documents (including Annexes & Corrigenda), 20 January 2011, para 30.

169 Prosecutor v. Karadžič, IT-95-5/18-T, Decision on Guidelines for the Admission of Evidence through Witnesses, 19 May 2010, para. 11.
reliable. However, documents used to impeach a witness are normally admitted for the limited purpose of credibility, and not for the truth of their contents.

C.1 The Use of “Fresh evidence” by the Prosecution during the Defence Case

71. As a general rule, the Prosecution must present evidence in support of its case during its case-in-chief. Defence counsel should be alert to issues related to the tendering of Prosecution evidence during the Defence case. The Prosecution may seek to use what is known as “fresh evidence” in its cross-examination of defence witnesses, namely:

- material that was not included on the Prosecution ter list;
- material not admitted during Prosecution case-in-chief;
- material tendered by the Prosecution when cross-examining a Defence witness; and,
- material not limited to the material that was not available to the Prosecution during its case-in-chief.  

72. In other words, “fresh evidence” includes both material available to the Prosecution during its case-in-chief and material obtained by the Prosecution after the close of its case-in-chief.

73. A Trial Chamber has the discretion to decide whether to allow “fresh evidence” on a case by case basis, taking into account the probative value of that evidence, and the need to ensure a fair trial. The factors that the Trial Chamber must consider when exercising its discretion are the following:

- when and by which means the Prosecution obtained these documents;
- when it disclosed the documents to the Defence;
- the time elapsed between disclosure and examination of the witness;
- the mode of disclosure of the documents in question;
- why the documents are being offered only after the conclusion of its case;
- the purpose of the documents admission;  

170 Prosecutor v. Karadžić, IT-95-5/18-T, Decision on Guidelines for the Admission of Evidence through Witnesses, 19 May 2010, para. 11.

171 Prosecutor v. Prlić et al., IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009, para. 23.

172 Ibid., para. 15.


174 Prosecutor v. Prlić et al., IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, 26 February 2009, para. 25l, see also Prosecutor v. Rasim Delić, IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008, paras. 22-23.

175 Prosecutor v. Prlić et al., IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, paras. 24-25, 28-29; Prosecutor v. Rasim Delić, IT-04-83-AR73.1,
74. The Prosecution must specifically justify a request for the admission of ‘fresh evidence’. Where “fresh evidence” introduced by the Prosecution during the Defence case is aimed at establishing the guilt of the accused, the Prosecution must explain to the Chamber on a case-by-case basis when and by which means it obtained the documents, when it disclosed them to the Defence and why they are being offered only after the conclusion of the Prosecution case. A Trial Chamber may be more lenient with respect to admission of fresh evidence for the sole purpose of impeaching a witness’s credibility or refreshing his or her memory, but still must decide on admission on a case-by-case basis in conformity with Rule 89. The Trial Chamber has the discretion to limit the purpose for which any admitted pieces of evidence may be used (see case box Prlić et al. case - Application of Threshold for Admission).

75. When objecting to the admission of fresh evidence, counsel must demonstrate the prejudice that would be caused by the admission of such evidence. The Trial Chamber may then exclude the evidence, or it may go on to grant relief other than the exclusion of the evidence, such as:

- providing more time for re-examination;

Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008, paras. 22-23.

176 Ibid., para. 25.
177 Prosecutor v. Prlić et al., IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, 26 February 2009, para. 23; see also Prosecutor v. Rasim Delić, IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal against Trial Chamber’s Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008, paras. 22-23.
178 Prosecutor v. Prlić et al., IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, 26 February 2009, paras. 24, 28.
179 Ibid.
180 Ibid., para. 29.
181 The Defence should be able to show real prejudice, not general prejudice. The Appeals Chamber in Kordić and Čerkez emphasized that “[t]he mere fact that [the admitted evidence] was probative of the Prosecution’s case does not mean that the [a]ccused were prejudiced” (Prosecutor v. Kordić and Čerkez, Appeal Judgement, para. 224).
• adjourning the session to provide the defence with more time to prepare; and,
• granting the possibility of recalling the witness.\textsuperscript{182}

\textbf{C.2 Rebuttal, Rejoinder and Re-opening}

76. Rules 85(A)(iii) and (iv)\textsuperscript{183} provided for the admission of evidence in rebuttal and rejoinder during the trial phase. The reopening of a party’s case, while not provided for in the Rules, has been permitted since the early days of the ICTY. There are specific standards and thresholds for the admission of evidence in each of these circumstances.

\textbf{C.2.1 Rebuttal}

77. The Prosecution may present evidence in rebuttal of evidence brought by the Defence during its case-in-chief, but only if it relates to a significant new issue arising directly from Defence evidence, which could not have been reasonably foreseen.\textsuperscript{184} Rebuttal evidence has been denied in cases where the Prosecution should have anticipated the issue and led the evidence in its own case-in-chief.\textsuperscript{185} Only highly probative evidence may be led as rebuttal evidence.\textsuperscript{186} The Prosecution is under a duty to adduce all evidence critical to proving the guilt of an accused by the close of its own case.\textsuperscript{187} Rebuttal evidence will not be admissible where:

\begin{itemize}
  \item i. the evidence is itself evidence probative of the guilt of the accused, and it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it;\textsuperscript{188}
  \item ii. merely because the relevant party’s case has been met by certain evidence to contradict it;\textsuperscript{189} or,
  \item iii. it could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time.\textsuperscript{190}
\end{itemize}

\textsuperscript{182} Prosecutor \textit{v. Prlić et al.}, IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, 26 February 2009, para. 25.

\textsuperscript{183} Rules 102(A)(iii) and (iv), IRMCT RPE.


\textsuperscript{186} Prosecutor \textit{v. Limaj et al.}, IT-03-66-T, Decision on Prosecution’s Motion to Admit Rebuttal Statements Via Rule 92 bis, 7 July 2005, para. 6.


\textsuperscript{189} Ibid.

\textsuperscript{190} Ibid., para. 276.
C.2.2 Rejoinder

78. The Defence may respond to Prosecution rebuttal evidence through the presentation of rejoinder evidence. This evidence may be brought only with respect to what directly arises out of rebuttal evidence and could not be expected to have been addressed during the Defence case.\(^\text{191}\)

C.2.3 Re-opening of the Case

79. Either the Prosecution or the Defence can apply to re-open their case-in-chief. A party will only be allowed to reopen its case to offer fresh evidence when it is shown that the evidence could not have, with reasonable diligence, been identified and presented in the case in chief.\(^\text{192}\) In this context, the Appeals Chamber has specified that “fresh evidence” is:

i. evidence which was not in the possession of a party at the conclusion of its case, and by which the exercise of all diligence could not have been obtained by the party at the close of its case; or

ii. evidence the party had in its prior possession, the importance of which only became apparent in light of other fresh evidence.\(^\text{193}\)

80. To establish whether the evidence is “fresh evidence” meeting the threshold for re-opening, the Chamber must assess the diligence shown by the requesting party in obtaining the exhibits sought for admission. To this end, the Chamber must take into account the existence of any \textit{indicia} which might have allowed the discovery of these exhibits or signaled their importance at an earlier stage of the proceedings.\(^\text{194}\) This analysis is done on a case-by-case basis.\(^\text{195}\) Even if the Trial Chamber is satisfied that the moving party has shown due diligence, it may still refuse to open the case pursuant to Rule 89(D), when the probative value is outweighed by the need to ensure a fair trial.\(^\text{196}\) The Trial Chamber must therefore “exercise its discretion as to whether to admit the fresh evidence by weighing the probative value of that evidence against any prejudice to the accused in admitting the evidence late in the proceedings.”\(^\text{197}\) The Chamber must, in particular, examine the following factors:

- the stage of the trial;
- the delay likely to be caused by the re-opening;

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\(^{191}\) \textit{Prosecutor v. Limaj et al.}, IT-03-66-T, Decision on Joint Defence Motion to Admit Rejoinder Statement via Rule 92 bis, 18 July 2005, para. 3.


\(^{194}\) \textit{Prosecutor v. Prlić et al.}, IT-04-74-T, Decision on the Prosecution’s Motion to Re-open its Case, 6 October 2010, para. 38.

\(^{195}\) \textit{Prosecutor v. Popović et al.}, IT-05-88-AR73.5, Decision on Vujadin Popović’s Interlocutory Appeal against the Decision on the Prosecution’s Motion to Re-open its Case-in-Chief, 24 September 2008, para. 10.


• the consequences that the presenting of fresh evidence against an Accused might have on the fairness of the trial against his co-accused; and,
• the probative value of the evidence to be presented. 198

81. Any motion by counsel to oppose re-opening should be based on an analysis of whether the proposed evidence meets all the criteria necessary for re-opening, as well as the prejudice to the accused, and any possible remedies to such prejudice, such as the exclusion of evidence, or the opportunity to re-call witnesses.

C.3 Judicial Notice of Adjudicated Facts

82. Rule 94(B) of the ICTY RPE 199 gave a Trial Chamber discretion to take judicial notice of relevant facts adjudicated in trial or appeal judgements of the ICTY after having heard the parties, even if one party objects to the taking of judicial notice of a particular fact. 200 The aims of Rule 94(B) were to achieve judicial economy and to harmonise the judgements of the Tribunal. 201 In applying Rule 94(B), the Trial Chamber must achieve a balance between promoting these aims and safeguarding the fundamental right of the accused to a fair trial. 202 This involves a two-step process. First, the Trial Chamber must determine whether the facts fulfil a number of admissibility requirements which have been set out in the jurisprudence, most recently in the Popović et al. case. 203 Secondly, for each fact that fulfils the requirements, the Trial Chamber must determine whether it should, in the exercise of its discretion,

198 Prosecutor v. Prlić et al., IT-04-74-T, Decision on the Prosecution’s Motion to Re-open its Case, 6 October 2010, para. 33; Prosecutor v. Popović et al., IT-05-88-AR73.5 Decision on Vujadin Popović’s Interlocutory Appeal against the Decision on the Prosecution’s Motion to Re-open its Case-in-Chief, 24 September 2008, para. 27; Prosecutor v. Delalić et al., IT-96-21-A, Appeal judgement, 20 February 2001, paras. 280, 290.
199 Rule 115(B),IRMCT RPE.
200 Prosecutor v. Popović et al., IT-05-88-T, Decision of Prosecution motion of judicial notice of adjudicated facts with annex, 26 September 2006, para. 3; Prosecutor v. Karamera et al., ICTR-98-44-AR73(C), Decision on Prosecutor’s interlocutory appeal of decision on judicial notice, 16 June 2006, para. 41; Prosecutor v. Kupreškić et al., IT-95-16-A, Decision on the motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to admit additional evidence pursuant to Rule 115 and for judicial notice to be taken pursuant to Rule 94 (B), 8 May 2001, para. 6; Prosecutor v. Vidoje Blagojević and Dragan Jokić, IT-02-60-T, Decision on Prosecution’s motion for judicial notice of adjudicated facts and documentary evidence, 19 December 2003, para. 15; Prosecutor v. Dragomir Milošević, IT-98-29/1-T, Decision on Prosecution’s motion for judicial notice of adjudicated facts and Prosecution’s catalogue of agreed facts with dissenting opinion of Judge Harhoff, 10 April 2007, para. 23; Prosecutor v. Prlić et al., IT-04-74-PT, Decision on motion for judicial notice of adjudicated facts pursuant to Rule 94 (B), 14 March 2006, para. 9. The ICC does not have an equivalent provision allowing judicial notice of adjudicated facts; Art. 69(6) of the Rome Statute provides only that a Chamber may take judicial notice of common knowledge facts. As of yet, no ICC trial judgment has taken judicial notice of common knowledge facts.
203 The Trial Chamber highlights the fact that the Popović et al Decision replaces the earlier Prlić et al Decision referred to by the Stanislić Defence in its responses to the First and Second Motions.
withhold judicial notice on the ground that taking judicial notice of the fact in question would not serve the interests of justice.\textsuperscript{204} The \textit{Popović et al.} requirements are the following:\textsuperscript{205}

i. the fact must have some relevance to an issue in the current proceedings;

ii. the fact must be distinct, concrete, and identifiable;

iii. the fact as formulated by the moving party must not differ in any substantial way from the formulation of the original judgement;

iv. the fact must not be unclear or misleading in the context in which it is placed in the moving party’s motion;

v. the fact must be identified with adequate precision by the moving party;

vi. the fact must not contain characterisations of an essentially legal nature;

vii. the fact must not be based on an agreement between the parties to the original proceedings; and,

viii. the fact must not relate to the acts, conduct, or mental state of the accused; and

ix. the fact must clearly not be subject to pending appeal or review.

83. The Trial Chamber has considered that “Rule 94 is not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted”.\textsuperscript{206} By taking judicial notice of an adjudicated fact, a Trial Chamber “establishes a well-founded presumption for the accuracy of the fact which, therefore, does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial”.\textsuperscript{207} Judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution.\textsuperscript{208} The legal effect of taking judicial notice of an adjudicated fact is only to relieve the Prosecution of its initial burden to produce evidence on a particular point (see case box \textit{Karemera et al. case - Re-assessment of previously adjudicated facts}). The Defence may put the issue into question by introducing reliable and credible evidence to the contrary.\textsuperscript{209}

\begin{itemize}


  \item \textit{Prosecutor v. Slobodan Milošević}, IT-02-54-AR73.5, Decision on the Prosecution’s interlocutory appeal against the Trial Chamber’s 10 April 2003 decision on Prosecution motion for judicial notice of adjudicated facts, 28 Oct 2003, 4; \textit{see also Prosecutor v Stanišić and Simatović}, MICT-15-96-T, Decision on Judicial Notice of Adjudicated Facts, 15 October 2018, para. 5.

  \item \textit{Prosecutor v. Karemera et al.}, ICTR-98-44-AR73(C), Decision on Prosecutor’s interlocutory appeal of decision on judicial notice, 16 June 2006, para. 42.

\end{itemize}
84. Despite making the admission of adjudicated facts under Rule 94(B) subject to competing interests, including the right of the accused to receive a fair trial pursuant to Article 20 and Article 21 of the Statute, a review of the guiding principles and reasoning set out in the case law raises serious questions about whether the rights of the accused are fully and properly protected. The Appeals Chamber acknowledged judicial notice under Rule 94(B) shifts the burden of production to the accused and has significant implications on the presumption of innocence guaranteed by Article 21(3) of the Statute, by requiring him to introduce evidence to rebut the adjudicated fact. The Appeals Chamber nonetheless reasoned that judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution. It determined that the effect of Rule 94(B) was only to relieve the Prosecution of its initial burden to produce evidence on the point. The ultimate burden of proof beyond a reasonable doubt remains with the Prosecution. The practical effect of this means that counsel must assess how to use their usually limited time and resources to prepare for rebuttal of these facts, in the knowledge that if any of these facts go unchallenged, they will be accepted as accurate and reliable by the Trial Chamber.

85. At the IRMCT, further guidelines on how to take judicial notice of adjudicated facts were introduced. A trial chamber may decline to take judicial notice should the fact be less central to the previous

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proceedings than in the current proceedings. Moreover, minor corrections or additions to the proposed facts can be made insofar as they provide clarity and consistency with the meaning intended by the original judgement, and so long as the corrections do not introduce substantive changes or new information nor alter the meaning of the original judgement.

86. Finally, proposed facts which relate to the existence of JCE, the conduct of its members other than the accused; and facts related to the conduct of physical perpetrators of crimes for which the accused is alleged to be criminally responsible, may be subject to judicial notice. However, proposed facts that go to issues which are at the core of the Prosecution’s case, should be denied judicial notice in the interests of justice.

Conclusion

87. The evidentiary regime of the ICTY was a broad and permissive one, and the practice was in favour of admissibility. Trial Chambers were under no obligation to give a detailed assessment of the ultimate weight and probative value accorded to any piece of evidence in their final deliberations. This regime is not free from criticism. It has been said that the indiscriminate admission of any and all materials the parties claim to be evidence, far from being the only means of promoting a successful search for the truth, buries the genuinely probative evidence in a vast accumulation of evidential debris, frustrating rather than facilitating the task of the judges trying to establish the truth.

88. This permissive regime applies even when the right to cross-examine is severely curtailed by the admission of evidence in documentary rather than oral form. It is by no means settled that this manner of proceeding is appropriate for international criminal trials. The Rome Statute of the ICC, by comparison, reflects a welcome return to the principle and preference for the principle that witnesses should testify in person, in court. The admission of prior written testimony or statements of a witness at the ICC, at least to date, is permitted only under limited circumstances, far more proscribed than the regime at the ICTY.

89. It is important for practitioners to have an understanding of the unique circumstances and procedural rules that applied to the admissibility of evidence at the ICTY. This is critical to a determination of

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213 Ibid.
215 Murphy, P. “No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials” 8 JICJ (2010), 539-73; see also Skilbeck, R. “Frankenstein’s Monster: Creating a New International Procedure” 8 JICJ (2010), 451-62.
216 Article 69(2), ICC Statute states that: “The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 68 or in the Rules of Procedure and Evidence”.
217 See e.g. Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on the prosecution’s application for the admission of prior recorded statements of two witnesses, 15 January 2009; Prosecutor v. Bemba, ICC-01/05-01/08, Judgement on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence", 3 May 2011.
whether that evidence can be held to be reliable in trials in the region of the former Yugoslavia. More than anything else, knowledge of the applicable procedural rules at any court is indispensable for a strong and effective defence. This is true not only for countering prosecution evidence, but also to ensure that all the necessary admissibility requirements are met when tendering defence evidence. At the end of the day, a case is won or lost on the facts. The only facts before the Chamber will be the ones admitted into evidence and which are given weight by the Chamber as being relevant and probative. Counsel must remain alert and prepared to counter prejudicial evidence, whether by attempting to exclude such evidence, by cross-examining to undermine such evidence, or through testimony and documentary evidence tendered during the defence case.
VII. WITNESSES

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1. The international courts employ a *sui generis* mix of Rules of Procedure and Evidence which do not constitute a transposition of any particular national legal system, be it of common or civil law origin.¹

The ICTY, ICTR, IRMCT and the ICC procedures provide, for example, for an adversarial-type system of pre-trial investigation and subsequent examination of witnesses at trial.² Though the trials are party driven, there is no jury. Trials are heard and decided by a panel of three judges. As in most civil law systems, the judges can and do take an active role in questioning witnesses when they deem it appropriate.³ Judges also have the authority, unusual in common law jurisdictions, to call witnesses on behalf of the Trial Chamber.⁴

¹ This chapter was authored by Colleen Rohan, J.D., who is a former President of the ADC-ICTY and a member of the ADC-ICT Executive Committee, the IRMCT Disciplinary Panel, and a co-founder of the International Criminal Law Bureau. She has practised as Defence counsel for 30 years and served as counsel on ICTY cases *Popović et al.* (Srebrenica) and *Haradinaj et al.* (Kosovo). She served as legal consultant to Defence teams on *Prosecutor v. Perišić* and *Prosecutor v. Karadžić*.


³ Rule 85, ICTR RPE and Rule 102, IRMCT RPE (regarding the order of examination of witnesses at trial).

⁴ Rule 85(B), ICTR RPE and Rule 102(B), IRMCT RPE (providing that “a Judge may at any stage put any question to the witness”). Judges are also routinely provided with witness statements obtained prior to trial and lists of the parties intended trial exhibits prior to trial. *See e.g.* Rule 65 *ter et seq*, ICTY RPE and Rule 70, IRMCT RPE

⁵ *Prosecutor v. Krajišnik*, IT-00-39-T, Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters, 24 April 2006, para. 3 (describing process Trial Chamber and the parties would use in examining witnesses called under Rule 98).
2. The trials at the ICTY are comprised of the *viva voce* testimony of witnesses who appear in person to testify in court during the trial, witnesses who testify *viva voce* by video link, and evidence offered by means of various forms of written witness statements prepared prior to or during trial.\(^5\)

3. One of the most fundamental challenges facing Defence counsel who have been called upon to defend accused at the ICTY has been to master those aspects of this system, which are unfamiliar to them based on their previous experiences in their domestic jurisdictions. Many counsel from civil law systems have had to acquire different courtroom skills, such as learning the rules for direct and cross-examination of witnesses during trial as practised in adversarial legal systems.\(^6\) Similarly, counsel from common law traditions have had to learn and adapt to aspects of the civil law system, such as the admission of hearsay evidence, the admission in evidence of written witness statements which preclude cross-examination of those witnesses, and judicial intervention in the trial process in the form of questions and/or witnesses called by the Trial Chamber.

4. This chapter will discuss the ICTY, IRMCT, ICC and ICTR RPE related to *viva voce* witness testimony presented at trial. It will also touch upon certain recurring issues related to the status of some witnesses, such as protected witnesses, experts, testimony from the accused, and similar issues which often arise at trial.

A. **Video-link Testimony**

5. As a general rule, a witness’ physical presence in the courtroom comports with the principle articulated in Article 21(4)(e) of the ICTY Statute, Article 20(4)(e) of the ICTR Statute, Article 19(4)(e) of the IRMCT Statute and Article 67(e) of the Rome Statute, that persons accused of criminal conduct “shall have the right to confront and cross-examine their accusers”.\(^7\)

6. Rule 81 *bis* of the ICTY RPE and Rule 96 of IRMCT RPE, however, provide that “At the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video conference link”.

7. Testimony presented by way of video-link is an exception to Article 21(4)(e) of the ICTY Statute, Article 20(4)(e) of the ICTR Statute, Article 19(4)(e) of the IRMCT Statute and Article 67(e) of the Rome Statute and is allowed only upon a showing of good cause

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\(^5\) See Chapter VI “Evidentiary Issues at Trial” and Chapter VIII “Direct, Cross-Examination and Re-Examination”, Section E., which provide an in-depth discussion of the procedures and rules governing admission of written witness statements.

\(^6\) See Chapter VIII “Direct, Cross-Examination and Re-Examination” discussing direct and cross-examination under the procedures employed at the ICTY.

\(^7\) Article 21(4)(e); ICTY Statute; Article 20(4)(e), ICTR Statute; Article 19(4)(3), IRMCT Statute; and Article 67(e), ICC (Rome) Statute, Rights of the Accused. *Prosecutor v. Hadzic*, IT-04-75-T, Decision on Defence Motion For Testimony of DGH-042 To be heard via Video-conference link (video-link application not granted as defence had not fulfilled the requirement that the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal).
as to why such an exception should be granted.\(^8\) Specifically, certain criteria, designed to protect and promote the interests of justice, must be met before testimony by video link will be allowed. They include:

i. the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal;

ii. the testimony of the witness must be sufficiently important to make it unfair to the requesting party to proceed without it;\(^9\) and,

iii. the accused must not be prejudiced in the exercise of his right to confront the witness if the video link testimony is permitted.\(^10\)

8. Despite these restrictions there are a number of grounds on which video-link applications may be based and are commonly granted, such as the poor health of the witness (conditioned on provision of a medical attestation), the safety of the witness (conditioned on provision of an attestation as to the basis for that claim), the witness’s age, or economic or other hardship to the witnesses which will occur if he or she is required to travel to the seat of the tribunal (such as individuals who are the sole caretakers of other family members).\(^11\)

9. When video-link testimony occurs, the witness is ordinarily brought to a regional ICTY, IRMCT, ICTR, ICC or United Nations office or a courthouse or other local government facility to testify from that location. A member of the Registry of the Court receiving the testimony will be present in the room to assist with the witness taking the solemn declaration to tell the truth, mandated under ICTR RPE Rule 90 and IRMCT

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\(^8\) *Prosecutor v. Strugar*, IT-01-42 -T, Decision on the Prosecution Motion to Admit Evidence via Video-Conference Link, 20 January 2004, 2, para. 3. *Prosecutor v. Augustin Ngrabatware*, ICTR-99-54-T, Decision on Prosecution Motion for Testimony via Video-Link of Prosecution Rebuttal Witnesses II, V, VI and VII (Chamber grants prosecution motion and allows witnesses to testify via video-link as it was not possible to reschedule the testimony of witnesses to a later date when they were available).

\(^9\) Unless there is a showing that the witness is important to the party’s ability to present its case, video-link testimony will likely not be granted. *Prosecution v. Zigrianyiraro*, ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, para. 3.


\(^11\) *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Chamber’s Oral Ruling, 27 March, T. 2078:3 - T.2079:6, on “Prosecution’s Second Motion for Testimony to be Heard via Video-Conference Link”. 23 March 2007 (oral ruling granting the Prosecution motion because Witness 24 was the sole caretaker of his seriously ill, elderly wife); *Prosecutor v. Simić et al.*, IT-95-9-T, Order to Receive Testimony via Video-Conference Link Pursuant to Rule 71 bis, 14 Feb 2003 (video link applications granted for a number of witnesses, one of whom was the sole caretaker of his seriously ill wife); *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution’s Motion for Testimony to be Heard via Video-Conference Link, 22 July 2010,para. 6; *Prosecutor v. Jovica Stanislić and Franko Simatović*, IT-03-69-T, Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link, 24 February 2010; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Proposed Rule 92 bis Witnesses and Reasons for Decision to Hear the Evidence of Those witnesses via Video-Conference Link, 3 November 2009; *Prosecutor v. Jovica Stanislić and Franko Simatović*, IRMCT-15-96-PT, Decision on Prosecution’s Second Motion to Hear Witness by Video-Conference Link, 1 June 2017 (video-conference request not granted due to failure of proposed evidence to meet evidentiary requirements of previous decision for admission of new evidence); *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on Defence Request To Hear the Testimony of Witness D-0207 via Video-link, 5 January 2018, para 3 (Chamber allowed the testimony of Witness via video-link as he could not travel in time to the seat of the Court. “The Chamber further recalls that it does not consider the use of video-link for testimony to require exceptional justification, and that, when deciding on a request to that effect, it may consider a variety of factors, including the nature and scope of a witness’s anticipated testimony, as well as a witness’s personal and professional circumstances, or logistical difficulties in arranging a witness’s travel to the seat of the Court”); *Prosecutor v. Vojislav Šešelj*, IRMCT-16-99-A, Order in relation to the appeal hearing, 18 September 2018 (Chamber allows Šešelj to request participation via video-conference link.)
RPE Rule 106, and to provide any other technical assistance for the witness and the Trial Chamber, such as providing the witness with documents or other materials to be used during testimony.  

10. The witness’ testimony will be taken down by a court reporter and the transcript of that testimony will be duly added to the trial record with the notation that the witness testified via video-link. Witnesses who testify in this manner are subject to the same rules of procedure and evidence as other witnesses appearing in person to give viva voce testimony in court.

11. Although video-link conferencing arguably protects the right of the accused to cross-examine witnesses and provides the Trial Chamber with the ability to observe the demeanour of the witness as a means of assessing his or her credibility and/or reliability, that is not necessarily a guarantee that allowing video-link testimony will never prejudice the accused’s exercise of his right to confront the witness. When a witness gives entirely unanticipated testimony and the accused cannot confront the witness with documentary or other evidence, for example, because the witness is not physically present, the right to effective cross-examination may be undermined. Similarly, practitioners should remain vigilant, when video-link proceedings are conducted, as to who is in the room with the witness at the time of his testimony and/or has access to the witness during any breaks in the testimony.

12. A witness testifying by video-link also does not have a clear view of the courtroom and will only see the face of the person who is putting questions to him or speaking to him. This final point is a factor which may or may not affect the quality or reliability of the testimony.

B. Witness “Proofing”

13. The term “witness proofing” generally refers to a meeting held between a party to the proceedings and a witness shortly before the witness is to testify in court, for the purpose of preparing and familiarising the witness with courtroom procedures and, at the ICTY, for reviewing the witness’ prior statements. The practice, considered essential to competent representation in some common law jurisdictions, is controversial in international courts. It was initially not permitted at the International Criminal Court

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12 Rule 90, ICTY RPE; Rule 106, IRMCT RPE.
14 It is also prohibited in some common law jurisdictions. For example, Article 705 of the Code of Conduct of the Bar Council of England and Wales provides, in relevant part, that a barrister must not rehearse, practice, or coach a witness in relation to his evidence.
14. In essence a “proofing session” with a witness will involve presenting that witness with his or her prior written statements, given as part of the Prosecution’s pre-trial investigation, and asking him or her to review those statements. The witness may simply affirm the prior statements. Often, however, the witness will make corrections and additions to the statements due to claimed translation errors, faulty memory or for other reasons. In some instances, the corrections may be minor; in others a witness may fundamentally change important aspects of the pre-trial statements which were previously disclosed to the accused to enable the Defence to prepare for trial.

15. When new information is produced as a result of witness proofing, the Prosecution will provide that information to the Defence in disclosure; though not always in the form of a formal written submission and only rarely in the form of a newly signed statement from the witness. These “proofing notes” may or may not be commented upon at trial and may or may not be made part of the trial record in some other fashion.

16. The ICTY allows proofing, despite objections from the Defence.  

16 “I’ve said it before, I’ll say it again it seems to me a crazy system this proofing days before a witness is supposed to give evidence when there has been a lengthy pre-trial phase in the case. I cannot, still cannot understand why the Prosecution don’t have lawyers go over statements with witnesses much earlier so that the final statements are available well before the witness is due to testify. I can see that this will be an ongoing problem in the trial as long as that practice persists.”

“... but you see, I ask again the question. Why are these witnesses being proofed at this stage? It seems utterly ridiculous to me to wait until they’re at the door of the court before a lawyer sits down with them and addresses their evidence; that a lawyer with an understanding of the case as a whole. Because all that’s going to happen is we’re going to limp from witness to witness, unsure of what that witness’s evidence is going to be until they come to court. Now that’s not—that’s not a good enough way to present an international case which is constantly in the public limelight [...] What’s the problem about lawyers going to Kosovo and actually investigating the case properly in the pre-trial phase at the latest? What’s the problem there? Is it not cheaper for a lawyer to go there than to bring witnesses and all their accompanying personnel to The Hague?”

“... There’s going to come a time when pressure will be such—that the pressure of the clock will be such—that we won’t be able to allow this sort of thing. We’ll have to do something which we find distasteful, which is take an otherwise unrealistic approach to a witness’s evidence and exclude things in fairness because time will not allow us the luxury of re-call or delay of cross-examination. So we urge you now to think about how you are carrying out these proofing exercises and how much time or notice you’re giving the Defence as a result of doing so at the very last minute.”

16 Prosecutor v. Lubanga, ICC-01/04-01/06, Trial Chamber 1, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007.


18 See, e.g., Prosecutor v. Sikirica et al., IT-95-8-PT, T: 446, 8 February 2001 (informally approving the practice); Prosecutor v. Limaj et al., IT-03-66-T, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, 10 December 2004 (approving the practice); Prosecutor v. Milutinović et al., IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006, paras. 22-23 (approving the practice but strongly criticizing the late production of notes or statements produced after proofing sessions). Prosecutor v Radovan Karadžic Public., IT-95-5/18-T, 29 October 2013 (ordering Registry to facilitate meeting between witness and accused for purposes of proofing).
Prosecution practice to proof witnesses right before they are scheduled to testify (usually upon their arrival in The Hague for purposes of testifying). When, as is often the case, the witness changes aspects of his or her prior statements or, on occasion, entirely recants the prior statements or portions of them, late “proofing” automatically results in the late disclosure of that new material, precluding the Defence from having the requisite time to investigate the new information before the witness is called to testify. Nonetheless, the practice of late proofing has been permitted at the ICTY, despite strong statements from some Trial Chambers; suggesting either a disorganized prosecutorial approach to this practice or a sense of impunity in continuing to conduct late proofing despite criticism from the bench (see case box Milutinović et al. Case - Concern over late witness proofing).

17. Oftentimes the new material produced as a result of a proofing session is not significant or amounts merely to small corrections to a pre-trial statement. The problems arise when witnesses significantly change their pre-trial statements - for example the dates and times of certain events, the names of those present and similar fundamentally important matters - and offer, at the last minute, new information which the Defence is powerless to investigate in any meaningful way before the witness enters the courtroom. When this is permitted to occur, the accused’s right to the time and facilities to prepare a defence may be directly implicated as well as his counsel’s ability to effectively cross-examine the witness.

18. As noted earlier, challenges to permitting Prosecution proofing have been consistently rebuffed at the ICTY. Practitioners who are defending regional cases with the same testimony and/or witnesses from a prior ICTY trial are well advised, if the testimony or witness is of importance to their case, to carefully review the ICTY trial records or to contact the defence counsel on the ICTY case to ascertain whether or not there were any significant issues or objections regarding proofing of the witness at issue and, if so, whether counsel is of the view that the problem affected the reliability of the trial record ultimately produced as to that witness.

C. Expert Witnesses

19. An expert witness is defined in ICTY jurisprudence as an individual who, “by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute” which is beyond the knowledge of a lay person. In determining whether a particular witness meets these criteria the Trial Chamber should take into account the witness’s former and present positions and

19 It is not suggested here that every prosecutorial team always engages in late proofing of its witnesses. That is not the case. The problem has been widespread enough, however, to have resulted in criticism from some Trial Chambers.
20 Practitioners at the newly established Kosovo Specialist Chambers located in The Hague should heed the same advice as to any witnesses called at trial who previously testified in proceedings before the ICTY.
professional experience through reference to the witness’s CV as well as the witness’ scholarly articles, other publications, or any other pertinent information about the witness.\textsuperscript{22}

20. There are any number of forensic disciplines which are likely to be of relevance in international or national criminal cases such as ballistics, pathology, DNA, military history, anthropology, psychiatry, psychology, eye-witness identification, intelligence analyses and similar disciplines. This list, needless to say, is not exhaustive and the need for expert testimony may be idiosyncratic to the particular circumstances in any given case.

21. An expert, unlike a lay witness, may testify to his or her expert opinions and conclusions based upon evidence and information which is not within the expert’s personal knowledge including hearsay and multiple hearsay evidence. A lay witness, on the other hand, may testify to his or her personal opinions or conclusions, if they are relevant, but based only on information which is within the witness’ personal knowledge.\textsuperscript{23}

22. The jurisprudence at the ICTY has established a number of requirements which must be met before an expert statement or report is admissible in evidence. They include:

- the proposed witness is classified as an expert;
- the expert statements or reports meet the minimum standard of reliability;\textsuperscript{24}
- the expert statements or reports are relevant and of probative value; and,
- the content of the expert statement or report falls within the accepted area of expertise of the witness.\textsuperscript{25}

23. ICTY Rule 94 \textit{bis} RPE, ICTR Rule 94 \textit{bis} and IRMCT Rule 116 RPE address time limits for disclosing experts reports and delineate the bases upon which an opposing party might object to them.\textsuperscript{26} The ICC also has

\textsuperscript{22} \textit{Prosecutor v. Šešelj}, IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008, para. 28; \textit{Prosecutor v. Perišić}, IT-04-81-T, Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008, para. 11. Popović et al. (IT-05-88), Judgment 30 January 2015, “375. […] The Appeals Chamber recalls that the purpose of expert testimony is to supply specialised knowledge that might assist the trier of fact in understanding the evidence before it, and that in the ordinary case an expert witness offers a view based on specialised knowledge regarding a technical, scientific or otherwise discrete set of ideas or concepts that is expected to fall outside the lay person’s ken.[1] [...]”


\textsuperscript{24} The phrase “minimum standards of reliability” means that the expert report must contain sufficient information as to the sources used in support of it and/or the conclusions contained in it. This information must be clearly set forth and accessible in order to allow the opposing party and the Trial Chamber a basis upon which to test or assess the information the expert relied upon when reaching the opinions in the report. See e.g., \textit{Prosecutor v. Galić}, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Professor Radinović, 21 February 2003, para. 9.

\textsuperscript{25} \textit{Prosecutor v. Milan Lukić and Sredoje Lukić}, IT-98-32/1-T, Decision on Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 \textit{bis} (Two Expert Witnesses), 23 July 2008, para. 15.

\textsuperscript{26} The complete Rule provides: “(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limits prescribed by the Trial Chamber or by the pre-trial judge. (B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether: (i) it accepts the expert witness statements and/or report; or (ii) it wishes to cross-examine the expert witness; and (iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts. (C) If the
time limits for disclosure of expert reports, based on consideration of the accused’s right to a fair trial and the Chambers concern for conducting expeditious proceedings.27

24. These rules are straightforward and have been straightforwardly applied. A party seeking to present an expert statement or report at trial must file a motion, under Rule 94 bis ICTY RPE, Rule 94 bis ICTR RPE and Rule 116 IRMCT RPE, notifying the Trial Chamber and the opposing party or parties of its intention to do so. The motion should include a copy of the expert statement or report itself as well as the expert’s CV.28

25. If the opposing party does not challenge admission of the expert statement or report, within the time limits set by the Trial Chamber, the expert report will be admitted in evidence and the expert will not need to appear at trial to answer any questions about it. The expert report will be assigned an exhibit number and become part of the trial record. Anyone wishing to read that expert report or find out its contents must obtain it by going to the court trial archives where it will be maintained as part of the trial record in the case in question.

26. If a party objects to admission of the expert statement or report on the basis that the expert is not qualified as an expert in the particular discipline for which the expert is offered, or on the basis that all or part of the expert report is irrelevant, then the objecting party must file a written submission to that effect, within the time limits specified by the Court rule, explaining the basis for the objections. The Trial Chamber will then rule on that submission.29

27. Even if the opposing party agrees that the expert is qualified to testify as an expert and that the report is relevant, the opposing party retains the right to confront and cross-examine the expert at trial. When that is the case, the opposing party must file a submission, also within the applicable time limits, stating that there is no objection to the qualifications of the expert or the relevance of the report, but that the opposing party does require the expert to appear for cross-examination.

28. It was rare for a Trial Chamber at the ICTY to exclude an expert’s report entirely. As with all other evidence, a Trial Chamber is far more likely to admit the report in evidence and, depending on the cross-examination of the expert and the relative success or lack of success in challenging the reliability of the

28 Prosecutor v Bosco Ntaganda, ICC-01/04-02/06, Decision on the Prosecution request for variation of time limit for disclosure of the report of one expert witness, 30 April 2015, para. 4-5.
29 The DVD which accompanies this Manual contains a list of experts who have testified at the ICTY including, when possible, the expert’s CV, report or statement and any motions filed challenging that expert under RPE Rule 94 bis. The list is not necessarily exhaustive though every effort was made to include all the experts who have testified at ICTY trials.

A practitioner looking for information in the ICTY case library or other database may wish to begin any search by looking up Rule 94 bis motions as, in theory, a motion under that rule should have been filed for any expert proposed by either party as a witness at trial.
expert’s report, the validity of its conclusions, or the qualifications of the expert, assign the report and its conclusions what weight it deems appropriate.30

29. An expert witness is expected to make statements and draw conclusions independently and impartially. Nonetheless:

“The fact that the witness has been involved in the investigation and preparation of the Prosecution or Defence case or is employed or paid by one party does not disqualify him or her as an expert witness or make the expert statement unreliable. Concerns relating to the witness’s independence or impartiality do not necessarily affect the admissibility of the witness’ statement or report pursuant to Rule 94 bis of the Rules, but may affect the weight to be given to the witness’s evidence.”31

30. Although it has been very rare, expert reports have been excluded from evidence at the ICTY.

31. In the Milutinović et al. case the report of a proposed Prosecution expert was excluded as an expert report on the grounds that the expert was “too close to the team, in other words, to the Prosecution presenting the case, to be regarded as an expert.”32 The evidence in Milutinović et al. established the proposed expert had worked for several years with the Prosecution office and in the course of that employment was present for and participated in the interviews of a number of Prosecution witnesses. The Trial Chamber ruled that under these circumstances, although the mere fact of the proposed expert’s employment in the Office of the Prosecutor did not disqualify him from testifying,33 his intimate involvement in the actual investigation of the Prosecution’s factual case pre-trial did not permit him to do so as an expert witness. He did not possess the objectivity and independence required of an expert witness.34

32. In the Đorđević case a Prosecution expert who was an employee of the Office of the Prosecutor and had interviewed several Prosecution witnesses as well as some of the alleged members of the Joint Criminal Enterprise (JCE) charged in that case. That expert was not permitted to testify as an expert and his proposed expert report was excluded from evidence based on the Trial Chamber’s finding that his involvement in the investigation of the Prosecution case “may have affected the reliability of the opinion

30 See, e.g. Prosecutor v. Perišić, IT-04-81-T, Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008; Prosecutor v. Ratko Mladić, IT-09-92-T, Interim Decision regarding the expert reports of Mile Poparić and Zorica Subotić, 17 September 2015 (Chamber denies prosecution request’s request to exclude portions of the three reports.)
32 Prosecutor v. Milutinović et al., T: 840-844 (13 July 2006) and see Decision on Ojdanić Motion to Preclude Parties from Calling Expert Witnesses, 16 November 2006.
33 At the ICTY, it has been the general practice to admit the reports and testimony of qualified experts who are Prosecution employees and to take their employment into consideration when determining what weight to give their “expert” evidence.
to such an extent that the Chamber would be unable to rely on them in making its findings on the issues in the case.”

33. Recently in the *Jovica Stanišić and Franko Simatović* case, the expert report and testimony from the expert was withdrawn by the Prosecution when it learned that portions of the report had been authored by individuals other than that expert. This has not prevented the same expert from being offered as an expert in subsequent cases, however.

34. In sum, when an expert crosses the threshold of possessing sufficient knowledge, training, and experience to qualify as an expert, and his or her report is relevant to the issues in dispute at trial, it has been very rare for the expert report and testimony to be excluded from evidence due to other alleged deficiencies such as bias or lack of appropriate scientific methodology. Those issues are seen as appropriate areas for cross-examination of the expert at trial, leaving it open to the Trial Chamber to assign what weight it chooses, in conclusions drawn in the report (see case box *Perišić case - Expert methodology*).

35. The expert’s report, opinions and conclusions must be within the particular expert’s area of expertise in order to be of “expert” assistance to the Trial Chamber. This requirement ensures that the statements or reports of an expert witness will only be treated as expert evidence, insofar as they are based on the expert’s specialized knowledge, skills, or training. Statements that fall outside the area of expertise will be treated as personal opinions of the witness and be weighed accordingly.

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36. Experts can and do express their opinions within the confines of their expertise on the facts established in evidence when that opinion is relevant to issues in dispute at trial. However, an expert witness should not be permitted to offer his or her opinion on the ultimate issue of whether or not the accused is guilty of the charged crimes no matter how that opinion might be phrased. That is a question which is solely within the powers and competence of the Trial Chamber.

37. In light of this jurisprudence, there are a number of tactical considerations Defence counsel may take into account when determining whether or not to challenge a Prosecution expert and/or in preparing to cross examine a Prosecution expert.

38. The first and most obvious is for counsel to study the expert’s CV as well as his report to determine if he is qualified to render the opinions contained in the report. If the report is based on underlying data (such as DNA or ballistics tests), counsel should ask for the underlying test results themselves, not only as a means to potentially challenge the opinions of the Prosecution expert but to have the underlying data available for review by counsel’s own experts.

39. Very often, forensic experts have testified in prior cases, sometimes in numerous prior cases. If possible, and assuming time and resources permit it, counsel should become familiar with that prior testimony if its subject matter is relevant to counsel’s own case. Counsel may also wish to consider whether the Prosecution expert may be of use to the Defence case. If so, a strategic decision should be made as to whether it is better to let the Prosecution expert testify, even if he or she is subject to some form of challenge. In that regard, if the Defence has its own expert in the same area as a Prosecution expert, counsel must realistically determine who is more credible, reliable, and qualified, and whether the Defence expert is in a position to persuasively undermine the opposing expert.

40. It is also good practice to research the background of experts offered by the Prosecution. Most qualified experts can be found on the internet which may be a rich source of background material. When it is possible, read articles, books, and other materials published by the Prosecution expert which the Prosecution has chosen not to offer in evidence through that expert’s testimony, if any such materials exist. These materials can sometimes provide a source for impeachment of the expert which is not readily recognisable from the expert’s CV or the Prosecution’s selection of documents for disclosure. It is also useful to contact counsel in cases in which the expert has testified previously to get a sense of that counsel’s experience in dealing with the expert.

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41. An increasing cause for concern in the area of some forensic sciences is the continued reliance on “expert” methodologies which may, despite their earlier acceptance by the courts, be unreliable. A comprehensive study commissioned by the United States government, for example, reflected an increasing concern that fingerprint experts, handwriting experts, tool mark experts, voiceprint and hair comparison experts, and a number of others employ methodology which may be subject to serious challenge on the grounds that it is not based on proper or consistent scientific technique. Moreover, a “science” is only as good as the individual who practises it. Seemingly impregnable evidence, such as DNA identification and blood typing may, in fact, be subject to challenge if the individuals performing the tests were not properly trained, made mistakes in the course of performing the tests, or worked in circumstances conducive to contamination.

42. Finally, counsel called upon to cross-examine an expert witness should educate him or herself as much as possible— hopefully with the assistance of a Defence expert—on the expert subject at hand so that counsel is prepared to focus on those portions of the expert testimony which are most subject to challenge and/or most crucial to the factual or legal issues at stake in counsel’s case.

D. Protected Witnesses

43. The trials in the international courts are usually broadcast on the internet and, in many countries, broadcast in whole or in part by other media outlets including television and radio. Many witnesses who are called to testify in international criminal trials are, for various reasons, concerned that their identities will inevitably become known to the public at large. Some, such as intelligence officers and agents, policemen, diplomats, and members of the military, may believe their effectiveness in their jobs will be compromised if they become readily recognizable due to the broadcasting of their image around the world. Other witnesses fear for their safety either because they have been threatened or approached regarding their upcoming testimony or because they are testifying “for” or “against” a particular individual or group.

44. The ICTY, ICTR, IRMCT and ICC have all put in place rules providing for the protection of witnesses. The international courts also have Victims and Witnesses Sections which are in charge of seeing to the needs of witnesses called to testify at trial before, during, and after their testimony.\footnote{See Chapter XIV (E) ‘Victims and Witnesses Section’ in \textit{ICTY Manual on Developed Practices} (Turin, UNICRI, 2009), 195-205 (describing in detail the services provided by the ICTY Victims and Witnesses office); \textit{Prosecutor v. Stanišić and Simatović} IRMCT-15-96-PT, 7 June 2017, Decision on Prosecution Submission on Protective Measures for Witness RFJ-064, para 6 (“With respect to the request for the protective measures of image distortion and voice distortion, having reviewed the investigator's declaration, the Trial Chamber is satisfied that there is a real likelihood of danger or risk to the witness and the witness' family should the witness testify without the requested protective measures. The Trial Chamber, therefore, orders that Witness RFJ-064’s protective measures be augmented, pursuant to Rule 86(1) of the Rules, to include image and voice distortion”)}

\footnote{See “Strengthening Forensic Science in the United States: A Path Forward”, Committee on Identifying the Needs of the Forensic Science Community, Committee on Science, Technology, and Law Policy and Global Affairs, Committee on Applied and Theoretical Statistics Division on Engineering and Physical Sciences, published by the National Research Council of the National Academies, Washington, D.C., 2009. This very comprehensive study is available on the internet.}
45. Rule 75 of the ICTY RPE, Rule 75 of the ICTR RPE, Rule 86 of the IRMCT RPE, and Rule 87 of the ICC RPE explain the measures utilized at the ICTY, ICTR, IRMCT, and ICC for the protection of victims and witnesses. They provide generally that a judge *proprio motu*, or at the request of either party, or at the request of the victim or witness concerned or the VWS, may order measures for the protection and/or privacy of victims and witnesses, though such measures must be consistent with the rights of the accused.43

46. In order to make an informed decision on such issues, the rules of the ICC, IRMCT, ICTR and ICTY provide that a Chamber may hold an *in camera* proceeding to determine whether to order measures to prevent disclosure of the identity of the individual in question or of persons related to or associated with them. Those measures can include expunging names or other identifying information from the public record of trials, providing image distortion or voice distortion during the witness’s testimony, providing the witness with a pseudonym, and/or ordering that testimony take place during closed sessions or on one-way closed circuit television so that it cannot be seen or heard by the public at large.44

47. Although these measures may be provided for in one trial, this does not mean that the witness’ identity will never be known beyond those present in the courtroom at the time the individual testifies. If the testimony of a witness is relevant in a subsequent case and/or if the witness is to be called to testify in a subsequent case, his or her identity may be disclosed in that subsequent case.45 Indeed, the VWS section, pursuant to Rule 75(C) of ICTY, ICTR RPE and Rule 86(c) of the IRMCT RPE, is required to inform protected witnesses of that fact.

48. On the other hand, once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (known as the “first proceedings”), those protective measures:

i. Shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in [Rule 75 ICTR/ICTY RPE] [Rule 86 IRMCT]46; but,

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43 Rule 75(A), ICTY RPE; Rule 75(A), ICTR RPE; Rule 86, IRMCT RPE; and Rule 87, ICC RPE.
44 Rule 75(A), ICTY RPE; Rule 75(A), ICTR RPE; Rule 86, IRMCT RPE; and Rule 87, ICC RPE; and see Rule 79. ICTY/ICTR RPE and Rule 93 IRMCT RPE which states that a Trial Chamber may order that the public and press be excluded from all or part of the trial proceedings for reasons of (i) public order or morality; (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or (iii) in the interests of justice. The Trial Chamber is required to make public the reasons for moving into “closed” or “private” session.
45 In the ICTY, it was common for counsel in one case to file a motion to obtain confidential information from other cases which are factually related to counsel’s case. Such motions are routinely granted when the appropriate showing for access to such information has been made.
46 *Prosecutor v. Jean De Dieu Kamuhanda*, IRMCT-13-33, Decision on appeal of decision declining to rescind protective measures for a deceased witness, 14 November 2016, para. 9, “Pursuant to Rule 86(F)(i) of the Rules, protective measures ordered before the ICTY, the ICTR, or the Mechanism (“first proceedings”), continue to have effect in any other proceedings before the Mechanism (“second proceedings”) unless and until they are rescinded, varied or augmented.”
ii. Shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

49. If a party to the “second proceeding” wants to vary, rescind, or augment the protective measures ordered in the first proceeding, that party must apply (1) to any Chamber, however constituted, remaining seized of the first proceedings, or (2) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceeding.47

50. The fact that protective measures remain in force during a second, third, or fourth trial proceeding can be a challenge for counsel or others researching court trial records. Counsel who is questioning a witness in one trial, for example, about issues relating to a protected witness from another trial, must abide by whatever protective measures were originally imposed for that protected witness, including using only the pseudonym for that witness. This process, albeit a necessary one, can make researching a trial somewhat complicated, particularly when, as is usually the case, a protected witness who testifies more than once is given a new pseudonym for each new trial.

51. Rule 75 of the ICTY RPE, Rule 75 of the ICTR RPE and Rule 86 of the IRMCT RPE set forth additional detailed requirements for the variation of protective measures and the place to go to obtain those variations. For the purposes of this chapter, however, the point is that Rule 75 is the foundation for the protective measures which are provided at the ICTY/ICTR. Rule 86, similarly, is the foundation for protective measures which are provided at the IRMCT.

52. A party seeking protective measures for a witness must do so by filing a written motion supported by sufficient information to justify the granting of the motion.48 The general policy at the ICTY was that the Trial Chamber, in determining the appropriateness of permitting protective measures in any given case, must balance the rights of the accused with the extent of the need to protect the victim or witness at issue.49 Trial counsels who believe the requested protective measures are unnecessary can oppose them by filing an opposition to the motion requesting them and asking for an order from the Trial Chamber.

53. The standard applied when protective measures are sought by an individual who is fearful for his or her own safety, should they testify, is that protective measures will be justified only if the witness has a genuine fear for his or her own safety or that of his or her family members. The fear must be objective, that is have a basis in fact which can be assessed objectively.50

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47 Rule 75(G), ICTY RPE; Rule 76(G), ICTR RPE; Rule 86(G), IRMCT RPE.
48 Given the purpose and nature of such motions, they are often filed confidentially in whole or in part.
49 Prosecutor v. Šešelj, IT-03-67-PT, Decision on Prosecution’s Fifth Motion for Protective Measures for Witnesses During the Pre-Trial and Trial Phases, 6 July 2005, 3; Prosecutor v. Delalić et al., IT-96-21-T, Decision on Defence Motion to Compel the Discovery of Identity and Location of Witnesses, 18 March 1997, para. 15.
50 Prosecutor v. Mrkšić et al., IT-95-13/1-PT, Decision on Prosecution’s Additional Motion for Protective Measures of Sensitive Witnesses, 25 October 2005, para. 5; Prosecutor v. Slobodan Milošević, IT-02-54-T, Decision on Trial Related Protective Measures for Witnesses (Bosnia), 30
54. The Trial Chamber can take various factors into account in deciding whether or not to grant protective measures including the nationality or ethnicity of the witness, the position or role of the witness during the conflict, or the nature and contents of the expected evidence to be given by the witness. Protective measures have also been granted when the Trial Chamber determined that a witness’ evidence could antagonise people who lived in the region where the witness resided, worked or owned property.

55. In “exceptional circumstances,” the Prosecutor may ask for non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the ICTY, ICTR, and IRMCT. In deciding on such an application, the Pre-Trial or Trial Chamber is free to consult with the VWS. Subject to Rule 75 of the ICTY/ICTR RPE and Rule 86 of the IRMCT RPE, the identity of the victim or witness must be disclosed to the Defence in sufficient time prior to the trial to allow adequate time for investigation and preparation by the defence.

56. As mentioned, there is an array of protective measures which may be granted, within the discretion of the Pre-Trial or Trial Chamber. The Chamber can provide for face or voice altering devices to be used when a protected witness testifies, order the use of only closed circuit television for such testimony, assign a pseudonym for the witness, or impose any or all of these protections. The Prosecution and trial counsel must honour these protections at the risk of being held in contempt of the Trial Chamber. The Trial Chamber may expunge the name and any identifying information of a protected witness from the public record of a trial, if it is inadvertently revealed during trial and order that all records identifying a protected witness remain confidential.

57. If the content of a protected witness’s testimony will itself reveal the identity of the witness (as can be the case with military officers, diplomats, politicians and, on occasion, individuals describing their particular role in well-known events), the Trial Chamber can order that the trial go into closed or private session. The public has no access to these sessions, which are not broadcast as are regular trial proceedings and which are not contained in the printed trial transcripts made available on the ICTY July 2002, para. 11; Prosecutor v. Jovica Stanisic and Franko Simatovic, IRMCT-15-96-PT, Decision on Prosecution Submission on Protective Measures for Witness RFJ-064, 7 June 2017, para. 6.


53 Rule 69(A), ICTY RPE; Rule 69(A), ICTR RPE; Rule 75(A), IRMCT RPE.

54 Rule 69(B), ICTY RPE; Rule 69(B), ICTR RPE; Rule 75(B), IRMCT RPE.


56 Rule 75(B), ICTY RPE; Rule 75 (B) ICTR RPE; Rule 86(B), IRMCT RPE; Prosecutor v. Stanišić and Simatović, MICT-15-96-PT, Decision on Prosecution Submission on Protective Measures for Witness RFJ-064, 7 June 2017, para. 6.

57 Rule 77(A)(ii), ICTY RPE, Rule 77(A)(ii), ICTR RPE, and Rule 90(A)(ii), IRMCT RPE (providing that anyone who knowingly and willfully discloses information relating to proceedings before the ICTY/ICTR/IRMCT in violation of an order of a Chamber may be held in contempt).
website. This can pose a problem for practitioners, as well as academics, journalists and others, interested in the contents of the trials in the international courts as crucial testimony often takes place outside of the public eye and will remain confidential despite the publication of the remainder of the trial record.

58. For legal practitioners, these circumstances potentially raise several practical problems, however, there are ways of resolving them if there is good cause to obtain access to such information. A motion can be filed with the Chamber explaining what information counsel needs access to and the reason why that access is necessary for counsel to adequately and effectively defend the Accused.

E. **Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT) Witnesses**

59. There is a universe of background information obtained by the Prosecution during its investigation of a case which is not subject to disclosure to the accused at the ICTY/ICTR/IRMCT under the general disclosure regime. The rule governing this category of information, and the conditions under which it might be disclosed to the accused, is Rule 70 of the ICTY RPE, Rule 70 of the ICTR RPE and Rule 76 of the IRMCT RPE.

60. Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT) provide that when the Prosecution obtains information with the condition that it remain confidential and when that information is used by the Prosecution only for the purpose of seeking new evidence, the original information and its source “shall not be disclosed” without the consent of the person or entity who provided it and “shall not” be presented in evidence at trial without prior disclosure to the accused.

61. Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT) incorporate safeguards for the protection of certain state interests as one means of encouraging states to fulfil their cooperation obligations with the ICTY, ICTR, and IRMCT. The rule allows for an individual person, a state, or any another entity (such as a non-

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58 There were no statutory or procedural provisions for anonymous witnesses at the ICTY. The accused and his counsel are entitled to know the identity of protected witnesses and the contents of their statements. These statements, however, are most often disclosed to counsel only in heavily redacted form to protect the identity of the witness. Unredacted statements are provided to counsel within 30 days of trial or, at times, within 30 days of the date of the witness’s testimony, though Trial Chambers have the discretion to order other time limits.

59 The practice also arguably implicates the accused’s right to a public trial and, to the extent that the practice is increasing, should be of concern to the international community at large. *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on Accused’s Motion for Variation of Protective Measures for Witnesses Testifying in Closed Session (Unsure), 16 March 2015. It is also difficult to see how international criminal trials will end impunity and serve to facilitate reconciliation in post-conflict areas, as claimed by the international courts, when large portions of the evidence is never revealed in public. Maintaining secrecy over the court proceedings also infringes on the public’s right to know what evidence is being presented in support of the verdicts returned and may ultimately serve to improperly shield the international courts from appropriate public accountability.

60 Rule 70(B), ICTY RPE. Rule 70(B), ICTR RPE. Rule 76(B), IRMCT RPE.

governmental organization) to provide information to the Prosecution or the Defence on a confidential basis and does not require that the person, state, or other entity justify its reasons for seeking confidentiality on national security or other grounds.62

62. A party who receives Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT) information during investigation of its case may later decide that it wishes to present that information in evidence at trial. It cannot do so unless it first obtains the consent of the source of the information. That consent may be given, of course, and it may be unqualified. Usually it is given only if certain conditions or restrictions are met regarding the presentation and/or examination of the information during trial.

63. Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT) provide, for example, that the Trial Chamber may not order the production of additional or related evidence from the person or entity which provided the initial Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT) information beyond that presented at trial. Despite the provisions of ICTY and ICTR RPE Rule 98 and IRMCT RPE Rule 120, the Trial Chamber may not call its own witnesses or require the disclosure of additional documents related to the Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT) subject matter.63 If the Prosecution calls a witness to testify to information originally provided under Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT), the Trial Chamber cannot compel that witness, unlike other witnesses, to answer relevant questions if the witness declines to answer them on the grounds of confidentiality.64

64. An accused has the right to confront and cross-examine a Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT) witness, the same as any other witness, but that cross-examination is subject to the same limitations as those imposed on the Trial Chamber which are outlined in Rule 70(C) and (D). Specifically, and contrary to the otherwise applicable provisions of Rule 90(H) which are related to the parameters of cross-examination,65 a “Rule 70 witness” may not be cross-examined on any subject not specifically addressed during the witness’s direct examination.

65. These Rules may result in imposing serious restrictions on the accused’s right to confront and cross-examine a crucial Prosecution trial witness. As such, once the decision has been made to present Rule 70 (ICTR/ICTY) and Rule 76 (IRMCT) information at trial, the rules restricting the extent to which the

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62 Rule 70(C), ICTY RPE, Rule 70(C), ICTR RPE and Rule 76(c), IRMCT RPE provide: “If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.”

63 Rule 70(D), ICTY RPE, Rule 70(D), ICTR RPE and Rule 76(D), IRMCT RPE provide: “If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question in relation to the information or its origin, if the witness declines to answer on grounds of confidentiality.”

64 Rule 70(E), ICTY RP; Rule 70(E), ICTR RPE; and Rule 76(e), IRMCT RPE provide, “The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).”

65 See Chapter VIII “Direct, Cross-Examination and Re-Examination” on the rules governing direct and cross-examination.
Trial Chamber or a party may effectively challenge that information appear to be directly contrary to the truth seeking function of the Trial Chamber.

66. In the *Slobodan Milošević* case, for example, the Prosecution called General Wesley Clark as a trial witness pursuant to Rule 70 and proposed that his testimony be received subject to a series of restrictions, all of which were permitted by the Trial Chamber. Those restrictions included that (a) two representatives of the United States government be present in court during his testimony; (b) his testimony would be given in open session subject to certain protective measures; (c) certain areas of his testimony would be given only in private session to protect the national interests of the United States and “request may be made for additional evidence to be so given on the same ground”; (d) the public gallery of the Trial Chamber be closed during his testimony; (e) the broadcast of his testimony would be delayed by 48 hours to “enable the U.S. Government to review the transcript and make representations as to whether evidence given in open session should be redacted in order to protect the national interests of the U.S., and shall be delayed for a period thereafter to enable the Trial Chamber to consider and determine any redactions requested, and if ordered, for the redactions to be made to the tape of the testimony prior to its release; (f) the scope of examination-in-chief and cross-examination of the witness be limited to the summary of information provided by the Prosecution to the Trial Chamber in its application to present this witness under the provisions of Rule 70; and (g) the accused or *amici curiae* may seek to have the scope of cross-examination expanded only by prior agreement of the U.S. government, which had to be obtained directly from that government or through the OTP once the summary of the proposed evidence-in-chief was disclosed to them.66

67. It goes without saying that this list of restrictions placed significant constraints on the ability of the accused to cross-examine General Clark, not to mention the ability of the Trial Chamber to pose its own questions to this witness, much less engage in an objective “search for the truth”.

68. A different result was reached, however, in the *Milutinović et al.* case when the Prosecution elected to call the same witness, with the same restrictions as those permitted in the *Slobodan Milošević* case. In *Milutinović et al.* the Prosecution also asked for the additional restriction that the scope of the examination-in-chief and the cross-examination of this witness be curtailed to address only matters contained in a limited summary of his anticipated testimony prepared pre-trial and that his evidence be limited solely to issues related to Kosovo.67

69. The *Milutinović et al.* Trial Chamber noted that considerations related to whether or not to permit these restrictions included not only consideration of the concerns of the Rule 70 provider but also the

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66 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Confidential Decision on Prosecution’s Application for a Witness Pursuant to Rule 70(B), 30 October 2003, page 3; and Order on the Testimony of General Wesley Clark, 17 November 2003 (ordering that the 30 October 2003 Confidential Decision related to this witness’s testimony be made public).

determination of whether allowing the restrictions would render the trial unfair for the accused.\(^{68}\) It stated:

“To restrict cross-examination to the subject matter predetermined by anyone other than the Chamber with the approval, at least tacit, of the Prosecution is inevitably unfair to the Defence. It would prevent them from challenging the honesty and reliability of the witness by looking at inconsistencies in what he may have said on matters out with the permitted territory of the examination. It would also prevent the Defence from cross-examining on relevant matters favourable to the Defence that are excluded by the restriction. There is no obligation on the Defence to indicate in advance the line of cross-examination to be pursued.\(^{69}\) To require them to seek permission for examination on a particular subject would oblige them to make disclosure not required by the Rules.”\(^{70}\)

70. The Trial Chamber also observed that the result of the application of the conditions proposed by the Prosecution, at the behest of the Rule 70 provider, would “wrest a measure of control of the proceedings from the Chamber and hand it to the Rule 70 provider.”\(^{71}\) It emphasized that:

“The Trial Chamber, with its knowledge of the issues in this trial, is best placed to exercise proper control over the presentation of General Clark’s testimony. It is particularly conscious of the need to protect the sensitive interests of the parties affected by trials such as this, including the current Rule 70 provider. However, it is uniquely placed to judge what questions should be permitted in cross-examination in the interest of a fair trial.”\(^{72}\)

71. The Trial Chamber accepted that given the role and prominence of the witness at issue, it would be appropriate for two legally qualified representatives of the government in question to be present in court during the testimony of the witness to intervene on behalf of the government if necessary. It found that the interests of the Rule 70 provider would thus be protected while the Chamber would retain control over the protection of the accused’s right to a fair trial.\(^{73}\) It denied the Prosecution motion to add General Clark to its witness list, due to its concern regarding the then proposed restrictions on cross-examination of his testimony.\(^{74}\)

72. In doing so, it made an important observation regarding all trials held on the international stage; that is:

\[^{68}\text{Ibid.}, \text{para. 26.}\]
\[^{69}\text{This holding refers to the requirement, imposed in Slobodan Milošević and sought to be imposed in Milutinović et al. that the Defence could seek to expand on the scope of cross-examination only with the approval of the Rule 70 provider, in this instance, the U.S. government.}\]
\[^{70}\text{Prosecutor v. Milutinović et al. IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend Its Rule 65 ter Witness List to Add Wesley Clark, 16 February 2007, para. 27.}\]
\[^{71}\text{Ibid., para. 26.}\]
\[^{72}\text{Ibid., para. 28.}\]
\[^{73}\text{Ibid., para. 28.}\]
\[^{74}\text{Ibid., para. 32. This decision was upheld after the Prosecution sought an interlocutory appeal. See Prosecutor v. Milutinović et al., IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution From Adding General Wesley Clark to its 65 ter Witness List, 20 April 2007, paras. 11-22.}\]
“It is [...] essential that the trial should not only be fair but be seen to be fair. Justice must be seen to be done [...] Any neutral interested bystander would be bound to view as unfair a trial in which one of the parties to the conflict insisted upon controlling the cross-examination of its citizen who commanded one force in the trial of accused from the other, thus depriving them of their full right to confront the witnesses against them.”

73. Most of the trials at the ICTY have involved presentation of evidence, to some extent, under the provisions of Rule 70. The record of the trial itself will usually reflect which witnesses and/or documentary evidence fell within this category. Practitioners and others reviewing these records should be on alert that, regardless of the legitimacy of the privacy, national security, or other concerns of the Rule 70 provider, the evidence ultimately produced by them may or may not represent a full and fair picture of the subject matter at issue precisely because of the limitations inherent in the Rule 70 procedures.

F. The Accused

74. All individuals who are indicted at the ICTY, ICTR, ICC, and IRMCT are entitled to the right to silence at trial. No accused can be forced to testify at trial or to answer questions in any other fashion at trial unless he voluntarily consents to waive his right to silence. On the other hand, the accused always has the right to testify, under oath, at trial if he chooses to do so. When an accused does choose to testify, his testimony is subject to the same procedures and rules which apply to any other trial witness. He must make a solemn declaration promising to tell the truth, and he will be subject to cross-examination by the Prosecution and any co-accused. However, testimony from an accused may be afforded greater weight by the Trial Chamber if it is presented at the outset of the Defence case before the testimony of any other Defence witness has been presented.

75. The fact that an accused can offer sworn testimony on his own behalf during ICTY, ICTR, IRMCT, and ICC trials varies significantly from many civil law jurisdictions which often have procedural rules permitting the accused to make an unsworn statement at trial, but preclude the accused from testifying under oath as part of his own defence.

75 Prosecor v. Milutinović et al., IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend Its Rule 65 ter Witness List to Add Wesley Clark, 16 February 2007, para. 30; and see O’Sullivan, E & Montgomery, D “The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY”, Journal of International Criminal Justice 8 (2010), 511-38 (in which the tension between the privacy concerns of a Rule 70 provider and the accused right to confront the witnesses against him at trial and to a fair trial are discussed in greater depth).
76 Article 21, ICTY Statute; Article 55, Rome (ICC Statute); Article 20, ICTR Statute; Article 19, IRMCT Statute; Article 14(g), ICCPR; Article 6, ECHR.
77 Rule 90(A), ICTY RPE; Rule 90(A), ICTR RPE; Rule 106(A), IRMCT RPE; Rule 66, ICC RPE.
78 See e.g., Prosecutor v. Limaj et al., IT-03-66-T, Trial Judgement, 30 November 2005, para. 22.
76. Similar to civil law practice, an accused at the ICTY, ICTR, and IRMCT can also make an unsworn statement at trial which will not be cross-examined. Such a statement can be given after the opening statements of the parties at the beginning of trial or, if the Defence defers giving its opening statement until the start of the Defence case, after the opening statement of the Prosecution at the beginning of trial.

77. The accused does not have the absolute right to make an unsworn statement at the beginning of trial, though a request to do so is generally granted. Rule 84 bis (ICTY/ICTR) and Rule 101 (IRMCT) provide that such a statement can be made only if “the Trial Chamber so decides” and that the statement will be made “under the control of the Trial Chamber.” If an accused uses the opportunity to present an unsworn statement for some improper or disruptive purpose, the Trial Chamber clearly has the discretion to order the accused to focus only on matters relevant to the trial or to his Defence or to cut the accused off altogether.

78. The Trial Chamber also has the discretion to give whatever weight it chooses to an unsworn statement given by an accused under Rule 84 bis(A) (ICTY/ICTR) and Rule 101(A) (IRMCT), including the discretion to give it no weight at all. In light of that, an important consideration for any counsel whose client is considering making an unsworn statement at the beginning of trial, is whether the benefits of providing that statement, which may be given little to no weight, outweigh the fact that such a statement, depending on its content, may reveal information about the accused and/or the Defence case strategy to the Prosecution before the Prosecution evidence has even begun.

G. Suspects or Witnesses Whose Testimony May Be Self-Incriminating

79. The accused has the right not to be compelled to testify against himself at trial, however, the same right does not apply to witnesses who are suspected of committing war crimes, crimes against humanity, genocide, or crimes under the laws of domestic jurisdictions. Trials at the ICTY, ICTR, and IRMCT commonly include testimony from such suspects. Usually such witnesses testify after entering into an agreement with the Prosecution in which they have agreed to testify against the accused in exchange for a grant of immunity or pursuant to a plea bargain in which the witness has plead guilty to certain charges on condition that the Prosecution will advocate on the witness’ behalf for a reduced sentence.

80. It can also be the case that individuals who are suspected of committing international crimes are called upon to testify without the benefit of any agreement with the Prosecution or that a witness, who is not a known suspect, is questioned by either side about matters which reveal themselves at trial as subjects which could potentially be incriminating to the witness.

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80 Rule 84 bis(A), ICTY RPE; Rule 84 bis(A), ICTR RPE; Rule 101(A), IRMCT RPE.
81 Rule 84 bis(A), ICTY RPE; Rule 84(bis(A), ICTR RPE; Rule 101(A), IRMCT RPE.
82 Rule 84bis(A) and (B), ICTY RPE; Rule 101(A) and (B), IRMCT RPE, “The Trial Chamber shall decide on the probative value, if any, of the statement.”
83 See Chapter IX “Plea Agreements”, which discusses the plea bargain process in greater depth.
81. The ICTY RPE, ICTR RPE, ICC RPE, and IRMCT RPE provide that a witness “may object” to making any statement in court which may tend to incriminate the witness. When this occurs the Trial Chamber may honour the witness’ objection or, as is more likely, compel the witness to answer the question regardless of his objection to it.

82. The RPE state that testimony which is compelled in this manner “shall not” be used as evidence against the witness in any subsequent prosecution for any offence other than false testimony. It is unclear, however, whether Rule 90(E) (ICTY/ICTR RPE), Rule 74 (ICC RPE), and Rule 106(E) (IRMCT RPE), which contain this provision, apply to all jurisdictions, including potential future prosecutions in domestic jurisdictions, or apply only to future prosecutions at the ICTY, ICTR, ICC, and IRMCT.

83. Although no rule of procedure or evidence at the ICTY, ICTR, and IRMCT requires it, good ethical practice would appear to dictate that when it becomes apparent that a witness is going to incriminate himself, the Trial Chamber should advise the witness of that fact and provide the witness with the opportunity to consult with counsel regarding his anticipated testimony and its potential to incriminate the witness or not, as the case may be. A witness who refuses to answer a question, based on his view that the answer will tend to incriminate him, may be held in contempt of the Trial Chamber. This is cause on its own for the witness to be given the chance to obtain the advice of independent counsel before making a decision to answer a potentially incriminating question or not.

84. A comparison to the rules governing the same situation at the ICC reflects this last point. At the ICC, when a witness is notified that he will be called as a witness, he must also be advised about the provisions related to self-incrimination. If a witness has not been so notified before his appearance in court the Trial Chamber is required to so notify him before the witness’ testimony begins. At trial at the ICC, if a witness objects to answering a question on the basis that it may incriminate him, and if the witness has been given “assurances” before his testimony that he will not be prosecuted, then the witness may be required to answer the incriminating question. If the witness has not been given any such assurances, the Trial Chamber may require the witness to answer the question only after assuring the witness that the evidence provided will be kept confidential, never disclosed to the public or any state, and will never be used either directly or indirectly against the witness at any prosecution at the ICC.

85. If the Trial Chamber at the ICC determines that it would nevertheless not be appropriate to provide assurances to a witness who has objected to a question on self-incrimination grounds, “it shall not

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84 Rule 90(E), ICTY RPE; Rule 90(E), ICTR RPE; Rule 74(3(A)), ICC RPE; Rule 106(E), IRMCT RPE.
85 Rule 90(E), ICTY RPE; Rule 90(E), ICTR RPE; Rule 74(3(A)), ICC RPE; Rule 106(E), IRMCT RPE’ Rule 106(E), IRMCT RPE.
86 Rule 90(E), ICTY RPE; Rule 90(E), ICTR RPE; Rule 74(3(A)), ICC RPE; Rule 106(E), IRMCT RPE; Rule 106(E), IRMCT RPE.
87 Defence counsel can also raise the issue with the Trial Chamber.
88 Rule 77(A)(i), ICTY RPE; Rule 77(A)(i), ICTR RPE; Rule 90A(i), IRMCT RPE.
89 Rules 190, 74(1), ICC RPE; and see C Rohan, “Rules Governing the Presentation of Testimonial Evidence” in K Kahn, C Buisman, C Gosnell, Principles of Evidence in International Criminal Justice (New York, Oxford Press, 2010), 528-29 (discussing the various procedural protections which must be provided to a witness whose testimony may be self-incriminating).
require the witness to answer the question,” though the questioning of the witness on other matters may still proceed.

86. Practitioners or others assessing the reliability or credibility of testimony provided in ICTY, ICTR, and IRMCT trials from witnesses who have asserted a concern over self-incrimination must take into account the protections, if any, provided to the witness before his testimony was compelled under the ICTY, ICTR, and IRMCT rules. This may be difficult as hearings regarding the basis for the witness’ concern regarding self-incrimination may well take place in closed or private session, and therefore never be part of the public record of the trial.

**H. Witnesses Who Are Impaired Due To Age or Health**

87. The trials at the ICTY have on occasion included the testimony of witnesses who were impaired in some manner due to their age or physical or mental health at the time of trial. Each case varies according to its particular circumstances; however, some guidance exists as to how such witnesses have been treated by the Trial Chambers and how their testimony may be assessed.

88. Rule 90(A) at the ICTY/ICTR, Rule 106(A) at the IRMCT, and Rule 66(1) of the ICC RPE require that every witness must make a solemn declaration before testifying, in which the witness swears on oath to tell the truth. Needless to say this requirement is fundamental to the integrity of the trial process as a means of attempting to assure that testimony given at trial is truthful, accurate, and reliable.

89. The solemn declaration may not be required, however, from witnesses who are children at the time of their testimony, though such witnesses have been rare at the ICTY. In such a case, the rules provide that if, in the opinion of the Trial Chamber, the child does not understand the nature of a solemn declaration, the child may still testify if he or she is mature enough (again, in the opinion of the Trial Chamber) to be able to report the facts which are the subject of the testimony and understands the duty to tell the truth. A judgement, however, “cannot be based on such testimony alone.”

90. This rule has been applied, by analogy, to an adult witness at the ICTY, in at least one instance. An elderly witness called to testify as part of the Prosecution case in Haradinaj et al. was apparently confused by the language of the solemn declaration and did not take the oath, even after it was read to him several times. He was still permitted to testify. Thereafter, the Defence moved to exclude his testimony from the trial record because the witness “was demonstrably confused about the nature of the proceedings and his role therein,” and never did take or appear to understand, the solemn declaration.

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90 The solemn declaration states: “I solemnly declare that I will speak the truth, the whole truth, and nothing but the truth.” Rule 90(A), ICTY RPE; Rule 90(A), ICTR RPE; Rule 66(1), ICC RPE; Rule 106(A) IRMCT RPE.

91 Rule 90(B), ICTY RPE; Rule 90(B), ICTR RPE; Rule 106(B), IRMCT RPE; Rule 66(2), ICC RPE.

91. The Trial Chamber agreed that the witness appeared to be confused by the procedure of taking the solemn declaration, but permitted the testimony to remain in the record even though it was never given on oath because when the witness was asked, during his testimony, if he would promise to tell the truth, he said that was what he was doing, “I’m telling you the truth [...] I told you the truth.” The witness also appeared to understand the questions, a circumstance relied upon by the Trial Chamber as cause to find he was not confused and knew his role as a witness in a trial.

92. This decision, while understandable under the specific circumstances in Haradinaj et al., should not be viewed as undermining in any respect the well-recognized need for all witnesses to swear to tell the truth before testifying at trial. It is limited to its facts. It is, however, an illustration of the kinds of difficulties which may confront counsel and the Trial Chamber when dealing with a witness who is impaired by age, illness, or other infirmity, from understanding the somewhat daunting rules and procedures which govern any criminal trial proceeding.

93. Trials in the international criminal courts may sometimes involve witnesses who, at the time of trial, are mentally or emotionally unstable. The Trial Chamber and counsel are then faced with the challenge of determining how to approach the witness during questioning and/or whether to permit the witness to testify at all. When the witness is crucial to a party’s case the Trial Chamber may be faced with a difficult balancing test between the right of the party who is presenting the witness to attempt to elicit his or her testimony and the right of the party cross-examining the witness to have a realistic opportunity to confront the witness by testing the witness’s ability to reliably and accurately recall and relate the facts. The Chamber will also be concerned with protecting the witness from undue emotional or mental trauma given the witness’ existing condition.

94. In the Haradinaj et al. case at the ICTY it became clear, very near the beginning of the testimony of a witness called by the Prosecution that the witness was in distress significant enough to cause the Trial Chamber to temporarily adjourn the proceedings so that the mental and emotional status of the witness could be evaluated. The witness eventually returned to resume testimony, but signs of mental and/or emotional distress or confusion became apparent again. At that point, Defence counsel asked to intervene to conduct a short voir dire of the witness regarding his current condition. During that examination, the witness first revealed his existing mental health issues, including that he suffered on occasion from auditory and visual hallucinations. Given that information, the Trial Chamber referred the witness for medical assistance and subsequently excused him from further testimony.

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93 Ibid., para. 7.
94 Prosecutor v. Haradinaj et al., IT-04-84-T, Reasons for Trial Chamber’s Decision to Exclude the Evidence of Witness 55 Under Rule 89(D) and Deny His Testimony Pursuant to Rule 92quater, 14 December 2007, paras. 5-7,13.
95. The question then arose as to whether the testimony the witness gave, prior to revealing his mental illness, could remain in the record; testimony which had never been completed during the Prosecution case-in-chief and therefore was never cross-examined.

96. In ultimately deciding to exclude the testimony, the Trial Chamber noted that an accused’s right to cross-examination was not absolute and that not all restrictions on cross-examination entail a violation of that right or a violation of the right to a fair trial. It did hold, however, that testimony which has never been cross-examined is not sufficient to sustain a conviction and must be corroborated. That portion of the testimony of the witness in question, which related to the acts and conduct of the accused, was entirely uncorroborated and was inconsistent with his prior statements to the Prosecution. Under those circumstances, the Trial Chamber determined it had to exclude the witness’ partial direct examination, not just because it had never been and never could be cross-examined, but because there were reasons to find the testimony was unreliable in any event.

97. A different result occurred in the Rwamakuba case at the ICTR where a witness testified that the numerous discrepancies between the witness’s several prior statements were the result of memory lapses caused by amnesia. The witness’s *viva voce* testimony also contained a number of internally inconsistent versions of the events which were the subject of the testimony. The Trial Chamber there, unlike the situation in Haradinaj *et al.*, had no independent proof that the witness’ claim of amnesia was credible. Hence the testimony was rejected, not due to the mental condition of the witness, but based on a finding that the witness simply was not credible. Indeed, the Trial Chamber noted that even if the claim of amnesia were credible, it would simply provide another reason to reject the reliability of the witness’ testimony.

98. It is not uncommon for testimony from individuals suffering from some level of mental or emotional distress to be called during international criminal trials, given the nature and subject matter of such cases. Defence counsel must remain alert to instances, however, in which a witness’ current mental or emotional stability may be at issue, as those conditions obviously can affect the reliability of the witness’ testimony. When there is cause to believe that is the case, the Trial Chamber has the power and duty to control the mode of questioning of such witnesses, as it does with any witness. It must also, however, be vigilant to ensure the accused is afforded a fair trial.

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Conclusion

99. This chapter does not, of course, address every situation which can arise with a *viva voce* witness during trial. It is hoped, however, that it will provide practitioners with an informed basis from which to assess the quality and reliability of the evidence produced in international criminal trials as well as provoke discussion as to how to address similar issues in domestic trials involving war crimes, crimes against humanity, and genocide.
VIII. **DIRECT, CROSS-EXAMINATION AND RE-EXAMINATION**

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1. Examination, cross-examination, and re-examination of witnesses are essential parts of the adversarial system of the presentation of evidence that has been adopted at the ICTY. A successful examination should enable the party calling the witness to elicit all the relevant facts the witness can provide in support of the party’s case. An effective cross-examination should aim to destroy or weaken the effect of the evidence given by the witness-in-chief and elicit information favourable to the cross-examining party. Re-examination is the process whereby the party who has examined a witness-in-chief is allowed
to use questions to correct matters discussed during cross-examination or deal with new facts arising out of cross-examination.

2. This chapter will provide a concise review of the guiding principles concerning each form of examination of witnesses. Where appropriate, examples from cases before the international courts have been included to illustrate how these principles operate in practice.

A. Examination-in-Chief

3. Examination-in-chief is always conducted by the party calling a witness to testify. The main purpose of an examination-in-chief is to elicit from the witness all the relevant facts he can provide in support of the party’s case. A witness may also be examined with the purpose of eliciting evidence to refute allegations made during the opposing party’s case. In order to examine witnesses effectively, it is essential that counsel has a good knowledge of the salient aspects of his case and knows what the witness is likely to say.

4. Rule 85 of the ICTY and ICTR Rules of Procedure and Evidence provide for examination-in-chief, cross-examination and re-examination: “Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness”.

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1 Rule 85, ICTY and ICTR RPE. Rule 102 IRMCT RPE. See Rule 85, SCSL RPE; see also Rule 140 (2) ICC RPE.
5. The guiding principles on how to conduct an examination-in-chief are set out below.

A.1 General Rule Against Leading Questions

6. As a general principle, during an examination-in-chief, the examiner must not ask leading questions. It is the practice of the ad hoc Tribunals not to allow leading questions on matters in dispute. A leading question is one “which either (a) suggests the desired answer; or (b) assumes the existence of a disputed fact”.

7. Evidence elicited from the prompting or leading of a witness has very little, if any, probative value. At the ad hoc Tribunals, if evidence is given as a result of a leading question, it is not per se inadmissible, but the weight to be attached to it may be substantially reduced (see case box Karadžić and Perišić case - Examples of leading questions at the ICTY; more examples can be found in Annex 2).

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**Karadžić and Perišić cases - Examples of leading questions**

In this excerpt, the Prosecutor is asking the witness about his “thesis” in relation to military action conducted by Bosnian Serbs.

Note the change in the prosecutor's phrasing of the question. Initially, he presumed that certain materials were not available to the witness when drawing his conclusions. However, once the question was characterised by the Judge as leading, the prosecutor changed its structure in order to ascertain what materials were available to the witness.

- [Prosecutor]: Now, I presume that your -- you arrived at this conclusion without benefit of access, for example, to internal Bosnian Serb military records or contemporaneous internal political documents.
- [Defence]: Excuse me, Mr. President. I'm losing track of who’s testifying here. These last two questions is just [the Prosecutor] testifying and asking leading questions.
- [Trial Chamber]: Mr. [Prosecutor], I think you are beginning to behave a little bit like Dr. Karadžić in that respect
- [Prosecutor]: I'm sorry, Your Honour, but with respect to the previous answer, I thought it was -- while arguably leading, it was a predicate question about which there was no dispute. But, fine, I will ask it in a classic non-leading way. [...] General Smith, in arriving at your thesis, did you have access to internal Bosnian Serb military records or to internal political documents?**

In this example Defence counsel asks a leading question and rephrases it following an objection by the prosecutor.

- [Defence counsel]: And any -- when you say any "documents coming in or leaving that office had to be registered," I take it, I'm asking if you know, any decision that is made by the Chief of the General Staff, a written decision or written order, is something that would have to be registered, if you know that?
- [Prosecutor]: Objection, Your Honour...It's a leading question. [Trial Chamber]: Mr. [Defence counsel].
- [Defence counsel]: Q. Do you know what the requirements were for any written decision and/or order that was authored by, promulgated, or instituted by the Chief of the General Staff with regard to it being recorded?**

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2 Prosecutor v. Kordić and Čerkez, IT-95-14/2-T, Decision on Prosecutor’s Motion on Trial Procedure, 19 March 1999. The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Decision on Defence request seeking leave to appeal oral decision concerning use of prior statements during direct examination, 11 March 2016, paras. 5, 8, 11. Prosecutor v Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision on the modalities of the presentation of additional evidence pursuant to Articles 54(6)(b) and (d) and 69(3) of the Rome Statute, 8 October 2014, para. 5. 2 June 2015, ICC-01/04-02/06-619 (“Decision on the Conduct of Proceedings”). The Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01-06, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 September 2009, para. 23.

3 May, Richard and Steven Powles, Criminal Evidence, 5th Edition, 2004 (“May and Prowles, Criminal Evidence”), p. 604; Prosecutor v Bosco Ntaganda, ICC-01/04-02/06, Decision on Defence request for leave to appeal the Chamber’s decisions overruling objections to certain questions put to Witness P-0017, 19 February 2016, paras. 1, 5.

4 Prosecutor v. Prlić et al., IT-04-74-T, Decision on Prosecution Motion concerning use of Leading Questions, the Attribution of Time to the Defence Cases, the Attribution of Time to the Defence Cases, the Time Allotted for Cross-Examination by the Prosecution, and Associated Notice Requirements, 4 July 2008 (“Prlić Decision Concerning Leading Questions”), paras. 17-19, citing Prosecutor v. Bagosora, ICTR-98-41-T, Decision on Modalities for Examination of Defence Witnesses, 16 April 2005, para. 6; Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision authorising the appearance of Victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09, 9 November 2010, para. 35.
A.2 Leading Questions on Non-Contentious Issues

8. Leading questions may be permitted during an examination-in-chief on issues that are non-contentious between the parties. It is good practice to agree with the opposing party before the commencement of an examination-in-chief about those areas upon which leading questions are intended and inform the Trial chamber that such an agreement has been reached. This is an important time-saving device (see case boxes Gotovina case - Leading questions on non-contentious issues).

A.3 Letting the Witness Tell the Story

9. It is important for the examiner to assess in respect of each witness whether it is better to permit the witness to tell his own story in his own way, guided minimally by counsel, or for counsel to take him through his account by means of a set of structured questions. There is no hard and fast rule in this regard. Often minimal intervention by counsel is extremely effective. In other situations, a witness will require counsel’s guidance in the form of succinct questions to ensure that the evidence given is both relevant and comprehensive.

A.4 The Framing of Questions

10. The preparation of an effective examination-in-chief is a time-consuming exercise, requiring counsel to understand and master all the relevant facts of the case. The examination must be succinct and yet sufficiently detailed to ensure that all relevant evidence is elicited from each witness. It must not be repetitive, verbose, complicated or argumentative. Rather, counsel should aim to create an examination which is clearly structured, relevant and consists of straightforward inquiries which do not lead the witness to one conclusion or another.

11. A question should never be asked without an object in mind or without a basis for the question which is relevant to the factual and/or legal issues in the case. Such an approach should ensure both a structured,

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5 Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Decision on the conduct of proceedings, 2 June 2015, para. 26; Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009, para. 66; Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 September 2009, para. 23.
concise and time efficient examination process as well as an examination which cannot be successfully challenged by opposing counsel as lacking relevancy.

12. To examine a witness efficiently, counsel must know what the witness is likely to say. In cases before the international criminal court, it is common for both an investigator and counsel to have prepared a proof of evidence/draft statement from the witness to be called. Such preparation and time spent with a potential witness should enable counsel to assess the probative value of the evidence and whether or not that individual will likely present as a credible witness.

13. Counsel should never ask an open-ended question when they do not know the answer to it. Asking open-ended questions when counsel does not know what the witness is likely to say risks exposing the witness to unnecessary cross-examination and may result in the witness giving an answer damaging to the questioner’s own case.

A.5 No Comments on a Witness’s Testimony

14. The party conducting an examination-in-chief must not comment on the testimony the witness provides. The advocate’s role is to pose questions, not comment on the answers given. It is the answer of the witness that constitutes the evidence, not the question or comment of the advocate. Comments and observations should be reserved for the bench (see case box Akayesu case - No commentary on witness testimony).

B. Cross-Examination

15. The aim of cross-examination is to destroy or weaken the effect of the evidence given by the witness-in-chief and to elicit from the witness information favourable to the cross-examining party. It is a weapon to test the veracity of a statement made by a person. Cross-examination should be conducted with the courtesy and consideration which a witness is entitled to expect in a court of law.

16. An effective cross-examination may have a range of different objectives. It may be that the cross-examiner wants to show that the witness did not see what he said he saw or did not hear what he said he heard. It may be the aim to reveal that the witness spoke from hearsay or is unable to particularise the incident to which he refers. The cross-examiner may want to show that the witness who had identified something had done so through mistake or that his account is inconsistent with a version of events he had given on a previous occasion. The cross-examiner may aim to bring out skillfully all that the witness omitted to say, suppressed or deliberately forgot to mention. The purpose of cross-examination is to show that the witness should not be believed on oath and/or is not otherwise accurate

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or reliable. As such, a witness may be cross-examined about his previous convictions and antecedents. The cross-examination must, however, be relevant to the standing of the witness before the ICTY.

17. In order to cross-examine effectively, counsel will require sufficient material concerning the individual testifying and those events to which he will speak. This is where the importance of effective and thorough investigations on the ground is crucial.

B.1 Scope of Cross-Examination

18. In Milošević, the Trial Chamber affirmed that the scope of cross-examination is limited by Rule 90(H)(i) of the ICTY RPE.7

19 Rule 90(H)(i-iii) states that:

(H)(i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness8 and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit inquiry into additional matters.9

20. It is interesting to note that in Prlić et al., the Trial Chamber stated that “[w]hen the question has not been raised or is not part of the scope of the examination-in-chief . . . the accused who wishes to put questions during the cross-examination must formulate his questions in the most neutral manner possible, and the question must not be leading in that case.”10

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10 Prosecutor v Prlic et al, IT-04-74-T, Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 13; Prosecutor v. Prlic et al, IT-04-74-T, Decision on Prosecution Motion on Use of Leading Questions, 4 July 2008, para. 19; Prosecutor v Stanisic & Simatovic, IT-03-69-T,
B.2 Time Limits

21. In proceedings before the ICTY, it is relatively common for the Trial Chamber to put time limits on the cross-examination of both parties. Timing is a particular issue for trials before the ad hoc Tribunals, given the relative size and complexity of the cases pending before them. Such time restrictions on cross-examination do not violate the rights of the accused provided there is sufficient flexibility in varying the time limits where necessary to safeguard the right to an effective cross-examination.11

B.3 Leading Questions

22. Leading questions may be asked in cross-examination. However, questions should not be asked in the form of a comment or an invitation to argue since the purpose of cross-examination should be to elicit matters of fact.12

B.4 Putting the Case

23. At the ICTY, Rule 90(H)(ii) sets out the obligation that during the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction to the evidence given by the witness. This rule, in sum, requires counsel to put the Accused’s version of the case to the witness so that the witness may have the opportunity to explain or deny the contradiction. If a party fails to do this, he or she is generally taken to have accepted the witness’ evidence. In practice this means that counsel may be precluded during closing argument from attacking or questioning that part of a witness’ evidence which he has not challenged in cross-examination when he had the opportunity to do so.

11 Prosecutor v. Prlic et al, IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber’s Oral Decision of 8 May 2006 Relating to Cross Examination by Defence and Association of Defence Counsel’s Request for Leave to File an Amicus Curiae Brief, 4 July 2006; Prosecutor v. Prlić et al., IT-04-74-T, Decision on prosecution motion concerning use of leading questions, the attribution of time to the defence cases, the time allowed for cross-examination by the prosecution, and associated notice requirements, 4 July 2008. See generally, Rule 101 ICC RPE, Regulation 35, ICC Regulations of the Court. Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, Decision on Prosecution request to add P-548 and P-66 to its witness list, 23 October 2013, para. 11.

B.5 Discretion to Permit Enquiry into Additional Matters

24. At the ICTY, ICTR and ICC, there are provisions within the RPE to allow the Trial Chamber in the exercise of its discretion to inquire into additional matters during cross-examination beyond those matters specifically permitted under Rule 90(H), as a “Judge may at any stage put any question to the witness.”

C. Common Objections to Questioning

25. This section will examine the timing and substantive nature of some of the objections commonly made by counsel during the questioning of witnesses. On a practical level, it should be noted that rulings made in response to timely objections during testimony do not negate a party’s right to submit subsequent written motions challenging those rulings.

C.1 The Timing of Objections: Practical Considerations

26. Oral objections during either the examination or cross-examination of witnesses should be raised at the earliest opportunity. In respect of an objection to evidence contained in a specific question, the objection must ordinarily be made as soon as the question has been asked and before the answer has been given. The parties are expected to make timely objections to any issue challenged. Failure to do so contemporaneously may have consequences depending on the type of objection and the prejudice caused. For example, failure to make a timely objection to the admission of evidence normally results in a waiver to object to its admission at a later stage unless there was a satisfactory reason for the failure to object contemporaneously and a credible showing that the accused will suffer prejudice if a waiver is found.

C.2 Common Objections

27. When preparing the questioning of a witness, counsel must always be alert to possible objections to the presentation of his evidence. Objections may be raised on the basis of the question being irrelevant to the charges and/or the particular area of a witness’s testimony. Often an objection is raised to counsel attempting to get a witness to give evidence in respect of something that is not within the witness’ knowledge or experience. There may be objections raised in respect to questions that seek opinion from fact witnesses or questions that attempt to solicit comment from the witness as opposed to fact.

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13 Rule 85 (B), ICTY and ICTR RPE. And see Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on judicial questioning, 18 March 2010, para. 46.
common objection during the course of an examination-in-chief or re-examination is that the examiner’s question is leading.

28. Counsel may also object to questions that call for speculation, or contain inaccurate summaries of facts or testimony, questions that refer to facts not in evidence, and those beyond the scope of examination-in-chief. Counsel may also raise objections to the admission of evidence based on lack of relevance, authenticity and/or context. Counsel must be ready to both object and defend the substance and the manner of his or her questioning.

C.3 The Use of Documentary Evidence during Examination and Cross-Examination of a Witness

29. During trial proceedings, the Trial Chamber may admit any relevant evidence that it deems to have probative value and may request verification of the authenticity of any piece of evidence obtained out of court. The Court generally takes a fairly liberal approach to admitting documents, “as often documents are not the ultimate proof of guilt or innocence, but...provide a context and complete the picture presented by the evidence gathered.” However, all evidence must meet the minimum standards of relevance and reliability and should not be cumulative or repetitious.

30. While there is no explicit requirement in the ICTY’s Statute or Rules stating that documentary evidence must be admitted through a witness, in principle this is the preferred approach. It is possible to admit documents into evidence without tendering them through a witness, but counsel must be allowed to challenge such evidence through cross-examination of a witness, oral argument, or in a written brief.


16 Prosecutor v. Delalić et al., IT-96-21-T, Decision on Motion of Prosecution for Admissibility of Evidence, January 1998 (“Delalić Decision on Motion for Admissibility”), para. 20.


in order to preserve the accused’s right to a fair trial.\textsuperscript{20} The parties may introduce documents directly under Rule 89, provided the documents display sufficient \textit{indicia} of reliability.\textsuperscript{21} However, documents that are introduced without authentication by a witness will generally be given less probative value than documents that were so introduced unless the contents are not in dispute.\textsuperscript{22}

31. In order for a document submitted through a witness during direct examination to meet the required degree of reliability, the examiner must “lay the source of the document”.\textsuperscript{23} The party conducting the cross-examination of a witness must ask the witness about the background and the source of the documents it wishes to submit through the witness in order to allow him to recognise or reject the document.\textsuperscript{24} Documents used in cross-examination should only be admitted into evidence “if they contain material which has actually become part of the evidence in the case.”\textsuperscript{25} Documents may also be introduced during the cross-examination of witnesses for the purpose of providing context for a witness’ testimony, impeaching the witness, or proving or disproving any legal or factual element of the charges against the accused.

32. Documents which have not been disclosed by the Prosecution in accordance with Rule 66\textsuperscript{26} may still be used in cross-examination in accordance with the jurisprudence of the ICTY as this rule deals only with

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\textit{Ibid.}, p. 2. ICC does not require but allows the parties to “show documents to a witness whose testimony has a connection with that item and have the witness comment on it.”; \textit{Prosecutor v. Ntaganda}, ICC-01/04-02/06, Decision on the conduct of proceedings, 2 June 2015, para. 31.


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material used for the Prosecution’s case-in-chief. The Prosecution cannot however introduce evidence during cross-examination if the witness does not adopt it, rejects it, or is unable to say anything meaningful about it. While the Prosecution may put material to Defence witnesses in accordance with Rule 90(H), it cannot admit material into evidence where there is no basis for its admission.

E. The Use of Prior Witness Statements during the Examination and Cross-Examination of Witnesses

33. The admissibility of written witness statements obtained prior to trial during the examination and cross-examination of witnesses is governed by Rules 89, and 92 of the ICTY RPE.

E.1 Rule 92 bis

34. Rule 92 bis was created as a means to expedite the trial process and is used mainly to establish “crime-based” evidence. The rule sets out certain requirements which must be fulfilled in order to admit a witness statement into evidence in lieu of live testimony. For purposes of this chapter, suffice it to say that there is no cross-examination of witness statements submitted under this rule. Such statements may be admissible to prove a matter other than the acts and conduct of the accused. Written witness statements will not be allowed in lieu of testimony, however, where it is in the public interest that such evidence be presented orally, where such evidence is deemed unreliable or overly prejudicial, or where the

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27 This Rule relates specifically to the Prosecution’s disclosure obligations.
30 Prosecutor v. Galić, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, paras. 9-10, 16.
witness should be made available for cross-examination.\textsuperscript{31}

35. Rule 92\textit{bis} has now been essentially adopted at the ICC. It is replicated in the wording of rule 68 (2) of the ICC’s Rules of Procedure and Evidence.\textsuperscript{32}

36. The \textit{Brđanin and Talić} case set out the following general rules related to statements sought for admission under Rule 92\textit{bis}:

- Evidence going directly to the accused’s acts or conduct cannot be admitted regardless of how repetitive it is;
- The cumulative nature of the evidence is relevant for evidence directly to the acts or conduct of the accused;
- Extreme caution must be used before admitting written statements related to the acts and conduct of subordinates where an accused is subject to superior responsibility liability;
- The applicant should provide general information about other witnesses who will provide similar nature of the overlap; and
- The parties should assist the Trial Chamber by adequately addressing the relevant considerations set out in the Rule,\textsuperscript{33} where the reliability and credibility of a proposed 92\textit{bis} witness is at issue, and cumulative.\textsuperscript{34}

37. Rule 92\textit{bis}(E) also allows the Trial Chamber to require a witness who has provided written evidence to appear for cross-examination. Once a Trial Chamber determines that the witness must appear for cross-examination, because his statements do not fall within the parameters of Rule 92\textit{bis}, the admission of any prior statements or testimony is governed by Rule 92\textit{ter}.\textsuperscript{35} In making such a determination, the Trial Chamber will consider several factors.

38. First, if the acts and conduct of persons described in the testimony reach a certain degree of proximity to the accused, the witness may have to appear for cross-examination.\textsuperscript{36} Secondly, where the written

\textsuperscript{31} For further discussions on the use of written witness statements at trial, see Chapter VI “Evidentiary Issues at Trial”, Section E.
\textsuperscript{32} \textit{Prosecutor v. Laurent Gbagbo and Charles Blé Goudé}, ICC-02/11-1/15 OA 8, Judgement on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3),” 1 November 2016, para. 102.
\textsuperscript{34} \textit{Prosecutor v. Gotovina, et al.}, IT, Decision on the First Batch of Rule 92\textit{bis} Witnesses, 3 June 2008, para. 8.
\textsuperscript{35} \textit{Prosecutor v. Jovica Stanišić and Franko Simatović}, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Written Evidence Pursuant to Rule 92\textit{bis}, 7 October 2010 (“Stanišić and Simatović Decision Pursuant to Rule 92\textit{bis}”), para. 35. The substance of 92\textit{ter} statements is discussed in Chapter 6, “Evidentiary Issues at Trial.” \textit{Prosecutor v. Jena-Pierre Bemba Gombo}, ICC-01/05-01/08, Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 19 November 2010, paras. 25-27. Also see Rule 92\textit{ter}, incorporated into Rule 156 of the Statute of the Special Tribunal for Lebanon.
\textsuperscript{36} \textit{Prosecutor v. Jovica Stanišić and Franko Simatović}, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Written Evidence Pursuant to Rule 92\textit{bis}, 7 October 2010, para. 35; \textit{Prosecutor v. Martić}, IT-95-11-T, Decision on Prosecution’s Motion for Admission of Transcripts Pursuant to Rule 92\textit{bis} (D) and of Expert Reports Pursuant to Rule 94\textit{bis}, 13 January 2006, para. 19, citing \textit{Prosecutor v. Galić}, IT-98-29-
evidence is a “critical element of the Prosecution’s case” or is “pivotal” to the Prosecution’s case, the Trial Chamber may choose to require cross-examination of the witness or exclusion of the evidence. Generally, though, evidence will be excluded only if its “prejudicial effect cannot be counterbalanced by allowing the accused the opportunity to cross-examine the witness.” The Trial Chamber will also consider whether the issues contained within the statement are “live and important” issues given the context of the specific circumstances of the case, including assessing whether the accused has put this evidence into issue and vigorously put forward a contrary case.

39. Any evidence that is admitted without cross-examination requires corroboration in order to be sufficient to constitute a basis for a conviction.

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37 Prosecutor v. Martić, IT-95-11-T, Decision on Prosecution’s Motion for Admission of Transcripts Pursuant to Rule 92 bis (D) and of Expert Reports Pursuant to Rule 94 bis, 13 January 2006, para. 20. The ICC approach to exclusion of evidence differs somewhat. See Prosecutor v Ongwen, ICC 02/04-01/15, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, 28 March 2017, paras 13-14; Prosecutor v Katanga and Ngudjolo, ICC 01/04-01/07, Decision on the Prosecutor’s Bar Table Motions, 17 December 2010, para 15.

38 Prosecutor v. Jovica Stanišić and Franko Simatović, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Written Evidence Pursuant to Rule 92 bis, 7 October 2010, para. 35. And see Prosecutor v Ntaganda, ICC 01/03-01/02, Public redacted version of Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68, 2 December 2016, ICC 01/04/02/06-1667 Conf., para 8.


40 Prosecutor v. Martić, IT-95-11-T, Trial Judgement, 12 June 2007, para. 27; Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido, ICC-01/05-01/13, Public Redacted Version of Judgement pursuant to Article 74 of the Statute, 19 October 2016, para. 25; Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Public redacted version of Decision on Defence Applications for Judgements of Acquittal, 5 April 2016, para. 41. And see Prosecutor v Harçija and Morina, ICTY, IT-04-84-R77.4, Trial Chamber Judgement, 17 December 2008, para 23 [following ECHR law the Trial Chamber held the “mere existence of corroborating evidence, however, does not preclude a conviction from being based to a decisive extent on untested evidence. The issue is not one of quantity, but of quality; in other words, how much importance was attached to the corroborating evidence in convicting the accused.” Ibid, para 24.

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40. Rules 89(C) and 92 bis are interrelated. Parties cannot attempt to tender written statements under Rule 89(C) in order to avoid the stricter standards of Rule 92 bis. Rule 92 bis is the lex specialis which takes the admissibility of written statements and transcripts out of the scope of lex generalis of Rule 89(C). Hence, if a tendered statement contains hearsay evidence, it may be admitted only if it complies with Rule 92 bis. Moreover, all evidence admitted under Rule 92 bis must meet the general requirements of Rule 89(C) in that it may be admitted only if it is relevant, probative, and reliable. Moreover, a Trial Chamber must exclude probative evidence if its probative value is substantially outweighed by the need to ensure a fair trial. However, Rule 92 bis has no effect on hearsay material that was not prepared for the purposes of legal proceedings. (see case box Mićo Stanišić and Stojan Župljanin case - Admission via Rule 92 bis prevents the opportunity for cross-examination).

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<tr>
<th>Mićo Stanišić and Stojan Župljanin case - Cross-examination under Rule 92 ter</th>
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<td>In this case, the Prosecution requested that written statements be admitted in lieu of viva voce testimony pursuant to Rule 92 bis.* However, the Defence requested that it be allowed to cross-examine the witness in order to test the “reliability and credibility” of his testimony. It also stated that the issues addressed by this witness were “highly contested”, that any inconsistencies in his account would need to be explored, and that cross-examination in the previous trial did not adequately address the matters in the present case. The Trial Chamber found that Rule 92 ter and not 92 bis applied. In his prior court testimony, the witness discussed not only his personal background but also gave his interpretation of a report prepared by the 5th Krajina Corps which discussed the number of persons killed and captured as well the term ‘mopping up’; the fact that there were no armed formations of Green Berets in a particular area; that a particular brigade took part in an incident; and that security organs would have been consulted prior to any attack. He also discussed events leading up to wider armed conflicts and the presence and activities of the Muslim paramilitary. The Trial Chamber determined that the report concerned “acts and conduct of the Accused and raise[d] important matters upon which the Defence should be allowed the right to cross-examine.” Therefore, it required that this witness appear for cross-examination in accordance with the provisions of Rule 92 ter.</td>
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* Prosecutor v. Mićo Stanišić and Stojan Župljanin, IT-08-91-T, Written Reasons for the Oral Decision pursuant to Rules 92 bis at 92 ter Granting in part Prosecution’s Motion for Admission of Evidence of ST247, 3 December 2010, para. 1, 7, 14, 15.

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43 Prosecutor v. Galić, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, para. 31.

44 Ibid.

45 Prosecutor v. Milutinović et al., IT-05-87-T, Decision Denying Prosecution’s Second Motion for Admission of Evidence Pursuant to Rule 92 bis, 13 September 2006, para. 5.


41. Unadmitted sections of a 92 bis statement may still be used to refresh a witness’ memory or to challenge his credibility during cross-examination (see case box Blagoje Simić et al. case - Unadmitted Sections of 92 bis statements & refreshing a witness’ memory).

E.2 Rule 92 ter

42. Rule 92 ter at the ICTY allows for the admission of written statements or transcripts of prior testimony given by a witness, even when that evidence goes to the accused’s acts and conduct, if (a) the witness is present in court, (b) available for cross-examination, and (c) attests that the statement or prior testimony accurately reflects what he would say if examined on the same issues in court. ⁴⁹

43. The fact that such a statement may discuss the acts and conduct of an accused does not render it inadmissible. ⁵⁰ Rather, the Trial Chamber has the discretion to decide whether to enter it in evidence and how much weight it should carry. Similar procedures apply at the ICC. ⁵¹

44. This rule, while aiming to expedite the trial process, also seeks to ensure the accused’s right to a fair trial by allowing for a witness whose prior statements have been admitted into evidence to be cross-examined at trial (see case box Mićo Stanišić and Stojan Župljanin case - Cross-examination under Rule 92 ter).

45. Associated exhibits that were discussed by the witness in his prior witness statement or previous trial testimony may be tendered for admission into evidence with the 92 ter statements if they meet the requirements for admission under rule 89 and are an “inseparable and indispensable” part of the witness’ prior evidence. ⁵² In order for exhibits to be deemed “inseparable and indispensable”, they must have been “discussed within the testimony, and it must be shown that, without the document, the

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⁴⁹ Prosecutor v. Slobodan Milošević, IT-02-54-AR73.4, Decision on Interlocutory appeal on the admissibility of evidence-in-chief in the form of written statements, 30 September 2003, disposition; Prosecutor v. Limaj et al., IT-03-66-T, Decision on the Prosecution’s motion to admit prior statements as substantive evidence, 25 April 2005, para. 16. The rules governing the admission of statements pursuant to rule 92 ter are discussed in greater depth in Chapter 6.

⁵⁰ Prosecutor v. Ntaganda, ICC-01/04-02/06, Public redacted version of Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, para. 28.


⁵² Prosecutor v. Karadžić, IT-9505/18-T, Decision on Prosecution’s Submission regarding Additional Transcript Pages from Momčilo Mandić’s Stanišić & Župljanin Testimony for Admission into Evidence, 8 September 2010, para. 5; Prosecutor v. Milan Lukić & Sredoje Lukić, IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 ter, 9 July 2008, para. 15. Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, para. 33.
witness’ testimony would lose probative value or become incomprehensible.” The admissibility rules required by Rule 89(C), that the evidence be relevant and have probative value, and Rule 89(D), which permits the exclusion of evidence if its probative value is substantially outweighed by the need to ensure a fair trial, continue to apply to Rule 92 ter evidence.

E.3 Rule 92 quater

46. Rule 92 quater governs the admissibility of a prior written statement of a witness who is unavailable at the time of trial. Under this Rule, “a written statement or transcript [of a person] who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted [...] if the Trial Chamber (i) is satisfied of the person’s unavailability...; and (2) finds from the circumstances in which the statement was made and recorded that it is reliable.” A Trial Chamber may, in its discretion, reject such evidence, in whole or in part, if it goes to the proof of the accused’s acts and conduct.

53 Prosecutor v. Tolimir, IT-05-88/2-PT, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 ter with Appendices A-C, 3 November 2009, para. 7.
54 Prosecutor v. Tolimir, IT-05-88/2-PT, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 ter with Appendices A-C, 3 November 2009, para. 8; Prosecutor v. Đorđević, IT-05-87/1-T, Decision on Prosecution’s Motions for Admission of Evidence Pursuant to Rule 92 ter, 10 February 2009, para. 6. Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 19 November 2010, para. 9.
55 This rule is also discussed at greater length in Chapter 6, Evidentiary Issues at Trial.” Rule 68 (2)(c) ICC REP.
56 Rule 68(2)(c)(ii) REP.
47. The ICC has replicated these provisions in Rule 68 (2) (c) of its Rules of Procedure and Evidence, providing for admission of prior recorded testimony when it comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case:

i. Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability.\(^{57}\)

ii. The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.\(^{58}\)

48. In order for a statement to be admitted under this rule, the witness whose statement or transcript is tendered for admission must be unavailable for “reasons beyond control”, and the written evidence must be deemed to be sufficiently reliable to be admitted without testing by cross-examination.\(^{59}\) (see case box Tolimir case - Strictness of the Unavailable standard).

49. The requirements of Rule 89, that the proposed evidence be relevant and have probative value, and that the probative value is not substantially outweighed by the need to ensure a fair trial, must also be met as with any other evidence.\(^{60}\) When weighing the value of such evidence, the Trial Chamber will look at issues

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\(^{57}\) Prosecutor v. Lubanga, ICC-01/04-01/06, Trial Chamber: Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witness...5, 28 April 2011, para. 53.

\(^{58}\) Prosecutor v. Ntaganda, ICC-01/04-02/06, Trial Chamber: Decision on Prosecution Application...for Admission of Prior Recorded Testimony of Witness P-0551, 19 January 2017, para. 23.


\(^{60}\) Prosecutor v. Đorđević, IT-05-87/1-T, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 quater, 5 February 2009, para. 7; Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on Prosecution application under Rule 68(2)(2) (c) for admission of prior recorded testimony of Witness P-0016, 24 February 2017, para. 32; Prosecutor v. Ntaganda, ICC-01/04-02/06, Public redacted version of “Decision on Defence request for admission of evidence from the bar table,” 31 January 2018, paras. 12,13,35, 38.
related to the substance of prior cross-examination, the alleged interests of counsel, and challenges to the witness’ credibility.\textsuperscript{61}

**E.4 Prior Consistent Statements**

50. While there is no explicit rule forbidding the use of prior consistent statements from a witness, such statements are generally inadmissible at the ICTY as they are considered to constitute cumulative evidence which is of limited probative value.\textsuperscript{62} Even when allowed into evidence, they cannot be used to vouch for a witness’ credibility, but may only be used for the limited purpose of rebutting a charge of recent fabrication by showing the prior consistency in the witness’ previous account\textsuperscript{63} (see case boxes Mićo Stanišić and Stojan Župljanin case - Prior Statement to Rebut a Charge of Recent Fabrication and Kordić and Čerkez case - Prior Consistent Statement Denied Admission into Evidence).

**E.5 Refreshing a Witness’ Memory**

51. Prior statements made by a witness can be used for a number of different reasons. One of them is to refresh a witness’ memory.\textsuperscript{64} A witness’s memory can be refreshed when a witness asserts, during

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\item \textsuperscript{61}Prosecutor v. Đorđević, IT-05-87/1-T, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 quater, 5 February 2009, para. 8; Prosecutor v. Popović et al., IT-05-88-AR73A, Decision on Beara’s and Nikolić’s Interlocutory Appeals Against Trial Chamber’s Decision of 21 April 2008 Admitting 92 quater Evidence, 18 August 2008, paras. 31, 44; Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, 24 February 2017, para. 30.
\item May, Richard and Marieke Wierda, International Criminal Evidence, 2002 (“May and Wierda, International Criminal Evidence”), page 236; Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on Prosecution application for admission of prior recorded testimony of Witness N (Tab 18) as part of the Dossier is accordingly not admitted.
\item Prosecutor v. Hadžihasanović and Kubura, IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, 2 April 2004 (“Hadžihasanović Decision on Interlocutory Appeal”), page 3; Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on Defence request seeking leave to appeal oral decision concerning use of prior statements during direct examination, 11 March 2016, para. 10; Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on the conduct of proceedings, 2 June 2015, para. 28.
\end{itemize}
\end{footnotesize}
testimony, that he or she does not recall a particular fact or incident. The previous statement of the
witness, recounting that fact or incident, can then be shown or read to him or her to refresh
recollection. Thereafter the witness will be asked if review of the statement has, in fact, refreshed his
or her memory about the event at issue. If so, he or she may testify about it. There are times when
showing a witness his or her prior statement will not refresh memory; however, practically speaking,
they are exceptional.

52. Other aides, such as contemporaneous notes or diaries, may also be used to refresh a witness’s
memory.\(^{65}\)

53. The Trial Chamber in determining the witness’ credibility or reliability regarding an issue which required
refreshing the witness’ memory will look to the totality of the circumstances surrounding the witness’s
testimony in making that determination.\(^{66}\)

**E.6 Impeachment**

54. Prior witness statements may also be used to impeach a witness. As a general rule impeachment
evidence serves to call the credibility and reliability of a witness’s testimony into question. It is not
used as substantive evidence. However, in specific circumstances where a witness has previously made
a statement which contradicts his or her in-court testimony, and the in-court testimony is adverse or
hostile to the party who called the witness; the Trial Chamber may consider the prior statement as
substantive evidence and rely on it for its truth.\(^{67}\)

55. At the ICC a Chamber has discretion to admit prior recorded testimony pursuant to Rule 68(2) and can
do so when admitting such statements will be in the interest of justice. The “. . . main purpose of [ICC]
Rule 68 is to expedite trial proceedings, the notion of interests of justice should be linked to the rights
of the accused to be tried without undue delay.”\(^{68}\)

56. In a situation where a witness is confronted with his or her own prior statements that are inconsistent
with one another, it is important to remember that the testimony which the Trial Chamber will rely

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\(^{67}\) Prosecutor v. Limaj et al., IT-03-66-T, Decision on the Prosecution’s Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras. 16 and 17. Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, paras. 86, 133; see also Section E.7, “Hostile Witnesses”, of this Chapter. Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, paras. 60, 86, 133.

\(^{68}\) Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11, 19 August 2015, para. 60.
upon is the live testimony given by the witness at trial. It has also been held that statements made by third parties cannot be used to directly impeach a testifying witness.

57. When deciding whether to impeach a witness for his or her prior inconsistent statements, counsel should consider whether discrediting the witness is:

• tactically desirable by determining if impeachment is consistent with counsel’s theory of the case;
• a benefit that outweighs the risk of harm; and
• discrediting the evidentiary value of the witness’ prior statement.

58. Documentary evidence may also be used to challenge a witness’ credibility. It is permissible to put a document to a witness which is not already in evidence and which contains factual assertions contrary to the testimony of the witness who is being examined, even if that document is not alleged to have been authored by the witness or is not adopted by the witness. If the witness contests the factual contents of the document, however, the document cannot be admitted as evidence through that witness, although it may be admitted through a different witness who can speak to its contents.

59. Other methods of substantive impeachment include:

• demonstrating that the witness lacked the ability to perceive, observe, remember or recount matters about which he or she has testified;
• highlighting contradictions in the witness’s testimony if any arise;
• eliciting evidence from the witness or others that shows the witness is biased or influenced by improper factors such as fear, prejudice or pecuniary interest; and,
• undermining the witness’ character for honesty and veracity by presenting evidence of prior criminal convictions or other events reflective of dishonesty.

69 Prosecutor v. Naletilić and Martinović, IT-98-34-T, Decision on the Admission of Witness Statements into Evidence, 14 November 2001, page 3. See also Prosecutor v. Kvočka et al., IT-98-30/1, Judgement, para. 800 (Annex A), stating that while prior statements could be used to challenge credibility, they could not be admitted as evidence; Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution’s list of evidence, 23 November 2010, para. 12.

70 Prosecutor v. Halilović, IT-01-48-T, Decision on Prosecution’s motion to vary its Rule 65 ter list, 7 February 2005, page 6. The ICC appears to permit such impeachment under certain circumstances. See Prosecutor v Ntaganda, ICC 01/04-02/06, Decision on the conduct of proceedings, 2 June 2015, paras 28 and 34.


72 May, Richard and Marieke Wierda, International Criminal Evidence, 2002, page 171. Prosecutor v. Nyiramasuhuko et al., ICTR-98-42-T, Decision on Kanyabashi’s Oral Motion to Cross Examine Ntahobali Using Ntahobali’s Statements to Prosecution Investigators in July 1997, 15 May 2006, para. 80. The Chamber determined that Ntahobali’s voluntary statements were admissible under Rule 89(C), which empowers the Chamber to admit relevant evidence which has probative value, for the purposes of cross-examination on issues relating to credibility; see also Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on the conduct of proceedings, 2 June 2015, para. 31.

E.7 Hostile Witnesses

60. In some cases, a witness may provide a statement that is relied upon by counsel but, when questioned during the trial, gives testimony contrary to the original statement. If the witness is considered to bear “a hostile animus to the party calling him and does not give his evidence fairly and with a desire to tell the truth,” he may be considered hostile to the party who called him to testify.74 In this situation, counsel may (but only by first seeking leave from the Trial Chamber) treat the witness as a hostile; a procedure which allows counsel - who, having called the witness as part of his or her own case, is normally not permitted to ask leading questions - to cross-examine the witness about the prior inconsistent statement75 and ask leading questions in the course of doing so.76 It should be noted that merely providing unfavourable evidence or being unable to recall information contained in a prior statement is not sufficient justification to treat a party’s own witness as hostile. The witness must be seen as unwilling to tell the truth or answer questions.77 To determine whether a witness is hostile, “the court will have to regard the witness’ demeanour, the terms of any inconsistent statement, and the circumstances in which [the prior inconsistent statement] was made.”78

61. As explained in Limaj et al., at the ICTY a hostile witness is “a witness who’s not prepared to answer truthfully and willingly.”79 To qualify as such, the witness should be “refusing to answer questions, giving false testimony or withholding relevant information.”80

62. A Trial Chamber may allow a party to impeach or cross-examine its own witness by putting inconsistent statements to its witnesses, without declaring the witness hostile, if the Trial Chamber considers that it is in the interest of justice to do so.81 This will generally occur, however, when the impeachment only involves a discreet part of the witness’ testimony as, for example, when a witness expresses reluctance to testify regarding certain matters but is otherwise willing to cooperate with the trial process and the party who called him to testify (see Annex 1 - Argument by the prosecutor to apply to treat a witness as hostile).


76 Prosecutor v. Šešelj, IT-03-67-T, T: 8491, 19 June 2008; Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on the conduct of proceeding, 2 June 2015, para. 49.


78 Prosecutor v. Limaj et al., IT-03-66-T, T: 2737, 1 February 2005; Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on the conduct of proceeding, 2 June 2015, para. 47.


80 Ibid., T:2143.

F. Re-Examination

63. Re-examination is the process whereby the party who has examined a witness-in-chief is allowed to put questions to correct matters or new facts arising out of cross-examination. It is not an opportunity to elicit further evidence-in-chief or to raise entirely new issues. The re-examiner may deal with all matters relevant to those raised in cross-examination, even if not dealt with expressly by the cross-examiner. However, the rebuttal evidence presented must be more than merely cumulative.

64. The objective of re-examination is to reconcile discrepancies, if any and if possible, between the statements in the examination-in-chief and cross-examination, or to remove any ambiguity or suspicion cast upon the evidence during cross-examination. New matters may only be introduced with the express leave of the Trial Chamber.

65. A witness may be asked about a previous consistent statement if there was an allegation of recent fabrication during cross-examination and may also be asked to clarify a prior statement if that statement was addressed during cross-examination. The re-examining party is allowed to use documents to refresh the witness’ memory or to respond to a new subject dealt with for the first time during cross-examination.

66. As with direct examination, leading questions are also not permitted on re-examination.

Conclusion

67. The aim of this chapter has been to highlight the main principles of examining and cross-examining witnesses in an adversarial trial setting such as that utilised at the ad hoc Tribunals and the ICC. To successfully employ these principles, it is crucial for counsel to master the factual and legal matrix of the Accused’s case and to determine as early as possible the main challenges to the Prosecution’s case. Such determinations will ultimately assist counsel in focusing on the real issues in dispute and the merits of the Defence case, so as to enable counsel to conduct examinations at trial in an expeditious and professional manner.


Annex 1: Argument by the Prosecutor to Apply to Treat a Witness as Hostile

In the following excerpt of the transcript of Prosecutor v. Limaj et al., IT-03-66-T, T: 2126-43, 18 January 2005, the Prosecutor seeks permission from the Court to have his witness treated as hostile. Defence counsel contest the Prosecutor’s application.

- [Prosecution]: ...And after a lot of questioning and going around the houses and some difficulty...the witness stated that it was possible that a soldier would be told to leave the unit and that they could be removed. That was after a great deal of, in my view and in my submission, efforts on his part to resist answering the question... So although that testimony ended up in the end consistent, I include that as an example of the witness’ efforts to resist answering questions and to try not to give us the same information he’s clearly stated earlier in his prior statements.

We’ve passed out today a letter which I think the Court has already received. It’s addressed to the Trial Chamber, sent by the witness on 23 November 2004, where he says he will not be a witness for the Officer of the Prosecutor...

I include this letter, Your Honour, because there are two issues which are slightly different but they are related. The first is the witness is an adverse witness which under the Rules which I practice on, as he aligned himself with the opposing party. That [is], clearly, the case with this witness. He’s openly stated he did not want to come for us. [Defence counsel] stated yesterday the witness refused to be a Prosecution witness; he’s happy to be a Defence witness. He considers himself adverse to the Office of the Prosecutor...

I’m just pointing out that he through this letter and through his statements when he was served with the subpoena to come here, he again said to the person serving him: I don’t want to come. He obeyed the subpoena. He’s adverse. He’s an adverse witness. Through the examples I’ve shown Your Honours he’s also a hostile witness, in that he’s trying to avoid giving this information and he has given materially different statements on -- in court yesterday than he has in previous interviews to us, to the Defence, and to the press on important issues. And there is a direct contradiction that it is a clear effort from him to try to avoid answering the question...

- [Defence counsel 1]: ...We submit this application is without both foundation or merit. We submit that Your Honours can, absent as we understand it any jurisprudence arising from [the ICTY] on the point, safely adopt the principle that adverse means hostile and not merely unfavourable. In indicating that is the principle we invite you to apply, we [by] no means concede in that...position has been arrived at here or indeed anywhere near it...

First of all...this witness is a commander of considerable seniority...we invite the court to read the last sentence of the letter written on his behalf indicating that his lack of preparedness to give evidence...is rather a recognition of the delicate position in which historically and today he finds himself.

He...is the only witness interviewed by any Defence team who specifically requested the attendance of the OTP during the interview. That of itself is another indicator, we submit, of a position very far from animosity towards the party calling him. He made no signed statement at the Office of the Prosecutor. He was the subject of a subpoena compelling his attendance, having written the letter or it having been written on his behalf at the back-end of last November.

Nonetheless, notwithstanding all of those matters, they chose to call him, to set up this skittle in order to knock it down. There was from 1946 a precedent that they could have adopted, the medical case, this Nuremberg case. They could have invited the [ICTY] to call the witness, had they feared what they now say has come about...

- [Defence counsel 2]: ...in the courts in which I practice, this application would be denied based upon what he has
Annex 2: Examples of Leading Questions

In this excerpt of Gotovina et al., Defence counsel is attempting to get information related to interactions between civilians and the Special Police, specifically concerning how the Special Police were to deal with civilians in various circumstances. However, in his attempt to obtain this information, Mr. Kuzmanović led the witness. Notice the difference between the original and revised versions of his question.

- [Defence counsel]: The Special Police had technical expertise in terms of encountering not just in vehicles but in other places booby-traps, mines. Is that a reason for the Special Police to be involved in certain instances in checking out vehicles and buildings?
  - [Trial Chamber]: Mr. [Prosecutor].
  - [Prosecutor]: It’s a leading question.
  - [Trial Chamber]: It is. [Defence counsel]
- [Defence counsel]: Q. Can you give a reason as to why Special Police would be involved in removal of vehicles and/or checking out buildings?
  - [Prosecutor]: It’s a leading question.
  - [Trial Chamber]: It is. [Defence counsel]
  - [Defence counsel]: Q. Can you give a reason as to why Special Police would be involved in removal of vehicles and/or checking out buildings?*

In this passage of Popović, Defence counsel is inquiring about particular passages from the witness’ prior written statement, which describe problems encountered due to the large number of prisoners being held and the unstable security situation.

- [Defence counsel]: Mr. Pandurević, did you intend the references to what in Serbian is "asanacija" and what has been translated as "security of the terrain" to refer to guarding and burying prisoners in the Zvornik area?
  - [Prosecutor]: Objection, leading. "What did you intend that to mean?"
  - [Trial Chamber]: Yes, can you rephrase it, please.
  - [Defence counsel]: I don’t think that’s a leading question. He is entitled to answer the case that’s put against him absolutely. That’s the Prosecution case. He is entitled to answer that as steadfastly as he is entitled to enter a not-guilty plea
- [Prosecutor]: I absolutely agree, but he first needs to set the foundation by letting the witness say what he intends. That’s the important thing.
  - [Defence counsel]: Well, I’ve got nothing further to say. I’d like you to rule on this. [Trial Chamber]: Yes, exactly... Our conclusion is that we consider the question as put as leading, to be a leading one, and we therefore suggest that you rephrase it and possibly agree to the way suggested by [the Prosecutor]. Of course, you will be able to follow it through once you have rephrased the question.
  - [Defence counsel]: Q. Mr. Pandurević, when you wrote this report, what did you believe to be the state of health of the prisoners that Brano Grujić had referred to?

IX. Plea Agreements

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1. It is sometimes forgotten that the first judgement handed down at the ICTY came about as a result of a guilty plea.* On 31 May 1996, Dražen Erdemović pleaded guilty to one count of crimes against humanity at his initial appearance.¹ Since then, twenty-two accused have pleaded guilty at the ICTY.² This chapter examines the law of the ICTY, the ICTR, IRMCT and ICC on plea agreements and, in particular, the requirements of Rule 62, Rule 62 bis, and Rule 62 ter of ICTY Rules of Procedure and Evidence (RPE) along with Rule 62, Rule 62 bis of ICTR RPE, and Rule 64 and Rule 65 of the IRMCT RPE. Throughout, specific reference is made to the pleadings filed in the Obrenović case, as an illustration of a written plea agreement and the factual basis which underlied and supported the guilty plea process. Finally, considerations on determining whether, when and how to negotiate a plea agreement are addressed.

A. Purposes of Plea Agreement

2. The ICTY jurisprudence has identified a number of positive aspects of the plea agreement process:

* Chapter co-authored by Eugene O'Sullivan and Slobodan M. Zečević. Eugene O'Sullivan, Defence Counsel at the ICTY for Zejnil Delalić (Čelebići case), Milojica Kos, Biljana Plavšić, Miodrag Jokić, Milan Milutinović, and legal consultant for Mićo Stanišić. Slobodan M. Zečević, LL.B, LL.M, Attorney at Law, Belgrade Bar since 1981, Managing partner of Zečević & Lukić Law offices, Belgrade, Serbia, former President of ADC-ICTY, Defence counsel at the ICTY on the cases of Milan Simić (Šamac case), Gen. Momir Talić (Krajina case), Miroslav Deronjić (Bratunac case), Milan Milutinović (Kosovo case) and Mićo Stanišić (Stanišić & Župljanin case).
An admission of guilt demonstrates honesty and it is important for the Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators.\(^3\)

A guilty plea contributes to the fundamental mission of the Tribunal to establish the truth in relation to crimes subjected to its jurisdiction.\(^4\)

An admission of guilt and acceptance of the facts provides a unique and unquestionable fact-finding tool that greatly contributes to peace-building and reconciliation among the affected communities.\(^5\)

Individual accountability which leads to a return to the rule of law, reconciliation, and the restoration of true peace across the territory of the former Yugoslavia is an integral part of the mission of the ICTY.\(^6\) The Trial Chamber in the Sentencing Judgement in the \textit{Erdemović} case described the ICTY’s mandate in the following terms:

\textit{“The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process. The International Tribunal must demonstrate that those who have the honesty to confess are treated fairly as part of a process underpinned by principles of justice, fair trial and protection of the fundamental rights of the individual. On the other hand, the International Tribunal is a vehicle through which the international community expresses its outrage at the atrocities committed in the former Yugoslavia. Upholding values of international human rights means that whilst protecting the rights of the accused, the International Tribunal must not lose sight of the tragedy of the victims and the sufferings of their families.”}\(^7\)

A plea of guilt contributes to public advantage and the work of the Tribunal by providing considerable saving of resources for, \textit{inter alia}, investigation, counsel fees and the general costs of a trial.\(^8\) The Trial Chamber in the \textit{Todorović} case concurred with the words of Judge Cassese in the \textit{Erdemović} sentencing appeal on the public advantage to a plea of guilty:

\textit{“It is apparent from the whole spirit of the Statute and the Rules that, by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible}\)


lengthy trial with all the attendant difficulties. These difficulties - it bears stressing - are all the more notable in international proceedings. Here, it often proves extremely arduous and time-consuming to collect evidence. In addition, it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses. Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation into various languages; provision of transcripts for the proceedings, again in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during trial, etc.). Thus, by pleading guilty, the accused undoubtedly contributes to public advantage.”

- An admission of guilt may in the case of some victims and witnesses relieve them from the stress of giving evidence.¹⁰

B. The Law of the ICTY, ICTR, IRMCT and ICC on Plea Agreements

3. The practice and procedure at the ICTY regarding guilty pleas is governed by three rules: Rule 62, Rule 62 bis, and Rule 62 ter.¹¹ Similar procedures are governed by Rule 62 and Rule 62 bis of the ICTR RPE at the ICTR,¹² Rule 64 and Rule 65 of the IRMCT RPE at the IRMCT,¹³ and Articles 64 and 65 of the Rome Statute at the ICC.¹⁴ Rule 62 (ICTY/ICTR RPE), Rule 64 (IRMCT RPE) and Article 64 (ICC Statute) provide, inter alia, that when an accused is brought before a Trial Chamber to be formally charged, he or she shall be called upon to enter a plea of guilty or not guilty on each count in the indictment, either at this initial appearance or within thirty days. In the case of a plea of guilty, the Trial Chamber may enter a finding of guilt provided that four criteria are satisfied:

i. The plea must be voluntary;
ii. Informed;
iii. Unequivocal (a factor not explicitly mentioned in the ICC Statute); and,
iv. Based on a sufficient factual basis for the crime and the accused’s participation in it.

4. Rule 62 ter (ICTY), Rule 62 bis (ICTR) and Rule 65 (IRMCT) set out the plea agreement procedure which provides for that: “the Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

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¹³ IRMCT Rules of Procedure and Evidence IRMCT/1 8 June 2012.
• apply to amend the indictment accordingly;
• submit that a specific sentence or sentencing range is appropriate; and,
• not oppose a request by the accused for a particular sentence or sentencing range.

5. According to ICTY/ICTR/IRMCT/ICC law, the Trial Chamber shall not be bound by any plea agreement entered into between the parties. If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session. For example, good cause may be established if the security of individuals may be jeopardized by making the terms of the plea agreement public or if it would prejudice further or ongoing investigations.

6. At first glance, Rule 62, Rule 62 bis and Rule 62 ter of the ICTY RPE not only appear to provide little substance or guidance to the plea process, the relationship between these three provisions is not satisfactorily harmonised. Rule 62 seems to indicate that an accused may only enter a plea of guilty at his or her initial appearance, whereas Rule 62 bis and Rule 62 ter provide that an accused may either plead guilty at initial appearance or request to change his or her plea to guilty at a later stage.

7. The history of these provisions and the practice of taking guilty pleas before the ICTY provide an explanation. In the original version of Rules, only Rule 62 existed, which explains why a plea of guilty or not guilty could be entered at the accused initial appearance. The concept of a negotiated guilty plea which is common to domestic adversarial criminal law systems was not initially contemplated at the ICTY. Indeed, in the first Annual Report of the ICTY, following the adoption of the first set of Rules by the Judges in plenary session, the President of the Tribunal wrote that the practice of plea bargaining finds no place in the rules. Rule 62 bis was added to the rules in November 1992 in the light of the Erdemović case and Rule 62 ter was added to the rules in December 2001. These latter two rules reflect the practice at the ICTY: an accused may enter a plea of guilty either in the pre-trial or trial phase. In other words, an accused may plead guilty at his or her initial appearance or change a plea of not guilty entered at the initial appearance to a plea of guilty at a later stage in proceedings.

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**C. Written Plea Agreement**

8. With the addition of Rule 62 bis and Rule 62 ter, the judges at the ICTY identified the legal requirements for a valid guilty plea, a procedure for plea bargaining between the Defence and the Prosecution and the powers of the Trial Chamber to ensure the validity of the plea and to determine sentence. These requirements are applicable at the ICTR and IRMCT and the ICC as well. Pursuant to Rule 62 bis (ICTY), Rule 62 (ICTR), Rule 64 (IRMCT) and Article 65 (Rome Statute), the Trial Chamber must be satisfied that four requirements are fulfilled. First, the guilty plea must be made voluntarily. This means that the accused must be mentally competent to understand the consequences of pleading guilty and the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence.

9. Second, the guilty plea must be informed. When pleading guilty, the accused must understand the nature of the charges and the consequences of pleading guilty generally and the nature and distinction of any different charges in the indictment. Here the concern is whether the accused understands that

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**Erdemović case - Informed guilty plea and alternative charges**

In the Erdemović case, the accused Dražen Erdemović was charged with alternative counts of murder both as a war crime and as a crime against humanity. At his initial appearance, Erdemović pleaded guilty to murder as a crime against humanity, which at the time was considered as a more serious charge than murder as a war crime. The Appeals Chamber found that there was a misapprehension on the accused’s part as to the difference between the two charges and therefore that the guilty plea entered by Erdemović could not be considered “informed”. Consequently, the Appeals Chamber remitted the case to another Trial Chamber, in order to give Erdemović the possibility to enter a new plea “in full knowledge of the nature of the charges and the consequences of his plea.”

In the words of Judges McDonald and Vohrah:

“the difference between a crime against humanity and a war crime was not adequately explained to the Appellant by the Trial Chamber at the initial hearing nor was there any attempt to explain the difference to him at any later occasion when the Appellant reaffirmed his plea. The Presiding Judge appears to assume that the Appellant had been advised by his counsel as to the distinction between the charges and that the Prosecution “will make things very clear”. From the passage of the transcript (...) quoted, it is apparent that defence counsel himself did not appreciate either the true nature of the offences at international law or the true legal distinction between them. It is also clear on the record that the difference between the charges was never made clear by either the Prosecution or by the Presiding Judge.”

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17 Rule 2, ICTY RPE defines “Defence” as the accused, and/or the accused’s counsel.
18 Rule 62 bis (i), ICTY RPE.
20 Rule 62 bis (ii), ICTY RPE.
he or she forgoes the right to a trial by pleading guilty as well as all related procedural guarantees and, in the case of an indictment which charges the accused in the alternative, whether he or she understands the difference between the crimes charged, \textit{i.e.,} war crimes, crimes against humanity, and genocide (see case box \textit{Erdemović case - Informed guilty plea and alternative charges}).

10. Third, the guilty plea must not be equivocal.\textsuperscript{22} This requirement is considered essential to uphold the presumption of innocence and to provide protection to an accused against forfeiture of the right to a trial where the accused appears to have a defence which he may not realise. Where the accused pleads guilty but persists with an explanation of his or her actions which amounts to a defence in law the Trial Chamber must reject the plea and have the defence tested at trial\textsuperscript{23} (see case box \textit{Erdemović case - Equivocal guilty plea}).

11. Fourth, there must be a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent \textit{indicia} or on lack of any material disagreement between the parties about the facts of the case.\textsuperscript{24}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Erdemovic_case}
\caption{\textit{Erdemović case - Equivocal guilty plea}}
\end{figure}

\begin{itemize}
\item \textit{Erdemović case - Equivocal guilty plea}
\end{itemize}

\begin{quote}
\textbf{The Separate Opinion of Judges McDonald and Vohrah can be very helpful in order to understand the scope of the “equivocal” requirement for a guilty plea:}

“The requirement that a plea must be unequivocal is essential to uphold the presumption of innocence and to provide protection to an accused against forfeiture of the right to a trial where the accused appears to have a defence which he may not realise. This requirement imposes upon the court in a situation where the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence, to reject the plea and have the defence tested at trial. The courts in common law jurisdictions all over the world, except in the United States, have consistently declared that a guilty plea must be unequivocal. It would appear that in the United States the constitutional right to plead as one chooses outweights any requirement that a defence be tested on the merits at trial. The validity of a guilty plea turns primarily on the voluntariness of the plea, that it is informed, and that it has a factual basis. If a United States court is satisfied that these conditions are fulfilled, apparently, it will be more willing than courts of other common law jurisdictions to accept a prima facie equivocal plea in recognition of pragmatic considerations relating to the practicality and the reality of plea-bargaining whereby credit is given for pleading guilty by reduction of sentence.

[...]

Whether a plea of guilty is equivocal must depend on a consideration, in limine, of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law. The Appellant pleaded guilty but claimed that he acted under duress. It follows therefore that we must now examine whether duress can constitute a complete defence to the killing of innocent persons.”

\textbf{After the examination of the law on duress, the Appeals Chamber concluded that duress cannot be a complete defence, but rather a mitigating circumstance that will be assessed during sentencing. Therefore, as the allegation of duress could not affect the guilty plea of \textit{Erdemović}, the plea was not considered “equivocal” by the Appeals Chamber.}

\textsuperscript{22} \textit{Rule 62 bis (iii), ICTY RPE.}
\textsuperscript{23} \textit{Prosecutor v. Erdemović, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 29.}
\textsuperscript{24} \textit{Rule 62 bis (iv), ICTY RPE. See \textit{Prosecutor v. Babić Milan, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 (“In the specific case of a sentencing judgement following a guilty plea, the Trial Chamber, pursuant to Rule 62bis(iv) of the Rules, must be satisfied that there}
12. The four legal requirements for a valid guilty plea (Rule 62 bis ICTY RPE, Rule 62 ICTR RPE, Rule 64 IRMCT RPE, Article 65 ICC Statute), and the plea agreement procedure (Rule 62 ter ICTY, Rule 62 bis ICTR, Rule 65 IRMCT) can best be understood and illustrated by examining the pleadings filed in the case of Dragan Obrenović. The Obrenović Motion provides an example of the way in which the agreement between the Prosecutor and the Defence is presented by way of motion to a Trial Chamber for consideration, along with the Plea Agreement and the Factual Basis. As the Obrenović Motion indicates, the motion itself is designed to reduce to writing the agreement between the parties to assist the Trial Chamber in assessing the validity of the plea agreement and to impose an appropriate sentence. The Trial Chamber is still required to assure itself of the legal validity of the plea of guilty in open court pursuant to Rule 62 bis and Rule 62 ter of the ICTY RPE (Rule 62 and Rule 62 bis of ICTR RPE and Rule 64 and Rule 65 of IRMCT RPE).

13. To satisfy the requirements that the plea of guilty was voluntary, informed, and unequivocal, the Plea Agreement includes express statements from both the accused and his counsel. The accused acknowledges that he has read the Plea Agreement in a language he understands, that he reviewed it carefully with his counsel, who advised him of his rights, possible defences, and the consequences of entering into the agreement. He confirms that he is of sound mind, that he understands all the terms of the Plea Agreement, that he voluntarily entered into it, and that no one threatened or forced him to enter into it. The signed declaration by counsel confirms that he provided proper advice to his client concerning the terms of the Plea Agreement, his rights, possible defences, the maximum possible sentence, the consequences of pleading guilty, and his belief that his client is of sound mind and that his decision to plead guilty was informed and voluntary.

14. The factual basis required pursuant to Rule 62 bis (iv) ICTY RPE, Rule 62(bis) ICTR RPE and IRMCT Rule 64 is case specific. In the Obrenović case, this requirement was satisfied by preparing a very detailed Statement of Facts which was signed by the accused on the same date as he signed the Plea Agreement. The Parties and in particular the accused agreed that the facts set forth in the Statement of Facts supported a finding of guilt beyond a reasonable doubt, that they were true and correct, and that the accused did not dispute them.

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27 Tab A to Annex A of the Obrenović Motion is the Statement of Facts as set out by Dragan Obrenović.


29 Tab A to Annex A of the Obrenović Motion is the Statement of Facts as set out by Dragan Obrenović.

30 Annex A of the Obrenović Motion, para. 7.
15. The *Obrenović* case also provides an example of other components of the plea agreement procedure. The Plea Agreement fully set out the specific count in the indictment to which the accused pleaded guilty with the acknowledgement by the accused that he is in fact guilty and fully responsible for his actions.\(^{31}\) The nature of the charges to which the accused is pleading guilty are detailed including any factual corrections which the parties agree more accurately reflect the criminal acts, conduct, and mental state of the accused.\(^{32}\) The Plea Agreement provides that the accused waives the rights he would normally enjoy at trial, including the rights guaranteed by “fair trial” provisions of Article 20 and Article 21 of the ICTY Statute (Article 19 and Article 20 of ICTR Statute and Article 18 and Article 19 of the IRMCT Statute), while preserving the right to be represented by counsel at all stages of the proceedings.\(^{33}\) The Plea Agreement included specific provisions concerning sentencing.\(^{34}\)

16. Certain aspects of this part of the agreement were specific to the particular circumstances of the *Obrenović* case. This included the Prosecution’s recommended sentence of 15 to 20 years and the agreement by the accused not to appeal the sentence imposed by the Trial Chamber, unless it exceeded the range recommended by the Prosecution. This part of the Plea agreement expressly makes reference to the relevant provisions of the Rules and Statute on sentencing. An accused may be sentenced to a maximum sentence of life imprisonment pursuant to Rule 101 and the sentence range recommended by the Prosecution is not binding on the Trial Chamber, which is free to sentence the accused as it sees fit (Rule 62 ter (B) of the ICTY RPE, Rule 62bis (B) of the ICTR RPE and Rule 65(B) of the IRMCT RPE). Pursuant to Article 24 of the ICTY Statute (Article 22 IRMCT Statute and Article 23 of the ICTR Statute) and Rule 101 of the ICTY RPE (Rule 101 of the ICTR RPE and Rule 125 of the IRMCT RPE), the Trial Chamber determines sentence based on such factors as the gravity of the offence and the individual circumstances of the convicted person, both aggravating and mitigating circumstances.\(^{35}\) The evidence in relation to these matters is presented to the Trial Chamber at a sentencing hearing (Rule 62 bis of the ICTY RPE, Rule 62 ICTR RPE and Rule 64 IRMCT RPE ), during which both the Prosecution and the convicted person may call evidence. These aspects of the Plea Agreement are intended to show that the accused’s guilty plea was voluntary, informed, and unequivocal.

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\(^{31}\) Plea Agreement, Annex A of the Obrenović Motion, paras. 2-3.
\(^{32}\) Plea Agreement, Annex A of the Obrenović Motion, paras. 5-6.
\(^{33}\) Plea Agreement, Annex A of the Obrenović Motion, paras. 17-18.
\(^{34}\) Plea Agreement, Annex A of the Obrenović Motion, paras. 12-16.
\(^{35}\) See Chapter X “Sentencing” for further explanation on aggravating and mitigating circumstances. In *Prosecutor v. Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15), the Court considered both aggravating and mitigating circumstances to determine the sentence. It stated, “The Chamber finds that the crime for which Mr Al Mahdi is being convicted is of significant gravity. This said, the Chamber has found no aggravating circumstances and five mitigating circumstances, namely: (i) Mr Al Mahdi’s admission of guilt;186 (ii) his cooperation with the Prosecution;187(iii) the remorse and the empathy he expressed for the victims;188 (iv) his initial reluctance to commit the crime and the steps he took to limit the damage caused; 189 and (v), even if of limited importance, his good behaviour in detention despite his family situation.190 Taking into account all these factors, the Chamber sentences Mr Al Mahdi to 9 years of imprisonment.” - Para. 109.
D. Mitigating Circumstances and Guilty Pleas

17. In addition to the factors that a Trial Chamber must consider in mitigation of a sentence - voluntary surrender, age, personal and family circumstances, credit for time served - there are specific factors which may mitigate a sentence following a guilty plea. 36

D.1 Admission of Guilt

18. The primary factor to be considered in mitigation of an accused person is his decision to enter a guilty plea. 37 As noted above, 38 ICTY jurisprudence has found accused who plead guilty should receive credit for an admission of guilt: it demonstrates honesty, it may encourage other indictees to come forward, it contributes to establishing the truth in relation to crimes, and it relieves witnesses from testifying at trial. An accused may plead guilty at any time, either pre-trial or during the trial. 39 However, an accused who pleads guilty prior to the commencement of trial will usually receive full credit for that plea. 40

D.2 Expression of Remorse

19. Remorse is a mitigating factor, if the Trial Chamber is satisfied that the expressed remorse is sincere. 41 At the sentencing hearing, 42 the convicted person may make a statement either in writing or orally during the hearing. With the leave of the Trial Chamber, pursuant to Rule 84 bis ICTY RPE (Rule 101 IRMCT RPE), an oral statement may be made without taking a solemn declaration and without being questioned about its contents. Any remorse expressed by the convicted person during this statement is evaluated by the Trial Chamber, which may consider it in mitigation of sentence. 43

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36 Prosecutor v Rašić (IT-98-32/1-R77.2) Appeal Chambers Judgment 6 Nov 2010.
38 See infra Section A.
39 See Prosecutor v. Sikirica et al., IT-95-8-S, Sentencing Judgement, 13 November 2001, where the three accused pleaded guilty following the completion of the presentation of evidence by the Prosecution.
42 See Rule 62 bis, ICTY RPE.
43 Prosecutor v. Ahmad Al Faqi Al Mahdi ICC-01/12-01/15 para. 103, “The Chamber notes that, as early as the first day of trial, Mr Al Mahdi has expressed genuine remorse for his acts. The Chamber notes that Mr Al Mahdi has expressed his ‘deep regret and great pain’. He insisted that the remorse he was feeling was for the damage caused to his family, his community in Timbuktu, his country and the international community. Not only did Mr Al Mahdi categorically express his remorse, he made the solemn promise that ‘this was the first and the last wrongful act [he] will ever commit’. Mr Al Mahdi also indicated that he was willing to ‘accept the judgment of the Chamber’. Lastly, Mr Al Mahdi called on people not to become involved in the same acts that he was involved in ‘because they are not going to lead to any good’ for humanity.”
D.3 Conduct Posterior to the Crimes

20. The conduct of the accused posterior to the crimes may be considered in mitigation of sentence if, since the commission of the offence, the accused has taken steps toward reparation to victims or society (see case box Plavšić case - Post-conflict conduct as a mitigating factor).

D.4 Cooperation with the Prosecution

21. Cooperation of the convicted person with the Prosecution is often an express requirement of a negotiated plea agreement. The Prosecution may want the convicted person to testify as a Prosecution witness in subsequent trials and to provide information which the Prosecution can use in on-going investigations. This of course will depend on the knowledge of the convicted person and whether the Prosecution believes that he or she can provide credible information. Both the Defence and the Prosecution will typically make submissions about the obligation of the convicted person to cooperate with the Prosecution at the sentencing hearing. This obligation is usually on-going, and the convicted person may not have completely fulfilled it by the time the parties address the Trial Chamber on this matter. The honesty, completeness, and forthrightness of this cooperation are important factors which the Trial Chamber will consider in the mitigation of a sentence.

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45 Prosecutor v. Ahmad Al Faqi Al Mahdi ICC-01/12-01/15, para 104, “In addition to expressing remorse, and contrary to the submission of the LRV,176 the Chamber does note that Mr Al Mahdi has expressed sentiments of empathy towards the victims of the crime he committed. The Chamber refers to the example of actions showing this empathy cited by the Defence, such as Mr Al Mahdi’s offer to the imam of the Sidi Yahia Mosque to reimburse the cost of the door.”

46 Prosecutor v. Ahmad Al Faqi Al Mahdi ICC-01/12-01/15, para 101, 102; Rašić (IT-98- 32/1-R77.2) Appeal Chambers Judgment 6 Nov 2010. Trial Chamber dismissed Rašić’s cooperation as contributing to mitigation. It stated,” The Trial Chamber considered that Rašić’s co-operation with the Prosecution was not “substantial’ within the meaning of Rule 101(B)(ii) of the Rules” and that she lied in response to questions asked by the Prosecution which were material to its investigation. As a result, the Trial Chamber gave little weight to Rašić’s co-operation……. Accordingly, the Appeals Chamber finds that Rašić has failed to demonstrate that the Trial Chamber erred in taking into account and weighing the relevant mitigating and aggravating factors to tailor a sentence to meet Rašić’s individual circumstances and the gravity of her crimes. 165” - Para. 58.
E. Considerations in Determining Whether, How, and When to Negotiate a Plea Agreement

22. A plea agreement is a means of resolving a criminal matter by way of negotiation between the Prosecutor and the Defence. It is an alternative to having a case go to trial, or it may be a means of settling a matter, after a trial has commenced.

23. At the ICTY, with the exception of the first guilty plea by Dražen Erdemović at his initial appearance, all other plea agreements have occurred during the pre-trial phase or during the trial phase. If a plea agreement is to be achieved a number of factors must come together. While preparing a case for trial, counsel will learn about the facts of the case and work to earn the trust and confidence of the client. Counsel must make determinations concerning the strengths and weaknesses of the Prosecution case and evaluate possible answers to those allegations and potential legal defences which could be presented on behalf of the accused. The pre-trial phase at the ICTY normally lasted years and during this time Defence counsel had time to work both with the client and the Prosecutor on matters that would either streamline issues for trial or result in a negotiated plea agreement.

24. The starting point in this process is to evaluate disclosure from the Prosecution and Defence investigation work. Within the context of criminal prosecutions for war crimes, crimes against humanity, and genocide, the factual and legal issues are often very complex and wide ranging. Indictments may cover large geographic and temporal areas. Depending on the scope of the indictment and the allegations against the accused, disclosure by the Prosecution of both inculpatory and exculpatory material may be tens of thousands of pages of material, including hundreds of witness statements, audio-visual materials, expert opinions on forensic evidence, military matters, police matters, constitutional and legal matters, demographics, reports by international organizations and NGOs, etc. In addition, investigative work conducted on behalf of the accused may for its part yield a tremendous amount of material of a similar nature. In this digital age, the amount of information produced and the ease with which it is distributed is often overwhelming.

25. At some point in the pre-trial phase, counsel has an obligation to discuss the option of a plea agreement with the client, as an alternative to going to trial. The client must be informed that this option as well as the possibility of having a trial is available to him or her. Normally, this will be discussed as both counsel and the accused review and analyse the evidence the Prosecution intends to use at trial and the results of Defence investigation work. Counsel must bear in mind that an accused who pleads guilty prior to the commencement of trial will usually receive full credit for that plea in the mitigation of a sentence. Of course, the client is in the best position to provide insight into the events surrounding the crimes charged in the indictment. However, the challenges facing counsel in preparing and developing a theory of the case, and any possible plea agreement, depend a great deal on the nature of the charges against the accused and his alleged activities during the period relevant to the indictment. If, for example, the
accused was a camp guard, a soldier, or a policeman who is charged with direct perpetration of murder, beatings, or sexual assault, then the most important factors are likely be evidence provided by victims or eyewitnesses, and the client’s version of events. On the other hand, the accused may be a high-ranking military or police commander, or a senior politician, who is far removed from the scene of the alleged crimes. In these circumstances, there will likely be complex factual and legal issues surrounding charges ranging from superior authority, joint criminal enterprise, aiding and abetting, and instigation. Accused in more senior positions may be more sophisticated than a foot soldier or regular policeman, however the concepts associated with vicarious liability and accomplice liability may require considerable time and effort to work through with a client.

26. Certainly, the client’s role in this process is of the utmost importance. Different from the counsel who can only provide a legal opinion on the disclosed body of evidence and advise in relation to process on guilty plea, it is the client first and foremost who must make the fateful decision whether to plead guilty or go to trial. In our opinion very rightly so, as counsel has a number of factors which limits his or her ability to judge the disclosed body of evidence the Prosecution intends to rely on. Counsel may face a dilemma as the amount of disclosure from the Prosecution grows. This disclosure will include both inculpatory and exculpatory material and items material to the preparation of the defence. Furthermore, this disclosure from the Prosecution is likely to continue not only during the pre-trial phase, but also after trial proceedings have commenced. Counsel may not therefore be entirely certain whether all important material the Prosecution intends to rely on at trial has been fully disclosed and analysed when discussions on guilty plea are started with the client and ultimately with the Prosecution. To this end, counsel must always be aware of his or her limitations and must approach the matter with appropriate seriousness. It is incumbent on counsel to explain all these factors and their consequences carefully to the accused and ultimately leave the final decision to the accused. This would explain why accused at the ICTY have pleaded guilty both before and after the commencement of trial proceedings. With the assistance of counsel, the accused must form his own view of the charges contained in the indictment and the consequences of pleading guilty or contesting the charges at trial.

27. The *quid pro quo* of a successful plea agreement is normally a reduced sentence and the dropping of certain charges against the accused in exchange for the admission of guilt and co-operation with the Prosecution. Normally, this would involve appearing as a Prosecution witness in subsequent trials or providing information that can assist the Prosecution in its investigations. The negotiation process and the resulting plea agreement are entirely *inter partes*. The Trial Chamber is not involved and the judges only become aware of the plea agreement when it is presented to them by way of motion under Rule 62 ter ICTY RPE (Rule 62 bis ICTR RPE, Rule 65 IRMCT RPE). This means that the accused cannot know in

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47 Rule 66(A), ICTY RPE.
48 Rule 68, ICTY RPE.
49 Rule 66(B), ICTY RPE.

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advance of presenting the plea agreement documents to the Trial Chamber whether it will be accepted by the Trial Chamber. As a preliminary matter, there must be an agreement (a proffer agreement) between the Defence and the Prosecution that if no plea agreement is concluded between the parties, no information provided by the accused and no details of the discussions between the parties may be used against the accused during a subsequent trial. Furthermore, in the event the parties finalise a plea agreement, special care must be taken by Defence counsel to ensure that all the details of the plea agreement documents satisfy the requirements of Rule 62 bis and Rule 62 ter of the ICTY RPE (Rule 62 and Rule 62 bis of the ICTR RPE, Rule 64 and Rule 65 of the IRMCT RPE) and that the accused is made aware that the Trial Chamber will insist on strict compliance with those provisions before accepting the plea of guilt. At this stage, both the Defence and the Prosecution have an interest in ensuring that the plea agreement is accepted by the Trial Chamber.

28. In most instances, in exchange for the accused’s plea of guilty and full cooperation, the Prosecution will apply to the Trial Chamber to amend the indictment (i.e. drop charges). The extent to which the indictment is amended is a matter which must be negotiated between the parties. It is important to note that the ICTY permitted cumulative charging which often resulted in the Prosecution “over indicting” an accused. For example, the indictment may charge the accused with grave breaches of the Geneva Conventions, violations of the laws and customs of war, crimes against humanity, including persecution, and genocide based on the same factual allegations as well as alleging numerous modes of liability: planning, instigation, ordering, committing (as a direct perpetrator or as a participant in a joint criminal enterprise), aiding and abetting, or as a superior authority. The Prosecution may believe that they can prove each and every charge against an accused at trial. However, as a practical matter, a plea agreement reflects the criminal conduct for which the accused is prepared to accept responsibility and for which the Prosecution is satisfied could be proven beyond a reasonable doubt at trial.

29. In relation to sentencing recommendations, the Prosecution and the Defence may make a joint recommendation in the plea agreement, the Prosecution alone may make a sentencing recommendation, or the parties may make their sentencing recommendations in writing, orally, or both at a later stage (i.e. at the sentencing hearing). The primary factor to be considered in mitigation of a sentence against an accused person is his or her decision to enter a guilty plea. However, Rule 62

51 Rule 62 ter (i), ICTY RPE.
52 Article 2, ICTY Statute.
53 Article 3, ICTY Statute.
54 Article 5, ICTY Statute.
55 Article 4, ICTY Statute.
56 Article 7(1), ICTY Statute.
57 Article 7(3), ICTY Statute.
58 Rule 62 ter (ii), ICTY RPE.
ter (B) of the ICTY RPE (Rule 62bis (B)
ICTR RPE, Rule 65(C) of the IRMCT RPE)
expressly provides a Trial Chamber is not
bound by any plea agreement (see case
box Dragan Nikolić and Momir Nikolić
cases - Harsher punishment than the one
proposed in the plea agreement).

30. A common feature of a plea agreement is
the requirement that the convicted
person agrees to cooperate fully and
truthfully with the Prosecution. The plea
agreement may specify that this
cooperation includes meeting with
representatives of the Office of the
Prosecutor to provide information
concerning on-going investigations, or on-
go ing and future trial proceedings.
Indeed, one of the incentives for the
Prosecution entering into a plea agreement is to secure the testimony of the accused against co-accused
or accused in related trials. In some instances, a condition in the plea agreement may be that the
sentencing hearing and sentencing recommendation not take place until the convicted person testifies
in a subsequent trial. As a practical matter, this can only be made a condition of the plea agreement, if
the convicted person’s testimony can be heard soon after the plea agreement is concluded and accepted
by a Trial Chamber. In addition, if the convicted person fails to cooperate fully with the Prosecution
after being sentenced, the only practical consequence may be that non-cooperation may affect a request
for early release from detention. When a request for early release is made, the Prosecutor submits a
detailed report of any cooperation that the convicted person has provided to the Prosecution and the
significance thereof which can be considered along with other factors in deciding whether to release the
convicted person from prison.

31. An important factor in relation to the factual basis underlying the plea agreement and the cooperation
of the convicted person is the language of Rule 62 bis (iv) of the ICTY RPE (Rule 62 B(iv) of ICTR RPE
and Rule 64(C)iv) of the IRMCT RPE. That provision states that “the Trial Chamber must be satisfied that
there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis

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60 Plea Agreement, Annex A of the Obrenović Motion, para. 9.
61 Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons
Convicted by the International Tribunal, IT/146/Rev. 2, 1 September 2009, para. 3(c);
of independent *indicia* or on lack of any material disagreement between the parties about the facts of the case.” The existence of “independent *indicia*” or a “lack of material disagreement” between the parties may be the result of a full review and analysis by the accused and defence counsel of material disclosed by the Prosecution which it intends to use at trial. In other words, accepting criminal liability by pleading guilty may not mean that the convicted person can necessarily provide meaningful information to the Prosecution or be able to testify from personal knowledge about all events related to other trials. It is important that the accused and the Prosecution are *ad idem* on the extent to which an accused can provide meaningful information or testimony in the future.

### F. Plea Agreement in Traditionally Inquisitorial Systems

32. As noted at the beginning of this chapter, the first judgement at the ICTY was in the *Erdemović* case. However, the taking of his guilty plea was not without considerable difficulties as a result of this “Anglo-Saxon” procedure which was foreign to counsel to *Erdemović* (from the former Yugoslavia) and the members of the Trial Chamber (French, Costa Rican, and Egyptian). In the *Erdemović* appeal, Judge Cassese wrote that this practice does not have a direct counterpart in the civil law tradition, where an admission of guilt is simply part of the evidence to be considered and evaluated by the court.\(^{62}\) Indeed, on appeal, counsel for *Erdemović* argued that his client’s guilty plea ensued from a misunderstanding by both the accused and counsel of the implications of pleading guilty. He pointed out that the institution of a plea of guilty by an accused was foreign to the procedure applied in the former Yugoslavia and described it as an example of the “collision” between the Anglo-Saxon and continental European criminal legal systems.\(^{63}\)

33. The example of the *Erdemović* case before the ICTY, will no doubt have implications on plea bargaining before the domestic courts in countries of the former Yugoslavia, in which plea agreements have been recently introduced. There are a number of concerns. There may be strong negative public reaction and criticism towards prosecutors who propose and accept plea agreements, as well as the courts which must ultimately evaluate the plea agreements and impose sentence.

34. There is a lack of uniformity in plea bargaining as a result of the fact that the opportunity to enter into such an agreement has been only recently introduced in the legal system and it inevitably will take time to create and develop certain standards for this process in the domestic criminal practice. It may be understandable that counsel from the inquisitorial system lack the experience and sufficient knowledge of the plea-bargaining process.

35. For example, in the Republic of Serbia, negotiation of a plea agreement is not regulated. Indeed, the contents of the plea agreements are often made public before the courts decide whether or not to accept such a plea, which is extremely worrisome for the Defence.

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36. In this regard, a proffer agreement is an extremely important part of negotiating process. Defence counsel must always bear in mind the possibility that the accused and the Prosecution will not ultimately come to an agreement. To this end a proffer agreement concluded between the parties before the start of plea-bargaining negotiations gives certain assurances to the accused that the information provided during the interview to the Prosecution will not be used against him in case the plea agreement fails.

37. The problems for the accused could arise when the parties fail to reach the agreement or the court does not accept the proposed agreement by the parties. In such a case, the existing practice in Serbia will be highly prejudicial to the accused. Namely, he or she is not given immunity in relation to information provided to the Prosecution, despite the fact that the law\(^{64}\) provides for some protection for the accused:

i. The admission of guilt provided for by the agreement cannot be used as evidence during trial; \(^{65}\)

ii. All written documents related to plea agreement are destroyed under court supervision; \(^{66}\)

iii. The Judge deciding on acceptance of the plea agreement is excused. \(^{67}\)

38. However, as discussed above, in cases where an agreement is reached, but is not ultimately accepted by the court, the fact that terms of the agreement become public amounts to an admission of guilt even before the trial begins. Challenging such an allegation during the trial in such circumstances becomes difficult, if not impossible.

39. A proffer agreement therefore must be entered at the very beginning of the negotiating process between the accused and the Prosecution. From the Defence prospective this agreement must contain provisions granting immunity to the accused in relation to information provided to the prosecutor during the negotiating process. Also, such agreements must contain provisions guaranteeing strict confidentiality of the negotiating process and understanding that application of such strict confidentiality will be extended during the actual plea negotiations, and ultimately applied to provisions of the plea agreement itself.

**Conclusion**

38. As we have seen, the plea agreement process was novel to the practice and procedure at the ICTY. Following the *Erdemović* case, rules were adopted to govern the plea agreement procedure. The plea process is “party driven” in the sense that the Defence and Prosecution determine the terms and conditions of the plea agreement. The Trial Chamber ultimately determines whether to accept the plea

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\(^{64}\) Law on Criminal procedure of the Republic of Serbia, Official Gazette 76/2010 Article 282 A to D.

\(^{65}\) Ibid., Article 282 V (9).

\(^{66}\) Ibid., Article 282 V (10).

\(^{67}\) Ibid.
agreement and whether to be bound by the terms of the agreement negotiated between the parties. With the introduction of the plea-bargaining process into domestic legal systems, which never in the past provided for this means of resolving a criminal matter, counsel and judges will have to learn to deal with a whole array of new issues. As illustrated in the Erdemović case, sometimes the “collision” between the continental European and the Anglo-Saxon legal traditions requires legal re-education and sometimes lengthy periods of adaptation and development. A certain degree of uniformity has developed at the ICTY concerning the plea agreement procedure and, as the Obrenović case shows, the documents underlying this procedure - the plea agreement and the factual basis - attempt to provide full details of the understanding and obligations on each party in this process. This is meant to assist the Trial Chamber in determining whether the conditions for accepting a plea of guilty have been satisfied, in understanding the respective rights and obligations of the parties, and in ultimately deciding the sentence to impose upon the convicted person.
THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-02-60-T
THE PROSECUTOR

v.

DRAGAN OBRENOVIĆ

ANNEX A
TO THE JOINT MOTION FOR CONSIDERATION OF PLEA AGREEMENT
BETWEEN DRAGAN OBRENOVIĆ AND THE OFFICE OF THE PROSECUTOR

PLEA AGREEMENT

Introduction
1. This constitutes the Plea Agreement, pursuant to Rule 62bis of the Rules of Procedure and Evidence (“the Rules”), between the Accused, Dragan Obrenovic, through his Counsel David Eugene Wilson, and the Office of the Prosecutor (OTP). The purpose of this Agreement is to clarify the understanding of the parties as to the nature and consequences of Mr. Obrenovic’s guilty plea and to assist the parties and the Trial Chamber in ensuring that the plea is valid, according to the Rules set forth by this Tribunal. The terms of the agreement are as follows:

Plea to Count 5 of the Indictment, Persecutions, A Crime Against Humanity
2. Dragan Obrenovic agrees to plead guilty to Count 5 of the Second Amended Joint
Indictment dated 27 May 2002, alleging Persecutions, a Crime Against Humanity, punishable under Article 5(h) of the Statute of the Tribunal, which states the following in relevant part:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(h) persecutions on political, racial and religious grounds
3. Dragan Obrenović agrees that he is pleading guilty to Count 5 because he is in fact guilty and acknowledges full responsibility for his actions that are the subject of the Indictment.

**Consideration for Dragan Obrenović’s Plea and Co-operation**

4. In exchange for Dragan Obrenović’s plea of guilty to Count 5, Persecutions, a Crime Against Humanity, his complete co-operation with the OTP as set forth in paragraphs 9 – 11 of this Agreement, and the fulfilment of all his obligations under this Agreement, the Office of the Prosecutor agrees to the following:

   (a) That the Prosecutor will recommend to the Trial Chamber that they impose a sentence within the range of 15 to 20 years and that the Accused be given credit for the time he has served in ICTY custody. The Accused will make his sentencing recommendation upon the filing of his pre-sentence memorandum.

   (b) That, at the time of the acceptance of the plea by the Trial Chamber, the Prosecutor will move to dismiss without prejudice to either party the remaining charges against Dragan Obrenović set out in the Indictment.

**Nature of the Charges**

5. Dragan Obrenović understands that he is pleading guilty to Count 5 of the Indictment, Persecutions, a Crime Against Humanity, specifically acknowledging and admitting his conduct as set forth in paragraphs 4-8, 15-27, 29-33, 36, 45, 46, 46.6 - 46.12, 47, 47.6 – 47.8, 48, 50, 51, 58 and 59 of the Indictment and further described in this agreement. However, Dragan Obrenović and the Prosecution agree that the following corrections are to be made to the Indictment:

   (a) *Paragraph 46.9, fourth sentence:* Replace “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade” with “under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade”.

   (b) *Paragraph 46.10, fourth sentence:* Replace “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and DRAGAN JOKIĆ” with “under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and the direction of DRAGAN JOKIĆ”.

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(c) **Paragraph 46.11, third sentence:** Replace “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade” with “under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade”.

(d) **Paragraph 46.11, fourth sentence:** Replace “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and DRAGAN JOKIĆ” with “under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and the direction of DRAGAN JOKIĆ”.

(e) **Paragraph 46.12, third sentence:** Replace “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and DRAGAN JOKIĆ” with “under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and the direction of DRAGAN JOKIĆ”.

(f) **Paragraph 47.7, first sentence:** Remove “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade”.

(g) **Paragraph 47.7, last sub-paragraph:** Add sentence to end of paragraph to read “DRAGAN OBRENOVIĆ, in his capacity as Chief of Staff of the Zvornik Brigade, had knowledge of and acquiesced to the capture, interrogation and execution of these four prisoners”.

(h) **Paragraph 47.8, second sentence:** Remove “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade”.

(i) **Paragraph 47.8:** Add sentence to end of paragraph to read “DRAGAN OBRENOVIĆ, in his capacity as Chief of Staff of the Zvornik Brigade, had knowledge of and acquiesced to the capture, interrogation and execution of this prisoner”.

6. Dragan Obrenović understands that if a trial were held, the Prosecutor would be required to prove the following elements of Article 5 beyond a reasonable doubt:
Persecutions

(a) an armed conflict existed during the time frame of the Indictment

It is understood and agreed by Dragan Obrenović and the OTP that the armed conflict alleged in paragraph 15 of the Indictment is the armed conflict that began on 6 April 1992 and ended with the Dayton Peace Agreement, signed on 14 December 1995.

(b) there was a widespread or systematic attack directed against a civilian population and, in a manner related to that attack, Dragan Obrenović committed acts against the civilian population that violated fundamental human rights

It is understood and agreed that the widespread or systematic attack on the civilian population of Srebrenica as alleged in paragraph 17 of the indictment and described in paragraphs 18 through 26 of the Indictment includes:

(1) the murder of over 7000 Bosnian Muslim men ages 16-60, including some women, children and elderly men, from the period beginning 14 July through 1 November 1995; (2) the cruel and inhuman treatment of Bosnian Muslim civilians, including beatings of civilians in schools and other detention centres in the Zvornik area on 13 through to 16 July 1995; (3) the terrorisation of Bosnian Muslim civilians from Srebrenica and Potočari from 13 to 16 July 1995; and (4) the destruction of personal property and effects of Bosnian Muslim civilians from Srebrenica who were detained and murdered in the Zvornik area.

(c) Dragan Obrenović’s conduct was committed on political, racial or religious grounds and was committed with discriminatory intent.

It is understood and agreed that one of the reasons Mr. Obrenović committed the conduct described in the Indictment and herein was because the victims were Bosnian Muslims.

(d) Dragan Obrenović was aware of the wider context in which his conduct occurred.
It is understood and agreed that Mr. Obrenović was aware of the widespread or systematic abuses described in the Indictment and in this agreement and of their effect on the entire population of Bosnian Muslims from the Srebrenica enclave.

Factual Basis

7. Dragan Obrenović and the Prosecution agree that if the Prosecution were to proceed with evidence, the facts and allegations as set out in paragraphs 4-8, 15-27, 29-33, 36, 45, 46, 46.6 - 46.12, 47, 47.6 - 47.8, 48, 50, 51, 58 and 59, Annex A, Annex B, and Attachments A-E of the Amended Joinder Indictment dated 27 May 2002, would be proven beyond a reasonable doubt, and that those facts are true and correct and not disputed by Dragan Obrenović (with the corrections to the Indictment made in paragraph 5 above). Specifically, Dragan Obrenović acknowledges the facts set forth in the “Statement of Facts as set out by Dragan Obrenović” attached to this Agreement at Tab A.

8. The Prosecution and Dragan Obrenović agree that the evidence supports a finding of guilt on Count 5, Persecutions, of the Indictment.

Co-operation by Dragan Obrenović

9. This Agreement is contingent upon Dragan Obrenović’s voluntary decision to accept responsibility for his actions and to co-operate with and to provide truthful and complete information to the Office of the Prosecutor whenever requested. Dragan Obrenović agrees to provide information in accordance with a previously negotiated written proffer agreement and to provide additional information beyond that detailed in the proffer agreement. In accordance with such co-operation, Dragan Obrenović agrees to meet as often as necessary with members of the Office of the Prosecutor in order to provide them with full and complete information and evidence that is known to him regarding the events surrounding the attack and fall of the Srebrenica enclave July 1995. Dragan Obrenović agrees to be truthful and candid, and to freely answer all questions put to him by members of the Office of the Prosecutor. Dragan Obrenović agrees to testify truthfully in the trial of the co-Accused in this case before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and in any other trials, hearings or other proceedings before this Tribunal for accused charged with offences relating to the fall of Srebrenica in July 1995 and its aftermath, as requested by the OTP.

10. The Prosecution and Mr. Obrenović also agree that they will jointly recommend to the Trial Chamber that sentencing of Mr. Obrenović in this matter not be set until after Mr. Obrenović has testified in the trial of the co-Accused in this case, in order that the full nature
and scope of Mr. Obrenović’s co-operation may be seen and evaluated by the Trial Chamber prior to sentencing.

11. It is understood and agreed by Dragan Obrenović and the Prosecution that all information and testimony provided by Mr. Obrenović must be absolutely truthful. This means that Dragan Obrenović must neither minimise his own actions nor fabricate someone else’s involvement.

**Maximum Possible Penalty and Sentencing**

12. Dragan Obrenović understands that, pursuant to Rule 101 of the Rules, he could face a sentence, if convicted after trial, of a term of imprisonment up to and including the remainder of his life.

13. Dragan Obrenović understands that the Prosecution’s recommendation of 15 to 20 years is not binding on the Trial Chamber and that the Trial Chamber is free to sentence the Accused as it sees fit.

14. Dragan Obrenović agrees that he will not appeal the sentence imposed by the Trial Chamber unless the sentence imposed is above the range recommended by the Prosecutor.

15. Dragan Obrenović agrees that he will not move to withdraw his guilty plea or appeal his conviction pursuant to his guilty plea.

16. Dragan Obrenović understands that, pursuant to Article 24 of the Statute and Rule 101 of the Rules, the Trial Chamber should take into account in determining the appropriate sentence such factors as the gravity of the offence and the individual circumstances of the convicted person. In addition, the Trial Chamber should take into account such factors as: any aggravating circumstances, any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction, the general practice regarding prison sentences in the courts of the former Yugoslavia, and the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.

**Waiver of Rights**

17. By pleading guilty, Dragan Obrenović understands he will be giving up the following rights:

   (a) the right to plead not guilty and require the Prosecution to prove the charges in the Indictment beyond a reasonable doubt at a fair and impartial public trial;
(b) the right to prepare and put forward a defence to the charges at such public trial;
(c) the right to be tried without undue delay;
(d) the right to be tried in his presence, and to defend himself in person at trial or through legal assistance of his own choosing at trial;
(e) the right to examine at his trial, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf at a trial under the same conditions as witnesses against him;
(f) the right not to be compelled to testify against himself or to confess guilt;
(g) the right to testify or to remain silent at trial; and
(h) the right to appeal a finding of guilty or to appeal any pre-trial rulings.

18. It is understood that by pleading guilty the Accused does not waive his right to be represented by Counsel at all stages of the proceedings.

**Voluntariness of the Plea**

19. Dragan Obrenović acknowledges that he has entered this Plea Agreement freely and voluntarily, that no threats were made to induce him to enter this guilty plea, and that the only promises made to him are those set forth in this agreement.

**Other Agreements**

20. Except as expressly referenced at paragraph 9 hereto, there are no additional promises, understandings or agreements between the Office of the Prosecutor and Dragan Obrenović or his Counsel, David Eugene Wilson.
Declaration of Dragan Obrenović

21. I, Dragan Obrenović, have read this Plea Agreement in a language which I understand and have carefully reviewed every part of it with my Counsel, David Eugene Wilson. Mr. Wilson has advised me of my rights, or possible defences, and of the consequences of entering into this Agreement. No other promises or inducements have been made to me, other than those contained in this Agreement. Furthermore, no one has threatened me or forced me in any way to enter into this Agreement. I have entered into this Agreement freely and voluntarily, and am of sound mind. I understand the terms of this Agreement, and I voluntarily agree to each of the terms.

[Signature]

Dragan Obrenović

[Date]
Declaration of Counsel

22. I, David Eugene Wilson, am Dragan Obrenović’s Counsel. I have carefully reviewed every part of this Agreement with my client. Further, I have fully advised my client of his rights, and possible defences, of the maximum possible sentence and the consequences of entering into this Agreement. To my knowledge, my client is of sound mind and his decision to enter into this Agreement is an informed and voluntary one.

David Eugene Wilson
Counsel for Dragan Obrenović

Date
May 20, 2003

On this 20th day of May 2003 the undersigned parties fully agree to each and every term and condition of this Plea Agreement:

Dragan Obrenović

David Eugene Wilson
Counsel for Dragan Obrenović

Dušan Slijepčević
Co-Counsel for Dragan Obrenović

Carla Del Ponte
Prosecutor

Peter McCloskey
Senior Trial Attorney
Office of the Prosecutor
## SENTENCING

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ICTY

1. The Trial Chambers pronounce judgements and impose sentences on persons convicted of serious violations of international humanitarian law that fall within the ICTY, ICTR and IRMCT jurisdiction. After the parties complete the presentation of their cases, the Presiding Judge declares the hearing closed, and the Trial Chamber deliberates in private.¹

2. When the Trial Chamber finds the accused guilty of a crime, a conviction is entered and a sentence is imposed. If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it will impose a sentence in respect of each finding of guilt, indicating whether the sentences should be served consecutively or concurrently. The Trial Chamber also has the power to impose a single sentence that reflects the totality of the criminal conduct of the accused.

3. The Prosecution and Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence. When exercising its discretion to determine an appropriate sentence, the Trial Chamber must take into account the gravity of the offence, the individual circumstances of the convicted person, any aggravating or mitigating circumstances, and the general practice regarding prison sentences in the courts of the former Yugoslavia.

4. The Trial Chamber must also take into account the extent to which any penalty imposed on the convicted person by a national court for the same act has already been served. The maximum sentence that a Trial Chamber may impose is life imprisonment.

5. The International Tribunal must select a State for imprisonment. The State should be selected from a list of States willing to accept convicted persons. Such imprisonment shall comply with the applicable law of that State, subject to the International Tribunal’s supervision.²

A. The Sentencing Legal Framework

6. The ICTY, ICTR and IRMCTs Statute and Rules of Procedure and Evidence provide guidelines regarding the legal framework governing sentencing. The relevant Statutes provide that “[t]he Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law”. They also provide that the “penalty imposed by the Trial

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¹ This chapter was authored by Gregor D. Guy-Smith, co-founder of the International Criminal Law Bureau (ICLB); former President of the Association of Defence Counsel (ADC-ICTY); Chair of the ADC-ICTY Disciplinary Council; Member of the ICTY Rules Committee and Chair of the Ad-Hoc Post Tribunal Matters Committee. He is a member of the IRMCT Disciplinary Panel and Advisory Panel. He has practised as defence counsel for over 35 years and served as counsel at the ICTY in Prosecutor v. Limaj et al. (Kosovo); Prosecutor v. Haradinaj et al. (Kosovo) Prosecutor v. Perisic (Sarajevo, Srebrenica, Zagreb).
² Article 27, ICTY Statute; Articles 22, 23, 26 ICTR Statute; IRMCT Article 22, 25, 26
Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences, as applicable, in the courts of the former Yugoslavia and Rwanda.”

7. According to the applicable RPE:

(A) “A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

1. any aggravating circumstances;
2. any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
3. the general practice regarding prison sentences in the courts of the former Yugoslavia;
4. the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.”

8. Rule 87(C) ICTY and ICTR RPE deal with the manner in which sentences should be imposed:

“If the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.”

B. Sentencing Objectives

9. Sentencing objectives and the purposes of incarceration are rooted in similar concepts which include retribution, incapacitation of the dangerous, deterrence, punishment, and rehabilitation. Deterrence and retribution, however, are the main objectives of sentencing. The Kunarac Trial Chamber discussed the objectives of sentencing at the ICTY stating:

“The Trial and Appeals Chambers of the International Tribunal generally consider what is variously and often interchangeably referred to, for example, as sentencing ‘objectives’, ‘purposes’, ‘principles’, ‘functions’ or ‘policy’ in the assessment of the term of actual imprisonment

1 ICTY RPE rule 101; ICTR RPE rule 101; IRMCT rule 125.
for convicted persons. These are considered in addition to the gravity of the offence and mitigating and aggravating circumstances. What appear to be justifications for imprisoning convicted persons, or theories of punishment, actually are treated as or resemble sentencing factors, in the sense that these considerations are consistently said to affect, usually in an unspecified manner, the length of imprisonment.”

“In the present case, the Prosecutor submits that the Trial Chamber ought to consider the principles of retribution, incapacitation of the dangerous, deterrence, punishment and rehabilitation when determining the sentences to be imposed on each of the accused.”

10. Within the ICTR, retribution and deterrence are the primary objectives for the trial chamber when sentencing. While rehabilitation is also an important objective, rehabilitation is not as heavily weighted when sentencing. In fact, in discussing the objective of rehabilitation, the appeals chamber in Nahimana et al. explained that for crimes of sufficient gravity, “the two main purposes of sentencing are retribution and deterrence; the purpose of rehabilitation should not be given undue weight.”

B.1 Deterrence

11. The Kunarac Trial Chamber at the ICTY stated that the principle of “special deterrence” as a general sentencing factor is usually of little significance because “the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair.”

12. In discussing “general deterrence” the Kunarac Trial Chamber followed the jurisprudence holding that “general deterrence should not be accorded undue prominence in the assessment of an overall sentence to be imposed.” The reason is that a sentence should in principle be imposed on an offender for his

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4 Prosecutor v. Kunarac et al., IT-96-23-T, IT-96-23/1-T, Trial Judgement, 22 February 2001, footnote 1430 citing, Prosecutor v. Aleksovski, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 185 (deterrence as “purpose” and deterrence and retribution as “factors” used in “overall assessment of sentences”); Prosecutor v. Tadić, IT-94-1-A, IT-94-1-Abis, Judgement on Sentencing Appeal, 26 Jan 2000, para. 48 (deterrence as “principle” and “factor” used in the “overall assessment of the sentences”); Prosecutor v. Blaškić, IT-95-14-T, Trial Judgement, 3 March 2000, paras. 761-763 (under the heading “Purposes and objectives of the sentence”, retribution, protection of society, rehabilitation, deterrence, putting an end to serious violations of international humanitarian law and contribution towards restoration and maintenance of peace in the former Yugoslavia as “parameters” and “objectives” when fixing the length of a sentence); Prosecutor v. Kupreškić et al., IT-95-16-T, Trial Judgement, 14 January 2000, paras. 848, 849 (under the respective heading and sub-heading of “Factors to be considered in sentencing” and “General sentencing policy of the International Tribunal”, deterrence, retribution, what appears to be a positive general prevention theory and rehabilitation are referred to as “purposes”); Prosecutor v. Jelisić, IT-95-10-T, Trial Judgement, 14 December 1999, para. 133 (as an aggravating circumstance the contribution of the ICTY to the restoration of peace in the former Yugoslavia); Prosecutor v. Furundžija, IT-95-17/1-T, Trial Judgement, 10 December 1998, paras. 288-291 (under the heading “Sentencing Policy of the Chamber”, deterrence and retribution as “functions”, rehabilitation, public reprobation and stigmatisation used as guidance in determination of sentence); Prosecutor v. Delalić et al., IT-96-21-T, Trial Judgement, 16 November 1998, paras. 1230-1235 (retention, deterrence, protection of society, rehabilitation and motives for the commission of offences as “factors” to be taken into consideration in determination of sentence).


culpable conduct - it may be unfair to impose a sentence on an offender greater than is appropriate to that conduct solely in the belief that it will deter others.

B.2 Rehabilitation

13. Rehabilitation as a sentencing objective, although supported by the Chambers in principle, was not found to be a significant relevant sentencing objective at the ICTY. Inasmuch as the only penalty a Trial Chamber at the ICTY can impose is imprisonment, the scope of any rehabilitative program would be entirely dependent on the states in which convicted persons will serve their sentence.9

B.3 Retribution

14. Article 24 of the ICTY Statute and Rule 101(B) ICTY RPE largely focus on sentencing factors relating to the individual accused and his criminal conduct, including the gravity of the offence. These provisions essentially require an enquiry into the conduct of the accused to determine a just punishment for his crime.

C. Factors taken into Consideration in the Sentencing Process

15. Article 24(2) of the ICTY Statute, Article 23(2) of the ICTR Statute and Article 22(3) of the IRMCT Statute provide that the Trial Chamber in imposing sentences “should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”

C.1 Gravity of the Offence

16. The ICTY and ICTR have consistently held that the gravity of the criminal conduct is the most important factor to consider in determining sentence.10 The Trial Chamber in Kupreškić stated:

“The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.”11

9 See Article 27, ICTY Statute; Rules 103 and 104, ICTY RPE.
And as emphasized in Rutaganda at the ICTR:

“[A] penalty must reflect the totality of the crimes committed by a person and be proportionate to both the seriousness of the crimes committed and the degree of participation of the person convicted. The gravity of the crime is a key factor that the Trial Chamber considers in determining the sentence.”

17. In determining the gravity of offence, a number of factors that are considered by the ICTY include the effect on the victim or persons associated with the crime and nearest relations, but it must be related to a specific and general harm of the victim and his or her relations. The gravity of the offence should be considered with respect to the particular and peculiar circumstances of each case, but certain crimes such as crimes against humanity are by definition of extreme gravity. The Appeals Chamber, in the Delalić et al. case (also known as Čelebići), confirmed its “acceptance of the principle that the gravity of the offence is the primary consideration in imposing sentence.”

18. Similarly, the Appeals Chamber in Nahimana et al. noted that “the effective gravity of the offences committed is the deciding factor in the determination of the sentence.”

19. In determining the gravity of offence, a number of factors that are considered by the Tribunal include the particular circumstances of the case and the form and degree of the participation of the individual in the crime. The Munyakazi Appeals Chamber stressed that “the determination of the gravity of the crime requires consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crimes.”

C.2 Consideration of Sentencing Practices in Domestic Courts

20. Article 24(1) of the ICTY Statute and Rule 101(B)(iii) ICTY RPE require the Trial Chamber, in determining sentence, to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia. However, while the Chamber may have recourse to the sentencing practices in the

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13 Prosecutor v. Delalić et al., IT-96-21-T, Trial Judgement, 16 November 1998, para.1226; Prosecutor v. Karadžić, IT-95-5/18-T, Trial Judgement, 24 March 2016, para. 6045 (finding that scale, systemic cruelty, and continued impact on victims were important factors of gravity to consider when determining an adequate sentence).
14 Ibid., para.1227.
former Yugoslavia, such practices do not bind the Chamber. If the Chamber diverges from the national practice of the former Yugoslavia, it shall explain why it is diverging from it.19

21. The same provisions apply at the ICTR in Article 23(1) of the Statute and Rule 101(B)(iii) of the ICTR RPE.

22. Whether a Trial Chamber has the discretion to impose a sentence greater than contemplated under the sentencing scheme of the former Yugoslavia (the maximum sentence being 20 years) was conclusively resolved by the Appeals Chamber in Tadić. The Chamber interpreted the relevant provisions of the Statute and Rules to mean that, while a Trial Chamber must consider the practice of courts in the former Yugoslavia, its discretion in imposing sentence is not bound by such practice.20 The Chamber found specifically that the wording of the Rules states clearly that the ICTY is given the power to sentence an accused for the rest of his natural life rejecting Tadić’s claim that the sentencing guidelines should be bound by the practice of courts in the former Yugoslavia.21 As reiterated by the Appeals Chamber, the ICTY is bound to apply the law of the ICTY and not that of the former Yugoslavia.22

23. The rules are the same at the ICTR where it was held a sentencing Chamber is entitled to impose a greater or lesser sentence than that which would have been imposed by the Rwandan courts.23

24. A related issue is the concept of nulla poena sine lege, or no penalty without law. The ICTY has rejected arguments by the accused that the sentencing laws of the ICTY conflicted with the laws of the former Yugoslavia and that because the ICTY sentencing law did not exist at the time of the crimes the accused were not bound by such law. As held in Stakić “the Trial Chamber was bound to apply the law of the ICTY and not that of the former Yugoslavia” and therefore the contention that “the Trial Chamber attempted to re-write the law of the SFRY and by doing so violated the principles of [...] nulla poena sine lege is without merit.”24

C.3 Credit for Time Served

25. Under Rule 101(C) ICTY RPE and Rule 101(C) ICTR RPE, the accused is entitled to credit for the time spent in detention pending and during trial.25

26. In cases where a life sentence is imposed:

19 Article 24, ICTY Statute; Prosecutor v. Kunarac et al., IT-96-23-T, IT-96-23/1-T, Trial Judgement, 22 February 2001, para. 829 (explaining that the text of the ICTY Statute does not impose an obligation to follow the sentencing practices of the former Yugoslavia and that “because very important underlying differences often exist between national prosecutions and prosecution in [the former Yugoslavia’s] jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia”); Prosecutor v. Krstić, IT-98-33-A, Appeal Judgement, 19 April 2004, para. 260-62.
21 Ibid., para. 21.
24 Ibid.
25 See, for example, Prosecutor v. Dordević, IT-05-87/1-T, Trial Judgement, 23 February 2011, para. 2228.
"[T]he Chambers are obliged to give credit for any period during which a convicted person was held in provisional detention. Even though the sentence imposed here was life imprisonment, the Trial Chamber should have made it clear that Appellant Ngeze would be credited with the time spent in detention between his arrest and conviction, as this could have an effect on the application of any provisions for early release." \(^{26}\)

**D. Aggravating Circumstances and Mitigating Circumstances**

27. The Prosecution is required to prove aggravating circumstances beyond a reasonable doubt. \(^{27}\) The standard of proof with regard to mitigating circumstances is *not*, as with aggravating circumstances, proof beyond reasonable doubt, \(^{28}\) but proof on a balance of probabilities: the circumstance in question must have existed or exists “more probably than not”. \(^{29}\)

28. With the foregoing in mind it is important to note that conduct not described in the indictment, including uncharged conduct that was part of the same course of conduct or common scheme or plan as the offence of conviction will not be considered an aggravating factor. The reason for this is manifest: an offender can only be sentenced for conduct for which he has been convicted. \(^{30}\)

29. The Trial Chamber is legally required to consider any mitigating circumstances. The Appeals Chamber in Nahimana et al. explains:

> “While the Trial Chamber is legally required to take into account any mitigating circumstances, what constitutes a mitigating circumstance and the weight to be accorded thereto is a matter for the Trial Chamber to determine in the exercise of its discretion. In particular, the existence of mitigating circumstances does not automatically imply a reduction of sentence or preclude the imposition of a sentence of life imprisonment.” \(^{31}\)

30. The Appeals Chamber will not intervene on the Trial Chamber’s discretion regarding sentencing unless the Appellant can show the Trial Chamber abused its discretion. \(^{32}\)

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\(^{28}\) Prosecutor v. Milan Babić, IT-03-72-A, Judgement on Sentence Appeal, 18 July 2005, para. 43.


\(^{30}\) Prosecutor v. Delalić *et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 763 (“The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused’s sentence or taken into account in aggravation of that sentence.”).


“In considering the issue of whether a sentence should be revised, the Appeals Chamber notes that the degree of discretion conferred on a Trial Chamber is very broad. As a result, the Appeals Chamber will not intervene in the exercise of this discretion, unless it finds that there was a “discernible error” or that the Trial Chamber has failed to follow the applicable law. In this regard, it confirms that the weighing and assessing of the various aggravating and mitigating factors in sentencing is a matter primarily within the discretion of the Trial Chamber. Therefore, as long as a Trial Chamber does not venture outside its “discretionary framework” in imposing a sentence, the Appeals Chamber shall not intervene.”

31. The ICTY and ICTR RPE and the IRMCT RPE do not exhaustively define all the factors that may constitute either aggravating or mitigating circumstances. Factors which have been considered as such are detailed below.

D.1 Aggravating Circumstances

32. Rule 101(B)(i) ICTY RPE, Rule 101(B)(i) ICTR RPE and Rule 125 IRMCT RPE require the Trial Chamber, in determining sentence, to consider any aggravating circumstances in relation to the crimes of which the accused stands convicted. Two of the most common aggravating circumstances found at the ICTY are:

- vulnerability of the victims, for example: women, children, elderly people and men who had been rendered helpless (unarmed, exhausted, confined, or wounded) and were subjected to cruel treatment at the hands of their captors; and,
- position of the accused and abuse of a position of authority may be considered in terms of the direct participation of the accused aggravating any Article 7(3) responsibility or the accused’s seniority or position of authority may aggravate his direct responsibility under Article 7(1). While a position of authority, even at a high level, does not automatically warrant a harsher sentence, the abuse of such may constitute an aggravating factor. The Appeals Chamber in Stakić noted that “in considering the superior position in connection with Article 7(1), the Appeals Chamber recalls that it is settled in the jurisprudence of the Tribunal that superior position itself does not constitute an aggravating factor. Rather it is the abuse of such position which may be considered an aggravating factor.”

34. Prosecutor v. Popović et al., IT-05-88-T, Trial Judgement, 12 June 2010, para. 2136; Prosecutor v. Karadžić, IT-95-5/18-T, Trial Judgement, 24 March 2016, para. 6034 (explaining that because “neither the Statute nor the Rules exhaustively define factors which may constitute aggravating or mitigating circumstances, the Chamber has the discretion to determine which factors to take into account and the weight to be attributed to them).
37. Prosecutor v. Stakić, IT-97-24-A, Appeal Judgement, 22 March 2006, para. 411, citing Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-A, Appeal Judgement, 1 June 2001, paras. 358 - 359. Moreover, the Appeals Chamber recalled in Blaškić, that where responsibility under both Article 7(1) and Article 7(3) is alleged under the same counts, and where the legal requirements pertaining to both of these modes of responsibility have been established, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused’s superior position as an aggravating factor in sentencing. Prosecutor v. Blaškić, IT-95-14-A, Appeal Judgement, 29 July 2004, paras. 91, 727.
of the Statute, which essentially incorporates the personal authority of the accused as an element, is that counting the position of authority and the power of a high-ranking officer over others as an aggravating factor would result in an impermissible double counting. However, proof of active participation by a superior (in the context of Article 7(3) of the Statute) in the criminal acts of subordinates adds to the gravity of the superior’s failure to prevent or punish those acts and has been considered as a potential basis for aggravating the sentence.

33. As noted above, the list of potential aggravating factors is not exhaustive. A number of other aggravating circumstances have been identified and considered by the ICTY and ICTR. They include:

- the duration of the criminal conduct;
- premeditation and motive; in Krstić the Trial Chamber stated that “when a genocide or a war crime, neither of which requires the element of premeditation, are in fact planned in advance, premeditation may constitute an aggravating circumstance. [...] In determining the appropriate sentence, a distinction is to be made between the individuals who allowed themselves to be drawn into a maelstrom of violence, even reluctantly, and those who initiated or aggravated it and thereby more substantially contributed to the overall harm. Indeed, reluctant participation in the crimes may in some instances be considered as a mitigating circumstance”;
- the enthusiasm with which a crime was committed;
- a discriminatory state of mind where discrimination is not an element of the offence; ICTY case law establishes that Chambers are entitled to consider ethnic and religious discrimination as aggravating factors, but only to the extent that they were not considered as aggravating the sentence for any conviction which included such discrimination as an element of the crime. For instance, a discriminatory state of mind cannot aggravate the sentence for the crime of persecution in Article 5(h) of the Statute;

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42 Prosecutor v. Kunarac et al., IT-96-23, IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 357, citing Prosecutor v. Delalić et al., IT-96-21-A, Appeal Judgement, 20 February 2001, para. 508 (stating that a discriminatory intent “is an indispensable ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5(h), concerning various types of persecution.”); see also Todorović: “[s]ince a discriminatory intent is one of the basic elements of the crime of persecution, this aspect of Todorović’s criminal conduct is already encompassed in a consideration of the offence. [I]t should not be treated separately as an aggravating factor.”; Prosecutor v. Todorović, IT-95-9/1-S, Trial Judgement, 31 July 2001, para. 57.
the number of the victims; \textsuperscript{43} however, not in cases such as \textit{Blagojević and Jokić} where the number of victims was already reflected in the crimes for which each accused were convicted; specifically complicity in genocide and extermination, respectively; \textsuperscript{44}

- the victims’ status\textsuperscript{45} and the effect of the crimes upon them; however, the impact on relatives of the victim is “irrelevant to the culpability of the offender” and “it would be unfair to consider such effect in determining a sentence.”\textsuperscript{46} Moreover, the Trial Chamber in \textit{Blagojević and Jokić} held that the status of the victims - in that case predominantly civilians including women, children and the elderly - was part of the definition of the crimes for which the accused were convicted.\textsuperscript{47}

- the systematic nature of the crimes;
- the intimidation of witnesses; and,
- the circumstances of the crimes generally.

34. Additional potential aggravating factors identified and considered by the ICTR include:

- an abuse of a position of influence and authority in society;\textsuperscript{48}
- the particularly gruesome nature of the crime;\textsuperscript{49}
- the zeal with which a crime is committed;\textsuperscript{50}
- sadism;\textsuperscript{51}
- perpetrating a crime in a manner which brings about irreparable harm to the victims and their families;\textsuperscript{52}
- a particularly large number of victims;\textsuperscript{53} and,


\textsuperscript{44} \textit{Prosecutor v. Vidoje Blagoević and Dragan Jokić}, IT-02-60-T, Trial Judgement, 17 January 2005, para. 841.


\textsuperscript{49} \textit{Prosecutor v. Kayishema & Ruzindana}, ITR-95-1-A, Appeal Judgement, 4 December 2001, para. 350 (“The particularly gruesome manner in which the victim, Beatrice, was killed, is an aggravating circumstance. The fact that this act of killing also supported a conviction for the crime of genocide, because it was part of the policy of genocide within Kibuye préfecture, does not prevent a separate finding that the manner in which it was carried out gave rise to an aggravating circumstance.”).


\textsuperscript{51} \textit{Prosecutor v. Simba}, ITR-01-76-A, Appeal Judgement, 27 November 2007, para. 320 (sadism is a factor to be considered as an aggravating factor).


\textsuperscript{53} \textit{Prosecutor v. Ndashimana}, ITR-01-68-A, Appeal Judgement, 16 December 2013, para. 231 (recalling that “with respect to extermination as a crime against humanity, a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime
• behavior not leading to a conviction.\textsuperscript{54}

35. It is only circumstances which have been put specifically before the Trial Chamber, whether in the indictment or during the trial, that may be considered in aggravation. The existence of such aggravating circumstances must be proven beyond reasonable doubt.

\textbf{D.2 Circumstances Deemed Not to be Aggravating}

36. It has been held that abstract comparisons of the “\textit{per se} gravity of the crimes”, comparing the severity of crimes against humanity and violations of the laws or customs of war is wrong.\textsuperscript{55} The Appeals Chamber held in \textit{Aleksovski} that there is no distinction in law between the seriousness of a crime against humanity and that of a war crime.\textsuperscript{56} For example, in \textit{Tadić} the Appeals Chamber overturned the Trial Chamber finding that there should be a distinction between war crimes and crimes against humanity, and again in \textit{Aleksovski} the Appeals Chamber found that the authorized penalties for crimes is fixed by reference to the circumstances of the case and not by the form of the crime.\textsuperscript{57}

37. The Appeals Chamber in \textit{Ntabakuze} made it clear that “grounds for denying mitigation do not, \textit{per se}, constitute aggravating circumstances,” however the Trial Chamber in \textit{Kayishema & Ruzindana} explained that aggravating circumstances could negate mitigating circumstances.\textsuperscript{58}

38. Similarly, false defences, disrespectful attitude towards the Chamber, and the effect of the conviction on third parties are impermissible considerations as aggravating factors.\textsuperscript{59}

\textbf{D.3 Prohibition Against Double Use of the Same Factor as an Aggravating Circumstance}

39. Factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and vice versa.”\textsuperscript{60} For example, in \textit{Krnojelac}, the Trial Chamber considered the particular vulnerability of the direct victims

\begin{footnotesize}
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\item \textsuperscript{55} \textit{Prosecutor v. Ndindabahizi}, ICTR-01-71-A, Appeal Judgement, 16 January 2007, para. 136 (finding that while the Trial Chamber did not convict the Appellant for encouraging attackers to kill Tutsi women married to Hutu men, it could be considered as an aggravating factor).
\item \textsuperscript{56} \textit{Prosecutor v. Kunarac et al.}, IT-96-23-T, IT-96-23/1-T, Trial Judgement, 22 February 2001, para. 851.
\item \textsuperscript{57} \textit{Ibid.}, citing, \textit{Prosecutor v. Aleksovski}, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 69.
\end{itemize}
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and the length of time during which crimes were committed while the accused acted as warden as aggravating circumstances in relation to the gravity of the offences committed. It therefore did not consider them again as matters of aggravation in relation to sentencing because they had already been taken into account.\footnote{Prosecutor v. Krnojelac, IT-97-25-T, Trial Judgement, 15 March 2002, para. 517.}

D.4 Mitigating Circumstances

40. Rule 101(B)(ii) ICTY RPE, Rule 101(B)(ii) ICTR RPE and Rule 125(B)(ii) IRMCT state that in determining a sentence, a Trial Chamber shall take into account “any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction.”\footnote{Prosecutor v. Serushago, ICTR 98-39-S, Appeal Judgement on Sentencing, 5 February 1999, para. 22; and See also Prosecutor v. Musema, ICTR-96-13-A, Appeal Judgement, 16 November 2001, para. 395.} Factors that have been taken into account by the ICTY as evidence in mitigation include:

- co-operation with the Prosecution including providing “truthful and complete information to the Tribunal” whenever requested;\footnote{Prosecutor v. Bralo, IT-95-17-A, Sentencing Judgement, 2 April 2007, para. 51 (holding that “an accused’s cooperation need not be substantial for it to be taken into account as a mitigating circumstance. In determining whether an accused’s cooperation was substantial, a Trial Chamber may take into account various circumstances such as his willingness to give interviews to the Prosecution and to testify in other proceedings before the International Tribunal, the provision of original documentation and, more generally, the provision of unique and corroborative information to the Prosecution.”); Prosecutor v. Miodrag Jokić, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, paras. 95-96; Prosecutor v. Todorović, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 88; Rule 101(B)(ii), ICTY RPE.}
- the admission of guilt or a guilty plea which may go to mitigation because it can demonstrate repentance, honesty, and readiness to take responsibility, help establish the truth, contribute to peace and reconciliation, set examples to other persons guilty of committing crimes, relieve witnesses from giving evidence in court, and save the ICTY time and resources;\footnote{Prosecutor v. Miodrag Jokić, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 95-96; Prosecutor v. Jelisić, IT-95-10-A, Appeal Judgement, 5 July 2001, para. 122; Prosecutor v. Miodrag Jokić, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 76.}
- an expression of remorse, provided that it is sincere, which can include efforts of remorse during or after the alleged events or the assistance in reconciliation efforts;\footnote{Prosecutor v. Miodrag Jokić, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 89; Prosecutor v. Erdemović, IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, para. 16(iii); Prosecutor v. Jelisić, IT-95-10-T, Trial Judgement, 14 December 1999, para. 127 (Jelisić’s sincerity of remorse not accepted); Prosecutor v. Blaškić, IT-95.14-T, Trial Judgement, 3 March 2000, para. 775 (Blaškić’s sincerity of remorse not accepted); Prosecutor v. Omar Serushago, ICTR-98-39-S, Judgement on Sentencing Appeal, 5 February 1999, paras. 40-41; Prosecutor v. Georges Ruggiu, ICTR-97-32-I, Trial Judgement, 1 June 2000, paras. 69-72.}
- voluntary surrender to the tribunal which can also prove a showing of remorse;\footnote{Prosecutor v. Miodrag Jokić, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, paras. 73, 89; but See Prosecutor v. Milan Babić, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 74, disapproving this factor as a basis for mitigation.}
- good character with no prior criminal convictions suggesting the possibility of reform;\footnote{Prosecutor v. Erdemović, IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, para. 16(i); Prosecutor v. Kupreškić et al., IT-95-16-A, Appeal Judgement, 23 October 2001, para. 459; but See Prosecutor v. Milan Babić, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 91, finding that prior good character is a mitigating factor only in exceptional circumstances.}

\footnote{As stated in Serushago, Trial Chambers are “required as a matter of law to take account of mitigating circumstances.” Prosecutor v. Serushago, ICTR 98-39-S, Appeal Judgement on Sentencing, 5 February 1999, para. 22; and See also Prosecutor v. Musema, ICTR-96-13-A, Appeal Judgement, 16 November 2001, para. 395.}

\footnote{See Prosecutor v. Milan Babić, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 74, disapproving this factor as a basis for mitigation.}

\footnote{Prosecutor v. Kupreškić et al., IT-95-16-A, Appeal Judgement, 23 October 2001, para. 459; but See Prosecutor v. Milan Babić, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 91, finding that prior good character is a mitigating factor only in exceptional circumstances.}
• comportment in detention but because most accused comport themselves well, the ICTY has only attached a limited importance to this condition;\textsuperscript{68}

• personal and family circumstances including an accused having children or a spouse as family circumstances are generally considered a mitigating factor;\textsuperscript{69}

• the character of the accused subsequent to the conflict including contributions made to ending the conflict which may include participation in political activities or in ceasefire and peace talks following the conflict and other attempts to encourage peace;\textsuperscript{70}

• duress including the extremity of the situation faced by the accused and real risk that the accused would have been killed had he disobeyed an order;\textsuperscript{71} and indirect participation including a limited or indirect participation or authority over the crimes charged;\textsuperscript{72}

• diminished mental responsibility based on a balance of probabilities, or that it was more probable than not that the condition existed at the relevant time;\textsuperscript{73}

• age, particularly if the accused is of an “advanced age”;\textsuperscript{74}

• assistance to detainees or victims such as ameliorating poor conditions at a detention camp in relation to particular detainees;\textsuperscript{75} and,

• poor health is to be considered only in exceptional or rare cases including where an accused’s life expectancy would be adversely affected by incarceration.\textsuperscript{76}

41. ICTR Chambers have also considered the following as mitigation:

• the accused’s family situation;\textsuperscript{77}

• timed served in public service;\textsuperscript{78}


\textsuperscript{70} Prosecutor v. Blaškić, IT-95.14-T, Trial Judgement, 3 March 2000, para. 773; See also Prosecutor v. Blaškić, IT-95-15-A, Appeal Judgement, 29 July 2004, para. 696, where the Appeals Chamber held that the factors taken into account as evidence in mitigation include, \textit{inter alia}, the character of the accused subsequent to the conflict; See also Prosecutor v. Plavšić, IT-00-39 & 40/1-S, Sentencing Judgement, 27 February, para. 94: “For instance, in the Plavšić case, the Trial Chamber accepted Biljana Plavšić’s post-conflict conduct as a mitigating factor because after the cessation of hostilities she had demonstrated considerable support for the 1995 General Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Agreement) and had attempted to remove obstructive officials from office in order to promote peace.” See also Prosecutor v. Miodrag Jokić, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, paras. 90-91, 103.

\textsuperscript{71} Prosecutor v. Erdemović, IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, para. 17 (stating that duress “may be taken into account only by way of mitigation.”); but see Prosecutor v. Bralo, IT-95-17-A, Sentencing Judgement, 2 April 2007, para. 24 (stating that pressures to join the “Jokers” does not alleviate a person’s duty to comply fully with the relevant norms of international humanitarian law).


\textsuperscript{73} Prosecutor v. Delalić et al., IT-96-21-A, Appeal Judgement, 20 February 2001, para. 590.

\textsuperscript{74} Prosecutor v. Miodrag Jokić, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 100.


\textsuperscript{78} Prosecutor v. Ntabakuze, ICTR-98-41-A, Appeal Judgement, 8 May 2012, para 284 (The Trial Chamber took into account the accused’s lengthy public service to his country as a military officer).
personal background;  
- lack of a previous criminal record;  
- a purported likelihood of successful rehabilitation;  
- the accused was following superior orders in executing his or her crimes;  
- good character;  
and,
- an expression of sincere regret, sympathy, compassion, or sorrow for the victims of the crimes with which the accused is charged.

42. This list is not exhaustive, and Trial Chambers are “endowed with a considerable degree of discretion in deciding on the factors which may be taken into account.”

E. Guilty Plea as a Basis for Conviction and Sentence

43. In the specific case of a sentencing judgement following a guilty plea, the Trial Chamber, pursuant to Rule 62 bis(iv) ICTY RPE must be satisfied that “there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case”. A common procedure is that the parties enter negotiations and agree on the facts underlying the charges to which the accused will plead. The parties may also submit, pursuant to Rule 100(A) ICTY RPE, “any relevant information that may assist the Trial Chamber in determining an appropriate sentence.” On the basis of the facts agreed upon by the parties as well as the additional information provided by the parties pursuant to Rule 100(A) (including those facts presented during the sentencing hearing), the Trial Chamber exercises its discretion in determining the sentence. A Trial Chamber need not make explicit findings on facts agreed upon by the parties or on undisputed facts. The reference by a Trial Chamber to such facts is by itself indicative that it accepts those facts as true.

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79 Prosecutor v. Ntabakuze, ICTR-98-41A-A, Appeal Judgement, 8 May 2012, para 284 (The Trial Chamber took into account the accused’s social, educational, and professional background).
80 Ibid, para 284 (explaining that while this is a mitigating factor, it is a common characteristic among convicted persons and thus accorded little weight as a mitigating factor in the absence of exceptional circumstances).
81 Ibid, para 271 (holding that while the Trial Chamber acknowledged the accused was “at times following superior orders in executing his crimes,” mitigation was not warranted on this ground because of the accused’s own senior status).
82 Ibid, para 296 (reiterating that while this is a mitigating factor, “in most cases the good character of a convicted person carries little weight in the determination of the sentence”); Prosecutor v. Semanza, ICTR-97-20-A, Appeal Judgement, 20 May 2005, para. 398.
E.1 Effect of Plea Agreement on Sentence

44. In exercising its discretion to impose a sentence, a Trial Chamber must take into account the special context of a plea agreement as an additional factor. A plea agreement is a matter of considerable importance as it involves an admission of guilt by the accused. Furthermore, recommendation of a range of sentences or a specific maximum sentence reflects an agreement between the parties as to what in their view would constitute a fair sentence. The Appeals Chamber has noted that Rule 62 ter (B) ICTY RPE unambiguously states that Trial Chambers shall not be bound by any agreement between the parties. Nevertheless, in the specific context of a sentencing judgement following a plea agreement a Trial Chamber shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially from that recommendation, give reasons for the departure. Those reasons, combined with the Trial Chambers’ obligation pursuant to Article 23(2) of the Statute to render a Judgement “accompanied by a reasoned opinion in writing”, will facilitate a meaningful exercise of the convicted person’s right to appeal and allow the Appeals Chamber “to understand and review the findings of the Trial Chamber”.

F. The Importance of Individualized Sentencing and Comparison to Other Cases

45. It is the overriding obligation of the Trial Chamber to “individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime.” In Delalić et al. the Appeals Chamber observed that, as a general principle, comparisons with other cases which have already been the subject of final determination for the purpose of assessing an appropriate sentence in a specific case are usually “of limited assistance.”

46. In particular, the Appeals Chamber stated:

“While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results. They are therefore not reliable as the sole basis for sentencing an individual.”

47. Because each case is made up of entirely different circumstances, with the differences often being more significant than the similarities, the Chamber will consider the personal circumstances of the individual

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87 See Chapter IX “Plea Agreements” for further discussions on this issue.
89 Ibid. citing Prosecutor v. Kunarac et al., IT-96.23-A, Appeal Judgement, 12 June 2001, para. 41.; see also ICTR RPE Rules 62bis and 100(A); IRMCT Rule 124.
91 Ibid. para. 719.
before it. This recognizes that mitigating and aggravating factors will factor into sentencing differently for different individuals accused of similar crimes. A Chamber may consider that “materially different criminal behavior of different convicted persons may, by measure of its specific gravity, warrant a coincidentally similar punishment.”

48. As stated by the Appeals Chamber in Kamuhanda:

“The principle of individualization requires that each sentence be pronounced on the basis of the individual circumstances of the accused and the gravity of the crime.”

G. Sentencing where there are Cumulative Convictions

49. The Appeals Chamber in the Delalić et al. case held that cumulative charging is to be allowed. The primary reason is that it is impossible for the Prosecutor to determine with certainty, prior to the presentation of all the evidence, which of the charges brought against an accused will be proved. A Trial Chamber is in a better position, after the parties’ presentation of the evidence, to evaluate which charges should be retained.

50. The Appeals Chamber in the Delalić et al. case held that cumulative convictions, however, are permissible only in certain circumstances. It is worth quoting the relevant section of that judgement in full:

“[t]his Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not

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95 Ibid., para. 400.
An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.\(^{98}\)

51. Once all the evidence has been assessed, a Trial Chamber first has to determine whether an accused is charged with more than one statutory offence based upon the same conduct. Secondly, if there is evidence to establish both offences, but the underlying conduct is the same, the Trial Chamber has to determine whether each relevant statutory provision has a materially distinct element not contained in the other. This involves a comparison of the elements of the relevant statutory provisions – the facts of a specific case play no role in this determination. Thirdly, if the relevant provisions do not each have a materially distinct element, the Trial Chamber should select the more specific provision (see case box – *Krnojelac case* – *Assessing the materially distinct element*).

52. The impact that cumulative convictions based on the same conduct will have on sentencing is that it must be clear that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the accused.\(^{99}\) The prejudice that an accused will or may suffer because of cumulative convictions based on the same conduct must also be taken into account when imposing the sentence.

**ICC**

**H. The Sentencing Legal Framework**

53. The Rome Statute and the ICC Rules of Procedure and Evidence provide a number of guidelines regarding the legal framework governing sentencing. First and foremost, Article 23 of the Rome Statute states that “[a] person convicted by the Court may be punished only in accordance with this Statute.” Article 78(1) of the Rome Statute provides that the “[i]n determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”

54. According to Rule 145 of the ICC RPE:

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

\(^{98}\) *Ibid.*

(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;

(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;

(c) In addition to the factors mentioned in Article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social, and economic condition of the convicted person.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:

(a) Mitigating circumstances such as:

(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
(ii) The convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;

(b) As aggravating circumstances:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;
(ii) Abuse of power or official capacity;
(iii) Commission of the crime where the victim is particularly defenceless;
(iv) Commission of the crime with particular cruelty or where there were multiple victims;
(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in Article 21, paragraph 3;
(v) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

3. Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.

55. As explained by the Trial Chamber VII in Bemba:

“The Chamber enjoys considerable discretion in determining an appropriate sentence. However, in so doing, it is guided by two considerations: (i) the sentence must reflect the culpability of the convicted person, as stipulated in Rule 145(1)(a) of the Rules; and (ii) the sentence must be proportionate to the ‘crime’, as enshrined in Articles 81(2)(a) and 83(3) of the Statute. With
regard to the latter consideration, the Appeals Chamber explained that ‘[p]roportionality is generally measured by the degree of harm caused by the crime and the culpability of the perpetrator’. Both these considerations make clear that the sentence must be individualised for each convicted person.”\(^\text{100}\)

56. Under Article 87(3) of the Rome Statute, “[w]hen a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment.”

I. **Sentencing Objectives**

57. Within the ICC, general deterrence and retribution are the main objectives of sentencing, with both being of equal importance.\(^\text{101}\) The *Katanga* Trial Chamber II discussed the objectives of sentencing at the ICC stating:

> “When determining the sentence, the Chamber must also respond to the legitimate need for truth and justice voiced by the victims and their family members. It therefore considers that the role of the sentence is two-fold: on the one hand, punishment, or the expression of society’s condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering caused to the victims; and, on the other hand, deterrence, the aim of which is to deflect those planning to commit similar crimes from their purpose. The punitive aspect of the sentence is therefore meant to restrain any desire to exact vengeance and it is not so much the severity of the sentence that should prevail as its inevitability. When determining the sentence, the Chamber must further ensure that, pursuant to rule 145(1)(a) of the Rules, the sentence reflects the degree of culpability while contributing to the restoration of peace and reconciliation in the communities concerned. Lastly, the extent to which the sentence reflects the culpability of the convicted person addresses the desire to ease that person’s reintegration into society, although, in particular in the case of international criminal law, this goal cannot be considered to be primordial as the sentence on its own cannot ensure the social reintegration of the convicted person.”\(^\text{102}\)

58. With regards to deterrence, the Trial Chamber observed in *Al Mahdi*:

> “In respect of deterrence, the Chamber considers that a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence), as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence).”\(^\text{103}\)

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\(^{101}\) *Prosecutor v. Bemba*, ICC-01-05-01/08, Trial Chamber III, 21 June 2016, para. 10 (“[T]he Chamber considers that the Preamble establishes retribution and deterrence as the primary objectives of punishment at the ICC.”); *Prosecutor v. Katanga*, ICC-01-04-01/07, Trial Chamber II, 23 May 2014, para. 37 (noting that “the sentence should act as a deterrent”).


\(^{103}\) *Prosecutor v. Al Mahdi*, ICC-01-12-01/15, Trial Chamber VIII, 27 September 2016, para. 67.
59. Other purposes of sentencing, such as restoration of peace, reconciliation and rehabilitation have also played a role in the ICC, although less so than retribution and deterrence. In fact, Chambers have consistently stated that the purpose of rehabilitation will not be given undue weight.\(^{104}\)

**J. Factors taken into Consideration in the Sentencing Process**

60. As with the *ad hoc* tribunals, Article 78(1) of the Rome Statute provides that the Court, in determining sentences, should “take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”\(^{105}\)

**J.1 Gravity of the Crime**

61. The gravity is the principal consideration by the Chamber in determining a sentence.\(^{106}\)

62. As consistently pointed out by the Chamber, the ‘gravity of the crime’ factor “must be assessed *in concreto*, namely in the light of the particular circumstances of the case.”\(^{107}\)

63. Accordingly, the gravity of an offense will be assessed differently depending on the mode of liability alleged. For example, when considering command responsibility, the Trial Chamber in *Bemba* explained:

> “In cases of command responsibility, the Chamber must assess the gravity of (i) the crimes committed by the convicted person’s subordinate; and (ii) the convicted person’s own conduct in failing to prevent or repress the crimes, or submit the matter to the competent authorities. Unlike aggravating circumstances, gravity necessarily involves consideration of the elements of the offence itself. Beyond such elements, the Chamber has a degree of discretion to consider relevant factors in assessing gravity or, if exceptional, as aggravating circumstances.”\(^{108}\)

**J.2 Credit for Time Served**

64. Under Article 78(2) of the Rome Statute, “[i]n imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.”

\(^{104}\) *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Chamber II, 23 May 2014, para. 38; *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgement III, 21 June 2016, para. 11 (explaining that in cases concerning serious crimes, rehabilitation, while relevant, should not be given undue weight).


\(^{106}\) *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Judgement III, 21 June 2016, para. 15.


K. Aggravating Circumstances and Mitigating Circumstances

65. The Prosecution is required to prove aggravating circumstances beyond a reasonable doubt.\textsuperscript{109} The standard of proof with regard to mitigating circumstances is by a “balance of probabilities.”\textsuperscript{110}

66. Aggravating circumstances must relate to the specific crime whereas mitigating circumstances do not need to be “directly related to the crime and are not limited by the scope of the charges or Judgement.”\textsuperscript{111}

67. Under ICC RPE 145(1)(b), once the Chamber identifies all relevant factors, including mitigating and aggravating factors, the Chamber will balance those factors and consider the circumstances of both the convicted person and the crime. The Chamber will explain the weight given to the mandatory factors and explain which specific evidence it relied on in determining the sentence.\textsuperscript{112}

68. It is important to remember that the Chamber has a considerable degree of discretion to determine what should be considered a mitigating circumstance, and what weight any such circumstance should be accorded.\textsuperscript{113}

69. Again, as with the ad hoc tribunals, the ICC RPE do not exhaustively define all the factors that may constitute either aggravating or mitigating circumstances.\textsuperscript{114} Factors which have been considered as such are detailed below.

K.1 Aggravating Circumstances

70. Rule 145(2)(b) ICC RPE requires the Trial Chamber, in determining sentence, to consider any aggravating circumstances in relation to the crimes of which the accused stands convicted. The listed examples of aggravating circumstances are:

- any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;\textsuperscript{115}
- abuse of power or official capacity;

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\textsuperscript{110} Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgement II, 23 May 2014, para. 33.

\textsuperscript{111} Prosecutor v. Bemba, ICC-01/05-01/08, Trial Judgement III, 21 June 2016, para. 18-19.

\textsuperscript{112} Prosecutor v. Bemba et al., ICC-01/05-01/13, Trial Judgement VII, 22 March 2017, para. 26; Prosecutor v. Lubanga, ICC-01/04-01/06, Appeals Judgement, 1 December 2014, para. 69.

\textsuperscript{113} Prosecutor v. Bemba, ICC-01/05-01/08, Trial Judgement III, 21 June 2016, para. 19.

\textsuperscript{114} Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgement II, 23 May 2014, para. 40.

\textsuperscript{115} Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgement II, 23 May 2014, para. 28.
71. A number of other aggravating circumstances, arising from the fact of specific cases, have also been identified and considered by the ICC. They include:

- efforts to obstruct the investigation;\textsuperscript{118}
- whether the victim was armed;\textsuperscript{119}
- commission of a crime in places of civilian sanctuary, “such as churches and hospitals, or the victims’ homes”\textsuperscript{120}
- the victims’ ages;\textsuperscript{121}
- commission of the crime over a particularly long duration or a consideration of the repeated nature of the acts;\textsuperscript{122} and,
- commission of the acts with a particular violent or humiliating nature.\textsuperscript{123}

72. The ICC upholds the principle that the absence of mitigating circumstances does not constitute an aggravating circumstance.\textsuperscript{124}

73. Only circumstances which have been put specifically before the Trial Chamber, whether in the indictment or during the trial, may be considered in aggravation. The existence of such aggravating circumstances must be proven beyond reasonable doubt.

74. A legal element of the offence or the mode of liability cannot be considered as an aggravating circumstance.\textsuperscript{125}

\textsuperscript{116} Prosecutor v. Bemba, ICC-01/05-01/08, Trial Judgement III, 21 June 2016, para. 42 (holding that the victims’ young ages rendered them particularly vulnerable and defenceless).
\textsuperscript{117} Ibid, para. 47 (finding that the especially sadistic nature of the rapes committed constituted the commission of a crime with particular cruelty).
\textsuperscript{118} Prosecutor v. Bemba et al., ICC-01/05-01/13, Trial Judgement VII, 22 March 2017, para. 54.
\textsuperscript{119} Prosecutor v. Bemba, ICC-01/05-01/08, Trial Judgement III, 21 June 2016, para. 25.
\textsuperscript{120} Ibid.
\textsuperscript{121} Ibid, para. 25 (noting that this factor is particularly important in cases of sexual violence).
\textsuperscript{122} Ibid (“[I]ncluding their public nature, and any verbal, physical, or other abuse or threats accompanying the crime.”).
\textsuperscript{123} Ibid (“[I]ncluding their public nature, and any verbal, physical, or other abuse or threats accompanying the crime.”).
75. Any factors which a Trial Chamber took account as contributing to the gravity of the crime cannot also be relied upon as a separate aggravating circumstance, and vice versa.\textsuperscript{126}

K.2 Mitigating Circumstances

76. Rule 145(2)(a) ICC RPE states that in determining a sentence, a Trial Chamber shall take into account any mitigating circumstances such as:”[t]he circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;” and “[t]he convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court.” Factors that have been taken into account by the ICC as evidence in mitigation include:

- the accused’s cooperation with the Prosecution;\textsuperscript{127}
- a good relationship with civilians in the accused's' community;\textsuperscript{128}
- personal circumstances;\textsuperscript{129}
- efforts to promote peace and reconciliation;\textsuperscript{130}
- initial reluctance to commit the crime;\textsuperscript{131}
- a show of sincere remorse;\textsuperscript{132} and,
- a guilty plea.\textsuperscript{133}

77. Mitigating circumstances do not need to directly relate to the charged offenses\textsuperscript{134} and are not limited by the scope of the confirmed charges or the judgement. They may relate directly to the convicted person regardless of the circumstances of the charged offenses.\textsuperscript{135}


\textsuperscript{127} Prosecutor v. Lubanga, ICC-01/04-01/06, Trial Judgement I, 10 July 2012, para. 90-91; Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgement II, 23 May 2014, para. 32.

\textsuperscript{128} Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgement II, 23 May 2014, para. 87 (holding Katanga’s “kindly and protective disposition towards the civilians in his community as relevant factors in mitigation”).

\textsuperscript{129} Ibid (holding that “Katanga's young age [and] the fact that he is now the father of six children” qualifies as a mitigating factor for sentencing).

\textsuperscript{130} Ibid, para. 91; Prosecutor v. Bemba, ICC-01/05-01/08, Trial Judgement III, 21 June 2016, para. 14.

\textsuperscript{131} Prosecutor v. Al Mahdi, ICC-01/12-01/15, Trial Judgement VIII, 27 September 2016, para. 89.

\textsuperscript{132} Ibid, para. 101; Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgement II, 23 May 2014, para. 32.

\textsuperscript{133} Prosecutor v. Al Mahdi, ICC-01/12-01/15, Trial Judgement VIII, 27 September 2016, para. 100; Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgement II, 23 May 2014, para. 32.

\textsuperscript{134} ICC RPE 145(2)(a).

78. The existence of mitigating circumstances does not lessen the gravity of the offense found to be true. They are relevant solely for assessment of the ultimate sentence to be imposed.\footnote{Prosecutor v. Bemba et al., ICC-01/05-01/13, Trial Judgement VII, 22 March 2017, para. 24; Prosecutor v. Katanga, ICC-01/04-01/07, Trial Judgement II, 23 May 2014, para. 77.}

79. As with factors in aggravation, the statutory list of mitigating factors is not exhaustive. The Trial Chambers are “endowed with a considerable degree of discretion in deciding on the factors which may be taken into account.”

\section*{L. The Importance of Individualized Sentencing and Comparison to Other Cases}

80. Occasionally the ICC will use the sentencing decisions of other Tribunals or Courts as guidance when making sentencing determinations for the same types of offenses. For example, the Trial Chamber in \textit{Lubanga} considered the sentencing practices of the Special Court for Sierra Leone when imposing sentence on Lubanga as the SCSL had returned the only other conviction in an international criminal court for the recruitment or use of child soldiers.\footnote{Prosecutor v. Lubanga, ICC-01/04-01/06, Trial Judgement I, 10 July 2012, para. 12.}

81. However, it is the overriding obligation of the Trial Chamber to “tailor\textit[sic] the penalty to fit the gravity of the crime and the individual circumstances of the convicted person.”\footnote{Prosecutor v. Bemba et al., ICC-01/05-01/13, Trial Judgement VII, 22 March 2017, para. 38.} Thus, while the Chamber can look to other cases for guidance, the individual circumstances of each case “make it difficult, at the least, to infer from the sentence that was imposed in one case the appropriate sentence in another case.”\footnote{Prosecutor v. Lubanga, ICC-01/04-01/06, Appeals Judgement, 1 December 2014, para. 77.}

82. The importance of individualized sentencing, taking into account all of the factors surrounding a particular convicted accused, is therefore of paramount importance within the ICC.

\section*{M. Sentencing where there are Cumulative Convictions}

83. According to Article 78(3) of the Rome Statute, “[w]hen a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment.”
84. This joint sentence cannot be less than the highest individual sentence, nor can it exceed the maximum sentence.\textsuperscript{140}

85. The Appeals Chamber in \textit{Bemba} clarified that convictions could be entered cumulatively. However, the court explained that “this does not mean that cumulative convictions can unduly inflate an accused’s punishment. The Chamber will take into account the fact that largely the same conduct underlies multiple convictions when determining an appropriate sentence.”\textsuperscript{141}

\textbf{N. Review for a Reduction of Sentence}

86. Under Article 110 of the Rome Statute, the Court may reduce the sentence of a convicted person if one or more of the following factors are present:

- the early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
- the voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture, or reparation which may be used for the benefit of victims; or
- other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

87. According to ICC RPE 223:

In reviewing the question of reduction of sentence pursuant to Article 110, paragraphs 3 and 5, the three judges of the Appeals Chamber shall take into account the criteria listed in Article 110, paragraph 4 (a) and (b), and the following criteria:

(a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime;
(b) The prospect of the resocialization and successful resettlement of the sentenced person;
(c) Whether the early release of the sentenced person would give rise to significant social instability;
(d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release;
(e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.

\textsuperscript{140} Article 78(3), Rome Statute.
\textsuperscript{141} \textit{Prosecutor v. Bemba}, ICC-01/05-01/13, Trial Judgement VII, 19 October 2016, para. 956.
88. Under Article 27 of the Rome Statute, an accused’s official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall not by itself constitute a ground for the reduction of his or her sentence.

**Conclusion**

89. The resolution of what is an appropriate sentence after conviction is never easy. Indeed, the answer to this question is often hotly contested by the public, both internationally and within the State of imprisonment.

90. The primary purposes of sentences under the jurisdiction of the various international criminal courts which are concerned with prosecutions for war crimes, crimes against humanity and genocide, are retribution and deterrence.

91. Retribution should envision the imposition of a just and appropriate punishment and nothing more. Deterrence serves a two-fold function by imposing fair and appropriate penalties to deter the convicted person from committing any future violations and the general deterrent effect of discouraging other potential perpetrators from committing the same or similar crimes.

92. There is now a substantial body of sentencing practice available at the ad hoc tribunals and the ICC. It is the Defence practitioner’s responsibility to be thoroughly familiar with that body of jurisprudence when seeking to protect the rights of a convicted individual facing sentencing so as to be in a position to prepare for and present all the relevant information that will allow the sentencing body to render a fair, informed and individualized sentence.
X. APPEALS

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1. After the trial proceedings in a case are completed and the Trial Chamber returns its verdict convicting or acquitting the accused of some or all of the charges, both the accused and the Prosecution have the automatic right to appeal that verdict in whole or in part. The accused and the Prosecution also have the right to appeal any sentence imposed by the Trial Chamber. The right to appeal is an important and fundamental right of international human rights law.

2. At the ICTY and ICTR, a decision may be appealed based on either an error on a question of law that invalidates the decision or an error of fact that resulted in a “miscarriage of justice.” Both bases of appeal are discussed in greater detail below.

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2 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, at 116 (“Such a right [to appeal] is a fundamental element of individual civil and political rights and has, inter alia, been incorporated in the International Covenant on Civil and Political Rights.”).

3 Article 24, ICTR Statute; Article 25, ICTY Statute.

4 See infra Standards Applicable to Errors of Law and Standards Applicable to Errors of Fact.
3. At the ICC, the Prosecutor may appeal on any of three grounds:

   a. procedural error;
   b. error of fact; or
   c. error of law.  

4. A person convicted at the ICC may appeal the verdict on the same three grounds as the Prosecutor, plus “[a]ny other ground that affects the fairness or reliability of the proceedings or decision.”

5. The same rules of Procedure and Evidence which govern the proceedings at trial apply to proceedings before the ICTY-ICTR Appeals Chamber. Thus, appellate proceedings also represent a mix of both common law and civil law legal traditions.

6. As a general rule, the same lead and co-counsel who represented the accused at trial will continue to represent him or her on appeal, though there are instances in which one or both counsel are replaced on appeal. The Office of the Prosecutor (OTP), however, has an appellate unit comprised of lawyers who specialize in appellate practice. OTP appellate counsel routinely consult and collaborate with OTP trial counsel, during trial and thereafter, in sheparding cases through the trial and appellate process.

7. As with the trial process, it is extremely important for Defence counsel to be well prepared, to organize the facts and evidence at trial for purposes of putting together the appellate briefs, to present issues on appeal in a clear and convincing manner, and to plan ahead of time for presenting oral arguments.

8. This chapter will cover the basic components of the appellate process, from the filing of the Notice of Appeal through the presentation of oral arguments after all briefs have been filed. The chapter will also provide Defence practitioners with ideas about how to creatively approach the appellate process within the specific rules and procedures in their own jurisdictions.

A. **Filing a Notice of Appeal**

9. In order to appeal a conviction and/or sentence, a Notice of Appeal must be filed with the Appeals Chamber advising that Chamber that some or all of the convictions and/or acquittals and/or the sentence are going to be appealed.

10. At the ICTY and ICTR the Notice must specify:

   1. the date of the judgement;

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5 Article 81, Rome Statute.
6 Ibid.
7 Rule 107, ICTY RPE; Rule 131, IRMCT RPE; see also Rule 145, ICC RPE. The ICTY and ICTR share the same Appeals Chamber.
2. the specific provision of the Rules pursuant to which the Notice of Appeal is filed;
3. the grounds of appeal, clearly specifying in respect of each ground of appeal;
4. any alleged error on a question of law invalidating the decision;
5. any alleged error of fact which has occasioned a miscarriage of justice;
6. an identification of the finding or ruling challenged in the judgement, with specific reference to page number and paragraph number of the Trial Judgement;
7. an identification of any order, decision or ruling challenged, with specific reference to the date of its filings and/or transcript page; and,
8. the precise relief sought and, if relevant, the overall relief sought.\(^8\)

11. In other words, the Notice of Appeal must identify the specific legal and/or factual errors which will be raised on appeal.\(^9\)

12. At the ICC, a notice of appeal must specify:

   a. the name and number of the case;
   b. the date of the decision of conviction or acquittal, sentence or reparation order appealed against;
   c. whether the appeal is directed against the whole decision or part thereof; and,
   d. the relief sought.\(^10\)

13. Separately, a document in support of the appeal is to be submitted to the ICC Chambers, which shall contain the grounds for appeal. Each ground must identify the legal and/or factual reasons in support of that ground of appeal.\(^11\)

14. There are time limits which apply to filing these notices. Rule 108 of the ICTY RPE provides that: “A party seeking to appeal a judgement shall, not more than thirty days from the date on which the judgement was pronounced, file a notice of appeal, setting forth the grounds.”\(^12\) Rule 108 also provides that the Notice of Appeal must list all the grounds which are going to be raised on appeal with sufficient specificity that the Appeals Chamber is aware of the nature of the error which is going to be raised and the place in the trial record where that error occurred:

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\(^8\) Rule 108, ICTY RPE. Rule 133, IRMCT RPE.
\(^9\) Rule 108, ICTY RPE; see also ICTY Practice Direction on Formal Requirements for Appeals From Judgements, 7 March 2002, II. Formal Requirements, “The Appellant’s Notice of Appeal” (1); ICTR Practice Direction on Formal Requirements for Appeals from Judgements, 15 June 2007. II. Formal Requirements, “The Appellant’s Notice of Appeal” (1).
\(^10\) Regulation 57, ICC Regulations.
\(^11\) Regulation 58, ICC Regulations.
\(^12\) Regulation 58(1) of the ICC Regulations states that: “Having filed an appeal in accordance with regulation 57, the appellant shall file a document in support of the appeal within 90 days of notification of the relevant decision.”
"The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought."\textsuperscript{13}

15. This aspect of Rule 108 reflects the need for trial practitioners to preserve legal errors during trial by objecting to evidence at the time it is offered or filing motions seeking the admission or exclusion of evidence or objecting to procedures which trial counsel believes are erroneous and potentially prejudicial to the accused or to the fairness of the trial. If a legal error was not preserved during the trial proceedings, that can be cause on its own for the Appeals Chamber to refuse to rule on that error by finding the error was waived.\textsuperscript{14}

16. It is extremely important for practitioners to exercise sound judgment and common sense in deciding which issues are worth raising on appeal and which are not. It may well be that a significant legal error occurred in a case but that the error had no effect or very little effect on the verdict ultimately returned.\textsuperscript{15} In such a case, barring some kind of unusual circumstances, the prudent decision is to not raise the error, because even a favourable resolution of it will not change the outcome for the accused. Generally speaking, practitioners who raise every conceivable legal or factual error which might be argued, regardless of its actual impact on the outcome of the case, are wasting their time and, more importantly, the time of the Appeals Chamber. Among other matters, raising all possible errors, despite their ultimate lack of merit, reflects poorly on the practitioner as it suggests the practitioner does not have good judgement or is not exercising good judgement.

17. A practitioner should also carefully consider which issues, of those which do have merit, are the strongest ones; that is, the issues most likely to win on appeal. Although the specific circumstances of cases will

\textsuperscript{13} Rule 108, ICTY RPE. Rule 133, IRMCT RPE.
\textsuperscript{14} This subject will be discussed more thoroughly infra in the section of this Chapter dealing with standards of review on appeal.
\textsuperscript{15} Prosecutor v. Hadžihasanović and Kubura, IT-01-47-A, Appeal Judgement, 22 April 2008, para. 130 ("Further, the Appeals Chamber recalls that ‘[w]here a party alleges on appeal that the right to a fair trial has been infringed, it must prove that the violation caused such prejudice to it as to amount to an error of law invalidating the judgement’. Thus, the element of prejudice forms an essential aspect of proof required of an appellant in relation to the appeal alleging a violation of his fair trial rights.").
vary, it is generally good practice to list the strongest issues first in the Notice of Appeal, followed by the remaining issues. This is not just good advocacy. The reason relates directly to the Appellant’s Brief on Appeal. Under section 4 of the Practice Direction on Appeals, the “grounds of appeal and the arguments must be set out and numbered” in the Appellant’s Brief “in the same order as in the Appellant’s Notice of Appeal” unless otherwise varied with leave of the Appeals Chamber.\(^{16}\) By leading with the strongest issues first, an Appellant’s Brief can quickly create a sense of legitimacy within the Appeals Chamber. An Appellant’s Brief that begins with the most meritorious issues will also be more likely to immediately capture the attention of the Chamber. The Notice of Appeal should be structured with that thought in mind.

18. As a general matter, if a potential ground for appeal is not listed in the Notice of Appeal, it cannot be raised later in the briefs filed on appeal or in oral arguments before the Appeals Chamber. It is extremely important, therefore, that counsel for the Appellant list every potential issue which may be raised in the initial Notice of Appeal.

19. It is always permissible to decide, during the course of the preparation of the appeal briefs, not to raise an issue which was initially identified as a potential issue in the Notice of Appeal. The problems occur when a party fails to timely raise an issue during the appellate process. If that happens, the Trial Judgement on the issues in question becomes final. The Appeals Chamber is barred from reviewing, revising or reversing a conviction or sentence where a party has failed to seize the Appeals Chamber by raising such errors on appeal.\(^ {17}\) No new appeal, except on different grounds or potentially based on newly discovered evidence, can be brought regarding legal or factual errors which were overlooked or negligently not raised during the appeal from the Trial Chamber’s judgement.\(^ {18}\)

A.1 Amending the Notice of Appeal

20. Since the Notice of Appeal must be filed within 30 days after the date of the Trial Judgement, counsel can sometimes overlook an issue or not recognize a potential issue on appeal before the time the Notice of Appeal must be filed.\(^ {19}\) As a result counsel may fail to include it in the Notice of Appeal. If this occurs

\(^{16}\) For the ICC, the “same order” requirement applies only to responses of parties to appeal briefs. See Regulation 59(2), ICC Regulations.

\(^{17}\) See e.g. Prosecutor v. Kajelijeli, ICTR-98-44A-A, Appeal Judgement, 23 May 2005, para. 202; cited in Prosecutor v. Vidoje Blagojević and Dragan Jokić, IT-02-60-A, Decision on Prosecution’s Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005, Partial Dissenting Opinion of Judge Pocar, para. 2. The ICTY and ICTR share the same Appeals Chamber. For the ICC, such principle of finality also exists; see Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-568, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, para. 16.

\(^{18}\) The manner in which new evidence may be introduced on appeal is also discussed \textit{infra}.

\(^{19}\) If the Notice cannot be filed within the initial 30 days, counsel can file a motion seeking additional time with the Appeals Chamber. The motion must demonstrate good cause to grant the additional time; See e.g. Prosecutor v. Blagojević and Jokić, IT-02-60-A, Decision on Vidoje Blagojević’s Motion for Extension of Time in Which to File His Notice of Appeal and on Dragan Jokic’s Motion for Extension of Time in Which to File His Appeal Brief, 14 April 2005 (good cause based on appointment of new counsel on appeal; delay in getting trial record to new counsel); \textit{see also} Rule 127(B), ICTY RPE; see also Regulation 35(1)-(2), ICC Regulations; Prosecutor v. Jean-Pierre Bemba Gombo,
counsel is not wholly without recourse. It is still possible to file a request with the Appeals Chamber seeking leave to amend the Notice of Appeal to include an issue or issues which were left out or overlooked.²⁰

21. A party applying to vary the grounds of appeal must do so by filing a written motion which:

   i. states the specific Rule under which the variation is sought; and,
   ii. the arguments which support the request to vary the grounds of appeal.²¹

22. The rules in relation to the ICC are somewhat different:

   i. An application for variation of grounds of appeal shall state the name and number of the case and shall specify the variation sought and the reasons in support thereof.
   ii. The application for variation shall be filed as soon as the reasons warranting it become known.²²

23. Such a request will not be granted unless counsel can show good cause as to why the issue or issues were not listed in the initial Notice of Appeal.²³

24. When it is necessary to file a Motion Seeking Leave to Amend a Notice of Appeal, counsel must, in that notice, explain precisely what amendments are sought and why, and, with respect to each such amendment, show "good cause" as to why the amendment should be allowed. Generic submissions, which are not specific on these points, may fall short of satisfying these requirements.²⁴

25. The question of whether “good cause” has been shown is necessarily resolved on a case-by-case basis; however, the Appeals Chamber has identified some factors as supporting a finding of good cause, including:

   • the minor nature of the variation such that it does not affect the content of the Notice of Appeal;
   • the fact that the variation has been fully addressed in the appeal and response briefs such that the opposing party will not be prejudiced if the variation is allowed;
   • the opposing party not objecting to the variation; and,

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²⁰ Practice Direction on Appeals, II, 2 and 3, "Variation on the Grounds of Appeal”. Rule 154, IRMCT RPE; see also Regulation 35, ICC Regulations.
²¹ Practice Direction on Appeals II, 2(a) and (b).
²² Regulations 61(1)-(2), ICC Regulations.
²³ Rule 108, ICTY RPE provides that “The Appeals Chamber may, on good cause being shown by motion, authorize a variation of the grounds of appeal.” Rule 154, IRMCT RPE.
• the fact that permitting the variation will bring the Notice of Appeal into conformity with the appeal brief.\textsuperscript{25}

26. In addition, good cause justifying a variation to the Notice of Appeal requires a showing as to why the party seeking the amendment was unable to raise the new ground in a timely fashion. As noted in \textit{Kupreškić}, “Appellants should not be permitted to side-step procedures fixed within the Statute and the Rules. Nor should they be given the opportunity to continue to point out errors as and when they believe they have been identified.”\textsuperscript{26}

27. Requested amendments to the Notice of Appeal which do not seek to broaden the scope of the appeal beyond that raised in the original Notice of Appeal or are meant to rectify “inadvertence or negligence by an Appellant’s counsel to plead a ground of appeal with sufficient clarity” will generally be allowed, upon request, as falling within the definition of “good cause” to permit the amendment.\textsuperscript{27} ICTY jurisprudence has also held that “inadvertence or negligence” by an Appellant’s counsel to plead a ground of appeal with sufficient clarity should not restrict an Appellant’s right to raise that ground of appeal where that ground could be of substantial importance to the success of an appeal, such as to lead to a miscarriage of justice if it is excluded.\textsuperscript{28}

28. Finally, the more time that elapses between the filing of the Notice of Appeal and a request for a variation to the Notice of Appeal, the less likely it will be that the Appeals Chamber will find “good cause” for permitting the amendment. However, a variation may be permitted at any point if good cause is established.\textsuperscript{29}

\textbf{B. Contents and Requirements of the Appellate Briefs}

29. After the Notice of Appeal is filed the Appellant must prepare the Appellant’s Brief on Appeal which is the document in which any legal and factual errors will be raised for the Appeals Chamber’s consideration. Because the Prosecution can appeal from an acquittal and/or a sentence imposed by the Trial Chamber, there are often two Appellant’s Briefs on Appeal; one filed by the Prosecution and one by the accused.

\begin{footnotesize}
\textsuperscript{25} \textit{Prosecutor v. Momir Nikolić}, IT-02-60/1-A, Decision on Appellant’s Motion to Amend Notice of Appeal, 21 October 2004, p. 3.
\textsuperscript{27} \textit{Prosecutor v. Kordić and Čerkez}, IT—95-14/2-A, Decision Granting Leave to Kariod Kordic to Amend His Grounds of Appeal, 9 May 2002, para. 5.
\textsuperscript{28} See e.g. \textit{Prosecutor v. Blagojević and Jokić}, IT-02-60-A, Decision on Prosecution’s Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005, para. 4.
\textsuperscript{29} \textit{Prosecutor v. Jelisić}, IT-95-10-B.3. Strategic Considerations for Appellate Briefs, A, Appeals Judgement, 5 July 2001, para.18 (amendment added during the oral argument on appeal). Similarly, the ICC Appeals Chamber has attempted to balance late applications against the showing of good cause; see also \textit{Prosecutor v. Ahmad Al Faqi Al Mahdi}, ICC-01/12-01/15-249, Decision on the Trust Fund for Victims’ request for time extension, 24 November 2017, para. 6.
\end{footnotesize}
B.1 The Appellant’s Brief

30. The Appellant’s Brief on Appeal is, with extremely rare exception, the most important document filed on appeal. It is the document which defines the issues the Appeals Chamber will consider, and it is the only opportunity for the Appellant to set forth all the arguments which are being pursued on appeal. Even though the Appeals Chambers will provide an opportunity for the parties to present an oral argument after all the briefing on appeal is completed, appeals are usually won or lost based on the written briefs. They are rarely won based only on the oral arguments.

31. The Appellant’s Brief must be filed within 75 days of the filing of the Notice of Appeal. If the appeal is only raising a sentencing error and no other issues, the Appellant’s Brief must be filed within 30 days of the filing of the Notice of Appeal. The Respondent must file the Respondent’s Brief within 40 days after the filing of the Appellant’s Brief. In an appeal which concerns only sentencing, the Respondent’s Brief must be filed within 30 days of the filing of the Appellant’s Brief.

32. Since cases at the ICTY usually involve complex legal and factual arguments, it is possible to obtain an extension of time to file appellate briefs, however, only based upon a showing of good cause as to why the brief cannot be filed within the time limits required by the rules. Although the cases necessarily vary significantly based on individual circumstances, in general, the following may constitute good cause for obtaining additional time to file an appellate brief:

- the substitution of new counsel on appeal;

30. Rule 113, ICTY RPE permits an Appellant to file a Reply Brief to respond to any arguments raised by opposing counsel in its Response Brief, but that is limited to issues raised in the Response Brief. Rule 140, IRMCT RPE. As for the ICC, an appellant’s reply is permitted if “the Appeals Chamber considers it necessary in the interests of justice”. Regulation 60, ICC Regulations. For the interpretation of “interests of justice” in this context, see Prosecutor v. Jean-Pierre Bemba Gombo et al., ICC-01/05-01/13-2182, Request for leave to reply to “Prosecution’s Consolidated Response to the Appellants’ Documents in Support of Appeal”, 24 July 2017, paras. 1, 12-13.

31. Rule 111(A), ICTY RPE. Rule 138, IRMCT RPE. At the ICC, the appeal brief shall be filed within 90 days of the notification of the impugned decision. Regulation 58, ICC Regulations.

32. Rule 111(A), ICTY RPE. Rule 138, IRMCT RPE. However, the ICC has not made this distinction.

33. Rule 112(A), ICTY RPE; Rule 139, IRMCT RPE. At the ICC, the response must be filed within 60 days of the notification of the appeal brief. Regulation 59(1), ICC Regulations.

34. See Practice Direction on Appeal, 7 March 2002, Ill ‘General Requirements’, para. 16 (“a pre-appeal judge or the Appeals Chamber may vary any time limit or recognize, as validly done any act done after the expiration of a time limit prescribed in this Practice Direction”).
• the extraordinary factual and legal complexity of a case;
• the length and complexity of the trial record;
• the number of issues raised on appeal; and/or,
• the legally unique character of issues raised on appeal.35

33. The ICC Appeals Chamber also permits extensions based upon “good cause”. According to its jurisprudence, good cause can be shown by: (i) the complexity of the issues and significance of issues of law and fact;36 (ii) the existence of competing work obligations and the need for internal discussion;37 and, (iii) any difficulty for defence counsel to visit the accused in detention in order to take instructions.38

34. The Prosecution, whether it is the Appellant or Respondent, must include a declaration in its brief that all disclosure has been completed “with respect to the material available to the Prosecutor at the time of filing the brief.”39 In practice, disclosure can still continue on appeal, and must continue regarding exculpatory evidence, which the Prosecutor has a continuing obligation to provide to the accused throughout the proceedings, including on appeal.40

35. The Appellant, be it the Prosecution or the Accused, is not required to file a Reply Brief to the Respondent’s Brief, but is permitted to do so under Rule 113.41 A Reply Brief must be filed within 15 days of the filing of the Respondent’s Brief. In cases involving only sentencing errors a Reply Brief must be filed within 10 days of the Respondent’s Brief.42

36. All appeals must be based on the record of the trial proceedings—which is the testimony and documents which were admitted at trial. That record is certified by the Registrar.43 This means that with the exception of instances in which a showing has been made under Rule 115 to present additional evidence

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36 Prosecutor v. Jean-Pierre Bemba Gombe et al., ICC-01/05-01/13-2161, Decision on the Prosecutor’s request for an extension of page and time limits for her consolidated response to the documents in support of the appeals, 18 May 2017, para. 12; see also The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11-1971, Decision on the requests for time and page extension, 18 September 2015, para. 6.
38 Prosecutor v. Simone Gbagbo, ICC-02/11-01/12-60, Decision on Ms Simone Gbagbo’s request for extension of time for the filing of a response to the document in support of the appeal, 28 January 2015, para. 10.
39 Rules 111(B) and 112(B), ICTY RPE. Rules 138(B) and 139(B), IRMCT RPE. The ICC system has not included this requirement.
40 Rule 68, ICTY RPE. Rule 73, IRMCT RPE. Article 67.2, Rome Statute.
41 Rule 113, ICTY RPE.
42 Ibid.
on appeal, the Appellant and Respondent must base any legal or factual arguments on the record of the trial and nothing else.

37. The purpose of the Appellate Brief is to persuade the Appeals Chamber to find a factual and/or legal error, to find the error was prejudicial to the accused and, therefore, to convince the Appeals Chamber to grant the relief the Appellant is seeking. Clear, concise, well-organized appellate briefs which follow a logical structure are most likely to fulfil all these requirements.

38. If a party’s brief is unclear or ambiguous, a designated Pre-Appeal Judge or the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include:

- an order for clarification;
- an order for re-filing (the most likely sanction);
- rejection of the filing; or,
- dismissal of the submissions contained in the filing.

39. There are formal requirements regarding the structure of the brief and the information which must be contained in it. The brief must contain an introduction with a concise summary of the relevant procedural history including the date of the judgement as well as the case number and date of any interlocutory filing or decision relevant to the appeal, the arguments in support of each ground of appeal, including, but not limited to:

- legal arguments, giving clear and precise references to provisions of the Statute, the Rules, the jurisprudence of the ICTY or other legal authorities relied on;
- factual arguments and, if applicable, arguments in support of any objections as to whether a fact has been sufficiently proven or not, with precise reference to any relevant exhibit, transcript page, decision or paragraph number in the judgement;
- arguments in support of the submitted causal link between any alleged error on a question of law invalidating the decision and/or any alleged error of fact which has occasioned a miscarriage of justice; and,
- the precise relief sought.

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44 Rule 115, ICTY RPE will be discussed in Section E of this Chapter.
45 Practice Direction, IV, ‘Non-Compliance with the Requirements’ para. 17. See, similarly, Regulation 29, ICC Regulations.
46 See Practice Direction on Formal Requirements for Appeals From Judgement, 7 March 2002, issued pursuant to Rule 19(B). As for the ICC, see generally Regulation 58, ICC Regulations. However, the ICC Appeals Chamber has deemed it “appropriate, in the interests of justice” to consider incomplete appeal briefs; Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-259-Red2, Judgment on the appeal of the victims against the “Reparations Order”, 8 March 2018, para. 82.
47 Practice Direction on Appeal, II, 4(a) “The Appellant’s Brief”.
48 Ibid., and see Prosecutor v. Halilović, IT-01-48-A, Appeals Judgement, 16 October 2007, paras. 12, 120 (citing general rule and dismissing the Prosecution allegation that the Trial Chamber erroneously excluded probative evidence because it subjected the evidence to an inappropriate standard of proof because the Prosecution failed to refer to specific portions of the trial record in support of this contention).
40. Finally any brief filed with the Appeals Chamber must contain a Book of Authorities; a separate compilation setting out references and proper citations to all authorities relied upon. The Book of Authorities must contain a Table of Contents describing each document and exhibit, including the date and reference. All legal authorities must be provided in “an authorized version of the authority in question, complete with an English or French translation, if the original is not in one of the languages of the International Tribunals.”

41. Where filings of the parties refer to passages in a judgement, decision, transcripts, exhibits or other authorities, they shall indicate precisely the date, exhibit number, page number and paragraph number of the text or exhibit referred to. Abbreviations or designations used by the parties in their filings must be uniform throughout the brief. Pages and paragraphs must also be numbered consecutively from the beginning to the end of the brief.

B.2 Respondent’s Brief and Reply Brief

42. As with the Appellant’s Brief, there are formal requirements for the contents of the Respondents’ Brief and any Reply Brief.

43. The Respondent shall file, in accordance with the Statute and the Rules, a Respondent’s Brief containing each ground of appeal, in the following order:

   i. a statement on whether or not the relief sought by the Appellant is opposed;
   ii. a statement on whether or not the ground of appeal is opposed; and
   iii. arguments in support of these statements.

44. The arguments in support of the above statements include:

   • legal arguments, including clear and precise references to the relevant provisions of the Statute, the Rules, the jurisprudence of the Tribunal or other legal authorities relied upon;
   • factual arguments including, if applicable, the arguments in support of the assertion that a fact has been sufficiently proven or not, with precise reference to any relevant exhibit, transcript page, decision or paragraph number in the judgement; and,

50 Ibid., para. 8.
51 Ibid., para. 9. Regulation 23(3), ICC Regulations.
53 Practice Direction, “The Respondent’s Brief”.

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arguments pertaining to the submitted causal link between any alleged error on a question of law invalidating the decision and/or any alleged error of fact which has occasioned a miscarriage of justice.\footnote{Ibid.}

45. The statements and the arguments must be set out and numbered in the same order as in the Appellant’s Brief and shall be limited to arguments made in response to that brief. A Respondent’s Brief is not a vehicle for raising substantive issues which the Appellant has not raised. However, if an Appellant relies on a particular ground to reverse an acquittal, the Respondent may support the acquittal on factual or legal grounds not raised in the Appellant’s Brief, if those grounds are supported by the trial record.\footnote{Ibid.}

46. It is not mandatory for an Appellant to file a Reply Brief to the Respondent’s Brief; however, it is very rarely good practice not to do so. When an Appellant files a Reply Brief, it is limited to arguing in reply to the points raised in the Respondent’s Brief which must be set out and numbered in the same order as in previous briefs.\footnote{Practice Direction, “The Appellant’s Reply Brief”. See also Regulation 59(2), ICC Regulations.} A Reply Brief may not raise new arguments which were not raised in the Appellant’s Brief or in the Respondent’s Brief.

\section*{B.3 Strategic Considerations for Appellate Briefs}

47. Within this structure there is plenty of room for creativity and variation given the particular circumstances of an individual case. The order required by the Practice Direction simply requires that the brief begin with a summary of the procedural background of the case, followed by presentation of the legal and factual arguments, and conclude with a description of the relief sought. Practitioners can structure individual legal arguments in the manner which works best to present those arguments in a persuasive way.\footnote{Practice Direction on Appeal, II, 4. Regulation 60(2), ICC Regulations.} The only real limit in the structuring of the brief is that the grounds of appeal and the arguments must be set out and numbered in the same order as in the Appellant’s Notice of Appeal, unless otherwise varied with leave of the Appeals Chamber.\footnote{For further discussion on how to present arguments in a persuasive way see Chapter V “Structuring a Legal Argument”.

\addcontentsline{toc}{section}{B.3 Strategic Considerations for Appellate Briefs}
48. It is important to provide a summary of the facts presented at trial to provide context for the legal errors which are raised and to show, assuming a legal error is found by the Appeals Chamber, that the error was prejudicial and requires whatever relief it is that the Appellant is seeking.59

49. Defence counsel should not ask the Appeals Chamber to re-weigh the significance of the facts as presented at trial and to come to factual conclusions which are different from those found in the Trial Chamber.60 The Appeals Chamber may not, within the applicable rules, re-weigh the factual evidence de novo.61 If a witness was found to be credible by the Trial Chamber, for example, a practitioner cannot argue on appeal that the Appeals Chamber should find the witness was not credible. Credibility findings, with extremely rare exception, belong solely within the province of the Trial Chamber.62 The facts, as found by the Trial Chamber, are to be relied upon and discussed as a means of presenting arguments that any asserted legal errors were prejudicial to the outcome in the case.

50. This leads to another important point regarding persuasive appellate advocacy. The proper standard of appellate review must be discussed in the brief. When writing an appellate brief, as opposed to other forms of written legal advocacy, the standard of appellate review can be presented (and often is) in a separate area near the beginning of the brief. It can also be discussed with each individual legal or factual issue in the section of the brief discussing that issue. As with all legal advocacy, the precise

59 Examples of written appellate arguments can be found in the DVD which accompanies this Manual.
60 The only exception to this is when the issue on appeal is that the Trial Chamber engaged in a factual error, which will be separately discussed in Section C.2, “Standard applicable to errors of fact”, of this Chapter.
61 See Section C.2, “Standard applicable to errors of Fact”, infra for further discussion on this issue.
manner in which an argument is presented will depend, to some extent, on the facts of the case and the nature of the argument which is being presented. When an appellate case lends itself to such a structure, it can be good practice to present a section discussing all relevant standards of appellate review at the beginning of the appellate brief in a separate section. Thereafter, as each individual legal or factual argument is raised, reference can be made back to that section, noting in a short sentence or two which standard applies to the particular legal or factual argument in question.

51. It is mandatory to always present a discussion as to why a particular legal or factual error was prejudicial to the Accused. No matter how egregious a legal or factual error may be, if it had no significant effect on the outcome of the case, then it was not prejudicial to the Accused and does not constitute cause to reverse a conviction, order a retrial, or reduce a sentence.

C. Standards of Review on Appeal

52. The nature of the burden of proof at trial necessarily affects the manner in which claimed errors in the finding of the facts are assessed in any subsequent appellate review of the Trial Chamber’s factual and/or legal findings. Additionally, as will be explained below, the burden of proof on appeal is different for the Prosecution and the Defence in establishing a factual error which could lead to a reversal of the Trial Chamber’s judgement; a requirement which reflects the rule that the Prosecution always bears the burden of proof at trial.

C.1 Standard Applicable to Errors of Law

53. The standards for appellate review of a Trial Chamber’s judgement at the ICTY and ICTR are well established. A party alleging an error of law must identify the claimed error, present arguments in support of that claim of error, and explain how the error serves to invalidate the judgement. Errors of law which have “no chance of changing the outcome of a decision may be rejected on that ground.”

54. The Appeals Chamber reviews the Trial Chambers’ findings of law de novo. If the Appeals Chamber finds an error of law arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard, apply the correct standard to the evidence contained in the trial record, where necessary, and determine whether it is itself convinced beyond a reasonable doubt as to the findings challenged by the Appellant, before such findings may be confirmed on appeal. (see case box Zigiranyirazo case - Standards of review of errors of law).

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C.2 Standard Applicable to Errors of Fact

55. The appellate standards of review for claimed factual errors are quite different. An accused alleging errors in the factual findings made by the trial chamber must not only demonstrate the factual error but also show that the error of fact resulted in a miscarriage of justice.\textsuperscript{65} The “miscarriage of justice” standard is a high one. It has been defined as “a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of a crime.”\textsuperscript{66}

56. The Appeals Chambers applies a standard of “reasonableness” when reviewing claimed errors of fact in the trial verdict. The Appeals Chamber will substitute its own factual finding for that of the Trial Chamber only when “no reasonable trier of fact could have reached the original decision.”\textsuperscript{67} In determining whether or not a Trial Chamber’s factual finding was reasonable, the Appeals Chamber “will not lightly disturb findings of fact by a Trial Chamber.”\textsuperscript{68} This is so because, at the ad hoc Tribunals and the ICC, an appeal is not a new trial.\textsuperscript{69} To the contrary, significant deference is given to the Trial Chamber’s factual determinations because the Trial Chamber has the advantage of observing witness’s testimony first-hand and assessing the demeanour and relative credibility of individual witnesses.\textsuperscript{70} As the Appeals Chamber in Kupreškić stated:

“Pursuant to the jurisprudence of the [International] 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. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is ‘wholly erroneous’ may the Appeals Chamber substitute its own finding for that of the Trial Chamber.”\textsuperscript{71}


\textsuperscript{70} Prosecutor v. Furundžija, IT-95-17/1-A, Appeal Judgement, 21 July 2000, para. 37.

\textsuperscript{71} Prosecutor v. Kupreškić et al., IT-95-16-A, Appeal Judgement, 23 October 2001, para. 30; Prosecutor v. Halilović, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 10. It should be noted that although the ICC has adopted the same “reasonableness” test, it nonetheless included the lack of legal reasoning. See Prosecutor v. Jean-Pierre Bemba-Gombo et al., ICC-01/05-01/13-2275-Red, Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidèle Babula Wandu and Mr. Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, para. 98 (“In particular if the supporting evidence is, on its face, weak, or if there is significant contradicting evidence, deficiencies in the Trial Chamber’s reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was such that no reasonable trier of fact could have reached.”)
57. Put another way, an accused who has had the benefit of the application of the reasonable doubt standard throughout his trial has a very high appellate standard of review to meet when, on appeal, he seeks reversal of the Trial Chambers’ factual findings.

58. The same standard of reasonableness and the same deference to the factual findings of the Trial Chamber apply when the Prosecution brings an appeal against an acquittal or a sentence, based on alleged factual errors in the Trial Chamber. The Appeals Chamber will only hold that an error of fact was committed if it determines that no reasonable trier of fact could have made the challenged factual finding. However, since the Prosecution has the burden of proof at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution.

As the Appeals Chamber in Bagilishema explained:

“Because the Prosecution bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber’s factual errors create a reasonable doubt as to his guilt. The Prosecution faces a more difficult task. It must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused’s guilt has been eliminated.”

59. In this regard the Prosecution is always held, as it properly must be under the relevant international law, to its burden to prove the accused guilty beyond a reasonable doubt. It is not relieved of that burden when it seeks on appeal to overturn a factual finding which is beneficial to the accused.

C.3 Procedural Error

60. At the ICC both the Prosecutor and the convicted person may appeal the Trial Chamber’s Judgement on the basis of “procedural error” under Article 81 of the Rome Statute. Procedural errors often occur “in the proceedings leading up to an impugned decision” and “may be based on events which occurred during the trial proceedings and pre-trial proceedings.”


75 Article 81, Rome Statute.

61. Examples of procedural errors include a Trial Chamber’s refusal to permit the questioning of a witness in a particular manner, refusal to allow access to certain reports, or refusal to permit use of certain documents during cross-examination.\(^77\) The Appeals Chamber will not interfere with the Trial Chamber’s exercise of discretion regarding such procedures, however, “merely because the Appeals Chamber, if it had the power, might have made a different ruling”\(^78\)

62. In the *Bemba* case at the ICC, the Appeals Chamber acquitted Mr. Bemba in part on procedural grounds.\(^79\) The ICC Appeals Chamber stated:

> “[A]n allegation of a procedural error may be based on events which occurred during the pre-trial and trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a decision [...] if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the decision would have substantially differed from the one rendered.”\(^80\)

63. In light of *Bemba*, practitioners should always consider raising procedural error claims when proceedings leading up to the impugned decision or events that occurred during the trial or pre-trial proceedings were arguably prejudicial to the result in the case.

**D. Interlocutory Appeals**

64. Pursuant to Rule 72 ICTY RPE, there are certain “preliminary motions” which must be made, if they are to be made at all, within a short period of time after the accused’s initial appearance. These include motions which:

- challenge the jurisdiction of the tribunal;
- allege defects in the form of the indictment;
- seek the severance of counts joined in one indictment or seek separate trials for accused who are joined for trial; or,
- raise objections based on the refusal of a request for assignment of counsel.\(^81\)


\(^{80}\) *Ibid.* para. 47.

\(^{81}\) Rule 72(A), ICTY RPE. Rule 79, IRMCT RPE.
65. The accused has the right to bring an interlocutory appeal from the denial of a motion challenging the jurisdiction of the Tribunal, as does the Prosecution if such a motion is granted. The interlocutory appeal must be filed within 15 days of the ruling on the motion challenging jurisdiction.

66. An interlocutory appeal from rulings on any of the other preliminary motions can be brought only if the Trial Chamber grants certification to appeal. The party seeking the certification must convince the Trial Chamber that 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 “an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

67. In practice, even though the remaining Rule 72 preliminary motions are not accompanied by an automatic right to an interlocutory appeal, they usually involve issues which are so fundamental to the anticipated trial—such as the sufficiency of the indictment or severance of accused due to a conflict of interest—that Defence counsel should be able to make a sufficient showing that the issues will affect the fair and expeditious conduct of the trial or its outcome and should therefore be immediately resolved by the Appeals Chamber before time and money is spent on the trial.

68. At the ICC decisions subject to an interlocutory appeal include:

- decision with respect to jurisdiction or admissibility;
- decision granting or denying release of the person being investigated or prosecuted;
- decision *proprio motu* of the Pre-Trial Chamber under article 56(3), Rome Statute; or,
- decision that 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 Pre-Trial or Trial

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82 Rule 72(B)(i), ICTY RPE. Rule 79(B)(i), IRMCT RPE. The only permissible bases for challenging the jurisdiction of the ad hoc Tribunals are that the accused are not any of the persons indicated in Articles I, 6, 7, and 9 of the ICTY Statute; the charges did not occur within the geographic area indicated in Article 1, 8 and 9 of the ICTY Statute, the charges occurred either before or after the time period which constitutes the ad hoc Tribunals mandate under Article 1, 8, and 9 of the Statute and/or the charges do not constitute any of the violations falling under Article 2, 3, 4, 5, or 7 of the Statute.

83 Rule 72(C), ICTY RPE. Rule 79(C), IRMCT RPE.

84 Interlocutory appeals before the ICC do not require leave, except made under Article 82(1)(d) of the Rome Statute. See Rules 154 and 155, ICC RPE.

85 Rule 72(B)(i), ICTY RPE. Rule 79(B)(i), IRMCT RPE; see also Rule 155(1), ICC RPE.

86 Examples of filings which successfully obtained leave to file an interlocutory appeal are contained on the DVD which accompanies this Manual.
Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.87

69. Trial Chamber decisions on other motions brought before or during trial are not subject to interlocutory appeal. Factual or legal errors occasioned by erroneous rulings on those motions will be resolved as part of the appeal from the Trial Judgement, assuming they resulted in prejudice to the accused and/or affected the verdict which was returned.88

70. Under Rule 73 ICTY RPE, however, if the resolution of an issue raised in such motions affects the fair and expeditious conduct of the proceedings or the outcome of the trial and the Trial Chamber agrees that immediate resolution of the issue by the Appeals Chamber will “materially advance the proceedings”, an interlocutory appeal may be brought89 if the Trial Chamber, in the exercise of its discretion, agrees to certify the issue for interlocutory appeal.90

71. In practice, even when an important point of law is raised, the effect of Rule 73(B) is to preclude certification for interlocutory appeal unless the party seeking certification establishes that both of the above conditions are met.91 A request for certification to bring an interlocutory appeal is not the appeal itself and is not concerned with whether the decision was correctly reasoned or not. That is a matter for the Appeals Chamber to determine. The request is directed only towards demonstrating that the two requirements in Rule 73(B) have been satisfied, after which the Trial Chamber may decide to certify an interlocutory appeal.92

72. This final point is important as a party is not entitled to an interlocutory appeal from pre-trial and trial motions as a matter of right no matter how potentially significant the issue may be.93 The Trial Chamber’s decision to grant or deny a request for certification is within the exercise of its discretion; it is free to deny certification even if the two prongs of Rule 73(B) are met.94

87 Article 82(1)(a)-(d), Rome Statute.
88 See Section C, supra, describing the standards of review on appeal.
89 Rule 73(B), ICTY RPE. Rule 80(B),IRMCT RPE. Article 82(1)(d), Rome Statute.
90 Rule 73(B), ICTY RPE. Rule 80(B),IRMCT RPE. Article 82(1)(d), Rome Statute.
92 Prosecutor v. Slobodan Milošević, IT-02-54-T, Decision on Prosecution’s Request for Certification of Appeal Under Rule 73(B), 18 January 2006, p. 1; Prosecutor v. Milutinović et al., IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo’s Expert Report, 30 August 2006, para. 8 (denying request to certify Trial Court’s decision to exclude expert report on the basis that the prosecution had failed to make a satisfactory showing as to how the resolution of that issue would “materially advance these proceedings” emphasis in original).
93 Prosecutor v. Prlić et al., IT-04-74-AR73.18, Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Motion for Reconsideration of Decision of 21 January 2010 and Application of Rule 73(D) of the Rules to Prlić’s Defence, 20 October 2010, para. 3.
94 The denial of a request for interlocutory appeal does not prevent counsel from raising the issue in an appeal from the subsequent verdict.
73. The practitioners’ job, if the issue is of importance to the accused’s case, is to convince the Trial Chamber that certification should be granted, which is done by the filing of a written motion.\textsuperscript{95} The Trial Chambers at the ICTY usually grant or deny such motions without seeking any oral argument from the parties; however oral argument may sometimes be requested if the Trial Chamber feels argument will assist it in resolving the issue. A party is always free to ask for the opportunity to present oral argument, though most Trial Chambers will resolve the issue without it.

74. There are several reasons why a Trial Chamber, given the particular circumstances in the case before it, may or may not elect to grant a motion to certify a legal issue for interlocutory appeal. Certification has been denied, for example, in cases involving judgements of acquittal entered under Rule 98\textsuperscript{96} or when certification was requested at an advanced stage of the proceedings.\textsuperscript{97} Certification has been granted, on the other hand, when the interlocutory appeal is from a decision denying the accused’s motion to replace his lead and co-counsel,\textsuperscript{98} granting a prosecution request to re-open its case\textsuperscript{99} or seeking clarification of the scope of the expected trial evidence.\textsuperscript{100}

75. Requests for certification to file an interlocutory appeal must be filed immediately after return of the impugned decision.\textsuperscript{101} If the impugned decision was made orally in court, the time limit begins to run from the date of the oral decision unless:

1. the party challenging the decision was not present or represented when the decision was made, in which case the time limit begins to run from the date on which the party is first notified of the decision; or,
2. the Trial Chamber states that a written decision will follow the oral one; in which case the time limit runs from the date of the written decision.\textsuperscript{102}

\textsuperscript{95} The motion must be filed within 7 days of the impugned decision, oral ruling or notice of the oral ruling. Rule 72(C), ICTY RPE. Rule 79(C), IRMCT RPE.
\textsuperscript{96} \textit{Prosecutor v. Blagojević and Jokić, IT-02-60-T}, Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber’s Judgement on Motions for Acquittal Pursuant to Rule 98 bis, 23 April 2004, para. 9 (Rule 73(B) applies to evidentiary and procedural matters, not judgements of acquittal returned under Rule 98 bis and (proper procedure to appeal 98 bis acquittal is to appeal pursuant to Rule 108 regarding appeals from judgements); see also \textit{Prosecutor v. Jelisić, IT-95-10-T}, Prosecution’s Notice of Appeal, 21 October 1999 (appealing under Rule 108 from judgement of acquittal entered under Rule 98 bis).
\textsuperscript{97} \textit{Prosecutor v. Blagojević and Jokić, IT-02-60-T}, Decision on Request for Certification to Appeal the Trial Chambers Decision on Vidoje Blagojević’s Oral Request and Request for the Appointment of an Independent Counsel for this Interlocutory Appeal Should Certification be Granted, 2 September 2004, page 6 (impugned decision denying Accused his right to testify under oath arose near close of trial thus no basis to find interlocutory appeal would materially advance the proceedings).
\textsuperscript{98} \textit{Prosecutor v. Blagojević and Jokić, IT-02-60-T}, Decision on Vidoje Blagojević’s Request for Certification, 25 July 2003 (decision affects fair, expeditious conduct of trial and requires immediate resolution).
\textsuperscript{99} \textit{Prosecutor v. Gotovina et al., IT-06-90-T}, Decision on Cermak and Markac Defence Requests for Certification to Appeal the Trial Chamber Decision of 21 April 2010 to Reopen the Prosecution’s Case, 10 May 2010.
\textsuperscript{100} \textit{Prosecution v Haradinaj et al., IT-04-84bis-PT}, Decision on Application on Behalf of Ramush Haradinaj for Certification Pursuant to Rule 73(B), 3 February 2011.
\textsuperscript{101} At the ICC, an appellant shall “make a written application to the Chamber . . . within five days of being notified of that decision”. Rule 155(1), ICC RPE. At the ICTY the filing must occur within seven days. Rule 72(C) ICTY RPE.
\textsuperscript{102} Rule 73(C), ICTY RPE. Rule 79(C), IRMCT RPE.
Interlocutory appeals are intended to resolve, early on in the trial process, legal issues which may affect the entire conduct of the trial or portions of the trial or which may result in an unfair trial for one of the parties. What those issues might be varies significantly from case to case. Because interlocutory appeals, which are discretionary, usually arise near the beginning of the trial or during the trial itself, the time frame for raising and resolving these issues is purposively short so as to avoid any undue delay in the trial proceedings. On the other hand, interlocutory appeals serve the laudatory function of resolving legal issues, which may significantly affect the outcome of trial depending on how they are determined, at an early stage of the proceedings, before the trial has been infected by undue prejudice to a party. Early resolution of such issues avoids the potential waste of time and resources which could be occasioned by delaying their resolution until the appeal brought from the final verdict after a completed trial.

E. New Evidence on Appeal

On occasion, a party may discover new evidence after a verdict has been returned and the case is already pending on appeal. Rule 115 at the ICTY allows for the presentation of new evidence on appeal, but only under certain circumstances. This is because, as noted above, an appeal is not a re-trial and cannot be used to fill in gaps or fix mistakes, in hindsight, that could have been prevented at the time of trial. Rule 115 provides that a party may make a motion to the Appeals Chambers to present new evidence during the appeal process. The relevant Practice Direction on Appeal requires that such a motion must, “in accordance with the Statute and Rules,” contain:

i. a precise list of the evidence the party is seeking to have presented;
ii. each ground of appeal to which the evidence relates and, where applicable, a request to submit any additional grounds of appeal based on such evidence;
iii. arguments in relation to the requirement of non-availability at trial; and,
iv. arguments in relation to the requirement that the admission of the evidence is in the interests of justice.

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103 See Article 84(1)(a), Rome Statute.
104 This rule at the ICTY is different from many civil law jurisdictions where an appeal may well be a re-trial. For a very thorough discussion of the differences between international criminal law as currently practised and the civil law tradition see C. Buisman, M. Bouazdi, M. Costa, “Principles of Civil Law”, in Principles of Evidence in International Criminal Justice (K. Kahn, C. Buisman, C. Gosnell) Oxford University Press, New York 2010.
105 Prosecutor v. Halilovic, IT-01-48-A, Appeal Judgement, 22 March 2006, para. 10. The ICC chambers have not established such a rule.
106 Rule 115, ICTY RPE provides: A party may apply by motion to present additional evidence before the Appeal Chamber. Such motion shall (1) clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed and (2) must be served on the other party and filed with the Registrar not later than 30 days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for the delay. See also Regulation 62, ICC Regulations, which requires the filing of an application setting out: “(a) [t]he evidence to be presented; (b) [t]he ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.”
107 Any relevant exhibits and documents, when necessary, must also be translated into one of the official languages of the Tribunal. Practice Direction on Appeal, II "Additional Evidence", para. 11.
78. As is clear from these rules, new evidence may not be introduced on appeal as a matter of right. The party offering the evidence must establish good reason for failing to produce the evidence at trial before it will be admitted on appeal. Generally, “good cause” will be found when the evidence was:

- unavailable at trial;
- discovered for the first time only after the trial was completed; or,
- other good cause as to why the evidence could not have been presented during the trial proceedings.

79. The opposing party is permitted, when new evidence is admitted on appeal, to present evidence to rebut it, though a party is not required to do so. The parties are also permitted to file supplemental briefs on the impact of the additional evidence, if any, on the verdict which was returned in its absence.\textsuperscript{108}

80. If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine “if it could have been a decisive factor in reaching the decision at trial.”\textsuperscript{109} If it could have been decisive, the Appeals Chamber will consider the additional evidence and any rebuttal materials along with that already on the record to arrive at a final judgement. The Appeals Chamber may also entertain oral argument following the receipt of the new evidence to assist it in rendering its judgement and/or to ask any questions it may have of the parties.

81. The ICTY rules also provide for a review process when new evidence is not discovered until after the appellate process is completed and the case is closed.

82. Rule 119 provides that when a new fact is discovered by a party after both the trial and appellate proceedings in a case have concluded, and that fact could not have been discovered through the exercise of due diligence prior to the final judgement, the Defence or “within one year after the final judgement has been pronounced, the Prosecutor” may ask the Appeals Chamber for review of the judgement.\textsuperscript{110} Proceedings under Rule 119 are not technically part of the appellate process, but rather a part of what is generally known as post-conviction review.\textsuperscript{111}

F. Appeals Hearing

83. After all the briefs are filed on appeal it is the practice at the ICTY to provide the parties with the opportunity to present oral argument as a matter of right.\textsuperscript{112} The parties are informed of the date for

\textsuperscript{108} Rule 115(A), ICTY RPE, also specifying a time limit of 15 days, from the close of new evidence on appeal, for the filing of such briefs. Before the ICC, the opposing party shall file responses “within a time limit specified by the Appeals Chamber”; Regulation 62(3), ICC Regulations.

\textsuperscript{109} Rule 115(B), ICTY RPE; Rule 142(C), IRMCT RPE. Article 84(1)(a)(ii), Rome Statute

\textsuperscript{110} See Rule 146, IRMCT RPE. At the ICC, revision for a new fact is permissible only for trial judgments. Regulation 66(1), ICC Regulations.

\textsuperscript{111} See Chapter XII “Post-Conviction”, Section E. “Post-Conviction Review” for further discussion on this issue.

\textsuperscript{112} The exception, as noted earlier, is interlocutory appeals in which oral argument is only rarely entertained. In contrast, the ICC has not had such practice so far.
the hearing well in advance and the amount of time which will be given to each party to present its arguments. It has been the practice for the Appeals Chamber to also advise the parties if they have any specific questions or issues it would like the parties to address during oral argument. The practice of advising the parties of such questions is of huge benefit, as it permits the parties to know ahead of time what issues are of particular concern to the Appeals Chamber and to structure oral arguments accordingly.

F.1 Strategic Considerations for Oral Argument

84. The key to presenting an effective oral argument in an appellate proceeding, as in any legal proceeding, is thorough preparation. Counsel should review the facts and legal authorities which underlie all of the issues raised on appeal. Counsel should be thoroughly familiar with the standard of review applicable to those issues, the trial record, all legal authorities relevant to counsel’s case, all those cited by the opposing party, and any authorities raised by the Appeals Chamber. When the Appeals Chamber informs counsel ahead of time of questions or issues it would like addressed during argument, counsel must always be thoroughly prepared to answer those specific questions.

85. The purpose of oral argument is to persuade the Appeals Chamber, in conjunction with the written arguments already provided to them in the appellate briefs, to rule in favour of counsel’s client. It is important, therefore, for counsel to have a clear structure and plan for the argument directed towards attaining that goal. Not every issue raised in a written brief, for example, will merit a full discussion during oral argument and, with rare exception, counsel should not expect to argue all the issues raised in the written briefs. In fact it is the practice of the Appeals Chamber for the ICTY-ICTR to tell counsel at the beginning of oral arguments that it does not want counsel to simply repeat the arguments in the written briefs, but to confine oral remarks to other matters. In practice, of course, counsel will be repeating, at least to some extent, matters raised in the written briefs as the content of the briefs is the focus of the appeal. The point, however, is that the Appeals Chamber will have read the briefs by the time oral argument takes place. Counsel is well advised to use the opportunity to present oral argument as a means to analyse or augment the written arguments, to clarify any issues which may remain potentially ambiguous, to make sure the Appeals Chamber agrees on the correct standard of review for the issues raised, and similar matters.

86. It is good practice for counsel to plan ahead of time exactly what counsel will say as an opening to counsel’s oral argument, to catch the attention of the Chamber and to provide it with an overview of counsel’s view of what the case is all about. It is often useful to tell the Appeals Chamber which issues counsel intends to argue so that the Chamber has a sense of what to expect during the course of counsel’s arguments. This also provides the Chamber with the opportunity, should it choose to do so, to tell counsel whether they are interested in hearing about certain issues but not others. Counsel should also start with the strongest, most viable issues in the case since oral arguments on appeal do have time
limits, counsel may also be interrupted by several questions from the appeals bench, and no lawyer wants to run out of time before he or she has addressed the strongest issues in the case.

87. Some practitioners prepare for argument by writing out their proposed argument in its entirety. If this practice is useful for thorough preparation then there is no reason not to do it. Every lawyer will prepare in his or her own way. It is never good practice, however, to simply read a prepared argument to the bench. A lawyer who is reading is not looking at the individual judges on the Appeals Chamber, is losing the opportunity to maintain eye contact with them, is therefore unable to assess their reactions to the points being argued and is most likely undermining his or her ability to sound convincing and to persuade the court of his or her position.

88. This final comment raises a critical point about the argument process, which is that counsel must always be flexible regarding the structure of the presentation of argument as it is likely that counsel will be interrupted by the Appeals Chamber with questions. It is extremely important to answer a question from the Chamber when that question is asked, regardless of what topic counsel might be discussing. There is usually a very good reason why the individual judge has asked the question at hand and if counsel puts off answering it, the opportunity to do so may never arise again, depending on the time limits set for the argument or questions put to counsel from other members of the Appeals Chamber. If that occurs counsel has perhaps lost his best chance to convince that judge of his or her position and may, depending on the circumstances, lose credibility by appearing to be evasive or ill-prepared.

89. As with the written appellate briefs, counsel must be careful to avoid exaggerating the merits of the case, denigrating opposing counsel or the lower court or becoming angry or sarcastic. Counsel should always conduct him or herself professionally and ethically, remaining focused on the job at hand, which is to convince the court of the merits of his or her client’s case. Counsel must also be aware of when counsel is losing a point. If the Appeals Chamber appears to be against counsel on a particular point—as will often occur—there is usually no reason to continue arguing with the Chamber about it. The best strategy is to move on to the next point; using the limited and valuable time set aside for argument on those issues on which counsel appears to have a chance of prevailing.

90. Oral argument at its best can be, when all parties are well prepared, an exciting and vibrant exchange of ideas in a very dynamic area—international criminal law. Counsel who is well prepared, honest about the merits of his or her case and flexible in his or her presentation will be best positioned to maximize the likelihood that this unique experience will result in a positive outcome for the client.

Conclusion

113 If, during the course of argument, counsel intends to cite to specific trial exhibits, pages of the trial testimony or other matters, those citations and materials should be organized during the preparation process in such a manner that counsel will have easy access to them at the time oral argument takes place.
91. There are, of course, many differences between the way in which appeal proceedings take place at the ICTY, the ICC, and other international courts and domestic jurisdictions around the world. The issues raised in this chapter are meant to provide Defence practitioners with a basis from which to consider and develop creative ideas and practices suitable to the rules and procedures which prevail in the jurisdictions in which counsel practices.
XI. POST CONVICTION

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1. Incarceration is meant to serve a number of purposes and the ad hoc Tribunals have spent a great deal of time articulating the justifications for international criminal law and the conviction of those accused of serious crimes. However, when an individual transitions from a person accused of crimes to one convicted of crimes, the rights and responsibilities associated with this newfound status are far less developed.*

2. This section focuses on the practical considerations a convicted person and his counsel should be aware of while the convicted person is serving his sentence in a domestic system following a conviction by the ICTY.

3. It is a fundamental tenet of international human rights law that prisoners should be treated with dignity and respect. The International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) set out a number of basic rights which cannot be ignored despite the unique nature of the system of incarceration which has developed within the international criminal legal system.1

4. These rights are encapsulated in Article 10 of the ICCPR and include that all persons deprived of their liberty shall be treated with humanity and respect, and that the penitentiary system shall ensure

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1 Article 10(1) ICCPR; Articles 3, 4, 5 ECHR.
treatment of prisoners, “the essential aim of which shall be their reformation and social rehabilitation”.²

5. It is with this in mind that this section will outline the procedure by which the international criminal tribunals determine the State of incarceration of a convicted person, the procedure adopted for granting early release, conditional release, and the treatment of such persons while in prison. Finally, post-conviction review will be addressed.

6. It is important to note that there is no provision at the IRMCT for assignment of counsel to convicted persons after a final judgment has been issued against them, even for matters of early release, absent exceptional circumstances.³

A. Place of Incarceration

7. The State in which a convicted person will serve his sentence must be in one of the States which have signed an enforcement agreement with the relevant international court.⁴ The convicted person shall be sent to a State in accordance with certain Practice Directions created by the relevant court.⁵

8. The practices of the ICTY are informative when considering the present practices of the IRMCT in deciding matters of sentencing from the ICTY and ICTR. According to the ICTY Practice Directions, following a conviction, the Registrar of the ICTY made a preliminary inquiry of one of the States which signed the enforcement agreement with the ICTY⁶. In deciding which government to approach, the Registry took the following factors into consideration:

• the national law of the relevant State in relation to early release;
• maximum sentence enforceable by the State, and any other relevant consideration related to the ability of States to enforce a particular sentence;
• equitable distribution of convicted persons among all the States; and,
• any other relevant considerations related to the case.

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² Article 10(3), ICCPR; see also Articles 3-5, ECHR; G.A. Resolution 45/111: Basic Principles for the Treatment of Prisoners, A/RES/45/111, 14 December 1990, para. 5 [hereinafter Basic Principles for the Treatment of Prisoners] (establishing that prisoners retain all fundamental human rights put forth in the Universal Declaration of Human Rights unless limitations are “demonstrably necessitated by the fact of incarceration”)
⁴ Article 26, ICTR Statute; Rule 103-04, ICTR Rules of Procedure and Evidence; Article 103, ICC (Rome) Statute A/CONF.183/9 17 July 1998; Article 29(1), STL Statute; Rule 174(A), STL Rules of Procedure and Evidence. The following states have signed such agreements: Austria, Belgium, Benin, Denmark, Estonia, Finland, France, Germany, Italy, Mali, Norway, Poland, Portugal, Senegal, Spain, Sweden, and the United Kingdom.
⁵ See ICTY Practice Direction on the Procedure for the International Tribunal’s Designation of the State in Which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev. 1, 1 September 2009 (Hereafter “Practice Direction”). Persons convicted by the ICC who are not designated a State in which to serve their sentence shall serve their sentence in a facility made available by the host State pursuant to the headquarters agreement. See Article 103(4), ICC (Rome) Statute.
⁶ The Registrar will also carry out a number of other logistical issues, such as the preparedness to carry out the sentence and a statement concerning how much time remains on the convicted person’s sentence.
9. When a government indicated it was willing to accept the convicted person, the Registrar prepared a confidential memorandum for the President of the ICTY indicating such willingness and containing the following information:

- the convicted person’s marital status, his dependents and other family relations, their usual place of residence, and, when appropriate, the convicted person’s indigency status;
- whether the convicted person was expected to serve as a witness in further proceedings of the ICTY;
- whether the convicted person was expected to be relocated as a witness and, in such case, which States have entered into relocation agreements with the ICTY;
- when appropriate, any medical or psychological reports on the convicted person;
- the linguistic skills of the convicted person; the general conditions of imprisonment and, if available, rules governing security and liberty in the State concerned;
- the national law of the relevant State in relation to pardon and commutation of sentence; and,
- any other relevant considerations related to the case.

10. The President, taking into account this information and any other inquiries he chose to make, would alone make the determination whether the convicted person would serve his sentence in the State listed in the confidential memorandum created by the Registrar.

11. If the President determined that enforcement in that State was not appropriate, the Registrar would approach another State. Before deciding the matter, the President could consult with the Sentencing Chamber or with its Presiding Judge.

12. The President could request the opinion of the convicted person and/or of the Office of the Prosecutor. The President could decide that the designation of the State should not be made public. The Registrar would inform the convicted person of the State that had been designated, the contents of the agreement on the enforcement of sentences between the ICTY and the State concerned, and any other issues of relevance to the matter.

A.1 Input of the Convicted Person on the State of Incarceration

13. At the ICTY, a convicted person had minimal input into the selection of the State where he would be incarcerated and no means of appealing the decision. The Practice Direction states that “particular consideration shall be given to the proximity to the convicted person’s relations”, as well as listing the previously mentioned conditions the Registry was to include in its report to the President. No other

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7 See Prosecutor v. Milosevic, IT-98-29/1-ES, Decision on Dragomir Milosevic’s Request for Reconsideration of Order Designating State in Which He Is to Serve His Sentence, 10 March 2011, para. 3.
criteria were set out for the President’s decision, and there was no absolute right allowing the convicted person to provide a statement to the President (see case box Martić case - Requesting a transfer to another enforcement State).

14. In practice even today, the President’s authority and decision-making process is largely out of the control of the convicted person.

15. While there is little information regarding the process by which the Registrar provides the President with the background for its decisions in selecting the State of incarceration, the few requests for reconsideration or transfer which have been brought have been unsuccessful. Note, however, that the courts do retain the authority to transfer a sentenced person to serve the remainder of his sentence in another state and the sentenced person retains the right to petition the courts for transfer.8

B. Practice Directions for Early Release

16. The IRMCT has taken over the issuance of early release for cases decided by the ICTY, the ICTR, and of course the IRMCT itself.9 The international criminal tribunals developed a series of Practice Directions in conformity with the Rules of Procedure and Evidence and the Statutes which provide the basic structure governing the application for and

8 See e.g., Article 104, ICC (Rome) Statute.
9 See Article 26, IRMCT Statute; Rules 150-51, IRMCT Rules of Procedure and Evidence.
consideration of pardon, commutation of sentence, or early release for a convicted person. A convicted person may apply for early release when he qualifies within the rules of the domestic system in which he is serving his sentence. At the ICTY and ICTR, when a convicted person became eligible for early release under the law of the State in which the convicted person was serving his sentence, that State had the obligation to notify the Tribunal prior to the date of eligibility for release. Note that the IRMCT does not have the authority to grant early release to a convicted person if they have a pending appeal.

17. There is also a direct petition system available to a convicted person. If a convicted person believes he is eligible for early release, he may directly petition the President to request, through appropriate State or Federal authorities, that the enforcing State inform the tribunal as to whether the convicted person is eligible for early release under domestic law.

18. Once a notification of eligibility for early release had been provided by the State of incarceration to the ICTY, certain obligations fell upon the Registry of the ICTY regarding the early release procedure. The Registry first informed the convicted person that he might be eligible for early release and advised the individual of further steps to be taken. The Registry would also request reports and observations from the relevant authorities in the enforcing State concerning the behaviour of the convicted person during his period of incarceration, the general conditions under which he was imprisoned, as well as any psychiatric or psychological evaluations prepared on the mental condition of the convicted person. The Prosecutor would also be allowed to submit a detailed report of any cooperation the convicted person provided to the ICTY OTP and the significance of that cooperation. Other information, as determined by the President, could also be requested by the Registry.

19. At the ICTY, the convicted person was given ten days to examine information provided by and to the Registry, after which the President heard any submissions from the convicted person through either written submissions or video or telephone link. The President then forwarded to the members of the Bureau and the permanent judges of the Sentencing Chamber who remained judges at the ICTY a copy of all information received from the enforcing State, the OTP and the President’s comments regarding the convicted person’s demonstration of rehabilitation, and any other information the President considered to be relevant. The judges concerned were given a specified period of time to survey the material provided, following which appropriate consultation was undertaken.

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10 For the purposes of this chapter, pardon, commutation of sentence, and early release will be referred to generally as early release unless specifically noted. See also section F. Post-Conviction Review.
11 See Article 27, ICTR Statute; see also Article 20, STL Statute (subject to the President’s discretion regarding the interests of justice and general principles of law); Rule 194, STL Rules of Procedure and Evidence.
20. The decision on early release was left exclusively to the President of the ICTY. However, the President, following the criteria specified in Rule 125 of the ICTY Rules of Procedure and Evidence, took into account:

- other information the President considered relevant;
- the views of the members of the Bureau; and,
- the permanent judges of the Sentencing Chamber who remained Judges of the ICTY.

21. The decision was required to be rendered at least seven days prior to the date of eligibility of early release and would be made public unless the President chose not to allow it to be made public. There were no criteria set out to determine when a decision would be made public. If the President declined to approve the early release of the applicant, the President’s decision would specify the date on which the convicted person would next become eligible for consideration for early release, unless it was specified by the domestic law of the enforcing State.

22. If a convicted person were granted early release, the Registry would transmit the decision immediately to the relevant authorities of the enforcing State which would execute the terms of the decision promptly. A copy of the decision would be sent to all parties. If appropriate and at the direction of the President, the Registry would inform persons who testified before the ICTY during the trial of the convicted person of that person’s release, the destination the convicted person would travel to upon release and any other information considered relevant by the President.

C. Early Release in Practice

23. Rule 125 of the ICTY RPE provided for additional factors to be considered in determining whether early release was appropriate. They included:

- the gravity of the crime or crimes for which the prisoner was convicted;
- the treatment of similarly-situated prisoners; 14
- the prisoner’s demonstration of rehabilitation; as well as,
- any substantial co-operation of the prisoner with the Prosecutor. 15

14 All prisoners are to be treated equally without regard as to whether they were convicted at the ICTY, the ICTR or the IRMCT. Prosecutor v. Bisengimana, MICT-12-07, Decision of the President on Early Release of Paul Bisengimana, 11 December 2012, para. 17; Prosecutor v. Serushago, MICT-12-28-ES, Public Redacted Version of Decision of the President on the Early Release of Omar Serushago, 13 December 2012, at para. 16; Prosecutor v. Simba, MICT-14-62-ES.1, Public Redacted Version of the President’s 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019, para. 31
24. At the IRMCT such factors include:

- Treatment of similarly situated prisoners
- Gravity of crimes
- Demonstration of rehabilitation (includes behavior while in detention)
- Substantial cooperation with the prosecution
- Humanitarian considerations
- Views of the sentencing chamber
- Whether the convicted person has familial support
- Health conditions, particularly when serious
- The convicted person’s willingness to abide by conditions of release
- Remorse (not a determining factor)

25. While the gravity of the crime for which the prisoner was convicted, in theory, dictates the length of the sentence and plays an important consideration in the grant of early release, there is little a convicted person can control concerning how he is evaluated. Given that other considerations have far more bearing on early release, the gravity of crimes will only be covered in the context of rehabilitation in this section.

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16 See Rule 151, IRMCT Rules of Procedure and Evidence; see also Prosecutor v. Simba, MICT-14-62-ES.1, Public Redacted Version of the President’s 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019, para. 31 (establishing that all prisoners, whether convicted by the ICTR or ICTY, are similarly situated to all other prisoners under the IRMCT’s supervision).


18 See Rule 151, IRMCT Rules of Procedure and Evidence; Prosecutor v. Kunarac, MICT-15-88-ES.1, Decision of the President on the Early Release of Dragoljub Kunarac, 2 February 2017, para. 68. See also IRMCT Practice Direction para. 4(b) (stating that the Registrar shall gather information concerning the convicted person’s behavior in confinement, confinement conditions, and all psychiatric reports prepared during confinement).

19 See Rule 151, IRMCT Rules of Procedure and Evidence. Prosecutor will be consulted pursuant to Rule 151 of the IRMCT Rules and IRMCT Practice Direction 4(c).


26. Instead, it is important to start with the treatment of similarly situated persons. In practice, no convicted person has been released or is likely to be released prior to serving two-thirds of his sentence. This became the adopted policy of the ICTY. The IRMCT will in theory permit release prior to the convicted person having served 2/3 of his sentence under exceptional circumstances. No President has stated clearly, however, what would be required for a convicted person to receive special consideration to allow for release prior to serving two-thirds of his sentence. For example, the ICTY has suggested that medical reasons are not the basis for early release in any of the jurisdictions in which convicted persons are serving their sentences.

27. Time spent while incarcerated during trial is counted towards a convicted person’s sentence under the ICTY. Time spent on provisional release, however, is not counted toward a convicted person’s sentence for purposes of early release.

28. Though some States allow early release prior to serving two-thirds of a sentence, the ICTY did not allow that given the need to treat prisoners similarly. It is the IRMCT’s practice, however, to grant early release to prisoners who have served 2/3 of their sentence, and in the case of a life sentence, after thirty years. As of the beginning of 2019, the IRMCT released numerous convicted persons after they served 2/3 of their sentence. The ICC, however, determines whether reduction of sentence is appropriate after hearing the convicted person’s case only upon completion of 2/3 of his sentence or 25 years in the case of a life sentence.

25 See Prosecutor v. Predrag Banović, IT-02-65/1-ES, Decision of the President on Commutation of Sentence, 3 September 2008, para 15 (“Notwithstanding the gravity of his crimes, I also note that Mr Banović has currently served more than two-thirds of his sentence. Considering that other convicted persons similarly situated have been granted early release after serving two-thirds of their sentences, this factor further supports his eligibility for early or conditional release”); Prosecutor v. Tadić, IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 24 June 2004, para. 4.


27 Prosecutor v. Tadić, IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 24 June 2004, para. 5.


29 For instance, Belgium and Austria allow for early release before two-thirds of a sentence has been served. Moreover, France allows for sentence remission which would reduce the actual length of the convicted person’s sentence. See Prosecutor v. Bala, IT-03-66-ES, Decision on the Application of Haradin Bala for Sentence Remission, 15 October 2010.


32 Article 110, ICC (Rome) Statute.
29. The ICTY suggested on occasion that other considerations might present a different interpretation of the presumption of serving two-thirds of a sentence, including the law governing early release in the domestic jurisdiction. For example, the ICTY noted the “systematic incompatibility of the French system with that of the Tribunal’s, which will result in unequal treatment of French detainees compared to other Tribunal’s convicts” due to the practice in France of sentence remission. In this same decision the President noted that future applications may lead to a “different view”. Despite the potential for a change in policy, the ICTY consistently granted early release only after defendants served two-thirds of the sentence, which suggests that consideration of domestic systems may be a formality rather than essential to the role of sentence remission as part of a convicted person’s rehabilitation. Domestic law is not binding. Even if a person is eligible for early release under domestic law, the tribunals retain the final decision-making power.

30. Cooperation with the Prosecution, based on a report sent by the Prosecution to the President, can affect a convicted person’s grant of early release. This should be considered by a convicted person if a request is made by the Prosecution. Pleading guilty may constitute cooperation with the Prosecution for this purpose, even if it was already considered during sentencing. Other methods of cooperation include: testifying in cases, providing documentation, and consenting to interviews. However, lack of cooperation with the Prosecution due to a failure by the Prosecution to request assistance is not held against a convicted person. Instead, where no cooperation is requested, even a non-favourable report from the Prosecution “must be considered as neutral”.

31. Nevertheless, if the convicted person concluded a plea agreement foreseeing cooperation with the Prosecution on specific cases, failure to cooperate and to abide by the plea agreement will affect the President’s decision on early release.

33 Prosecutor v. Predrag Banović, IT-02-65/1-ES, Decision of the President on Commutation of Sentence, 4 September 2007, para. 13.
34 Ibid.
32. The question of rehabilitation is more difficult to define. It is, by necessity, based primarily on reports by the State of incarceration and the psychiatrists or other examiners available to assess the convicted person’s personal rehabilitation.\(^{41}\) Some convicted persons have noted that due to circumstances beyond their control, namely the prison conditions and the foreign nature of the prison system, rehabilitation has been impeded.\(^{42}\) That this factor has been included in decisions suggests that the tribunals are willing to consider the difficulties associated with serving a sentence in a foreign prison system.

33. Ultimately, while there are a number of factors taken into consideration in the granting of early release, the overwhelming practice at the tribunals has been to allow for release of a convicted person only after he has served two-thirds of his sentence. Other considerations, while included as issues to be weighed in making a determination on a convicted person’s early release, appear to ultimately prove far less important than the amount of time the individual has served. Given that such considerations are present, however, the potential for the tribunals to deny a convicted person’s request based on a lack of cooperation with the Prosecution or a finding of no progress made in terms of rehabilitation, should not be ignored.

34. Finally, neither the prosecution, nor third parties, nor victims have standing to be heard on applications for early release.\(^{43}\)

**D. Difficulties in Obtaining Early Release Based in the Domestic System**

35. The convicted person should also be aware that domestic systems, through their law or through negligence, can create difficulties in the early release process. Convicted persons have had to apply directly to the tribunals for reconsideration and receive special orders from the State of incarceration when they do not come up for early release even when they otherwise qualify.\(^{44}\) The ICTY has proven willing to cooperate when difficulties arising from the domestic legal system create circumstances in

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\(^{41}\) *Ibid.*, para. 9 (“the reports of the Norwegian authorities are indicative of rehabilitation”).

\(^{42}\) *Ibid.*, para. 6; *Prosecutor v. Josipović*, IT-95-16-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Drago Josipović, 30 January 2006, para. 11 (“Josipović’s isolation and his inability to communicate in Spanish is the reason why he is withdrawn and unable to engage in many activities”).


\(^{44}\) *Prosecutor v. Drago Josipović*, IT-95-16-ES, Decision of the President on Application for Pardon or Commutation of Sentence of Drago Josipović, 30 January 2006, para. 6.
which a convicted person may be treated unequally from other convicted persons in different jurisdictions.\textsuperscript{45} This includes the possibility of the tribunals ordering release and termination of the enforcement in the State of incarceration under Article 9(2) of the Sentence Enforcement Agreement (see case box \textit{Krnojelac case - Ordering release regardless of national law}).

\textbf{E. Conditional Release}

35. In Security Council Resolution 2422, the Security Council urged the IRMCT to consider placing conditions on early release in an effort to ameliorate Member States’ concerns about the early release process.\textsuperscript{46} In January 2019, the IRMCT granted early release to Valentin Ćorić and Aloys Simba conditioned upon certain behaviors. Particularly troubling is the condition that convicted persons refrain from discussing any aspect of their case with anyone other than \textit{pro bono} counsel.\textsuperscript{47}

36. The ICTY, and by extension the IRMCT, is a subsidiary organ of the UN; therefore, “acts and omissions imputable to the ICTY [or IRMCT] are...attributable in principle to the [U.N.].”\textsuperscript{48} As a result, the IRMCT should be hesitant to impose conditions of release which contravene UN positions regarding issues relating to human rights, but the defense should pay attention to the implications of conditions of release anyway.

37. In the past, the Tribunals have relied upon human rights jurisprudence to inform decisions regarding the rights of an accused or convicted person. In deciding the “Media Case” for instance, the ICTR Trial Chamber reviewed and relied upon international jurisprudence from the Nuremberg International Military Tribunal, the United Nations Human Rights Committee, and the European Court of Human Rights.


\textsuperscript{48} \textit{Blagojević v. The Netherlands}, Third Section Decision as to the Admissibility of Application 49032/07, 9 June 2009, para. 35; see also Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Preamble, S/1994/848-849, (25 July 1994).
to balance the fundamental right to freedom of expression with accountability for incitement to genocide. Likewise, the ICTY utilized its discretion to rely upon the ECHR and its jurisprudence in cases involving threats to human rights. Therefore, it is justified to reference human rights jurisprudence to inform the President’s decision regarding the appropriateness of release conditions.

38. If a convicted person violates a condition of release, the IRMCT may hold him in contempt of court pursuant to Rule 90 of the Rules of Procedure and Evidence of the Mechanism. Conversely, willingness to abide by conditions of release is a factor in the convicted person’s favor in early release determinations.

F. Concerns over Prison Conditions and Legal Aid

39. Not all prisons or prison systems are created equal. Prisoners experience vastly different circumstances in the international system of incarceration. Some prisoners are entitled to a very positive experience, including involvement in “weekly excursions such as cycling trips, football matches [...] skiing trips and mountain walks.” Other prisoners, however, experience extremely difficult conditions which make the possibility of rehabilitation exponentially more difficult. The criteria for rehabilitation may include social reintegration, which can be based, in the international incarceration system, on integrating into an entirely different culture. Some inmates have been physically attacked in prison for their crimes.

40. Conditions of confinement in prison systems in States of enforcement must comply with internationally recognized standards regarding treatment of prisoners. For instance, the enforcement agreement with Estonia expressly mandates that Estonia comply with the Standard Minimum Rules for the Treatment of Prisoners (“SMRTP”), the Body of Principles for the Protection of Persons under any Form of Detention or Imprisonment, and the Basic Principles for the Treatment of Prisoners (“BPTP”).


50 See Prosecutor v. Aleksovski, IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 24; Prosecutor v. Mrksic, Dokmanovic et al., IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic, 22 October 1997, paras. 59-60, 67.

51 Prosecutor v. Simba, MICT-14-62-ES.1, Public Redacted Version of the President’s 7 January 2019 Decision of the Early Release of Aloys Simba, 7 January 2019, para. 84(c).


54 Prosecutor v. Predrag Banović, Case IT-02-65/1-ES, Decision of the President on Commutation of sentence, 3 September 2008; Prosecutor v. Josipović, IT-95-16-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Drago Josipović, 30 January 2006, para. 11; Prosecutor v. Krnojelac, IT-97-25-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac, 9 July 2009, para. 12.

55 This occurred with General Radislav Krstić who is imprisoned in the United Kingdom.

56 These standards are the minimum conditions deemed suitable by the United Nations. ECOSOC Res. 663C (July 1957); ECOSOC Res. 2067 (13 May 1977) [hereinafter Standard Minimum Rules for the Treatment of Prisoners].

57 Enforcement Agreement, Preamble.
41. Conditions of imprisonment must also align with the enforcing State’s domestic law, which can differ markedly, subject to the tribunal’s supervision. The IRMCT maintains a duty to oversee detention and has the authority to request the termination of enforcement at any time and order the transfer of a convicted individual to the Mechanism or to an alternate State based on the enforcement agreements with host states.

42. In some instances, the conditions of confinement in States of enforcement, most of which are in Europe, have failed to comport with basic respect for prisoners’ human rights in such instances as living conditions, medical care, and psychiatric care. These issues amongst others have been investigated by international bodies.

43. Of all the considerations which may be addressed concerning prison conditions, access to legal aid is the most universally relevant to all convicted persons. Legal aid is, by the standards of most countries, an important and necessary component to a prisoner’s rehabilitation and the realization of his rights. However, most prison systems are not prepared, nor have they had any reason to be prepared, for inmates from vastly different cultures. As a result, the ability to obtain counsel, to ensure that the rights of the individual are protected, and to ensure that prisoners have the ability to address the ICTY in an informed manner may suffer because prisoners have little to no access to legal assistance.

G. Post-Conviction Review

44. Article 26 of the ICTY Statute, Article 25 of the ICTR Statute, and Article 24 of the IRMCT Statute provide that “where a new fact has been discovered which was not known at the time of the proceedings [...] and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.” Rule 119(A) of the ICTY RPE governs requests for review and allows that “where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.” The Appeals Chamber

58 See Article 106, ICC (Rome) Statute; Article 25(2), IRMCT Statute (“The Mechanism shall have the power to supervise the enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States.”). See also Agreement between the Government of the Republic of Estonia and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia art. 3, para. 3, 25 May 1993; Rule 127(A) and Rule 128 of the IRMCT Rules of Procedure and Evidence; STL Statute, Art. 29(2); Rule 175, STL Rules of Procedure and Evidence.

59 See e.g., Enforcement Agreement art. 9(2). Note that the duty arising under the Enforcement Agreement applies mutatis mutandis to the IRMCT.

60 Memorandum: by Thomas Hammarberg Council of Europe Commissioner of Human Rights (Strasbourg, 20 November 2008).

61 Detention conditions are monitored by the ICRC. See Agreement Between the STL and the ICRC on Visits to Persons Deprived of Liberty Pursuant to the Jurisdiction of the STL (stating that the ICRC visits detainees held under the authority of the ICTY, the ICTR, the SCSL, and the ICC). Monitoring of European States is also conducted by the Commissioner for Human Rights at the Council of Europe, with reports available at http://www.coe.int/t/commissioner/Activities/countryreports_en.asp
has found that the Statute and the rules, read together, require the moving party to establish four preliminary criteria:

i. there must be a new fact;
ii. that new fact must not have been known by the moving party at the time of the original proceedings;
iii. the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and,
iv. the new fact could have been a decisive factor in reaching the original decision.\textsuperscript{62}

45. The ICTY set out a number of guidelines regarding Rule 119 in a decision on a request for review by Duško Tadić. The proper forum for filing a request for review is the judicial body which rendered the final judgement, which may be the Trial Chamber (when the parties have not lodged an appeal) or the Appeals Chamber (when the judgement has been appealed).\textsuperscript{63} The absence of judges who participated in the original decision does not eliminate the competence of the body.\textsuperscript{64} Only final judgements can be the subject of review.\textsuperscript{65}

1. The “new fact” may be defined as “new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings”.\textsuperscript{66} It does not matter whether new fact existed prior to or during the proceedings; what is ultimately relevant is “whether the deciding body and the moving party knew about the fact or not.”\textsuperscript{67} In regards to the second and third parts of the test, the Appeals Chamber has found that “[i]t is only when the decision made was of such a nature in the circumstances of the case as to have led to a miscarriage of justice” that a Chamber will not hold an accused accountable for the conduct of his counsel.\textsuperscript{68} Moreover, if the evidence was not put to the Trial Chamber due to lack of due diligence the accused must establish that its exclusion would lead to a miscarriage of justice.\textsuperscript{69}

47. In the case of Tadić, the tribunal did consider a contempt judgement against Tadić’s counsel to be a new fact meeting the threshold requirement for a request for review.\textsuperscript{70} However, the Appeals Chamber concluded that none of the findings of contempt against Tadić’s prior counsel could be considered either

\textsuperscript{63} Ibid., para. 22.
\textsuperscript{64} Ibid., para. 23.
\textsuperscript{65} Ibid., para. 24.
\textsuperscript{69} Ibid.
\textsuperscript{70} Ibid., para 29.
as a “decisive factor” affecting the final judgement or as meeting the requirements set out by parts two and three of Rule 119.\(^{71}\)

**Conclusion**

48. On 22 December 2010, the United Nations Security Council adopted the International Residual Mechanism for Criminal Tribunals (the Mechanism) which took over the duties of the ICTY and ICTR on 1 July 2013 at the ICTY.\(^{72}\)

49. The IRMCT carries out a number of essential functions of the *ad hoc* Tribunals after their closure, including the trials of fugitives who are among the most senior leaders suspected of being most responsible for war crimes, crimes against humanity and genocide.\(^ {73}\)

50. It is also responsible for conducting review proceedings, supervising the enforcement of sentences and rendering decisions on applications for pardon or commutation of sentences.\(^ {74}\) Although the establishment of offices for Judges, the Registry and Prosecution are set forth in the resolution,\(^ {75}\) the resolution is silent regarding the contemplated mechanism for Defence participation.

51. The Resolution emphasizes that the nature of the residual functions will be substantially reduced and therefore “the international residual mechanism should be a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions.”

52. It is therefore expected that the procedures addressing post-conviction issues presently in place will remain the same and the access to, and remedies for, persons convicted at the *ad hoc* Tribunals will not change substantially, if at all.

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\(^{71}\) *Ibid.*, paras 29-57.


XIII. **Contempt of Court**

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1. Contempt of court is a common law concept establishing a court’s inherent power to control and ensure the integrity of its proceedings. All international criminal courts and tribunals grant their judges the power to conduct contempt proceedings and impose criminal penalties for conduct that interferes with the administration of justice or threatens the integrity of the judicial proceedings. The purpose of such proceedings is to secure and protect witnesses, secure and protect the court’s functions, and to ensure compliance with court orders. Conduct which may constitute contempt of court includes, but is not limited to, disrespectful behavior directed at a judge or court officer, disobedience of court orders and refusal to comply with court proceedings.

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1 See e.g., Rule 77, ICTY RPE; Rule 77, ICTR RPE; Article 71, Rome Statute.
2 See e.g., Rule 77, ICTY RPE; Rule 77, ICTR RPE; Article 71, Rome Statute.
3 See e.g., Rule 77, ICTY RPE; Rule 77, ICTR RPE; Article 71, Rome Statute.
2. This chapter discusses how contempt proceedings operate at the ICTY, the ICTR, the IRMCT, and the ICC. Although there is overlap in approach between these international courts, each court has adopted procedures which are unique to that court, as will be addressed below.

**ICTY/ICTR/IRMCT**

3. At the ICTY and ICTR contempt of court is governed by Rule 77 of their respective Rules of Procedure and Evidence; at the IRMCT it is governed by Rule 90. Those rules provide:

a. The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and willfully interfere with its administration of justice, including any person who:
   i. being a witness before a Chamber, contumaciously refuses or fails to answer a question;
   ii. discloses information relating to those proceedings in knowing violation of an order of a Chamber;
   iii. without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
   iv. threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or
   v. threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

b. Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.

c. When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:
   i. direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;
   ii. where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or
   iii. initiate proceedings itself.

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4 Rule 77, ICTY RPE; Rule 77 ICTR RPE; Rule 90 IRMCT RPE.
d. If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:
   i. in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or
   ii. in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct amicus curiae to prosecute the matter or prosecute the matter itself.

e. The rules of procedure and evidence in Parts Four to Eight shall apply mutatis mutandis to proceedings under this Rule.

f. If a counsel is found guilty of contempt of the Tribunal pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.

A. Jurisdiction and Judicial Discretion

4. As with all courts, the ad hoc tribunals must preserve the integrity of criminal proceedings to ensure the fair and effective administration of justice. The tribunals, therefore, possesses the inherent power to punish conduct which interferes with the administration of justice; a power derived from the nature and function of the tribunals and their governing statutes.\(^5\)

5. The specific forms of contemptuous conduct delineated in the relevant rules “fall within – but do not limit –“ this inherent power,” as these lists of conduct are not exhaustive.\(^7\) Conduct which interferes with the administration of justice or undermines the integrity of criminal proceedings, even if it does not fall precisely within one of the discrete categories listed in the Rules, may still constitute contempt if the relevant mens rea is present.\(^8\)

6. Proceedings for contempt are held independently of the proceedings from which the contempt charges arise.\(^9\) Indeed, prosecutions for contempt can occur before or after proceedings for the related trials

\(^5\) Rule 77(A), ICTY RPE; Rule 77(A) ICTR RPE; Rule 90(A) IRMCT RPE.
\(^7\) Prosecutor v. Domagoj Margetić, Case No. IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007, para. 13; see also Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-R77.4, Decision on Failure to Remove Confidential Information From Public Website and Order In Lieu of Indictment, 9 May 2011, para. 26.
\(^8\) Ibid.
\(^9\) See Prosecutor v. Nyiramasuhuko et al., ICTR-98-42-A, Decision on Pauline Nyiramasuhuko’s Motion to Void Trial Chamber Decisions, 30 September 2011; see also Prosecutor v. Karemera et al., Decision, para. 25 (“[I]nvestigations and proceedings pursuant to Rule 77 of the
are completed. Individuals charged with contempt are entitled to all the protections afforded to the accused in criminal cases including the right to counsel, the presumption of innocence and the right to appeal any conviction or sentence ultimately imposed.\textsuperscript{10}

\section*{B. Elements of Contempt of Court}

7. An individual may be found liable for contempt if the individual knowingly and willingly interferes with the Tribunal's administration of justice.\textsuperscript{11} To be held in contempt requires both an \textit{actus reus}, that is, conduct that interferes with the Tribunal, and a culpable \textit{mens rea}; that the Accused acted knowingly and willingly.

\subsection*{B.1 Actus Reus}

8. The ICTY, ICTR and IRMCT rules set forth a list of the kinds of conduct that may qualify as contempt.\textsuperscript{12} The conduct includes:

\begin{enumerate}
\item A witness before the Chamber who, contumaciously, refuses or fails to answer a question;
\item An individual who discloses information relating to proceedings in knowing violation of an order of a Chamber;
\item An individual who, without just excuse, fails to comply with an order to attend before a Chamber or produce documents before a Chamber;
\item An individual who threatens, intimidates, injures, bribes, or otherwise interferes with a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber or a potential witness;
\item An individual who threatens, intimidates, bribes, or seeks to coerce any other person, with the intention of preventing that person from complying with an order of the Chamber.
\end{enumerate}

\textsuperscript{11} Cf. Prosecutor v. Hormisdas Nsengimana, ICTR-01-69-A and ICTR-10-92, Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses, 16 December 2010, in which the Appeals Chamber considered an appeal against a decision related to contempt allegations issued by Trial Chamber I after the rendering of the trial judgement in Mr. Nsengimana's case.
\textsuperscript{12} Rule 77(A) ICTY RPE; Rule 77(A) ICTR RPE; Rule 90(A) IRMCT RPE.
B.1.1 Disclosure of Confidential Information

9. Disclosure of information related to proceedings, in violation of a court order, refers to the revelation of information when the Chamber has ordered that information is to remain confidential. This includes, for example, publication of the identity of a protected witness’ when the protective measures have not been removed by the Chamber. The fact that a case has been concluded does not change the effect of the court order, which is ongoing. Unless and until the witness protective measures are lifted or confidential documents or testimony have been made public by court order, unauthorized revelation of such information will constitute contempt of court.

10. In the Haxhiu case at the ICTY, for example, a journalist was convicted of contempt after he revealed the identity of a protected witness who had previously testified in a trial at the ICTY. The revelation of the witness’s identity occurred after the trial at issue had ended however the court found the conduct plainly interfered with the administration of justice as it “eviscerated the authority of Tribunal orders protecting the identity of witnesses.” It also found the conduct jeopardized the security of the witness and his family “creating an immeasurable risk of danger for protected witnesses.” It concluded, as a general matter, that the conduct undermined the public’s confidence in the effectiveness of the Tribunal’s protective measures orders and had the effect of dissuading witnesses from cooperating with the Tribunal.

11. Contempt of court can occur even if the conduct in question did not result in actual harm to specific pending proceedings. In the Hartmann case at the ICTY, a prosecution spokesperson was charged with improperly publishing information, after conclusion of the related case proceedings, which was subject to confidentiality orders by ICTY Chambers. Hartmann argued that only conduct which actually

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13 Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-R77.4, Decision on Failure to Remove Confidential Information From Public Website and Order In Lieu of Indictment, 9 May 2011, para. 26; see also Prosecutor v. Baton Haxhiu, Case No. IT-04-84-R77.5, Judgement on Allegations of Contempt, 24 July 2008, para. 10; Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo against Finding of Contempt, 30 May 2001, para. 40(c); Prosecutor v. Domagoj Marjetić, Case No. IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007, para. 15.

14 Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-R77.4, Decision on Failure to Remove Confidential Information From Public Website and Order In Lieu of Indictment, 9 May 2011, para. 26; Prosecutor v Baton Haxhiu Case No. IT-04-84-R77.7-A, Judgement, 19 July 2011 [journalist published name of protected witness who had testified during trial at the ICTY]

15 The same is true for any information ordered to remain confidential, such as documents or testimony.


17 Ibid, para 34
obstructs, prejudices or abusesc the administration of justice constitutes contempt. She submitted that conduct which merely created a potential risk of such harm was not contemptuous.  

12. On appeal that argument was rejected. The Appeals Chamber held that “[t]he language of Rule 77 shows that a violation of a court order as such constitutes an interference with the International Tribunal’s administration of justice. “[N]o additional proof of harm to the International Tribunal’s administration of justice is required.”

13. When a court order has been violated, the Trial Chamber does not need to assess whether any actual interference took place or whether a real risk to the administration of justice has taken place. Such a violation per se interferes with the administration of justice.

14. Given the nature of the contemptuous behavior in Hartmann (the revelation of confidential information) the Chamber pointed out that the accused’ conduct could deter future sovereign states from cooperating with the Tribunal where confidential evidentiary material was concerned; a factor which underlined the serious nature of the accused’s conduct. It emphasized that such an interference would impact the Tribunal’s ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law as prescribed by its mandate.

15. It also noted, as did the Haxhiu Chambers, that disclosure of protected information in breach of a judicial order undermines public confidence in the effectiveness of protective measures, orders and decisions which are vital to the success of the work of the Tribunal.

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18 Prosecutor v. Florence Hartmann, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 103; Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo against Finding of Contempt, 30 May 2001, para. 30.

19 Prosecutor v. Florence Hartmann, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011; Prosecutor v. Josip Jović, Case No. IT-95-14 & IT-95-14/2-R77, Judgement, 30 August 2006, para. 30, quoting Prosecutor v. Ivica Marijačić and Markica Rebić, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006, para. 44.

20 And see Prosecutor v. Josip Jović, Case No. IT-95-14 & IT-95-14/2-R77, Judgement, 30 August 2006, para. 30; see also Léonidas Nshogoza v. The Prosecutor, Case No. ICTR-2007-91-A, Judgement, 15 March 2010, para. 56; In the Case Against Vojislav Šešelj, Case No. IT-03-67-R77.2-A, Judgement, 19 May 2010, para. 20.

21 Prosecutor v. Florence Hartmann, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 107; and see Prosecutor v. Nshogoza, ICTR-07-91-A, Appeals Judgement, 15 March 2010, para. 56 (noting that the Appeals Chamber is “unconvinced by Nshogoza’s argument that the actus reus of contempt requires a certain threshold of gravity”) (citing Prosecutor v. Josip Jović, IT-95-14 and 14/2-R77-A, Appeals Judgement, 15 March 2007, para. 30); see also Prosecutor v. Ivica Marijačić and Markica Rebić, IT-95-14-R.77.2-A, Appeals Judgement, 27 September 2006, para. 44 (“The language of Rule 77 shows that a violation of a court order as such constitutes an interference with the International Tribunal’s administration of justice. [...] It has already been established in the jurisprudence that any defiance of an order of the court interferes with the administration of justice.”).

22 Ibid., para. 104.

23 Ibid., para. 101.

24 Ibid.
B1.2 Unauthorized Contact with Witness

16. Unauthorized contact with protected witnesses may constitute contempt and was found to be contempt in the Kamuhandu case at the ICTR. There, despite the existence of a witness protection order, the defence met with protected prosecution witnesses without prior authorization and later revealed information about their identities.

17. The lesson to be drawn from Kamuhandu and similar cases is clear. When counsel needs or wishes to meet with witnesses who are the subject of protective orders counsel should not do so without prior authorization. It may not be optimal to conduct defence investigations under such restrictions, however proceeding without authorization is also not optimal. The likelihood the witnesses will report such contacts to the Court or the Prosecution is high. If the witness cannot be approached without violating a court order, then the witness should not be approached at all.

B.1.3 Intimidation of Witnesses

18. Similarly, the intimidation or attempted intimidation of witnesses may constitute contempt of court as it undermines the fundamental objectives of the tribunals to ensure fair trials, among other considerations. It is not a defence for counsel if such intimidation is carried out or attempted by a defence investigator or someone working in that capacity as was the case in Renzaho. If such an approach was done with counsel's knowledge, counsel may also be found culpable.

19. As emphasized by the Trial Chamber in the Kanyabashi et al case:

“[I]nterference with a witness as contempt, is to be construed as prohibiting only undue interference with a witness. Undue interference with the prosecution witnesses who were already contacted could have occurred, in the present case, if the individuals concerned acted in knowing and willful violation of a witness protection order of this court, or if they tried to intimidate witnesses, as specified under Rule 77(C) of the Rules, or, notably, if they tried to induce them to change their testimony, as the Prosecutor alleges in the present case.”

25 Prosecutor v Jean de Dieu Kamuhandu, ICTR-99-5(4)-1, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 10 July 2000 [violation of witness protection order for Prosecution occurred when defence met with such witnesses and disclosed identifying information, conduct which constituted contempt].

26 See Prosecutor v Renzaho, ICTR-97-31-A, Appeals Judgement, 1 April 2011, para 207 [involving allegations of witness intimidation by defence investigator].

B.1.4 Incitement

20. Finally, incitement to commit or attempt to commit the acts outlined in the rules on contempt is punishable the same as contempt at the ICTY, ICTR and IRMCT and carries the same penalties.\(^{28}\) As of the publication of this chapter a complex prosecution for contempt and incitement to commit contempt is in the pre-trial phase at the IRMCT court in Arusha.\(^{29}\) The case involves six accused charged with interference with protected witnesses and their intermediaries, incitement to commit contempt, knowing disclosure of confidential information and having prohibited contact with protected witnesses.\(^{30}\)

B.2 Mens Rea

21. The *mens rea* element for contempt of court is knowledge on the part of the contemnor that his or her conduct constitutes a violation of a court order or otherwise undermines or interferes with the lawful conduct of court proceedings.\(^{31}\) As noted in *Nshogoza* at the ICTR: “The *mens rea* requirement for contempt under Rule 77(A) of the Rules is satisfied by proof of any knowing and willful conduct in violation of a Chamber’s order.”\(^{32}\)

22. The fact an individual was following instructions or orders from a superior has no bearing on a finding of the requisite *mens rea* as those circumstances do not change the fact the individual acted knowingly and willfully.\(^{33}\)

23. As with any other criminal offense, knowledge may be proved by circumstantial evidence. Proof of knowledge does not require an accused’s statement expressing intent.\(^{34}\) Culpability for contempt also does not require proof of the specific intent to interfere with the administration of justice\(^{35}\)

\(^{28}\) See, e.g., *Prosecutor v Nshogoza*, ICTR-07-91-T, Judgement, 7 July 2009, paras 195, 204.

\(^{29}\) See, *Prosecutor v Turinabo et al MICT-18-116-PT* [six accused charged in three count indictment for contempt and incitement to commit contempt and knowing disclosure of confidential information]

\(^{30}\) Rule 77(B), ICTY RPE; Rule 77(B), ICTR RPE; Rule 90(B) IRMCT RPE.

\(^{31}\) *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4, Decision on Failure to Remove Confidential Information From Public Website and Order In Lieu of Indictment, 9 May 2011, para. 27; see also *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006, para 18; *Prosecutor v. Josip Jović*, Case No. IT-95-14/R/IT-95-14-R77, Judgement, 30 August 2006, para. 20.


\(^{33}\) *Ibid*, para 85 [even if accused was acting on instructions and advice from Lead Counsel does not change that he acted knowingly and willfully in engaging in the prohibited conduct.

\(^{34}\) *Prosecutor v. Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, paras. 94, 127, 135 [The Chambers held Hartmann possessed actual knowledge and acted willfully based on proof that prior to publishing the information she was told by the tribunal’s Registrar the information in question was confidential and the publication itself referred to the confidential nature of the information].

\(^{35}\) *Prosecutor v. Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 128.
24. In the Seselj case at the ICTY, for example, Mr. Seselj represented himself at trial and maintained an active website on which he published information related to his trial proceedings. During trial he published three books, discussing his case as well as trial proceedings. He repeatedly published the names of protected witnesses, personal information related to those witnesses and the contents of confidential documents, despite repeated warnings from the court and, ultimately, three separate prosecutions for contempt.\textsuperscript{36} This conduct was more than sufficient to establish the circumstantial inference that he acted willfully and knowingly.

25. As explained in Hartmann:

“The mens rea required […] is the disclosure of particular information in knowing violation of a Chamber’s order. Generally, it is sufficient to establish that the conduct which constituted the violation was deliberate and not accidental. This may be inferred from circumstantial evidence. Where it is established that an accused had knowledge of the existence of a Court order, a finding of intent to violate the order will almost necessarily follow. Willful blindness to the existence of the order, or reckless indifference to the consequences of the act by which the order is violated may satisfy the mental element. Mere negligence in failing to ascertain whether an order had been made is insufficient.”\textsuperscript{37}

\textbf{C.\textit{Sentencing and Penalties}}

26. The maximum penalty that may be imposed on a person found to be in contempt at the ICTY is a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both.\textsuperscript{38} At the ICTR and IRMCT the maximum penalty is five years imprisonment, or a fine of $10,000, or both.\textsuperscript{39}

27. If the convicted contemnor is counsel practicing before the Tribunal the Chamber may order that counsel is “no longer eligible to represent a suspect or accused before the Tribunal or find that the contumacious conduct also amounts to misconduct of counsel pursuant to Rule 46, or both”.\textsuperscript{40}


\textsuperscript{37} In the Case Against Florence Hartmann, Case No. IT-02-54-R77.5, Judgement on Allegations of Contempt, para. 22.

\textsuperscript{38} ICTY RPE Rule 77(G)

\textsuperscript{39} ICTR RPE, Rule 77(G); IRMCT RPE, Rule 77(G).

\textsuperscript{40} ICTY RPE Rule 77(I)
28. The Chamber has the discretion, in determining an appropriate punishment, to tailor sentences to the specific circumstances of an individual case. In *Hartmann*, in which the accused was not counsel practicing before the Tribunal, the Chamber identified the factors it assessed when determining the appropriate penalty in that case. Those factors included:

   a. The risk of interference with the Tribunal’s administration caused by the Accused’s conduct;\(^{41}\)
   b. The need to deter future wrongful disclosure of confidential information by the Accused or any other person\(^ {42}\);
   c. The fact that some of the information published by the Accused was already in the public domain\(^ {43}\);
   d. The Accused’s criminal record and adherence to the Tribunal’s proceedings throughout the investigation.\(^ {44}\)

29. In sentencing, the Chambers may consider the manner in which the accused committed the contempt. As explained by the Appeals Chamber in *Nshogoza*:

   “*[T]he Trial Chamber properly considered the particular circumstances surrounding Nshogoza’s specific conduct. The Trial Chamber did not merely focus on contempt as an inherently grave offence, but addressed the gravity of the particular way in which Nshogoza committed contempt. It found that, by breaching the Kamuhanda Protective Measures Order, Nshogoza ‘undermined the authority of the Kamuhanda Trial Chamber, as well as confidence in the effectiveness of protective measures, and the administration of justice.’ The Trial Chamber did not merely focus on Nshogoza’s defiance of the authority of the Tribunal, but considered more specifically that his conduct ‘may also have the effect of dissuading witnesses from testifying before it.’”\(^ {45}\)

30. The Sentencing Chamber also has jurisdiction to revisit a sentence imposed for contempt to modify it in light of changed circumstances. In the *Hartmann* case, for example, Hartmann was originally punished by imposition of a fine. When she failed to pay it, apparently without justification, the Sentencing Chamber vacated the fine and sentenced her to a term in jail instead.\(^ {46}\)

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\(^ {42}\) *Ibid.*
\(^ {43}\) *Ibid.*
\(^ {44}\) *Ibid.*
\(^ {46}\) *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Second Order on Payment of Fines Pursuant to Rule 77 *bis* and Warrant of Arrest, 16 November 2011, para. 12.
31. Contempt provisions at the ICC, governed by Article 70 of the Rome Statute, share the same ultimate goals of protecting the administration of justice as similar contempt provisions at other international tribunals. The Article is intended “to protect the integrity of the proceedings before the Court by penalising the behaviour of persons that impedes the discovery of the truth, the victims’ right to justice and, generally, the Court’s ability to fulfil its mandate.”

32. However, as will be discussed below, operationally there are significant differences between the manner in which contempt proceedings can be brought at the ICC and contempt proceedings at the ICTY, ICTR and IRMCT.

33. To date there has been only one Article 70 trial brought to completion at the ICC; in the Bemba case. It resulted in conviction of the Accused, his defence counsel and members of his defence team on various witness intimidation and interference charges. Two Article 70 arrest warrants issued in relation to the Ruto et al case, regarding post-election violence in Kenya, and alleging improper intimidation of witnesses in that case, but they remain outstanding.

D. Article 70

34. At the ICTY, ICTR, and IRMCT jurisdiction to initiate proceedings for contempt arises from the “inherent power” of Chambers, which may direct the Prosecutor to investigate and, in certain circumstances, prosecute alleged contumacious acts. If there is a potential conflict of interest in the prosecutor doing so, the Chamber has the power to direct the Registrar to appoint an amicus curiae or independent prosecutor to ensure both the fact and the appearance of a fair investigation and trial.

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50 As well as at the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

51 Rule 77(C)(ii) ICTY RPE; Rule 77(C)(ii) ICTR RPE; see also IBA Discussion Paper; and see *Prosecutor v. Lubanga*, ICC-01/04-01/06-3114, Decision on the Request of the Defence in Relation to Investigations Conducted Pursuant to Article 70 of the Statute, 17 June 2014, para. 19.)
35. The ICC regime is quite different. The Rome Statute of the ICC specifically confers jurisdiction over contempt cases on the Chambers, stating the Court “shall” have jurisdiction regarding the offenses listed in Article 70. ICC RPE Rules 162-169 set forth the procedures for the investigation and prosecution of those offenses.

36. However, unlike the ad hoc tribunals, the Chamber does not have the power to initiate such prosecutions. Pursuant to ICC RPE Rule 165, investigations may be initiated only by the Prosecutor on the basis of information communicated by a Chamber or “any reliable source” to the Prosecutor. ICC jurisprudence has also interpreted Article 70 as providing that the Prosecution is the sole organ at the ICC that can initiate prosecutions under Article 70. There is no statutory provision which provides for alternative procedures in the event of a conflict of interest on the part of the Prosecutor, such as the appointment of amicus curiae or independent counsel, although nothing prevents the Prosecutor from doing so on his or her own initiative.

37. In a case where the defense is concerned that the Prosecutor has a conflict of interest which will adversely affect the fair investigation and/or prosecution of contempt, the defense can request that the prosecutor be disqualified. Rule 42(7) of the Rome Statute, for example, provides that “neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground.” The Chamber can then communicate that information to the Prosecutor. Nothing in the statute or rules requires the Prosecutor to appoint independent counsel in such circumstances however, or for that matter, to investigate allegations communicated to it.

38. Nonetheless, if counsel has reliable information of violations of Article 70 that information should be presented to the Chamber. In the Lubanga case the Defense alleged that prosecution intermediaries had engaged in various kinds of misconduct with trial witnesses including improper influencing and intimidation. The Trial Chamber ultimately found the allegations to be well-grounded. In the Trial Judgement the Chamber acknowledged that under the ICC’s legal framework it could not order an investigation. It therefore communicated its findings to the Office of the Prosecutor. Under those circumstances the Prosecutor agreed to appoint an independent counsel to investigate the matter.53

52 Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-3114, Decision on the Request of the Defence in Relation to Investigations Conducted Pursuant to Article 70 of the Statute, 17 June 2014, para 19. See also Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-T350-Red2-ENG, p 15, lines 15-18.

53 See IBA Discussion Paper, p. 22 quoting Situation in the Central African Republic, ICC-01/05-50, Decision on the Registry’s Observations pursuant to regulation 24bis of the Regulations of the Court on the implementation of the “decision on the Prosecutor’s Request for judicial assistance to obtain evidence for investigation under Article 70,” 27 May 2013, para 9, citing Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, Judgement pursuant to Article 74 of the Statute, 14 March 2012, para 483. Apparently no charges were ever brought as a result of that investigation nor was any report of the investigation ever made public.
39. ICC Regulations permit Article 70 cases to be brought before a single judge of the pre-trial chamber and trial chambers for pre-trial and trial proceedings, not a full panel of three judges. Appeals in contempt cases are heard by a panel of three rather than five judges. Proceedings may also be referred to the appropriate State Party with a request that it pursue the case, instead of the ICC.  

D.1 Actus reus

40. Article 70 of the Rome Statute defines those acts which may constitute contempt of court. It provides:

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
   a. Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
   b. Presenting evidence that the party knows is false or forged;
   c. Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
   d. Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
   e. Retaliating against an official of the Court on account of duties performed by that or another official;
   f. Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

41. Conviction for any offense under Article 70 is punishable by a term of imprisonment not to exceed five years or a fine in accordance with the Rules of Procedure and Evidence of the ICC, or both.

42. As with similar provisions at the ICTY, ICTR and IRMCT, Article 70 “seeks to protect the integrity of the proceedings before the Court by penalising the behaviour of persons that impedes the discovery of the truth, the victims’ right to justice and, generally, the Court’s ability to fulfil its mandate”. Article 70 also aims to protect witnesses from interference in the form of intimidation, corruption and threats. The ICC’s jurisprudence has interpreted Article 70(1) (c) of the Rome Statute as proscribing ‘any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the

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54 ICC, Regulations of the Court, ICC-BD/01-01-04, 26 May 2004, amended on 6 December 2016, Regulation 66bis
55 Rome Statute, Article 70(3).
56 Prosecutor v Jean-Pierre Bemba Gombo et al, ICC-01/05-01/13-2123, Decision on Sentence Pursuant to Article 76 of the Statute, 22 March 2017, para 19. See also IBA Discussion Paper.
testimony to be given by a witness, inducing the witness to falsely testify or withhold information before the Court’. 57

D.2 Mens rea

43. To result in criminal liability acts prohibited under Article 70 must be committed with knowledge and be done “intentionally.” 58 A witness must knowingly and intentionally testify falsely, for example, to be found guilty under Article 7(1)(a). 59

44. In Bemba, the Chamber held that “intentional” conduct as contemplated in Article 70(1)(a), should be understood “to embrace dolus directus in the first degree (direct intent) and second degree (oblique intent).” 60

“Dolus directus in the first degree requires that the witness knows that his or her acts or omissions will bring about the material elements of the offence, viz. false testimony, with the purposeful will (intent) or desire to bring about those material elements of the offence. . . . Dolus directus in the second degree requires that the witness does not need to have the will (intent) or desire to bring about the material elements of the offence, viz. false testimony. Rather, he or she is aware that those elements will be the almost inevitable outcome of his or her acts or omissions, i.e. the witness ‘is aware that [the consequence] will occur in the ordinary course of events’, as described in Article 30(2)(b) and 30(3) of the Statute.” 61

45. To establish an offense under Article 70, a mens rea of dolus eventualis (recklessness, or negligence) is likely not enough. Instead, the offense must be committed with intent and knowledge as just described. 62

46. Because offences under Article 70 are by definition against the administration of justice and “threaten or disrupt the overall fair and efficient functioning of justice in the specific case to which they refer,” these offenses are considered to be serious and are subject to disciplinary action as well as criminal charges and sentencing. 63

57 Ibid., and see Prosecutor v Jean-Pierre Bemba Gombo et al, ICC-01/05-01/13-749, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, para 30; ICC, Prosecutor v Jean-Pierre Bemba Gombo et al, ICC-01/05-01/13-1989-Red, Judgment Pursuant to Article 74 of the Statute, 19 October 2016, para 43.
58 Prosecutor v. Bemba et al., ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, 19 October 2016, para. 26.
59 Ibid.
60 Ibid., para. 29.
61 Ibid.
62 Ibid., para. 27.
63 Prosecutor v. Bemba et. al., Judgement pursuant to Article 74 of the Statute, ICC-01/05-01/13, 19 October 2016, para. 65.
47. While there is no “gravity” threshold by which to discern whether specific conduct warrants an Article 70 prosecution, a case which presents a threat to the integrity of past, ongoing or future proceedings at the ICC will justify investigation and prosecution. In cases involving presentation of false testimony, for example, not all false information will trigger a prosecution; rather only such information as is determined to be “material” to the investigation or assessment of the factual merits of the case or the credibility of witnesses.

48. An accused charged with an Article 70 violation is entitled to the minimum fair trial guarantees set out in Articles 61 and 67 of the Rome Statute, including the right to counsel, the presumption of innocence and the right to present a defense. The Prosecution bears the burden of proof and as with all criminal cases must prove the offense beyond a reasonable doubt.

49. In the event of conviction, the Chamber may impose a term of imprisonment not to exceed five years or a fine in accordance with the Rules of Procedure and Evidence, or both.

E. Article 70 cases at the ICC

50. As mentioned earlier allegations of improper influencing of witnesses have been raised in several cases at the ICC. The Lubanga case was the first although it did not result in any charges being brought against anyone. Offenses against the administration of justice have actually been charged against eight people; five of whom ultimately stood trial and were convicted. These charges arose from two underlying ICC prosecutions; the Bemba and the Ruto et al cases.

51. The Prosecution has investigated other accused at the ICC, who were previously on trial or are on trial now, including Bosco Ntaganda, Thomas Lubanga Dyilo, Mathieu Ngudolo Chui and Dominic Ongwen. To date no charges have been brought against any of these individuals or any members of the defense teams associated with these cases.

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64 Ibid., at para. 15 (“Indeed, on 27 March 2015, the Chamber indicated that considerations of ‘gravity’ or ‘interests of justice’ cannot be invoked in the context of Article 70 proceedings.”).

65 Kilolo case, Pre-Trial Chamber, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, para. 23; Prosecutor v. Bemba, Judgement pursuant to Article 74 of the Statute, ICC-01/05-01/13, 19 October 2016, para. 15 (“[T]he Chamber considers that for a court of law, there is an intrinsic gravity to conducts that, if established, may amount to the offence of obstruction of justice with which the accused is charged.”).

66 Prosecutor v Bemba, Judgement pursuant to Article 74 of the Statute, ICC-01/05-01/13, 19 October 2016, para 22.

67 See Article 66(1).

68 See Rule 149.

69 Prosecutor v. Bemba, Judgement pursuant to Article 74 of the Statute, ICC-01/05-01/13, 19 October 2016, para. 190.

70 See Article 66(2).

71 See Article 70(3).

72 The five individuals were all involved in the Bemba case.

73 Prosecutor v Jean-Pierre Bemba Gombo, ICC-0105-01/08.

52. The Defence and Chambers have raised allegations pursuant to Article 70 regarding prosecution witnesses or intermediaries in the Katanga and Ngudjolo, Lubanga, Kenyatta and Ruto and Sang cases. These allegations included perjury on the part of prosecution witnesses, improper influence of witnesses by prosecution intermediaries, prosecution intermediaries persuading, encouraging or assisting witnesses to give false evidence, prosecution witnesses providing false evidence (an allegation which resulted in the withdrawal of charges against the Accused in the Kenyatta case), and allegations of witness interference by the Prosecution beginning in the pre-trial, investigative phase.

53. Regardless of the merits of the various Article 70 investigations and prosecutions which have taken place at the ICC to date, the procedures followed in the investigation of such cases, combined with the proscription that only the Prosecution has the authority to investigate and charge such cases, raise real concerns about the rights of the Defence when, as occurred in the Bemba and Ntaganda cases, the same Prosecution office prosecuting in the main case was at the same time investigating a separate Article 70 case against the accused, potentially the accused’s trial counsel and members of the defence team.

E.1 The Bemba case

54. The first trial of a contempt case under Article 70 at the ICC was in Bemba et al. In that case Mr. Bemba, on trial for war crimes and crimes against humanity under Article 5, was indicted under Article 70, along with his lead counsel, Mr. Kilolo, and other members of his defence team, for improperly influencing several defence witnesses and presenting false evidence to the Chamber during Bemba’s war crimes trial.

55. It was alleged that Mr. Bemba, his counsel Mr. Kilolo, his case manager and two defence team associates communicated with defence witnesses, advising them on what to say and what not to say during their testimony. The witnesses were allegedly paid prior to testifying but denied such payments during testimony at trial.

56. Mr. Kilolo first learned his defence team was being investigated for bribing defence witnesses about one month before the close of the defence case. It was alleged that after that Mr. Bemba directed

76 Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, Judgement pursuant to Article 74 of the Statute, 14 March 2012, para 483 (resulting in the Prosecution agreeing to appoint independent counsel to investigate).
78 Ruto & Sang, ICC-01/09-01/11, Trial Chamber V(A), Decision on Defence Applications for Judgments of Acquittal, 5 April 2016.
79 Bemba et. al., ICC-01/05-01/13, Judgement pursuant to Article 74 of the Statute, 19 October 2016.
Mr. Kilolo to call all of the witnesses who had testified and bribe them with incentives and money to remain silent and not to assist the Prosecutor in making a case against the Bemba defence team. 80

57. After trial in the Article 70 case all of the accused were found guilty of having corruptly influenced witnesses. 81 Mr. Kilolo and Mr. Bemba were also found guilty for presenting false testimony at trial and the other accused were convicted for aiding and abetting that offence. 82

58. The Bemba et al case is the subject of serious concern regarding the process by which the Prosecutor initiated and investigated the case. In particular, the prosecutor on the Article 70 case was the same prosecutor in Mr. Bemba’s underlying Article 5 war crimes case. The general concern is that procedures were implemented which directly undermined the rights of the defence in both cases.

59. The main, Article 5 trial against Mr. Bemba began in late 2010. Approximately two years later, in November 2012, the Prosecution received an anonymous tip about witness interference on the part of members of the Bemba team. At the time that tip was received the Defence had already begun presenting its affirmative case; in fact, had been doing so for about three months. 83

60. In confidential, ex parte filings the Prosecution asked the Bemba Trial Chamber for access to various defence records, including Registry records of payments to defence witnesses. In March 2013 it formally notified the Trial Chamber, in another confidential, ex parte filing, that it was investigating the accused and his defence team for various Article 70 offenses, which were outlined in detail for the Trial Chamber. Among other things it asked for and was granted recordings of all of Mr. Bemba’s telephone conversations from the detention unit.

61. In April 2013, the Trial Chamber transferred the Prosecution’s request to a Pre-trial Chamber. By the time this took place the Prosecution had been investigating the accused and his counsel for nine months. The Trial Chamber, sitting during trial on Mr. Bemba’s main war crimes case, had been made aware of the nature and extent of those investigations. The Defence was not aware of them.

62. The ICC Registry which, unlike the Defence, also knew about the Article 70 proceedings, raised its concern there was a need to appoint ad hoc counsel to represent the interests of the defence during the Article 70 investigation. That request was denied by the Pre-trial Judge who found that the subjects of the Article 70 investigation were not entitled to representation or even knowledge of the existence of the investigation unless and until the Prosecutor found reasonable grounds to believe an offense had been committed. Only then would the suspects in question have the right to counsel. In the interim the Prosecution was provided with unsupervised reign to review privileged and non-privileged conversations seized as part of the investigation.

80 Bemba et. al., ICC-01/05-01/13, Judgement pursuant to Article 74 of the Statute, 19 October 2016, paras. 9-13, 110, 111, 123, 129.
81 Ibid., pg. 455-58.
82 Ibid.
83 The facts of the Bemba case are lengthy and complicated. A good summary is contained in the IBA Discussion Paper, pp 20-23.
63. The Article 70 investigation, and the ex parte proceedings which were an integral part of it, lasted for a total of eleven months. Throughout that period of time Mr. Bemba’s trial was taking place before a Trial Chamber aware of the Article 70 investigation and across the courtroom from the Prosecutor who had initiated that investigation and was actively involved in it. The focus of that investigation was the witnesses who were testifying at that trial. Mr. Bemba, and his trial counsel first learned of the existence of the investigation when arrest warrants were executed against the five individuals who were ultimately charged.  

E.2 The Ntaganda case

64. Bosco Ntaganda was charged with war crimes and crimes against humanity and entered ICC detention in 2013. His trial began in September of 2015.

65. In August of 2014 the Prosecution obtained an order from the Trial Chamber to put restrictions on Mr. Ntaganda’s telephone contacts based on its allegation that he was revealing confidential information about prosecution witnesses during his telephone exchanges from the detention unit as a means to encourage witness intimidation or interference.

66. Those restrictions were imposed. Mr. Ntaganda was told about them and reports prepared by the Registry memorializing the content of Mr. Ntaganda’s conversations were given to the defence. The same reports were given to the prosecution, but in redacted form. In March of 2015 additional restrictions, also made known to Mr. Ntaganda and his defence team, were imposed based on his alleged abuse of his communication privileges.

67. One year later the Prosecution, in an ex parte, confidential filing, asked for unrestricted, unredacted access to all of Mr. Ntaganda’s non-privileged phone conversations and visitor logs since the date he entered detention. That request was granted. The defence was not notified of the existence of this expanded investigation.

68. The defence first learned of the expanded investigation one year later, in November 2016; approximately 15 months after the investigation first began. They were at that time provided with several thousand recordings of Mr. Ntaganda’s conversations from the detention unit.

69. Thereafter the defence filed a request for stay of trial proceedings arguing that “given the high relevance of those conversations to Defence strategy as well as to Mr. Ntaganda’s personal knowledge

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84 See description of these proceedings, IBA Discussion Paper, pp 39-40.
of the case,” providing the prosecution with access to such information constituted an abuse of process precluding the possibility of Mr. Ntaganda ever having a fair trial.\(^8\)

70. The Chamber denied the stay but did rule that the Prosecution could not use evidence obtained in the Article 70 investigation during Mr. Ntaganda’s main trial unless the Trial Chamber permitted it to do so “upon receipt of a substantial request to be filed sufficiently in advance.”\(^7\)

71. Throughout these proceedings it was the Prosecution position, not only that the Statute permitted only the prosecution to institute Article 70 proceedings and did not require participation of any independent counsel, but that an investigation into witness interference would necessitate the participation of prosecution staff working on the main trial in order to assess the nature and extent of the influence, interference or intimidation at issue.\(^8\)

**Conclusion**

72. As of the time of this writing, the substantive law defining contempt of court and the *actus reus* and *mens rea* for offenses against the administration of justice is, in general, the same at the ICTY, ICTR, IMRCT and the ICC. Of course, individual cases will differ based on their specific facts and circumstances and the existing contempt statutes are not necessarily exhaustive. Counsel must always be aware of the statutory law and the jurisprudence interpreting that law at the court where counsel is practicing.

73. The ICC, however, utilizes a unique procedural process for instituting contempt investigations and prosecutions which is different from the other extant international courts. That process, which provides that only the Prosecution can initiate such proceedings, implicates all other aspects of contempt proceedings.

74. Although individual cases will differ, it is important for practitioners to appreciate that the ICC process permits the Prosecution to investigate the Accused, defence counsel and defence team members, utilizing *ex parte*, confidential communications with the Trial Chamber sitting on the Accused’s underlying Article 5 trial. The ICC Prosecutor has been permitted to review both non-privileged and privileged attorney-client communications, defence work product and statements of an Accused who is represented by counsel, without the knowledge of the counsel. These procedures have been allowed with no provision made for an independent counsel’s participation so as to represent and protect basic rights of the accused—such as valid attorney-client privilege and defence work product privilege.

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\(^7\) *Ibid*, para 61.

75. There are also no conflict of interest provisions in the ICC statutory framework that require appointment of independent counsel or an amicus prosecutor in cases, such as Bemba and Ntaganda where the prosecutor had a clear conflict of interest. In both cases the same prosecutor’s office pursuing the underlying Article 5 war crimes trial was also investigating Article 70 allegations regarding the defence in the Article 5 trial and obtaining, as a result, access to otherwise confidential, privileged information.

76. It is counsel’s duty to abide by the applicable law and ethical codes when representing accused before the international criminal courts. It is lead counsel’s duty to oversee defence team members to assure that they conform to appropriate legal and ethical behavior. It is equally important for counsel at the ICC to be aware that Article 70 investigations can take place without counsel’s knowledge, even during a pending trial, and to take what steps are appropriate to assure compliance with the law, protection of the rights of the Accused and protection of privileged information, work product and defence communications.
XIV. Defence Organisations at the International Courts and Tribunals

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1. As in any other court of law, the Defence plays a crucial role at the ad hoc Tribunals.\(^*\) An individual accused of a crime is presumed to be innocent, is entitled to a fair trial without undue delay and to the assistance of counsel and “adequate time and facilities for the preparation of his defence”\(^{89}\) The right of the accused to a fair trial is not only a fundamental human right but also one of the basic principles of criminal justice.

\(^*\) Chapter authored by Dominic Kennedy, JP, LL.B (Hons), LL.M, Head of Office for the Association of Defence Counsel practising before the International Courts and Tribunals (ADC-ICT) and Executive Director for the International Criminal Court Bar Association (ICCBA) and former Justice of the Peace (Magistrate) in England and Wales. For further reading on this topic see Dominic Kennedy & Isabel Düsterhoft, The Proper Role for International Defense Counsel Organizations, in Defense Perspectives on International Criminal Justice, Cambridge University Press, 2017 and Isabel Düsterhoft & Dominic Kennedy, How to Manage the Defence - Experiences from the ADC-ICTY, in The Defence in International Criminal Trials, Observations on the Role of the Defence at the ICTY, ICTR and ICC, Nomos Verlagsgesellschaft, 2016.

\(^{89}\) Article 21, ICTY Statute; Article 14, International Covenant of Civil and Political Rights (ICCPR) and Article 6, European Convention on Human Rights (ECHR).
2. Defence counsel who take on the formidable task of defending an individual accused of international crimes are, along with all other parties operating within the international courts or tribunals, responsible for protecting these rights on behalf of the accused, in addition to the responsibility of providing the accused with a vigorous defence.

3. During the early years at the ICTY, Defence counsel were essentially excluded from the work of the ICTY, other than that required for the preparation of their own individual cases. Defence counsel had no individual or collective voice in the development of ICTY rules, procedures and practices, though the Defence was and remains an essential component of the trial process.

4. Defence counsels’ experience differed significantly from that of the Prosecution or staff at the ICTY. They were not allowed access to the ICTY building except for the public lobby, one Defence room and the courtrooms when trial proceedings were taking place. Defence counsel were not, for example, allowed access to the cafeteria or the law library. The Defence room had limited facilities, though it did include telephones, computers and a photocopying machine.

5. A major challenge faced by Defence counsel, in addition, is that they did not have the opportunity of entering into and remaining in an established law office throughout the pre-trial and trial proceedings. In contrast, lawyers from the Office of the Prosecutor (OTP) are able to work at the international courts or tribunals, with the guidance and assistance of experienced trial lawyers, appellate lawyers, and trial support staff located in their offices.

6. These circumstances improved gradually over the years as the Defence gained an increased opportunity to contribute to the resolution of issues which directly affected the Defence function at the ICTY. This progress was made with the substantial support and assistance of the Office of Legal Aid and Defence Matters (OLAD), and included increased access to resources critical to the ability of Defence counsel to adequately represent the accused.

7. In 2002, the Association of Defence Counsel Practising Before the ICTY (ADC) was established as a result of a rule change by the ICTY judges, requiring that all Defence counsel appearing before the Chambers belong to an officially recognised association of counsel. This chapter will explore the challenges faced by Defence counsel, describe how the ADC-ICTY was created, and explain how Defence organisations function to address challenges at the international courts and tribunals.

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90 Formerly known as the Office of Legal Aid and Detention Matters
A. The ADC-ICTY

8. When the ICTY was established there were no lawyers’ associations to represent Defence counsel who were practising there. Consequently, there was no collective voice for the Defence as a whole. Each individual Defence team had to liaise with the ICTY Registry on its own to negotiate for its resources. In 2002, the judges at the ICTY instigated the creation of the ADC-ICTY as the existing structures were deemed unsatisfactory. The judges felt there was a need to have an association that could ensure a highly qualified Defence counsel group and to make collective representations to the organs of the ICTY on behalf of all Defence counsel involved in the cases. It was also deemed necessary to have a Defence association in the context of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal. In September 2002, pursuant to a decision made at the July 2002 plenary, the Association of Defence Counsel was established. A working group of four Defence counsel, one Dutch Bar member and a Registry representative drafted the ADC-ICTY’s Constitution which was adopted at that plenary session.\(^\text{92}\)

9. The ICTY Rules of Procedure and Evidence (ICTY RPE) were amended to require that each Defence counsel “is a member in good standing of an association of counsel practising at the Tribunal recognised by the Registrar”.\(^\text{93}\) The Registrar officially recognised the ADC-ICTY on 4 October 2002.\(^\text{94}\) This provision meant that compulsory membership in the ADC-ICTY was required before counsel could practise at the ICTY and that they had to remain in good standing under the terms of the Constitution of the ADC-ICTY. The ADC-ICTY was established under Dutch law as an independent Bar Association and registered with the Dutch authorities, therefore remaining independent from the ICTY itself.

10. The International Residual Mechanism for Criminal Tribunals (IRMCT) was established by the Security Council in 2012 with the mandate to carry out residual functions of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR). The Registrar of the IRMCT recognised the ADC as the association of counsel practising before the IRMCT and therefore it is mandatory for lawyers on the list of counsel at the IRMCT to be members of the ADC.

11. In light of the pending closure of the ICTY at the end of 2017, the ADC changed its name to the Association of Defence Counsel practising before the International Courts and Tribunals.\(^\text{95}\) The ADC-ICT remains the only officially recognised association of counsel at the IRMCT and membership for list counsel is mandatory.

\(^\text{93}\) Rule 44(A)(iii), ICTY RPE.
\(^\text{95}\) The name change was effective from 1 June 2017.
12. In the first year the ADC engaged in important groundwork for future developments, including creating a website, establishing member services and procedures for applications, finding part-time support staff, requiring active participation of members in the various committees of the Association and involving itself in the technological developments within the ICTY. In its second year the ADC built on previous developments by employing a full-time staff member as its Head of Office and by addressing a long list of issues; both practical problems as well policy related questions.

13. The ADC managed to build bridges between the Defence and the ICTY which in turn gave the Defence an increased participation in the functioning of the ICTY and the IRMCT. As a result, it was also able to break down some of the perceived barriers between the three official organs of the ICTY and the Defence and maintains this cooperation with the organs of the IRMCT.

14. Although the ADC was not institutionally an organ of the ICTY, the ICTY Registrar involved the ADC in Tribunal-wide committees and projects. The Registrar, for example, consulted with the ADC prior to adopting major policies affecting the work of Defence teams. Notably, the ADC was consulted prior to adopting the pre-trial and trial legal aid policies. In addition, the ADC was involved in the complete review of the Directive on the Assignment of Defence Counsel in 2006. The ADC also keeps its members informed on relevant practical and procedural issues which enable individual counsel to strengthen the effectiveness of their performance. However, despite the many achievements of the ADC, it remains understaffed and under resourced. It received no funding from the ICTY budget and survived on membership dues.

**A.1 Objectives of the ADC-ICT**

15. The objectives of the ADC-ICT are numerous and include the following:

   a. To support the function, efficiency and independence of Defence Counsel practising before the International Courts and Tribunals;
   b. To promote and ensure the proficiency and competence of Defence Counsel Practising Before the International Courts and Tribunals in the fields of advocacy, substantive international criminal law and information technology systems relevant to the representation of persons accused before the International Courts and Tribunals;
   c. To offer advice to the President, the Chambers and the Registrar of the International Courts and Tribunals in relation to the right of the accused to a fair trial and the Rules of Procedure and Evidence as well as Regulations, Practice Directives and Policies related to the work of Defence Counsel, such as *inter alia*, the Directive on the Assignment of Counsel, the Code of Professional Conduct for Counsel Appearing Before the International Courts and Tribunals and the applicable Legal Aid Policies; and

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96 The three official organs of the ICTY are the Registry, Chambers, and the Prosecution.
97 Article 2, Constitution of the ADC-ICTY.
d. To oversee the performance and professional conduct of Defence Counsel, in so far as it is relevant to their duties, responsibilities and obligations pursuant to the Statute, the Rules of Procedure and Evidence, the Code of Professional Conduct for Counsel Appearing Before the International Courts and Tribunals, the Directive on the Assignment of Defence Counsel, and the Detention Rules and Regulations of the International Courts and Tribunals.

A.2 Membership

16. One of the fundamental challenges facing Defence counsel at the ICTY was that the jurisprudence at the ICTY involved a mix of traditional civil and common law principles. Therefore, the ADC and the ICTY, and subsequently the IRMCT required that Defence counsel meet certain minimum qualifications before they can be assigned to represent an accused. The ADC has a Membership Committee which is comprised of five full members of the Association.98 The role of this committee is to determine if applicants to the ADC fulfill all the criteria for full membership in the ADC.

17. If the Membership Committee determines that a lawyer does not meet the minimum qualification criteria this will prevent that individual from being accepted on the list of counsel maintained by the Registry; the list from which counsel are selected by accused who are in need of legal aid. In practice this means that the ADC has the ultimate responsibility to determine who is qualified to represent an accused and not the Registry. Any decision issued by the Membership Committee can be appealed before the Executive Committee of the ADC whose decision will be final.99 Hence the ADC performs the important function of assisting in ensuring that counsel for the accused are sufficiently qualified to provide the accused with competent representation.

A.3 Qualifications of Defence Counsel

18. A competent Defence enforces one aspect of the principle of equality of arms between the Prosecution and the Defence, thereby facilitating the fairness of trial proceedings. Furthermore, a vigorous and qualified defence contributed to positive perceptions of the ICTY, and subsequently the IRMCT’s, overall credibility and legitimacy in the eyes of the international community. The confidence the public has in the outcome of trials depends on the fairness of those trials. Therefore, Defence counsel are required to be highly experienced and competent to represent those accused of war crimes, crimes against humanity and genocide.

19. The requirements to be admitted as a member of the ADC-ICT are:

1. counsel is admitted to the practice of law in a state, or is a university professor of law;

98 Article 4, Constitution of the ADC-ICT.
99 Article 4(4), Constitution of the ADC-ICT.
2. counsel possesses established competence in criminal and/or international criminal law/
   international humanitarian law/ international human rights law;
3. counsel possesses at least seven years of relevant experience, whether as a judge, prosecutor,
   attorney or in some other capacity, in criminal proceedings;
4. counsel has written and oral proficiency in one of the two working languages of the IRMCT;
5. counsel has not been found guilty or otherwise disciplined in relevant disciplinary proceedings
   against counsel where he is admitted to the practice of law or is working as a university professor
   of law; and,
6. counsel has not been found guilty in relevant criminal proceedings against him.100

20. The requirement for seven years’ experience may be waived for a counsel retained by the accused, as
    opposed to counsel assigned by the Tribunal.

21. Once a person is admitted as a full member of the ADC-ICT s/he must also fulfill a similar set of criteria
    codified in Articles 42 and 43 of the IRMCT Statute.101 These requirements are the same as those which
    were previously needed to be admitted to the list of counsel at the ICTY. These requirements are
    comparable to those stipulated by the ADC with the addition that all Defence counsel must remain in
    good standing with the ADC to be eligible to practice before the IRMCT. To remain in good standing,
    members of the ADC must pay annual membership fees and those assigned to a current case must also
    pay monthly membership dues.102 The Registry is vested with the power to decide if applicants to list of
    counsel eligible to be assigned to cases fulfill the requirements of Rules 42 and 43 of the IRMCT RPE.103
    Once applicants meet all the qualification requirements they will be added to the list of counsel.

22. The qualification requirements are an important framework in which the accused’s right to counsel is
    protected and ensure that individual accused will have counsel already possessed of sufficient
    competency to effectively represent them during trial proceedings.

A.4 Disciplinary Council

23. The ADC-ICT Disciplinary Council (Council) is comprised of five full members of the ADC.104 The role
    of the Council is to provide a complimentary safeguard for the values of the IRMCT Code of Conduct. It is
    charged with governing the conduct of the members of the ADC. Unlike all other ADC committees, it is
    independent from the Executive Committee. It has three main duties:

100 Article 3, Constitution of the ADC-ICT.
101 The same provisions existed in the ICTY Statute in Articles 44 and 45.
102 The annual membership fees for 2020 are €250 and an additional €80 per month for counsel in trial phase and €40 per month for counsel
    in pre-trial or appeal stage.
103 Formerly Rules 44 and 45, ICTY RPE.
104 Article 15, Constitution of the ADC-ICT.
i. monitoring the conduct of members of the association in their representation of those accused by the Tribunal;
ii. adjudicating complaints received against members of the ADC-ICT for alleged misconduct; and,
iii. providing advisory opinions on matters relating to the Code of Professional Conduct, the Directive on the Assignment of Counsel as well as the interpretation of the ADC-ICT Constitution.\(^{105}\)

24. Complaints against members of the ADC-ICT for alleged misconduct can be brought by another full member, by an accused or by staff members of the international courts and tribunals where the ADC-ICT is recognised as the association of counsel, whose rights or interests are affected by the alleged professional or ethical misconduct.\(^{106}\)

25. The Council may:

- mediate between the parties to the disagreement;
- issue a formal warning to the respondent for his conduct;
- refer the complaint to the Disciplinary Panel of the international court of tribunal; and,
- terminate a counsel’s membership in the ADC-ICT.\(^{107}\)

26. If any Defence counsel is found to be in breach of the Code of Professional Conduct, the Council can recommend his/her removal from membership in the ADC. In such a case, the lawyer in question will no longer be in good standing with the ADC and therefore will no longer meet the pre-requisite for being on the list of counsel eligible to practise before the IRMCT. This was equally applicable during the existence of the ICTY.

27. The Executive Committee of the ADC also nominates one of the members of the Disciplinary Council to represent the ADC on the IRMCT Disciplinary Panel and two ADC members to represent the organization on the IRMCT Disciplinary Board.\(^{108}\)

28. In addition, the Disciplinary Council performs the extremely important function of providing individual Defence counsel with support and guidance regarding any ethical questions or dilemmas which may arise in an individual case. If the Council is approached by individual counsel seeking such guidance it will provide counsel with a confidential advisory opinion to assist counsel in resolving such quandaries. The Disciplinary Council has also been appointed as *amicus curiae* by Trial Chambers to assist Trial Chambers in the resolution of ethical issues related to Defence counsel.\(^{109}\)

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\(^{105}\) See Articles 16, 18 and 19, Constitution of the ADC-ICT.

\(^{106}\) Article 18, Constitution of the ADC-ICT.

\(^{107}\) Articles 15-18, Constitution of the ADC-ICT.

\(^{108}\) Article 40, Code of Professional Conduct for Counsel Appearing Before the IRMCT. The same provision was contained in the Code of Professional Conduct for Counsel Appearing Before the ICTY.

A.5 Rules Committee

29. The ICTY Rules of Procedure and Evidence were frequently amended; a process which took place at the Plenary of Judges.\(^{110}\) A proposal was first made to the ICTY Committee on Rules of Procedure and Evidence\(^{111}\) which was comprised of at least three permanent judges and non-voting representatives from the OTP, Registry and Defence. The Rules Committee submitted a report on proposed amendments to the last plenary session of each calendar year for consideration.

30. The ADC has a Rules Committee which is comprised of three full members of the ADC-ICT. It was created to liaise with and take part in the ICTY Committee on the Rules of Procedure and Evidence; an important development for the ADC as it constitutes an opportunity for the Defence to have a voice in the development and changes to RPE which could directly affect the procedures at trial and the Defence function. The ADC Rules Committee members are permitted to submit proposals for amendments to the RPE and presented the views of the Defence on proposed amendments. This participation was a noticeable improvement from the early years at the ICTY when the ICTY Committee on Rules of Procedure and Evidence was comprised solely of the Judges of the Tribunal and did not have a mechanism which permitted any input from the community of Defence counsel.

31. The ADC-ICT Rules Committee continues to sit on the Rules Committee of the IRMCT with the same participation as was applicable at the ICTY.

A.6 Amicus Curiae Committee

32. The Amicus Curiae Committee was created by the ADC to have a group of Defence counsel on hand to prepare and submit *amicus curiae* briefs, when requested, in matters which are considered to be important to all Defence counsel practising before the Tribunal. *Amicus* Briefs and requests to submit *Amicus* Briefs have been filed on numerous occasions by the ADC in support of individual Defence teams. These briefs have included submissions on both substantive legal issues\(^{112}\) and funding issues.\(^{113}\)

33. The ADC was also requested to file *Amicus* Briefs in support of the Defence in other international courts such as the International Criminal Tribunal for Rwanda (ICTR).\(^{114}\) To obtain the assistance of the Amicus

\(^{110}\) Rule 6, ICTY RPE.


\(^{114}\) See *Prosecutor v. Kanyarukiga*, ICTR 02-78-A, Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as Amicus Curiae, 18 April 2011.
Committee, Defence teams can approach the ADC Head of Office and request such assistance from the ADC. The final decision as to whether the issues in question should be collectively supported by the ADC is made by majority vote of the Executive Committee members. The aim of filing such briefs is to provide collective support for Defence teams and ultimately the accused. The contents of the Amicus Briefs prepared by the Amicus Committee are also subject to approval by the Executive Committee before submission to the respective Trial or Appeals Chamber.

A.7 Ad Hoc Committees

34. The ADC-ICT Executive Committee and General Assembly have the power to create committees as deemed necessary to address matters relevant to the Defence function which may arise from time to time. These Committees have, for example, included a Legacy Committee, a Post-Conviction Committee and a Post ad hoc Tribunals Committee. The aim of these committees is to represent the ADC on particular areas of importance to the association and to provide a means for representing the Defence perspective and experience regarding such issues formerly to the ICTY, and now the IRMCT or the UN Security Council. These committees are meant to develop and reflect to the extent possible the common view amongst Defence counsel on the topics in question.

A.8 Training

35. The cases brought before the ICTY necessitated that Defence counsel acquired a unique understanding of military, cultural, and political issues that require case preparation, investigation and management quite distinct from cases in national jurisdictions. In addition, the combination of both civil and common law traditions in the ICTY RPE and case law was also a formidable challenge for Defence counsel to meet and overcome. Therefore, it was essential that adequate, continuous training was provided to Defence counsel.

36. Defence counsel came from all over the world and often had little to no contact, particularly prior to trial, with other Defence counsel working at the ICTY on cases different from their own. Due to the ICTY’s funding policies, counsel were also not able to be consistently present in The Hague throughout the pre-trial preparation of their cases.

37. Unfortunately, there was no consistent policy at the ICTY for providing training for Defence counsel despite the need for such training and its clear benefits. The ADC therefore created a Training Committee charged with the significant responsibility of organising substantive training courses for Defence counsel. In 2004 and 2005, training was provided for Defence counsel new to the ICTY, as well as members of their legal teams, in certain technological tools critical to any counsel’s ability to organise and prepare cases involving international crimes at the ICTY, such as how to access the Judicial Database (JDB) and the Electronic Disclosure System (EDS). Other training events were organised for all members of the ADC on matters considered vitally important for practising at the international courts and
tribunals, such as practical exercises for conducting direct and cross-examination at trial, case management and organization, and issues involving the substantive law.

38. OLAD has a limited biennial budget for the provision of training for Defence counsel however the Registry was not in a position to offer all counsel the possibility of travelling to The Hague for the training and concentrates only on counsel who were practising at the ICTY. The training itself, however, was done by the ADC which, as mentioned, has organised various comprehensive training programs for its members from time to time. Due to lack of resources it has not been able to do so on a consistent basis.

39. The Registry provides some limited training for counsel, right before the scheduled beginning of trial, regarding essential technology used in court during trial and appeal (for example, Ringtail; LiveNote and eCourt systems) and on issues such as the bureaucratic steps which must be taken to get documents translated and the function and role of the Victims and Witnesses Section (VWS).

A.9 Representation and Outreach

40. The ADC-ICT was regularly been requested to participate in events organised by the ICTY and now the IRMCT and external institutes. This progress was an encouraging step towards increased representation of the Defence perspective on issues critical to the fair and balanced development of international criminal law. The Outreach section of the IRMCT now regularly seeks Defence counsel representatives to participate in academic discussions and official visits to the Mechanism; something which did not occur in the early years of the ICTY. This representation is important, among other matters, to educate the public by showing that there is an active Defence group at the international courts and tribunals which is as concerned with the protection of human rights as other entities in the international community, including the rights of the accused and to present the Defence view of issues. Additionally, members of the ADC are actively involved in capacity building activities in the region of the former Yugoslavia as experts and trainers to transfer what knowledge and skills they have acquired during the course of practising at the ICTY.

41. The ADC organises an annual conference which facilitates discussions on pertinent issues in international criminal law. The conference attracts legal professionals, academics and students and is one of the ADC’s main outreach events.

42. The ADC, in conjunction with the International Criminal Law Bureau, organises an annual Mock Trial and training where a week of training is given to the participants on international criminal law practice and procedure. The training culminates in a full day mock trial in the courtroom of the IRMCT with judges from the international courts and tribunals. The ADC is the only organization to hold such an event The Hague.

43. In August 2019, the ADC-ICT was formally recognised and approved as one of only 25 organisations which can send representatives to observe proceedings at the Military Commissions in Guantanamo Bay, Cuba.
This was recognition that the members of the Association have a wealth of experience in defending complex war crimes cases and these observations are vitally important to ensure that proceedings in the Military Commissions are as transparent as possible.

B. Setting Up a Defence Team

44. In order to competently and adequately prepare and present the defence in complex cases involving international crimes there is a need to put together a team of lawyers and support staff to represent the accused. A team is necessary to divide up the myriad tasks associated with the pre-trial and trial proceedings. A well balanced and qualified team is also imperative to ensure that a variety of skills are available to adequately represent the accused.

45. Cases at the ICTY involved, at minimum, hundreds of thousands to a million or more documents of disclosure as well as other types of material, including photographs and videos, which will be electronically disclosed to the Defence by the Prosecution during the pre-trial stage. Defence teams had to filter this mass of disclosure as it is relevant to the case, though the majority of it may never be offered in evidence by the Prosecution at trial.

46. Over the years, Defence counsel practising at the ICTY learned, from their own experiences and the experiences of colleagues, how to put together a Defence team. These teams should be able to prepare and present the Defence case within the constrictions of the finite amount of resources which are made available to the accused.

47. The practice has developed of combining a lawyer from the same region as the accused, with a lawyer trained in the common law system. This combination maximises the team’s ability to absorb and function within the mixed legal system and will generally obviate the need to employ a translator for meetings with the accused. This is not done in every case, nor is it required. There are successful teams comprised of two lawyers from the region and successful teams comprised of two lawyers who are not from the region. Each lead counsel appointed to a case is free to create the kind of legal team which best fits the circumstances of his client’s case.

48. The majority of Defence teams employ a “case manager”. This individual can have many different functions, however a primary one is to organise the massive amount of disclosure which will take place in each case. Case managers are trained in the use of various technological systems for the organisation of the high volume of materials. As the case proceeds and additional disclosure is served on the Defence, the case manager is responsible for continuing to organise that disclosure within the system used by the team, so that it is accessible to counsel or other members of the team when it is needed. Some case managers will also organise all written motion work from the Prosecution and Defence in a similar manner. Although the practice varies, many teams have their case manager present in court through all trial proceedings so that when counsel requires a document or reference to a transcript page, the case
manager is there to immediately provide that information. The ability to use technological systems and also understand the law constitutes an optimal asset for a case manager.

49. Defence teams usually employ legal assistants responsible for doing factual and legal research. Most legal assistants are law students or law school graduates. Legal assistants’ varied duties may include drafting motions and assisting investigators in the field with the on-the-ground work there. Many legal assistants also participate in review of disclosure, applying their legal knowledge to these factually oriented materials. As with a case manager, the specific tasks assigned to a legal assistant are varied and depend on the case.

50. Defence investigators are employed by many defence teams in order to gather and analyse evidence, intelligence reports and information on witnesses. This includes interviewing witnesses and taking official witness statements. The investigators work in close cooperation with other team members; however it is usually more advantageous if they are actually based in the region where the crimes are alleged to have taken place during their investigations both to save resources and to become well acquainted with the area.

51. Team members from the region of the accused, who speak one of the working languages of the international court or tribunal and can also speak the accused’s language are invaluable in assisting with the adequate and proper preparation and presentation of the Defence case pre-trial and at trial. As the team works together over time, all team members, whatever their legal background, will learn a combination of the skills required in civil and common law systems. Each Defence teams usually also enlists a number of highly qualified interns to alleviate some of the workload from the defence team and given the very limited resources available to many Defence team. These interns are considered a vital part of most defence teams.

C. Defence Counsel and OLAD

52. The IRMCT Registry’s Office for Legal Aid and Defence Matters (OLAD) determines whether an accused is indigent, administers payment to the accused’s Defence team and has financial investigators to ensure that the legal aid system functions effectively. The Registry works to ensure that it provides financial support to those accused who need it. OLAD is also the key mediator between Defence counsel and other sections of the IRMCT. The office is the first point of contact for most Defence counsel upon arrival at the IRMCT and is responsible for ensuring that Defence counsel are provided with help and assistance with issues such as resources, translators, and assignment of defence personnel. OLAD performed the same function during the existence of the ICTY.
C.1 Legal Aid

53. Accused persons who could not afford to fund counsel were entitled to assigned counsel, paid for by the ICTY. If the accused had means to partially remunerate counsel, the ICTY only covered that portion of the costs of the defence which the accused cannot bear.

54. The amount the Registry paid to a Defence team depended principally on the phase of the accused's case (whether it was in pre-trial, trial or appeal), and how complicated the case was. The same system is in place at the IRMCT.

55. In determining the difficulty of a case, the Registry takes into account a number of factors, including:

- the accused's position within the political or military hierarchy;
- the number and nature of counts in the indictment;
- the number and type of witnesses and documents involved;
- whether the case involves crimes committed in a number of municipalities; and,
- the complexity of legal and factual arguments involved in the case.

56. Payment to the accused's Defence team covers all aspects of preparing and presenting the Defence case, including reviewing the indictment, the supporting materials and all other documents provided by the Prosecution or gathered through Defence investigation, filing motions, interviewing witnesses, research and presenting the case at trial and on appeal.

57. The Legal Aid Policies\textsuperscript{115} delineate the rules governing the payment of Defence teams. The creation of these policies involved negotiations between members of the Registry and representatives from the ADC. Sufficient remuneration for Defence teams has always been a difficult and contentious issue. Initially counsel were remunerated on an hourly basis; a practice which was not considered sufficient compared with domestic practice. The current legal aid policies incorporate a “lump sum” payment method where payment is given, in a lump sum, for each separate phase of the proceedings. The aim of the lump sum system was to distinguish between the levels of difficulty of various cases by providing a larger amount of funding for the more complex cases. It removed the detailed hourly invoices which were previously required of Defence counsel and replaced that process with requiring an end of stage report, for each pre-trial and trial stage, describing in detail the work performed during the stage in question and attaching hourly time sheets from each team member.

58. Despite best efforts to streamline the payment system, Defence counsel still encounter problems with obtaining sufficient, timely remuneration for their Defence teams. This is a problem which, in the more extreme cases when money is not forthcoming during a critical stage of the proceedings, (for example, when final trial briefs must be prepared), it may directly and detrimentally impact on the accused right to equality of arms.

C.2 Decision on Indigency

59. All accused who claim to be indigent must provide the Registry with information about their financial assets as well as those of the members of their household. An accused who claims indigence has a legal duty to update his declaration of means at any time a change relevant to his financial status occurs.

60. OLAD determines whether an accused is indigent and will administer payment to the accused's defence team and employ financial investigators to ensure that the legal aid system functions effectively.

61. The Registrar shall determine to what extent an accused can remunerate his counsel and Defence related expenses, by taking various assets into consideration, such as:

- direct income;
- bank accounts;
- real or personal property;
- pensions;
- stocks bonds; and,
- other assets held.\(^\text{116}\)

62. The Registrar also has the right to take into account “the means of the spouse of a suspect or accused, as well as of those persons with whom he habitually resides”.\(^\text{117}\) Chambers have commented on how far the scope of Article 10(A) of the Directive on Assignment of Defence Counsel extends generally and in the case of Zoran Žigić, the Appeals Chamber noted that this article permits “the Registrar to take into account the means of those with whom an Accused habitually resided before entering detention and/or those with whom he would be residing if he were not in detention”.\(^\text{118}\) In the same case, the Appeals Chamber found that when assessing the means of an accused, the Registrar may “take into account the value of assets in the hands of other persons [sic] where those assets have been purchased with means

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\(^{117}\) Ibid.

\(^{118}\) Prosecutor v. Kvočka et al., IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid From Zoran Žigić, 7 February 2003, para. 16.
which the accused has freely disposed of”.

In Krajišnik, the Trial Chamber noted that not all assets of members of the household should be taken into account, especially if they are not a close family member to the accused.

Chambers have also commented on how far the scope of Article 10(A) extends in relation to the means of specific individuals.

With regard to the parents of the accused, it is stated that if the parent was receiving income from property (partly) owned by the accused or if the accused had transferred means to his parents in order to conceal the extent of his own means, the parents must contribute to the Defence or to their child.

Concerning the pension of an accused’s parents, it was stated in Šainović, that if the pension is insufficient to meet the parents’ own needs, account shall not be taken of that pension.

The Trial Chamber in Šainović held that account may be taken of the a spouse’s income, unless the accused satisfies the Registrar that the income does not constitute means in respect of which the accused has direct or indirect enjoyment or of which he freely disposes.

Concerning shares in a company or immovable objects, the Trial and Appeals Chambers in Žigić and Martić found that they were relevant to the assessment of the accused’s means. If a child forms part of the accused’s household, it is not unreasonable to take the child’s assets into account.

If the Registry finds that the accused is able to pay part of his defence costs, it will indicate which costs should be covered by the accused and which ones by the IRMCT. The Registry should ensure that the accused's defence does not exhaust his household's financial means and result in his dependents losing support.

C.3 Choice of Defence Counsel

All persons indicted by and appearing before an international court or tribunal have the right to be represented by counsel. If an accused wishes to be represented by counsel, he can either choose his own or be assigned counsel by the Registrar. If the accused is funding his own defence he is permitted to

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119 Ibid., para. 47.
121 Ibid., para. 22.
123 Ibid.
choose any counsel. If the accused’s defence will be funded through the legal aid policy he can choose counsel who are qualified and admitted to the list of counsel or the Registrar can assign counsel if it is in the interests of justice. In the Blagojević et al. case the Trial Chamber ruled that the “right to free legal assistance of counsel does not confer the right to counsel of one’s own choosing. The right to counsel applies only to those Accused who can financially bear the costs of counsel”. Article 19(4)(d) of the IRMCT Statute also states that the right to assigned counsel is not specifically a right to counsel of the accused’s own choosing. Thus, there is no absolute right for an accused to choose his assigned counsel. It is within the Registrar’s discretion to determine whether there are relevant and sufficient grounds to allow or override the wishes of an accused in the interest of justice. The Registrar does not have to be bound by the wishes of an indigent accused but will, as a matter of practice give significant consideration to the accused’s choice.

68. Although this decision is primarily the decision of the Registrar, a Trial Chamber can review this decision due to its inherent power to ensure that the accused have a fair and expeditious trial.

C.4 Withdrawal of Counsel

69. In Mucić et al., the Trial Chamber stated that an accused should only be allowed to seek withdrawal of his assigned counsel if he can establish good cause. The burden of proof to establish good cause lies with the person requesting the withdrawal of counsel. The Trial Chamber must examine these reasons and be satisfied that they are genuine and not frivolous. In the Blagojević et al. case, the Trial Chamber held that grounds for genuine and good reasons include, but are not limited to:

- fulfilment of professional obligations and responsibilities;
- satisfaction of qualification requirements pursuant to the rules of the Tribunal;
- the existence of a conflict of interest;
- engagement in any form of misconduct; and,
- performing responsibilities with diligence, competence and loyalty towards the client.

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126 Article 19, IRMCT Statute provides the right for counsel of the accused’s choosing. The same provision was contained in Article 21 of the ICTY Statute.
127 Prosecutor v. Blagojević et al., IT-02-60-PT, Decision on Oral Motion to Replace Co-Counsel, 9 December 2002, para. 61
129 Prosecutor v. Blagojević et al., IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s motion to instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 117.
130 Ibid., para. 62.
131 See Prosecutor v. Mejakić et al., IT-02-65-T, Decision on Accused’s Request for a Review of the Registrar’s Decision as to Assignment of Counsel, 6 September 2002.
133 Prosecutor v. Mucić et al., IT-96-21-T, Decision on Request by Accused Mucić for Assignment of New Counsel, 24 June 1996, para. 3.
134 Prosecutor v. Blagojević and Jokić, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 116.
70. A lack of trust in counsel is not automatically good cause to withdraw counsel.\textsuperscript{135} Moreover, an accused’s refusal to cooperate with his counsel is insufficient grounds for a withdrawal of counsel.\textsuperscript{136}

71. With regard to the accused’s right to an expeditious trial, only the most exceptional motions for withdrawal of counsel will be granted, especially if it is requested immediately before or during the trial.

72. Article 20(A)(ii) of the IRMCT Directive on Assignment of Counsel states that “where a request for withdrawal of counsel, made pursuant to paragraph A, has been denied the person making the request may seek the President’s review of the decision of the Registrar within two weeks from the notification of the decision to him”.\textsuperscript{137} This article provides that it is for the President to review a refusal to withdraw counsel. The same procedure existed at the ICTY.

73. Pursuant to Article 9(B) of the IRMCT Code of Conduct for Counsel Practising Before the Residual Mechanism, counsel may request withdrawal if such termination could be accomplished without material adverse effect on the interests of the client. Counsel can also request withdrawal when it will have a material adverse effect on the interests of his client, if a good cause for withdrawal exists and if it is “in the interest of justice”.\textsuperscript{138} In general counsel will not be permitted to actually withdraw until new counsel has been assigned to the accused. When that occurs, counsel has the ethical obligation to immediately transfer all disclosure, records, and other matters relevant to his client’s case to the newly assigned counsel.

\textbf{D. Functional Immunity}

74. According to the Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the ICTY, only the judges, the Prosecutor and the Registrar enjoyed personal inviolability, immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention and inviolability of all papers and documents.\textsuperscript{139} The Defence was neither included in this provision, nor in the provisions of Articles 30(1), 30(2) and 30(3) of the ICTY Statute, but were solely protected under Article 30(4), which stated: “Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning

\textsuperscript{135} Ibid., para. 120.
\textsuperscript{136} See \textit{Prosecutor v. Slobodan Milošević}, IT-02-54, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, 7 December 2004.
\textsuperscript{137} See Article 20 (A) (ii), Directive on Assignment of Defence Counsel.
\textsuperscript{138} \textit{Prosecutor v. Milutinović et al.}, IT-99-37-PT, Decision of the Registrar withdrawing Mr. Livingston as lead counsel for Milutinović, 9 September 2003.
\textsuperscript{139} See Article XIV, Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (UN Doc. S/1994/848), UN Secretary-General, 14 July 1994.
of the International Tribunal”. The Headquarters Agreement between the Netherlands and the IRMCT contains the same provisions.

75. In February 2011, the ICTY Appeals Chamber proclaimed a landmark decision in the Gotovina et al. case, ruling that Defence counsel and their teams enjoy functional immunity from investigations and prosecution regarding matters arising from and related to their representation of accused before the ICTY. This marks a milestone in the history of Defence teams working at the ICTY.

76. This ruling arose because in 2008, the Trial Chamber ordered Croatia to intensify its search for Operation Storm documents, leading to the Defence’s requests for temporary and permanent restraining orders against the Croatian authorities, pursuant to Rule 73 of the ICTY RPE. The Defence team requested that Croatia cease all criminal investigations and prosecutions against current and former members of the Gotovina Defence.

77. The Trial Chamber denied the request for restraining orders against Croatia and found that while Defence investigators should benefit from protection under Article 30(4) of the Statute, this article did not provide for personal or functional immunity for other members of the Defence team, as it did not refer to the Vienna Convention on Diplomatic Relations or to the Convention on privileges and immunities of the United Nations.

78. The Trial Chamber recalled that treatment of members of the Defence has not been defined by a resolution of the Security Council, a multilateral treaty or a bilateral agreement with Croatia. Moreover, the Trial Chamber took into consideration an opinion by Larry Johnson, Assistant Secretary-General for the Office of Legal Affairs of the United Nations, which addressed Defence investigator immunity at the ICTR and found that Johnson’s Legal Opinion did not conclude that members of the Defence enjoyed functional immunity under Article 29(4) of the ICTR Statute, mirroring Article 30(4) of the ICTY Statute.

79. Gotovina argued six grounds of appeal and the Appeals Chamber found that, under Article 30(4) of the ICTY Statute, members of the Gotovina Defence, including investigators, were entitled to functional immunity to allow them to independently exercise their official functions and assist the accused with his defence. The Appeals Chamber noted that Prosecution investigators are given functional immunity for their actions in fulfilment of their official functions before the ICTY under Articles 30(1) and 30(3) and therefore the Defence should be afforded the same right.

140 See Article 30(4), ICTY Statute.
143 Ibid., para. 19.
144 Ibid., para. 20.
145 Ibid., para. 34.
80. At the ICTR, functional immunity for Defence teams was a highly debated and controversial issue. Peter Erlinder, Defence counsel for Aloys Ntabakuze, was arrested in May 2010 in Kigali, under Rwanda’s “genocide ideology” laws and accused of negating and denying genocide during his closing arguments in Ntabakuze’s case. Erlinder’s arrest raised issues of the accused’s right to counsel and of the independence of counsel practising before the ICTR; in particular, counsel’s ability to present proper legal and factual arguments on behalf of the accused.146

81. The Appeals Chamber found that Defence counsel possess immunity from personal arrest or detention while performing their duties as counsel and also regarding written or spoken words and acts done by them in the course of the performance of their duties before the Tribunal.147 The Appeals Chamber decided that the proceedings against Erlinder on the basis of words spoken or written in the course of Ntabakuze’s closing arguments before the ICTR directly violated his functional immunity and interfered with the proper functioning of the Tribunal.148

82. In contrast to the ICTY and ICTR provisions relating to privileges and immunities of Defence counsel, the International Criminal Court Agreement on the Privileges and Immunities, authorises Defence counsel and assisting staff to conduct their own investigations without running the risk of arrest for doing so.149

83. These events reflect that although the ICC’s Agreement on the Privileges and Immunities grants functional immunity to Defence counsel practising before the ICC, this principle still not universally recognised at all international courts and tribunals, which may impede a safe working environment, independence for Defence and the efficient functioning of the trial court process itself.

E. The International Criminal Court

84. The International Criminal Court (ICC) was established in 2002 by the Rome Statute150 and is the first and only permanent international criminal court. The Office of Public Counsel for Defence (OPCD), as the main defense office within the ICC, was created in May 2004, nearly two years after the establishment of the Court.151 Hence, in comparison to the ICTY, the defense at the ICC has an actual institutional

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146 See Théoneste Bagosora, Aloys Ntabukaze, Anatole Nsengiyumva v. Prosecutor, ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder - ICTR, 6 October 2010, para. 18.
147 Ibid., para. 26.
148 Ibid., para. 29.
150 Rome Statute, art. 1.
151 Regulations of the Court (26 May 2004) ICC-BD/01-01-04, Regulation 77(1).
presence within the Court. The OPCD falls within the remit of the Registry for administrative purposes but is considered to be an independent office.\textsuperscript{152} The OPCD provides services to defense teams which include training, updates on the developing law and other case related assistance. The physical presence of the OPCD within the ICC also enables it to inform defense counsel of pertinent issues, most of whom are not located at the seat of the court. The Counsel Support Section (CSS) is another office within the ICC which is partly responsible for handling defense counsel matters. This office, also located within the Registry, is responsible for administering the list of qualified defense counsel and the funding for defense counsel and their teams.

85. There were attempts to create a legitimized bar association for the ICC for many years, which is recognized by the Court, similar to the ADC. The International Criminal Bar (ICB) was established in Montréal in June 2002 with the intention of being the independent bar association to represent defense counsel and counsel for victims practicing before the ICC. The Assembly of State Parties to the Rome Statute (ASP) gave the ICB observer status in 2005 and the following year one member was permitted to address the ASP. Despite this, the ICB was never given official recognition in the rules of the ICC which has resulted in membership of the ICB remaining voluntary and largely unrelated to qualifying to be on the list of counsel for the ICC. Due to its only partial representation of List Counsel at the ICC, the ICB’s influence at the ICC and the ASP is very limited.

86. In March 2014, after a number of expert meetings, the ICC Registrar created a Committee tasked with proposing a structure for an independent association of counsel at the ICC.

87. In July 2016, the International Criminal Court Bar Association (ICCBA) was formally created with the adoption of its Constitution.\textsuperscript{153} Unlike the ADC, the ICCBA represents both defence and victims’ lawyers at the ICC and their support staff. There are three categories of membership; full membership for those on the list of counsel, associate membership for those on the list of assistants to counsel and affiliate membership for those who support the objectives of the ICCBA.

88. Since its creation, the ICCBA has been involved in ICC official activities and policy level discussions on issues such as legal aid and taxation of defence counsel and support staff. The ICCBA has also held several training events for its members and has been invited to conduct training events in States Parties, including Georgia and Ukraine.

89. The ICCBA has also signed a number of affiliation agreements with national bar associations and international lawyer associations with the aim of assisting national jurisdictions and disseminating information about the ICC across the world.

\textsuperscript{152} Ibid, Regulation 77(2).
\textsuperscript{153} See Constitution of the ICCBA, available at: https://www.iccba-abpci.org/documents
90. The ICCBA has several committees, much like the ADC, which are responsible for different activities of the Association. The Executive Council of the ICCBA is composed of 15 members including a President and a Vice President for Defence and a Vice President for Victims. The Executive Council is responsible for managing the activities of the ICCBA and is the body which represents the ICCBA both at the internal and external level. The ICCBA has an Executive Director who is responsible to the Executive Council and manages the daily work of the Association.

91. In December 2019, at the 18th Assembly of States Parties held in The Hague, the ICCBA was officially recognised as a representative body of counsel in accordance with Rule 20(3) of the Rules of Procedure and Evidence. At the time of writing, unlike the ADC, membership of the ICCBA is not mandatory for lawyers on the list of counsel at the ICC.

F. The Special Tribunal for Lebanon

92. The Special Tribunal for Lebanon (STL) was created in 2009 following a request of the government of Lebanon to the United Nations. It has a primary mandate to hold trials for individuals accused of carrying out the attack of 14 February 2005 which killed former Prime Minister of Lebanon, Rafik Hariri.

93. Unlike at the IRMCT, ICTY, ICTR and ICC, the Defence Office at the STL is an organ of the Tribunal equal to the Chambers, Prosecution and Registry and is a fully independent.

94. The Defence Office does not represent or take instructions from any suspects or accused but its function is to support defence counsel and their team members. It also administers the legal aid system and the list of defence counsel.

95. The Head of the Defence Office is part of the senior management and sits on the Rules Committee and other Tribunal-wide bodies.

96. In light of the fact there is a Defence Office there has never been an association of counsel at the STL.

Conclusion

97. Defending cases involving international crimes presents numerous challenges both practically and procedurally. Since the establishment of the ICTY, measures have been implemented which have alleviated some of these challenges. Despite this progress there are still many obstacles which Defence counsel face at the international courts and tribunals. The creation of the ADC assisted Defence counsel at the ICTY, and now the IRMCT, in managing some of these institutional challenges.

98. The ADC is in the unique position of being the only bar association officially recognised by an international court or tribunal in which membership was compulsory for lawyers practising before the ICTY and currently still is for the list of counsel at the IRMCT. In comparison, the Association Des Avocats de la Defense (ADAD) which was created by lawyers at the ICTR, was not mandatory and compulsory membership of the ICCBA is not required at the ICC. The development at the STL with the Defence Office being the fourth organ of the Tribunal is progress for the rights of the defence but also has its limitations.

99. An ideal structure for the defense at the international courts and tribunals would contain three components:

1. A defense office which is an official organ of the court and actively supports the defence teams in their daily work;
2. An office within the Registry which administers assignments and payment of defense counsel; and
3. An independent defense counsel organisation which represents the interests of its membership, membership of which is mandatory.

100. The experience of Defence counsel at the international courts and tribunals illustrates the requirement that Defence teams have access to adequate resources and facilities to properly represent their clients and the opportunity to meaningfully participate in the day-to-day functions of the courts which directly impact on the Defence function. Although significant progress has been made since the opening of the ICTY there is still much room for improvement which must occur to ensure that trial proceedings are both fair and seen to be fair, and that the rights of the accused are adequately protected.
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<th>Acronym</th>
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<td>ADC-ICTY</td>
<td>Association of Defence Counsel practising before the ICTY</td>
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<td>BiH-OSA</td>
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<td>ECHR</td>
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