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Practice regarding motions for acquittal at the close of evidence for the prosecution. Specifically an overview of the law and practice of the international criminal tribunals regarding motions for judgment of acquittal at the close of the prosecution case, the legal standards applied by the other tribunals that also provide for such motions, as well as in the practice adopted, including whether the practice involves full briefing by the parties or just oral argument.

Daniel Joseph Carravallah

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CASE WESTERN RESERVE UNIVERSITY
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MEMORANDUM FOR THE SPECIAL TRIBUNAL FOR LEBANON

ISSUE: PRACTICE REGARDING MOTIONS FOR ACQUITTAL AT THE CLOSE OF EVIDENCE FOR THE PROSECUTION

SPECIFICALLY AN OVERVIEW OF THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS REGARDING MOTIONS FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE PROSECUTION CASE, THE LEGAL STANDARDS APPLIED BY THE OTHER TRIBUNALS THAT ALSO PROVIDE FOR SUCH MOTIONS, AS WELL AS IN THE PRACTICE ADOPTED, INCLUDING WHETHER THE PRACTICE INVOLVES FULL BRIEFING BY THE PARTIES OR JUST ORAL ARGUMENT.

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J.D. Candidate, May 2017
Spring Semester, 2016

TABLE OF CONTENTS

Bibliography of Sources 3

Introduction 6

Summary of Conclusions 6

Factual Background 8

Legal Discussion 10

- Conflicts Between Adversarial Procedure and Inquisitorial Procedure 10
- Practice and Standards of Review 12
  - Special Tribunal for Lebanon 12
  - Extraordinary Chambers in the Courts of Cambodia 13
  - International Criminal Court 16
  - International Criminal Tribunal for the former Yugoslavia 17
  - Special Court for Sierra Leone 21
  - International Criminal Tribunal for Rwanda 23

Conclusions 24

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ICTR Rules of Procedure and Evidence

I. Introduction

The OTP (Office of the Prosecutor) is interested in an overview of the law and practice of the international criminal tribunals regarding motions for judgment of acquittal at the close of the Prosecution case. This is governed by Rule 167 of the Special Tribunal for Lebanon's rules. The OTP is interested in the legal standards applied by the other tribunals that also provide for such motions, as well as in the practice adopted, including whether the practice involves full briefing by the parties or just oral argument.

The question of the law and practice surrounding a motion for judgment of acquittal at the close of the prosecution's case is ultimately a question of procedure. International criminal procedure is generally the result of a mixing of styles between the adversarial and inquisitorial approaches. The adversarial system is derived from the Anglo-American tradition of criminal procedure. The inquisitorial system is developed from the European Continental tradition. These approaches vary significantly and in international tribunals which have adopted elements of both approaches this can create confusion.[1]

II. Summary of Conclusions

The practice and standards of review applied by international criminal tribunals is mostly dependent on what type of approach it applies to procedure. The ECCC and ICC are generally courts that fit into the inquisitorial model. The STL, ICTY, ICTR, and SCSL more closely follow the adversarial model.

The presentation of evidence in an inquisitorial system is determined by the presiding judges. Therefore, there is no specific time for the close of the prosecution's evidence. The ICC does not have a procedure for a motion of acquittal except at the close of all evidence. The ECCC does have a procedure that is analogous to an adversarial court, whereby the defense can

[1] Safferling, *International Criminal Procedure*, p. 52-54.

file a motion to the Co-investigating judges requesting an annulment of charges. If the Co-investigating Judges at any time consider that any part of the proceedings is null and void they may notify the Parties and submit a reasoned application to the Trial Chamber requesting annulment.

The adversarial tribunals have a great deal of uniformity in the practice and standards of review surrounding a motion for acquittal at the close of the prosecutor's evidence. Generally, the standard of review is that if the prosecution's evidence is accepted without consideration of its credibility and reliability, the tribunal must acquit if the evidence presented by the prosecution at trial would be insufficient to prove the accused guilty of the charges listed on the indictment beyond a reasonable doubt.

The practices of the ICTY and SCSL have replaced the practice of a written submission with an oral argument. The SCSL, rather than a full brief, requires each party to submit a skeleton argument in support of or in opposition to the motion. The ICTR continue the practice of a full written submission. The change in procedure was seen as unfair to the accused by some defense lawyers for the ICTY because of the great disparity in time between the length of the prosecution evidence and the opportunity to prepare an adequate argument in support of the brief. The defense lawyers for the SCSL did not resist the change in procedure believing that the change in procedure would have little effect on the preparation of their arguments in support of the brief. The change in procedure is believed to have shortened the length of time between the close of the prosecution's case to the beginning of the defense's case in some trials.

When determining whether to replace a written submission of a motion for acquittal with an oral submission, a court must consider weighing how seriously the rights of the accused are affected against the degree to which the change in procedure enhances the efficiency of the court.

III. Factual Background

The Special Tribunal for Lebanon was inaugurated on March 1, 2009. Its primary mandate is to hold trials for the people accused of carrying out the attack of February 14, 2005 which killed 22 people, including the former prime minister of Lebanon, Rafik Hariri, and injured many others.[2] The prosecutor also has jurisdiction to investigate and prosecute persons suspected to be responsible for crimes related to the Hariri attack that occurred in Lebanon between October 1, 2004 and December 12, 2005. The Lebanese Parliament refused to cooperate in drafting an agreement, so the UN Security Council adopted Resolution 1757 to establish the court. The UN Resolution remains the primary legal basis of the Tribunal.[3]

The law to establish the ECCC was passed by the Cambodian National Assembly in 2001 in order to investigate and prosecute crimes committed against the Cambodian people during the Khmer Rouge, which was in power from April 7, 1975 to January 7, 1979. Cambodia wished to invite international support for the court due to the international nature of the crimes, the weakness of the Cambodian legal system, and the desire to meet international standards of justice. The ECCC's jurisdiction is limited to crimes committed between the beginning and end of the Khmer Rouge's time in power, and only to the party leadership and those believed to be responsible for grave violations of Cambodian and international law.[4]

The ICC was created by the Rome Statute and entered into force on July 1, 2002. The ICC has jurisdiction only over states that have ratified the Rome Statute, and only has jurisdiction over crimes committed after the Treaty was brought into force in that jurisdiction.[5] The ICC is limited to prosecuting "the most serious crimes of concern to the international

[2] Safferling, 43-44
[3] Id., 44
[4] Id., 38-43
[5] Rome Statute, Art. 11

community as a whole…:" genocide, crimes against humanity, war crimes, and crimes of aggression.[6] The ICC is considered a court of last resort when a domestic law system is unable or unwilling to prosecute heinous crimes.[7]

The ICTY is the oldest ongoing ad hoc international tribunal. The UN Security Council established the tribunal in 1993 in order to investigate and prosecute war crimes and crimes against humanity committed during the Balkan conflict that began in 1991. The ICTY has jurisdiction for serious violations of international humanitarian law including grave breaches of the Geneva Convention, violations of the laws or customs of war, genocide, and crimes against humanity.[8]

The Special Court for Sierra Leone was established by agreement between the United Nations and the Government of Sierra Leone on August 14, 2000. The tribunal had "the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November, 1996..." during the civil war.[9] The Court was concerned with crimes against humanity, violations of the Geneva Convention, and under Sierra Leonean law, violations of the Prevention of Cruelty to Children Act of 1926, as well as other crimes.[10] The SCSL has closed proceedings, but the Residual Special Court for Sierra Leone is still functioning.

The ICTR was founded in 1994 by UN Security Council Resolution 955. The court's jurisdiction covers serious violations of international humanitarian law committed in Rwanda and by Rwandan citizens in neighboring states between January 1, 1994 and December 31, 1994. The ICTR had the right to investigate and prosecute genocide, crimes against humanity, and

[6] Id., Art. 5.1
[7] Safferling, 47-52
[8] Statute of the International Criminal Tribunal for the Former Yugoslavia, Articles 1-5
[9] Statute of the Special Court for Sierra Leone, Art. 1
[10] Id., Articles 2-5

violations of Article 3 of the Geneva Conventions and of Additional Protocol II.[11] Because the genocide in Rwanda had so many perpetrators, the ICTR was focused only on prosecuting the top-level planners.[12]

IV. Legal Discussion

Every international criminal tribunal uses element of both the adversarial and inquisitorial trial procedure. There are no juries in international tribunals, so the judges act as both the trier of law and the trier of fact. This is a familiar disposition for judges that come from an inquisitorial system. However, the international criminal tribunals also delegate more authority to the lawyers for the respective parties than would an ordinary domestic inquisitorial court. The procedures for a mid-trial motion for acquittal are deeply dependant on whether the tribunal is closer in procedure to an adversarial or inquisitorial system.

A. Conflicts between adversarial and inquisitorial trial procedure

The primary difference between adversarial and inquisitorial trial procedure is the preference for the delegation of decision making. The inquisitorial system tends to have firmer rules put in place leaving less discretion to judges and prosecutors. Traits of the inquisitorial system include centralized decision-making, rigid ordering of authority, and a preference for determinative rules. At trial, the judge is very active and is responsible for calling and examining witnesses. In this model, there is a stronger likelihood that judges sit on a panel rather than individually.[13]

The adversarial model tends to afford judges and prosecutors more discretion. The prosecutor has nearly complete discretion in how or whether to prosecute a case. It is the responsibility of the attorneys to present evidence at trial. The judge tends to have a more passive

[11] Statute of the International Criminal Tribunal for Rwanda, Articles 1-4
[12] Safferling, 28
[13] Damaska, *Structures of Authority and Comparative Criminal Procedure*, 523-526

role, acting as more of an umpire to make sure the action is fair. A major difference between the models is that the adversarial model is more likely to use a lay jury to weigh the evidence. The rules of evidence at trial rather than determining behavior of the institutional actors are used to ensure a fair presentation of the evidence to a group of people not well-versed in the law.[14]

There are three elements that influence the development of criminal procedural law: (1) the investigative element, (2) the procedural element, and (3) the judging element. The inquisitorial and adversarial systems have a different aim in each of these elements.[15] The investigative element is about uncovering the truth of the matter. There are essentially two conceptions of the truth at trial: that truth is external of the trial and needs to be determined by the judges ("material truth"), and that truth is relative to the evidence presented at trial ("procedural truth"). With judges controlling the presentation and evaluation of evidence, inquisitorial courts seek the material truth. Adversarial courts, which typically use juries to weigh evidence, seek procedural truth in order to prevent a verdict based on prejudicial or confusing evidence. Likewise, there are two general aims of determining the procedural parameters: protecting the defendant's basic rights and presenting the evidence fairly. Inquisitorial courts develop procedure that leans more towards protecting the rights of defendants, whereas adversarial courts attempt to present the evidence in an unbiased manner. Finally, the judging element is about whether the court leaves the question of guilt to a panel of judges or to a group of lay jurors. In an inquisitorial system the judge or judges weigh the evidence and determine guilt. In an adversarial system, where the presentation of evidence is largely determined by the parties themselves, the purpose of procedural law is to present the

[14] Id.
[15] Safferling, 55

procedural truth in fairness to the defendant so that a lay jury is not burdened with weighing prejudicial or confusing evidence when determining guilt or innocence.[16]

International tribunals adopt a mixture of norms from the adversarial and inquisitorial models. This can cause difficulties in creating procedural norms, especially at the trial stage as this is the area where adversarial and inquisitorial models diverge most.[17] The major international crime tribunals are mostly designed as adversarial proceedings. This is the case in the ICTY, ICTR, SCSL, and ICC. Only the STL and ECCC more closely conform to the civil law inquisitorial models that exist in their respective countries.[18] However, more important to the courts than the origin of a procedure are "whether it assists the tribunals in accomplishing tasks and whether itit complies with fundamental fair trial standards."[19]

B. Practices surrounding motions for acquittal and standards of review of the various international tribunals

1. Special Tribunal for Lebanon

The STL adopts and incorporates Lebanese substantive law, which is based on a civil law inquisitorial system. The STL however has adopted many procedural rules that are seen much more frequently in common law systems. Like in adversarial trials, the prosecution first presents its case in order to prove the charges set forth in the indictment. Unlike adversarial trials, victims can participate in the proceedings as well. This means that the Trial Chamber may call further evidence and witnesses at the request of victims who choose to participate in the proceedings. Any evidence submitted by the prosecution or victims may be challenged by the defendant. Like in an adversarial system, each party has a right to cross-examine any witness. Unlike a typical

[16] Id., 54-57
[17] Ambos, Kai, *The Structure of International Criminal Procedure: 'Adversarial', 'Inquisitorial' or 'Mixed'?*, in: Michael Bohlander, ed., *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, 475
[18] Pocar, Fausto & Linda Carter, *The challenge of shaping procedures in international criminal courts*, in: Linda Carter Fausto Pocar, eds., *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, 27-30
[19] Ambos, in Bohlander, ed., 500

adversarial trial, but in line with every other international tribunals, there is no jury so determination of the verdict rests solely with the judges.

After the close of the prosecution's case the defense has an opportunity to move for a judgment of acquittal pursuant to Rule 167 of the STL's Rules of Procedure and Evidence. Rule 167 states that "[a]t the close of the prosecutor's case, the Trial Chambers shall, by oral or written decision and after hearing submissions of the Parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction on that count." The STL is relatively young and no cases have yet to reach the close of the Prosecution's presentation of evidence in any of its trials. However, this rule is modeled very closely on Rule 98 *bis* from the ICTY Rules of Procedure and Evidence. For this reason the STL will likely follow the detailed jurisprudence of the ICTY on the application of its Rule 98 *bis*.

2. Extraordinary Chambers in the Courts of Cambodia

The ECCC applies both Cambodian and international law.[20] Cambodia is a civil law society, but Rule 21.1(a) of the ECCC's Internal Rules promises that the "proceedings shall be fair and adversarial and preserve a balance between the rights of the parties." Despite the guarantee of an adversarial system, the Internal Rules lay out procedure in a fashion much closer to an inquisitorial trial.[21] The President of the Chambers controls all the proceedings. Rule 80 lays out how the preparation for the trial shall take place. The Co-Prosecutors submit a list of witnesses, experts, and other evidence they intend to summon to trial. The Accused and Civil Parties (victims) may submit a list of any additional witnesses they wish to summon.[22] According to Rule 80 *bis.*, at the Initial Hearing, the Chamber may reject a request for summons based on whether each proposed witness or expert would be conducive to the good

[20] Safferling, 38-43
[21] Id., 41
[22] Id., 41

administration of justice. At the outset of the Substantive Hearing, according to Rule 91 *bis.*, "[t]he President of the Trial Chamber shall determine the order in which the judges, the Co-Prosecutors and all other parties and their lawyers shall have the right to question the Accused, the witnesses, experts and Civil Parties."

Because the trial conforms more to inquisitorial standards rather than adversarial standards, the ECCC does not actually have a time at which the Prosecution closes its case. Instead, the Accused has an opportunity to at any time request the Trial Chamber to reduce the scope of the trial pursuant to Rule 89 *quater.*, which allows the Trial Chamber the authority to exclude certain facts from the proceedings. If facts are excluded, any proceedings that stem from charges in the indictment that relied on such facts must be terminated. Rule 76 also provides a framework by which charges can be dismissed: if the Co-investigating Judges at any time consider that any part of the proceedings is null and void they may notify the Parties and submit a reasoned application to the Trial Chamber requesting annulment. The Parties may also submit a reasoned application seeking annulment to the Co-investigating Judges. The standard of proof is best laid out in Rule 76.4: "The Chamber may declare an application for annulment inadmissible where the application: does not set out sufficient reasons; relates to an order that is open to appeal; or is manifestly unfounded."

These standards are illustrated in an appeal that the Co-Lawyers for Ieng Thirith submitted alleging misconduct on the part of one of the Co-Investigating Judges. The Co-Lawyers alleged in an application seeking annulment to the Co-Investigating Judges that one of them had demonstrated partiality against the Accused, had an impermissibly close relationship with the Co-Prosecutors, and had attempted to block his Co-Investigating Judge from accessing information relating to the trial. The Co-Lawyers sought to annul the entire investigation because

their client's rights had been so thoroughly violated as to taint the entire proceeding. All of the evidence was based on contradictory hearsay and the Co-Investigating Judges dismissed the application. The Co-Lawyers appealed, and the Pre-Trial Chamber ruled that the Internal Rules do not allow for the Co-Investigating Judges to rule on the merits of an application. When determining whether to seize the Chamber with an application seeking annulment, the Co-Investigating Judges should consider whether there is a reasoned application that there has been: (1) a procedural defect; and (2) such defect infringes on the rights of the party making the application.[23] The standard of proof the Co-Investigating Judges should have used was simply whether a prima facie case could be made. The Pre-Trial Chamber dismissed the application seeking annulment on all counts because their chamber applies a much higher standard of proof: "the applicant must prove the existence of a procedural defect that has harmed their interests in order to satisfy the threshold for annulment."[24]

It should also be noted that in the case of the ECCC, in the event a case is annulled due to procedural defects, that would not foreclose the Tribunal from proceeding with a new investigation untainted by defects.[25] (Thirith Appeal, Par. 27)

3. International Criminal Court

The ICC uses an inquisitorial framework in its investigations. Being a court of limited jurisdiction, there does not seem to be a procedure in place similar to the annulment procedure from the ECCC. The decision to end the investigation rests solely with the Judges. The defense

[23] Prosecutor v. Ieng, Pre-Trial Chamber, 002/19-09-2007-ECCC/OCIJ (PTC 41)-D263/2/6, 25 June 2010, Decision on Ieng Thirith's appeal against the co-investigating judges' order rejecting the request to seise the Pre-Trial Chamber with a view to annulment of all investigations, para. 18
[24] Id., para. 21
[25] Id., para. 27.

may submit a request to the Trial Chamber to make a final determination on the case based on the evidence presented by the prosecution.[26]

Uhuru Kenyatta had been charged by the ICC with crimes against humanity for an eruption of violence that occurred in December 2007 and January 2008 in the wake of his re-election. The Pre-Trial chamber upon examining the Prosecutor's evidence confirmed the charges and sent them to the Trial Chamber. After the charges were confirmed, three key witnesses were either found to have made false statements or withdrew their intention to testify.[27] This request was simply submitted under the color of Article 67 of the Rome Statute which provides for the rights of the accused.[28] This includes the right to be tried without undue delay as is specifically provided for in Art. 67.1(c). If the Judges find that the evidence presented lacks sufficiency to prove beyond a reasonable doubt that the accused committed the crimes, they may order the Prosecution to either present new evidence or withdraw its charges against the accused.[29] (Kenyatta, withdrawal of charges by Prosecution). In any case, it is at the discretion of the Judges to demand the close of the investigation and make a determination of guilt. The standard of proof, as provided in Article 66.3 of the Rome Statute, is that the Court must be convinced of the guilt of the accused beyond a reasonable doubt.

4. International Criminal Tribunal for the former Yugoslavia

The trial phase of the ICTY is based on the adversarial model. This means that the prosecution presents their evidence first, followed by the defense as provided in Rule 85 of the

[26] Prosecution v. Kenyatta, Defence, ICC-01/09-02/11-945-Red, 10 September 2014, Defence Response to 'Prosecution Notice Regarding the provisional trial date' (ICC-01/09-02/11-944) and Request to Terminate the Case Against Mr. Kenyatta.

[27] Id., para. 5, 8, and 9
[28] Id., para. 17
[29] Prosecutor v. Kenyatta, TC5(B), ICC-01/09-02/11-1005, 13 March 2015, Decision on the withdrawal of charges against Mr. Kenyatta

ICTY Rules of Procedure and Evidence. The prosecutors have more control over the presentation of evidence than is seen in the ECCC. Each witness may be summoned for examination-in-chief, cross-examination, and re-examination.[30] The rules of evidence are also more indicative of an adversarial system, allowing for the Trial Chamber to "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."[31] This is a typical prophylactic rule in jury trial to prevent the jury from being unfairly prejudiced. However, there are no jury trials at the ICTY as the verdict is determined by the Trial Chamber.

Rule 98 *bis* provides that "[a]t the close of the prosecutor's case, the Trial Chamber shall, by oral decision and after hearing oral submissions of the parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction." The standard of review under Rule 98 *bis* is that the Trial Chamber must acquit in cases "to which, in the opinion of the trial chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find guilt has been proved beyond a reasonable doubt."[32]

The ICTY has gone into specific detail of exactly the test for whether there is evidence, if accepted, on which the Trial Court could convict:[33]

1. "Where there is no evidence to sustain a charge, the Motion is to be allowed. Although Rule 98 *bis* speaks of the sufficiency of evidence to sustain a conviction on a charge, the Trial Chamber has, in accordance with the practice of the Tribunal, considered the sufficiency of the evidence as it pertains to elements of a charge, whether set out in separate paragraphs or schedule items;
2. Where there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it, the Motion is to be allowed. This will be the case even if the weakness in the evidence derives from the weight to be attached to it, for example, the credibility of a witness. This is in accordance with the exception to the general principle in common law

[30] ICTY Rules of Procedure and Evidence, Rule 85(B)
[31] Id., Rule 89(D)
[32] Prosecutor v. Jelisic, AC, IT-95-10-A, appeal judgment, para. 37
[33] Prosecutor v. Milosevic, TC3, IT-02-54, 16 June 2004, Decision on Motion for Judgement of Acquittal, para. 13.

jurisdictions that issues of credibility and reliability must be left to the jury as the tribunal of fact.

3. Where there is some evidence, but it is such that its strength or weakness depends on the view taken of a witness's credibility and reliability, and on one possible view of the facts a Trial Chamber could convict on it, the Motion will not be allowed. This accords with the general principle in common law jurisdictions that a judge must not allow a submission of no case to answer because he considers the prosecution's evidence to be unreliable, since by doing that he would usurp the function of the jury as the tribunal of fact.
4. The determination whether there is evidence on which a tribunal could convict should be made on the basis of the evidence as a whole.
5. Whether evidence could lawfully support a conviction must obviously depend on the applicable law of the Tribunal and the facts of each case. The common law cannot be relied on to rule evidence as incapable of supporting a conviction if on the basis of Tribunal jurisprudence the evidence is to be considered as having that capacity. Thus hearsay evidence, generally inadmissible in common law jurisdictions, is, pursuant to Rule 89(C), admissible, the principal factor determining admissibility being the reliability of the evidence. Once admitted, it is for a Trial Chamber to determine the weight to be attached to hearsay evidence.
6. In view of the peculiarly common law origin of Rule *98bis*, and the well known difficulties to which its application has given rise in the work of the Tribunal, the Trial Chamber considers it important to stress the point made both in *Prosecutor v. Kordic* and *Prosecutor v. Jelisic* that a ruling that there is sufficient evidence to sustain a conviction on a particular charge does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge; that is so because the standard for determining sufficiency is not evidence on which a tribunal *should* convict, but evidence on which it *could* convict. Thus if, following a ruling that there is sufficient evidence to sustain a conviction on a particular charge, the Accused calls no evidence, it is perfectly possible for the Trial Chamber to acquit the Accused of that charge if, at the end of the case, it is not satisfied of his guilt beyond reasonable doubt.
7. When, in reviewing the evidence, the Trial Chamber makes a finding that there is sufficient evidence, that is to be taken to mean that there is evidence on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the accused."

The procedure places the presiding judges of the Trial Court in a strange position because in the ICTY, as in the other international tribunals, the judges serve as both the trier of fact and the trier of law. In adversarial proceedings in domestic courts, the motion, also commonly referred to as "no case to answer" rulings, gives the judge the authority to dismiss the case to protect the

accused from facing a jury when no reasonable trier of fact could convict. In this way, the Rule 98 *bis* motion demonstrates why the mixing of procedural frameworks can be difficult for judges.[34]

The Rule 98 *bis* motion is limited in scope to assessing a judgment of acquittal based on the prosecutor's evidence at its best. The Trial Court is to take no consideration of evidence that it anticipates the defense will present. Furthermore, a denial of a motion to acquit does not remove the presumption of innocence. The denial of the Rule 98 *bis* motion only serves to advance the trial to the presentation of the defense.[35] Therefore, it is conceivable that the Trial Court may deny a Rule 98 *bis* motion while accepting the prosecutor's evidence without regard to its reliability, but, without the defense presenting any new evidence, still acquit if it determined the evidence to be unreliable at the close of the trial.

The ICTY amended Rule 98 *bis* on 8 December 2004 so that submissions of the parties and the decisions of the judges are made orally. This was done in the interest of expediting the proceedings. The text of Rule 98 *bis* read before the amendment read:[36]

> "(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii).
> (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or proprio motu if it finds that the evidence is insufficient to sustain a conviction on that or those charges."

Under the previous version of the rule, the procedure was initiated by the defense counsel within seven days of the close of the prosecutor's case. In particularly complex cases, the defense would be granted several extensions of time to accommodate the need to produce the written

[34] Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights*, 535-536
[35] Id., 539
[36] ICTY Rules of Procedure and Evidence, Rev. 32, 28 July 2004

submissions. Furthermore, the prosecution would submit written motions in opposition, and the judges would need to take all the submissions into consideration and issue written opinions. Often the Rule 98 *bis* proceedings would take over 3 months to complete.[37] (*Prosecutor v. Oric*, transcript, Case No. IT-03-68-T, T. Ch. II, 4 May 2005, p. 7849) The amended Rule 98 *bis* was aimed at making better use of the time of all parties.[38] (Id., p. 7847-7862) Furthermore, the amended procedure was initiated by the Trial Court rather than being initiated by the defense. This simplified the procedure by requiring the Trial Court to acquit of its own volition if there is no evidence to sustain a conviction rather than waiting for a submission from the defense.[39]

The decision to reduce the presentation of submissions of the parties for a judgment of acquittal from written to oral was somewhat controversial. Defense attorneys believed that it swayed the balance of the proceedings too far in favor of the prosecution. Under the amended procedure, the defense counsel is provided relatively little time to prepare an oral motion after the prosecution's case-in-chief which may last one year or more. One defense attorney for the ICTY said that there are situations in which it was in the best interest of the defendant to decline to make an oral submission for acquittal. In regards to one case, the attorney stated: "We believed it was unlikely that the chamber would be prepared to acquit or rule on the technical aspects of a badly-presented case, which we wished to avoid."[40]

5. Special Court for Sierra Leone

The SCSL is based mostly on the adversarial model. The SCSL Rules of Procedure and Evidence provide in Rule 85 for the trial to proceed as most common law criminal proceedings

[37] Prosecutor v. Oric, TC2, IT-03-68-T, 4 May 2005, Transcript, 7849.
[38] Id., 7847-62.
[39] Id., 7853, ln. 22-25
[40] Karnavas, Michael G., 'Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer', in: Michael Bohlander, ed., *International Criminal Justice: A Critical Analysis of Institutions and Procedure*, p. 117, footnote 138.

with the prosecution first presenting its case followed by the defense and prosecution's rebuttal. Rule 89(B) provides that "the President, Designated Judge, or Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." Furthermore, Rule 89(C) makes all relevant evidence admissible. The Trial Chamber through Rule 93(A) may also admit evidence of a consistent pattern of conduct that is relevant to serious violations of international law. Rule 95 states that "[n]o evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."

Rule 98 states that "[i]f, after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more counts of the indictment, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on those counts." The rule was amended to adopt the procedure used by the ICTY Rule 98 *bis*.[41] Despite misgivings by defense counsel at the ICTY, the change to oral submissions in regards to a Motion for Acquittal resulted in better efficiency and sometimes saved a great deal of time. The SCSL requires the defense counsel to submit a skeleton argument that identifies and notifies in a clear and concise manner the specific issues of each count of the indictment, as well as the legal arguments, that the defense intends to raise in their oral submissions.[42] Prior to the actual oral arguments, the prosecution has an opportunity to concede that it failed to meet the standard of Rule 98 in any of the issues raised by the Defense in the skeleton arguments. In the case adopting these standards, the defense even conceded "that the

[41] Prosecutor v. Sesay, et al., TC1, SCSL-04-15-T-621, 2 August 2006, Scheduling Order Concerning Oral Motions for Judgment of Acquittal Pursuant to Rule 98.

[42] Id., para. 1.

outcome of the Rule 98 proceedings [would] have little effect, if any, on the preparation of its Defence case…."[43]

The length of time necessary to prepare submissions for a Rule 98 hearing may vary widely depending on the complexity and duration of a case. At the ICTY, for the Oric case the length of time between the close of the Prosecution's evidence and the Trial Chamber's ruling on the motion was only eight days.[44] At the SCSL, the Rule 98 motion on the Sesay, Kallon, Gbao case mentioned above was argued two months after the prosecution closed its evidence.

The SCSL also incorporates the decisions of the ICTY and ICTR into its jurisprudence. Article 20(3) of the Statute of the Special Court for Sierra Leone advises that "the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda." The Trial Chamber has ruled that although Article 20(3) only refers to the Appeals Chamber, the effect is felt by the whole court. Thus, the Trial Chamber follows precedents set by the other international tribunals in matters involving international law.[45] Therefore, in regards to SCSL Rule 98 motions, the Trial Chamber may use the jurisprudence set forth in the ICTY regarding standards of review.

6. International Criminal Tribunal for Rwanda

The presentation of evidence at the ICTR follows the adversarial model. "Examination-in-chief, cross-examination and re-examination shall be allowed in each case."[46] As is the case with SCSL, the Rules of Evidence are very open and allow a great deal of material. The Trial

[43] Prosecutor v. Sesay, et al., Defence, SCSL-04-15-T-596, 11 July 2006, Joint Defence Position Paper on Implementing Rule 98 Modalities, para. 11.

[44] Prosecutor v. Sesay, et al., Prosecutor, SCSL-04-15-T-597, 11 July 2006, Prosecution Position Paper on Implementing Modalities for Rule 98, para. 7.

[45] Prosecutor v. Norman, et al., TC1, SCSL-04-14-T-473, 21 October 2005, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, para. 27-28.

[46] ICTR Rules of Procedure and Evidence, Rule 85(B).

Chamber may admit any evidence it deems to be relevant and to have probative value. The Rules regulating the treatment of witnesses are more specific, but generally a great deal more evidence is admitted than is common for domestic adversarial courts.

Rule 98 *bis* of the ICTR states: "If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief… shall order the entry of judgment of acquittal in respect of those counts." In practice, the test is "whether a reasonable trier of fact could arrive at a conviction if the Prosecution evidence is accepted…. [T]he sufficiency of the available evidence should be determined without consideration of its credibility and reliability, which is to be made at the end of the trial in light of all evidence adduced."[47]

Although ICTR Rule 98 *bis* is worded differently than ICTY Rule 98 *bis*, the Trial Chamber interprets the standards of review identical to ICTY. The ICTR even cites the ICTY in its decisions under Rule 98 *bis*. Despite the slight divergence in language, the Trial Chamber has referred to the respective rules as "substantially identical."[48]

V. Conclusions

Among the international criminal tribunals, there are many ways in which the procedure surrounding the judgment for acquittal varies. The primary determinative factor is whether the trial chamber is more closely linked to an adversarial or inquisitorial approach. Each tribunal tends to mix aspects of both approaches. Among the tribunals that employ a more adversarial approach, there is very little to distinguish the procedures. But among the tribunals that use an

[47] Prosecutor v. Rukundo, TC2, ICTR-01-70-0275, 22 May 2007, Decision on Defence Motion for Acquittal Pursuant to Rule 98 *bis*, para. 3.
[48] Prosecutor v. Hategekimana, TC2, ICTR-00-55B-T-0144/1, 5 June 2009, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, para. 7-8.

inquisitorial approach, where there is no clear close to the prosecution's case, the acquittal procedure can be raised in a novel fashion.

Among the international criminal tribunals, the ICC can be said to employ an approach that is most closely aligned with a pure inquisitorial approach. Because of this, there is no close to the prosecution's evidence. The only standard applied is whether the accused has been proven guilty beyond a reasonable doubt. If at any time the Judges find the evidence insufficient to sustain a conviction they can demand the prosecution either submit new evidence or withdraw the charges. This contrasts significantly with the ECCC, which provides for annulment. Although different in nature, the annulment procedure at the ECCC is analogous to the procedure for acquittal used at the adversarial tribunals. The Trial Chamber may annul charges if it finds that portion of the proceedings to be null and void. This gives the Trial Chamber the means to move the proceeding along in the interest of judicial efficiency.

It may be necessary for the ECCC to have an additional measure over the ICC to protect defendant's rights. The ECCC has the power to prosecute crimes under both international law and Cambodian law. This could potentially lead to great deal of charges being issued on an indictment. With the ICC, such a safeguard may not be necessary because its jurisdiction is so comparatively narrow. The ICC may only the most egregious violations of international law. As such, if an ICC Judge is asked to acquit on a single charge he or she may be issuing a judgment on the entire case.

The adversarial international tribunals have sufficient uniformity regarding the standards of review for ruling on a motion to acquit at the close of the prosecutors case. For the ICTY, The standard of review under Rule 98*bis* is that the Trial Chamber must acquit in cases "to which, in the opinion of the trial chamber, the prosecution evidence, if believed, is insufficient for any

reasonable trier of fact to find guilt has been proved beyond a reasonable doubt."[49] The SCSL has adopted the same standard. The ICTR uses a nearly identical standard, adding that the in practice the test is "whether a reasonable trier of fact could arrive at a conviction if the Prosecution evidence is accepted…. [T]he sufficiency of the available evidence should be determined without consideration of its credibility and reliability, which is to be made at the end of the trial in light of all evidence adduced."[50]

The adversarial international tribunals also have more uniformity in their practice surrounding a motion for judgment of acquittal. Each tribunal allows for a submission by the defense at the close of the Prosecution's case. The practice surrounding this procedure varies slightly because of the change adopted by the ICTY, and subsequently by the SCSL, which replaced the requirement for written submissions by the parties with a strictly oral submission. Defense attorneys for the ICTY felt that the amended procedure was unfair to their clients. The prosecution would present a case that could sometimes last for more than a year. Several of the defense attorneys felt that the change rendered the procedure useless, and at least one attorney felt that it might be in the client's best interest not to make an oral submission at all.[51] Despite the protests of defense attorneys at the ICTY, the amended rules were accepted and embraced by SCSL lawyers. SCSL defense lawyers believed that the changes to oral submissions would change very little in the way they built their case. Furthermore, they believed that preparing an oral submission rather than a written submission would actually save time that could be better spent preparing the defense's case. The skeleton outline that is required for the oral submission is

[49] Jelisic, IT-95010-A, Appeal Judgment, para. 37.
[50] Rukundo, TC2, ICTR-01-70-0275, 22 May 2007, Decision on Defence Motion for Acquittal Pursuant to Rule 98 *bis*, para. 3.
[51] Karnavas, Michael G., 'Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer', in: Michael Bohlander, ed., *International Criminal Justice: A Critical Analysis of Institutions and Procedure*, p. 117, footnote 138.

in effect the same as a full written submission, but is less burdensome on the attorneys. After the adoption of the oral submissions amendment in the ICTY, the SCSL noted several cases that advanced much more quickly. This was more of an exception rather than a norm, but the SCSL defense attorney noted that the preparation of their defense case was not substantially affected by the amended procedure.[52]

The most significant factor in determining procedure for any tribunal is the structure of the court. Each international tribunal incorporates some elements of both the adversarial and inquisitorial models, though each tribunal also generally leans closer to one method of procedure. The ECCC and ICC are much more strongly reflect an inquisitorial model, while the STL, ICTY, ICTR, and SCSL reflect an adversarial model. The procedure of acquittal during the course of the trial varies among the ECCC and ICC, but the procedure and standards of review are very consistent throughout the adversarial courts. But when considering an amendment to the rules of procedure, the court should ask whether its policy goals would be met through amending the procedure: protecting the defendants' basic rights and presenting evidence in a fair manner.

[52] Prosecutor v. Sesay, et al., Defence, SCSL-04-15-T-596, 11 July 2006, Joint Defence Position Paper on Implementing Rule 98 Modalities, para. 11.