Chapter 12

All Roads Lead to Rome – Lifting the Veil on the ICC’s Procedural Pluriformity

Simon De Smet*

1 Introduction

Fifteen years after the entry into force of the Rome Statute, the ICC still does not have a clearly defined procedural model for how to conduct its trials. In practice, different trials are conducted in a significantly different manner. On one view, this is a natural and unproblematic result of the fact that the ICC’s procedural rules were deliberately drafted in an open-ended manner. On another view, the Court’s inability to adopt one specific approach is evidence of the fact that the deep conceptual divisions that prevented the diplomats in Rome from agreeing on a set of clear and precise procedural rules are still simmering – only now at the level of the judges. Whatever the case may be, the fact is that the accused before the ICC do not all get the same procedural treatment.

The paper aims to illustrate the ICC’s current state of procedural pluriformity on the basis of two concrete examples. In particular, the paper discusses how different trial chambers have adopted dissimilar approaches towards the admission of evidence in general and the admission of prior recorded testimony in particular. These different approaches betray substantial disagreements on how to interpret and apply the principles of free proof and the principle of orality. At a structural level, the differences illustrate divergent conceptions about the burden of proof and the role of different players in the proceedings.

2 Admissibility of Evidence

Something that may come as a surprise to outside observers as well as newly arrived counsel or legal staff is that the ICC’s statutory framework has very little to say about how ICC trials are to be conducted. If anything, it appears that the

* The views expressed herein are those of the author alone and do not reflect the views of the International Criminal Court.
drafters of the Rome Statute and the Rules of Procedure and Evidence wanted to give Trial Chambers as much flexibility as possible in terms of how they wish to conduct trial proceedings.\textsuperscript{1} For example, who decides which evidence should be called and in what order is something that is left for the presiding judge and the parties to hammer out at the beginning of each case.\textsuperscript{2} Another fundamental question that is not clearly regulated in the texts is whether and, if so, when Trial Chambers should rule on the admissibility of exhibits that are submitted by the parties in the trial proceedings. The Statute states that Trial Chambers have the power, on application of a party or on their own motion, to rule on the admissibility or relevance of evidence.\textsuperscript{3} However, apart from specific instances,\textsuperscript{4} the Statute does not seem to impose a strict obligation on the Trial Chambers to systematically rule on the admissibility of all evidence.\textsuperscript{5} This, of course, raises the question as to whether Chambers have to rule on admissibility at all.

In a key procedural decision of 2011, the Appeals Chamber held that Trial Chambers have an obligation to rule on the admissibility of all submitted


\textsuperscript{2} Article 64(9)(b) Rome Statute: At the trial, the presiding judge may give directions for the conduct of proceedings [...] Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of the Statute.

Rule 140 Rule of Procedure and Evidence: (1) If the Presiding Judge does not give directions under article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.

\textsuperscript{3} Article 64(9)(a).

\textsuperscript{4} E.g. Article 69(7), Rule 72.

\textsuperscript{5} Article 69(4) states that the "Court may rule on the relevance or admissibility of any evidence [...]" emphasis added.