

**PUBLIC**  
**ANNEX D**

## Chapter 4

### Development of an Approach to the Exclusion of Evidence by the International Criminal Court

**Abstract** Chapters 2 and 3 have provided a base of knowledge concerning, on the one hand, the legal framework the ICC operates in and, on the other hand, the approaches that other systems have taken to the exclusion of illicitly gained evidence. The present chapter will constitute the central part of the research. Turning to the ICC, it will develop the basic principles of an own approach to the exclusion of evidence that fits the International Criminal Court. To this end, it will first depict the conditions ICC investigators operate in by describing the cooperation system between the ICC and domestic states. Based on the findings of the previous chapters, it will then set out and interpret the legal framework for exclusion under the law applicable to the ICC. In this context, one of the main questions of this chapter pertains to the rationale that should guide the exclusion of evidence from ICC proceedings. In domestic legal systems, excluding tainted evidence is usually justified on the basis of four different rationales: a lack of reliability of the respective evidence, deterrence, the vindication of individual rights and the maintenance of procedural integrity. The chapter will demonstrate that in case of the ICC, the last of these justification models, the integrity rationale, is not only the rationale that is most consistent with the wording of Article 69(7) of the ICC Statute but that it must also be given preference over other approaches in light of teleological considerations. Finally, this chapter will give an outline of the kind of legal violations that may at all lead to the exclusion of evidence in ICC proceedings.

**Keywords** Cooperation regime • Admissibility • Vindication of rights • Deterrence • Theory of integrity • Unreliable evidence • Internationally recognized human rights • Article 69(7) of the ICC statute • Torture • Right to silence • Right to privacy

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### 4.1 Introduction

The procedural part of the ICC Statute is the manifestation of a highly ambitious compromise. It constitutes an attempt to reconcile for the international level the sometimes widely diverging views among legal cultures on the appropriate procedure for criminal trials. As commentators have emphasized, finding a common system of procedure for the ICC revealed a deep chasm between the ideas of lawyers with a common law background and those with a civil law background in particular.<sup>1</sup> The law of evidence was among those procedural areas that triggered a lot of controversy.<sup>2</sup>

For the specific issue of the admissibility of illicitly obtained evidence, the underlying controversy is somewhat different than for most questions of criminal procedure. As we have seen in the review of domestic systems, the dividing lines here are not so much between common law and civil law. They are rather between more liberal and more restrictive approaches. This controversy will also impact on the development of solutions for the ICC. At the same time, the dichotomy between civil law and common law ideas cannot be entirely disregarded. It sometimes provides useful insights and helps one to understand the emergence of the different approaches to the admissibility of illicitly obtained evidence that we will now try to transfer to the ICC.

The legal regulations that govern the law of evidence in the ICC proper law are rather scarce. During the Preparatory Committee's session in 1996, an agreement was reached that only fundamental and substantive principles of evidence should appear in the Statute itself. The rationale behind this decision was to guarantee that the Court's evidentiary law would later be able to adapt to new procedural issues. It was therefore decided that less important matters would appear in the more easily amendable Rules or would be left to the jurisprudence of the Court. When drafting the Rules, adaptability was again the prevailing guideline. Instead of providing detailed evidentiary rules, the Preparatory Commission opted for the inclusion into the Rules only of a selected number of previously controversial areas. The decision on most evidentiary issues was left to the jurisprudence of the

<sup>1</sup>Brady 2001, p. 286.

<sup>2</sup>Behrens 1999, p. 243.

future judges.<sup>3</sup> As a result, only one article of the ICC Statute, Article 69, deals with matters of evidence. The Rules relating to this provision remain fragmentary as well.

This fragmentary nature of the law of evidence was not, however, only the result of diplomatic ambiguity. We have seen that a liberal approach to evidence is a common feature of international criminal institutions.<sup>4</sup> The normative framework adopted by the States Parties to the ICC Statute follows therefore the lines of the approach adopted by previous international criminal tribunals. At the ICC, the flexibility in the law of evidence goes even a step further than it does at the *Ad hoc* tribunals. The applicable law at the tribunals is shaped by the combination of an adversarial order in which evidence is presented with a liberal admissibility regime akin to the civil law principle of the judge's freedom to evaluate the evidence.<sup>5</sup> The ICC proper law in turn grants discretion to the judges in both respects.<sup>6</sup>

With respect to admissibility, Article 69(4) of the ICC Statute and Rule 63(2) of the Rules of Procedure and Evidence contain a delicate compromise between the diverging approaches of the different domestic systems. This compromise consists of eschewing a number of technical rules of evidence while, at the same time, generally allowing the judges to make a decision on the admissibility of evidence. It follows from these provisions that the bench is free in terms of the analytical method it chooses to apply. It can either rule on the admissibility of evidence at the outset or it can initially admit all evidence and consider the question of its admissibility at a later stage together with its weight.<sup>7</sup> So far, the judges have mainly followed the line of the *Ad hoc* tribunals: They have opted for an adversarial style for the presentation of evidence, while they have admitted evidence rather generously.<sup>8</sup>

### 4.2 The Collection of Evidence in Light of the ICC Cooperation Regime

The question whether evidence collected through improper means is admissible in ICC trials cannot be answered without first looking at the way evidence generally reaches the Court. To this end, we have to consider a number of peculiarities that shape international investigations. The most important of these peculiarities

<sup>3</sup>Behrens 1999, p. 242; Fernández de Gurmedi 2001, p. 240.

<sup>4</sup>See Sect. 3.1.1.

<sup>5</sup>See Sect. 3.1.1.

<sup>6</sup>The mode of submission of evidence is left entirely to the judges, see Article 64(8)(b) of the ICC Statute. Also see Damaška 2009, p. 176; Schuon 2010, p. 292.

<sup>7</sup>Piragoff 2001, p. 351.

<sup>8</sup>Combs 2011, p. 326; Schuon 2010, p. 292.

pertains to the absence of international enforcement agencies. Criminal prosecution has a major significance for the sovereignty of states. Accordingly, it was out of the question to create an international body that would bear the primary responsibility for ICC investigations.<sup>9</sup> As a consequence, the Court, like its predecessors, is dependent to a large extent on the cooperation of national authorities.

The importance of effective state cooperation for the successful operation of the Court has been pointed out repeatedly.<sup>10</sup> This concerns *inter alia* the collection of evidence. The modalities of this evidence gathering naturally also influence the later judicial assessment of evidentiary issues. The legal regime for cooperation is a decisive factor, for example, for the actors that will usually play an active part in investigations. We will see that this has consequences for the attribution of responsibility for investigative mistakes committed by national authorities.<sup>11</sup> Another example would pertain to the burden of proof for violations, which we will see is also influenced by the shape of a cooperation system.<sup>12</sup>

The cooperation regime established by the ICC proper law is different from the traditional concepts of mutual legal assistance between states. It also differs from the cooperation regimes that govern the relationship between states and the *Ad hoc* tribunals. The ICTY Appeals Chamber in the *Blaškić* case introduced a widely accepted terminology that was meant to describe the distinction. The ICTY judges termed the consensual and reciprocal cooperation regime between sovereign states a *horizontal* cooperation system while the cooperation regime between the *Ad hoc* tribunals and states has been called a *vertical* cooperation system.<sup>13</sup> This latter term results from the stricter obligations of national authorities vis-à-vis the international tribunals, which have the power to unilaterally impose duties on states under the powers conferred to them by the UN Security Council.<sup>14</sup>

The regime adopted by the States Parties to the ICC Statute in turn is a mixture of both of these cooperation models. It imposes obligations on the States Parties and requires explicitly that these states “cooperate fully with the Court”.<sup>15</sup> At the same time, sovereignty concerns have prevented the adoption of a truly vertical scheme of cooperation. As a result, the treaty-based system of the ICC falls short of allocating the same kind of power to the Court that the *Ad hoc* tribunals have enjoyed, at least from a legal perspective, by virtue of their relationship with the UN Security Council.<sup>16</sup>

<sup>9</sup>Cryer 2009, p. 201.

<sup>10</sup>Cryer et al. 2010, p. 509.

<sup>11</sup>See Sect. 5.4.

<sup>12</sup>See Sect. 7.6.

<sup>13</sup>*Prosecutor v. Blaškić* (Judgment on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of July 1997), ICTY (Appeals Chamber), decision of 29 October 1997, paras 47 and 50.

<sup>14</sup>See Sect. 3.1.1.

<sup>15</sup>See Article 86 of the ICC Statute.

<sup>16</sup>Sluiter 2002, p. 344.

The details of the ICC cooperation regime are set forth in Part 9 of the ICC Statute. This cooperation regime is based on the primary responsibility of the States Parties to conduct investigative measures. The most significant provision for the present research is Article 93 on ‘*other forms of legal assistance*’. The norm makes it possible for the ICC to make ‘*requests*’ regarding *inter alia* the collection of evidence. This includes, for instance, the questioning of both suspects and witnesses, the examination of places and sites or the execution of searches and seizures. The term ‘*request*’ instead of ‘*obligation*’ underlines the difference to the vertical cooperation scheme of the *Ad hoc* tribunals.<sup>17</sup>

Admittedly, when compared to ordinary horizontal systems of inter-state cooperation, the ICC Statute reduces significantly the grounds for a refusal to execute an ICC request.<sup>18</sup> But while this appears to constitute an advantage compared to the traditional cooperation between sovereign states, a number of features in the ICC cooperation regime reflect the will of the States Parties to put in place safeguards for the protection of their sovereignty. Cooperation duties can, for instance, be diminished or the compliance with them can at least be slowed down.<sup>19</sup> What is more, when compared to horizontal cooperation systems, these constraints are further compounded by the fact that the ICC lacks the means traditionally at the disposal of states to enforce their requests for cooperation on a bilateral level. In contrast to horizontal cooperation systems, the ICC, as an international organisation, is unable to implement economic or diplomatic sanctions against an uncooperative state, at least not without the support of its further States Parties or of the UN Security Council.

Sovereignty concerns have also shaped the modalities of the involvement of the ICC Office of the Prosecutor in the collection of evidence. Under the ICC Statute, independent on-site investigations by ICC staff are only allowed to a very limited degree. According to Article 99(4) of the ICC Statute, the power of the Prosecutor to act on his own is generally confined to non-compulsory measures. This explicitly includes the taking of voluntary witness statements and the examination

<sup>17</sup>Cryer et al. 2010, p. 510. The term ‘*obligation*’ is used in *Prosecutor v. Blaškić* (Judgment on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of July 1997), ICTY (Appeals Chamber), decision of 29 October 1997, para 53.

<sup>18</sup>For the ‘*other forms of legal assistance*’, only two grounds for refusal remain possible. States can deny cooperation firstly on national security grounds, see Articles 72, 73 and 93(4) of the ICC Statute; and secondly where the measure requested by the Court “*is prohibited in the requested State on the basis of an existing fundamental legal principle of general application*”, see Article 93(3) of the ICC Statute. None of the more extensive traditional grounds for refusal, such as for example the requirement of double criminality, is permissible; see Cryer et al. 2010, p. 523.

<sup>19</sup>States have the possibility for instance to seek consultation, see Article 97 of the ICC Statute; or to demand for a postponement of the compliance with a request, see Articles 94 and 95 of the ICC Statute. In addition, they may also ask for a modification of the content of a request, see Article 93(3) of the ICC Statute.



without modification of a public site or other public place.<sup>20</sup> But even here, consultations may be required and, under certain conditions, the affected state can determine conditions that the international investigators must respect.

In addition, the Pre-Trial Chamber has the power to authorize investigative measures by the Office of the Prosecutor, including coercive measures under Article 57(3)(d) of the ICC Statute. This possibility, however, is limited to the scenario of so-called 'failed states', meaning the case where no domestic authorities that could authorize the measure exist. No such possibility exists where the authorities are simply unwilling to conduct or permit the respective measures. In this case, as well as in any other case of non-compliance with cooperation duties, the Court is confined to refer the matter to either the Assembly of States Parties or the UN Security Council.<sup>21</sup>

The reluctance to allow independent investigations by the ICC Prosecutor has been criticised in view of the resulting lack of efficiency of ICC investigations.<sup>22</sup> In fact, a stronger involvement of OTP staff members in investigative activities would promote the efficiency of the respective measures. This concerns in particular the collection of evidence. International investigators will regularly have a better awareness of the requirements that evidence must meet in order to contribute to the success of an ICC indictment. It can *inter alia* be assumed that their presence would be likely to promote compliance with the requirements of the ICC proper law and with international human rights standards. With a view to the present research, this could avoid a later motion for the exclusion of evidence. Moreover, there are instances where witnesses will be less reluctant to speak if international investigators question them without the presence of national authorities.<sup>23</sup>

However, it must be conceded that despite the above, the results achieved by the negotiators of the ICC Statute with respect to OTP investigations should not be underestimated. The fact that international investigators can even conduct measures on the territory of a State Party without its consent constitutes an advantage in comparison to the options investigators in a horizontal cooperation system have.<sup>24</sup> Even though greater investigative powers would have been desirable, a political consensus on such a strong OTP mandate was not to be expected.<sup>25</sup>

<sup>20</sup>In practice, even the exercise of these limited powers might be hampered. The legislation of a number of states on the implementation of the ICC Statute into national law expressly excludes the operation of Article 99(4) of the ICC Statute. This amounts to a violation of their obligations under Article 88 of the ICC Statute to "ensure that there are procedures available under their national law" for all kinds of cooperation envisaged by the ICC Statute; see Rastan 2008, p. 437.

<sup>21</sup>See Article 87(7) of the ICC Statute. The latter possibility is limited to situations that were referred to the Court by the UN Security Council under Article 13(b) of the ICC Statute.

<sup>22</sup>Sluiter 2002, p. 347.

<sup>23</sup>Cryer et al. 2010, p. 525.

<sup>24</sup>Rastan 2008, p. 437.

<sup>25</sup>On the difficulties to reach a consensus even for non-compulsory measures, see Kaul and Kreß 1999, p. 169.

What is more, on a practical level, the question has been raised whether, in the course of past investigations, ICC investigators have even exhausted those options for independent investigations that are legally available to them.<sup>26</sup> In this context, the OTP has been criticised for the large extent to which it has outsourced investigative tasks to so-called intermediaries. Intermediaries are individuals on the ground that are regularly used by the OTP to facilitate contact with victims and witnesses in view of the often precarious security situations in areas affected by ICC proceedings. The assessment of their involvement in investigations was a major issue in the *Lubanga* case. In this context, the ICC Trial Chamber has criticized the lack of proper oversight of intermediaries by the OTP.<sup>27</sup> In the context of the present research, the use of such intermediaries raises the question whether and to what extent misconduct by the latter is relevant for the exclusion of evidence.<sup>28</sup>

Turning to the comparison with the vertical cooperation system of the *Ad hoc* tribunals, it has been argued that the differences between the ICC and the *Ad hoc* tribunals in terms of cooperation are less significant in practice than in theory. In fact, the legal powers allocated to the *Ad hoc* tribunals by the Security Council have not prevented problems of non-compliance.<sup>29</sup> Ultimately, both the ICC and the *Ad hoc* tribunals are predominantly governed by indirect enforcement systems.<sup>30</sup> Such systems depend in any case on the willingness of states to cooperate. Moreover, courts and tribunals should not expect much action from those bodies which, unlike the courts and tribunals themselves, could theoretically impose sanctions on recalcitrant states. Such measures are highly contentious from a political point of view. Accordingly, the *Ad hoc* tribunals have in practice often followed a procedure that was not that different from the one under the ICC Statute. In an attempt for diplomacy, the ICTY and ICTR judges have urged their prosecutors to first call upon the domestic authorities. The judges decided that the use of direct enforcement powers was constrained to situations where these authorities were not available.<sup>31</sup>

<sup>26</sup>See Buisman 2013, p. 30 et seq. for a critical discussion from the perspective of a defence lawyer involved *inter alia* in the ICC proceedings in the cases *Katanga* as well as *Ruto*.

<sup>27</sup>*Prosecutor v. Lubanga* (Judgment pursuant to Article 74 of the Statute), ICC (Trial Chamber), decision of 14 March 2012, paras 178 et seq. and 482.

<sup>28</sup>See Sect. 5.4.

<sup>29</sup>Cryer 2009, p. 187 and p. 198; Cryer et al. 2010, p. 528 et seq.; Jackson and Summers 2012, p. 114.

<sup>30</sup>Rastan 2008, p. 455.

<sup>31</sup>*Prosecutor v. Blaškić* (Judgment on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of July 1997), ICTY (Appeals Chamber), decision of 29 October 1997, para 55. A similar conclusion has been drawn by the ICTR, see for instance *Prosecutor v. Bagosora et al.* (Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana), ICTR (Trial Chamber), decision of 25 May 2004, para 6. See also De Meester et al. 2013, p. 283 et seq. Note however that the cooperation of the ICTR with the Rwandan government has been particularly complicated and has at times been characterized by considerable power struggles; see Peskin 2009, p. 170 et seq.

Despite these reservations, when compared to the ICC, a considerable difference, at least with the ICTY, lies in the fact that the ICTY judges have made an exception to the approach outlined above for the states and entities of the former Yugoslavia. In these areas, which are particularly important for the investigations of the ICTY, the prosecution has been granted a right of direct enforcement without first involving domestic authorities.<sup>32</sup> In comparison, the ICC faces problems of enforcement in particular in those areas that are crucial for its investigations. Under the principle of complementarity, the Court can only exercise its jurisdiction where the state that would normally have jurisdiction is either unwilling or unable to prosecute the allegedly committed crimes.<sup>33</sup> Accordingly, for measures that do not fall under Articles 99(4) and 57(3)(d) of the ICC Statute, the prosecution regularly needs the cooperation of states that have been labelled either unwilling or unable to take action. It is obviously no easy task to ensure that such a state will help effectively with investigative measures, including the taking of evidence.<sup>34</sup> It can be added that the ICC is also in a more difficult situation than the *Ad hoc* tribunals for factual reasons: unlike the latter, the former partly operates in conflicts that are still ongoing, which makes the taking of evidence an even greater challenge.<sup>35</sup>

In summary, a consideration of the process of evidence gathering requires taking a number of differences between investigations for the ICC and domestic investigations, as well as between the ICC and investigations for the *Ad hoc* tribunals, into account.

Any comparison with the *Ad hoc* tribunals must take into account the different legal frameworks governing these judicial bodies, in particular the—albeit restricted—greater powers of the *Ad hoc* tribunals under their vertical cooperation regime. And it must also consider the factual differences between the situations these bodies operate in.

Any comparison with national investigations, on the other hand, must make allowance for the indirect enforcement model that the States Parties to the ICC have agreed upon. This model sets ICC investigations apart from national proceedings, which regularly operate in a system of direct enforcement. The ICC, in

<sup>32</sup>The tribunal has justified this exception by referring to the possible implication of authorities in the crimes in these areas, see *Prosecutor v. Blaškić* (Judgment on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of July 1997), ICTY (Appeals Chamber), decision of 29 October 1997, paras 53 and 55.

<sup>33</sup>Rastan 2008, p. 455. The *Ad hoc* tribunals on the other hand have jurisdiction over the states on the territory of the former Yugoslavia since 1991 and on the territory of Rwanda and—where Rwandan citizens are alleged to be responsible—for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994 respectively, independently of any own jurisdictional competence of the affected states, see Article 1 of the ICTY Statute and Article 1 of the ICTR Statute.

<sup>34</sup>Even in case of a self-referral, where full compliance should be expected, a state may fail to live up to these expectations due to practical circumstances, see Cryer et al. 2010, p. 529.

<sup>35</sup>Cryer et al. 2010, p. 529.

comparison, is often confronted with a lack of overview and control over investigations. Compared in turn to domestic cases concerning cross-border crime, the ICC may, theoretically, enjoy larger powers than states in cases of inter-state cooperation. In practice, however, these advantages are unlikely to compensate for the lack of political pressure available to the Court.

## 4.3 The Legal Framework for the Exclusion of Evidence

### 4.3.1 The Admissibility of Evidence in General

The general approach of the ICC to the admissibility of evidence, as set forth in Article 69(4) of the ICC Statute, parallels what is demanded at the ICTY and at the ICTR. By stipulating that the ICC judges “*may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial*”, the provision refers to the same basic requirements as the *Ad hoc* tribunals.<sup>36</sup>

While, according to this provision, relevance and admissibility are distinct from each other, the case law applies a comprehensive approach covering both notions.<sup>37</sup> To this effect, the Trial Chamber in the *Lubanga* case established a threefold test. This test consists of a *prima facie* evaluation firstly of whether the evidence is relevant and, secondly, of whether it has probative value. In a third step, the Chamber must then “*weigh the probative value of the evidence against its prejudicial effect*”.<sup>38</sup>

Once again, the threshold for the first two requirements is not very high. Relevance is merely a precondition for admissibility.<sup>39</sup> For evidence to be relevant, it must only relate to the matters that the Chamber has to consider in view of the charges.<sup>40</sup> The second requirement, probative value, is an established concept of common law. It has been defined as “*evidence that tends to prove or disprove a point in issue*”.<sup>41</sup> According to the jurisprudence of international courts and tribunals, to have probative value, the evidence must, in particular, have some

<sup>36</sup>On the similarities between the requirements for admissibility, see Gosnell 2010, p. 376 et seq.

<sup>37</sup>Safferling 2012, p. 492.

<sup>38</sup>*Prosecutor v. Lubanga* (Corrigendum to Redacted Decision on the Defence Request for the Admission of 422 documents), ICC (Trial Chamber), decision of 8 March 2011, para 39. On this test, see also Safferling 2012, p. 490; Gaynor et al. 2013, p. 1023.

<sup>39</sup>*Prosecutor v. Katanga and Chui* (Decision on the Prosecutor's Bar Table Motions), ICC (Trial Chamber), decision of 17 December 2010, para 16. See also on the jurisprudence of the *Ad hoc* tribunals, Sect. 3.1.3.

<sup>40</sup>*Prosecutor v. Lubanga* (Corrigendum to Redacted Decision on the Defence Request for the Admission of 422 documents), ICC (Trial Chamber), decision of 8 March 2011, para 39.

<sup>41</sup>Gaynor et al. 2013, p. 1022.

component of reliability.<sup>42</sup> In addition, the ICC Trial Chamber has held that probative value entails that the evidence has some significance.<sup>43</sup> The third prong of the test is the most interesting for the admissibility of illicitly obtained evidence. The balancing required between the probative value of the evidence and its prejudicial effect on trial fairness may theoretically be used as a legal basis for the exclusion of tainted evidence. This part of Article 69(4) is reminiscent of Rule 89(D) of the ICTY Statute. But unlike in the latter provision, the balancing exercise is not conceived as a distinct exclusionary rule. Instead, fair trial considerations are inserted in the legal basis for the general decision on the admissibility of evidence.<sup>44</sup>

There is, however, in the ICC Statute a provision that does contain a distinct exclusionary rule, namely Article 69(7). Before turning to the relationship between Articles 69(4) and 69(7), the latter norm shall be presented in more detail.

In general, Article 69(7) implements a similar approach to the one laid down in Rule 95 of the ICTY and ICTR Rules of Procedure and Evidence. The provision, which will subsequently be referred to as the ICC exclusionary rule, reads as follows:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- a. The violation casts substantial doubt on the reliability of the evidence; or
- b. The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

There was, at first, no agreement within the Preparatory Committee on the general basis for exclusion. The central issue was whether the emphasis should be placed on the manner in which the evidence was collected or whether the focus should be on the effects that such a violation might have on the proceedings. The first of these proposals would have corresponded to the original wording of Rule 95 of the RPE of both of the *Ad hoc* tribunals, while the latter would have been similar to the tribunal's rule in its amended version.<sup>45</sup>

The consensus that finally emerged combines both prerequisites: The starting point of any exclusion is that evidence was collected in violation of a person's

<sup>42</sup>See Gosnell 2010, p. 384 et seq.; Gaynor et al. 2013, p. 1022.

<sup>43</sup>*Prosecutor v. Katanga and Chui* (Decision on the Prosecutor's Bar Table Motions), ICC (Trial Chamber), decision of 17 December 2010, paras 20 and 34. See also Safferling 2012, p. 493. Significance refers to "[...] the measure by which an item of evidence is likely to influence the determination of a particular issue in the case.", see *Prosecutor v. Katanga and Chui* (Decision on the Prosecutor's Bar Table Motions), ICC (Trial Chamber), decision of 17 December 2010, para 35. But where the test of admissibility is made at the end of the trial, this second criterion can hardly be distinguished as an own requirement from the overall weight of the evidence, see *Prosecutor v. Bemba* (Decision on the admission into evidence of materials contained in the prosecution's list of evidence), ICC (Trial Chamber), decision of 19 November 2010, para 9, where probative value is defined as pertaining "[...] *inter alia*, to the reliability and weight to be attached to the evidence concerned."

<sup>44</sup>Combs 2011, p. 328.

<sup>45</sup>For more details on Rule 95 of the RPE of the *Ad hoc* tribunals, see Sect. 3.1.3.

rights. At the same time, exclusion as a remedy for such a violation is only available in case of a specific negative impact on the proceedings, namely that the evidence either lacks reliability or that its admission "would be antithetical to and would seriously damage the integrity of the proceedings".<sup>46</sup>

This combination has important consequences. At first sight, the provision is formulated as a mandatory rule. The inclusion of additional requirements, however, changes its character into a discretionary rule.<sup>47</sup>

This formulation of the provision has met a lot of criticism, both among delegates during the consultations and among commentators. This criticism is directed against Article 69(7)(b) in particular. The argument is that it seems difficult to imagine any instance where the admission of evidence gained in violation of human rights would not damage the integrity of the proceedings.<sup>48</sup> As a consequence, commentators have argued, even after the adoption of the final wording, that the provision should be interpreted based on the assumption that every human rights violation *ipso facto* fulfils the requirements of the second prong.<sup>49</sup>

The formulation of the provision however does not seem to allow for such an equation. It would lead, at least with regard to human rights violations, to an automatic exclusion of the tainted evidence. The drafters of the ICC Statute, however, have clearly opted for a different policy. To this extent, a similar assessment can be made as for Rule 95 of the RPE of the ICTY and ICTR.<sup>50</sup> Despite the fact that Article 69(7) of the ICC Statute is formulated as a mandatory rule, its wording contains a number of vague legal terms whose interpretation requires the exercise of evaluation and thus grants discretion to the judges.<sup>51</sup> This is done in particular through the interpretation of its two subparagraphs, providing for tests of reliability and prejudice.<sup>52</sup> This assessment corresponds to the existing case law on the provision. The Pre-Trial Chamber in *Lubanga* explained the general principle governing the exclusion of evidence at the ICC claiming that "[...] article 69(7) of the ICC Statute rejects the notion that evidence procured in violation of internationally recognised human rights should be automatically excluded. Consequently, the judges have the discretion to seek an appropriate balance between the Statute's fundamental values in each concrete case."<sup>53</sup> The Trial Chamber confirmed this

<sup>46</sup>Triffterer 2008—Piragoff, Article 69, para 16 et seq.

<sup>47</sup>Miraglia 2008, p. 492; Safferling 2012, p. 499.

<sup>48</sup>Sluiter 2002, p. 226; Triffterer 2008—Piragoff, Article 69, para 70; Zahar and Sluiter 2008, p. 382; Zappalà 2002, p. 152.

<sup>49</sup>Zahar and Sluiter 2008, p. 382; Zappalà 2003, p. 152.

<sup>50</sup>See Sect. 3.1.3.

<sup>51</sup>Triffterer 2008—Piragoff, Article 69, para 66.

<sup>52</sup>Schabas 2010, p. 848.

<sup>53</sup>*Prosecutor v. Lubanga* (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, para 84. For a review of this decision, see Miraglia 2008, p. 492 et seq. In addition, also see *Prosecutor v. Mbarushimana* (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 16 December 2011, para 61.

understanding in the same case, explicitly rejecting the view that automatic inferences follow from human rights violations.<sup>54</sup>

In other words, the provision follows the approach outlined above accepted in many legal systems, both at the international and at the domestic level, to predicate the decision on the exclusion of evidence on a discretionary decision of the judges. The execution of this judicial discretion is an integral part of the interpretation of the constituent elements of Article 69(7) of the ICC Statute. Discretion guides in particular the decision in the more contentious situation where reliable evidence is challenged on the basis of a violation. In this situation, Article 69(7)(b) calls for a balancing exercise.

It is not possible therefore to claim that human rights violations generally lead to the exclusion of tainted evidence. However, it may very well be argued that exclusion is generally warranted in cases of a certain category of violations. This is not as such contrary to the discretionary nature of the provision. Where a certain violation is generally severe enough, the discretion of the bench may be constricted to a point where the balancing exercise can lead to no other decision than exclusion. This has been held to be the case, for instance, where evidence has been obtained as a result of torture.<sup>55</sup>

Article 69(7) ostensibly requires a higher threshold than its equivalent in the Rules of the *Ad hoc* tribunals. Unlike the latter, it provides for a two-part exclusionary rule, namely a violation in the obtaining of evidence and a detrimental effect with regard to its admission to the trial.<sup>56</sup> Rule 95 of the RPE of the ICTY and ICTR in contrast only contains the second part of this test. This does not mean, however, that the different formulations necessarily lead to diverging results. In essence, both provisions require a balancing exercise. We will see that in Article 69(7) of the ICC Statute, just as in the ICTY and ICTR Rule, the crucial element is the second part, namely the detrimental effect on the proceedings. This is the part that gives rise to problems of interpretation.<sup>57</sup> Moreover, Rule 95 implicitly requires a prior violation leading to the subsequent detrimental effect. Admittedly, in contrast to the ICC provision, the types of norm whose violation may trigger exclusion are not expressly delimited in Rule 95.<sup>58</sup>

The explanations above have demonstrated that, theoretically, two provisions allow for the exclusion of illicitly obtained evidence: the general admissibility rule of Article 69(4) and the exclusionary rule of Article 69(7). Similar to the Rules of the ICTY, the parallel existence of two norms raises the question of their relationship.<sup>59</sup> In particular, the difference between “*fair trial*” and the “*integrity of the*

<sup>54</sup>*Prosecutor v. Lubanga* (Decision on the admission of material from the “bar table”), ICC (Trial Chamber), decision of 24 June 2009, para 41.

<sup>55</sup>Triffterer 2008—Piragoff, Article 69, para 71. For more details, see Sect. 5.4.3.

<sup>56</sup>Combs 2011, p. 328; Sluiter 2002, p. 224.

<sup>57</sup>Sluiter 2002, p. 224.

<sup>58</sup>Alamuddin 2010, p. 240.

<sup>59</sup>On the parallel question with regard to Rules 89 (D) and 95 of the RPE of the ICTY, see Sect. 3.1.3.

*proceedings*” does not seem evident.<sup>60</sup> The Trial Chamber in *Lubanga* clarified the relationship between these two paragraphs, stating that Article 69(7) of the ICC Statute was *lex specialis* to other rules on admissibility, including Article 69(4).<sup>61</sup>

Despite the different formulation of the provision, Article 69(4) of the ICC Statute bears similarity to Rule 89(D) of the ICTY RPE. Like the latter, the former is not confined to fair trial infringements resulting from the methods of collection of evidence. In accordance with their assumption that Article 69(7) is to be considered *lex specialis*, the ICC judges, unlike their colleagues at the ICTY, have refrained from using the general rule on admissibility for their decision when confronted with illicitly obtained evidence.<sup>62</sup> Instead, they have dealt with this issue under the more specific exclusionary rule of Article 69(7). The fact that Article 69(4) was not conceived as a further exclusionary rule has probably benefited this jurisprudence.

As a consequence, the following research will focus on Article 69(7) of the ICC Statute as the decisive ICC exclusionary rule. The scheme followed by Article 69(7) can be summarized in the following way: The main ICC exclusionary rule requires a test that consists of two steps. The first step is described in the first part or *chapeau* of the provision. It consists of a determination of all of those violations in the gathering of evidence that may trigger the exclusionary rule. These may be either violations of the Statute or of “*internationally recognized human rights*”. The discretionary nature of the exclusionary rule is most evident from the fact that the inquiry does not stop here. Instead, Article 69(7) of the ICC Statute provides for a second step that allows to the judges to filter out, from the abundance of violations possible during the gathering of evidence, those violations that result in exclusion.

This inquiry demands justification. More precisely: why do certain violations lead to exclusion, while others do not? In order to guide the discretion of the judges, Article 69(7) contains two options that describe the justification for this selection. In other words, subparas (b) and (c) pertain to the purposes of exclusion. Only where at least one of these purposes is fulfilled is the exclusion of evidence gathered for ICC trials warranted. Naturally, the purposes that are prominently described in these two subparagraphs must also be taken into account when interpreting the rest of the provision. As a consequence, the deliberations below will not follow the composition of Article 69(7) of the ICC Statute. Instead, they will first concentrate on the justification of the ICC exclusionary rule reflected in subparas (a) and (b). This will include reflections on the reason for the choice of these very purposes for the ICC exclusionary rule, when compared to other possible justifications that guide exclusion in domestic legal systems. Only then will this research turn to the interpretation of the *chapeau* and to the details of the balancing exercise under Article 69(7) of the ICC Statute.

<sup>60</sup>Alamuddin 2010, p. 241 and p. 242.

<sup>61</sup>*Prosecutor v. Lubanga* (Decision on the admission of material from the “bar table”), ICC (Trial Chamber), decision of 24 June 2009, paras 34 and 43.

<sup>62</sup>On the respective jurisprudence of the *Ad hoc* tribunals, see Sect. 3.1.3.



### 4.3.2 The Purpose of the ICC Exclusionary Rule

#### 4.3.2.1 Introduction

Some of the uncertainties regarding the exclusion of evidence in international proceedings result from a lack of theoretical foundations. At the domestic level, exclusion is usually justified on the basis of four different rationales: a lack of reliability of the respective evidence, deterrence, the vindication of individual rights and the maintenance of procedural integrity. All of these concepts have already been mentioned when explaining the different domestic approaches to exclusion. At the international level, none of the bodies of international criminal adjudication have clearly explained their approach to the exclusion of evidence. Neither has the problem been discussed in detail in the legal literature.

In the case of the ICC, the Statute provides insight into the purposes that must guide ICC judges when exercising their discretion under Article 69(7). Subparagraphs (a) and (b) reflect the purposes that the drafters of the Statute thought most appropriate in ICC proceedings, namely guaranteeing the reliability of evidence and preserving the integrity of the Court. Despite this legislative decision, references to other rationales have sometimes emerged in the literature and in international case law, including that of the ICC. The following deliberations will therefore consider all of the previously mentioned rationales. This will enable an understanding of the choice that was made for Article 69(7) and a determination whether other justifications play a role in addition to those reflected in the wording of the provision. The exclusion of reliable evidence is comparatively uncontroversial. As a consequence, the discussion will concentrate on the more contentious cases under Article 69(7)(b). These cases will be the starting point of the following analysis. It will then give some consideration to the exclusion of reliable evidence under subpara (a).

#### 4.3.2.2 The Purpose of Excluding Reliable Evidence

The exclusion of reliable but tainted evidence is one of the most controversial topics in the law of criminal procedure of many countries. The different and sometimes overlapping approaches that can be identified in domestic debates vary both with respect to the degree to which they endorse the idea of an exclusionary rule and, if they do so at all, to the way they justify this rule.

The first line of argument opposes exclusion altogether; on the other end of the scale, the proponents of a mandatory exclusionary rule argue that the exclusion of evidence should be the automatic consequence of every violation. While the arguments of the remaining views are sometimes drawn upon to justify a mandatory exclusionary rule, most of their advocates today adopt a middle course between the general admissibility and the automatic exclusion of illicitly obtained evidence. These views offer rival rationales underpinning the exclusion of illicitly obtained evidence under certain conditions. In this latter category, the analysis

of the domestic approaches has identified as one rationale the so-called theory of deterrence, namely the idea that exclusion serves as a tool to discipline investigating authorities. The exclusion of cogent but tainted evidence has also been justified by resorting to what is usually labelled the remedial or protective approach, according to which exclusion is principally concerned with the vindication of the individual rights of the accused. Finally, it has been held that exclusion can best be explained by resorting to a theory of integrity or legitimacy. The overall idea of this last conception is that by admitting improperly obtained evidence, a court endangers its moral authority.

The wording of Article 69(7)(b) of the ICC Statute suggests that it is essentially the integrity rationale that may serve as a basis for the ICC exclusionary rule.<sup>63</sup> Where the reliability of evidence is not at issue, the provision demands that the admission of tainted evidence “*would be antithetical to and would seriously damage the integrity of the proceedings*”.

As we will see, this choice was a sensible one. Not only is the integrity theory probably the best justification for the exclusion of reliable evidence in general, including in trials at the domestic level, it is also the only justification that sufficiently takes into account the particular context of international criminal proceedings. Before turning to the integrity theory, however, the competing approaches shall be assessed.

#### 4.3.2.2.1 Opposing Arguments

In domestic proceedings, the exclusion of evidence solely on grounds of a rights violation has sometimes been rejected altogether. The starting point of such views is that the focus of admissibility should be on reliability and accuracy only. The traditional common law approach in particular did not consider as relevant the manner in which evidence was obtained except for cases where its reliability was thereby affected.<sup>64</sup>

Such an argument is clearly incompatible with the wording of the ICC Statute. The initially cumulative effect requirements of Article 69(7) of the Statute were ultimately made disjunctive.<sup>65</sup> By introducing in this way an alternative for exclusion independent from reliability, the drafters of the ICC Statute made clear that importance is to be attached to values other than the mere trustworthiness of the evidence.

But beyond this evident policy choice of the ICC Statute, the arguments put forward to oppose a value based exclusionary rule can also be dismissed in principle. In domestic systems, the position that rejects the exclusion of reliable evidence altogether has usually been labelled the ‘separation thesis’.<sup>66</sup> The separation

<sup>63</sup>Zahar and Sluiter 2008, p. 380.

<sup>64</sup>See Sect. 3.3.1.

<sup>65</sup>Triffterer 2008—Piragoff, Article 69, para 18.

<sup>66</sup>Jackson and Summers 2012, p. 155.

thesis includes the argument that there is no real connection between a rights violation in the investigative phase and the admissibility of evidence in trial. Moreover, it is claimed that investigating authorities on the one hand and the judiciary on the other are entirely separate institutions.<sup>67</sup>

The first of these claims has been countered at the national level by an argument that equally applies in the international context. The pre-trial and trial phases are not in fact distinct sequences within criminal proceedings. They are rather intimately linked. The former is only a means of laying the foundations for the latter. This may include arresting the suspect or, more relevantly, gathering the evidence required for a conviction.<sup>68</sup> As a consequence, courts, be it at the national or at the international level, cannot simply deny any connection with those acts that have produced the very evidence on which their verdicts are based.

The assertion, however, that the police and the judiciary are entirely separate institutions seems easier to refute at the national than at the international level. In the domestic context, opponents to the separation thesis have pointed to the fact that both the police and the courts are parts of the same state and its criminal justice system. In light of this common institutional embedding, they are in fact two closely linked components of law enforcement.<sup>69</sup>

At the international level, there is no uniting under the auspices of a state. There is a clear institutional separation between the ICC and the national authorities, which are mostly active at the investigative phase. At first sight, this seems to be a strong argument for not holding the former responsible for the failures of the latter. But such an allegation would ignore that this separation is the result of a deliberate choice of the ICC States Parties. Instead of creating a proper enforcement mechanism for the ICC, the States Parties have decided to assign the main part of the investigative tasks to national authorities.

This decision is based on the understandable desire of states to safeguard their sovereignty. It cannot however be intended to entirely circumvent those responsibilities that arise from the enforcement of international criminal justice. The Court and the investigating authorities are part of the same international criminal justice system. They have a shared responsibility for the guarantee of fundamental rights in the international context.<sup>70</sup> We will see later that the loose institutional connection between the ICC and domestic authorities does in fact influence to a certain degree the attribution of violations to the Court.<sup>71</sup> As a matter of principle, however, this type of connection cannot be relied upon to create the illusion of a general separability.

<sup>67</sup>For an example of a prominent proponent of this thesis, see Wigmore 1922, p. 479 et seq.

<sup>68</sup>Ashworth 2003, p. 114; Roberts and Zuckerman 2010, p. 189.

<sup>69</sup>Ashworth 2003, p. 115.

<sup>70</sup>Similar, Zahar and Sluiter 2008, p. 380.

<sup>71</sup>See Sect. 5.4. In this context, see also the parallel question of the accountability of the ICC in case of investigative mistakes committed by intermediaries.

#### 4.3.2.2.2 Exclusion as an Automatic Rule

The separation thesis examined above is one of the two extreme positions with respect to the exclusion of illicitly obtained evidence. At the opposite end of the scale, proponents of a mandatory exclusionary rule in different legal systems have supported the idea that tainted evidence should never be admitted as evidence in a court of law. As we have seen above, despite first appearances, Article 69(7) of the ICC Statute is not conceived as an automatic exclusionary rule. Its discretionary nature results in particular from the inclusion of the two subparas (a) and (b).<sup>72</sup> This discretionary nature was confirmed by the ICC in its first decisions.<sup>73</sup> Given that the present research is meant as an analysis of the status quo of an existing provision of the ICC Statute, the inquiry could simply stop here, by pointing to the obvious policy choice of the drafters of the ICC Statute, embodied in Article 69(7) of the ICC Statute. For the sake of completeness, however, we will briefly address the question of whether this was a sensible policy choice policy.

As mentioned above, the existing version of the ICC exclusionary rule with its restricting additional subparagraphs was heavily criticized both by participants at the Rome Conference and by commentators.<sup>74</sup> Some commentators have even argued that, despite its wording, Article 69(7) should be interpreted, at least with respect to all human rights violations, as a mandatory exclusionary rule.<sup>75</sup> It has been argued above that this view cannot be sustained given the clear wording of the provision. The criticism, however, reflects the need to answer a very basic question. How can it be that a court such as the ICC is put in a more favourable position through the possibility of using evidence that has evidently been obtained by means contrary to its own law and even contrary to human rights? In other words, would the drafters of the ICC Statute have been better advised to adopt a mandatory exclusionary rule after all?

This research is based on the assumption that applying a mandatory exclusionary rule to the Court's proceedings would not be appropriate for reasons beyond the positivistic argument of the policy choice made by the drafters of the ICC Statute. We will see below that all of the classical rationales for the exclusion of evidence could, in principle, be construed in a way that would call for a mandatory exclusionary rule. Theoretically, the deterrence theory, as well as the remedial theory and the theory of integrity, can be understood either in a more restrictive and inclusionary or in a more liberal way. At first sight, an automatic exclusionary rule may even seem more appropriate for an international court with a firm commitment to due process rights. Proportionality concerns, however, suggest refraining from such an all-purpose rule.

<sup>72</sup>See Sect. 4.3.1.

<sup>73</sup>See *Prosecutor v. Lubanga* (Decision on the Admission of Material from the "Bar Table"), ICC (Trial Chamber), decision of 24 June 2009, para 41; *Prosecutor v. Lubanga* (Decision on the Confirmation of Charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, paras 84 and 90.

<sup>74</sup>See Sect. 4.3.1.

<sup>75</sup>Zahar and Sluiter 2008, p. 382; Zappalà 2003, p. 152.



The review of domestic systems has revealed, as a very basic principle, that bright line rules are doomed to failure when it comes to the question whether or not to exclude tainted evidence.<sup>76</sup> Such rules fail to sufficiently do justice to the moral and legal complexity of the issue.<sup>77</sup> This conclusion also applies to the imposition of a mandatory exclusionary rule. The respect for the different rights affected in the course of an investigation is without any doubt paramount. At the same time, these rights are not the only values that must be upheld in criminal proceedings. The interests of both society in general and of the victims of a crime are valid concerns that must equally be taken into account.

This brings us back to the tension between the protection, in particular,<sup>78</sup> of individual rights on the one hand and the need for the effective prosecution of crimes on the other, which was mentioned at the very outset of this research.<sup>79</sup> In view of these competing values, automatic exclusionary rules are in danger of yielding disproportionate results because they focus exclusively and too narrowly on the rights protected in the course of evidence gathering.<sup>80</sup> The idea of a mandatory exclusionary rule has been challenged because such rules force courts to categorically ignore the discovery of cogent evidence without ever considering other interests and values. Critics have invoked the crime control responsibilities of states. Once evidence has been discovered, the official knowledge of the facts puts the state and its authorities in a problematic position. Having a responsibility towards its citizens to control crime, the state cannot categorically pretend not to know of a crime and of the danger that the suspect possibly poses to society.<sup>81</sup>

It is because of their one-sided focus that mandatory exclusionary rules have not prevailed in domestic systems. This is most explicitly illustrated by the mandatory exclusionary rule initially conceived by the U.S. Supreme Court.<sup>82</sup> Despite the development by the Supreme Court of a mandatory exclusionary rule, its critics ultimately prevailed. Up until today, this mandatory exclusionary rule has been eroded through a number of important exceptions. Leaving aside the question of whether the U.S. exclusionary rule in its current form strikes the appropriate balance, the erosion of the automatic exclusionary rule shows that one-sided solutions are not viable and socially acceptable in the long-term.

In the case of the ICC, the focus of crime control is less on averting the danger posed by a specific perpetrator than in domestic criminal proceedings. It is rather on the enhancement of the general belief in the validity of international criminal

<sup>76</sup>See in particular Sects. 3.3.2 and 3.3.4.

<sup>77</sup>Cryer et al. 2010, p. 190. Similar, Muthorst 2009, p. 75. For the opposite view with respect to the ICC, Vanderpuye 2005, p. 129 et seq.

<sup>78</sup>On the protection of the rights of states during the collection of evidence, see in particular Sect. 4.3.2.2.4.

<sup>79</sup>See Sect. 1.1.

<sup>80</sup>Penney 2003, p. 112. Critical with respect to this argument, Potter 1983, p. 1396.

<sup>81</sup>Dennis 2010, p. 106; Roberts and Zuckerman 2010, p. 183.

<sup>82</sup>Roberts and Zuckerman 2010, p. 182.

law.<sup>83</sup> This belief, however, would also be threatened by a strong mandatory rule of exclusion. We have already mentioned that the legitimacy of the Court does not only depend on its respect for due process rights. It is also closely linked to its capacity to enforce international criminal law.<sup>84</sup> It would be disproportionate to categorically ignore credible evidence related to gross human rights atrocities. These arguments were central to the creation of the ICC exclusionary rule in its present form. Accordingly, the drafters of the ICC Statute were well advised to implement an exclusionary rule that leaves sufficient room to the Court's judges to take into account the interests of effective law enforcement.

#### 4.3.2.2.3 The Deterrence Rationale

In domestic law, one of the strongest justifications for the exclusion of evidence has traditionally been the alleged disciplining effect on the police. We have seen that the so-called deterrence rationale has been discussed in a number of domestic legal orders and has had a particularly strong impact on the U.S. exclusionary rule. But even in the domestic debates, this approach has drawn severe criticism both for practical and for theoretical reasons. At the international level in turn, the ICTY has held that exclusion in international proceedings cannot be directed at disciplining domestic authorities.<sup>85</sup> The ICC in *Lubanga* adopted this jurisprudence. It has not, however, conclusively assessed the question of deterrence for investigative measures carried out by OTP staff itself.<sup>86</sup> The following section will show that, not least because of the particularities of the system of international criminal justice, the deterrence theory is generally not the appropriate justification for exclusion in ICC proceedings.

In the domestic context, doubt exists as to whether, from a practical point of view, the exclusionary rule is actually able to achieve the purported deterrent effect.<sup>87</sup> It has been pointed out that, often, there will be no such effect because officials believe that their misconduct will not come to light. In addition, it has also been held that the behaviour of the police is usually not motivated by the conviction of an individual suspect. It is rather encouraged by other considerations such as maintenance of order or intelligence gathering.<sup>88</sup>

In general, it is safe to say that the practical effect of deterrence is in any event difficult to prove. Proponents of the theory have repeatedly sought to demonstrate

<sup>83</sup>On the purposes of special and general prevention at the international level, see Sect. 2.2.3.

<sup>84</sup>See Sect. 2.2.3.

<sup>85</sup>*Prosecutor v. Brđanin* (Decision on the Defence "Objection to Intercept Evidence"), ICTY (Trial Chamber), decision of 3 October 2003, para 63.

<sup>86</sup>*Prosecutor v. Lubanga* (Decision on the Admission of Material from the 'Bar Table'), ICC (Trial Chamber), decision of 24 June 2009, para 44.

<sup>87</sup>Jackson and Summers 2012, p. 154; Ma 1999, p. 297.

<sup>88</sup>Ashworth and Redmayne 2010, p. 344; Roberts and Zuckerman 2010, p. 187; Slobogin 2013, p. 16.

that there is a visible deterrent effect even if it is not perfect.<sup>89</sup> A considerable amount of research has been conducted on the subject. The results of the respective empirical studies, however, remain ambiguous.<sup>90</sup>

On a theoretical level, domestic scholars have argued that the objective of deterrence is better served by means outside of the trial forum. This may involve criminal investigations or the imposition of disciplinary measures against the officials involved. These arguments are based on the view that a disciplining function is alien to the concept and aim of criminal proceedings and thus better left to alternative mechanisms. This point has had a major impact on the debate in a number of domestic systems. In Germany, for instance, it is this very argument that has led the majority of legal academia to oppose the deterrence rationale.<sup>91</sup> Similar deliberations can be found in the English,<sup>92</sup> Canadian<sup>93</sup> and U.S. literature.<sup>94</sup> Where the decision on exclusion has been predicated on a balancing exercise, deterrence has often been considered a weak factor at best, unable to outweigh the public interest in prosecution.<sup>95</sup>

In the specific context of ICC proceedings, the previous arguments apply all the more, particularly in cases of violations committed by domestic officials. The success of deterrence with respect to domestic authorities must be doubted for a number of practical reasons. It is first of all questionable whether the ICC as a court situated in a foreign country that has no legal power in the states themselves is sufficiently recognized as an authority by domestic police forces. These police forces will actually often have little knowledge about ICC proceedings at all. Furthermore, only a small number of domestic cases actually fall under the jurisdiction of the Court. Deterrence, however, can only be successful if the exclusion of evidence is a regular repercussion of official misconduct. The exclusion of evidence in single cases before the ICC is unlikely to make much of an impression on investigators when compared to the many cases they are confronted with that fall under national jurisdiction.<sup>96</sup>

The ICTY, when rejecting deterrence as an objective of Rule 95 in the *Brđanin* case, seems to have relied *inter alia* on such practical considerations. We have seen above that the system of cooperation between the *Ad hoc* tribunal and states is a vertical one. This means that the ICTY is an international criminal institution that is endowed with stronger authority over states than the ICC. Regardless of this relationship, the judges stated that they were not convinced that they had the power to discourage domestic authorities from using such measures in the

<sup>89</sup>Penney 2003, p. 114.

<sup>90</sup>See Bilz 2012, p. 150, with further references.

<sup>91</sup>Amelung and Mittag 2005, p. 615; Eisenberg 2011, p. 125; Muthorst 2009, p. 55.

<sup>92</sup>Roberts and Zuckerman 2010, p. 188.

<sup>93</sup>See Penney 2003, p. 120 et seq. with further references.

<sup>94</sup>Slobogin 1999, p. 363 et seq.

<sup>95</sup>Jackson and Summers 2012, p. 155.

<sup>96</sup>Similar, Berger 2012, p. 38.

future.<sup>97</sup> This must be true all the more for a court like the ICC whose cooperation system is characterized by a weaker position vis-à-vis states.

In addition, theoretical arguments can be advanced against the validity of the deterrence theory with respect to ICC proceedings. To this effect, two further differences between national proceedings and ICC proceedings need to be taken into account.

The first is closely connected to the practical arguments advanced above. It concerns the weak institutional connection between domestic investigating authorities and the Court. The discussion of the separation thesis has demonstrated that these actors of international criminal justice cannot be regarded as entirely disconnected.<sup>98</sup> At the same time, the link between them is clearly weaker than it is between investigators and courts at the domestic level. As a result of this weak institutional connection, ICC trials are an even more inappropriate forum to address investigative misconduct than domestic trials. To obtain evidence, the Court depends to a large extent on domestic authorities, which carry out many investigative measures independently. The ICC, in this setting, has only very little influence on the actual way investigative measures are implemented. As a result of the non-vertical nature of the ICC cooperation regime, this is even the case where evidence gathering is carried out at the behest of the international prosecutor. It seems however misplaced in a trial conducted by an international court to deal with acts carried out by officials of a sovereign state that this court cannot control. Attempts by the Court to not only serve as a moral role model but to openly discipline national investigation forces would in fact be regarded as infringing upon state sovereignty.<sup>99</sup> It should be noted that these arguments are not to be confused with the claims made by proponents of the separation thesis. There is no general disconnection between the acts of the Court and the investigating authorities. But the existing connection does not justify the conferral of responsibility on the ICC to exercise influence over the future conduct of domestic investigations through its procedure. Where exclusion nevertheless has an educational impact on national authorities, this is rather to be considered merely a positive side effect.

The second difference between national proceedings and ICC proceedings relevant in this context pertains to the subject matter of the ICC. The Court is dealing with crimes that are considerably more serious than the average crime at the domestic level. As a consequence, applying the deterrence rationale would cause an imbalance. The seriousness of the crimes is certainly not a reason to generally restrict the validity of human rights.<sup>100</sup> But the purpose to exercise, with very uncertain outcomes, a deterrent influence on national investigators is certainly too weak a factor to outweigh the public interest in the prosecution of such crimes.<sup>101</sup>

<sup>97</sup>*Prosecutor v. Brđanin* (Decision on the Defence "Objection to Intercept Evidence"), ICTY (Trial Chamber), decision of 3 October 2003, para 63.

<sup>98</sup>On the separation thesis, see Sect. 4.3.2.2.1.

<sup>99</sup>Safferling 2001, p. 313; Gaynor et al. 2013, p. 1034.

<sup>100</sup>See in particular Sect. 5.2.

<sup>101</sup>Safferling 2012, p. 502.

In conclusion, where national authorities have gathered evidence through illicit means, deterrence must be rejected as a purpose of an ICC exclusionary rule. This is irrespective of whether the measures were carried out independently or on behalf of the international prosecutor.

But what about deterrence where OTP staff itself carries out the respective investigative measure? There certainly is a strong institutional connection between the Chambers of the ICC and its Office of the Prosecutor. This may call for a disciplining role of the former vis-à-vis the latter.

The ICC in the *Lubanga* case seems to have considered at least the possibility that exclusion may have a disciplining effect on OTP staff. It has, however, doubted its significance in light of the limited power of the international prosecutor to carry out investigative measures himself.<sup>102</sup> Indeed, deterrence cannot play a considerable role for ICC proceedings as long as the structure of the ICC cooperation regime limits the direct intervention of OTP to exceptional cases. But even beyond this limited impact under the cooperation regime as it stands today, the validity of deterrence for OTP violations is doubtful. Firstly, the practical benefit of deterrence will once more be difficult to assess. Admittedly, one may argue that the Prosecutor will usually have a strong interest in every individual conviction and not be driven by considerations such as the maintenance of order. But at the same time, ICC investigations often take place in unstable regions far away from The Hague. Prosecution staff may therefore believe that violations will not come to light. Beyond that, and even more importantly, the question of adequacy arises once more. In particular with respect to the seriousness of the crimes under the Court's jurisdiction, it seems more appropriate to punish prosecutorial rights violations by means other than the exclusion of evidence.<sup>103</sup>

#### 4.3.2.2.4 The Vindication of Individual Rights

A second explanation for the exclusion of reliable evidence advanced in domestic debates concentrates on the protection of the individual rights of the accused. According to this approach, the state itself has set legal limits on its access to evidence. Where these limits are not respected by the investigating authorities, the accused has a right to a remedy. It is argued that the best way to vindicate the rights of the accused is to exclude illicitly gathered evidence. As a consequence of such an exclusion, both the accused and the state are supposed to be put back in

<sup>102</sup>*Prosecutor v. Lubanga* (Decision on the Admission of Material from the 'Bar Table'), ICC (Trial Chamber), decision of 24 June 2009, para 44.

<sup>103</sup>For existing possibilities to sanction ICC staff, see Rules 23 et seq. of the Rules of Procedure and Evidence. See also Rules 110.1 et seq. of the Staff Rules of the International Criminal Court, available at [http://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/staff%20rules%20of%20the%20international%20criminal%20court%20annex%20to%20icc%20ai%202005%20003.asp](http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/staff%20rules%20of%20the%20international%20criminal%20court%20annex%20to%20icc%20ai%202005%20003.asp) (last visited: October 2013).

the same position they would have been in had the violation not occurred. This approach has also been endorsed for the ICC exclusionary rule.<sup>104</sup>

The idea that exclusion is closely connected to the protection of individual rights is the basis of a number of domestic approaches. It constitutes, for instance, the gist of the originally strong mandatory exclusionary rule in the United States.<sup>105</sup> In its initial form, the U.S. exclusionary rule was conceived as a direct manifestation of the individual rights guaranteed by the U.S. Constitution.<sup>106</sup> This view has also been endorsed in the discussions in England.<sup>107</sup> In Germany, individual rights concepts have been supported at times by the judiciary. The so-called '*Rechtskreistheorie*' that was first followed by the German Federal Supreme Court was based on the assumption that evidentiary exclusion is only triggered in the case of a violation of individual rights.<sup>108</sup> Other approaches referring to the exclusionary rule as a remedy for the violation of individual rights have been developed by German scholars.<sup>109</sup>

Like the deterrence rationale, these propositions have been subject to much criticism in domestic debates. Depending on the specific embodiment of the remedial concept, it has either been considered too wide or too narrow.<sup>110</sup> We will see that the criticism raised at the domestic level is also valid for international criminal proceedings.

First of all, a strict understanding of the remedial theory has been criticized as too wide. Where the remedy of exclusion is seen as a direct consequence of the violation of individual rights, there is a danger of yielding disproportionate results.<sup>111</sup> In principle, it could be held that exclusion is triggered automatically whenever a violation occurs in the course of the collection of evidence. The mandatory exclusionary rule initially conceived by the U.S. Supreme Court is, once again, an illustrative example of such an approach.<sup>112</sup> As we have seen before, however, such a mandatory conception of the exclusionary rule is problematic because it forces courts to simply ignore cogent evidence, which is problematic with respect to the official responsibility to enforce criminal law.<sup>113</sup>

The remedial theory however does not necessarily have to be conceived in such a categorical way. At the national level, even strong proponents of the theory have

<sup>104</sup>Safferling 2001, p. 313.

<sup>105</sup>Roberts and Zuckerman 2010, p. 182.

<sup>106</sup>On the initial concept of the U.S. mandatory exclusionary rule, see Sect. 3.3.2.

<sup>107</sup>See for instance Ashworth 1977, p. 723 et seq.

<sup>108</sup>On the '*Rechtskreistheorie*', see Sect. 3.3.1.

<sup>109</sup>A prominent example is the so-called '*Informationsbeherrschungslehre*', an approach that conceives most of the rules on the exclusion of evidence as resulting from subjective rights to control information, see Amelung 1990. Also see Sect. 3.3.1.

<sup>110</sup>Roberts and Zuckerman 2010, p. 189.

<sup>111</sup>Penney 2003, p. 112. Critical with respect to this argument, Potter, 1983, p. 1396.

<sup>112</sup>Roberts and Zuckerman 2010, p. 182.

<sup>113</sup>See Sect. 4.3.2.2.2.

conceded that, for reasons of proportionality, the obligation to provide a remedy may not be applicable to every kind of violation.<sup>114</sup> Theoretically, Article 69(7) of the ICC Statute could therefore be understood as limiting the right to a remedy to cases where the additional requirements of subparas (a) and (b) are fulfilled.

But even if the right to a remedy is restricted in this way, other points of criticism have been raised against the remedial theory. First of all, the remedial theory has naturally been rejected by the proponents of the separation thesis.<sup>115</sup> This criticism can be refuted right away. It maintains that there is no connection between the violation and the trial. Accordingly, there would be no reason that a court would have to provide a remedy. This argument, however, disregards the fact that investigators and courts have a shared responsibility for the fair administration of justice.

At the same time, the criticism raised by the separation thesis points to an aspect which, in a similar form, has already been discussed in relation to deterrence. While there is a connection between the official misconduct and the trial, the question emerges whether the trial is the appropriate forum to remedy the violation. Admittedly, the Latin principle '*ubi remedium, ibi jus*' is recognized in both common and civil law. It postulates that any violation of a right requires a remedy. And certainly, this principle is all the more applicable where a human rights violation is concerned. Such a remedy, however, could also be provided by resorting to the law of tort. Accordingly, as for deterrence, there is an alternative way to reach the objectives pursued by the remedial theory.

One could object that tort law remedies would only provide for material compensation whereas the exclusion of evidence is meant to entirely redress the violation suffered by the accused. But in many cases, it is doubtful whether the remedy of excluding tainted evidence actually fully eliminates the adverse effects of the violation. In most domestic proceedings, as well as in ICC proceedings, the decision on exclusion is taken by the same judicial authority that also passes the final judgment. Once introduced into trial, the judicial awareness of the existence of the evidence can never be entirely reversed.<sup>116</sup> As a consequence, there will often be a risk that the evidence has nevertheless influenced the decision, at least to some degree. Accordingly, the choice is between two imperfect remedies, material compensation, which only provides for a substitute, and the exclusion of the evidence from trial, which cannot guarantee that its objective will actually be achieved.

In cases, on the other hand, where the bench actually ignores the evidence, the question of proportionality arises once again. In such cases, the remedy provided to the accused may affect the enforcement of criminal law to a considerable degree and possibly even lead to the acquittal of the accused. This is why the remedial theory has been criticised for benefiting the accused in a manner disproportionate

<sup>114</sup>Ashworth 2003, p. 112.

<sup>115</sup>On the separation theory, see Sect. 4.3.2.2.1.

<sup>116</sup>Dennis 2010, p. 106; Roberts and Zuckerman 2010, p. 183.

to the violation of his rights.<sup>117</sup> Admittedly, as we have previously found, in order to avoid entirely disproportionate results, the remedial theory can be limited to serious cases of rights violations. If however, the remedy of exclusion is restricted in this way, the question arises how those violations which, for reasons of proportionality, cannot be compensated through the exclusion of evidence will be remedied. Such violations would have to be remedied by means of the law of tort after all, thus creating disparities between the different violations. Ultimately, it would seem more appropriate to have one common mechanism for the remedy of violations committed during the collection of evidence. The allocation of damages through the law of tort is equally available in all cases and provides a remedy as a matter of right and not of judicial discretion.<sup>118</sup>

The possibility of providing material compensation instead of excluding the evidence has been used as a strong argument against the remedial theory at the national level. At the international level, one may raise the objection that it could be difficult to obtain damages from the responsible authorities.

First of all, there is no comprehensive scheme on rights compensation in the ICC proper law that could be invoked where OTP staff commits a violation. Article 85 of the Statute creates an enforceable right to compensation. This right is limited, however, to instances of unlawful arrest or detention or to cases where a person has been punished as the result of a miscarriage of justice. On a discretionary basis, the Court may also award compensation to a detained person who has not been convicted because of a grave and manifest miscarriage of justice. Neither of the instances of compensation for miscarriages of justice applies, however, to cases where a person has suffered a violation and was still justly convicted and sentenced. As a result, there seems to be no right to compensation where the violation does not reach the extent that would warrant a release. Neither does Article 71 of the Statute establish such a claim. The provision is limited to misconduct before the Court and not at the investigative phase.<sup>119</sup>

Where domestic authorities have gathered the tainted evidence independently, the matter is often not less difficult. The access to a remedy then depends both on the domestic legal framework for government liability and on the actual enforceability of such claims. But it must be taken into account that evidence relevant to ICC proceedings often stems from states in conflict or post-conflict situations. Under such conditions, it will be difficult for an individual to assert his claim under domestic law.

In addition, persons affected by violations committed by domestic authorities could be eligible for damages under human rights conventions. In practice, however, the claims for compensation will often be difficult to enforce. While Article (2)(3)(a) of the ICCPR, Article 41 of the ECHR, as well as Article 63 of

<sup>117</sup>Potter 1983, p. 1396.

<sup>118</sup>Dennis 2010, p. 106.

<sup>119</sup>Altogether, see Acquaviva et al. 2013, p. 800.



the IACHR and Article 27 of the Additional Protocol to the ACHPR,<sup>120</sup> stipulate the right to an effective remedy, compensation for abuses is not always accessible to the individual. This is particularly true for those individuals who, under the present circumstances, are actually affected by the jurisdiction of the International Criminal Court. All of them originate from states on the African continent. Despite the comprehensive ratification of the African Charter of Human Rights by African States, access to a remedy is not likely to be readily available, be it at the domestic level or through the human rights monitoring body. As of today, the jurisprudence of the African Court of Human Rights is still fragmentary and the young institution is at this point far from being a reliable guarantor for the allocation of remedies for human rights abuses.<sup>121</sup>

But despite this unsatisfactory situation, it is not evident that its consequence should be to integrate the vindication of rights into the ICC law of evidence. The appropriate way to address such deficiencies would rather be the same as with any other deficiencies in the access to legal recourse: improve existing remedial mechanisms.<sup>122</sup> With respect to violations by OTP staff, this is a matter to be dealt with by the ICC's Assembly of States Parties and not by its judges. Regarding the lack of compensation at the domestic level, it is beyond the scope of tasks of the ICC to provide for improvement. Reforms are the responsibility of domestic states and human rights systems.

Another important objection against the remedial theory then again is that its scope of protection is too narrow. If exclusion is based on a remedial effect, the exclusionary rule can only apply to violations of those rights that explicitly protect the accused. It could not therefore be triggered by violations of the rights of third parties. At the domestic level, this has rightly been criticized. It has been argued that the accused not only has the right to the observation of rules that aim at his individual protection; instead, he is entitled to a criminal trial that, in its entirety, is in line with the rule of law.<sup>123</sup>

This argument is all the more convincing in view of an international criminal court that has an enhanced need to preserve and improve its perception as a legitimate institution. The legitimacy of the ICC would be affected if the rights of third parties would not sufficiently be taken into account in its trials. This includes the rights of victims, in particular where they participate as witnesses in the proceedings. We have seen that safeguarding the interests of victims is one of the major

<sup>120</sup>Article 27 of the Additional Protocol to the ACHPR is technically only a provision on competence which confers the jurisdiction for such a claim to the AfCHPR. Given its similarity to Article 41 of the ECHR and Article 63 of the IACHR, it can however be regarded as a substantive legal basis for a tort remedy; see Seegers 2005, p. 148.

<sup>121</sup>For an introduction into the development and current situation of the African Court of Human and Peoples Rights, see Viljoen 2012, p. 410 et seq.

<sup>122</sup>Roberts and Zuckerman 2010, p. 184.

<sup>123</sup>For the respective critics of the German 'Rechtskreisstheorie', see Eisenberg 2011, p. 123. See also Sect. 3.3.1.

purposes of international criminal trials.<sup>124</sup> This has also left its marks on the ICC proper law. It is an often emphasized characteristic of the procedural regime of the ICC that it accords special importance to the rights of victims and witnesses.<sup>125</sup> It would be contrary to this key value if these rights were completely disregarded when it comes to the exclusion of evidence.

Moreover, a failure to guarantee the respect for the rights of third parties would provide a convenient argument for states to refuse cooperation. This argument does not only pertain to the rights of the citizens of a state; it is also important that the rights of states themselves are guaranteed, in particular their sovereignty rights. International courts have a distinct responsibility to ensure that their decisions are consistent with international law and that they respect state sovereignty.<sup>126</sup> Accordingly, the ICTY, for instance, has not precluded the accused from raising the violation of state sovereignty, including with respect to the exclusion of evidence.<sup>127</sup> The same conclusion has been suggested with respect to Article 69(7) (b) of the ICC Statute.<sup>128</sup>

In conclusion, the exclusion of illicitly obtained evidence by the ICC cannot be explained as a tool to vindicate individual rights. The exclusion of evidence is not the appropriate mechanism to compensate for abuses. Moreover, such a justification would not sufficiently take into account the rights of third parties which play a paramount role in the legal system of the Court.

#### 4.3.2.2.5 The Theory of Integrity

Having sketched the main rival theories, we will now turn to the last rationale, the theory of integrity. At the core of this concept is the idea that the moral authority of a court is brought into disrepute where this court does not dissociate itself from illicit investigative methods. We will see that in spite of justified criticism, there is no real alternative to the integrity theory.

This is particularly true for ICC proceedings. Among the theoretical approaches presented here, the integrity rationale is not only the one that is most consistent with the wording of Article 69(7)(b) of the ICC Statute. The assumption that the

<sup>124</sup>See Sect. 2.2.3.

<sup>125</sup>For an introduction into the status of victims under the ICC legal framework, see Greco 2007, p. 531 et seq.

<sup>126</sup>Sluiter 2002, p. 226.

<sup>127</sup>With respect to the exclusion of evidence, see *Prosecutor v. Kordić and Čerkez* (Decision stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence), ICTY (Trial Chamber), decision of 25 June 1999, para 10. Generally, see *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY (Appeals Chamber), decision of 2 October 1995, para 55.

<sup>128</sup>See Alamuddin 2010, p. 261. This seems also to be implied by *Prosecutor v. Lubanga* (Decision on the admission of material from the 'Bar Table'), ICC (Trial Chamber), decision of 24 June 2009, para 42.

integrity theory must be given preference over other approaches follows in particular from teleological considerations. As we have seen, the main purpose of ICC proceedings is positive general prevention, meaning the socio-pedagogical effects of the prosecution and punishment of international crimes.<sup>129</sup> As a consequence, it is particularly important that the Court is perceived as a legitimate institution possessing moral authority and acting with integrity, including with respect to the evidence that it relies upon in its proceedings.<sup>130</sup>

Among the domestic legal orders considered above, the strongest example for the appreciation of this rationale can be found in Canadian law. The Canadian Charter of Rights and Freedoms predicates decisions on exclusion on whether the admission of evidence obtained in breach of a Charter right "would bring the administration of justice into disrepute".<sup>131</sup>

But the maintenance of judicial integrity is also part of the debate on exclusion in other states. References to this idea can be found in decisions of the United States Supreme Court dating from its liberal era,<sup>132</sup> as well as in the case law of the English Supreme Court (formerly the House of Lords).<sup>133</sup> Integrity based approaches have been discussed in English,<sup>134</sup> American<sup>135</sup> and German<sup>136</sup> legal discourse. In general, the theory has become increasingly popular in recent times among legal scholars throughout different domestic systems.<sup>137</sup>

Within any system governed by the rule of law, the courts are tasked with promoting legal and societal values. The discharge of this task necessarily requires a certain level of public acceptance. Such acceptance in turn depends heavily on the moral authority of the courts. Authority, however, cannot be sustained where the courts themselves do not adhere to the values they are entrusted to protect. These assumptions have implications not only for the actual behaviour of the judges themselves, but also for the attitude they need to adopt towards official impropriety.

<sup>129</sup>See Sect. 2.2.3.

<sup>130</sup>Safferling 2001, p. 302.

<sup>131</sup>See Article 24(2) of the Canadian Charter of Rights and Freedoms. See in particular Sect. 3.3.4.

<sup>132</sup>See *Mapp v. Ohio*, United States Supreme Court, decision of June 19, 1961, 367 U.S. 643 (1961); *Terry v. Ohio*, United States Supreme Court, decision of 10 June 1968, 392 U.S. 1 (1968). In contrast, for a decision opposing integrity as a benchmark, see *Stone 1995 v. Powell*, United States Supreme Court, decision of 6 July 1976, 428 U.S. 465 (1976).

<sup>133</sup>For a clear example, see *A. and others v. Secretary for Home Department (No. 2)*, House of Lords (Appellate Committee), decision of 8 December 2005, [2005] UKHL 71, para 87: "[...] that the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted."

<sup>134</sup>Roberts and Zuckerman 2010, p. 188 et seq.

<sup>135</sup>See Slobogin 2013, p. 17 et seq.

<sup>136</sup>See Muthorst 2009, p. 56, with further references.

<sup>137</sup>Jackson and Summers 2012, p. 156.

If judges were to overlook such impropriety on a regular basis, they would quickly be perceived as applying a double standard. Their attitude would create the impression that regular citizens are required to comply with legal values while the same behaviour is not expected from state officials.<sup>138</sup> Even worse, where courts not only fail to identify a violation but even make use of its outcome, they risk being perceived as its accomplices.<sup>139</sup> A court that does not proceed against violations of due process rights eventually loses its authority to teach citizens moral lessons through its judgments.<sup>140</sup> Proponents of the integrity theory argue that, consequently, courts must place an emphasis on due process and distance themselves from illegally gained evidence. A possible reaction to official violations of due process rights would be excluding the evidence gathered by such means.

The judicial attitude towards official impropriety, however, is not the only criterion that impacts on the moral authority of a criminal court. As we have seen, the authority and credibility of a court are also closely linked to its ability to enforce substantive criminal law.<sup>141</sup> Public confidence is undermined where excluding evidence results in a failure to convict a guilty person.<sup>142</sup> Thus, the aim of effective law enforcement would be served best by admitting as much cogent evidence as possible.

As a result, a tension arises between due process guarantees and the public interest in the enforcement of substantive criminal law. Proponents of the integrity theory recognize this tension. The theory tries to dissolve it through a balancing exercise between the two poles 'due process' and 'effective law enforcement'.<sup>143</sup> This process of balancing ultimately reflects the common methodological approach deduced from the review of national and international systems. All of the systems reviewed above have, to some degree, balanced against each other the different interests affected in cases of tainted evidence. This is not surprising from the teleological point of view of the integrity theory. It simply results from the fact that every system needs to dissolve the tension between due process rights and effective prosecution in order to maintain the legitimacy of its judicial system.

But while, in recent times, the approach has become increasingly popular within domestic debates, it has not been without its opponents. A first line of attack against the integrity rationale is based on the separation thesis rejected above. Commentators have argued that the integrity rationale is unable to refute the argument that pre-trial breaches do not affect the trial itself.<sup>144</sup> Interestingly, a similar argument seems to have been raised by the ICTY. In *Kordić and Cerkez*,

<sup>138</sup>Roberts and Zuckerman 2010, p. 188.

<sup>139</sup>Ashworth 2003, p. 108.

<sup>140</sup>Roberts and Zuckerman 2010, p. 188.

<sup>141</sup>See Sect. 2.2.3.

<sup>142</sup>See Muthorst 2009, p. 59 et seq., who claims that excluding evidence may have a worse effect on public confidence than admitting it. See also Rogall 1979, p. 14; Penney 2003, p. 111.

<sup>143</sup>Ashworth 1977, p. 346; Roberts and Zuckerman 2010, p. 190.

<sup>144</sup>Ashworth 2003, p. 121; Muthorst 2009, p. 57.



the issue was the admissibility of a tape that had been recorded by means of an interception, allegedly in violation of domestic law. During the discussion, the bench refuted the argument that admitting the evidence would be tantamount to tacitly approving illegal measures. Judge May held that the only decision to be made related to the admissibility of the tape. And, in his words, admitting this evidence “*doesn't mean that you are approving the conduct*”.<sup>145</sup> He was not convinced therefore that admitting illegally gained evidence would reveal anything about the tribunal's attitude towards the violation, let alone affect the tribunal's integrity. The argument rather presents the violation and the trial as completely unrelated.

In fact, a loose institutional connection between the actors at the pre-trial and those at the trial phase has consequences for how deeply a violation affects a court's integrity. But be it at the national or at the international level, presuming a complete disconnection neglects the bonds that actually exist between the different procedural stages, as well as between the actors involved in them. What is more, the tenets of the integrity theory necessitate going even one step further than with respect to the rationales discussed above. Despite the connection between the different phases and actors of criminal proceedings, both the deterrence and the remedial theory were rejected above *inter alia* because there are alternatives to reach the objectives pursued by them. The trial is neither the appropriate forum for deterrence nor for the vindication of individual rights. This argument is not transferable to the integrity theory. Deterrent and remedial goals may be achieved outside of a criminal trial. The purpose of sustaining the integrity of a court, however, is inseparably connected to the trial forum.

Another counter-argument commonly raised against the integrity theory seems to be more relevant, namely that the integrity theory risks putting too much emphasis on public reaction. Where crimes are serious enough to attract revulsion, public opinion is likely to reject considerations of due process altogether. At the national level, cases involving the sexual abuse of children or terrorism have been advanced as examples.<sup>146</sup> The same risk certainly exists with respect to the grave crimes under international jurisdiction.

Most advocates of the integrity theory, however, are aware of this risk. As a reaction, commentators have drawn a distinction between two versions of the integrity principle. The first of these versions is based on ‘*public attitude integrity*’, while the second is based on ‘*court-centred integrity*’. In the latter, preferable version, the integrity rationale is understood as focussing on the consistency of judicial decisions. This means that courts must first of all guarantee respect for a certain set of values irrespective of whose behaviour they assess.<sup>147</sup> Accordingly,

<sup>145</sup>See *Prosecutor v. Kordić and Čerkez*, ICTY (Trial Chamber), Transcript of 2 February 2000, p. 13671. See also *Prosecutor v. Brđanin* (Decision on the Defence “Objection to Intercept Evidence”), ICTY (Trial Chamber), decision of 3 October 2003, para 63.

<sup>146</sup>Ashworth 2003, p. 111; Ashworth and Redmayne 2010, p. 346.

<sup>147</sup>Ashworth 1977, p. 110. Also see Bilz 2012, p. 166, who points out that according to psychological research, inconsistency has a negative impact on the perception of a judicial system.

the moral authority of a court is not sustained through the widespread consensus with a particular decision. It rather builds on growing public respect for the consistent affirmation by this court of its own values. The case law of the Canadian Supreme Court is exemplary for this line of thought. With the risk of opportunism in mind, Canadian judges have concentrated on the long-term effects of exclusion to the reputation of the justice system rather than on immediate public reaction when interpreting Section 24(2) of the Canadian Charter.<sup>148</sup>

Such an understanding must also govern the conception of the integrity rationale in the case of the ICC. The aim of sustaining the Court's integrity should not indiscriminately make it subject to public opinion. This is not least confirmed by the teleological considerations advanced above.<sup>149</sup> If the purpose of ICC proceedings is a socio-pedagogical one, the Court cannot promote its perception as legitimate by simply complying with the status quo of prevailing societal values. The socio-pedagogical purpose rather suggests that the Court must impart knowledge about the validity of legal standards through a consistent application of its own values.

Moreover, a ‘*public attitude*’ version of the integrity rationale would also be particularly problematic for international proceedings for reasons of definition. At the domestic level, the theory as such has been criticized for the relativity of the notion of integrity. This is true in particular if the definition of integrity depends on public opinion. The public perception of what integrity means varies considerably across space and time.<sup>150</sup> At the international level in turn, the range of public opinions naturally differs to a much greater degree than within one domestic society. Any attempt at defining the already vague term ‘*integrity*’ on this basis would be a hopeless endeavour.

Admittedly, the problem of vagueness remains important. Albeit to a somewhat lesser extent, a ‘*court-centred*’ conception must also face the notorious vagueness of the integrity rationale. Here, the main point of criticism has been the danger of an inherent subjectivity of decisions on exclusion. Domestic opponents to the integrity rationale have argued that the performance of the required balancing exercise is highly dependent on the views of the judge responsible for taking the decision.<sup>151</sup> The fear is that judicial decisions on the exclusion of evidence would become unpredictable.<sup>152</sup> This danger may come with a risk that decisions would differ greatly depending on the composition of the bench. This would entail an inequality of treatment of defendants. It has been argued in general that the

<sup>148</sup>On this approach by the Supreme Court of Canada, see Sect. 2.3.4.

<sup>149</sup>See Sect. 2.2.3.

<sup>150</sup>Bilz 2012, p. 168.

<sup>151</sup>Ashworth and Redmayne 2010, p. 347. See also, Ashworth 2003, p. 118 et seq.

<sup>152</sup>The vagueness of the integrity theory has been criticized in particular by the U.S. Supreme Court in the more conservative post-Warren area, see for instance *Stone 1995 v. Powell*, United States Supreme Court, decision of 6 July 1976, 428 U.S. 465 (1976).

discretion allocated to the judges would be disproportionate because they would be given the authority to make policy decisions that should be left to the legislator.<sup>153</sup>

Beyond the domestic debates, this is a contentious point, most particularly for the application of an integrity based rationale by an international court. Generally speaking, granting a very broad discretion to judges is considered even more problematic at the international level than it is in domestic proceedings. This reluctance to give too much leeway to international judges results in particular from the fragmentary nature of international law. Given the lack of legal framework, it seems particularly difficult to predict the standards international judges will abide by.<sup>154</sup> What is more, this lack of regulation comes in addition to a paucity of legal backgrounds among international judges. The resulting divergence of opinion is no less problematic for creating confidence in their exercise of discretion.

Thus, in principle, the aforementioned criticism is not unjustified. At the same time, it must be acknowledged that there is no real alternative to granting judicial discretion for cases of reliable but illicitly obtained evidence. It is no coincidence that all of the systems analysed above have, to some extent, balanced the different interests affected in such cases. Mandatory requirements do not generate workable solutions for evidentiary exclusion. This is best illustrated by the development of the formerly automatic exclusionary rule in the U.S. The matter is simply too complex to allow for predetermined moral certitude embodied by a simple all-purpose rule.<sup>155</sup> Ultimately this is also acknowledged by the deterrence and the remedial theories. In their modern shapes, both of these approaches recognize that the objectives they consider relevant are not absolute. As a consequence, they both limit the consequences of their presumptions: Where the deterrence rationale is used as an explanation, this has led to resorting to rules of exception. Here, the U.S. rule is once again an illustrative example.<sup>156</sup> The remedial theory in turn is confronted with the same problem of deciding which rights violation are serious enough to require exclusion. By openly resorting to a balancing exercise, the integrity theory concedes to the moral and practical complexities of the issue. To openly allocate discretion to the judges simply means to recognize that no legislator would ever be able to regulate all possible cases.<sup>157</sup>

In the end, predicating decisions on an exercise of discretion is also less problematic than the critics suggest. Granting leeway to judges is not a tool alien to law. The ICC Statute makes no exception and recognizes such judicial power not

<sup>153</sup>For a critique with respect to international criminal proceedings, see Gallant 1999, p. 719; Vanderpuye 2005, p. 130; Zappalà 2003, p. 51 et seq.

<sup>154</sup>Kamardi 2009, p. 108.

<sup>155</sup>Cryer et al. 2010, p. 190. Similar, Muthorst 2009, p. 75. For the opposite view with respect to the ICC, Vanderpuye 2005, p. 129 et seq.

<sup>156</sup>See Sect. 3.3.2.

<sup>157</sup>Similar, with respect to the jurisprudence, see Rogall 1979, p. 32.

only in Article 69(7) but in a number of provisions.<sup>158</sup> If one were to reject the integrity rationale on that basis, the same would have to apply to all instances where evaluation and the weighing of interests are demanded from a judge.<sup>159</sup> What is more, discretionary rules are even less assailable in matters of criminal procedure. The requirements of the principle of legal certainty are not as strict here as they are for substantive law.<sup>160</sup>

Finally, exercising discretion does not necessarily need to be equated with a complete lack of predictability. Admittedly, discretion inevitably implies a core amount of freedom to decide on the part of the responsible judge.<sup>161</sup> But this decision-making process can be guided. In the case of evidentiary exclusion, it is at least to some extent possible to structure the balancing process with a framework of principles that applies beyond the single case. Such an approach, however, is conditional on a sound methodology. It requires the identification of factors that are relevant for the balancing exercise.<sup>162</sup>

The development of such a methodology is not left up in the air. As stated at the outset of this chapter, the theoretical foundations of an exclusionary rule are of considerable importance for its implementation. The integrity theory has now been determined as the best explanation for exclusion in international criminal proceeding. This rationale represents the point of reference for the development of abstract factors. We have seen that the judiciary in a number of systems has striven to identify relevant factors for a balancing exercise. This case law may serve as a starting point to determine adequate criteria for the ICC. The validity of every possible factor will however have to be examined in light of the peculiarities of the ICC legal system and, in particular, in light of its significance for the promotion of judicial integrity.

#### 4.3.2.3 The Exclusion of Unreliable Evidence

Some consideration shall finally be given to the first of the two alternatives in Article 69(7). This instance of evidentiary exclusion is rather straightforward. The need to guarantee the reliability of evidence is deeply rooted as one rationale for exclusion in domestic legal systems. In common law systems, unreliability was initially even regarded as the sole reason for the exclusion of evidence.<sup>163</sup> In civil law systems in turn, the importance of not relying on inaccurate evidence necessarily results from the strong emphasis on the truth-ascertaining function accorded

<sup>158</sup>For just some of the many examples, see Article 19(1), Article 57(3)(a), Article 64(6) or Article 77 of the ICC Statute.

<sup>159</sup>Similar with respect to the German jurisprudence, see Rogall 1979, p. 32.

<sup>160</sup>See Sect. 2.3.1.1.

<sup>161</sup>Roberts and Zuckerman 2010, p. 219.

<sup>162</sup>Rogall 1979, p. 33; Roberts and Zuckerman 2010, p. 191.

<sup>163</sup>Jackson and Summers 2012, p. 153.

to criminal trials.<sup>164</sup> Moreover, basing convictions on evidence whose reliability is doubtful is naturally also problematic from a human rights point of view. Accordingly, the ECtHR has included the reliability of disputed evidence in its overall assessment of the fairness of a trial under Article 6 of the ECHR.<sup>165</sup> Finally, this alternative of the ICC exclusionary rule can be found verbatim in Rule 95 of both of the *Ad hoc* tribunals.

Today, it is widely agreed that reliability is not the only rationale for exclusion. This view also prevailed among the drafters of the ICC Statute and drove them to include a separate subpara (b) that would allow for the exclusion of possibly reliable evidence.<sup>166</sup> At the same time, guarding fact finders against risks of error evidently remains one major purpose of exclusion. This applies without doubt to ICC trials as well. Convictions resting on a wrong factual basis would endanger the fulfilment of the mandate of the ICC to prosecute those persons who are in fact liable for international crimes. Moreover, wrongful convictions are also problematic in view of the previously emphasized need of the Court to be perceived as a legitimate institution. This last assessment has an impact on the relation between subpara (a) and (b) of the ICC exclusionary rule. Even though the two requirements of unreliability and threat to integrity were finally made disjunctive, there continues to be a degree of overlap between the two alternatives of Article 69(7). While Article 69(7)(b) more immediately aims at the protection of the Court's integrity, this is indirectly also a concern of Article 69(7)(a). It is hard to imagine that the requirements of the first alternative of the ICC exclusionary rule would be met without there being also an adverse effect on the integrity of the proceedings in terms of Article 69(7)(b). At the same time, the relation between the two alternatives of the provision is not one of *lex specialis* and *lex generalis*. In aiming directly not at integrity but at the discovery of material truth, Article 69(7)(a) to some extent has a protective function that differs from Article 69(7)(b). Ultimately, this alternative was probably maintained as a separate option because of the paramount importance of the reliability issue for the exclusion of evidence in many domestic legal systems.

So far, no evidence has been excluded by the ICC on the basis of Article 69(7) (a) of the Statute. It has even been suggested that this alternative of the ICC exclusionary rule is redundant, not because of the above-mentioned overlap with subpara (b), but because unreliable evidence would in any case not be admissible in

<sup>164</sup>Weigend 2003, p. 168.

<sup>165</sup>See *Güfgen v. Germany*, ECtHR, decision of 1 June 2010 (Application no. 22978/05), para 164: "In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy." On the *Güfgen* case, see in particular Sect. 6.2.2.

<sup>166</sup>Initially, the draft language of the ICC exclusionary rule predicated exclusion cumulatively on doubts about reliability and an adverse effect on the integrity on the proceedings. At the Rome Conference, it was agreed that it would be sufficient that either of these requirements be met. See Triffterer 2008—Piragoff, Article 69, para 18.

ICC proceedings.<sup>167</sup> In fact, reliability is also a criterion for the general decision on admissibility. The drafters of the ICC Statute did not include it as a distinct factor in either Article 69(4) or Rule 63.<sup>168</sup> The question of reliability is, however, of major significance for the probative value of a piece of evidence.<sup>169</sup> But while the exclusion of unreliable evidence is possible on this basis, the *lex specialis* nature of Article 69(7) vis-à-vis Article 69(4) needs to be taken into account. Accordingly, where the unreliability results from the use of illicit methods of evidence gathering, exclusion under Article 69(7) takes precedence.<sup>170</sup>

What kind of cases are covered by this first alternative of the ICC exclusionary rule? The most obvious example are confessions obtained as a result of torture. In cases of torture, the violation raises doubts about whether the confession was truthful or merely the result of the coercion resulting from the manner of questioning.<sup>171</sup> In fact, together with humanitarian concerns, the unreliability of evidence was one of the main reasons for abolishing torture in enlightened 18th century European states.<sup>172</sup> The same conclusion can be drawn for other instances of undue pressure during interrogation that do not amount to torture.<sup>173</sup> Accordingly, the ICTY has held *inter alia* with respect to their lack of reliability that "*statements, which are not voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95*".<sup>174</sup>

In addition, the reliability of evidence may be impaired where rules relating to its preservation are violated. Article 56(2) of the ICC Statute for instance sets forth a number of measures aimed at the preservation of evidence in the case of unique investigative opportunities.<sup>175</sup> Moreover, Rule 112(1) of the RPE demands that interrogations of suspects and arrested person shall be recorded.

When compared to subpara (b), the alternative set forth in subpara (a) of the ICC exclusionary rule allows less leeway to the judges. We have seen that generally, the margin of appreciation in Article 69(7) does not result from the formulation of a discretionary rule *per se*. Rather it is an inherent part of the interpretation of the vague terms included in particular in the two subparagraphs of the provision.<sup>176</sup>

<sup>167</sup>Schabas 2011, p. 317.

<sup>168</sup>There was some discussion to include reliability in Rule 63 of the RPE as a distinct criterion for the general admissibility of evidence. No agreement could however be reached, see Combs 2011, p. 326; Gaynor et al., p. 1027.

<sup>169</sup>See Gosnell 2010, p. 384 et seq.; Gaynor et al. 2013, p. 1022. See also Sect. 4.3.1.

<sup>170</sup>On the relation between Articles 69(4) and 67(9) of the ICC Statute, see Sect. 4.3.1.

<sup>171</sup>Triffterer 2008—Piragoff, Article 69, para 67.

<sup>172</sup>Ambos 2010, p. 369.

<sup>173</sup>Triffterer 2008—Piragoff, Article 69, para 67.

<sup>174</sup>*Prosecutor v. Stakić* (Provisional Order on the Standards Governing the Admission of Evidence and Identification), ICTY (Trial Chamber), decision of 25 February 2002, para 8.

<sup>175</sup>Triffterer 2008—Piragoff, Article 69, para 67.

<sup>176</sup>See Miraglia 2008, p. 492; Safferling 2012, p. 499. Also see Sect. 4.3.1.



Article 69(7)(b) covers cases where evidence that is reliable is excluded nevertheless due to its adverse effect on the integrity of the proceedings. Where evidence is excluded despite its reliability, a tension arises between due process guarantees and the interest of the international community in the enforcement of international criminal law. This tension results in a balancing of these two interests. No such balancing exercise is necessary in turn where the methods of evidence gathering impair the reliability of the evidence. Instead, in cases covered by Article 69(7)(a), the admission of evidence does not further any of the previously mentioned interests. In particular, there can be no public interest in convicting an accused on the basis of possibly erroneous facts. Likewise, such a conviction would not serve the related goal of international trials to recognize the suffering of victims of gross human rights violations.<sup>177</sup> But while a balancing exercise is not necessary in this case, the judges still enjoy a certain margin of appreciation when interpreting the terms “reliability” and “substantial doubt”.

The ICC itself has interpreted the term “reliability” only in the context of Article 69(4). In the *Katanga* case, the Trial Chamber provided a non-exhaustive list of criteria that it deemed appropriate to determine whether evidence was reliable, including its source, its nature and characteristics, its contemporaneity and purpose and, finally, the way in which the evidence was gathered.<sup>178</sup> This list was intended, however, to deal with the admissibility of documentary evidence and seems only partly transferable to Article 69(7)(a). It may be useful for instance in cases of violations of Article 56 of the Statute.

The ICTY has held in the context of hearsay evidence that in order to be reliable, evidence must be “voluntary, truthful and trustworthy” and that the judges, in order to make that determination, may look in particular at the content of the evidence, as well as at the circumstances under which it arose.<sup>179</sup> This jurisprudence has in turn been adopted by the ICC.<sup>180</sup> In the end, however, reliability seems too broad a concept to be defined conclusively. The ICC Trial Chamber in *Katanga* thus seems correct in holding that any determination of reliability is dependent on a case-by-case assessment.<sup>181</sup>

The more problematic question with respect to Article 69(7)(a) is whether the effect of a violation is severe enough to “cast substantial doubt” on the reliability of the evidence. It has been held that evidence produced by the Prosecutor would

<sup>177</sup>See Sect. 2.2.3.

<sup>178</sup>*Prosecutor v. Katanga and Chui* (Decision on the Prosecutor’s Bar Table Motions), ICC (Trial Chamber), decision of 17 December 2010, para 27.

<sup>179</sup>*Prosecutor v. Aleksovski* (Decision on Prosecutor’s Appeal on Admissibility of Evidence), ICTY (Trial Chamber), decision of 16 February 1999, para 15.

<sup>180</sup>*Prosecutor v. Lubanga* (Decision on the admissibility of four documents), ICC (Trial Chamber), decision of 13 June 2008, para 28.

<sup>181</sup>*Prosecutor v. Katanga and Chui* (Decision on the Prosecutor’s Bar Table Motions), ICC (Trial Chamber), decision of 17 December 2010, para 28. Altogether on the interpretation of the term ‘reliability’ in international case law, see Safferling 2012, p. 495 et seq.

likely be held to a high standard of reliability.<sup>182</sup> This might suggest that the degree of probability of unreliability would be rather low, at least where Article 69(7)(a) is used to contest the admissibility of prosecution evidence.

The wording of the provision and the ratio of admissibility decisions, however, call for a certain restraint in this regard. The inclusion of the qualifier “substantial” implies that not every allegation of unreliability is sufficient to trigger exclusion on the basis of Article 69(7)(a). The French version of the provision uses the word “sérieusement” which unequivocally demands that a certain degree of doubt be reached before excluding the evidence.

What is more, the preliminary nature of admissibility decisions needs to be taken into account. It is important to distinguish between the admissibility of a particular item of evidence and the weight attached to it in the overall assessment in the final decision. The generally liberal, more civil law oriented, approach to admissibility in international criminal law suggests that ICC judges will tend to admit evidence rather generously except for cases where there are strong indicia of unreliability. Accordingly, the threshold for admissibility would have to be lower for the admissibility of evidence than for the final determination of its weight.<sup>183</sup>

The jurisprudence of the *Ad hoc* tribunals confirms this approach. According to case law, the tribunals cannot base their decisions on evidence whose reliability is not confirmed beyond a reasonable doubt.<sup>184</sup> However, including with respect to the application of Rule 95, both tribunals have considered a *prima facie* assessment of reliability to be sufficient at the admissibility stage.<sup>185</sup> The ICTR has pointed out that mere speculation cannot lead to exclusion on the basis of that rule.<sup>186</sup>

At the same time, Article 69(7)(a) of the ICC Statute does not require that it be virtually certain that the evidence is unreliable. This does not only result from the use of the word “doubt”: Any other interpretation would make the provision a dead letter. If nothing else, a higher threshold would be inconsistent with the previously mentioned influence of legitimacy concerns on Article 69(7)(a). Thus, the Court is well advised not to make the hurdles for unreliability too high. Otherwise, its legitimacy would be threatened where evidence was admitted despite there being clear indications that its trustworthiness is questionable. Again, this corresponds to the line followed by the *Ad hoc* tribunals. The ICTY, despite its reluctance, described above, to exclude unreliable evidence early in the proceedings, has most clearly held in the *Brđanin* case that it “[...] finds that it is necessary,

<sup>182</sup>Triffterer 2008—Piragoff, Article 69, para 67.

<sup>183</sup>See with respect to the *Ad hoc* tribunals, Gaynor et al. 2013, p. 1026.

<sup>184</sup>*Prosecutor v. Brđanin* (Decision on the Defence “Objection to Intercept Evidence”), ICTY (Trial Chamber), decision of 3 October 2003, para 66. *Prosecutor v. Milosević* (Preliminary Decision on the Admissibility of Intercepted Communications), ICTY (Trial Chamber), decision of 16 December 2003.

<sup>185</sup>*Prosecutor v. Brđanin* (Decision on the Defence “Objection to Intercept Evidence”), ICTY (Trial Chamber), decision of 3 October 2003, para 68. *Prosecutor v. Karemera et al.* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence), ICTR (Trial Chamber), decision of 25 January 2008, para 17.

<sup>186</sup>*Prosecutor v. Bagosora* (Decision on Exclusion of Evidence under Rule 95), ICTR (Trial Chamber), decision of 27 January 2004, para 5.

even at this stage, to be satisfied that there is a *prima facie* indication of reliability failing which it would be incumbent on it to exclude them [the intercepted communications] *straightaway*".<sup>187</sup> Depending on the particular case, a decision on reliability may require further inquiry into the factual situation. In the *Milosević* case, the admission of intercepted communications was also contested by the defence *inter alia* under Rule 95. The tribunal admitted the evidence only after court-appointed experts had dispelled alleged doubts about their reliability.<sup>188</sup>

In general, Article 69(7)(a) of the ICC Statute does not require a balancing exercise. The judges of the ICC are, however, given a certain margin of appreciation when interpreting the norm. When exercising their discretion, they should find a reasonable middle ground for the interpretation of the vague legal terms of this subparagraph. While taking into account the preliminary nature of the admissibility decision, they should be careful not to make this first alternative of Article 69(7) a dead letter. In particular, they should take into account the legitimacy concerns of the ICC.

In the following sections, subpara (b) will not be analysed in further detail. Instead, the focus will be on the more contentious case of when the admissibility of reliable evidence is contested for conflicting reasons of fairness. However, where the following sections pertain to the general requirements of Article 69(7), the discussion implicitly includes exclusion on the basis of unreliability. This concerns the discussion of the requirements of the chapeau of Article 69(7), including the causality requirements that will be discussed in Chapter 6. Given the overlap between both alternatives of Article 69(7) mentioned at the outset of this section, a separate discussion is not required. This is in particular because, as we have seen, legitimacy concerns underlie both of the rationales of the ICC exclusionary rule. We will see that, ultimately, this common concern must also guide the interpretation of the general requirements of the ICC exclusionary rule.

### 4.3.3 The Relevant Violations

The next basic question we have to address pertains to the norms that must have been violated in order to trigger the ICC exclusionary rule. In its *chapeau*, Article 69(7) of the ICC Statute expressly enumerates these norms. Exclusion may rely either on a violation of the Statute itself or of "*internationally recognized human rights*".<sup>189</sup> The notoriously vague wording of the latter category in particular constitutes a major challenge for the interpretation of the ICC exclusionary rule.

<sup>187</sup>*Prosecutor v. Brđanin* (Decision on the Defence "Objection to Intercept Evidence"), ICTY (Trial Chamber), decision of 3 October 2003, para 68.

<sup>188</sup>*Prosecutor v. Milosević* (Final Decision on the Admissibility of Intercepted Communications), ICTY (Trial Chamber), decision of 14 June 2004.

<sup>189</sup>Brady 2001, p. 293.

Questions also arise from the fact that neither violations of the Rules of Procedure and Evidence, nor violations of domestic law are mentioned in the wording of the provision. We will see, however, that it can be argued that the Rules are implicitly included in the scope of Article 69(7). A violation of domestic law as such is in turn never a sufficient reason for the exclusion of evidence by the ICC.

#### 4.3.3.1 Violations of the ICC Statute

The first alternative, a violation of the Statute, is a rather straightforward notion among the many ambiguous terms of Article 69(7). On the basis of this alternative, the exclusionary rule can be triggered by, for instance, a violation at the investigation stage of the rights of the accused or of the rights of witnesses. The ICC Statute contains a rather broad set of human rights guarantees. Wherever such a violation occurs, it is not necessary to rely on the notoriously vague category of "*internationally recognized human rights*". The applicability of Article 69(7) is not limited to individual rights.<sup>190</sup> Such violations are likely, however, to be the most frequent way in which the ICC exclusionary rule will be triggered. A brief overview of the main rights explicitly stipulated in the ICC Statute will demonstrate what kind of human rights guarantees exclusion under this first alternative may rely on.

During the debates on the ICC Statute, there was a general consensus on the need to apply a high standard of protection for both suspects and accused persons.<sup>191</sup> In part, this attitude was based on similar considerations to those underlying this research. The drafters of the ICC Statute were aware of the fact that the legitimacy of the Court would depend *inter alia* on its respect for the persons affected by its jurisprudence.<sup>192</sup> In addition, this position was certainly also prompted by less idealistic motives. The negotiations having been conducted by states, the participants probably also had in mind that these rights might be accorded to their own citizens in future proceedings.<sup>193</sup>

A panoply of proposals on the concrete design of the respective ICC provisions, mostly based on domestic law, were introduced in the consultations. The general consensus, however, was that the minimum threshold would be the major international human rights instruments.<sup>194</sup> The framework finally adopted would, however, go further than that. Most of these international instruments were designed to

<sup>190</sup>Alamuddin 2010, p. 261. See also Sect. 4.3.2.2.4.

<sup>191</sup>Friman 1999, p. 248.

<sup>192</sup>Edwards 2001, p. 344.

<sup>193</sup>Zappalà 2003, p. 48.

<sup>194</sup>Friman 1999, p. 248 et seq. This meant above all the International Covenant on Civil and Political Rights (ICCPR), whose significance has already been pointed out with respect to the *Ad hoc* tribunals, see Sect. 2.3.2.4, in particular, fn. 175. On the broader protection of the ICC Statute when compared to the law of the *Ad hoc* tribunals, see Gallant 1999, p. 701; Alamuddin 2010, p. 235.

protect persons at the trial stage of criminal proceedings. So far, both international human rights bodies and international criminal institutions had given but little attention to the protection of suspects or other persons at the investigation stage. The ICC Statute broke new ground by inserting provisions that focus exclusively on individual protections at this early stage of the proceedings.<sup>195</sup>

The provision that incorporates the core human rights protections at the investigation stage is Article 55 of the ICC Statute. This provision is central to the legality of evidence gathering under the ICC proper law. It contains a rather broad set of minimum guarantees. The protection applies to the accused but also to other persons affected by investigations, such as victims and witnesses. The extension of pre-trial rights to this latter category of persons is another aspect that makes this provision particularly innovative. Given its ample scope, Article 55 has been labelled a "*mini human rights convention for the period before trial*".<sup>196</sup>

Article 55 distinguishes two steps in the process of investigation, which depend on the status of the person affected by an investigative measure. Its first paragraph grants a number of core rights to any such person. This pertains in particular to victims, witnesses and to those persons who may be indicted later on but for whom there is not yet enough indication that they have committed a crime. The provision involves protections that are important for the law of evidence, such as the right against self-incrimination, a protection against torture and other ill-treatment, as well as the right to an interpreter. The rights stipulated by paragraph 1 remain applicable from the outset to the end of the investigation phase. Accordingly, their applicability is not affected when a suspicion becomes more concrete.

Article 55(2) in turn is only applicable where the suspicion is sufficiently high, namely where "*there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned*". It adds a number of additional rights equally important for evidentiary issues, namely the right to be informed that the said suspicion exists, the right to silence and the right to counsel. It would have been expected that the drafters of the Statute would employ the word '*suspect*' in this context. The use of this term was, however, deliberately avoided. One reason was to prevent any premature criminalization of the respective person. Another consideration was that it would be exceedingly difficult to find an agreement for a notion for which such widely diverging concepts exist under domestic law.<sup>197</sup> It has nevertheless been presumed that the term would still be used in practice.<sup>198</sup> This has been confirmed by the

<sup>195</sup>Gradoni et al. 2013, p. 76; Triffterer 2008, Article 21, para 1 (McAuliffe de Guzman).

<sup>196</sup>Alamuddin 2010, p. 235; Triffterer 2008, Article 55, para 1 (McAuliffe de Guzman).

<sup>197</sup>Friman 1999, p. 254; Triffterer 2008, Article 55, para 10 (McAuliffe de Guzman).

<sup>198</sup>Critical, Zappalà 2003, p. 48, who holds that the lack of definition is likely to bring about more interpretative difficulty than were avoided by using the term '*suspect*'. Commentators have employed the term as well, see Triffterer 2008, Article 55, para 10 (McAuliffe de Guzman).

case law that exists thus far on Article 55(2).<sup>199</sup> Consequently, the term suspect will also be used in this research to refer to persons falling under Article 55(2) of the ICC Statute.

In light of the cooperation regime of the ICC, acts of national authorities play a distinct role in the context of investigations, including for the collection of evidence. One question that arises in this respect is the applicability of the protections that the ICC Statute provides in its Article 55 to acts of domestic law enforcement.

There are two scenarios where national authorities conduct investigative measures. Either they act on a request of the ICC Prosecutor in accordance with Chap. 9, or the measures are carried out independently and exclusively under national law. The ICC Trial Chamber has clarified that where national authorities conduct their own investigations, states are not bound by the ICC proper law. As a consequence, the Chamber concluded that in the absence of an ICC request, evidence gathered by domestic authorities "*cannot be said to have been obtained by means of a violation of the Statute*".<sup>200</sup>

This jurisprudence is based *inter alia* on the wording of Article 55(2) of the ICC Statute. The provision only explicitly extends the applicability of its protections to questioning by national authorities where national acts are based on an OTP request.<sup>201</sup> Beyond the wording, the Trial Chamber has held that there was no indication that the States Parties had agreed, simply by adopting Article 55(2), to comply with the standards set by the Statute in their own, independent investigations.<sup>202</sup>

Article 55(1) of the ICC Statute in turn does not contain any reference to the acts of national authorities. At the same time, the wording of the first paragraph does not necessarily preclude its applicability to national investigative acts. In light of the above-mentioned jurisprudence, this is at least worth consideration where domestic authorities act on behalf of the ICC Prosecutor. To this effect, it has been argued that because the investigative process is clearly designed to involve national authorities, Article 55(1) must apply to their acts as well.<sup>203</sup> Rule 111(2) of the RPE has been referred to in support of this argument. This rule

<sup>199</sup>*Prosecutor v. Katanga and Chui* (Decision on the Prosecutor's Bar Table Motions), ICC (Pre-Trial Chamber), decision of 17 December 2010, para 59; *Prosecutor v. Katanga and Chui* (Decision on the Defences' Applications for Leave to Appeal the "Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased witness 12"), ICC (Pre-Trial Chamber), decision of 22 May 2008, p. 6 and p. 19; *Prosecutor v. Lubanga* (Decision on the Defence Request for Order to Disclose Exculpatory Materials), ICC (Pre-Trial Chamber), decision of November 2006, p. 5.

<sup>200</sup>*Prosecutor v. Katanga and Chui* (Decision on the Prosecutor's Bar Table Motions), ICC (Pre-Trial Chamber), decision of 17 December 2010, para 59.

<sup>201</sup>See Article 55(2) of the ICC Statute: "*Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned [...] by national authorities pursuant to a request made under Part 9 [...]*".

<sup>202</sup>*Prosecutor v. Katanga and Chui* (Decision on the Prosecutor's Bar Table Motions), ICC (Pre-Trial Chamber), decision of 17 December 2010, para 59.

<sup>203</sup>Gallant 1999, p. 712.



stipulates that in all cases where a person is questioned, be it by the Prosecutor or by national authorities, "*due regard shall be given to Article 55*". It does not restrict this requirement to para 1 of the provision.<sup>204</sup> The argument, however, does not seem entirely convincing. The reference to Article 55 only includes the order to respect those rights that are in fact stipulated by the provision. Given that Article 55(1) does not expressly provide for an extension to national authorities, such reasoning appears to lead to a circular argument.

Conversely, a systematic consideration could in turn be advanced to argue to the contrary. It could be argued that a comparison between Article 55(1) and (2) indicates the will of the States Parties not to submit their authorities to obligations at the very early stage of investigations covered by Article 55(1). This would explain why national authorities are only mentioned in Article 55(2).

There are, however, strong teleological arguments pointing to the opposite conclusion. An extension to national authorities seems to be required by the very purpose of the provision, which is to provide for comprehensive human rights guarantees at all stages of the proceedings. In a cooperation system where national authorities are so prominently involved in investigations, states cannot be free from the duty to respect these fundamental guarantees. The consequence would be their regular inapplicability. In view of the high human rights standard required from the ICC, the rights under Article 55(1) should also therefore be regarded as applicable where national authorities act on behalf of the ICC Prosecutor.

In addition to a violation of the human rights protections under Article 55, any other disregard of a provision of the ICC Statute may trigger the application of Article 69(7). This pertains in particular to a number of additional provisions in the ICC Statute that also protect the rights of persons during investigations.<sup>205</sup> It can be added that the idea that has just been developed for Article 55(1) should be applicable to all of the protections contained in the ICC proper law. Regardless of whether this is mentioned in a provision, the rights of individuals must generally be respected where states act on behalf of an ICC request.

Beyond individual protections, the ICC exclusionary rule can also be triggered by other infringements. We have already seen that the rule is not limited to the violation of individual rights. More precisely, unlike it has been held in some domestic legal systems, there is no requirement contained in Article 69(7) for the provision that is violated to be aimed at the protection of the rights of the accused himself. As a result, the accused is entitled to file a motion for exclusion even where legal requirements that do not affect him directly have been violated. This includes violations of the rights of states such as those contained in the provisions

<sup>204</sup>Alamuddin 2010, p. 234; Triffterer 2008, Article 55, para 4 (McAuliffe de Guzman).

<sup>205</sup>See for example Article 54(1)(c), requiring that the Prosecutor shall "[f]ully respect the rights of persons arising under this Statute.", Article 59(2)(c), demanding for the respect of the rights of a person upon arrest by national authorities and Article 66, which pertains to the presumption of innocence.

on the cooperation regime set out in Part 9 of the Statute.<sup>206</sup> There is no reason why the ICC, in this respect, should not follow the parallel assessment by the ICTY.<sup>207</sup>

#### 4.3.3.2 Violations of the Rules of Procedure and Evidence

Violations of the Rules of Procedure and Evidence are not explicitly mentioned in Article 69(7) of the ICC Statute. This raises the question whether violations of the Rules may trigger the ICC exclusionary rule.

To begin with, it can be noted that a comparison with the jurisprudence of the *Ad hoc* tribunals is not helpful in this respect. The ICTY has indeed considered that violations of the Rules of Procedure and Evidence are sufficient to trigger the exclusion of evidence.<sup>208</sup> We have seen, however, that the wording of Rule 95, in its amended version, does not list the types of norms that may trigger exclusion.<sup>209</sup> What is more, many of the key provisions that are part of the ICTY Rules, have, in the case of the ICC, been inserted into the Statute rather than into the Rules. Accordingly, this is one of those instances where the different shape of the ICC procedural system leads to a lack of comparability with the *Ad hoc* tribunals.<sup>210</sup>

Looking at the drafting process of the ICC Statute, it is unclear whether omitting the Rules from Article 69(7) was a deliberate choice or not. This omission might in fact stem from a clerical error. The inclusion of a violation of the Rules was discussed during the debates in the Preparatory Committee. At that time, however, the central draft provision on the Rules, which was then Article 52, involved different wording than the finally adopted Article 51. It contained the option to include a reference stating that the "*Rules of Procedure and Evidence [...] shall be an integral part of this Statute*" and would be annexed to it.<sup>211</sup> Consequently, in the early days of the Rome Conference, many of the debates in the different working groups might have been based on the premise that the Rules were an integral part of the Statute. At the Rome Conference, the said option was deleted. Instead, Article 51 in its final version contains another option which determines that the Rules "*shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties*". The working group responsible for the provision on the Rules was different from the one working on Article 69(7).

<sup>206</sup>Triffterer 2008—Piragoff, Article 69, para 60, fn. 126. See also Sect. 4.3.2.2.4.

<sup>207</sup>See *Prosecutor v. Kordić and Čerkez* (Decision Stating Reasons for Trial Chamber's Ruling of June 1999 Rejecting Defence Motion to Suppress Evidence), ICTY (Trial Chamber), decision of 25 June 1999, para 10. On this ICTY jurisdiction, see also Sect. 3.1.3.

<sup>208</sup>See *Prosecutor v. Delalić* (Decision on Zdravko Mucić's Motion for the Exclusion of Evidence), ICTY (Trial Chamber), decision of 2 September 1997, para 55.

<sup>209</sup>Alamuddin 2010, p. 240. See also Sect. 3.1.3.

<sup>210</sup>Alamuddin 2010, p. 241.

<sup>211</sup>See Rome Statute, Official Records, Volume III, 41; available at [http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings\\_v3\\_e.pdf](http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf) (last visited: October 2013).

The consequence of this development might have been that out of a lack of cooperation, the latter simply did not take this deletion into account.<sup>212</sup>

Even if one considers Articles 69(7) and 51 as they were finally adopted, one may argue that the Rules are still an integral part of the ICC Statute, even without an express reference. As a consequence, it has been held that violations of the Rules are covered by the wording of the exclusionary rule.<sup>213</sup> This view however has not gone unchallenged. It has been opposed on the basis that restricting the exclusionary rule to the Statute was intentional and a result of the lesser significance of the Rules when compared to the Statute.<sup>214</sup> This opinion is certainly more in accordance with the strict wording of Article 69(7). There is, however, some argument in support of a wider interpretation that includes the Rules. Admittedly, the Rules are legally subordinate to the Statute.<sup>215</sup> One might nevertheless argue that they are still significant enough to trigger the application of the exclusionary rule.

The modes of drafting and adoption chosen for the Rules reveals the importance that the States Parties attached to many of the issues addressed in them. Unlike the Rules of the *Ad hoc* tribunals, the drafting and adoption of the ICC Rules was not entrusted to the judges. Many delegations were concerned about ratifying the Rome Statute without being able to exercise a certain amount of control over the many significant issues that were to be covered by the Rules. As a consequence, it was agreed that these Rules would have to be adopted by the Assembly of States Parties itself.<sup>216</sup> This not only highlights the significance attached to the Rules by the delegations; the mode of adoption also enhances the consistency of the Rules with the principle of legality and ultimately invests them with a higher degree of legitimacy.

The deletion of former Article 52 in turn seems not to have been due to the Rules' legal status. It was rather related to practical considerations that concerned the adoption of the Rules. The States Parties strove to prevent the Rome Conference from being overburdened with questions of procedural details. Accordingly, they chose not adopt the Rules as an annex to the Statute but instead to adopt them at a later time. The option described above was then deleted because states did not want to subject themselves in advance to a legal text that they did not know at the time.<sup>217</sup>

Ultimately, the overall scheme of Article 69(7) ICC Statute militates in favour of an inclusion of the Rules at this stage of the inquiry. Article 69(7) provides a

<sup>212</sup>Triffterer 2008—Piragoff, Article 69, para 62.

<sup>213</sup>Triffterer 2008—Piragoff, Article 69, para 62.

<sup>214</sup>Rwelamira 1999, p. 172. For a critical view, see Safferling 2012, p. 500.

<sup>215</sup>See Article 51(4) of the ICC Statute.

<sup>216</sup>Rwelamira 1999, p. 172.

<sup>217</sup>Rwelamira 1999, p. 172 et seq. See also Rome Statute, Official Records, Volume II, 238 et seq.; available at [http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf) (last visited: October 2013).

twofold test consisting of, first, the establishment of a violation and second, the determination of its consequences. In this structure, the seriousness of a violation is not a consideration in the context of the first step, but rather in the context of the second step.<sup>218</sup> The Pre-Trial Chamber has held with respect to the determination of the violation under Article 69(7) that “the Statute does not ‘quantify’” this violation.<sup>219</sup> Minor breaches must rather be sorted out when considering their detrimental effect in the single case. In light of this distinction, the argument seems unconvincing that the Rules should generally be disregarded because of their alleged minor significance. Whether a Rule is significant enough to call for exclusion must rather be decided in a second step on the basis of a comprehensive balancing exercise.

#### 4.3.3.3 Violations of Internationally Recognized Human Rights

In addition to statutory violations, the ICC exclusionary rule can be triggered by a violation of ‘internationally recognized human rights’. In view of the Court’s legitimacy concerns, it is evidently crucial that judgments do not rely on human rights violations. The more difficult question is how to determine those protections that are covered by the human rights reference in Article 69(7) of the ICC Statute. The notoriously vague formulation ‘internationally recognized human rights’ precludes any conclusive definition. The choice of such a broad reference, however, bears advantages in light of the dynamic nature of human rights law. Human rights standards are constantly subjected to the development of societal values. Any comprehensive coverage of contemporary human rights protections requires therefore that judges be given enough discretion to be able to adapt to developments. Of course, here again, the margin of appreciation is not entirely without limits. We will see that it is possible at least to delineate the term to a certain degree.

The ICC Statute uses the formulation ‘internationally recognized human rights’ both in Article 69(7) and in Article 21(3). Neither of these provisions provides any further guidance on its content. The elusive wording of the formulation makes it difficult in turn to simply determine any ordinary or plain meaning in terms of Article 31 of the Vienna Convention on the Law of Treaties.<sup>220</sup>

Neither has international jurisprudence established a common definition that would suggest an ordinary meaning. A look at the case law reveals that while both the ICC and the *Ad hoc* tribunals have repeatedly used the expression, their jurisprudence has not provided any substantial, let alone common, definition. Instead, the case law usually refers cumulatively to a number of human rights conventions

<sup>218</sup>See also Sect. 5.4.

<sup>219</sup>*Prosecutor v. Lubanga* (Decision on the admission of material from the ‘bar table’), ICC (Trial Chamber), decision of 24 June 2009, para 35.

<sup>220</sup>On the applicability of the Vienna Convention on the Law of Treaties, see Sect. 2.2.2.

to demonstrate that a right is an 'internationally recognized human right'.<sup>221</sup> Reference is regularly made to international conventions such as the International Covenant on Civil and Political Rights (ICCPR), but also to regional conventions, including the European and the American Convention on Human Rights, and sometimes the African Charter of Human and Peoples Rights and the Arab Charter of Human Rights.<sup>222</sup> It can be noted that the ICC, in its first decisions dealing with Article 69(7) has most heavily relied on the case law of the ECtHR.<sup>223</sup>

Furthermore, no ordinary meaning can be derived from the use of the expression in international legal sources.<sup>224</sup> The phrase appears regularly in international instruments such as in resolutions of the UN Security Council or the UN General Assembly, as well as in declarations and guidelines of different UN organs, in documents issued by regional organisations and in international treaties. It has also been employed by NGOs such as Amnesty International and Human Rights Watch.<sup>225</sup> But, in general, these instruments do not elaborate any further on the meaning of the phrase. Where further specification is included, reference is usually made to major human rights treaties such as the Universal Declaration of Human Rights (UDHR)<sup>226</sup> or the ICCPR.<sup>227</sup> Some texts also enumerate specific rights solely for the understanding of the term in the respective treaty.<sup>228</sup> There is not, however, any common understanding of the phrase as of today.

An approach to the expression seems nevertheless possible. Some basic assumptions can be drawn from teleological and methodological arguments permissible under Article 31 of the Vienna Convention on the Law of Treaties.

First of all, a teleological approach indicates that the ICC is always bound by the highest human rights standards. We have established earlier that the main purpose of ICC proceedings lies in positive general prevention and that the main

<sup>221</sup>Critical, Sheppard 2010, p. 48.

<sup>222</sup>Bitti 2009, p. 301; Gradoni et al. 2013, p. 88.

<sup>223</sup>See *Prosecutor v. Katanga and Chui* (Decision on the Prosecutor's Bar Table Motions), ICC (Trial Chamber), decision of 17 December 2010, para 60 et seq.; *Prosecutor v. Lubanga* (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, para 73 et seq.; confirmed in *Prosecutor v. Lubanga* (Decision on the admission of material from the "bar table"), ICC (Trial Chamber), decision of 24 June 2009, para 19; *Prosecutor v. Katanga and Chui* (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 30 September 2008, para 93 et seq.

<sup>224</sup>Hafner and Binder 2004, p. 183.

<sup>225</sup>For an enumeration of instruments referring to the phrase, see Hafner and Binder 2004, p. 178 et seq.

<sup>226</sup>Universal Declaration of Human Rights, signed on 16 December 1966, adopted on 10 December 1948, available at <http://www.un.org/en/documents/udhr/index.shtml> (last visited: October 2013).

<sup>227</sup>See for instance *The United Nations Millennium Declaration*, UN Doc. A/55/49 (2000), paras 24, 25, available at: <http://www1.umn.edu/humanrts/instree/millennium.html> (last visited: October 2013).

<sup>228</sup>See for instance Dayton Peace Accords, Annex 6: *Agreement on Human Rights*, entered into force on 14 December 1995. See also Young 2011, p. 204.

reason to exclude evidence beyond reliability is to maintain the Court's integrity. In view of its need for legitimacy, the Court has a decisive interest in applying a high human rights standard. Ultimately, this high standard is also implied in the simple fact that the reference includes 'internationally recognized human rights' without any distinctions. It is only possible to guarantee that no human rights are violated by always adhering to the highest standard among the relevant rights.<sup>229</sup> It has in fact been held that, beyond the ICC Statute, it is a general principle of human rights law that the highest possible standard of protection is authoritative.<sup>230</sup>

Secondly, a wide interpretation should also be applied to the geographical dimension of Article 69(7). The term 'internationally' presupposes a certain degree of widespread approval. The question that arises is how broad the recognition must be in order to become 'international'. A systematic comparison with Article 7(1)(h) of the ICC Statute is helpful in this respect. It suggests that this qualifier should not be used to overly restrict the applicability of the ICC exclusionary rule. In the context of crimes against humanity, Article 7(1)(h) refers to "grounds that are universally recognized as impermissible under international law". The use of the expression 'universally' in the ICC Statute indicates that a higher level of recognition exists when compared to an 'international' recognition and that the latter encompasses a broader category of human rights. Universal recognition would demand a right to be recognized in all world societies. For recognition to be international in turn, a less comprehensive endorsement would suffice.<sup>231</sup> This assessment is confirmed by a look at the legislative history of the provision. The use of the qualifier 'universal' was discussed during the consultations on the ICC Statute. In the end, however, it was rejected because it was considered too limiting.<sup>232</sup>

This means, first of all, that for the most basic human rights protections, establishing that a certain right is 'internationally recognized' does not pose much difficulty. With respect to these rights, there is a considerable amount of overlap between the different human rights conventions.<sup>233</sup> Rights such as the right to silence or the right to legal assistance, for instance, are so comprehensively covered by human rights treaties that at least their core content definitely meets the degree of recognition required by the qualifier 'international'. It is irrelevant in turn whether the protection of such rights is acknowledged in all world societies.

In addition, beyond the core rights covered by treaty law, the reference without doubt also covers any right that has acquired the status of customary law.

<sup>229</sup>Gradoni et al. 2013, p. 86.

<sup>230</sup>See *Prosecutor v. Mrkšić et al.* (Judgment), ICTY (Trial Chamber), decision of 5 May 2009, Dissenting Opinion Judge Pocar, para 7: "One of the key principles in the international protection of human rights is that when there are diverging international standards, the highest should prevail." See also Gradoni et al. 2013, p. 86.

<sup>231</sup>Bitti 2009, p. 301; Edwards 2001, p. 377 et seq.

<sup>232</sup>Triffterer 2008—Piragoff, Article 69, para 64.

<sup>233</sup>Gradoni et al. 2013, p. 88.

The determination of customary law requires broad recognition among states.<sup>234</sup> Where these relatively strict conditions are met, the necessary degree of recognition will automatically be satisfied.<sup>235</sup>

The previous deliberations are reflected in the general practice of the ICC and the *Ad hoc* tribunals of mentioning conventions cumulatively and interchangeably which was considered at the outset.<sup>236</sup> The citations include regional instruments, such as the ECHR, the ACHR and the AchHR. In the ICC jurisprudence, regional instruments alone have been cited as an indication for the existence of an *internationally recognized human rights* standard.<sup>237</sup> With respect to the exclusion of evidence, we have seen that the ICC has heavily relied on the case law of the ECtHR. International criminal institutions have more generally never considered regional instruments irrelevant only because of their geographically limited scope.<sup>238</sup> The question arises, however, whether quoting single regional human rights instruments or the jurisprudence of their monitoring bodies truly suffices to establish an '*internationally*' recognized right.

In accordance with the above, the practice to refer interchangeably to regional conventions and case law is rather unproblematic where main human rights instruments set forth identical protections.<sup>239</sup> As we will see in more detail below, mentioning more than just one regional convention will always improve the transparency of judicial reasoning. But where a right is sufficiently widespread, shortcomings to this effect do not affect the establishment of the right as such. The geographical dimension of the human rights reference raises questions, however, where a right is not as broadly recognized.

There is no indication that the wording of the human rights reference precludes the reliance on single regional human rights instruments. A literal interpretation of the word '*international*' does not *per se* indicate that any minimum level of recognition must be reached.<sup>240</sup> A systematic reading of the human rights reference even suggests that it is characterized by a high amount of flexibility. This in turn indicates that there is a broad discretion as to the legal instruments that may be relied upon.

<sup>234</sup>On the determination of customary law, see Werle 2012, para 154. See also Sect. 2.3.2.2.

<sup>235</sup>Similar, Sheppard 2010, p. 48.

<sup>236</sup>Gradoni et al. 2013, p. 88.

<sup>237</sup>See e.g. *Prosecutor v. Lubanga* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "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 on 10 June 2008"), ICC (Appeals Chamber), decision of 21 December 2008, para 46; *Prosecutor v. Harun and Kshayb* (Decision on the Prosecution Application under Article 58(7) of the Statute), ICC (Pre-Trial Chamber I), decision of 27 April 2007, para 28.

<sup>238</sup>Alamuddin 2010, p. 236; Gradoni et al. 2013, p. 87; Sluiter 2009, p. 466.

<sup>239</sup>Sheppard 2010, p. 50.

<sup>240</sup>Sheppard 2010, p. 64.

The words '*internationally recognized*' can be contrasted with other formulations in the ICC Statute. The reference to external sources in Article 21(1)(c) for instance includes '*international law and internationally recognized norms and standards*'. The wording indicates that there is a difference between '*international*' and '*internationally recognized*'. The conjunction with '*law*' on the one hand and '*norms and standards*' on the other seems to imply that '*internationally recognized*' refers to a more flexible concept than the term '*international*'. This is also supported by the formulation in Article 36(3)(b)(ii) of the ICC Statute that alludes to the '*law of human rights*', which again seems to refer to a more rigid body of law than '*internationally recognized human rights*'.<sup>241</sup>

The broad and flexible interpretation of the reference is also supported by a look at the genesis of the provision. In the early debates, a reference to '*rules of international law*' was considered.<sup>242</sup> Subsequently, this reference was, however, deleted in favour of a formulation that was explicitly meant to be broader, namely the formulation '*internationally protected human rights*'.<sup>243</sup> Later, the word '*protected*' was changed because it was considered misleading. Critics argued that it was unclear which human rights were not protected.<sup>244</sup>

As a matter of principle, these considerations suggest that the ICC judges have the discretion to consider that a right that is set forth in a regional convention is '*internationally recognized*'.

This kind of flexibility cannot, however, result in arbitrariness. Where different human rights instruments provide different standards, judges cannot simply choose among these instruments without further explanation. In most cases, the question of diverging standards can easily be solved by relying on the teleological arguments raised above. We have seen that in light of the legitimacy concerns of the ICC, the Court should generally adopt the highest among different standards.

The determination of the correct standard of a right would then only be problematic where, in the circumstances of the case, different rights are affected and these rights come into conflict.<sup>245</sup> This is the situation where the adequate protection of one right rules out another right being protected to a similar degree. In such a situation, the different human rights regimes have often found different solutions for the balancing of the various interests involved. Where this is the case, applying

<sup>241</sup>Young 2011, p. 193.

<sup>242</sup>The wording was supposed to include in particular the International Covenant on Civil and Political Rights, without however being limited to it; see Preparatory Committee, *Decisions Taken By The Preparatory Committee At Its Session Held From 1 To 12 December 1997* of 18 December 1997, endnote 60; available at: <http://www.iccnw.org/?mod=prepcommittee5> (last visited: October 2013).

<sup>243</sup>See Preparatory Committee, *Decisions Taken By The Preparatory Committee At Its Session Held From 1 To 12 December 1997* of 18 December 1997, endnote 60.

<sup>244</sup>Altogether, see Triffterer 2008—Piragoff, Article 69, para 64.

<sup>245</sup>Gradoni et al. 2013, p. 86; Sheppard 2010, p. 64 et seq.



the highest standard naturally becomes relative. While one human rights system may emphasize a certain right, another may focus on the conflicting protection.<sup>246</sup>

In the context of Article 69(7) of the ICC Statute, however, such cases are likely to be a rare exception. It presupposes a conflict of rights that arises already at the stage of evidence collection. Only then would such a conflict influence the existence of an '*internationally recognized human right*' under the chapeau of Article 69(7). Such rare cases may include the use of force during the investigative measure in order to protect the investigators against an attack. This would result in a conflict between the right to physical integrity of the defendant and of the same right of the investigators. Another example could be that the evidence results from a journalist whose work has impinged upon the defendant's right to privacy, which would result in a conflict of the latter right with the freedom of the press. Where human rights instruments have found different solutions for such conflicts, the ICC can obviously not simply rely on one instrument. It will have to disclose the different standards in its judgments. It will then have to find its own solution by weighing the different human rights affected in light of its own values and in view of the peculiarities of its legal framework. Reference to single regional human rights instruments and related case law is not precluded under the ICC exclusionary rule. Such a reference falls short, however, where instruments provide different standards of protection. Here, the ICC must disclose its line of reasoning in more detail.

While the focus on single instruments is not prohibited, we have already alluded to the fact that it would generally be advisable to rely on a broader legal basis. Such a practice would enhance the transparency of the Court's legal reasoning. This would contribute to the fulfilment of its legitimacy aspirations. In particular, the Court would be well advised to include more often in its assessments the legal norms and standards considered legitimate in those communities that are directly affected by its jurisdiction.<sup>247</sup> The focus of the ICC judges on the ECtHR is understandable to some extent. The significance of the European human rights regime has been depicted above.<sup>248</sup> At the same time, all of the ICC's prosecutions today affect African communities. Critics have claimed that the ICC is a Western court that targets African states in an inappropriate way.<sup>249</sup> This is why the socio-pedagogical purpose of the ICC requires, to the extent that is possible, the inclusion of affected societies in a dialogue about shared human rights beliefs. Thus, the African human rights system in particular should not be overlooked in the

<sup>246</sup>Sheppard 2010, p. 64.

<sup>247</sup>The same idea is also supported by Article 21(1)(c) of the ICC Statute which allocates particular significance to the consideration of "[...] the national laws of States that would normally exercise jurisdiction over the crime [...]".

<sup>248</sup>See in particular Sect. 3.2.1.

<sup>249</sup>See for instance Ssenyonjo 2013, p. 385 et seq. For a summary of the discussion, see also Kimani 2009, p. 12 et seq.; available at: <http://www.un.org/africarenewal/fr/magazine/october-2009> (last visited: October 2013).

Court's decision-making.<sup>250</sup> Open-ended clauses such as the human rights reference in Article 69(7) are a particularly important tool in this respect. We have seen that the procedural law of the ICC was developed on the basis of Western legal systems. As a consequence, these systems are usually also considered for the purpose of interpretation, including in this research.<sup>251</sup> Open-ended clauses such as the notion of '*internationally recognized human rights*' in turn are gateways for the consideration of different values in the international arena and in particular of those prevailing in the affected communities. Naturally, this cannot mean following norms and standards that reflect the very attitude that the effects of positive general prevention are supposed to overcome. But local legal regimes must not be ignored where they are consistent with the Court's own values.<sup>252</sup>

In conclusion, it comes as no surprise that it is not possible to positively define the exact content of a phrase as vague as '*internationally recognized human rights*'. Ultimately, this ambiguity was a deliberate choice by the Statute's drafters, giving the ICC judges a wide margin of discretion. The only practical approach to gain some understanding of the term is by considering some reference points. This includes the assumption of a high human rights standard, as well as of a generally flexible approach, in particular with regard to the geographical dimension of the phrase. At the same time, the Court should be careful to make use of the possibility of addressing local standards and values through the open-ended human rights references set forth in its Statute.

#### 4.3.3.4 The Insignificance of Violations of Domestic Law

The final question that arises relates to the treatment of violations of domestic law under Article 69(7) of the ICC Statute. The issue whether such violations should be able to trigger the ICC exclusionary rule was raised in the debates in the Preparatory Committee. Some states argued in favour of the creation of a mechanism that would allow the Court to decide whether evidence had been collected in conformity with domestic law. The majority, however, was concerned that the Court would have to adjudicate on national law, thereby interfering with the sovereignty of the respective state.<sup>253</sup> This latter view, according to which "*the Court*

<sup>250</sup>Young 2011, p. 205 and p. 207. For an introduction into the African human rights system, see Viljoen 2012, p. 151 et seq., see in particular p. 213 et seq. (on substantive human rights law in Africa, including in particular the Banjul Charter), p. 289 et seq. (on the work of the African Commission on Human Rights) and p. 410 et seq. (on the work of the African Court of Human and Peoples' Rights).

<sup>251</sup>See Sect. 2.3.2.3. See also Gradoni et al. 2013, p. 70.

<sup>252</sup>Damaška 2009, p. 184.

<sup>253</sup>Edwards 2001, p. 361.

should not get involved in intricate inquiries about domestic law and procedure", finally prevailed.<sup>254</sup>

Accordingly, Article 69(8) of the ICC Statute precludes the Court from ruling on the application of domestic law. It has been criticised that to generally exclude the possibility of challenging domestic illegalities does not do justice to the fundamental significance of the exclusionary rule for trial fairness. In addition, it has been considered inconsistent with the requirement placed on States Parties by Article 88 of the ICC Statute to ensure that their domestic law provides for sufficient procedures for all forms of cooperation. And the same has been said about Article 93, which requires that States Parties, under their national procedures, comply with ICC requests.<sup>255</sup>

As justified as this criticism may be, the basic legislative decision in favour of state sovereignty that is contained in Article 69(8) seems quite clear. Accordingly, the ICC Trial Chamber, in the *Lubanga* case, adopted the same approach to violations of domestic law as the ICTY.<sup>256</sup> It has emphasised that domestic rules, even if they implement national standards protecting human rights, do not automatically trigger the ICC exclusionary rule.<sup>257</sup> Naturally, this is as long as they do not likewise constitute a violation of internationally recognised human rights. But a violation of domestic law will never be able as such to trigger the exclusion of evidence.

This is not, however, to say that such violations will never have any impact on admissibility. It has been doubted whether the categorical stipulation to refrain from any consideration of national law can always entirely be complied with. In fact, compliance with formal requirements under domestic law will have to be taken into account when determining whether an 'internationally recognized human rights' has been violated.<sup>258</sup> This is because formal correctness as such is a procedural guarantee for persons affected by investigative measures. To this extent, Article 69(8) will have to be interpreted narrowly, prohibiting an overall reliance on domestic violations and a comprehensive assessment of national law, but not its consideration altogether.

Early ICC case law also seems to have followed this line. The Trial Chamber, when deciding on an alleged violation of *internationally recognized human rights* in the context of a house search in *Lubanga*, alluded to the fact that the order to conduct this investigative measure was "given by the competent authority in order

<sup>254</sup>ICC Preparatory Committee, *Report of the Preparatory Committee on the Establishment of an International Criminal Court* Volume I, *Proceedings of the Preparatory Committee during March-April and August 1996*, U.N. Doc. A/51/22 of 13 September 1996, p. 60 et seq.

<sup>255</sup>Edwards 2001, p. 362.

<sup>256</sup>For the ICTY, see *Prosecutor v. Kordić and Čerkez* (Decision Stating Reasons for Trial Chamber's Ruling of June 1999 Rejecting Defence Motion to Suppress Evidence), ICTY (Trial Chamber), decision of 25 June 1999, para 10. See also Sect. 3.1.3.

<sup>257</sup>*Prosecutor v. Lubanga* (Decision on the admission of material from the "Bar Table"), ICC (Trial Chamber), decision of 24 June 2009, para 36.

<sup>258</sup>See Orié 2002, p. 1486; De Meester et al. 2013, p. 294.

to gather evidence for the purpose of lawful criminal proceedings".<sup>259</sup> The compliance with domestic formalities is thus one consideration in the overall establishment of a violation under Article 69(7).<sup>260</sup>

This approach can be welcomed in light of the comprehensive respect for procedural rights that it reflects. Not least, it seems to bear out to some degree the fundamental criticism of Article 69(8) summed up at the outset. At the same time, it can be noted that the Trial Chamber did not go into a detailed analysis of domestic law, but confined itself to a *prima facie* assessment. This reflects the challenge posed by the consideration of domestic legal aspects when determining a violation under Article 69(7). ICC judges cannot disregard entirely blatant illegalities under national law. But the express restrictions contained in Article 69(8) of the ICC Statute make it difficult for the judges in individual cases to find the right margin for such considerations and to not trespass on legislative orders.

#### 4.3.3.5 Examples of Violations of Under Article 69(7) of the ICC Statute

The spectrum of rights covered by the chapeau of Article 69(7) of the ICC Statute cannot be determined exhaustively. To get a better idea of the kind of protections that fall into the scope of the ICC exclusionary rule, we will nevertheless look at a few examples. These examples will also serve as a background for later considerations. The following chapters will refer to specific rights violations. The most significant ones will be treated in the following sections. Where these rights are expressly mentioned in the ICC Statute, the applicability of the ICC exclusionary rule would not require a determination of whether they also exist as an 'internationally recognized human right'. For reasons of completeness, and in order to fully understand the significance and the scope of these rights for later considerations, we will, however, address their status under international law as well.

##### 4.3.3.5.1 The Prohibition of Torture

The first example of a right covered by the chapeau of Article 69(7) is also the most obvious, namely the right not to be tortured. This right is explicitly protected by Article 55(1)(b) of the ICC Statute. In light of the previous discussion on the applicability of Article 55(1) of the ICC Statute to acts of domestic authorities,<sup>261</sup> it is interesting to note that commentators have argued that the primary aim of Article 55(1)(b) seems to be the protection of persons against violations

<sup>259</sup>*Prosecutor v. Lubanga* (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, para 76.

<sup>260</sup>Similar Triffterer 2008—Piragoff, Article 69, para 75.

<sup>261</sup>See Sect. 4.3.3.1.

committed by state authorities that assist OTP investigations.<sup>262</sup> Furthermore, where the admissibility of statements is concerned, acts of torture regularly also result in a violation of the right to silence under Article 55(1)(b) and (2)(b).<sup>263</sup>

The right not to be tortured is without doubt also an 'internationally recognized human right'. The rather moderate level of recognition required by the human rights reference is certainly met.<sup>264</sup> Torture is prohibited under international treaties, namely under Article 7 of the ICCPR and under Article 5 of the UDHR, as well as under regional human rights norms such as Article 5(2) of the ACHR, Article 3 of the ECHR and Article 5 of the Banjul Charter. Most importantly, it is banned by the UN Convention against Torture, which by May 2012 had acquired 153 States Parties.<sup>265</sup> The Convention, in Article 2, contains an absolute ban on torture. States Parties to the Convention are explicitly forbidden to derogate from this prohibition whatever the circumstances.<sup>266</sup>

Beyond treaty law, torture is also banned by customary law. What is more, this ban is not only a simple rule of customary international law but one of *jus cogens*. As a result, derogations are also forbidden by custom.<sup>267</sup> The consequence of this broad recognition is that evidence obtained through torture must always be inadmissible under Article 69(7) of the ICC Statute. As we will see, despite the discretionary nature of the ICC exclusionary rule, this consequence is mandatory.<sup>268</sup> This includes not only primary but also secondary evidence.<sup>269</sup>

#### 4.3.3.5.2 The Right to Silence

Some preliminary remarks are also in order with respect to the right to silence, also referred to as the privilege against self-incrimination or the right not to confess guilt. Irrespective of the idiom, the core substance of this right appears to be identical.<sup>270</sup> It guarantees the right of a suspect not to be compelled to participate

<sup>262</sup>Calvo-Goller 2006, p. 167; Triffterer 2008, Article 55, para 6 (McAuliffe de Guzman).

<sup>263</sup>Zappalà 2003, p. 55.

<sup>264</sup>On the necessary level of recognition, see Sect. 4.3.3.3.

<sup>265</sup>See The United Nations Treaty Collection, available under: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidg_no=IV-9&chapter=4&lang=en) (last visited: October 2013).

<sup>266</sup>It should be noted that except for the Central African Republic, all of the states currently concerned by the ICC's jurisdiction have ratified UNCAT. Furthermore, all of them, including the Central African Republic have ratified the Banjul Charter. The suggestion, made in Sect. 4.3.3.3, to take into account human rights protections explicitly recognized in the affected communities would therefore be complied with if such a case were currently to be decided.

<sup>267</sup>For a comprehensive deduction of both the customary status and the *jus cogens* nature of the prohibition against torture, see Stein 2007, p. 240 et seq.

<sup>268</sup>See Sect. 5.4.3.

<sup>269</sup>See Sect. 6.2.3.4.

<sup>270</sup>Zappalà 2003, p. 77.

in his or her own conviction and the ensuing right to make a self-determined choice about whether and to what extent to speak to the authorities. This right is one of the most basic guarantees of the law of criminal procedure.<sup>271</sup> It is explicitly included in human rights instruments such as the ICCPR<sup>272</sup> and the ACHR.<sup>273</sup> The European Convention on Human Rights in turn does not expressly refer to the right to silence. The guarantee has however been recognized by the ECtHR in its case law as part of Article 6(1) of the ECHR. Finally, the Statutes of the *Ad hoc* tribunals also contain respective safeguards.<sup>274</sup>

At the domestic level, not all modern systems of criminal procedure recognize this right and where they do, the scope of protection varies considerably.<sup>275</sup> Critics have in fact deplored a weakening of the right to silence in recent years.<sup>276</sup> At the same time, the comprehensive protection by supranational and international legal instruments is still mirrored in a widespread recognition and enforcement by domestic legal orders. Despite these reservations, it appears safe to claim that the right to remain silent is an '*internationally recognized human right*' in the sense of Article 69(7) of the ICC Statute. This is all the more plausible in light of the assumption made above that this formula does not require universal recognition.<sup>277</sup>

While this interpretative exercise underlines the significance of the right to silence, as for the right not to be tortured, the recourse to '*internationally recognized human rights*' is not necessary for the applicability of the ICC exclusionary rule. In its Articles 55 and 64, the ICC Statute contains the most modern phrasing of the right to silence. Article 55 establishes a twofold protection at the investigation stage. Any person in general is protected by a right "*to not be compelled to incriminate himself or herself or to confess guilt*", as set forth in Article 55(1)(a) of the ICC Statute. Once a person becomes a suspect, this protection is reinforced by the right "[t]o remain silent, without such silence being a consideration in the determination of guilt or innocence" under Article 55(2)(b) of the ICC Statute. The scope of these provisions clearly overlaps. Yet Article 55(1)(a) is primarily meant to protect persons from providing the prosecution with evidence against themselves and especially from being pressured into doing so. Article 55(2) in turn adds a distinct notion to the protection of the right to silence. It focusses on the right to be free of procedural sanctions for refusing to answer questions.<sup>278</sup>

<sup>271</sup>Safferling 2009, p. 784.

<sup>272</sup>See Article 14(3)(g) of the ICCPR.

<sup>273</sup>See Article 8(2)(g) of the ACHR.

<sup>274</sup>See Article 21(4)(g) of the ICTY Statute and Article 20(4)(g) of the ICTR Statute.

<sup>275</sup>Pradel 2008, p. 444.

<sup>276</sup>Safferling 2009, p. 784.

<sup>277</sup>See Sect. 4.3.3.3.

<sup>278</sup>Zappalà 2003, p. 78 et seq.

According to the arguments made above, both subparagraphs apply not only to interrogations conducted by the international prosecutor but also where domestic investigators operate on his behalf.<sup>279</sup>

#### 4.3.3.6 The Right to Privacy and the Requirement of a Search Warrant

The last right that we will consider is the right to privacy. Generally speaking, the right to privacy is widely recognized, not only for criminal proceedings. Its exact content is not easy to determine. It has been described as pertaining to the extent to which a person must be 'left alone', to his or her choice to interact and exist with or without others and to the degree to which his or her identity, integrity, autonomy, intimacy, sexuality or emotions may not be interfered with against his or her will.<sup>280</sup> In the context of criminal investigations, the right to privacy contains in particular the right to be free from unreasonable, arbitrary or unlawful searches and seizures. One important aspect of this right is the question whether this entails the right to have one's premises searched only subsequent to the issuance of a search warrant.

Unlike the rights described above, the right to privacy is not expressly mentioned in the ICC Statute. Its inclusion was discussed in the course of the negotiation process.<sup>281</sup> But, in the end, proposals to this effect were not accepted.<sup>282</sup> We will see, however, that, in general, the right to privacy can be considered an 'internationally recognized human right' in terms of Article 69(7) of the ICC Statute. At the same time, we will have to give some consideration to the extent to which the human rights reference covers this right and in particular to the question whether it includes the necessity of a search warrant. This latter question is of paramount importance for the practice of evidence gathering. It will also be relevant at a later stage in this research in the context of the significance of hypothetical courses of investigations for the exclusion of evidence.<sup>283</sup>

In principle, the right to privacy can easily be classified as an 'internationally recognized human right'. The required threshold of recognition is evidently satisfied. Provisions on the right to privacy exist in both international and regional human rights instruments. At the international level, these include in particular Article 12 of the UDHR, as well as Article 17 of the ICCPR. At the regional level, both Articles 8 of the ECHR and Article 11 of the ACHR protect the right to

<sup>279</sup>See Sect. 4.3.3.1.

<sup>280</sup>Edwards 2001, p. 331.

<sup>281</sup>See for instance the proposal contained in the Draft Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, 30 January 1998, as reprinted in De Meester et al. 2013, p. 294.

<sup>282</sup>For a detailed description of the negotiation process with respect to the right to silence, see Edwards 2001, p. 349 et seq.

<sup>283</sup>See Sect. 6.4.3.

privacy.<sup>284</sup> In addition, the right is also widely recognized at the domestic level. A large number of those states with written constitutions have privacy safeguards incorporated in their fundamental legal texts. This includes the constitutions of states affected by the jurisdiction of the ICC.<sup>285</sup> This latter point indicates that privacy is not only a Western concept.<sup>286</sup> As a consequence of its broad recognition and application, the right to privacy has even been claimed to have acquired the status of customary law.<sup>287</sup> It does not therefore come as a surprise that the ICC, in its early jurisprudence, has confirmed that the right to privacy is an 'internationally recognized human right' under the ICC Statute.<sup>288</sup>

A question that has not yet been discussed in the case law of the Court is whether, under this right, searches in the context of international prosecutions require a search warrant. Given the practical significance of the requirement and its implications for the applicability of the ICC exclusionary rule to warrantless searches, we will address this issue in more detail.

In many domestic systems, the conduct of a search requires a judicial authorization by way of a search warrant granted before the search. But a look just at the domestic systems reviewed so far reveals that the requirement is dealt with in a variety of ways. This includes differences in terms of its legal basis, as well as with respect to its scope.

Both in the United States and in Germany, the warrant requirement is codified as a matter of constitutional law.<sup>289</sup> In Canada in turn, while the constitution contains a provision prohibiting unreasonable searches, this provision does not explicitly mention the need for a search warrant.<sup>290</sup> The warrant requirement has however been established through case law. According to the jurisprudence of the Canadian Supreme Court, there is an assumption that a search is unreasonable where no warrant was previously issued. This assumption is based on the

<sup>284</sup>The African Charter on Human Rights and Freedoms in turn has been criticized as incomplete *inter alia* because it does explicitly mention the right to silence, see Heyns 2003, p. 687. In light of the otherwise comprehensive coverage by human rights instruments, this does not affect the status of the right as 'internationally recognized'.

<sup>285</sup>See Article 27 of the Constitution of Uganda; Article 31 of the Constitution of the Democratic Republic of Congo; Article 14 of the Constitution of the Central African Republic; Article 4 of the Constitution of Côte d'Ivoire; Article 29 of the Constitution of the Republic of Sudan; as well as Article 31 of the Constitution of Kenya.

<sup>286</sup>Also see Edwards 2001, p. 401.

<sup>287</sup>See Edwards 2001, p. 388 et seq.

<sup>288</sup>See *Prosecutor v. Lubanga* (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, paras 74 and 75, confirmed by *Prosecutor v. Lubanga* (Decision on the admission of material from the "bar table"), ICC (Trial Chamber), decision of 24 June 2009, para 19.

<sup>289</sup>See the 4th amendment of the United States Bill of Rights, as well as Article 13(2) of the German Grundgesetz.

<sup>290</sup>See Section 8 of the Canadian Charter of Rights and Freedoms.



argument that a prior judicial authorization, when compared to a subsequent validation, is the most effective instrument to prevent unjustified searches.<sup>291</sup>

In the English legal system, warrantless searches are handled less strictly than in the other three systems. Under English law, a warrant is required by statutory law.<sup>292</sup> At the same time, in a large number of cases, a broad variety of exceptions enable investigators to enter private premises without a warrant. These exceptions include, for instance, the far-reaching power to generally conduct warrantless searches subsequent to a suspect's arrest.<sup>293</sup> Exceptions to the general warrant requirement admittedly also exist in other systems of criminal procedure, including, in particular, in cases of urgency. But at least among the other domestic systems reviewed here, this exceptional power of police and prosecutors is not as broad as in the English system.<sup>294</sup>

Turning to the international level, none of the statutes of the ICC's predecessors has explicitly required judicial authorization for searches and seizures or other coercive measures. At both the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMFTE), searches and other coercive measures were simply carried out without any formal legal basis justifying the measure, let alone setting conditions.<sup>295</sup> The extensive powers of the prosecution at the *Ad hoc* tribunals in turn include in principle the authority to conduct searches and seizures.<sup>296</sup> The prosecutor theoretically has the power to conduct such measures on the territory of domestic states without involving the domestic authorities. However, as we have seen before, the policy of the tribunals has often been to leave it to the domestic authorities to carry out investigative measures.<sup>297</sup>

Irrespective of who conducts a search, there is no express warrant requirement in either the statutes or the RPE of the tribunals. In those cases where domestic

<sup>291</sup>*Hunter et al. v. Southam Inc.*, Supreme Court of Canada, decision of 17 September 1984, [1984] 2 S.C.R. 145.

<sup>292</sup>See Section 8 et seq. of PACE.

<sup>293</sup>See Section 18 of PACE. This power already existed under common law. Altogether, see Safferling 2001, p. 157.

<sup>294</sup>In the United States, the Supreme Court has developed a comprehensive doctrine on search and seizure. According to this jurisprudence, there is a number of instances, where searches may be conducted without warrant. Incident to a lawful arrest for example, the police has the right to search a person, as well as those areas in the arrestee's immediate physical surroundings. Other examples for lawful warrantless searches include exigent circumstances, such as a search in the context of a so-called '*hot pursuit*', or where there is the danger that evidence will be destroyed. Altogether, see LaFave et al. 2004, p. 194 et seq. A very similar jurisprudence exists under Canadian law, see Stuart 2010, p. 247 et seq. In Germany, in case of exigent circumstances, Section 105 of the StPO allows for a search to be conducted without judicial warrant, on the order of either the public prosecutor or the police officers that investigates the crime. For a general definition of exigent circumstances under German law, see Meyer-Göfner 2013, Section 98, paras 6 et seq.

<sup>295</sup>De Meester et al. 2013, p. 283.

<sup>296</sup>For the legal basis, see Articles 18(2) of the ICTY Statute and 17(2) of the ICTR Statute.

<sup>297</sup>See Sect. 4.2.

authorities carry out the measure, the warrant requirement depends of course first of all on domestic law.<sup>298</sup> Moreover, commentators have suggested that where the domestic procedural rules do not contain a respective demand or where the international prosecutor acts himself, the need for a warrant should be derived from Rules 39(iv) and 54 of the ICTY and ICTR RPE respectively. Such a warrant would have to be issued by the judges of the tribunals.<sup>299</sup>

The jurisprudence of the tribunals on this matter has been rather ambiguous. On the one hand, the ICTY Trial Chamber II has expressly stated that "*there seems to be no identifiable rule of public international law according to which it is mandatory to request a judge's warrant before conducting a search and seizure*".<sup>300</sup> At the same time, in those cases where the international prosecutor exceptionally acts independently of domestic authorities, it has been the common practice of the international investigators to seek a warrant.<sup>301</sup> Given that the ICTY judges have complied with these requests, they seem to approve of this practice.<sup>302</sup> A mandatory demand for a judicial authorization, however, that would include those cases where the measure is carried out by domestic authorities but without previous domestic authorization, cannot be identified in the case law.<sup>303</sup>

With respect to the ICC, we have seen that the ICC Prosecutor is compelled to rely on domestic cooperation to an even greater extent than his colleagues at the *Ad hoc* tribunals. In the vast majority of cases, searches will be carried out by domestic authorities upon a request of the international prosecutor under Articles 54(3)(a) and 93(1)(h) of the ICC Statute. The ICC Prosecutor himself only has the very limited possibility to carry out searches himself under Article 54(3)(d) of the ICC Statute in so-called failed state scenarios.<sup>304</sup>

It has been argued that lawful searches for ICC investigations also require a previous judicial authorization. Others have held that a prior judicial authorization of coercive measures is dispensable in light of the different nature of international criminal proceedings as opposed to domestic law.<sup>305</sup>

<sup>298</sup>De Meester et al. 2013, p. 283. A violation would of course not as such trigger the exclusionary rules of the tribunals, see Sect. 3.1.3.

<sup>299</sup>De Meester et al. 2013, p. 284; Safferling 2001, p. 159; De Meester 2008, p. 281.

<sup>300</sup>*Prosecutor v. Stakić* (Decision on the Defence request to exclude evidence as inadmissible), ICTY (Trial Chamber), decision of 31 July 2002.

<sup>301</sup>De Meester et al. 2013, p. 284; Cryer et al. 2010, p. 527.

<sup>302</sup>See for instance the search warrants issued in the *Karadžić* case: *Prosecutor v. Karadžić and Mladić* ("Mandat de perquisition"), ICTY (Duty Judge), two warrants issued under seal on 24 February 1998; *Prosecutor v. Karadžić* (Search warrant for the Public Security Center (CJB) Srpsko Sarajevo), ICTY (Duty Judge), decision issued under seal and *ex parte* on 11 September 2003. All of these decisions were unsealed by *Prosecutor v. Karadžić* (Decision on the accused's requests for copies of search warrants), ICTY (Trial Chamber), decision of 29 August 2008.

<sup>303</sup>De Meester et al. 2013, p. 285.

<sup>304</sup>For more details, see the general explanations on the ICC cooperation regime in Sect. 4.2.

<sup>305</sup>Klamberg 2013, p. 252. See also Cryer et al. 2010, p. 526, fn. 138, who advance doubts in particular on the practicability of judicial authorizations.

The argument that a warrant issued by the ICC judges is necessary has been based on Article 57(3)(a) of the ICC Statute. Under this provision, the ICC Pre-Trial Chamber has the power to “*issue such orders and warrants as may be required for the purposes of an investigation*”.<sup>306</sup> Admittedly, Article 57(3)(a) of the ICC Statute does not give any information about the nature of the orders and warrants that it requires. Instead, it leaves this determination to the discretion of the judges.<sup>307</sup>

Beyond this specific grant of discretion, the establishment of a warrant requirement could also be based on the general human rights clause in Article 21(3) of the ICC Statute. As we have seen, this provision does not only set forth a consistency test with respect to “*internationally recognized human rights*”; it also has a power-conferring function that allows to the judges of the ICC to act as law creators where this is necessary to make the ICC procedure compatible with human rights.<sup>308</sup>

A number of arguments support the view that the discretion in Article 57(3)(a) and the power of the judges under Article 21(3) should be exercised in favour of the establishment of a general warrant requirement. It can be argued that the warrant requirement is part of the right to privacy as an “*internationally recognized human right*” under Article 69(7) and, more generally, under Article 21(3) of the ICC Statute.

In this respect, a look at the guidance of human rights institutions is revealing. Generally speaking, the right to privacy is not absolute under either the human rights instruments or the case law of their monitoring bodies. It can to some extent be limited, *inter alia*, for the purpose of criminal prosecution.<sup>309</sup> An interference with privacy rights can, however, only be justified under certain restrictive conditions. This includes the existence of a precise legal basis and that the measure is proportionate to its aim.<sup>310</sup> Proportionality in turn presupposes the limitation of

<sup>306</sup>De Meester et al. 2013, p. 285 et seq.; Zahar and Sluiter 2008, p. 367.

<sup>307</sup>De Meester et al. 2013, p. 293.

<sup>308</sup>See Sect. 2.3.1.2.

<sup>309</sup>Article 8(2) of the ECHR provides for the lawful interference for overriding reasons. This includes the public prosecution of crimes, see Ambos 2011, para 20; Safferling 2012, p. 277. Article 11 of the ACHR, while not this explicit, has been interpreted in a similar way by the Inter-American Commission on Human Rights, see *García v. Peru*, Inter-American Commission on Human Rights, Report No. 1/95 of 11 February 1995: “[T]he right to privacy is not absolute; quite the contrary, exercise of this right is routinely restricted by the domestic laws of States.” At the international level, Article 17 of the ICCPR, which echoes Article 12 of the UDHR, has been understood in the same way by the Human Rights Committee, see Human Rights Committee, General Comment no. 16 of 8 April 1988, para 7: “*As all persons live in society, the protection of privacy is necessarily relative.*”; available at: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/23378a8724595410c12563ed004aeecd?Opendocument> (last visited: October 2013).

<sup>310</sup>On Article 8 of the ECHR, see Ambos 2011, paras 18 and 22; Safferling 2012, p. 277. On Article 17 of the ICCPR, see Human Rights Committee, General Comment no. 16 of 8 April 1988, para 3: “*The term ‘unlawful’ means that no interference can take place except in cases envisaged by the law.*”, and para 4: “[T]hat even interference provided for by law should be [...] reasonable in the particular circumstances.”

the discretion of the authorities. This is most clear from the prohibition of “*arbitrariness*” which explicitly appears in the privacy guarantees of the UDHR and the ICCPR, as well as the ACHR. Admittedly, in the jurisprudence of human rights monitoring bodies, a search warrant has not always been regarded as mandatory to meet the requirements of proportionality. The warrant requirement has, however, been considered the central safeguard for the rights of affected persons. Where this safeguard does not exist, this omission must be adequately compensated through other legal protections.<sup>311</sup> This could be the formulation of strict and concise rules that would limit prosecutorial discretion.<sup>312</sup>

At the ICC, the judges have recognized proportionality as a requirement for the lawful interference with the right to privacy.<sup>313</sup> The warrant requirement was not at issue in this case. Were this issue to arise, it would, however, seem difficult for the Court, in light of the above-mentioned human rights case law, to guarantee respect for the principle of proportionality and to generally reject the warrant requirement at the same time.

The ICC should take into account the view, supported in the human rights case law, that a warrant issued prior to the measure has the character of a general guarantee for the proportionality of searches. This is in particular supported by the high human rights standard required with view to the Court's legitimacy concerns. Interestingly, this view has also been supported in domestic law.<sup>314</sup>

Moreover, in the absence of a warrant, it would be difficult for the ICC to determine that a search was proportionate based on alternative conditions being met which, under human rights law, may compensate for a missing warrant requirement. At the international level, there are no strict and concise rules that would limit the power of investigators to conduct searches and seizures and that would thereby be able to compensate for the lack of a search warrant. With respect to the complete absence of such rules in international criminal procedure, a warrant is in

<sup>311</sup>See for instance *Mialhe v. France*, ECtHR, decision of 25 February 1993 (Application no. 12661/87), para 38, where the ECtHR identified a violation of Article 8 of the ECHR because it considered that the fact that there was no warrant requirement was not sufficiently compensated under domestic law: “[I]n the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law [...] appear too lax and full of loopholes for the interferences with the applicants' rights to have been strictly proportionate to the legitimate aim pursued.”. On the case law of the ECtHR on searches, also see Edwards 2001, p. 396 et seq. Similarly, the IACtHR has found a violation of Article 11 of the ACHR in case of a warrantless search in *García v. Peru*, Inter-American Commission on Human Rights, Report No. 1/95 of 11 February 1995, where it emphasized the significance of a search warrant for the justification of privacy interferences. On the case law of the IACtHR, see also Edwards 2001, p. 398 et seq.

<sup>312</sup>Altogether, see Zahar and Sluiter 2008, p. 367 et seq.

<sup>313</sup>See *Prosecutor v. Lubanga* (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, para 79; interestingly, this decision quotes exactly the ECtHR's case *Mialhe v. France*, ECtHR, decision of 25 February 1993 (Application no. 12661/87), confirming the approach of the ECtHR to the warrant requirement laid out before.

<sup>314</sup>See the jurisprudence of the Canadian Supreme Court depicted before, in particular *Hunter et al. v. Southam Inc.*, Supreme Court of Canada, decision of 17 September 1984, [1984] 2 S.C.R. 145.

fact the only possibility to limit the discretion of the authorities and to put in place safeguards against arbitrary decisions.<sup>315</sup>

This affects in particular those cases where the international prosecutor carries out the measure. But where a domestic system lacks a warrant requirement, it will also be difficult for the Court to assess the proportionality of the measure *ex post facto*. In order to establish whether a coercive measure meets the demands of 'internationally recognized human rights', the judges would have to thoroughly assess the domestic rules allegedly compensating for the lack of a warrant. A comprehensive review of domestic legal rules, however, is not envisaged by the ICC Statute. This was a deliberate choice, which, as we have seen, was meant to avoid politically sensitive assessments of domestic investigation procedures. While it has been argued above that, despite Article 69(8), domestic rules cannot be disregarded altogether, a thorough legal analysis is exactly what this provision strives to avoid.<sup>316</sup> Under these conditions, advocating for a general warrant requirement seems to be the most simple and adequate means to respect both the rights of the accused and the decision of the drafters of the ICC Statute.

In contrast to this view, the particularities of the international system have been advanced to argue against a warrant requirement. It has been argued that the issuance of a warrant can be extremely difficult and time-consuming in international criminal cases.<sup>317</sup> This may be correct. The increased complexity of cases, however, cannot be a general argument against the guarantee of fundamental rights. In an individual case, the issuance of a warrant can also be difficult at the domestic level without the need arising to challenge the warrant requirement as such. Moreover, time-related difficulties could be handled based on the concept of exigent circumstances. It would be possible to establish conditions in the case law under which investigators in international proceedings have the exceptional power to carry out coercive measures independently.

The question remains in which cases a warrant is required. This depends on the actors that are responsible for the respective search. For the more frequent case that the domestic authorities carry out the measure, a warrant issued by the ICC would be necessary where no equivalent procedural demands exist under domestic law. The requirement of an international warrant in such cases would guarantee the proportionality of the measure by ensuring at least one level of judicial supervision.<sup>318</sup>

Beyond these cases, it has been suggested that an international warrant should also be issued by the ICC even where the domestic law does provide for a similar mechanism. It has been argued to this effect that domestic judges lack a sufficient overview with respect to international investigations.<sup>319</sup> While such a practice

<sup>315</sup>Zahar and Sluiter 2008, p. 368.

<sup>316</sup>On the policy behind Article 69(8) of the ICC Statute, see Sect. 4.3.3.4.

<sup>317</sup>See Cryer et al. 2010, p. 526, fn. 138.

<sup>318</sup>See De Meester et al. 2013, p. 293.

<sup>319</sup>Zahar and Sluiter 2008, p. 367.

would be beneficial to a uniform treatment of affected persons, it seems less compelling from a proportionality point of view to demand two levels of judicial supervision. What is more, the specific ICC cooperation system should be given due consideration. A parallel assessment of the same matter on the domestic as well as on the international level would bear the risk of diverging decisions and related conflicts of competence.

In contrast, a warrant should be necessary where the prosecutor exceptionally carries out a coercive measure himself. In such a case, there would be no other level of judicial assessment.<sup>320</sup> It may be argued that the authorization requested by Article 57(3)(d) of the ICC Statute already provides for such an assessment. This authorization alone cannot, however, be sufficient to justify the interference with the right to privacy.<sup>321</sup> The permission under Article 57(3)(d) is meant to confer upon the Prosecutor the power to act without turning to the domestic authorities. A decision under this provision is thus meant to address the sovereignty concerns that arise in the relationship between the ICC and states. A search warrant, in comparison, pertains to the relationship between the investigating authorities and the individual affected by a search. The legal test for such a warrant is different and necessarily independently of the former authorization.

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<sup>320</sup>For this argument, albeit with respect to the larger powers of the prosecutor of the *Ad hoc* tribunals, see Klamburg 2013, p. 252 et seq.

<sup>321</sup>But see De Meester et al. 2013, p. 292, who seem to suggest otherwise.



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## Chapter 5

### Factors in the Balancing Exercise

**Abstract** Under Article 69(7) of the ICC Statute, not all legal violations committed during investigations lead to the exclusion of thereby tainted evidence. Instead, evidence is only excluded where such a violation has a specific negative impact on the proceedings of the ICC, namely because either the evidence lacks reliability or because its admission “*would be antithetical to and would seriously damage the integrity of the proceedings*”. We have seen in Chap. 4 that the wording of Article 69(7) of the ICC Statute, while indicating a mandatory exclusionary rule at first sight, is ultimately a discretionary rule due to fact that these additional requirements were included in the provision. We have also seen in Chap. 4 that the exclusion of illicitly obtained evidence should be guided by the integrity theory, meaning the idea that the exclusion of evidence should serve the maintenance of the integrity of the Court. Under this theory, the exercise of the discretion granted under Article 69(7) of the ICC Statute requires the Court to strike a balance between the interests of ‘*due process*’ and ‘*effective law enforcement*’. In order to guide this balance, this chapter will discuss a number of factors that may militate in favour of either one of these two poles.

**Keywords** Torture • Mandatory rule of exclusion • Good faith • Office of the prosecutor • Customary international law • Balancing of rights • Effective law enforcement • Discretion • Abuse of process doctrine • Lubanga

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