# PUBLIC
# ANNEX E

# Article 69
# Evidence*

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court 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 or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. 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.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Content



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## A. Introduction/General remarks

### I. Historical development

#### 1. Paragraph 1 (an undertaking as to truthfulness)

Apart from the addition of the words 'of Procedure and Evidence' after the word 'Rules', paragraph 1 remained unchanged from article 44 para. 1 of the International Law Commission Draft Statute. However, the ILC Draft Statute did not grant the Court itself the power to punish false testimony before the Court[1]. Article 70 para. 1 (a) of the Statute now gives the Court the jurisdiction to punish the giving of false testimony when an undertaking under article 69 para. 1 has been given. There was little discussion of this provision after the 1

[1] 1994 ILC Draft Statute, article 44, p. 120.

Preparatory Committee on the Establishment of an International Criminal Court decided to leave the form of the undertaking and any supplementary rules, such as the question of undertakings by children, to the Rules of Procedure and Evidence[2]. In the drafting of sub-rule 66(2), consensus was reached on giving discretion to the Court to allow children or persons with an impairment to testify absent an undertaking. This was viewed as preferable to creating an arbitrary bar on such testimony or requiring corroboration. Consensus was achieved by making explicit reference to the 'beyond a reasonable doubt' standard for conviction in article 66, such that the Court could consider such evidence in the context of evaluating all of the evidence admitted.

### 2. Paragraph 2 (testimony shall be given in person)

2 Paragraph 2 did not have any counterpart in the 1994 ILC Draft Statute[3]. Following a general discussion of a number of procedural law issues at the March–April 1996 session of the Preparatory Committee, a number of proposals were made at its August 1996 session, which are the origins of paragraph 2. These included a proposal that witnesses shall in principle be heard directly and in person, unless a Chamber orders that the witness be heard by means of a deposition[4], and a proposal that

> 'a document, audio recording, or video recording containing a statement of a person other than the accused, which was given before a judge of the court of a State Party, is admissible in evidence when that person is not able to testify before the Court because of death, illness, injury, old age or other good cause'[5].

The proposed article 44 was not considered again until the December 1997 session when a paragraph 1*bis* was added:

> 'The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 43 or in the rules of evidence. These measures shall not be [prejudicial to] [inconsistent with] the rights of the accused'[6].

3 Debate in the Committee concerned the possibility of witnesses testifying without revealing personal data, and the Committee therefore added the link to the proposed article on protection of victims and witnesses but with a caveat regarding the rights of the accused. Shortage of time prevented any further discussion. At the March–April 1998 session, the second sentence of the present paragraph 2 was added to permit the reception of testimony through live or recorded video and audio technology, as well as the introduction of documents or written transcripts. Although some delegations had wanted to include in the Statute a list of the justifications or limitations concerning when electronic technologies could be used (*e.g.*, illness, injury, age or other justifiable reason), the decision was taken that these matters could be left for the Rules of Procedure and Evidence, or the jurisprudence of the Court. At the Rome Conference, there was again some discussion about including within the Statute the justifications for the use of technologically transmitted or recorded testimony, but the final decision was to confirm that these were matters of detail for the Rules or the Court to elaborate. The two options regarding the phrases 'prejudicial to' and 'inconsistent with' the rights of the accused were resolved uniformly in a disjunctive manner in a number of articles throughout the Statute where the same issue arose.

The debate over the optimal balance between the rights of the accused and the rights of victims and witnesses continued during the development of the Rules by the Preparatory Commission. The result was an approach to the use of protective measures in rule 87 that

[2] See Report of the Working Group on Procedural Matters, UN Doc. A/AC.249/1998/L.17, and UN Doc. A/AC.249/1998/WG.4/CRP.2.
[3] See 1994 ILC Draft Statute, see note 1.
[4] 1996 Preparatory Committee Report II, pp. 217 and 220.
[5] *Ibid.*, p. 217.
[6] Preparatory Committee Decisions Dec. 1997, p. 37.





emphasized protection of the identity or personal matters of witnesses and victims from press and public exposure rather than protection from disclosure to the accused. However, an element of ambiguity on the possible use of anonymous witnesses was preserved in rule 88 on special measures. While this rule is generally designed to assist vulnerable witnesses rather than protect them, the list of special measures available to the Court was made non-exhaustive and the rule permits *ex parte* and *in camera* hearings on the adoption of special measures.

Rule 68 on prior recorded testimony emerged from the Preparatory Commission in a form that would preclude the use of recorded testimony in the absence of a meaningful opportunity by the defence to directly examine the witness. This places more stringent conditions on the use of prior recorded testimony at the ICC compared to the practice of the *ad hoc* Tribunals.

### 3. Paragraph 3 (submission of evidence)

The original ILC Draft Statute had no provision similar to paragraph 3. During the 1996 Preparatory Committee, Germany proposed a new paragraph to what was then article 44[7]. When the Preparatory Committee debated the article for the first time, Germany reworded its proposal to read as follows: 4

> 'The Court has the authority and duty to call all evidence that it considers necessary for the determination of the truth. The Court's decision shall be based on its evaluation of the evidence and the entire proceedings'.

Some delegations believed, however, that the emphasis on the Court's duty to call additional evidence was too strong. As the main point for the civil law countries was to ensure that the Court was not restricted to consider only that which was offered by the parties and could itself call evidence, the reference to 'duty' was dropped. While the first sentence was incorporated with this change in the Draft Statute for an ICC as article 69 para. 3[8], the second sentence was thought to be better placed in the article dealing with quorum and judgment. It was incorporated there as the first sentence of article 72 para. 2[9].

The issue of judicial authority to call evidence was often regarded as one of the main differences between civil and common law jurisdictions. In reality, the concepts in the two systems are not all that different. Even in common law jurisdictions judges have the authority to call evidence. Given the adversarial nature of the proceedings, however, they rarely exercise this authority. The difference is one of legal tradition and the perception of the role of the judge, rather than a strict difference of legal authority. In the context of the Statute, this paragraph became an indicator regarding the role that delegations wanted to give to the judges in trial proceedings. In the Preparatory Committee, it became clear that the majority of delegations were prepared to accept that the judges should have a more active role than in traditional adversarial proceedings. 5

During the Rome Conference, the emphasis of the paragraph shifted from the apparent controversy between civil and common law to the specific question of whether the Court should be allowed to call evidence or rather have the authority to order the parties to submit additional evidence. As the main effect of the provision was to confirm the Court's ability to play an active part in that stage of the proceedings, the civil law countries accepted the change in the wording to authorize the Court to request the parties to submit additional evidence. In addition, Canada proposed a new first sentence to assist in clarifying the roles of the Court and the parties in the submission of evidence, which was added in the Conference[10].

[7] 1996 Preparatory Committee Report II, p. 207. The proposal read: 'In order to determine the truth, the court shall, ex officio, extend the taking of evidence to all facts and evidence that are important for the decision. The court will decide on the taking of evidence according to its [free] conviction obtained from the entire trial'.
[8] Preparatory Committee (Consolidated) Draft, article 69.
[9] *Ibid.*, para. 72; in the final text the article was renumbered 74.
[10] UN Doc A/CONF.183/C.1/WGPM/L.23.

6 The Rules of the ICTY have also recognized the need to incorporate some of the guiding principles of the civil law system into what is predominantly a common law framework in the Tribunal's procedure[11]. Rule 98 ICTY provides as follows: 'A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance'[12]. It is unlikely that the lack of a similar *proprio motu* power for the judges of the ICC will make any practical difference, given the Court's power to order the production of evidence from the parties.

### 4. Paragraph 4 (relevance or admissibility)

7 Articles 19 and 20 of the *Nuremberg Charter* provided that the Tribunal shall admit any evidence which it deemed to have probative value, shall not be bound by technical rules of evidence and may require the parties to inform it of the nature of the evidence before ruling on its relevance[13]. This source appears to be the origin of the proposed article 44 para. 3 of the 1994 draft of the ILC's *Draft Statute* which provided: 'The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility'[14].

During the Preparatory Committee, a number of proposals were made to recognise that relevancy should not be the sole determinant of admissibility and that other factors needed to be considered, including a fair trial, the rights of the defence and a fair evaluation of the testimony of a witness[15]. As early as 1996, there was also a commonly shared view that 'fundamental or substantive principles of evidence should figure in the Statute itself while secondary and subsidiary rules could appear in the Rules of the Court or other instrument. This approach would be more flexible since the latter could be more easily amended than the Statute and would also allow the Court the flexibility to adopt rules according to its practice and requirements'[16].

Given the vast number of articles that needed to be debated, it was not until the Preparatory Committee session in March–April 1998 that this view was put into effect with a much simpler formulation that left all of the detail to be determined in the Rules of Procedure and Evidence. Proposed paragraph 4 provided that the 'Court may rule on the relevance or admissibility of any evidence in accordance with the Rules of Procedure and Evidence'[17]. However, it was by no means unanimous that this formulation was sufficient as many delegations were of the view that other fundamental principles should be included in the Statute, such as the non-admissibility of 'evidence where its probative value is substantially outweighed by its prejudice to a fair trial of an accused or to a fair evaluation of the testimony of a witness, including any prejudice caused by discriminatory beliefs or bias', and the 'exclusion of evidence of prior sexual conduct of a witness, evidence protected by the lawyer-client privilege, as well as other grounds of exclusion'. Additionally, 'many delegations also felt that the Rules should provide sufficient flexibility to enable the Court to rule on the relevance and admissibility of evidence where no other rule provides guidance on the standards to be applied'[18].

[11] Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 955.

[12] Rules of Procedure and Evidence, as amended (adopted 11 Feb. 1994), International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 2nd Sess., UN Doc. IT/32 (14 Mar. 1994) [hereinafter ICTY Rules].

[13] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 Aug. 1945, 82 UNTS 280.

[14] 1994 ILC Draft Statute, p. 122.

[15] 1996 Preparatory Committee Report II, pp. 214–217; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 53rd Sess., UN Doc. A/AC.249/1998/CRP.7 (1998), p. 131, fn. 15 [hereinafter: Report of the Preparatory Committee (1998)].

[16] 1996 Preparatory Committee Report I, p. 60; Report of the Preparatory Committee (1998), see note 15, p. 131.

[17] Report of the Preparatory Committee (1998), see note 15, p. 131.

[18] Report of the Preparatory Committee (1998), see note 15, p. 131, fn. 15.







At the Rome Conference, the decision of the Preparatory Committee to leave everything to 8
the Rules was revisited, and a number of the matters that had earlier been proposed for inclusion were added, but in a flexible manner which stated the underlying fundamental principles while leaving the detail to be determined in the Rules. A decision was made that some statements of principle were necessary to guide both the development of the Rules and the adjudication of the Court. For example, a particular provision on privilege was added as paragraph 5, with the details to be determined in the Rules. Paragraph 4 was amended to read as it is currently provided in the Statute, which provides a general principle that relevance is not the sole determinant of admissibility and that other factors need to be considered as well, such as *inter alia* the degree of probative value of the evidence and any prejudice that such evidence may cause to a fair trial or fair evaluation of the testimony of a witness. No specific or rigid standard such as 'substantially outweighed' was included, due to the desire to state principles, permit flexibility and leave the details for the Rules or the Court's own jurisprudence.

Maintaining the Statute's delicate balance in the development of the ICC Rules was a challenge. An initial French draft of rule 63, setting out the general provisions relating to evidence, would have established an overarching principle of admissibility for all evidence, effectively undoing the compromise reached in Rome[19]. After a June 1999 drafting meeting, the pendulum swung in the other direction, with a proposed version of the rule that would have obligated the Court to assess all evidence for the purpose of admissibility. At the second session of the Preparatory Commission, the current form of the rule was developed, which authorizes rather than obligates a Chamber 'to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69'. At the fifth session of the Preparatory Commission, an attempt was made to include reliability as a factor to be freely assessed by a Chamber in determining relevance or admissibility. No consensus was reached on this proposal, with the result that the Rules are silent on the issue[20]. ICTY judicial decisions, however, provide support for the view that an assessment of the *prima facie* reliability of evidence can form part of an inquiry into probative value[21].

Rule 64 was drafted to clarify the procedure for challenging relevance or admissibility and to clearly state that a Chamber was not to consider evidence found to be irrelevant or inadmissible. It provides that such challenges must be made when the evidence is submitted to a Chamber or, exceptionally, immediately after the issue has become known. The Chamber can require that any challenge be made as a written motion, which must be communicated to all participants in the hearing unless the Court orders otherwise. A Chamber must give its reasons for any ruling on evidentiary matters.

The admissibility of evidence in cases of sexual violence was one of the most contentious issues for the Preparatory Commission in formulating the draft Rules, requiring months of extensive negotiations. Agreement was finally achieved in the form of rule 70 that prohibits the drawing of certain inferences based on sexual stereotypes, and rule 71, that makes evidence of prior or subsequent sexual conduct by a victim or witness inadmissible[22]. A special procedure for considering any evidence falling under rule 70 was elaborated in rule 72.

Rules 70–72 emerged after a sharp debate over what could constitute evidence of consent 9
in circumstances that were inherently coercive. There was a parallel debate in the negotiation of the Draft Text of the Elements of Crimes. There also, drafters raised serious concerns about the relevance of consent to any charge of sexual violence in the context of war crimes or crimes against humanity.

[19] See Piragoff, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 349, 351–352.

[20] Finalized draft text of the Rules of Procedure and Evidence, Report of the Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2000/1/Add.1 (2 Nov. 2000), rule 63.

[21] *Prosecutor v. Stakić*, IT-97-24, Provisional Order on the Standards Governing the Admission of Evidence and Identification, Pre-Trial Judge, 25 Feb. 2002.

[22] Rules 70 and 71 ICC. See also see note 19 for a history of the negotiations.

In the final version of the *Draft Text of the Elements of Crimes*, lack of voluntary consent was not directly incorporated as an element for either crimes against humanity or war crimes. This provided additional support for delegations arguing that it was inappropriate and damaging to engage in an inquiry about purported consent in that such inquiries tend to blame and re-traumatise the victim. The final draft of the Rules created an approach that broadly prohibits this type of inquiry, while leaving a circumscribed discretion to the Court under rule 72 to admit some evidence of consent in exceptional circumstances.

The related issue of evidence of prior or subsequent sexual conduct of victims and witnesses is dealt with in rule 71. This rule provides that the Court shall not admit such evidence, subject to article 69 para. 4. The reference to article 69 may seem redundant, but in fact was inserted to signal a constructive ambiguity in the Rules. The drafters of the Rules did not want to create any explicit exceptions to this rule out of concern that any exception would invite abuse. However, by making the rule subject to the statutory provision, the Court retains a narrowly defined discretion to not apply the rule should they determine, in some exceptional circumstance, that it was impossible to reconcile the rule with their obligations under article 69 para. 4. In effect, the reference to article 69 is a subtle reminder to the Court that article 51 para. 4 requires the Court to prefer the Statute over the Rules in the event of an irreconcilable conflict and, in such case to conduct an analysis of the proffered evidence in the manner set forth in article 69 para 4. Rule 72 provides that evidence of prior or subsequent sexual conduct cannot be admitted except through the procedural screening mechanism set out in the rule even though rule 72 makes no mention of rule 71. This is the case because rule 72 references sub-rule 70(d), which covers evidence of prior or subsequent sexual conduct.

In order to reach agreement on the approach taken in rules 70–72, negotiators included a provision in the explanatory note to the Rules indicating that the Rules do not affect the procedural rules for any national court or legal system for the purpose of domestic proceedings[23].

Returning to the more general issues involving probative value and relevance, it should be noted that the ICTY has extensively interpreted the meaning of these terms in the context of rule 89 *lit.* C and DICTY. Rule 89 *lit.* C of the ICTY provides that a 'Chamber may admit any relevant evidence which it deems to have probative value'. Rule 89 *lit.* D specifically acknowledges that relevancy is not the sole determinant of admissibility and provides that a 'Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'[24]. ICTY decisions regarding relevance and probative value will likely prove influential with judges of the ICC and are referred to extensively in this chapter.

### 5. Paragraph 5 (privileges on confidentiality)

10 The discussions in the Preparatory Committee and in the Diplomatic Conference mainly focussed on the lawyer-client privilege. Several Delegations urged the recognition of other established privileges, such as the privilege on confidentiality with respect to the medical profession or to priests. There were attempts at finding a suitable definition that would include all these privileges[25]. The Holy See proposed wording to the effect that all 'classic privileges on confidentiality' should be respected[26]. In the end, it was felt that the term 'classic' privileges would add nothing to the rather shorter, but still open definition now contained in the text.

The Preparatory Commission extensively considered the parameters of the lawyer-client privilege in the development of rule 73. Sub-rule 73 para. 1 establishes that communications between the accused and his or her legal counsel are privileged, where made in the context of

[23] For a full discussion of the negotiating history of rules 70, 71 and 72, see Piragoff, *Evidence*, see note 19, 369.
[24] Rules 89 *lit.* C and 89 *lit.* D ICTY.
[25] Proposal submitted by the Holy See, UN Doc. A/CONF.183/C.1AVGPiM/L.14; Proposal submitted by the SyrianArabRepublic, UN Doc. A/CONF.183/C.1AVGPM/L.22.
[26] UN Doc. A/CONF.183/C.1AVGPM/L.14.





their professional relationship, and where the accused has not already voluntarily consented to disclosure, either to the Court or a third party. In the latter case, the communication may be introduced through the testimony of the third party.

The Preparatory Commission continued the work begun in Rome of expanding the notion of privilege beyond the lawyer-client relationship. The final form of rule 73 creates a hybrid approach of listing specific additional privileges concerning communications while providing the Court with a principled framework for establishing the parameters of listed privileges and recognizing additional privileges beyond those enumerated. The criteria for a finding of privilege are outlined in sub-rule 73 para. 2 and require that the relationship in question in which the communication was made: 1) involve a reasonable expectation of privacy and non disclosure, 2) that confidentiality be essential to the type of relationship concerned, and 3) that recognition of the privilege would further the objectives of the Statute and Rules.

The listed classes of professional relationships in sub-rule 73 para. 3 benefit from a presumption of privilege. The listed categories comprise professional relationships with 1) a medical doctor, 2) a psychiatrist, 3) a psychologist or counsellor or 4) a member of a religious clergy. The professional privileges as a whole (excluding lawyer-client) require a finding by a Chamber that they are part of a class of relationships that meet the general criteria for privilege articulated in sub-rule 73 para. 2. This was intended to provide a Chamber with adequate discretion to define certain classes appropriately, especially that of 'counsellor'. A specific reference in sub-rule 73 para. 3 to relationships involving victims was included in order to highlight the particular importance of privilege in the context of support to victims.

The clergy privilege, while included in the list of professional privileges subject to judicial discretion, becomes mandatory, unless waived, if a Chamber finds that the communication took place in a context where sacred confession is an integral part of the practice of the religion concerned.

Another specific issue that preoccupied the Preparatory Commission was the privilege that should be accorded to the ICRC with respect to its operations under its statutes. Privilege for the ICRC was a live issue before the ICTY during the development of the Rules and had been the subject of an ICTY Trial Chamber decision that recognized the ICRC's right to confidentiality under international law[27]. The Preparatory Commission accepted the existence of the privilege, but did not want to foreclose the possibility of obtaining evidence from this important source. The solution was to include a complex consultation procedure in the rule that recognized the privilege, but placed the onus on the ICRC to positively assert any privilege if the Court should request consultations with it on a particular request for ICRC information.

### 6. Paragraph 6 (judicial notice)

The wording of this paragraph has remained unchanged from article 44 para. 4 of the ILC 11
Draft Statute. The provision is derived from article 21 of the Statute of the International Military Tribunal at Nuremberg. The only difference is that the Court 'may' take judicial notice whereas under the Nuremberg Statute the Court 'shall' do so[28]. The Preparatory Commission did not draft any rules on judicial notice *per se*, although the provision for agreements as to evidence under rule 69 provide a vehicle for admitting facts and evidence that are not contested by either party.

It should be noted that rule 69 allows the Court to insist on a complete presentation of evidence, even where there is no dispute between the parties. Rule 69 reflects the role of the Court in establishing the historical record and, in particular, providing victims with a full

[27] *Prosecutor v. Simić et. al.*, IT-95-9, Decision of the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.
[28] There is no general standard for judicial notice in international adjudication. The International Court of Justice is silent on the issue in its rules. The ICTY has adopted the Nuremberg wording ('shall') in its rule 94 on judicial notice.

understanding of what occurred. This 'truth commission' role is a distinctive feature of the ICC and requires a Chamber to balance its concern for judicial efficiency with its responsibility for establishing the historical record. Such a balancing process may prompt a Chamber to take judicial notice in one context and decline to do so in another, even when the same facts are at issue.

### 7. Paragraph 7 (mandatory exclusion of evidence)

12 Neither the *Charters for the International Military Tribunals at Nuremberg* nor *of the Far East* contained any provisions for the formal exclusion of evidence, the collection of which violated human rights or the Charters[29]. It appears that relevance and probative value were the determinants of admissibility[30].

13 The *Statute of the ICTY* also did not contain any formal exclusionary rule, but its *Rules* adopted by the judges contained a rule that provided that 'A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'[31]. The ICTY Rules underwent a number of revisions, and in 1995 an additional exclusionary rule was added to permit the exclusion of evidence that was 'obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings'[32].

14 The ILC in its *Draft Statute for an International Criminal Court* and its *Commentaries* also provided for an exclusionary rule. The 1993 Draft provided an exclusionary rule triggered by the obtaining of evidence 'directly or indirectly by illegal means which constitutes a serious violation of internationally protected human rights'[33]. The 1994 Draft dropped the references to direct or indirect means and to internationally protected human rights, and instead founded a broader rule that evidence shall not be admissible if obtained 'by means of a serious violation of this statute or other rules of intentional law'[34], presumably on the basis that human rights were incorporated by reference to both the statute and rules of international law.

15 During the sessions of the *Ad hoc* Committee on the Establishment of an International Criminal Court, a number of delegations expressed support for the ILC's provision, but others expressed the view that 'careful attention should be paid to the way in which the provision would operate in practice and it was suggested that the grounds for inadmissibility of evidence should be more narrowly circumscribed'[35]. During the early debate in the Preparatory Committee, no firm theoretical basis or expression for the rule was evident. Proposals ranged from the ILC proposal, the rule of the *ICTY* to a number of variations thereof[36], as well as specific proposals concerning the obtaining of confessions[37]. Concerns were also raised about the inter-relations between any exclusionary rule and whether the evidence had been obtained in accordance with national rules[38].

16 The issues were again considered at the Preparatory Committee's session in December 1997 and four (disjunctive or conjunctive) philosophical bases for exclusion were posited: the means of collection of the evidence constituted a serious violation of the Statute or other rules of international law; substantial doubt would be cast on the reliability of the evidence

[29] Agreement 1945, see note 13; Proclamation by the Supreme Commander for the Allied Powers, 19 Jan. 1946, T.I. A.S. No. 1589.
[30] See Report of the International Law Commission to the General Assembly on the Work of its Forty-Fifth Session, UN GAOR, 48th Sess. Supp. No. 10, UN Doc. A/4S/10 (1993), p. 122.
[31] Rule 89 *lit.* DICTY.
[32] ICTY Rules, UN Doc. IT/32/Rev.3 (as revised 30 Jan. 1995), rule 95.
[33] 1994 ILC Report Draft Statute, article 48 para. 5, p. 123.
[34] *Ibid.*
[35] *Ad hoc* Committee Report, p. 36 at para. 84.
[36] 1996 Preparatory Committee Report II, p. 218.
[37] *Ibid.*, pp. 215 and 216.
[38] 1996 Preparatory Committee Report I, pp. 60–61, and Vol. II, p. 208.





due to the manner of its collection; the detrimental effect on the integrity of the proceedings that would result by the admission of the evidence; and/or the means of collection constituted a serious violation of internationally protected human rights or a violation of the rights of the defence[39]. There was, therefore, no consensus on whether the basis of the rule should be the manner by which the evidence was collected (*i. e.* a violation of the Statute, a violation of rules of international law or a breach of internationally protected human rights) or the effects of such collection on other values such as the reliability of the evidence or the integrity of the proceedings. Neither was there consensus on how human rights should be defined or referenced. Several concerns were expressed about the inter-relation between the Court's adjudication and national law; in particular, whether the Court could or should consider national law in determining relevance or admissibility of evidence collected in a state. The ensuring debate resulted in a separate paragraph being proposed to address this particular concern (*i. e.* paragraph 8, *infra*)[40].

17 During the March–April 1998 session of the Preparatory Committee, debate continued primarily in informal sessions. A small informal working group, chaired by Canada, was established to develop consensus on the outstanding issues within article 69 and to report back to the Committee. After significant discussion, consensus emerged that the predicate event to the exclusion of evidence should be the means by which it was obtained (*i. e.* a violation of the Statute or internationally recognized human rights [or other relevant rules of international law]), but that the evidence should not be excluded unless the means of collection also had a detrimental effect on the reliability of the evidence or the integrity of the proceedings. The phrase 'internationally protected human rights' was also changed to 'internationally recognized human rights'[41].

18 This formulation was subsequently adopted by the Rome Conference, but with the deletion of a reference to the phrase 'other relevant rules of international law' as being a predicate event to exclusion. Concerns were expressed that this phrase was too vague and might incorporate many rules of public international law that had little to do with human rights or the provisions of the Statute. Some discussion also occurred over the qualifiers to the reference to human rights. The basic philosophical structure of the provision, however, was not altered in light of the consensus achieved in the Preparatory Committee in March–April 1998[42].

Another change that took place at Rome broadened the scope of the exclusionary rule. Up until the Rome Conference, the draft language required that any violation have the effect of both casting substantial doubt on the reliability of evidence AND damaging the integrity of the proceedings. At the Rome Conference, these effects requirements were made disjunctive, making it possible to invoke the exclusionary rule if either 7(a) or 7(b) alone was the effective result of the violation.

### 8. Paragraph 8 (application of national law)

19 During the course of debate in the Preparatory Committee on article 44 para. 5 [now article 69 para. 7], the question was raised regarding the inter-relation between the Court's ability to exclude evidence on the basis of a violation of the Statute or human rights and the fact that the evidence may have been obtained in accordance with the national law of the state in which it was collected, likely by the state's own authorities. A few delegations raised the question of whether the Court would be required to inquire whether such evidence had been obtained in accordance with national law, which might necessitate the Court to adjudicate the national law. 'It was suggested that a mechanism should be created whereby the Court, in cases of allegations of evidence obtained by national authorities by illegal

[39] Preparatory Committee Decisions Dec. 1997, p. 38.
[40] *Ibid.*
[41] See discussion under Part B, mn. 65 *et seq.*
[42] *Ibid.*

means, could decide on the credibility of the allegations and the seriousness of the 'violations"[43]. On the other hand, it was also suggested that the Court should presume that the national authorities acted in accordance with their own domestic provisions, but that such presumption could be challenged and, if so, the Court could refer the question of compliance to the national courts for a decision with a transmission of that decision back to the Court[44]. A proposal giving effect to part of this suggestion was included into the Statute, within brackets, at the December 1997 session of the Preparatory Committee[45].

20 According to another view which was widely supported, 'the Court should not get involved in intricate inquiries about domestic laws and procedures and it should rather rely on ordinary principles of judicial co-operation'[46]. It should apply international law and should exclude evidence on the basis of a violation of international standards, regardless of what the national standards might be concerning the manner of its collection. In support of this view, a concern was raised that the Court would be interfering with the sovereignty of a State if it were to adjudicate a question of national law, as opposed to applying its own law *(i. e.* the applicable law pursuant to article 21) to the facts regarding the manner of collection of the evidence. This view gained support and in the March–April 1998 session of the Preparatory Committee the previous proposal was deleted and replaced by a proposal which provided that, 'when deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on [, but may have regard to,] the application of the State's national law'[47]. The outstanding issue was whether the Court may, nevertheless, have regard to the application of the national law in making its decision on relevance and admissibility.

21 At the Rome Conference the bracketed reference to having regard to national law was deleted. While some delegations argued that it might assist the Court to understand why the national authorities acted in the manner in which they did, especially if they acted in accordance with national law, other delegations believed that this could be considered by the Court as a factual matter without any express reference to the Court being able to have regard to the national law. Concerns were also expressed that any explicit references to, or applications of, national law should be governed only by the process outlined in article 21 para. 1 (c). A reference to national law in article 69 could lead to specialized interpretations of applicable law in the evidentiary context, a result that was not desired by the drafters of the Statute.

### II. Purpose

22 As noted in the section on historical development, a decision was taken that the Statute should only contain the fundamental principles governing evidence, and that the details, secondary and subsidiary rules should be further elaborated in the Rules and through the interpretations and adjudication of the Court. 'This approach would be more flexible since the latter could be more easily amended than the Statute and would also allow the Court the flexibility to adopt rules according to its practice and requirements'[48].

In the course of drafting the Rules, the Preparatory Commission faced a similar dilemma in deciding what needed to be included in the Rules and what would be better left to practice directions and any regulations of the Court. Here again, the goal of flexibility precluded the creation of a comprehensive rule book. Instead, the Preparatory Commission sought to provide additional guidance primarily in those areas where discussion at Rome and within the Preparatory Commission had revealed unresolved tensions touching on basic principles and judicial values. As a result, the rules that relate to article 69 provide detailed evidentiary

[43] 1996 Preparatory Committee Report I, p. 60.
[44] 1996 Preparatory Committee Report II, p. 208.
[45] Preparatory Committee Decisions Dec. 1997, p. 38.
[46] 1996 Preparatory Committee Report I, pp. 60–61.
[47] Report of the Preparatory Committee (1998), see note 15, p. 132.
[48] 1996 Preparatory Committee Report I, p. 60.





rules in a select number of areas and are silent in others where Commission members were prepared to rely on the discretion of the Court.

## B. Analysis and interpretation of elements

### I. Paragraph 1

*Rule Cross-Reference:rule 66 (solemn undertaking), rule 171 (refusal to comply).*

#### 1. 'Before testifying'

The witness shall give the undertaking before starting to give evidence. The scope of the 23
provision is to enhance the reliability of the testimony. The failure to give the undertaking before testifying does not render the evidence inadmissible. The witness will, however, not be under an obligation as mentioned in article 70 para. 1 (a) and will therefore not be liable for punishment for giving false testimony. The probative value of the statement will thus be diminished and the Court will be entitled to take this into account when considering the value and weight of the evidence. Refusal to give the undertaking without good reason may also amount to misconduct under article 71 para. 1 of the Statute.

#### 2. 'undertaking'

The form of the undertaking is provided by rule 66:' I solemnly declare that I will speak the 24
truth, the whole truth and nothing but the truth'. This form is identical to that of the ICTY (rule 90 *lit.* A) and takes into account the fact that some religious beliefs do not recognize the taking of an oath. National legislation of many States accommodate this concern by providing for an affirmation of the truth of testimony in a way that still alerts the conscience of the witness to the seriousness of the occasion[49]. The solemn declaration to speak the truth also enables the Court to punish a witness who gives false testimony. The Court must inform the witness of the offences under article 70 in order to establish its authority to punish a witness who gives false testimony. Offenders are liable to imprisonment for up to five years under article 70 or a fine of not more than € 2,000 per occurrence based on rule 171.

A child or a person with an impairment may testify without an undertaking so long as they are able to communicate their evidence and understand the meaning of a duty to speak the truth. Unlike sub-rule 90 *lit.* C ICTY, rule 66 does not prohibit a Chamber from convicting based solely on child testimony or the testimony of impaired persons admitted without an undertaking, so long as the judges are convinced of guilt beyond a reasonable doubt.

### II. Paragraph 2

*Rule Cross-Reference: rule 65 (compellability), rule 67 (audio or video-link technology), rule 68 (prior recorded testimony), rule 69 (evidence by agreement), rule 86 (general principle – victims and witnesses), rule 87 (protective measures), rule 88 (special measures), rule 91 (participation by victim's representatives in proceedings).*

#### 1. 'The testimony of a witness at trial shall be given in person'

The requirement for testimony in person reflects the desire that the primary source of 25
evidence of a witness (*i. e.* his or her own testimony presented before the Court) should be available for the purposes of the trial. This permits the best opportunity for the parties to

[49] 1994 ILC Draft Statute, article 44, p. 120. Examples of national legislation are the United Kingdom, Oaths Act § 5 (1); Germany, *Code of Criminal Procedure* § 66 d.

examine the witness and for the Court to ask questions and evaluate the demeanour and credibility of the witness. It also furthers the right of the accused 'to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her own behalf under the same conditions as witnesses against him or her', as guaranteed in article 67 para. 1 (e. Indeed, as confirmed by the Trial Chamber in *R. v. Lubanga*, '[t]he statutory framework of the Court establishes the clear presumption that the evidence of a witness at trial will be given orally'.[50]

In the *Prosecutor v. Jean-Pierre Bemba Gombo*[51], Trial Chamber III ruled that a presumption of orality does not preclude the admission of non-oral evidence.

Furthermore, the Majority is of the view that nothing in the ICC legal framework prevents the Chamber from *prima facie* admitting non-oral evidence, whether written, audio, visual. According to the Statute and the Rules, a Chamber can rely on all types of evidence, as several legal provisions facilitate evidence being given in writing, orally or by means of video or audio technology. In the view of the Majority, the Statute only envisages a presumption in favour of oral testimony, but no prevalence of orality of the procedures as a whole. According to the Trial Chamber III, although it might be argued that such a prevalence of orality could be inferred from the first sentence of Article 69(2) of the Statute, the Majority stressed that the rule has several exceptions, and the same Article gives the Court the discretion ('may also") to permit the giving of recorded testimony or the introduction of documents or written transcripts.

The Court's authority to require the attendance of witnesses is provided by article 64 para. 6 (b) and (d). Rule 65 acknowledges the exceptions to the power of the Court to compel testimony, which are set out in rules 73, 74, and 75 on privileges. It also asserts the Court's authority to impose fines on individuals present before it who refuse to testify without legitimate excuse (not to exceed € 2,000 per day, as provided in article 71 and rule 171).

### 2. 'except to the extent provided by the measures set forth in article 68'

26 The general requirement for live-testimony in the courtroom is subject to exceptions. The first involves the implementation of protective measures authorized in article 68. Indeed these exceptions to the presumption of orality were also noted by the Trial Chamber in the *Lubanga* decision cited above.[52] Under article 68 para. 1, the Court is under a general obligation to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. As an exception to the principle of public hearings, paragraph 2 of that article specifically authorizes a Chamber of the Court to allow the presentation of evidence by electronic or other special means, particularly in the case of a victim of sexual violence or a child who is a victim or a witness. Paragraph 1 does not specify any particular measures, leaving it to the discretion of the Court to order protective measures that it considers appropriate, pursuant to paragraph 1 and article 64 para. 6(e). The Court must take into account the Rules, applicable law, and any advice received from the Victims and Witnesses Unit under article 68 para. 5.

Indeed, in another decision by the Trial Chamber III in the *Gombo* trial, it was confirmed that the presumption of orality does not require that it be given by way of live testimony and that the Statute and the Rules afford the Court a broad discretion, subject to Rule 67, to use audio or video technology.[53] The Trial Chamber III also confirmed that one of the relevant criteria for whether or not a person may give *viva voce* evidence by means of audio or video technology is the witness's well-being and personal circumstances.

[50] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Prosecution's Application for admission of four documents from the bar table pursuant to Article 64(9),16 December 2010 at para 12.

[51] *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 19 November 2010.

[52] See note 50 at para 12.

[53] *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08,, 'Public redacted decision on the 'Prosecution request to hear Witness CAR-OTP-PPPP-0036's testimony via video-link', 3 February 2012 at para 5.





To implement article 68 in the evidentiary context, rule 67 allows witnesses to testify by audio or video link. The technology used must allow the Court and all parties to examine the witness, and the venue of the witness must be conducive to the needs of the witness and the giving of truthful and open testimony. Rule 87 para. 3 (c) permits the alteration of the visual or sound presentation of a witness. Such distortions may dilute the right of accused persons to confront their accuser and can only be used in situations where the safety and privacy rights of a witness are in question and after the accused has had an opportunity to be heard on the issue.

Rule 87 establishes the procedure for implementing appropriate protective measures for witnesses. It permits the withholding of the identity of witnesses from the public and holding some proceedings *in camera*, departing from the principle of a public trial in order to safeguard the privacy and security rights of the witnesses. The protective measures contemplated in rule 87 are intended to shield the identity or personal matters of a victim or witness from exposure to the public and the media rather than from disclosure to the accused. This analysis is supported by the procedure in rule 87 that prohibits the *ex parte* consideration of a motion for protective measures. The involvement of the accused in any decision on protective measures under rule 87 would likely reveal to him or her the identity of the victim or witness concerned.

The Rules do not, however, completely forbid protective measures that might diminish the capacity of the accused to confront witnesses, including the possible use of anonymous witnesses. Rule 88 allows the Court to impose 'special measures' following a motion that can be served under seal and considered in a hearing that may be held *in camera* and/or *ex parte*.While the special measures referred to in rule 88 do not include withholding the identity of a witness from the accused, they are not an exhaustive listing, nor does the rule explicitly rule out such a measure. On the other hand the measures included in rule 88 are clearly focused on assisting vulnerable witnesses to testify rather than protecting them as is the case with rule 87. The ambiguity surrounding this issue was purposeful. The Preparatory Commission was divided on the issue, with some countries, notably the Netherlands and Italy, supporting the use of anonymous witnesses under controlled conditions. On the other hand, a large number of other participants in the Preparatory Commission vehemently objected to the notion of anonymous witnesses[54].

Since any procedure to shield the identity of a witness from the accused will be a protective measure, it is open to the defence to argue that the procedure under rule 87 must be used. However, an ICTY Trial Chamber has ruled that 'as a matter of practice and in accordance with common sense, applications by either party for protective orders are determined on an *ex parte*basis where the persons to be protected would otherwise be identified'[55]. A similar rationale could be used to justify using the special measures procedure under rule 88 where the witness has significant cause to fear disclosure to the accused.

The evidentiary measures in the Rules for the implementation of article 68 must be considered in light of the jurisprudence of the ICTY. The ICTY, in the *Tadić* case, initially took an expansive approach to witness protection, even approving the use of anonymous witnesses. The test outlined in *Tadić*[56] continues to be applied by the ICTY, but in its more recent judgements, particularly in the *Blaškić* trial, it has moved away from anonymous witness testimony. The *Blaskić* Trial Chamber articulated the following approach to competing rights:

[54] See Fernandez de Gurmendi, *Victims and Witnesses*, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 427, 351.

[55] *Prosecutor v. Simić et al*, IT-95-9, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, 28 Feb. 2000.

[56] This test requires first, that there must be a real fear for the safety of the witness. Second, the Prosecutor must demonstrate the importance of the witness to proving the counts of the indictment to which the evidence relates. Third, there must be no evidence to suggest that the witness is untrustworthy. Fourth, the Tribunal itself is not in a position to offer protection to the witnesses or their families after receiving their testimony. *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 Aug. 1995, para. 77.

'[T]he victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the public and the media'[57].

In the *Brdanin & Talić* case, the ICTY noted that 'the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one'[58]. The judges in this case also raised the standards for what could be considered exceptional circumstances sufficient to warrant witness anonymity, making it clear that a general climate of intimidation was insufficient justification.

### 3. 'or in the Rules of Procedure and Evidence'

27 The second general exception to the requirement for in-person testimony is the Rules. In addition to their role in implementing article 68 (rules 67, 68, 87, 88), the Rules also promote judicial economy and the greatest possible access to evidence of probative value consistent with the rights of the accused (rules 67, 68 and 69).

Rule 69, allowing the admission of evidence by agreement between the parties, covers witness testimony, documents and physical evidence. It will be an important tool for the Court to use in ensuring an expeditious trial and promoting judicial economy. One of the major problems in the case management by the Yugoslavia and Rwanda Tribunals has been the extensive time taken by the parties to prove matters of fact in a particular case that should not really have been in dispute.

However, in recognition of the role of the Court in establishing the historical record as well as judging the individual case, rule 69 permits the Court to require a complete presentation of evidence despite any agreement. It should also be noted that victims may also be represented at trial and may, with permission from the Court under sub-rule 91para. 3, question witnesses or have the witnesses questioned by the Chamber on their behalf. The discretion given to a Chamber by both rules 69 and 91 suggest that agreements as to evidence will not automatically rule out in-person testimony relating to agreed facts.

A major barrier to in-person testimony occurs when a witness is prevented from participating in a proceeding by his or her state of residence. It should be noted that both the ICTY and the ICTR have placed significant restrictions on the use that can be made of deposition evidence in such cases, even where defence counsel is provided with an opportunity to question the witness[59]. The ICTR has also required that parties exhaust all their options before requesting testimony by deposition[60]. At the ICC, access to testimony in these circumstances will be even more restrictive. Article 56 (unique investigative opportunity) and rules 67, 68 and 69 are the only explicit provisions that allow for the introduction of testimony from such witnesses.

[57] *Prosecutor v. Blaskić*, IT-95-14-PT, Judgement, 3 Mar. 2000, para. 50.

[58] *Prosecutor v. Brđanin & Talić*, IT-99-36, Decision on the Motion by the Prosecution for protective Measures, Trial Chamber, 3 July 2000, para. 20.

[59] See *Prosecutorv Naletilić* and *Martinović*, IT-98-34-PT, Decision on Prosecutor's Motion to Take Depositions for Use at Trial (rule 71), 10 Nov. 2000. The Trial Chamber in the ICTY noted that judicial discretion to use depositions would be exercised where 'the witness proposed for deposition will not present eyewitness evidence directly implicating the accused in the crimes charged, or alternatively, their evidence will be of a repetitive nature in the sense that many witnesses will give evidence of similar facts'. See also *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Decision On The Prosecutor's Amended Extremely Urgent Motion For The Deposition Of A Detained Witness Pursuant To Rule 71, 4 Oct. 2002, [hereinafter Niyitegeka, Decision on the Deposition of a Detained Witness, 4 Oct. 2002].

[60] See *Niyitegeka*, Decision on the Deposition of a Detained Witness, 4 Oct. 2002: In such cases, the Chamber should hear the direct testimony of the witness in order to assess the witness's demeanour. In addition, such evidence should be given in the presence of the Accused; the presence of Accused's Counsel is insufficient in this regard.... Even if 'exceptional circumstances' were found to exist, the Chamber is not inclined, in the present case, to receive by way of deposition evidence directly incriminating the Accused, given in his absence and without his consent.





The third general exception to in-person testimony is testimony imported from an article 56 procedure. The absence of a reference to this exception in article 69 may have been an oversight or it may imply that testimony admitted under article 56 is deemed to be in-person testimony for trial purposes by operation of the Statute.

### 4. '*viva voce* (oral) or recorded testimony of a witness by means of video or audio technology'

The second sentence of article 69 para. 2 specifically provides that either live or recorded 28
testimony of a witness can be presented by means of video or audio technology. This specific authority is separate from the authority provided in the exceptions in the first sentence of paragraph 2, which refers to protective measures for victims and witnesses in article 68. This redundancy clarifies the availability of this type of technology for circumstances where the protection of vulnerable victims and witnesses is not at issue. Concerns for illness, injury, age or other justifiable reasons for not being present physically at the trial location are thereby included. The Trial Chamber has held that one of the relevant criteria to be considered is the witness's personal circumstances, including logistical difficulties in arranging for the witness to testify in person.[61] It also permits the giving of recorded testimony, which could be applicable in situations where the witness dies prior to trial or is incapable of testifying at the time of trial. This provision should be read with special regard to article 56 (unique investigative opportunity), rule 67 on audio and video links, and rule 68 on prior recorded testimony. Article 56 specifically provides for the taking of evidence under the direction of the pre-trial Chamber where there is a unique opportunity to take testimony or a statement from a witness who may not be available subsequently for the purposes of trial. Article 56 includes its own procedural safeguards, which are not identical to those provided by rule 68. For example, the Pre-Trial Chamber has the discretion in an article 56 procedure to appoint counsel to represent defence interests during depositions. Rule 68 reserves this role for the defence itself during the trial.

The article 56 procedure comes into play when a potential witness is ill or, for whatever reason, may not be available for trial. The Rules for the ICTY and ICTR do not have a comparable procedure, but allow the admission of prior statements of such witnesses where there are adequate indicia of reliability. Rule 92*bis* ICTY gives the tribunal broad discretion to introduce prior recorded testimony without the opportunity for cross-examination, subject to the right of all parties to be heard on the matter. In general, the ICTY restricts the use of such evidence to matters other than the acts or conduct of the accused, although this restriction does not apply in the case of recorded testimony by a deceased, disappeared or disabled witness[62].

In a clear departure from the approach of the *ad hoc* Tribunals, the ICC Rules do not include any alternative route for admitting prior recorded testimony outside the protections of article 56 or rules 68 and 69. Recorded witness statements can only be admitted pursuant to rule 68 if both the Prosecutor and defence had the opportunity to examine the witness at the time they were recorded or if the witness adopts the testimony at trial and is available for examination by the parties. Examination by someone of like interest is not sufficient under the ICC Rules. In contrast, the ICTY takes into account whether or not testimony given in a separate proceeding was subject to examination by an accused with 'like interests' in deciding whether or not to admit such testimony. A fuller discussion of this difference between the *ad hoc* Tribunals and the ICC is provided below at mn. 30 *et seq.*

Rule 67 provisions for audio and video link testimony can be used by the Court to overcome logistical problems. It requires that the Prosecutor, the defence and the Chamber itself be able to examine the witness at the time of testimony and must ensure that the venue

[61] See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01.05-01.08, Decision on the 'Submission on the remaining Defence evidence" and the appearance of Witnesses D04-23, D04-26, D04-25, D04-36, D04-29, and D04-30 via video-link, 15 August 2013, para 10.

[62] Rule 92*bis* ICTY.

for the testimony is appropriate. While the preference for in-Court testimony is explicit, the Court has the discretion to use audio or video links to overcome logistical problems.

The ICTY established general conditions and guidelines for the use of audio or video link technology which will provide the Court with important guidance beyond that contained in the Statute and Rules. Given the preference for in-person testimony, the ICTY has required that the defence or prosecution satisfy certain threshold requirements before using such technology. These include:a) the testimony of the witness is shown to be sufficiently important to make it unfair to proceed without it; b) the witness is unable or unwilling for good reasons to come to the tribunal; and c) the accused will not thereby be prejudiced in his or her right to confront the witness[63]. The Tribunal has also prescribed guidelines to ensure that testimony given by video-link is practicable and reliable. These guidelines include matters such as the choice of venue for the recording and transmission, the appointment and attendance of officers to ensure the testimony is given freely and voluntarily, the ability for the witness and the questioner to see each other, and subjecting the witness to the solemnity of the proceedings, including liability for perjury, as if the witness had given evidence within the courtroom[64].

The ICTY has held that 'video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness' and 'the accused is therefore neither denied his right to confront the witness, nor does he lose materially from the fact of the physical absence of the witness'. The procedure permits the parties to examine and cross-examine the witnesses, and the judges can ask questions and observe the demeanour of the witness. However, the ICTY has acknowledged that 'the evidentiary value of testimony provided by video-link is not as weighty as testimony given in the courtroom' due to the lack of proximity of the witness to the solemnity of the courtroom and the inability to view persons or parts of a room outside the focus of the camera[65].

### 5. 'introduction of documents or written transcripts'

29 Explicit authority in the Statute to permit the introduction of documents and written transcripts is in accord with the general philosophy of article 69 to avoid overly technical rules of evidence, such as those relating to the admissibility of documents in a common law system[66]. This paragraph permits their introduction and their relevance and admissibility is governed by paragraph 4, subject to the Rules.

There is no general rule prescribing how documents or physical evidence are to be placed in evidence. The Court is thus left to apply its discretion under article 69 para. 4, as to the relevance or admissibility of such evidence. The *ad hoc* Tribunals have required, as a condition of introduction that documents be said or adopted by a witness capable of vouching for the documents' authenticity. An ICTY Trial Chamber has ruled that concern about the authenticity of a document goes to weight rather than admissibility unless the document lacks probative value[67]. Prosecution and defence counsel appearing before the ICC will be able to challenge a document through examination of the adopting witness or by

[63] *Prosecutor v. Delalić, Mucić, Delić and Landzo*, IT-96-21,Decision on the Motion to allow K, L, and M to give their Testimony by Means of video-link Conference, 28 May 1997, para. 17 [hereinafter *Delalić et al.*, Decision on video-link, 28 May 1997]. See also *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Defence motions to summons and protect defence witnesses, and the giving of evidence by video-link, 25 June 1996, para. 19 [hereinafter: *Tadić*, Decision on video-link, 25 June 1996].

[64] *Delalić et al.*, Decision on video-link, 28 May 1997, see note 58, paras. 15 and 18. See also *Tadić*, Decision on video-link, 25 June 1996, see note 58, para. 21.

[65] *Delalić et al.*, Decision on video-link, 28 May 1997, see note 58, para. 21. See also *Tadić*, Decision on video-link, 25 June 1996, see note 58, para. 22.

[66] *E. g.* rules relating to hearsay and the best evidence rule. The ICTY Appeals Chamber noted in the *Aleksovski* decision that 'it is well settled in the practice of the Tribunal that hearsay evidence is admissible'. This will also be true of the ICC Trial Chamber.

[67] See *Prosecutor v. Blaskić*, IT-95-14, Decision on the Defence Motion for Reconsideration of the Ruling to exclude from Evidence authentic and exculpatory Documentary Evidence, 30 Jan. 1998, paras 10–11.





requesting a ruling on admissibility or relevance under the procedure created by rule 64. At this hearing, the Court can apply article 69 para. 4, and take into account any circumstances surrounding the origins, contents and/or chain of custody.

Rule 68 governs the introduction of written transcripts and other documented evidence of prior testimony. It creates a requirement that both the prosecution and defence must have an opportunity to examine the witness who provided the testimony, either at the time the testimony was taken or at the point the recorded testimony is introduced into evidence. As noted above, an exception to rule 68 is the procedure under article 56 for taking testimony when a unique investigative opportunity arises. Transcripts from article 56 proceedings will be admitted according to the safeguards provided in article 56 itself.

In the *Prosecutor v. Lubanga* trial, the Trial Chamber I discussed the introduction of evidence other than oral evidence, in particular, written statements such as prior written testimony, taken in accordance with Rules 111 and 112. The Trial Chamber recognized that while oral testimony is generally preferable, there are material advantages in having evidence read, in whole or in part, especially in terms of efficiency and unnecessary repetition of evidence. However, in any analysis, the right of the accused to a fair trial must not be undermined by the admission of prior written testimony, and this right will always trump other concerns such as efficiency.[68] Rule 68 ICC does not make any concessions for relaxing the standards for admission of transcripts from other trials even where the evidence will be used to prove issues other than the acts or conduct of the accused. The Preparatory Commission could not achieve consensus on this point. A proposal was drafted that would have allowed transcripts to be admitted on consent by the parties. However, this was deleted during the June 2000 meeting of the Commission because the consent requirement made it redundant with the provisions of rule 69 (evidence by agreement). Rule 69 and article 69 para. 6 (judicial notice) do provide vehicles for bringing uncontroversial transcripts.

Rule 68 is more restrictive than the comparable rules of the ICTY. The ICTY Rules provide for a number of specific exceptions to the principle of live testimony. Examples of these exceptions include prior statements by deceased witnesses and the use of transcripts from other trials that go to the proof of a matter other than the acts and conduct of the accused[69]. Transcripts from other trials have been used before the *ad hoc* Tribunals to address such issues as whether or not a state of war existed at a particular place and time, troop movements and the like[70]. The negotiations in the Preparatory Commission make it clear that the stricter standard incorporated in rule 68 was deliberate.

The possibility exists that a Chamber of the ICC could use its power of judicial notice (article 69 para. 6) or its general discretion to consider all relevant and admissible evidence (rule 63) to circumvent the strict standard in rule 68. However, this is unlikely. In the first place, the Court would have to satisfy itself that the rights of the accused would be respected[71]. In the second place, as a general rule of law, a court cannot use a broad discretionary power to circumvent the specific requirements of a relevant rule. An ICTY Appeals Chamber has noted that this renders the safeguards in the more restrictive rule meaningless[72]. This same Appeals Chamber did not dispute that non-compliance with 'technical-procedural' requirements should not categorically preclude admissibility, but it did find that procedural requirements are not presumptively technical and are a necessary

[68] *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009 at paras 18- 21.

[69] Rule 92*bis lit.* C and D ICTY. The ICTY's approach to prior recorded testimony has evolved over time and generated significant debate. Rule 92*bis* was adopted at the 23rd Plenary Session held on 12 Jan. 2001 to replace rule 94*ter* which was deleted.

[70] However, the ICTY significantly restricts the use of such transcripts in cases where the accused is charged on the basis of command responsibility or for his or her role in a joint criminal enterprise. See *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002.

[71] See *Blaskić* and *Lubanga*, see notes 67 and 74 and accompanying text.

[72] *Prosecutor v. Kordić*, IT-95-14/2, Decision on Appeal Regarding the Admission Into Evidence of seven Affidavits and one Formal Statement, 18 Sept. 2000.

element to a fair trial. This distinction between substantive and technical procedural rules may play an important role in future proceedings before the ICC[73].

### 6. 'subject to this Statute and in accordance with the Rules of Procedure and Evidence'

30 As the second sentence of article 69 para. 2, does not specify the justifications or conditions when electronic evidence, documents, or written transcripts may be presented, the sentence provides that the Court shall exercise these powers subject to the Statute and the Rules. Relevant statutory provisions include articles 56, 67 and 68 and the relevant rules include 63, 67, 68, 69, 87, 88. The applicable provisions of the Statute and Rules have already been discussed in detail. However, these are not the last word, as many procedures remain to be developed by the Court. This will continue to occur through practice directions, any regulations created by the Court and jurisprudence. The *ad hoc* Tribunals will provide a fertile source for this further evolution, just as they played a critical role in the development of the Statute and Rules themselves.

For example, the Statute and the Rules do not explicitly provide for the use of prior witness statements, which are not otherwise admissible in relation to their assertive contents, for the sole purpose of challenging a witness' credibility. The ICTY, in the *Naletilić* case, endorsed the use of prior statements to test the credibility of witnesses, but ruled that the evidence was the reaction of the witness to being confronted with the prior statement and not the contents of the prior statement[74]. The ICTY in that case referred to statements used for this purpose as 'aids' to distinguish them from 'evidence'. The regulation of exhibits, aids, re-creations, evidence summaries and expert testimony are not specifically dealt with in the Rules of the ICC[75].

The relative weight appropriate for different types of evidence may also be an area where the ICC looks to the jurisprudence of the *ad hoc* Tribunals. Recorded testimony (audio or video), for example, is unlike live, transmitted evidence in that the Court cannot examine the witness and the full examination of the witness must either be recorded or take place some time later (when the recording is placed into evidence). as noted above, the ICC Rules are more rigorous than the *ad hoc*Tribunals in requiring that such testimony always be subject to examination by the opposing party, either at the time it is recorded or at the point that it is adopted by the witness and entered into evidence[76]. There is, nevertheless, some loss of immediacy to recorded testimony. For this reason, an ICTY Trial Chamber has ruled that such testimony, even when subject to examination by the defence when recorded, may be given less weight than live testimony[77].

Regarding ICC jurisprudence, in the case of *Prosecutor v. Jean-Pierre Bemba Gombo*, the Appeals Chamber confirmed that the Trial Chambers have the discretion to receive testimony of witnesses by means other than in-court testimony, as long as it does not violate the Statute and is in accordance with the Rules of Procedure and Evidence. Nonetheless, the

[73] DeFrancia, *Due Process In International Criminal Courts: Why Procedure Matters* (2001) 87 *VirginiaLRev* 1381, 1429.

[74] See *Prosecutor v. Naletilić*, IT-98-34, Decision on the Admission of Witness Statements into Evidence, 14 Nov. 2001. See also *Prosecutor v. Simić et al.*, IT-95-9, Decision on Prosecution Interlocutory appeals on the use of statements not admitted into evidence pursuant to Rule 92 *bis* as a basis to challenge credibility and to refresh memory, 23 May 2003.

[75] In regards to summary evidence, the ICTY has ruled that the evidence being summarized must, itself, be admissible before the summary can be admitted. See *Prosecutor v. Slobodan Milosević*, IT-02-54, Decision on Admissibility of Prosecution Investigator's Evidence, 30 Sep. 2002.

[76] The use of recorded testimony in conjunction with live testimony can relieve some of the pressure on children or other vulnerable witnesses, minimizing their exposure to the courtroom.

[77] *Prosecutor v. Naletilić and Martinović*, IT-98-34-PT, Decision on Prosecution Amended Motion for Approval of Rule 94*ter* Procedure (Formal Statements) and on Prosecutor's Motion to take Depositions for Use at Trial (rule 71), both decisions issued 10 Nov. 2000.





Appeals Chamber urged the Trial Chambers to exercise this discretion with caution so as not to prejudice the rights of the accused or the fairness of the trial generally[78].

In contrast, however, in the *Prosecutor v. Chui*, the Trial Chamber II did not allow the admission of a prior recorded statement of a witness and stated that '[t]he simple assertion that a written statement of a witness who has appeared for testimony provides the broader context in which a specific statement was made, or allegedly corroborates the oral testimony given at trial, does not qualify as a sufficient reason for admitting it into evidence.[79]

### 7. 'not be prejudicial to or inconsistent with the rights of the accused'

The primary right of an accused that is affected by article 69 para. 2, is the right to 31 confront witnesses. This is specifically guaranteed in article 67 para. 1 (e), which guarantees the right 'to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her'.

Substantive rights for the accused to challenge and test testimony are incorporated into each of the Rules established under article 69. These rights are necessarily balanced against the rights of victims and witnesses protected by article 68. The requirement of balance is further emphasized by the general principle affirming the rights of victims and witnesses articulated in rule 86. Specific procedures for determining the appropriate balance are provided by rules 64, 87 and 88. Rule 87 on protective measures requires the participation of the accused in any hearing regarding protective measures for victims or witnesses that might have an impact impact the presentation of evidence. The rule 88 'special measures' procedure can exclude the participation of the accused, but the ultimate effect of this clause is to ensure that the Court will not order special measures that it determines are prejudicial or inconsistent with the rights of the accused.

In hearings on relevance and admissibility under rule 64, any written submissions must be provided to all parties and a Chamber must provide reasons for all rulings on relevance or admissibility. This procedure ensures the participation of the accused and the availability of a record in the event of an appeal. The opportunity for victims to be represented by counsel at trial in accordance with rule 91 will allow victims to play a far more active role in these proceedings than is the case in domestic courts, including the right to make submissions on the relevance or admissibility of evidence and, with approval of the Chamber, direct questioning of witnesses.

The evolving jurisprudence of the *ad hoc* Tribunals suggests that the rights of an accused to know the identity of his accusers and challenge their testimony will likely take precedence over the interests of victims and witnesses to not have their identities disclosed[80]. However, the victim participation provisions in the Statute will provide opportunities for victims and witnesses to be heard by a Chamber when their interests or safety are affected in order to fashion other protective measures.

The rights of the accused referenced in this paragraph also incorporate internationally recognized human rights by virtue of article 69 para. 7 and those rights of the accused which are recognized elsewhere in the Statute and in the Rules. Particularly important among the Statute rights are those relating to disclosure discussed below.

[78] *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chambers, 'Judgment on the appeals of Mr Jean-Pierre Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"', 3 May 2011.

[79] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on Defence Request to Admit into Evidence Entirety of Document' DRC-OTP-1017-0572, 25 May 2011 at para 7.

[80] See *Blaskić*, see note 57.

## III. Paragraph 3

*Rule Cross-Reference: rule 63 (general provisions) rule 64 (Procedure relating to relevance or admissibility), rule 69 (evidence by agreement), rule 70 (sexual violence), rule 71 (evidence of sexual conduct), rule 72 (in camera procedure), rule 140.2(a) (right to question one's own witness)*

### 1. 'The parties may submit"

32 The issue of whether victims fall within the ambit of article 69(3) and have a right to participate at trial to lead evidence or challenge the admissibility or relevance of evidence was discussed by the Appeals Chambers in the *Prosecutor v. Lubanga*[81]. The Appeals Chamber underscored that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, that is, the Prosecution and the Defence. However, the Appeals Chamber also found that this did not preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused. Article 69(3) makes it clear that 'the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth'. Indeed, the Appeal Chamber also noted that Article 68(3) established the right for victim participation, and in order to give effect to the spirit and intention of the article, it must be interpreted as to make participation meaningful. The Appeal Chamber ultimately upheld the decision of the Trial Chamber to allow participating victims the possibility to lead evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of evidence in the trial proceedings.

However in *Prosecutor v. Abdallah Banda Abakaer Nourain*[82] the Trial Chamber upheld the approach that challenges to the relevance or admissibility of this evidence does not fall under Article 69(3) of the Statute, rather the legal basis upon which this evidence may be challenged extends frome combined effect of: (i) the obligation to give effect to the spirit and meaning of Article 68(3) of the Statute; and (ii) the Chamber's power to make rulings on the relevance or admissibility of evidence under Articles 64(9) and 69(4) of the Statute.

The issue of whether the rules considering evidence in article 69(3) apply also to pre-trial stages of the proceedings was discussed in two cases. In *Prosecutor v. Katanga and Chui*[83] the Single Judge considered 'that article 69(3) of the Statute is not applicable during the pre-trial proceedings conducted before the Pre-Trial Chamber because: (i) the Pre-Trial Chamber is not a truth-finder; and (ii) according to the literal interpretation of article 69(3) of the Statute, its application is subject to consideration of the competent Chamber that evidence other than that introduced by the Prosecution and the Defence is 'necessary for the determination of the truth.'"

The Pre-Trial Chamber in *Prosecutor v. Jean-Pierre Bemba Gombo* came to a different conclusion. The Pre-Trial Chamber III concluded that article 69(3) establishes a general principle that applies to the various stages of the proceedings. Therefore, the rules concerning evidence in 69(3) also apply at the pre-trial stage of the proceedings, but must take into account the specific purpose and limited scope of the confirmation charges. 'To that end, it needs to be noted that the application of article 69(3) of the Statute at the confirmation phase is restricted since, in contrast to the trial phase, the Chamber does not have to determine the guilt

[81] *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 9 OA 10, 'Judgment on the appeals of the Prosecutor and The Defence against Trial Chamber I's Decision on the Victims' Participation of 18 January 2008' 11 July 2008 at paras 93-9.

[82] *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09, 'Decision on the participation of victims in the trial proceedings', 20 March 2014 at para 29.

[83] *Prosecutor v. Germain Katanga and Mathiew Ngudjolo Chui*, ICC-01/04-01/07, 'Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case', 13 May 2008 at para. 110.





of the person prosecuted beyond reasonable doubt. It simply has to determine whether there are substantial grounds to believe that the person prosecuted committed the crimes charged.'[84]

### 2. 'evidence relevant to the case'

This provision has to be read in conjunction with article 69 para. 4, which provides that 33
the Court may rule on the relevance or admissibility of any evidence. For the meaning of 'relevant', see the discussion below concerning article 69 para. 4.

According to paragraph 3, evidence that is irrelevant is not to be submitted. However, views about the relevance of a certain piece of evidence to the case may differ. It must be noted that the text specifies that the evidence must be relevant 'to the case'. This means that a particular piece of evidence that has been admitted may subsequently be held not to be relevant in connection with the particular fact which it was meant to prove, but may still be relevant to the case as a whole. In such a situation, evidence, though irrelevant for the purpose for which it was originally submitted, has still been submitted in accordance with paragraph 3 if relevant to other issues in the case. The Court will have to decide on the relevance in that sense under paragraph 4[85].

The ICTY has used a general concern about both relevance and probative value to exclude specific evidence as well as to place limits on the volume of evidence. Relevance has been used to justify limits on evidence about the good character of the accused[86], historical roots of the underlying conflict[87], and similar bad acts by opposing forces[88].

### 3. 'in accordance with article 64'

Although the initial proposal mentioned only article 64 para. 3, the text now requires the 34
parties to submit evidence in accordance with article 64 as a whole. Consequently, if the Trial Chamber refers a preliminary question to the Pre-Trial Chamber in accordance with article 64 para. 4, the parties may have to submit evidence before that Chamber. The most important paragraph of article 64, however, will be paragraph 3. The parties will have to submit their evidence in accordance with the decisions that the Trial Chamber has taken regarding the procedures and languages to be used for trial, and, most importantly, any decision regarding disclosure. At the ICTY, admissibility of evidence has been successfully challenged on such bases as the failure of the prosecution to provide a translation of a disclosed document[89], and failure to disclose complete documents (only excerpts to be used at trial had been provided)[90]. The timing of disclosure has also been a major issue before the *ad hoc* Tribunals. The ICTR Rules required complete disclosure of all witnesses 21 days prior to trial. The ICTY developed a more complex system for disclosure, distinguishing between disclosure of witnesses called to prove basic facts and witnesses who directly implicate the accused[91]. Both Tribunals recognized an obligation on the prosecution to immediately disclose any exculpatory evidence to the defence.

The ICC Rules provide significant guidance on the issue of disclosure. Rules 76 through 84 place disclosure requirements on both the prosecution and defence and spell out the circum-

[84] The *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 'Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties', 31 July 2008 at para 10.

[85] See mn. 37 *et seq.*

[86] *Prosecutor v. Kupreskić*, IT-95-16, Decision on Evidence of Good Character of the Accused and the Defence of *Tu Quoque*, 17 Feb. 1999.

[87] See *Prosecutor v. Kunarac et al.*, IT-96-23, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000.

[88] See *Kupreskić*, see note 86.

[89] See *Prosecutor v. Milošević*, IT-02-54, Decision on Prosecution Motion for Permission to disclose Witness Statements in English, 19 Sept. 2001.

[90] *Prosecutor v. Dosen*, IT-95-8, Decision on the Defence Motion to compel Discovery, 11 May 2000.

[91] *Prosecutor v. Brđanin and Talić*, IT-99-36, Decision on Motion by Prosecution for protective Measures, 3 July 2000.

stances and procedures to be used for any restrictions on disclosure. Article 61 para. 3 sets out the disclosure requirements for hearings held prior to trial. Article 67 para. 2 requires exculpatory evidence to be disclosed to the defence 'as soon as practicable'. Rule 83 allows the Prosecutor to seek the guidance of the Court on an *ex parte* basis where this is an issue under article 67 para. 2. Unlike the ICTR, the ICC Rules do not establish any specific timeframes for disclosure. Instead, they establish a principled approach to disclosure[92].

#### 4. 'authority to request the submission of evidence'

35 Due to this formulation, the Court will not be allowed to call evidence on its own authority. It may, however, when it believes that the evidence produced by the parties does not suffice to give a full picture of the situation or to reach a decision on a particular point, order the parties to submit further evidence. This follows the Rules of the ICTY[93]. The effect of this provision is that the parties are not free to withhold evidence that the Court considers to be important. The Court may focus on aspects of the crime that are not covered by the evidence brought forward by the parties. In such a case, the parties may be ordered to submit evidence regarding *e.g.*, a particular conduct occurring at a particular time that neither party has so far seen proper to touch upon. The submission of evidence, therefore, is not a matter to be decided solely by the parties, but also by the Court.

On the other hand, the Statute makes it clear that any evidence will have to be brought forward by the parties. The Court is restricted to its procedural tools (orders) when it wishes to hear additional evidence. It has to rely on the cooperation of the parties, although it may compel them to cooperate. This is different from the procedure in some civil law systems.

#### 5. 'it considers necessary for the determination of the truth'

36 It is for the Court alone to decide whether the parties have submitted sufficient evidence. The phrase 'determination of the truth' demonstrates that the point is not just whether the Court has enough material on its hands to reach a decision. The function of the ICC goes beyond that of an ordinary criminal court. Given the kind of situations that might be the subject of a trial, the parties and the Court have the additional duty to clarify as much as possible the historical facts of the case. This does not mean, however, that the Court has to examine every detail of the situation before it when it already has a clear picture of the facts. The individual crime before the Court provides the framework within which the Court has to operate. If the facts of the particular crime are sufficiently clear, the Court will not consider further evidence necessary.

The role envisioned for the Court necessarily means that it is not bound by narrow rules regarding when and how evidence is presented. At the same time, some limits are justified as to when new evidence can be placed before the Court during the trial so as not to prejudice either party. The ICTY established a relevant test for the submission of new evidence at trial outside of the agreed procedure, which requires that the material 1) must be new in the sense of not having been available on the basis of due diligence when it should have been appropriately submitted, 2) not be cumulative and/or repetitious of evidence already given, 3) must be of significant relevance to the core issues in the case, and 4) be of such nature that its admission is in the interests of justice[94].

[92] See Brady, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 403 *et seq.*

[93] See rule 98 ICTY.

[94] *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts, 1 Dec. 2000.





### IV. Paragraph 4

*Rule Cross-Reference: rule 47.2 (evidence per article 15(2)), rule 63 (general evidence provisions), rule 64 (procedure relating to relevance or admissibility), rule 70 (evidence in cases of sexual violence), rule 71 (evidence of other sexual conduct), rule 72 (in camera procedures to consider relevance or admissibility)*

#### 1. 'the relevance or admissibility of any evidence'

As with all of article 69, para. 4 is an amalgam of both common law and civil law concepts 37
and does not strictly follow the procedures of either. While the article adopts presumptively the civil law procedure of general admissibility and free evaluation of evidence, some common law concepts are incorporated, which results in a hybrid system. The basic principle in both common law and civil law systems is 'that relevant evidence which has probative value is admissible if such evidence is not affected by an exclusionary virus'[95]. Article 69(4) permits the Court 'to rule on the relevance or admissibility of any evidence' before considering the question of weight. The Court can either: 1) rule first whether evidence possesses sufficient relevance to justify its admissibility, taking into account a number of factors mentioned in article 69, para. 4, and evaluate subsequently the weight of any admitted evidence as part of the evaluation process; or, instead 2) admit evidence and consider relevance, admissibility and weight together as part of the evaluation of the admitted evidence, taking into account the same factors.When the Court would choose to proceed by one analytical method or the other would be influenced, *inter alia*, by the need to ensure the protection of other values in the adjudication process, for example, such as the rights of the accused, a fair trial, fair evaluation of the testimony of a witness and the rights of victims.[96] In some situations, protection of these values would best be served by the exclusion or non-admissibility of the evidence, rather than by admitting it and subsequently according it little or no probative weight[97]. In either case, rule 64 makes it clear that issues about relevance or admissibility should be raised when evidence is submitted and that a Chamber must give reasons for any rulings on evidential matters.

Relevance and admissibility are related but distinct concepts. Relevance is not an absolute 38
concept but is a relationship or nexus that is derived from the proffered item of evidence and the fact in issue or proposition that is sought to be proved or disproved. It is a relation the existence of which makes it more probable than not that the fact or proposition exists or does not exist. The existence of the item of evidence tends to increase or decrease the probability of the existence of the fact in issue. This is often termed the rational probativeness of the evidence; *i.e.* the question is whether the item of evidence is rationally probative to a fact in issue[98].

Determining whether a rational connection exists or whether evidence has probative value 39
is often a mixture of logic and common sense borne by the experience of life and humankind. In addition to strict logic, the determination of relevance or probative value also involves the application of common sense as to whether the item of evidence tends to make more or less

[95] *Prosecutorv. Delalić, Mucić, Delić and Landzo*, IT-96-21,Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zradavko Mucic, to provide a Handwriting Sample, 19 Jan. 1998, para. 30 [hereinafter: *Delalić et al.*, Decision on Exhibit 155, 19 Jan. 1998].

[96] See *Prosecutor v. Lubango Dyilo*, ICC-01/04-01/06, 'Decision concerning the Prosecution Proposed Summary Evidence' where the Pre-Trial Chamber I declared 'as inadmissible some documents submitted by the Prosecution on the grounds that their disclosure would compromise the protection of witnesses' 4 October 2006.

[97] Piragoff, see note 19, p. 351.

[98] See note 83, *Prosecutor v. Delalić et al.*, Decision on exhibit 155, para. 29; *Prosecutor v. Delalić et al.*, IT-96-21, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 Jan. 1998, para. 17 [hereinafter: *Delalić et al.*, (Decision on admissibility of evidence, 19 Jan. 1998)]; see also G.F. James, *Relevancy, Probability and the Law*, 28 *CalifLRev* 689 (1941).

probable the existence of the fact in issue that is sought to be proved or disproved. Common sense is of course dependant not only on the process of logical deduction or induction but on life experience or values, be they individual, societal or as part of humankind. The conclusion to a logical deduction is only as true as is its major premise, which is often derived from an application of one's life experience and values. At times, the validity of the deductive process and the conclusion can be called into question if the validity of the major premise (or the values on which it is based) is questionable, biased or erroneous[99].

40 There are two aspects to relevancy that may make evidence irrelevant. In the first, the evidence does not tend to prove or disprove the fact in issue; *i. e.* there is no rational connection or probative value or relationship. In the second aspect, there may equally be no rational connection or probative value if the particular fact in issue to which the evidence could be probative is not at issue in the case. In such situations, the evidence is both irrelevant and not admissible[100].

41 However, merely because evidence is strictly relevant in a logical sense does not guarantee its admissibility. Relevance is often a question of the degree of probativeness and, sometimes, while having some probative value it is not sufficiently probative so as to justify its admission into evidence given other considerations. These considerations can include the situation where the particular fact in issue is too collateral or remote to be probative to the main issues to be proved or disproved, or the particular fact in issue is not really at issue in the context of the case due to the overwhelming probative value of other evidence that tends to prove or disprove the fact in issue. It can also include situations where, due to the nature of the evidence or the values upon which probative value is being determined, the evidence may be considered falsely to possess more probative value than it actually does. For example, evidence of prior conduct (sexual, criminal or otherwise) which is not rationally related to the conduct in question in the trial may tend to show-that the person is immoral or of bad character (which is a value judgement based on the assessor's own life experience and values) or has been prone to criminality, but without more rational connection to the case, such degree of probativeness might not justify the admission of the evidence. Its prejudicial value obscures its true probative value, which may really be minimal or non-existent[101]. The admission of such evidence may, therefore, cause prejudice to a fair trial or to a fair evaluation of the testimony of a witness.

Sometimes, even if evidence is sufficiently relevant (*i. e.* of sufficient probative value) other policy considerations outweigh its admission, such as where evidence is subject to a legally recognised privilege or its exclusion is necessary to protect national security interests or a witness from harm[102].

In the case of *R. v. Lubanga* the Trial Chamber I discussed the broad power conferred on the Chamber to make decisions with regards to evidence under Article 69(4), 'it has a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC."[103]

In *Prosecutor v. Jean Pierre Bemba Gombo*[104], the Trial Chamber III discussed the relationship between the guiding principle of orality set out in Article 69(2) and the Court's

[99] See note 83, *Delalić et al.*, Decision on exhibit 155, para. 29; see note 85, *Delalić et al,* Decision on the admissibility of evidence, 19 Jan. 1998, para. 17. See also: see note 98, G.F. James, 694–5; D.K. Piragoff, *Similar fact evidence: probative value and prejudice* (1981) 124–128; M. Eggleston, *Evidence, proof and probability* (1978)24; R. Cross, *Cross on evidence* (4th ed. 1974)16 and 24.

[100] See note 83, *Delalić et al.*, Decision on the admissibility of evidence, 19 Jan. 1998, para. 17. McCormick, *Mccormick on evidence* (4th ed. 1992) 338–339.

[101] *E. g.*, *Prosecutor v. Delalić, Mucić, Delić and Landzo*, IT-96-21-T, Judgement, 16 Nov. 1998, para. 70, which held that evidence of prior sexual conduct was irrelevant and inadmissible.

[102] *E. g.*, see article 69 para. 5, article 72 and article 68 para. 1.

[103] *Prosecutor. v. Lubanga*, ICC-01/04-01/06, 'Corrigendum to Decision on the admissibility of four documets' 20 January 2011 at para 24.

[104] *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 19 November 2010.







discretion to rule on relevance or admissibility of *any* evidence set out in Article 69(4). The Majority determined that there is sufficient legal basis set out in the ICC legal framework to consider *prima facie* admitting into evidence all statements of witnesses to be called to give evidence at trial.

However, the Dissenting Opinion to the Majority decision above written by Judge Ozaki disagreed with these arguments.[105] In her opinion, Article 69(2) is clear that the primacy of the principle of orality must prevail in all proceedings before the Court, and indeed, thus far international criminal tribunals and the ICC have all primarily relied on the oral testimonies of witnesses with written statements having been admitted on an exceptional, case-by-case basis. Moreover, in her opinion, the argument that all written documents are *prima facie* admissible is not founded upon any provision in the ICC legal framework. As well, the Majority's ruling has the effect of creating an 'intermediate state' in the ruling on admissibility, which was not contemplated by the drafters of the Rome Statute.

The Majority Decision was appealed and on May 3, 2011 the Appeals Chamber rejected the argument of the Trial Chamber. The Appeals Chamber ruled that the Trial Chamber's ruling of a '*prima facie* finding of admissibility of the evidence" without assessing the evidence on an item by item basis was incorrect.[106] The Appeals Chambers found that while expeditiousness is an important component of a fair trial, the statutory requirements established by article 69(4) and (7) and rule 71 of the Rules of Procedure and Evidence anticipate that a Chamber's determination of the relevance or admissibility of evidence be made on an item-by-item basis.

### 2. 'the probative value of the evidence'

The meaning of this term has already been discussed in section 1, above, in relation to the 42
determination of relevance and admissibility. 'There is implicit in 'relevancy" an element of probative value'[107]. In applying this concept as one of the factors to be taken into account in determining relevance and admissibility, the Court will likely have regard to the manner by which the evidence derives its probative value and the degree of probativeness.

Likewise, the Court may have regard to the reliability of the evidence, not only as a factor going to its weight, but also to its degree of probative value and even admissibility. As the ICTY Appeals Chamber noted, 'the reliability of a statement is relevant to its admissibility and not just to its weight. A piece of evidence may be so lacking in terms of the indicia of reliability that it is not 'probative' and is therefore inadmissible'[108]. Nevertheless, reliability is only a factor to be considered and is not a separate pre-condition to admissibility, as the degree of reliability can also affect the weight to be given evidence once admitted[109]. However, an ICTY pre-trial judge has ruled that a Trial Chamber may call upon the parties to provide 'a minimum of proof which would be sufficient to constitute a *prima facie* indicia of reliability if a document so warrants'[110]. The case in question dealt with identification evidence where the Prosecutor was responsible for the context in which the identification was made. It signals that the Prosecutor can be held to a high standard for ensuring the reliability of evidence where the Prosecutor exercises significant control over the form or content of the evidence in question.

[105] *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 'Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 23 November 2010.

[106] *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 'Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011 at para 57.

[107] *Delalić et al.*, Decision on Exhibit 155, see note 83, para. 29.

[108] *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-AR73.5, Decision on Appeal regarding Statement of a Deceased Witness, 21 July 2000, para. 24.

[109] *Prosecutor v. Tadić*, IT-94-I-T, Decision on the Defence motion on hearsay. 5 Aug. 1996, paras. 13–15; See note 83, *Delalić et al.*, Decision on exhibit 155, para. 30–32.

[110] See note 21.

However within the ICC, the Pre-Trial Chamber I, in the *Prosecutor v. Chui* distinguished its approach from the approach of other international tribunals as to the question of whether reliability is a separate or inherent component of the admissibility of a particular item of evidence. The Pre-Trial Chamber adopted an alternative approach, 'to consider reliability as a component of the evidence when determining its weight'.[111]

An ICTY Trial Chamber has outlined factors that should be considered in determining the probative value of expert witness statements. The Chamber required, at the admissibility state, a minimum degree of transparency in the sources and methods used. They also required a degree of specificity and accessibility of sources sufficient to allow opposing counsel to effectively examine the witness[112].

On June 13, 2008, Trial Chamber I issued the 'Decision on the admissibility of four documents' in which it set out a general approach to the admissibility of evidence other than direct oral evidence.[113] The Chamber set out a three step approach to be applied: 1) determine whether the evidence in question is, *prima facia*, relevant to the trial; 2) determine whether the evidence has probative value; and 3) weigh the probative value of the evidence against its prejudicial effect. With regard to the probative value of the evidence, the Chamber indicated that 'there should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall'.[114] The Chamber also cautioned against imposing artificial limits on its 'ability to consider any piece of evidence freely, subject to the requirements of fairness'[115].

43 As noted above in section 1, evidence may possess prejudicial value that tends to obscure the true degree of probative value of an item of evidence or tends to offend or prejudice other values that the trial is supposed to protect, such as a fair trial or the fair evaluation or protection of a witness. The evidence may have a disproportionate prejudicial effect as compared to its true probative value. This necessitates a balancing or weighing process. Unlike some proposals made in the Preparatory Committee[116], the Statute does not specify the exact nature of the test to be used in the balance, nor do the Rules. However, in cases of sexual violence the Rules provide considerable guidance. Rule 70 prohibits the Court from drawing inferences about the consent of a victim based on any words, conduct or silence by him or her if the act(s) occurred in a coercive setting. It also prohibits the Court from making inferences about the character or sexual availability of a victim or witness by reason of prior or subsequent sexual conduct. Rule 71 directs the Court not to admit evidence of the prior or subsequent sexual conduct of a victim or witness. Rule 72 provides for *in camera* consideration of the admissibility of any evidence suggesting the defence of consent to charges of sexual violence. The elaboration of these Rules by the Preparatory Commission provoked sharp debate during the drafting process. The underlying issues in that debate are dealt with more fully in section 1, above.

The restrictions placed on the defence by rules 70 and 71 in the context of sexual offences are premised on principles of relevance and probative value and, as such, are no more prejudicial to the rights of an accused than any other determination of relevance. Rule 72, moreover, guarantees the right of the defence to present to the Court reasons why evidence caught by Rule 70 should, nonetheless, be admissible.

[111] *The Prosecutor v. Chui*, ICC 01/04-01/07, 'Decision on the confirmation of charges" 30 September 2008 at para 78.

[112] *Prosecutor v. Galić*, IT-98-29-T, Decision on the expert witness statements submitted by the Defence, 27 Jan. 2003.

[113] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the admissibility of four documents (13 June 2008).

[114] *Ibid*, paragraph 28.

[115] *Ibid*, paragraph 29.

[116] Report of the Preparatory Committee (1998), see note 15, p. 131, fn. 15 ('probative value is substantially outweighed by its prejudice …'); see also rule 84*bis*. DICTY ('probative value is substantially outweighed by the need to ensure a fair trial').





### 3. 'fair trial'

The concept of 'fair trial' is one of the fundamental values inherent in the *ICC Statute*. 44
Article 64 para. 2 mandates that the 'Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses', article 67 para. 1 entitles an accused 'to a fair hearing conducted impartially' and article 68 paras. 1 and 5 refer to 'a fair and impartial trial'. As the concept of 'fair trial' is addressed primarily in article 67 of the Statute and in the *ICCPR*[117], discussion here will focus on the manner by which this fundamental value operates as a factor in determining relevance and admissibility, rather than on its meaning.

First, as noted in sections 1 and 3, above, the nature of the evidence or the values upon 45
which probative value is being determined can result in a situation where the evidence may be considered erroneously to possess more probative value than it actually does. The admission of such evidence may have an adverse impact on the fairness of the trial, as it obscures the true probative value of the evidence or 'the determination of the truth' by the Court[118].

Second, the concept of fair trial has traditionally referred to the fairness of the trial vis-à- 46
vis the accused. Article 67 sets out a number of specific rights of the accused in the context of the trial process, which also inform the meaning of fair trial. Their violation can prejudice a fair trial. Violation of pre-trial rights can also prejudice the fairness or integrity of a subsequent trial[119]. Other international standards regarding therights of an accused and fair trial are incorporated through article 21 paras. 1 and 3.

Third, the Statute recognises the importance of victims and witnesses and charges the 47
Prosecutor and all Chambers of the Court with the protection of their rights and interests. This is explicitly dealt with in article 68, but article 64 para. 2 specifically mandates that the 'Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'. Article 21 would equally apply to the further understanding and elaboration of these concepts. Therefore, a fair trial, and prejudice thereto, may also incorporate or be counter-balanced by some aspects of the fair treatment of victims and witnesses, and not merely fair treatment of an accused, provided that these aspects are not 'prejudicial to or inconsistent with the rights of the accused or a fair and impartial trial'[120]. The fairness of a trial may encompass considerations that are broader than the rights of an accused and other participants, and may require a balancing process of the factors mentioned in article 64 para. 2 which may be inter-related rather than distinct. Alternatively, if some of these rights and interests are not encompassed within the concept of 'fair trial', they may find their expression and protection in the concept of 'fair evaluation of the testimony of a witness', which is also included in paragraph 4.

Fourth, the UN Human Rights Committee has held that observance of the minimum 48
guarantees of the *ICCPR*' is not always sufficient to ensure the fairness of a hearing'[121]. This suggests that the admission of some types of evidence may cause prejudice to a fair trial in a manner that does not explicitly breach one of the rights of an accused set out in the Statute or incorporated by reference through article 21. Unlike article 69 para. 7, a breach of the

[117] 19 Dec. 1966, 999 UNTS 171 (entered into force 23 Mar. 1976). article 14; and see Ch. Lonsdale and K. Trapp, *The International Criminal Court: Excluding Evidence under Article 69(7)*, unpublished manuscript (1998), Faculty of Law, McGill University, Canada, p. 18, footnote 18, for a list of international instruments that develop the concept of fair trial in international law.

[118] The determination of the truth is one of the key purposes of the trial, for the Court itself is authorised to request the submission of evidence; article 69 para. 3.

[119] *E.g.*, articles 55, 56 paras. 1 (b) and 4.

[120] Article 68 paras. 1, 3 and 5. In the *Tadić* case, the ICTY held that 'a fair trial means not only fair treatment to the defendant but also to the prosecution and to witnesses'; see note 125, paras. 55 and 72.

[121] Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1 (1992), General comment 13.

Statute or internationally recognized human rights is not a prerequisite under paragraph 4 in order to make a ruling that certain evidence is inadmissible.

49 Finally, the question arises as to what extent violations of the Statute or internationally recognized human rights find their operation through article 69 para. 7 as opposed to paragraph 4. Clearly, violations of rights that are specifically enumerated in the Statute or recognized internationally find their remedy regarding admissibility in paragraph 7. Therefore, in situations where paragraphs 4 and 7 overlap, paragraph 4 is either a statement of principle to which paragraph 7 provides specific rules in the situations therein outlined, or is a residual means of non-admissibility or exclusion where paragraph 7 does not apply but the fairness of the trial may nonetheless be prejudiced by the admission of the evidence. The relationship between paragraph 4 and 7 in this regard may be clarified through the jurisprudence of the Court.

The failure to comply with decisions of the Trial Chamber may be taken into account when the Trial Chamber rules on the admissibility of the evidence under article 69 para. 4. Evidence will likely only be inadmissible for failure to comply if the failure was so egregious that its impact on the rights of the accused is of such importance as to outweigh the possible value of the evidence for the proceedings[122].

### 4. 'fair evaluation of the testimony of a witness'

50 In authorising the Court 'to request the submission of all evidence that it considers necessary for the determination of the truth', article 69 para. 3 recognises that the search for truth is a fundamental concern of the trial process. Therefore, it is logical that the Court may, in ruling on the relevance and admissibility of any evidence, take into account any prejudice that such evidence may cause to a fair evaluation of the testimony of a witness. Many of the considerations that are applicable to determining prejudice to a fair trial (discussed above) apply equally to the fair evaluation of a witness.

51 First, the nature of the evidence or the values upon which probative value is being determined can result in a situation where the evidence may be considered to possess more probative value than it actually does. The admission of such evidence may have an adverse impact on the fair evaluation of the testimony of a witness, as it obscures the true probative value of the evidence or 'the determination of the truth' by the Court. For example, as noted in the discussion on 'relevance and admissibility', above, evidence of prior conduct which is not rationally related to the conduct or issue in question, particularly if it is value-laden, can obscure the true probative value of the evidence[123]. This is the rationale that motivates rules 70 and 71.

52 Second, as also noted above, the Statute specifically charges the Prosecutor and the Court 'to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'[124]. While such protection is important in its own right given the inherent dignity of all human beings, the manner of presentation of evidence, or the lack of sufficient safeguards for the protection of victims and witnesses, can have an adverse impact on the willingness and ability of a witness to testify, especially to testify truthfully and without fear of outside repercussions or threats, thereby prejudicing the fair evaluation of their testimony and the determination of the truth[125].

[122] See mn. 37 *et seq.*

[123] *E.g., Prosecutor v. Delalić, Mucić, Delić and Landzo*, IT-96-21-T, Judgement, 16 Nov. 1998, para. 70, which held that evidence of prior sexual conduct was irrelevant and inadmissible. rule 96 (iv) ICTY specifically addresses this situation.

[124] See discussion of 'fair trial', mn. 44 *et seq.*, and article 68 para. 1.

[125] In *Prosecutor v. Tadić*, IT-94-1, Decision of the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 Aug. 1995, some witnesses were granted the ability to testify anonymously in order to ensure their protection, thereby excluding evidence of their true identity, as the admission of evidence of identity would prejudice the giving and fair evaluation of their testimony.





### 5. 'inter alia'

Paragraph 4 does not set out a specific test or standard as to how relevance is to be balanced with other factors. As noted earlier[126], formulations similar to that in rule 89 *lit.* D *ICTY* were not accepted for the purposes of the Statute, in favour of a statement of principle and a listing of some of the factors that may be taken into account. Paragraph 4 does not contain an exhaustive list, and the Rules do not provide a specific test. The Court will have discretion to interpret article 69 para. 4 and can consider other factors, but will have to keep in mind the very clear guidance provided by rules 70 and 71 dealing with cases involving sexual offences, sexual conduct and sexual violence. 53

### 6. 'in accordance with the Rules of Procedure and Evidence'

Rule 64 establishes the general procedure for considering relevance or admissibility, requiring that the issue be raised at the earliest practical opportunity and that the Court provide reasons for any ruling it makes on relevance or admissibility. It further clarifies that evidence found to be irrelevant or inadmissible shall not be considered by the Chamber in its judgment. As noted earlier, no explicit test or standard is incorporated in paragraph 4, and neither is the list of factors that should be taken into account exhaustive. 54

A far greater degree of direction is provided through the Rules when it comes to determining the relevance or admissibility of evidence in cases of sexual violence. Any attempt to introduce or elicit evidence of consent to a sexual crime or evidence touching on prior or subsequent sexual conduct of a victim or witness triggers the requirements of rule 72. This rule requires the party seeking to introduce or elicit such evidence to first provide notice to the Court, including the substance of such evidence and its relevance to issues in the case. An *in-camera* will then be held to hear the views of the defence, the Prosecutor and the witness or victim or their representative, if any. The Court must state on the record the specific purpose for which any evidence admitted through this process may be used. Rule 72 spells out clearly the relevant tests and principles it must apply in such a hearing.

### 7. 'The Court'

Although article 69 is within 'Part 6: The Trial', various paragraphs within article 69 refer to the 'Court', which raises the question whether article 69 might be applicable at other stages of the Court's proceedings given that the term includes all of its chambers under article 34? Although paragraph 7 contains no reference to 'Court', paragraph 4 does and is the general provision concerning admissibility of evidence. Can the Pre-Trial Chamber exclude the admission of evidence for its own purposes, such as at the confirmation hearing? If it can, is such decision binding on the Trial Chamber? Can the Pre-Trial Chamber hear a pre-trial motion to exclude evidence for the purposes of the trial? Ought the Pre-Trial Chamber to have any of these powers? A number of these questions have been examined by some authors, and it is suggested that the Pre-Trial Chamber can exclude evidence in the context of its own proceedings. The answers to the other questions are less clear[127]. These matters were resolved in the context of the Rules by creating one chapter on rules relating to various stages of the proceedings (Chapter 4) and a separate chapter for those rules applicable exclusively to the trial procedure (Chapter 6). Since those rules that relate directly to article 69 were included in Chapter 4, it is likely that article 69 is intended to apply beyond the context of the trial itself. 55

[126] See text at note 31.

[127] Trapp and Lonsdale, *Excluding Evidence: the Timing of a Remedy*, unpublished manuscript (1998), Faculty of Law, McGill University, Canada.

## V. Paragraph 5

*Rule Cross-Reference: See rule 73 (Privilege), rule 74 (Self-Incrimination), rule 75 (Incrimination by Family Member), rule 190 (Notice to witnesses), rule 191 (Assurances)*

### 1. 'respect and observe'

56 The main object of this obligation is to prevent disclosure of privileged communications. The practice of the obligation to respect the privilege is provided in the Rules and is similar in principle to the Rules of the ICTY. In general, at the ICTY, privileged communications are not disclosed at trial, unless the accused consents to disclosure or has already voluntarily disclosed the content of the communication to a third party, thereby indicating that he or she did not in fact regard the communication as strictly confidential[128]. In rule 73, the ICC adopted the same high threshold for any waiver of the privilege.

The Court will not be entitled to order the defence to disclose statements given by a witness or the accused under the privilege. Based on the jurisprudence of the ICTY, this may also apply to statements made by the accused prior to being fully informed of the charges against him or her[129].

### 2. 'privileges on confidentiality'

57 The privileges to be respected and observed are defined in detail in rule 73 (privileged communications and information). Privileges proposed in the Committee of the Whole at the Rome Conference, but which ultimately were not specifically mentioned in the Statute (lawyer-client, doctor-patient and confessor-penitent), are given particular recognition in the rule.

The lawyer-client privilege in rule 73 is almost absolute and can only be breached if its possessor consents to disclosure in writing or voluntarily discloses a communication to a third party who then provides evidence. The ICTY has viewed lawyer-client privilege as the privilege of the client and not the legal adviser and extended it to cover only confidential communications and documents which come into existence or are generated for the purpose of giving or getting legal advice or in regard to prospective or pending litigation[130].

Rule 73 uses the term 'legal counsel' in preference to 'lawyer' as the former term is more comprehensive. However, at the same time, it restricts the privilege to communications made in the context of the professional relationship. This ensures maximum flexibility on the part of an accused to appoint counsel of their own choosing, while it prevents an accused from using the privilege to cloak communications that were made for purposes other than the giving or receiving of legal advice.

The doctor-patient privilege is given an expansive treatment in rule 73, with psychiatrists, psychologists and counsellors specifically mentioned. A claim to privilege based on a listed relationship must still satisfy the criteria set out in sub-rule 73(2). The advantage of listing these relationships in the rule is that it creates a presumption in their favour.While some delegates to the Preparatory Commission felt that the reference to counsellor needed greater definition, this issue was resolved by adding a particular reference to relationships involving victims[131].

[128] See rule 97 ICTY (relating to lawyer-client privilege only).

[129] *Prosecutor v. Tadić*, (Decision on Prosecution Motion for Production of Defence Witness Statements) 27 Nov. 1996, IT-94-1-T; JRWD Jones (ed.), *Practice of the International Criminal Tribunal for the Former Yugoslavia* 165 (2nd ed. 1997).

[130] *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on motion for production of documents – Dzonlic Testimony, 11 Mar. 2002.

[131] For a full discussion of the negotiating history of rule 73 see see note 19, D. Piragoff, *Evidence*, p. 357.





The clergy privilege is more narrowly defined, restricting the privilege to circumstances where it is an integral part of the practice of the religion concerned. However, unlike the professional privileges, the Court is required to honour the privilege when a communication fits within the definition.

Professional privileges other than lawyer-client will be evaluated on a class basis using the three criteria set out in sub-rule 73(2):1) the existence of a confidential relationship producing a reasonable expectation of privacy/non-disclosure, 2) a finding that confidentiality is essential to the relationship, and 3) a finding that the privilege furthers the objectives of the Statute and Rules[132]. These criteria mirror those used in many States to decide whether a privilege should be recognized[133].

The ICTY has ruled that the ICRC enjoys a privilege under international law because the nature of its work requires that it maintain absolute neutrality in conflict situations[134]. Sub-rule 73(4) grants the International Committee of the Red Cross the right to assert an exemption from disclosure requirements regarding information, documents or other evidence that came into its possession in the course of or in consequence of performing its functions. The ICRC privilege is designed to protect its neutrality, covering all its communications as well as shielding its personnel from having to divulge anything they saw, heard or documented in the course of their work. Unlike the professional privileges, the privilege sought by the ICRC was intended to benefit the ICRC rather than a right of the accused or the right of a witness or victim. As a consequence, it is considerably broader than the professional privileges and can be asserted by the ICRC for its own protection. However, the rule places an onus on the ICRC to object in writing to disclosure should the Court determine that evidence in the ICRC's control is of great importance to a case. The rule seeks to promote consultations between the Court and the ICRC while preserving the ICRC's ability to assert its privilege.

The Rules of the ICTY on privilege focus on the lawyer-client relationship[135], but the tribunal has asserted its right to recognize additional privileges on a principled basis. The ICRC decision is the most notable example of this use of inherent jurisdiction. Recently, the ICTY also acknowledged the existence of a qualified form of journalistic privilege[136]. The ICTY decisions are not precedents in any strict sense, since the ICC does not recognize *stare decisis* and, in any event, the ICC rule governing privileges is quite different from the comparable ICTY rule. However, the exact scope of any new privilege is not determined by the criteria in rule 73 and, in this regard, the decisions of the ICTY on additional privileges are likely to prove helpful.

The ICC Rules establish two important privileges for witnesses:the privilege against self-incrimination in rule 74 and the privilege against incrimination of family members in rule 75.

Rule 74 permits a witness to refuse to provide answers that may incriminate him or her absent assurances from the Court. Only incriminating answers are covered. Assurances can take the form of protective measures and commitments to confidentiality. If assurances are offered prior to attending at the Court, a witness who attends can be required to testify. If a concern about self-incrimination arises during testimony without prior assurances, the Chamber may still require the witness to answer provided it assures the witness that his or

[132] Sub-rule 73 para. 2 ICC.

[133] See, *e.g.*, for Canada: *Wigmore. Evidence, rev. 1961*, Vol. 8, para. 2285; for Germany: Judgment of the Federal Constitutional Court, 19 July 1972, BVerfGE 33, 363 (375).

[134] *Simić et. al.*, see note 27.

[135] Rule 97 ICTY.

[136] See *Prosecutor v. Brđanin and Talić*, IT-99-36-AR73.8, Decision on Interlocutory Appeal, 11 Dec. 2002. The Appeals Chamber in this case indicated that the amount of protection that should be given to war correspondents from having to testify is directly proportional to the harm that forced testimony may cause to the newsgathering function. A two-prong test was proposed: First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.

her answers will remain confidential and will not be disclosed to the public or any State, and will not be used in a subsequent prosecution of the witness, except under articles 70 and 71.

The Chamber must consider the criteria in sub-rule 74(5) before requiring a witness to answer a question. Sub-rule 74(6) gives a Chamber discretion to excuse a witness from answering a question even if assurances have been given and all witnesses must be notified of their privilege under rule 74 prior to giving their testimony. Rule 74 also places a duty on the Prosecutor to advise the Court of any possibility of self-incrimination. Rule 74 further guarantees a witness the opportunity to seek independent legal advice if an issue of self-incrimination arises during the proceedings.

Rule 75 gives a spouse, child or parent of an accused person the option to refuse to answer questions that may incriminate their family member. As is the case with rule 74, only incriminating answers are covered by the privilege. The rule is fairly narrowly drawn, in its focus on incriminating answers and a select number of relationships, but it still raised concerns at the Preparatory Commission for its potential to obstruct efforts to obtain crucial evidence. The solution agreed to was the addition of sub-rule 75(2), providing that the Court may take account of an objection by a witness to a question intended to contradict a previous statement made by the witness or if a witness proves selective in choosing which questions to answer. It needs to be emphasized that the family member privilege is discretionary and attaches to the witness rather than the accused.

## VI. Paragraph 6

### 1. 'facts of common knowledge'

58 Facts of common knowledge are facts which are so notorious that they do not require formal proof. They include the facts of which an informed and reasonable person has knowledge or which he or she can learn from reliable and publicly accessible sources, having regard to the circumstances of the case and, in the context of the ICC, to the parties involved. The question whether a fact is commonly known can only be decided with regard to the setting of the trial, *i.e.* the circumstances of the case[137]. Examples include geographical circumstances, established historical data or possible natural causes of certain events. In the context of the ICC, as well as in the context of the ICTY, UN documents, including resolutions of the Security Council, will also likely be regarded as facts of common knowledge. It is for the Court to decide whether a given fact will require proof or whether it can be regarded as a fact of common knowledge. An important factor will be how widely the document or data in question is available and how widely it has been accepted as common ground.

### 2. 'judicial notice'

59 The concept of judicial notice is well known in domestic criminal law. It enables the Court to enter facts of common knowledge into the records of the proceedings and to use them as a basis for the judgment without having to take formal evidence. In litigation between governments in the International Court of Justice, the concept can be more freely used than inthe context of criminal proceedings against an individual[138]. It is of the very first importance – especially with regard to a possible appeal – to have the facts upon which the decision is based clearly set out in the records and in the decision itself[139].

Unlike the ICTY and ICTR, the ICC Rules do not address judicial notice, its scope or limitations. The jurisprudence on the subject at the Tribunals will likely have significant weight with the ICC. The general test used by the ICTY was facts not reasonably subject to

[137] See Prosecutor of the ICTY, Transcript of Hearing in an interlocutory appeal before the Appeals Chamber, 7 Sep. 1995, pp. 107 *et seq.*; quoted in see note 129, JRWD Jones, 162 *et seq.*

[138] *Id.*, 163.

[139] See article 74, paras. 2 and 5.





dispute balanced against an accused's right to a fair trial[140]. A decision of the ICTR suggests that voluntary admissions by an accused cannot be the subject of judicial notice, because such admissions do not make a fact indisputable, nor do they prove that a fact is generally accepted[141].

An important form of judicial notice is notice of adjudicated fact. It provides an efficient way to introduce evidence that speaks to issues other than the acts or conduct of the accused without having to recall witnesses heard in other proceedings for further examination. The ICTY restricted this form of judicial notice to cover only facts explicitly accepted in a judgment which had already been appealed or where the time limit for appeal had already run out and where the general test for judicial notice supports admission[142]. Given the specific provisions in rule 68 for the admission of written transcripts, it is unlikely the Court will exercise their authority to admit adjudicated fact under their power of judicial notice. The ICTY has ruled that judicial notice of adjudicated fact does not prevent a party from challenging the fact in question; it only means that the fact does not have to be proved[143].

## VII. Paragraph 7

*Rule Cross-Reference: See rule 64 (Procedure to Determine Relevance or Admissibility of Evidence), rule 72 (in-camera procedure to consider relevance or admissibility of evidence)*

### 1. Chapeau

**a) 'Evidence obtained by means of'.** In light of the negotiating history, the presence of paragraph 8 and the precedential value of the *ICTY Rules*[144], it is clear that paragraph 7 applies to the collection of evidence by either the Prosecutor or national authorities. Paragraph 8 clearly contemplates that the Court may decide on 'the relevance or admissibility of evidence collected by a State'. The phrase 'obtained by means of' contemplates some sort of causal relationship between the violation and the collection of the evidence. It will be up to the Court to determine the degree of causality required. This degree could vary depending on the right or procedure violated *(e.g.,* the collection of evidence in the context of a violation of the right to counsel could require less of a causal link than collection in the context of an illegal search and seizure). 60

**b) 'a violation of this Statute'. aa) Statute.** A violation of the Statute is a relatively straightforward concept, which could include a violation of any of the rights of an accused[145] or of victims or witnesses[146] or other substantive or procedural provisions of the Statute[147], provided that the violation is causally related to the collection of the impugned evidence. 61

[140] *Prosecutor v. Simić et al.*, IT-95-09-PT, Decision on Pre-trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 Mar. 1999.

[141] *Prosecutor v. Semanza*, ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 Nov. 2000.

[142] *Prosecutor v. Sikirica, Dosen, Kolundžija*, IT-95-8, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 Sep. 2000; See also *Prosecutor v. Kvocka et al.*, IT-98-30-1-T, Decision on Judicial Notice, 8 June 2000, and *Prosecutor v. Kupreskić et al. (a/k/a 'Vlado')*, Decision on the Motions of Drago Josipović, Zoran Kupreskić and Vlatko Kupreskić to Admit Additional Evidence pursuant to Rule 115 and for Judicial Notice to be taken pursuant to Rule 94(B), 8 May 2001, IT-95-16-A.

[143] *Prosecutor v. Ljubicić*, IT-00-41-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 Jan. 2003.

[144] Commentaries to rule 95 ICTY note that while 'a Trial Chamber is not bound by national rules of evidence, it will refuse to admit evidence – no matter how probative – if it was obtained by improper methods'. Report of the ICTY, UN GAOR, 49th Sess., UN Doc. A/49/342.S/1994/1007 (1994), at para. 26, footnote 9. See also *Prosecutor v. Delalić, Mucić. Delić and Landzo*, IT-96-21-T, Judgement, 16 Nov. 1998, para. 63.

[145] *E.g.*, articles 55, 67, and article 64, paras. 2 and 6 (e).

[146] *E.g.*, articles 57, 68, and article 64, paras. 2 and 6 (e).

[147] *E.g.*, articles 56, 57, and Part 9 of the Statute.

62 bb) Rules. During the debates in the Preparatory Committee, the question arose as to whether a violation of the Rules should also be considered in the context of the application of article 69 para. 7 or whether such violation should be addressed by a separate provision in the Statute or the Rules. It was decided at the March–April 1998 session that this question needed to be determined in the context of the consideration of articles 21 and 52 [now article 51][148]. At that time, article 52 para. 1 contained an option 1 that the 'Rules of Procedure and Evidence … shall be an integral part of this Statute'[149], and article 20 [now article 21] referred to both the Statute and the Rules, as it does now[150]. During the Rome Conference option 1 of article 52 para. 1 was deleted. Did this signal a decision that references to the Statute did not also include a reference to the Rules[151]?

63 As articles 51 and 52 were being considered by a different working group, much of the debate in the working group that considered Parts V and VI, particularly in the early days of the Rome Conference, were premised on the Rules being an integral part of the Statute. Is the singular reference in article 69 para. 7 to 'Statute' a clerical error or intentional? One view is that the restriction is intentional. Violations of the Rules are not of the same order as a violation of the Statute. The Statute, for example, contains the fundamental principles governing the Court, the investigation, the trial procedure and the rights of the suspect or accused. Furthermore, the Rules did not exist at the time of the Rome Conference, and it was difficult to contemplate exclusion for their breach when their content was not yet known. Therefore, paragraph 7 applies only to a violation of the Statute. Violations of a lesser instrument, such as rules, might justify a different remedy or exclusion based on different criteria, or even the same remedy and criteria but explicitly addressed in the Rules. The other view is that the Rules are subordinate and derived from the Statute by virtue of article 51 and, despite any specific references to them in other articles, are an integral part of the Statute. Subject to a conflict, the Rules are to be applied by the Court in accordance with article 21. The distinction made between technical and substantive procedural rules in the ICTY *Kordic* decision provides some precedent that a measure of flexibility to tolerate breaches of the rules can be permitted so long as it does not impinge on the rights of the accused[152].

64 In any event, article 64 para. 1 provides that the functions and powers of the Trial Chamber set out in that article shall be exercised in accordance with the Statute and the Rules, and paragraph 9 (a) of that article specifically empowers the Trial Chamber to rule on the admissibility or relevance of evidence. Accordingly, the question of the application of article 69 para. 7 to a violation of the Rules or, alternatively, the creation of a separate rule of exclusion for violation of the Rules can be adopted under the process set out in article 51.

65 c) **'internationally recognized human rights'.** As noted above in Part A, prior proposals had contained references to 'internationally protected human rights', the 'rights of the defence' or 'other relevant rules of international law'. One interpretation of 'international law' was that it included the *ICCPR*. Some delegations were concerned that it might also include other rules of international law that had little, if anything, to do with human rights or the Statute, despite the qualifier 'relevant'. Accordingly, the reference to international law was deleted by the Rome Conference. The phrase 'internationally protected human rights' was 'intended to cover non-treaty standards as well and would therefore be broader than "international law"'[153]. It could, for example, include recognised norms and standards developed by the United Nations in the field of criminal justice, as appropriate[154]. While accepting that non-treaty rights could also be included, the reference to internationally

[148] Report of the Preparatory Committee (1998), see note 15, p. 131, fn. 17.
[149] ICTY Rules, see note 12, p. 87 (see Option 1).
[150] *Ibid.*, p. 55.
[151] See Fernández de Gurmendi, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 235.
[152] See *Kordić*, see note 72.
[153] Preparatory Committee Decisions Dec. 1997, p. 38, fn. 30.
[154] 1996 Preparatory Committee Report I, p. 61, para. 289.





'protected' human rights begged the question of which international human rights were not protected. Accordingly, the reference was changed during the March-April 1998 session of the Preparatory Committee to read 'internationally recognized human rights', as the key question was their international recognition. Some delegations had suggested the use of the phrase 'universal human rights' or 'universally recognized human rights', but this was not accepted either by the Preparatory Committee or the Rome Conference as it was considered to be too limiting. The qualifier 'internationally recognized' was considered to give sufficient precision but also flexibility for growth and application. The phrase was also subsequently adopted for use in the context of article 21 para. 3.

The Statute itself contains a number of provisions that afford human rights to a suspect or 66
an accused person[155]. The additional and specific reference to 'internationally recognized human rights', which encompasses rights not specifically mentioned in the Statute, is a clear intention that these human rights should also be respected, as their violation can result in the invocation of the remedy prescribed in article 69 para. 7. Human rights, the violation of which can trigger the operation of article 69 para. 7 are not limited to those specifically mentioned in the Statute. This interpretation is supported by article 21 para. 3.

d) **'shall not be admissible'.** Although article 69 para. 4 provides for a discretionary rule of 67
exclusion, paragraph 7 stipulates a mandatory rule of exclusion if its conditions are met. Paragraph 4 creates a flexible balance in which various factors can be weighed against the probative value of the evidence. Paragraph 7, on the other hand, specifically stipulates specific predicate events regarding the manner of collection of the evidence and detrimental effects on the trial process which, if they are found to exist, justify exclusion. Nevertheless, the determination of the existence of those predicate events or effects necessitates the exercise of evaluation and, thereby, discretion by the Court.

Paragraph 7 makes no distinction between evidence proffered by the Prosecutor or the accused, or requested by the Court. Accordingly, the exclusionary rule could be applied against evidence proffered by any of these sources.

Other sanctions are also available to the Trial Chamber when the rights of the accused have been compromised, including adjournments and, in extreme cases, dismissal of charges. The ICTR has ruled that, before charges will be dismissed, any injustice done to the accused must be balanced against the damage that would result to the administration of justice[156]. In the Baragawiya case at the ICTR, the Tribunal dismissed the case against the accused because of failures to respect the rights of the accused while in detention. The Appeals Chamber later reversed itself, citing new evidence that showed greater diligence by the Prosecutor than was apparent during the first appeal. The latter decision established the principle that a court must seek to balance any injustice done to the accused against the injustice that might result if his or her case does not proceed to verdict, taking into account all alternative sanctions available[157].

### 2. The different subparagraphs

a) **'The violation casts substantial doubt on the reliability of the evidence, or'.** This basis 68
of exclusion reflects the concern that the manner by which the evidence is obtained, in violation of the Statute or internationally recognized human rights, can adversely affect the reliability of the evidence. Some forms of illegality or violations of human rights create the danger that the evidence, such as a confession obtained from a person during interrogation, may not be truthful or reliable as it may have been proffered as a result of the duress arising from the circumstances of the violation. Other forms of evidence require preservation or collection in a manner that safeguards the integrity and reliability of the evidence from

[155] *E.g.*, articles 55 and 67.
[156] *Barayagwiza v. Prosecutor*, ICTR-97-19, Decision of the Appeals Chamber, 3 Nov. 1999.
[157] *Barayagwiz a v. Prosecutor*, ICTR-97-19-AR72, Prosecutors Request for Review or Reconsideration, 31 Mar. 2000.

tampering, corruption or tainting[158]. Paragraph 7 (a) requires that the effect of the violation of a procedural or substantive right of the Statute, or of internationally recognized human rights, must be of such degree that it 'casts substantial doubt' on the reliability of the evidence. Evidence created by the Prosecutor (*e. g.* identifications made under prosecutorial supervision) will likely be held to a high standard of reliability[159].

69 **b) 'The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings'.** This basis of exclusion includes, but is broader than, issues related to the reliability of the evidence. Despite a violation of the Statute or internationally recognized human rights, the evidence may be reliable or substantial doubt may not be cast on its reliability. Nevertheless, paragraph 7 (b) could afford a remedy. Likewise, the 'violation' need not be antithetical to, or damage, the proceedings for the purposes of obtaining the remedy under paragraph 7 (b). The detrimental effect in paragraph 7 (b) is triggered by the 'admission' of the evidence, not the 'violation' of the Statute or of internationally recognized human rights. A violation must exist as a precondition, as required by the chapeau of paragraph 7. However, it is the admission of that evidence, in light of the violation, that would be antithetical to or damage the integrity of the proceedings. The rationale for this paragraph is that it would be antithetical to the purposes and integrity of a Court, which was created to redress serious violations of international humanitarian law, to admit and use evidence that was obtained by means of a violation of its own Statute or internationally recognized human rights. Essentially, the admission and use of such evidence by the Court would damage the purpose and integrity of its own proceedings, which are to uphold the rule of law and human rights in the world (or, in the words of the preamble to the Statute, 2respect for the enforcement of international justice' and 'peace, security and well-being of the world').

70 The assessment of 'antithesis' or 'damage' only has meaning in reference to the meaning to be given to the phrase 'integrity of the proceedings'. While it can broadly be said that the purpose of the Court is to uphold the rule of law and human rights, that purpose is delinked by the context of the Statute. It has been suggested by one set of authors that 'the respect for the integrity of the proceedings is necessarily made up of respect for the core values which run through the *Rome Statute*. Clearly no sole value can be singled out as guaranteeing the integrity of the proceedings and the *Rome Statute* represents an attempt to blend competing concerns and values into a coherent whole'[160]. These authors have identified and evaluated some of the core values as being 'respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes'. The authors evaluate how each of these core values is expressed, clash and is balanced throughout the Statute, and suggest that 'the Court will have regard to the relative weight which should be accorded these values when ruling on the admissibility of evidence under article 69 (7)'[161]. The Court will be required to balance these abstract competing values within the context of determining whether the admission of a particular item of evidence would be antithetical to, and seriously damage, the integrity of the proceedings.

71 The dual test within paragraph 7 (*i. e.* the requirement for both a violation and a detrimental effect), together with the inherent discretion of the Court in determining the existence of these conditions, has raised the criticism that the paragraph permits the violation of some provisions of the Statute or of human rights, so long as that violation is not of such degree as to produce the detrimental effects set out in paragraphs (a) or (b). To some extent this is a valid criticism, but paragraph 7 is the product of obtaining consensus and

[158] *E. g.*, article 56 prescribes a number of safeguards with respect to the collection of evidence in relation to a unique investigative opportunity, the breach of which could affect the reliability of the evidence.
[159] *Stakić*, see note 21.
[160] Trapp and Lonsdale, see note 106, p. 21.
[161] *Id.*, 22.





compromise. It is a balance of competing conceptions as to the basis for a rule of exclusion, as well as a mechanism to resolve the application of competing core values of the Statute within the concrete context of determining the admissibility of evidence in a particular case which, while probative, has been collected in manner that offends other values. As was noted in section 1, the detrimental effects in paragraphs (a) and (b) were listed conjunctively in earlier drafts. By listing these effects disjunctively in the final version of the Statute, drafters have made this exclusionary rule more accessible.

Nevertheless, there are particular guides in the Statute which appear to give pre-eminence 72
to particular values. Article 21 para. 1 (b), which is applicable where the Statute does not clearly resolve a matter, provides that applicable treaties and the principles and rules of international law shall be applied. In all cases, article 21 para. 3 provides that the application and interpretation of the Statute must be consistent with internationally recognized human rights, and be without any adverse distinction founded on a number of grounds therein exemplified. It can be argued, therefore, that there are some violations which, by their nature, are always so egregious or so inconsistent with internationally recognized human rights that the admission of evidence obtained as a result of such violation will always be antithetical to, or damage, the integrity of the proceedings. For example, in light of the clear obligations in the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* to refrain from the use of torture and to exclude any evidence obtained as a result thereof[162], it can be argued that evidence obtained as a result of any amount of torture that is proscribed by the Convention would always be antithetical to, or damage, the integrity of the Court's proceedings.

## VIII. Paragraph 8

### 1. 'deciding on the relevance or admissibility of evidence'

Given the historical background, this phrase clearly refers to decision regarding exclusion 73
of evidence under article 69 para. 7, but it also equally applies to decisions of admissibility made under paragraph 4. Paragraph 4 is the general provision concerning the relevance and admissibility of evidence. The procedure for challenging the admissibility or relevance of evidence is provided by rule 64. A Chamber must give its reasons for any ruling on evidentiary matters and evidence ruled irrelevant or inadmissable is automatically excluded.

### 2. 'collected by a State'

Given the historical background to paragraph 8, it is likely that no distinction exists 74
dependant on whether the evidence was collected by a State on its own initiative or at the request of the Prosecutor under Part 9 of the Statute.

Paragraph 8 does not address the issue of evidence collected illegally by a party other than the state or in violation of state sovereignty (*e. g.* evidence collected by U. N. personnel without specific authorization to do so, information collected by third country intelligence agencies or private parties). Given the negotiating history of paragraph 7, such evidence should generally be admissible, subject to the Court's discretion under paragraph 4.

### 3. 'shall not rule on the application of the State's national law'

This precludes the Court from adjudicating and making a decision about the applicability 75
of a State's national law to a particular factual situation related to the relevance or admissibility of evidence. The Court is not to rule on the validity of a decision of a national court, nor to make a decision as to whether or how a national law might apply. These are

[162] 10 Dec. 1984, *ILM* 1027 (1984).

matters of domestic jurisdiction within the sovereignty of the particular State. The Court is to be guided by its own applicable law, as set out in article 21, and the provisions of article 69. It is to apply its law, and not the domestic law, in deciding on the relevance and admissibility of evidence[163].

76 Nevertheless, given the negotiation history, there is some support that, while the Court may not rule on the application of a State's national law as one of its legal functions, compliance or non-compliance with such law may be treated as a factual matter if relevant to the admissibility or weight of the evidence. Compliance or non-compliance with national law gives some additional factual context. However, it will be difficult for the Court to consider the issue of compliance or non-compliance if this matter is contested, as this would necessitate an adjudication by the Court which is specifically prohibited by paragraph 8.

[163] This is essentially how the ICTY proceeded in *Prosecutorv. Delalić, Mucić, Delić and Landzo*, IT-96-21-T, Judgement, 16 Nov. 1998, para. 63, and *id.*, Decision on Zdravko Mucić's motion for the exclusion of evidence, 2 Sep. 1997, paras. 48–53.



# Article 70
## Offences against the administration of justice*

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
   (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
   (b) Presenting evidence that the party knows is false or forged;
   (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
   (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
   (e) Retaliating against an official of the Court on account of duties performed by that or another official;
   (f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.
2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.
3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.
4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;
   (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Content



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