Comparing the Rules of Evidence Applicable Before the ICTY, ICTR and the ICC
- Meistararitgerð til Mag. jur. prófs í lögfræði -

HÁSKÓLI ÍSLANDS

Umsjónarkennari: Pétur Dam Leifsson Dósent
Lagadeild Háskóla Íslands
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Preface

This subject of this thesis started to form in my mind while attending a class in “International Criminal Law” in the Catholic University of Leuven. There the teacher Prof. Verbruggen told us about the Lubanga Dyilo case before the International Criminal Court, (ICC). This sparked my interest to learn more about the ICC and its establishment as the only permanent international criminal court in the world. As time went on I started to think more and more about the procedural aspect of the trials, especially with the news of deliberate delays caused by the accused Lubanga Dyilo. When looking into the establishment of the ICC, it became apparent that a substantial amount of its procedural law was based on legal instruments and jurisprudence from other international criminal courts, even back to the WWII Nuremberg and Tokyo trials. The ICC legal instruments were also based on the legal instruments and practice of the two truly international criminal courts of the UN, namely the International Criminal Tribunals for the former Yugoslavia and for Rwanda. After contemplating this approach for a while, I eventually settled on the comparison of rules of evidence before the ICTY, the ICTR and the ICC.

I would like to thank my advisor Pétur Dam Leifsson Associate Professor of Public International Law for his guidance and good advice.
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Introduction

After the end of the Cold War the world has seen the establishment of two *ad hoc criminal* Tribunals. In 1993 the International Criminal Tribunal for the former Yugoslavia (hereafter ICTY) and in 1994 the International Criminal Tribunal for Rwanda (hereafter ICTR) were established to prosecute for the international crimes that took place in the territories of former Yugoslavia and Rwanda. Yet these Tribunals were intended to be temporary and the need for a permanent international criminal court was evident. In 2002 the International Criminal Court (hereafter ICC) was established as a permanent establishment with a broad jurisdiction. The Statute and Rules of the *ad hoc* Tribunals and the Court take into account rules and traditions of the common law countries as well as civil law countries. The tribunals and the Court have adopted a predominately adversarial procedure, from the common law countries. At the same time the laws and traditions of the civil law countries contribute strong inquisitorial aspects, especially with the control that Judges are given over the scope of the rules of evidence and the non-technical admission of evidence, which goes against the traditional strict admission criteria in common law courts. Even though pure adversarial or inquisitorial systems hardly exist anymore it is still relevant to observe the rules through these respective traits as it is best to learn about something by studying its origin. It must be observed that many changes made in the Tribunals' Rules are due to the fact that they are temporary and the need to expedite the trial proceedings has been a major concern for those Tribunals. As adversarial trials generally take a long time as each piece of evidence is admitted during trial. Over the years the Tribunals (especially the ICTY) have incorporated even more inquisitorial aspects into its jurisprudence in order to expedite them, and the ICTY has essentially introduced a pre-trial dossier into its pre-trial proceedings.

The aim of this thesis is to compare Rules of Evidence as they are established for the two ad hoc Tribunals and the International Criminal Court and provide a comprehensive record as to the differences between those judicial organs. The rules of evidence are broadly similar in all three judicial organs, as the ICTR on its establishment adopted the Rules of Procedure and Evidence from the ICTY as they were at the time. The ICC drafters also incorporated many aspects of the ad hoc Tribunals' Rules. Rules on evidence cover an extensive part of the two ad hoc Tribunals' and the Court's legal texts and case-law. The scope of this thesis ranges from the pre-trial proceedings until the appeals stage. This thesis will start by providing the
proper context for the rules of evidence by describing briefly the establishment of the ICTY, ICTR and the ICC, their jurisdiction and how their rules of evidence function generally.

Chapter two explains the pre-trial proceedings that take place after the confirmation of charges of the accused. (The investigations stage, which takes place before these pre-trial proceedings is outside the scope of this thesis.) The pre-trial proceedings are important for the following trial as it shapes the case ahead and this is especially the case with the ICTY as it has extensive powers in that respect.

Chapter three discusses disclosure of evidence which involves the obligation for disclosure of the Prosecutor and the Defence and the different rules that apply to each party. Chapter three also addresses disclosure of sensitive information, for example for the sake of protection of witnesses and national security interest of a sovereign state.

Chapter four describes general rules on evidence, namely rules on admission of evidence, rules that exclude the admissibility of evidence and further rules that apply. This chapter further deals with witnesses, their oral or written testimony, as well as the special rules that apply to expert witnesses.

Chapter five deals with judicial notice of facts of common knowledge, as well as judicial notice of adjudicated facts or documents from other proceedings.
1 Contemporary international criminal courts and tribunals

1.1 The International Criminal Tribunal for the former Yugoslavia (ICTY)

A devastating war between nations, ethnicities and neighbours was waged in the territory of the former Yugoslavia, and violations of international humanitarian law were countless and horrific. The United Nations Security Council followed closely the events in the Balkans and adopted UN's Security's Council Resolution 808 (1993) where it was decided according to paragraph 1 to establish an:

international tribunal […] for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.¹

In paragraph 2 of the same resolution the UN Secretary-General is asked to make

a report on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision contained in paragraph 1 above, taking into account suggestions put forward in this regard by Member States;²

When submitting his report pursuant to paragraph 2 above, the Secretary-General recommended that the tribunal would not be a treaty based organ, since that would take too much time and rather that the legal basis for it could be found in Chapter VII of the UN Charter. It would be a subsidiary organ of the Security Council (hereafter SC) permitted by Article 29 of the UN Charter.³ The Secretary General's (hereafter SG) report contained a draft for the statute of the ICTY and commentary, this was approved by the Security Council in resolution 827 (1993) which formally established the ICTY on 25 May 1993.⁴ „This date marked the beginning of the end of impunity for war crimes in the former Yugoslavia. “⁵

As mentioned above the SC in that resolution approved the SG's report and then adopted the statute proposed there.⁶ It can be held that the ICTY was the first international criminal

⁴ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993 (S/25704), chpt. II-VII.
⁵ „Establishment“, http://www.icty.org/sid/319
tribunal established. It is debated whether the Nuremberg and Tokyo trials can be considered truly international in character, as mainly only the allies in WWII took part in the establishment and procedure of the trials, and prosecuted Germans and Japanese. The Nuremberg and Tokyo trials certainly laid down groundwork for other international criminal courts to build on. It is also the first criminal tribunal established by the UN and special for the fact that the SC used Chapter VII of the UN Charter to create it.\(^7\)

To sum up, the ICTY was established using Chapter VII of the UN Charter due to the horrific war that raged in the territory of the former Yugoslavia. Chapter VII was used to establish it quickly without undertaking a multilateral treaty. The ICTY is the first international criminal court established by the UN and the first since the Nuremberg and Tokyo trials.

1.1.1 Jurisdiction of the ICTY

According to Article 1 of the ICTY Statute the Tribunal has the authority “to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 [...]”. Its territorial jurisdiction ranges over the territory of the former Yugoslavia and its temporal jurisdiction from the 1 January 1991, according to Article 8. As to the subject matter jurisdiction, the Tribunal can prosecute for grave breaches of the 1949 Geneva Conventions (according to Article 2 of the Statute), violations of the laws or customs of war (according to Article 3), Genocide (in Article 4) or crimes against humanity (in Article 5).

The ICTY has jurisdiction over natural persons according to Article 6 and prosecutes individuals responsible for violations of international humanitarian law as stated above. The persons are to be held individually responsible for their crimes according to Article 7. Therefore, the Tribunal does not have jurisdiction over legal subjects such as companies, political organisations and states.\(^8\)

The ICTY has concurrent jurisdiction with national courts. The Security Council decided not to exclude the national courts from exercising their jurisdiction with national law.\(^9\) The ICTY does still have primacy towards the national courts according to Article 9, par. 2 of the

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\(^8\) “Establishment”, http://www.icty.org/sid/319

\(^9\) “Mandate and Jurisdiction, http://www.icty.org/sid/320

Statute. This as well as Article 10 of the ICTY Statute on the principle of *non-bis-in-idem* work together in order to ensure that individuals are prosecuted for their crimes. But not twice unless the national courts held “mock-trials” for criminals in order to escape the International Tribunal or the suspects were only tried for an ordinary crime instead of a crime that fell under the ICTY Tribunal's Statute, according to Article 10 para. 2(a)-(b).

To sum up, the ICTY has territorial jurisdiction in the territory of the former Yugoslavia and temporal jurisdiction after 1 January 1991. The ICTY may exercise its jurisdiction over any natural person responsible for genocide, grave breaches under the Geneva conventions, or crimes against humanity. The ICTY has concurrent jurisdiction with national courts and the principle of *non-bis-in-idem* is applicable unless mock-trials were held or the suspect was not charged with an international crime.

1.1.2 **Rules of Procedure and Evidence before the ICTY**

The ICTY's *Rules of Procedure and Evidence* were created by its judges according to Article 15 of the ICTY statute, which reads as follows:

> The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

This approach was recommended by the Secretary-General in his abovementioned Report.\(^\text{10}\) The Rules were adopted within a very short period of time with the first general debate on concepts to be used beginning in November 1993 and then its adoption took place at the end of the second session in February 1994. The judges worked on the Rules amongst themselves with the assistance of members of the Office of Legal Affairs of the United Nations Secretariat, also based on proposals from States and some Non-Governmental Organizations, (NGO's).\(^\text{11}\) At the time, no suspects were in the Tribunal's custody and therefore they could focus on creating the procedural basis needed for future trials.\(^\text{12}\) In its Statute the Tribunal stipulates that certain rules shall be found in its Rules of Procedure and Evidence, for example in Article 22 where the provision states that in its Rules it shall have protection measures for victims and witnesses and in Article 20 (4) on when to have closed hearings.

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\(^\text{10}\) *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993 (S/25704).*


It has been debated whether the ICTY should function as an adversarial (i.e. bound to the case as the parties lay it out) or inquisitorial court (i.e. the Judge reigns over the case). In its annual report from 1994 the ICTY states that the Tribunal, based on experience from the Nuremberg and Tokyo trials, has adopted an adversarial system for its procedures. However the Tribunal has not opted for a pure adversarial system and has several elements taken from the inquisitorial system to ensure a fair and expeditious trial, as well as due consideration for its special status as an international criminal tribunal. Like the Nuremberg and Tokyo trials the Tribunal has „no technical rules for the admissibility of evidence.‖¹³ For instance in Rule 89, of the Rules of Procedure and Evidence, it is for the Chamber to decide whether certain evidence will be admissible and according to Rule 98 the Trial Chamber may order either party to produce additional evidence and may proprio motu summon witnesses.¹⁴ Both these examples contradict a pure adversarial system where the judge acts almost only as an arbitrator for the parties and there are several technical rules for evidence in existence for the parties to follow. Later changes to the Rules of Procedure and Evidence mixed the system even more by adopting more inquisitorial aspects, especially with the purpose of expediting the trials.¹⁵

One of the drawbacks with the ICTY regarding its Rules of Procedure and Evidence is that they are amended very frequently. The ICTY Judges may adopt amendments to the Rules when at least ten permanent Judges agree at a plenary meeting, otherwise unanimous agreements is required, according to Rule 6. During the 15 years since the Rules were adopted they have been amended over 40 times, sometimes with a very short time interval between the changes. The ICTY was in essence the first of its kind and understandably had some procedural problems to work out that usually are only discoverable in actual practice. Yet there must remain a certain degree of consistency and the parties must within reasonable limit be able to foresee the procedures used throughout the trial at the early stages of it.

To sum up, the Rules of Procedure and Evidence were adopted by the ICTY Judges and can be amended by the Judges. This has lead to a great number of amendments to the ICTY Rules which is unfortunate, but probably due to it being essentially the first of its kind. The

ICTY opted for a predominately adversarial system based on the experiences of the WWII trials. Yet, there are some strong inquisitorial aspects in order to expedite trials, especially regarding rules of evidence.

1.1.3 Completion Strategy of the ICTY

The ICTY was intended to be a temporary institution. At the time of its establishment, the national judicial systems in the former Yugoslavia were neither able nor willing to prosecute consistently serious violations of international humanitarian law committed in that area after 1991. From 2003 the national courts started to show more competence in their ability to handle such grave crimes. For that reason the Tribunal judges drew up a plan on the so-called Completion Strategy, which was approved by the Security Council in its resolutions 1503 (2003) and 1534 (2004), where the SC asked the Tribunal to submit such Completion Strategy reports every six months. These initiatives were made in the view of letting the national courts handle the prosecution of the bulk of less important cases and assist the national courts in repairing and strengthening their judicial system. The first deadline aimed at finishing all investigations by 2004, which was successfully met, while other deadlines have been pushed back since some late arrests were made and those cases are immensely complex. The current estimate as of November 2009 is now that five trials will be concluded in 2010, while three trials will continue until early 2011, and the Karadzic case is expected to finish in 2012. Appellate work should be mostly completed 2013, with the Karadzic case expected to finish early 2014. This estimate will be amended, if the two fugitives Rtako Mladic and Goran Hadzic are apprehended. If Mladic is apprehended early enough his case will be rejoined with the Karadzic case.

To sum up, the ICTY was intended to be temporary until the national judicial system was able and willing to prosecute for serious violations of international humanitarian law. In 2003 when the national courts started to show more competence a completion strategy was drawn up. This completion strategy is updated every six months and now the ICTY expects to finish

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Letter dated 21 May 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, para. 4.
Letter dated 12 November 2009 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, para. 3-4, 21-22 and Enclosure VIII.
all cases with appeals in early 2014. This could change if the two remaining fugitives are caught.

1.2 The International Criminal Tribunal for Rwanda (ICTR)
The world watched in horror as thousands upon thousands of Rwandan people, mainly of one ethnic group the Tutsi, were massacred in 1994 by their fellow countrymen namely Hutu extremists. The Rwandan people felt abandoned by the world and the inability of the few international peacekeepers meant to shield them. Perhaps in order to begin to heal the country devastated by this predominately internal conflict and win back some of the reputation lost for international organizations, the UN SC decided to establish another ad hoc Tribunal, this time for Rwanda. The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, (hereafter ICTR), was formally created with Security-Council resolution 955 on November 8 1994, and annexed to resolution 955 was the Statute for the Tribunal. The ICTR made full use of the ICTY’s experience and was based largely on it. The ICTR's Statute was similar to the ICTY Statute with some differences to account for the mostly internal and temporary aspects of the conflict in Rwanda. The two Tribunals ICTR and ICTY even shared Prosecutors, as mandated in the then Article 15 (3) of the ICTR Statute, while in SC Resolution 1503 (2003) this was changed and the UN Secretary General was asked to appoint a new Prosecutor for ICTR. The Tribunals also de facto share Appeals Chambers.

Like the ICTY, the ICTR was created under Chapter VII of the UN Charter. On two separate occasions the Security Council found that the situation in Rwanda constituted a threat to peace and security in the region which led to use of Chapter VII, as well as a request from Rwanda for a special court was at hand. The ICTR is also, like the ICTY, a subsidiary organ of the Security Council under Article 29 of the UN Charter.

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21 William A. Schabas: The UN International Criminal Tribunals, p. 4.
23 Ibid., para. 8.
To sum up, the ICTR was created due to a horrific massacre in Rwanda. As the ICTY, the ICTR was created under Chapter VII of the UN Charter and both Tribunals are subsidiary organs of the UN Security Council.

1.2.1 Jurisdiction and competence of the ICTR

Article 1 of the ICTR Statute outlines the competence of the Tribunal. The jurisdiction is limited to the power to prosecute persons responsible for serious violations of international humanitarian law, that were committed in Rwanda and Rwandan citizens for serious violations in neighbouring states. Accordingly, the Tribunal does not have the competence to prosecute non-citizens if the violations happened outside of Rwanda. Article 1 also sets the time-frame for these serious violations, as only perpetrators of such crimes committed between 1 January 1994 and 31 December 1994 can be brought before the Tribunal. The serious violations of international humanitarian law that the Tribunal has jurisdiction over are: Genocide (in Article 2 of its Statute), Crimes against Humanity (in Article 3) and Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (in Article 4 of the Statute).

To sum up, the ICTR has territorial jurisdiction over crimes committed in Rwanda, nationality jurisdiction and temporal from 1 January till 31 December 1994. It can prosecute for genocide, crimes against humanity, and specific violations of the Geneva Conventions.

1.2.2 Rules of Procedure and Evidence before the ICTR

The Rules of Procedure and Evidence (hereafter Rules) for the ICTR were based on the ICTY’s Rules at that time, pursuant to Article 14 of the ICTR Statute, and were almost identical. The Rules were adopted at the first plenary session of the Tribunal and entered into force on 29 June 1995. Since then, the two sets of Rules have drifted somewhat apart, due to the fact that the Judges in each Tribunal have the power to amend the Rules, see Rule 6 of the ICTR Rules. At the ICTR, same as the ICTY, at least ten Judges have to approve an amendment for it to enter into force at a plenary meetings or unanimously.24 The ICTR Rules have been amended 17 times since they originally entered into force.25

24 Roelof Haveman: “The Context of the Law”, p. 15

ICTR Rule 6 is as follows: (A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted, if agreed to by not less than ten Judges at a Plenary Meeting of the Tribunal convened with notice of the proposal addressed to all Judges. (B) An amendment of the Rules may be adopted otherwise than as stipulated in Sub-Rule (A) above; provided it is approved unanimously by any appropriate means either done in writing or confirmed in writing. (C) An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.
To sum up, the ICTR Rules of Procedure and evidence were adopted based on the ICTY Rules at that time. Over time, the ICTR Rules have deviated from the ICTY Rules, as both Tribunals' Judges can amend their Rules independently.

1.2.3 Completion Strategy of the ICTR
The first Completion Strategy for the ICTR was introduced in 2003, following Security Council's resolution 1503 (2003) which called upon the two ad hoc Tribunals to do everything in their power to complete all investigations by 2004, all first instance trials by 2008 and finish all work by 2010. A new revised Completion Strategy was made by the ICTR in May 2009 which envisioned the evidence phase in all first instance trials bar one, (the Karamera trial), are expected to be finalized before the end of 2009. According to the new Completion Strategy the change is mainly due to several new cases brought to trial recently and the denial of referrals to national courts. Now the ICTR expects to finish most first instance trials in 2009 which some possible spill-over into 2010 because of delays and the Karemera trial.

To sum up, the ICTR, as the ICTY is intended to be temporary. A completion strategy was drawn up in 2003. The latest estimate is to finish all first instance cases in 2010.

1.3 The International Criminal Court (ICC)
The idea of a permanent international criminal court has been resurfacing over the years since the aftermath of World War I, until the International Criminal Court finally came into existence with the ratification of the Rome Statute on 1 July 2002. In the aftermath of World War II the Nuremberg and Tokyo Trials were held by the allies and as stated above even if it is debatable whether they were truly international courts, they are an important predecessor to the present international criminal courts. Nevertheless many lessons were learned from the Nuremberg and Tokyo Charters, these first semi-international tribunals were mainly adversarial in nature and the Charters' contained few provisions, but most relevant to this paper is the non-technical approach to the admission of evidence which later influenced both

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29 Ibid. para. 69.
30 Ibid. para. 69-74.
31 Antionio Cassese; Paolo Gaeta and John R.W.D. Jones: The Rome Statute of the International Criminal Court, Volume 1, p. 4-5.
the ad hoc International Criminal Tribunals Statutes and Rules and the ICC instruments.32 These military tribunals in essence triggered the UN's desire for a permanent international criminal institution and led to work in the 1940s and 50s by the International Law Commission (hereafter ILC) on drafting a “Code of Crimes Against the Peace and Security of Mankind” which was not finished for several decades and to formulate the so-called “Nuremberg Principles”.33 During that time the UN also appointed a special committee to draft a statute for an international criminal court which it concluded in 1952 and then another committee reviewed it “in light of comments by Member States” and reported back to the UN General Assembly in 1954.34 Despite of this, the work was suspended inter alia because definition of aggression was disputed and the world was already on its way toward the Cold War with dividing factions, which effectively stagnated the powers of the UN.35 Almost nothing happened in the quest to establish a permanent international criminal court for several decades, except a definition of the crime of aggression was adopted by the UN General Assembly in 1974.36 The work on the so-called Code of Crimes resumed with the ILC upon request of the UN General Assembly in 1981, and the draft of the Code became more international in character when the General Assembly requested the special rapporteur working on it to consider an international court in the context of the Code in 1989. The so-called Code of Crimes was ultimately finalized in 1996.37 Meanwhile the General Assembly decided in 1993 to give priority to working on a draft statute for an international criminal court. The ILC was in charge of the project and submitted its final Draft Statute to the General Assembly in 1994 with a recommendation for an international conference.38 Most State delegates in the General Assembly expressed support for an international criminal court but they could not agree on when to hold such a conference and debated for instance on the jurisdiction of the potential Court and the relationship it would have with the Security

34 William A. Schabas: An Introduction to the International Criminal Court, p. 9.
36 William A. Schabas: An Introduction to the International Criminal Court, p. 9.
38 Ibid. note 36, p. 10. Antonio Cassese; Paolo Gaeta and John R.W.D. Jones: The Rome Statute of the International Criminal Court, Volume 1, p. 36.
Council. In the end the General Assembly created a *ad hoc* Committee to “review the major substantive and administrative issues arising out of the Draft Statute” and on the basis of the review it was supposed to make arrangements for a diplomatic conference.\(^{39}\) Even though the *ad hoc* Committee did not succeed in leading to such a conference it changed some important details in the ILC Draft Statute and had great affect as it mixed together the ILC Draft Statute and the Code of Crimes as to make a Statute with details on each crime.\(^{40}\) Then the General Assembly decided to convene a Preparatory Committee (hereafter PrepCom) in 1996 comprised of representatives of potential Member States, NGO's and other International Organizations, in essence with the same mandate as the *ad hoc* Committee, that was to prepare a widely acceptable text of a convention for an international criminal court, which could be submitted to an international conference.\(^{41}\) The PrepCom made considerable progress in bringing the various proposals of amendments together and in the end made the so-called Zutphen draft, which was then reworked and submitted to the Diplomatic Conference as a final draft, which was substantially different from the ILC Draft Statute. In the end a Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court began in Rome on 15 June 1998. The Diplomatic Conference faced difficult issues regarding the Draft Statute and the powers of the Court but in the end, albeit without consensus, adopted the Rome Statute of the International Criminal Court on 17 July 1998. The Conference also adopted a so-called “Final Act,\(^{67}\) providing for the establishment of a Preparatory Commission by the United Nations General Assembly.”. This Preparatory Commission was expected to draft the Rules of Procedure and Evidence for the ICC and also to draft up the Elements of Crimes, and met its deadline for that on 30 June 2000.\(^{42}\) The Rome Statute (hereafter ICC Statute) required ratifications from 60 countries in order to enter into force and that happened on 1 July 2002.\(^{43}\)

To sum up, the International Law Commission (ILC) drafted a statute for an international criminal court based somewhat on the experiences of the WWII trials. The UN convened many committees in order to work on that draft statute and a code of crimes. The two latter instruments got mixed together and eventually substantial changes were made to the original


\(^{40}\) William A. Schabas: *An Introduction to the International Criminal Court*, p. 16.

\(^{41}\) Ibid. p. 17; Antionio Cassese; Paolo Gaeta and John R.W.D. Jones: *The Rome Statute of the International Criminal Court*, Volume 1, p. 46

\(^{42}\) William A. Schabas: *An Introduction to the International Criminal Court*, p. 17-21.

\(^{43}\) Ibid. p. 22.

1.3.1 Jurisdiction of the ICC

The ICC has competence to exercise jurisdiction over persons for the most serious crimes of international concern according to Article 1 of the ICC Statute. Those crimes are listed in Article 5 para. 1 as the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, that is once the definition of a crime of aggression has been adopted according to Article 5, para. 2. The elements of the crimes are further prescribed in detail in Articles 6, 7 and 8 respectively, except for the crime of aggression, while Article 9 states that the Elements of Crimes shall assist the Court in its interpretation and application of those Articles.

The ICC has jurisdiction *ratione temporis* only of crimes committed after 1 July 2002 as the Rome Statute entered into force at that time, pursuant to Article 11, para.1 of the ICC Statute. The temporal jurisdiction is therefore not retroactive, and the Court may not deviate from it. In respect of States, which become a party to the Statute after it entered into force, then the time at which the Statute entered into force for that State limits the jurisdiction, unless it accepts otherwise, pursuant to Article 11, para. 2. All States which become parties to the ICC Statute accept the jurisdiction of the Court over crimes under Article 5, pursuant to Article 12 para. 1. This states that the ICC can exercise its jurisdiction over individuals for crimes committed in the territory of State Parties to the Statute, while the nationality of the offender does not matter in such circumstances, pursuant to Article 12, para. 2(a). The Court can also exercise jurisdiction over nationals of States Parties to the Statute when he or she commits a crime that falls under the jurisdiction of the Court even in a non-member state pursuant to Article 12, para. 2 (b). Other non-party States can also accept *ad hoc* jurisdiction for a crime according to Article 12, para. 3. In order for the ICC to exercise its jurisdiction in situations in which one or more crimes under Article 5 have been committed pursuant to Article 13, a State Party under Article 14; or the UN Security Council acting under Chapter VII of the UN Charter has to refer the situation to the Prosecutor or the Prosecutor *proprio motu* initiates an investigation under Article 15.

Thus, to sum up, jurisdiction over persons can be based on the territorial principle, nationality principle, consent of a state or by a decision of the Security Council. All Member States of the Rome Statute are subject to the jurisdiction of the ICC. Unlike that of the ICTY
and ICTR, the ICC temporal jurisdiction is not retroactive and it can only prosecute for crimes after 1 July 2002.

1.3.2 The ICC Statute and Rules of Procedure and Evidence

The ICC Statute has predominantly an adversarial approach, albeit with strong inquisitorial aspects, especially as relates to evidence as is the case with the ICTY and ICTR.\(^{44}\) Reasons for this approach are in part historical and date back to the Nuremberg and Tokyo Trials which adopted a non-technical approach to the admission of evidence despite being prominently adversarial in nature. Also contributing are the lessons learnt from the ICTY, which has over the years gradually adopted more and more inquisitorial aspects as for example the control of Judges on the pre-trial proceedings.\(^{45}\) The ICC Statute can be seen as a compromise between countries with an adversarial common law approach and those with civil law tradition. In the drafting stages many delegates from different legal systems came together and tried to work out a manageable consensus of disciplines and traditions that most countries would find acceptable, in essence an international system of procedural law. As could be expected this resulted in a compromise, a mixed system of adversarial and inquisitorial processes.\(^{46}\)

The ICC Statute and Rules are thought to go further to use inquisitorial aspects than the ICTY and ICTR instruments.\(^{47}\) The Rules of Procedure and Evidence (hereafter Rules) as mentioned above were drafted by a Preparatory Commission which finished its work on 30 June 2000. the Rules were adopted without change by the Assembly of State Parties in its first session during 3-10 September 2002.\(^{48}\) Unlike the liberal approach of the ICTY and ICTR, the ICC has several provisions on evidence predetermined in its Statute mainly in Article 69, which refers to the Rules and is cross-referenced in the Rules as well. It is made clear in Article 51 para. 5 in the ICC Statute that the Statute prevails over the Rules in cases of conflict and that all amendments to the Rules shall be consistent with the Statute pursuant to Article 51 para. 4. Thus the Rules are put on a step beneath the

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\(^{44}\) William A. Schabas: *An Introduction to the International Criminal Court*, p. 237.


\(^{47}\) William A. Schabas: *An Introduction to the International Criminal Court*, p. 238.

\(^{48}\) The Rules were entered into force after the members of the Assembly of State Parties adopted it with a two-thirds majority in accordance with Article 51, para. 1 of the ICC Statute.

William A. Schabas: *An Introduction to the International Criminal Court*, p. 23.
Statute and the Judges will have to interpret the Rules in light of the Statute being a superior instrument.

The ICC has decided to take a different route compared to the somewhat relaxed attitude regarding amendments of the Rules by the Judges of the ICTY and ICTR as described above. The ICC requires that amendments may be proposed by any State Party, or the Judges with absolute majority, or by the Prosecutor and the amendments will only enter into force if adopted “by a two-thirds majority of the members of the Assembly of States Parties”, according to Article 51 para. 2 of the ICC Statute. This stringent approach could of course become problematic when unforeseen situations arise and therefore the authors of the Statute have wisely included a temporary exception which allows the Judges by two-thirds majority, when “the Rules do not provide for a specific situation”, to “draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.”, pursuant to Article 51 para. 3. It is foreseeable that the ICC Rules are therefore somewhat carved in stone and will not change much over the years. This is a result of the nature of the Court being a permanent and established by means of a multi-lateral treaty between nations which came together and formed an agreement as to the content of the Statute and the Rules.

In addition to the ICC Statute and Rules, the Judges have also adopted Regulations of the Court on various matters required for the routine functioning of the Court, after consulting with the Prosecutor and the Registrar pursuant to Article 52 of the ICC Statute. These Regulations as stated in Regulation 1 para. 1 are subject to the Statute and Rules. These Regulations among other things clarify further the proceedings and elaborate on what several provisions in the Statute and Rules actually require along with technical details on the functioning of the Court.

To sum up, the ICC drafters adopted as the ad hoc ICTY/R Tribunals a predominately adversarial system, although with strong inquisitorial influences on the rules of evidence. The ICC legal instruments as regards rules on evidence are thus the ICC Statute, the ICC Rules of Procedure and Evidence and the Regulations of the Court. The ICC Judges have nearly no “legislative powers”, contrary to the ICTY/R, which could be to the detriment of future trials. The provisional amendments the Judges are afforded are only temporary and could be rejected or changed at the next meeting of the Assembly of Parties. Any amendments to the aforementioned legal instruments have to go through several channels and so the legal instruments are somewhat carved in stone.
2 The Pre-trial Stage

The pre-trial procedures of the ICTY and ICTR have been amended over the years in order to expedite the whole trial and emphasize the issues that need to be litigated further at the trial itself. An important part to the scheme of expediting the trial is to obligate the parties to communicate and find out which parts of issues and/or evidence they agree on and therefore do not need to be tried. The pre-trial proceedings at the ICTY and the ICTR include as shown here below, the obligations for the Prosecutors to file pre-trial briefs, as well as a detailed witness lists. The Defence at the ICTY has similar obligations to that of the Prosecutor, and the ICTR Defence must also fulfil such obligations if so ordered by the ICTR Chamber. The Chambers of both the ICTY and ICTR have the power inter alia to control the time allotted to the parties for the examination-in-chief of some witnesses and to reduce the number of witnesses. In essence the pre-trial proceedings are sculpting and clarifying the case for the actual trial part.

The ICC has a Pre-Trial Chamber, but its role is only active until confirmation of the charges against the accused and it is used primarily to have some control over the Prosecutor's investigation. The scope of this paper is limited to comparing the pre-trial proceedings taking place after the confirmation of the charges and initial appearance of the accused, and excludes the investigation stage, so the ICC Pre-Trial Chamber, will not be discussed further in this essay. The ICC has a Status Conference which resembles the ICTY and ICTR Pre-Trial and Pre-Defence Conferences, more than the similarly named status conferences held at the Tribunals. The most important feature in the ICC pre-trial proceedings involves the orders that may be issued at the Status Conference.

2.1 Pre-trial or designated Judge

The Chambers or Judges at the ICTY, the ICTR and the ICC, take an active role in the pre-trial proceedings in order to shape and clarify the case before the trial begins. The purpose of this sub-chapter is to show to what extent the Judges or Chambers can control the case.

The pre-trial Judge under the ICTY Rules, or the designated Judge under the ICTR Rules, is assigned to handle numerous responsibilities in the pre-trial phase. For example this Judge oversees that the parties file pre-trial briefs and controls the time allotted to the parties for

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49 See ICC Statute Articles 57 and 61 para. 11.
questioning their witnesses in the trial. Having a pre-trial Judge to streamline the case and the evidence beforehand is viewed as mainly inquisitorial in nature. The notion of the pre-trial Judge itself has traditionally been traced back to civil law systems, and a classic example is the *le juge d’instruction* in French law.\(^{50}\)

According to ICTY Rule 65 *ter* (A) a pre-trial Judge shall be designated “no later than seven days after the initial appearance of the accused” and is responsible for the pre-trial proceedings. The ICTR has less extensive rules regarding the Judge than the ICTY, as shows in ICTR Rule 73 *bis* (B), where the designated Judge can be designated at the Pre-Trial Conference, which should be held before the trial starts. The ICTR Trial Chamber is mentioned interchangeably throughout the ICTR Rules as with the same powers as the designated Judge. The Chamber thus does not need to designate a Judge at all and instead the whole Chamber can perform all the tasks of the pre-trial procedures found in the ICTR Rules.

The ICC Rules do not stipulate the appointment of a pre-trial or designated Judge. Instead a Trial Chamber shall be assigned to the case once the charges have been confirmed under ICC Statute Article 61, para.11. The ICC Trial Chamber has more discretion, than the pre-trial ICTY and designated ICTR Judges, on how to the pre-trial proceedings shall be conducted, and in which manner the evidence shall be presented or limited. This is especially obvious in respect to witness testimony, as there are only vague guidelines in the ICC Statute and Regulations as to how the pre-trial proceedings should be conducted. This is discussed in Article 64 para. 6 of the ICC Statute, where the Trial Chamber may:

\begin{itemize}
  \item[(b)] Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute; 
  \item[(c)] Provide for the protection of confidential information; 
  \item[(d)] Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties; 
  \item[(e)] Provide for the protection of the accused, witnesses and victims; and 
  \item[(f)] Rule on any other relevant matters.
\end{itemize}

The ICC Trial Chamber may thus perform the duties attributed to the pre-trial Judge or designated Judge of the ICTY and ICTR and even go further in its orders to produce evidence and require witnesses to attend. ICC Regulation 54 of the Court more specifically states some guidelines on what materials the Chamber may order from the parties but the list is not exhaustive. Regulation 54 is as follows:

\begin{itemize}
\end{itemize}

(a) The length and content of legal arguments and the opening and closing statements;
(b) A summary of the evidence the participants intend to rely on;

c) The length of the evidence to be relied on;
(d) The length of questioning of the witnesses;

e) The number and identity (including any pseudonym) of the witnesses to be called;

(f) The production and disclosure of the statements of the witnesses on which the participants propose to rely;

(g) The number of documents as referred to in article 69, paragraph 2, or exhibits to be introduced together with their length and size;

(h) The issues the participants propose to raise during the trial;

(i) The extent to which a participant can rely on recorded evidence, including the transcripts and the audio- and video-record of evidence previously given;

(j) The presentation of evidence in summary form;

(k) The extent to which evidence is to be given by an audio- or video-link;

(l) The disclosure of evidence;

(m) The joint or separate instruction by the participants of expert witnesses;

(n) Evidence to be introduced under rule 69 as regards agreed facts;

(o) The conditions under which victims shall participate in the proceedings;

(p) The defences, if any, to be advanced by the accused.

Like with the ICTY and ICTR, the ICC Trial Chamber uses status conferences to confer with the participants of the case in order to facilitate expeditious proceedings, and can call them for that purpose as often as it considers necessary under Rule 132 para. 2.

At the ICTY, the pre-trial Judge is not strictly independent in his role, but adheres to the authority and supervision of the Trial Chamber assigned to the case. The Trial Chamber may also proprio motu exercise any function of the pre-trial Judge. The pre-trial Judge's job is to coordinate communications between the parties and to see to that the trial is not unduly delayed, besides having the authority to do whatever is necessary to have the case prepared for a fair and expeditious trial according to Rule 65 ter (B). To achieve this role, the pre-trial Judge supervises the completion of pre-trial briefs, the disclosure of evidence between the

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51 ICTY Rule 65 ter (M).
parties and the pre-trial conference as well as the pre-defence conference.\textsuperscript{52} The pre-trial Judge shall then create a work plan for the parties indicating the obligations they have to fulfil, and the deadlines for each part according to Rule 65 ter (i) and (ii). If the pre-trial Judge is assisted by a Senior Legal Officer, that Officer oversees the implementation of the work plan and reports back to the Judge on the progress of the discussions with the parties, and especially if any potential difficulty comes up and then communicates to the parties the pre-trial Judge's observations or decisions according to Rule 65 ter (D)(i) and (iii). The pre-trial Judge shall order the parties to discuss issues concerning the preparation of the case so the parties can fulfil their obligations to file in due time their witness lists and trial-briefs filed by the Prosecutor pre-trial and the Defence mid-trial, see Rule 65 ter (D)(iv).\textsuperscript{53}

The ICTY pre-trial Judge is expected to record in particular the points the parties agree or disagree on, and to be able to do so, the Judge can order the parties to file written submission either with him/her or the Trial Chamber, see Rule 65 ter (H). This power of the pre-trial Judge and the admissions of the parties so early in the proceedings can severely reduce the need for judicial notice under Rule 94, which will be discussed further later on. The pre-trial Judge has to inform the assigned Chamber on a regular basis regarding the pre-trial proceedings and in particular on which issues are still in dispute and can refer them to the Chamber.\textsuperscript{54} One of the last duties of the pre-trial Judge, after the Prosecutor has submitted his materials as Rule 65 ter (E) describes, is to submit a complete file which holds all the filings of the parties, transcripts from status conferences and minutes of meetings to the Chamber according to ICTY Rule 65 ter (L)(i). Then after the Defence has handed in its materials (under Rule 65 ter (G)) the pre-trial Judge shall submit another such file to the Chamber according to Rule 65 ter (L)(ii). The pre-trial Judge reports to the Trial Chamber if a party does not fulfil its pre-trial obligations and the Chamber then decides on the appropriate sanctions, which could include exclusion of testimonial or documentary evidence, according to Rule 65 ter (N).

To sum up, the most important pre-trial duties of the pre-trial Judge (ICTY), designated Judge (ICTR) or the ICC Trial Chamber roles are to see to it that the parties communicate amongst themselves either with or without the judicial staff. In order to do so the respective

\textsuperscript{52} See ICTY Rule 65 ter (C) and (D)(iv).
\textsuperscript{53} The parties can meet by themselves to fulfil their obligations, besides they can also meet separately or together with the Senior Legal Officer, while in meetings with the Senior Legal Officer the accused is not required to attend., according to ICTY Rule 65 ter (D)(v)-(vi).
\textsuperscript{54} ICTY Rule 65 ter (J).
Judges or Chambers can hold regular meetings to allow the parties to interact and the ICTY and ICTR Judges are to make a specific work plan for the parties. At the ICTY/R the Judge is expected to record agreements and points of disagreements between the parties, the ICC could also do the same. Only at the ICTY the pre-trial Judge shall submit a kind of pre-trial dossier with all the filings of the parties to the Trial Chamber. The ICC Trial Chamber at this stage holds a lot of discretion as to what materials it orders from the participants under Regulation 54 and how to control the proceedings. The ICC legal instruments and limited case law do not offer specific guidance as to the role of supervision by the Chamber before the trial commences. The ICTY and ICTR are more restricted by their Rules, which helps the pre-trial proceedings by making them more foreseeable.

2.2 Status conferences
The purpose of the pre-trial proceedings in all three courts is to get the parties to communicate and lay out the case at hand. Status conferences are one of the tools the courts have for that purpose.

Both the ICTY and ICTR use status conferences to organize exchange between parties and to ensure expeditious trial proceedings and trial preparation. The ICTY status conferences are to be held periodically, alongside the ICTY 65 ter meetings which are held more frequently and typically a few days before a status conference in order for the parties to prepare for it. The ICTY Rule 65 bis (A)(ii) states that the purpose of the status conference is also to review the status of the case and to allow the accused to raise issues including those regarding his hers mental and physical health. A difference between the ICTY and ICTR Rule 65 bis (A) is that at the ICTY the status conferences is obligatory and shall be called within 120 days after the initial appearance of the accused and periodically within 120 days since the last conference. The ICTR leaves it to the discretion of the Chamber whether to call a status conference and does not specify a time-limit. The obligation or discretion, with the ICTY and ICTR respectively, to convene a status conference lies in the hands of a Trial Chamber or Trial Chamber Judge according to ICTY /R Rule 65 bis (A).

The ICC Trial Chamber shall promptly after it has been assigned a case hold a status conference in order to set a date for the trial, according to Rule 132. The Trial Chamber may hold status conferences as often as it sees necessary in order to confer with parties and

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55 See ICTY Rule 65 bis (A)(i) and ICTR Rule 65 bis (A).
56 ICTY Manual on Developed Practices, 2009, p. 56-7
“facilitate the fair and expeditious conduct of the proceedings” according to Rule 132 para. 2. The ICC status conferences are much more like pre-trial conferences in the ICTY and ICTR Tribunals. At a status conference, the ICC Trial Chamber may issue an order on numerous issues regarding the presentation of evidence, number of witnesses, a summary of evidence, which the parties intend to rely on and so forth, under ICC Regulation 54. The ICC Chamber decides when it issues orders to the participants and may do so on a continuing basis to allow the parties to effectively prepare for trial. The ICC Court has almost full discretion to decide to let all participants in the case submit seemingly anything and the Rules do not mention specific parties, except where the accused is to rely on defences (i.e. defence of an alibi or any special defence) according to Regulation 54, specifically paragraph (p).

To sum up, status conferences are a tool for the pre-trial Judges and Chambers to organize communications between parties. At the ICTY status conferences are also a place to review the status of the case. Status conferences of the ICC are akin to that of the pre-trial conferences of the ad hoc Tribunals. As at the status conferences the ICC Chamber may order the parties to submit various materials, which are further discussed below.

2.3 Prosecutor's pre-trial obligations

The Prosecutor has to prove the case at hand and is the main investigator of all the courts and thus is responsible to seek the truth. Thus his/her submissions of materials should make the Trial Chamber more capable of understanding the entire case and allow the Defence to prepare its case.

The ICTY Rules dictate that after the existing preliminary motions have been disposed of, and upon the Senior Legal Officers report, the pre-trial Judge shall order the Prosecutor to file the final version of his/her pre-trial brief, a list of witnesses he/she intends to call and list of exhibits. The brief should be filed at a time-limit set by the pre-trial Judge or at the latest 6 weeks before the Pre-Trial Conference, according to Rule 65 ter (E). The Prosecutor's pre-trial brief is a detailed and fact-filled outline of his case and it must contain the following: on each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused. The brief helps the Trial Chamber to oversee the case and the Defence to prepare its case. In addition the pre-trial brief must contain “any admissions by the parties and a statement of

57 See Chapter 2.1.
58 ICTY Rule 65 ter (E)(i).
matters which are not in dispute; as well as a statement of contested matters of fact and law”.59 This is done so that the parties and the Trial Chamber can see what issues are relevant and still debated and which are agreed by all parties. It negates the need to bring additional proof for issues that are not in dispute or have been acknowledged by the parties, thereby saving time during the trial and streamlining it for the main issues.

The ICTR Rules place similar obligations as the ICTY upon the Prosecutor, but not until the Pre-Trial Conference is held, according to ICTR Rule 73 bis. The ICTR Prosecutor thus has to file a pre-trial brief, but the only guideline the Rules offer is that it should address the factual and legal issues. This is rather vague and can be interpreted in many ways, which is unfortunate as the purpose of these pre-trial proceedings is to expedite the trial. Due to the lack of guidelines the pre-trial briefs in some cases may lack the substance needed to achieve that purpose.60 The ICTR Prosecutor, like the ICTY Prosecutor, has to file “admissions by the parties and a statement of other matters not in dispute;” as well as “a statement of contested matters of fact and law”.61

ICC Rule 69 is not limited to the pre-trial proceedings and the parties can agree that if certain facts, documents or “expected testimony of a witness” or “other evidence is not contested” the Chamber may consider it proven. In exceptional cases the chamber may consider it to be in the interests of justice and especially the interests of victims, that further presentation of such facts takes place. According to Regulation 54 of the ICC Court, the Chamber may at a pre-trial status conference order a list of agreed evidence from the parties under sub-paragraph (n). ICC Rule 69 would then negate the need for further proof of evidence on that list, if the Chamber approves. Further more akin to the pre-trial briefs of the ICTY and ICTR Tribunals, the ICC parties may be ordered to submit a list of “issues the participants propose during trial” according to Regulation 54 (h) and a summary of evidence under sub-paragraph (b). The ICC Chamber under Regulation 54 may order on any issues in the interests of justice related to the proceedings. Effectively the ICC Chamber could thus order the parties to hand in the same materials as the parties of the ICTY and ICTR Tribunals are required to.

59 Ibid.
60 ICTR Rule 73 bis (B)(i).
61 ICTR Rule 73 bis (B)(ii) and (iii).
The Rules of both the ICTY and ICTR Tribunals also require the Prosecutor to file a list of witnesses which he/she intends to call. 62 This ICTY witness list according to Rule 65 ter (E)(ii) must have the following details:

a) the name or pseudonym of each witness; (b) a summary of the facts on which each witness will testify; (c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment; (d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count; (e) an indication of whether the witness will testify in person or pursuant to Rule 92 bis or Rule 92 quater by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and (f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor’s case.

The ICTR Prosecutor does not have to submit such a detailed list and simply has to submit the same information as found in subparagraphs (a)-(c) above, without the need to specify on what count each witness will testify, and finally the estimated time require for each witness.63

This information is necessary in order for the Defence to prepare its case and to effectively gather evidence to challenge a witness's statement or credibility. It is also imperative for the Chamber to have an oversight over the witnesses called and their expected testimony whether live or written. The witness list is also especially important as the Chambers of both the ICTY and ICTR Tribunals have the discretion to reduce the number of witnesses called and to limit the estimated time used for the examination-in-chief for some witnesses.64 The ICTY Chamber also has the power to refuse to admit any witness not on the amended witness list according to Rule 90(G).65 In essence the ICTY Rule regarding witness lists beforehand are not as specific as the ICTY one, but it seems to be sufficient to serve its purpose. The ICTR Chamber or the designated Judge may also order the Prosecutor to provide the Chamber with copies of written witness statements of each witness at the Pre-Trial Conference according to Rule 73 bis (B). The ICC Trial Chamber may also order participants to issue the number of witnesses to be called and their identities including pseudonym, as well as the production and disclosure of statements of witnesses the participants intend to rely on, prior recorded testimony and documents (under ICC Statute Article 69 para. 2), according to Regulation 54 (d-g)

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62 For the ICTY the Prosecutor has to file the witness list before the Pre-Trial Conference, while at the ICTR the deadline is before the trial and is to be determined at the Pre-Trial Conference.
63 ICTR Rule 73 bis (B)(iv) is as following: “(a) The name or pseudonym of each witness; (b) A summary of the facts on which each witness will testify; (c) The points in the indictment on which each witness will testify; and (d) The estimated length of time required for each witness”.
64 ICTY Rule 73 bis (B) and (C) and ICTR Rule 73 bis (C) and (D).
65 ICTY Rule 73 bis (B) and (C).
Finally the Prosecutors in both the ICTY and ICTR Tribunals have to file a list of exhibits (i.e. tangible evidence, documents, objects etc.), which he/she intends to offer at trial. Where possible that list should show whether the defence has any objections as to its authenticity, according to ICTY Rule 65 ter (E)(iii) and ICTR Rule 73 bis (B)(v). The ICTY Rule further states that the Prosecutor shall serve copies of the exhibits to the Defence. Whether the Defence objects to the authenticity of certain exhibits should arise during the pre-trial communications between the parties. The Rule has been interpreted in such a way that the exhibits should be filed and disclosed to the Defence without the need for invoking reciprocal disclosure obligations under ICTY Rule 66 and 68, as the Defence could hardly state whether it objects to the authenticity of an exhibit if it has not seen it.

To sum up, the Prosecutor at both the ICTY and ICTR Tribunals shall submit pre-trial briefs which includes at the ICTY a fact-filled outline of the case and at the ICTR a brief that addresses factual and legal issues. The ICTY/R Prosecutor also must file admissions by the parties, on issues that are not in dispute as well as those issues still disputed. The ICTY/R Prosecutor also has to file detailed witness lists, including what parts of the case the witness shall testify on and whether in oral or written form. The ICTY/R Prosecutor must file and disclose to the Defence lists of exhibits intended for use at the trial, and any objections the Defences' have to the authenticity of the items. The ICC may also under the guidelines of Regulation 54 order Prosecutor to submit the same materials as the ICTY/R. At this time it is not clear exactly how the ICC Chamber will interpret Regulation 54.

2.4 Defence obligations

The Defence obligations for pre-trial submissions are less extensive than the Prosecutor's and are at a later date, typically after the Prosecutor has already filed his/her materials.

The ICTY specifies that the pre-trial Judge shall order the Defence to file a pre-trial brief, after the Prosecutor submits the materials under Rule 65 ter (E), within a set time-limit or at least no later than three weeks before the Pre-Trial Conference. This brief shall address factual and legal issues and include a written statement which should state “(i) in general terms, the nature of the defence of the accused; (ii) the matters with which the accused takes issue in the Prosecutor’s pre-trial brief; and (iii) in the case of each such matter, the reason

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66 The ICTY Prosecutor must present this brief at latest before the pre-trial conference and the ICTR Prosecutor before the trial itself.
67 ICTY, Prosecutor v. Krajisnik et.al, Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65 ter, 66(B) and 67(C), IT-00-39 & 40-PT, 1 August 2001, para. 8.
why the accused takes issue with it.”, according to ICTY Rule 65 ter (F). This is an unusual rule as generally the Defence is not expected to reveal the nature of its case beforehand. One scholar theorizes that the purpose of this rule is simply to “avoid hearing a large quantity of evidence on a matter which is not at any rate under dispute”. At ICTY the Defence has to file this pre-trial brief but other obligations as stated below do not come into play until after the Prosecutor closes his/her case. The ICTR leaves it up to the discretion of the Trial Chamber or the designated Judge whether to order the defence at the Pre-Trial Conference “to file a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues, not later than seven days prior to the date set for trial.”, as stated in ICTR Rule 73 bis (F).

According to the ICTY Rules, after the close of the Prosecutor's case and before the defence's case commences, the Defence must also file a witness list with an identical criteria as the Prosecutor. This allows the Prosecutor time to prepare for cross-examination of the Defence's witnesses and ensure the equality of arms in that respect. The Defence also must at that time file a list of exhibits which is identical to the Prosecutor's obligation.

The ICTR Chamber, if a Pre-Defence Conference is held, may order the Defence to file the same materials as the Prosecutor except the Defence can not be ordered to file a pre-trial brief at that time. The ICTR Defence, if so ordered, has to hand in admissions by parties and statements of other matters not in dispute, a statement of contested matters of fact and law, detailed witness list and a list of exhibits according to Rule 73 ter (B). The Defence, under the same ICTR rule, may be also be ordered to provide the Chamber and the Prosecutor with copies of the written statements of each witness it intends to call.

The ICC Regulation 54 does not distinguish between parties and the Chamber may order the Defence to submit the same materials as the ICTY/R according to the discretion of the ICC Chamber.

To sum up, typically the Defence's obligations for pre-trial submissions are not as extensive as the Prosecutor's. The ICTY Rules have begun to change that as the ICTY Defence must now submit a pre-trial brief before the pre-trial conference, where the nature of its defences and essentially its case is outlined. The ICTY Defence must also state what issues

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69 ICTY Rule 65 ter (G) and regarding the Prosecutor's witness list ICTY Rule 65 ter (E)(ii).
71 For further details see the chapter above on Prosecutor's obligations.
it contests in the Prosecutor's pre-trial brief and why. The ICTR is not as demanding as the ICTY as the Defence only may be ordered to submit a pre-trial brief and admitted facts, which may be filed shortly before the trial commences. After the Prosecutor's case closes the Defence at both ICTY and ICTR Tribunals has to hand over a witness list in order for the Prosecutor to prepare for cross-examination. The ICC does not distinguish between the parties and thus all the obligations under Regulation 54 may apply mutatis mutandis to the Defence. The ICC chamber has the discretion order the Defence to file similar briefs as required by the ICTY and ICTR Tribunals. Time will tell how the ICC interprets Regulation 54.

2.5 Pre-Trial Conference – Chambers or designated Judge's control

At the Pre-Trial Conference the ICTY, ICTR or ICC Chamber has extensive powers to shape the Prosecutor's case. A Chamber can limit the Prosecutor's witness list and time afforded for the presentation of evidence.

The Pre-Trial Conference, which is held before the commencement of the trial according to Rule 73 bis (A), is where the Trial Chamber in both the ICTY and ICTR Tribunals, or the designated Judge in the ICTR, show the most power in controlling the pre-trial proceedings. This is the most controversial part of the pre-trial proceedings since this effectively allows the Chamber (or designated Judge) to limit the time estimated by the Prosecutor for the witness testimony and with the ICTY to control parts of the indictment as well. This high level of control by the Trial Chamber on the parties' cases and presentation of evidence is rather inquisitorial in nature and goes against the otherwise adversarial nature of the ICTY and ICTR Tribunals. It has been criticized as affording the Judges too much power over the presentation of evidence.

With the ICTY, in light of the pre-trial Judge's report “pursuant to Rule 65 ter (L)(i), the Trial Chamber may call upon the Prosecutor to limit the estimated length of the examination-in-chief for some witnesses.” according to Rule 73 bis (B). Based on the wording of the Rule the ICTY Chamber does not have the power to order the Prosecutor to shorten the estimated time for each witness, as the phrase “may call upon” should be interpreted as a request, not an order. The ICTR Rules go further in that respect and afford the Trial Chamber the discretion to order the Prosecutor to limit his estimated time for examination-in-chief for some witnesses, according to Rule 73 bis (C). Neither the ICTY or ICTR Tribunals Rules offer

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further guidance as to why the Chamber should request or order the Prosecutor to reduce the
time for some witnesses. The Chamber has a complete list of witnesses and a summary of
their testimony and can foresee which witnesses will not need prolonged examination-in-
chief, for example those who only offer repetitive testimony and are not material to the
Prosecutor's case. The ICTY also looks to the insight of the pre-trial Judge and his report,
which inter alia is based on meetings with the parties and should give the Chamber insight
into the importance of each witness.

The ICTR Chamber has the discretion to order the Prosecutor to reduce the number of
witnesses called, if it “considers that an excessive number of witnesses are being called to
prove the same facts.”, according to Rule 73 bis (D). This is a very clear rule and exemplary
as to the power of the Chamber to avoid wasting time.. The ICTY Rule 73 bis (C) takes a
different approach compared to the ICTR and empowers the Chamber, in light of the pre-trial
Judge's report and after hearing from the Prosecutor, to determine the number of witnesses
which the Prosecutor may call. This ICTY Rule offers guidelines as to why witnesses should
be cut from the list. The ICTY Rule also states that with the same pre-conditions as above
that the Chamber shall determine “the time available to the Prosecutor for presenting
evidence.” The ICTY Chamber has extensive powers over the scope of the Prosecutor's
witness testimony and the presentation of evidence. The ICTY Prosecutor may, after the trial
has begun, file a motion to change the witness list or ask for additional time for evidence, but
it is left to the discretion of the Chamber whether to allow this in the interests of justice
according to Rule 73 bis (F). The ICTR Rules also include a safeguard here and allows the
Prosecutor, after the commencement of the trial, to apply for a leave from the Trial Chamber
to change the witness list or to reinstate the witness list if the Prosecutor considers it to be in
the interests of justice to do so according to ICTR Rule 73 bis (E).

The ICC Trial Chamber may order on issues regarding the length of the witness testimony,
the number of witness to be called and their identities, the production and disclosure of any
witness statement the parties intend to rely on, and “the extent to which a participant can rely
on recorded evidence, including the transcripts and the audio- and video-record of evidence
previously given;”, under Regulation 54 (d-f and i).

In addition to changes to the witness list the ICTY Chamber, with the recently amended
ICTY Rule 73 bis (D) and (E), may after hearing from the Prosecutor invite or direct the

73 ICTY Rule 73 bis (C)(i).
74 ICTY Rule 73 bis (C)(ii).
Prosecutor to reduce or select the number of counts in the indictment and may also fix the number of crime sites being prosecuted for.\textsuperscript{75} Under Rule 73 \textit{bis} (D) the ICTY Chamber may also, after hearing from the Prosecutor, fix the number of crimes sites or incidents in one or more of the charges, to which evidence may be presented by the Prosecutor. The Prosecutor should know his/her case better than anyone else and thus be best qualified to reduce the size of it without compromising the whole of the case. If the ICTY Chamber is not satisfied that the proposals by the Prosecutor as to what sites may be omitted, it can use Rule 73 \textit{bis} (C)(ii) to limit the whole time available for the Prosecutor's presentation of evidence. This gives the Prosecutor extra incentive to propose to exclude as many sites as he/she feels are disposable. Reducing sites or incidents under Rule 73 \textit{bis} (D) means that the Prosecutor can not present evidence on those sites or incidents, but they are not removed from the indictment.\textsuperscript{76}

ICTY Rule 73 \textit{bis} can effectively take the power out of the hands of the Prosecutor for various parts of his case. Wisely, there are safeguards in ICTY Rule 73 \textit{bis} (F) which allow the Prosecutor to file a motion to change the number of fixed crime sites and incidents, to which evidence may be presented. Also according to sub-paragraph (E) the parties can appeal the decision of the Chamber to direct the Prosecutor to select counts in the indictment.

To sum up, the ICTY Trial Chamber has very broad discretion to control the Prosecutor's case at the Pre-Trial Conference. The ICTY Chamber may request the Prosecutor to limit the number of witnesses and it may shorten the estimated time of examination-in-chief of some witnesses. In addition the ICTY Chamber can request the Prosecutor to reduce the number of charges or crime sites prosecuted for. The ICTY Chamber may finally limit the time estimated for the presentation of evidence by the Prosecutor. The ICTR Rules do not go as far as the ICTY in affording the Chamber control over the Prosecutor's case. Instead the ICTR Chambers control is limited to reducing the number of excessively repetitive witnesses and the length of the examination-in-chief in the Pre-Trial Conference. The ICC Trial Chamber has broad discretion in controlling the participants' cases with orders under Regulation 54 and it may for example issues orders on the number of witnesses for participants, and to what extent the participants may rely on recorded evidence. But it remains to be seen in practice, as

\textsuperscript{75} ICTY Rule 73 \textit{bis} (D) was first amended as to incorporate this discretion for the Chamber on 17 July 2003 and finally amended to its current state in 30 May 2006. Sub-paragraph (E) was amended to its current state on 30 May 2006.

\textsuperscript{76} ICTY, Prosecutor v. Karadzic, \textit{Decision on the Application of Rule 73 bis, IT-95-5/18-PT}, 8 October 2009, para. 5-6.
there is at the present no way of telling how the ICC Chamber will make use of this discretion.

2.5.1 Varying the witness list
The decision to vary or reinstate a witness previously reduced by the Chamber in both the ICTY or ICTR Tribunals is at the discretion of its Trial Chamber and is to be viewed in the interests of justice.77 The witness lists of both parties may be reduced and therefore the principles stated below are applicable for them. It must be kept in mind thought that late edits of the witness list can prejudice the other party's case and can go against the rules followed regarding disclosure of evidence. Among the criteria that the ICTR Chamber has adopted for an assessment as to whether to grant changes to the witness list is:

In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence.78

The ICTR Chamber has further shown that each witness will be assessed on an individual basis and the proposed testimony weighed against the possible prejudice against the opposing party's case and whether the Defence in that case can effectively cross-examine the witness.79

The ICTY Chamber has when assessing the interests of justice looked to, whether the addition of a witness would burden the defence.80

Thus if the Chambers at the ICTY or ICTR Tribunals reduced the number of witnesses or changed the witness list, the parties may apply in the interests of justice to have those changes undone or other amendments made to vary the witness list again.

2.6 Pre-Defence Conference
The ICTY or ICTR Tribunals can hold conferences before the commencement of the Defence's case in order to streamline it.

The Pre-Defence Conferences in the ICTY and ICTR Tribunals are held upon the discretion of the Trial Chamber before the Defence commences with its case in the trial

77 See ICTY Rule 73 bis (F) and 73 ter (D) and ICTR Rule 73 bis (E) and 73 ter (E).
80 ICTY, Prosecutor v. Gotovina et.al., Reasons for the Addition of a Witness to the Prosecution's Witness List and Admission into Evidence of Two Documents, IT-06-90-T, 27 February 2009, para. 5.
according to Rule 73 ter (A). If Pre-Defence Conference is held, the ICTR Chamber may order the Defence to submit the following: admissions by parties and statements of other matters not in dispute, a statement of contested matters of fact and law, detailed witness list and a list of exhibits according to Rule 73 ter (B). At the ICTR, the Defence as well as the Prosecutor, may be ordered to shorten the estimated length of the examination-in-chief for some witnesses and to reduce the number of witnesses, if an excessive number of them are being called to prove the same facts according to ICTR Rule 73 ter (C) and (D). The ICTY Chamber in light of the file submitted by the pre-trial Judge under Rule 65 ter (L)(ii) may call upon the Defence to shorten the time estimated for the examination-in-chief for some witnesses according to Rule 73 ter (B), the ICTY, whereas the ICTR Chamber which may order this. The ICTY Chamber may, in light of the pre-trial Judge's report and also after hearing from the Defence, set the number of witnesses which the Defence may call according to Rule 73 ter (C). This Rule evidently lacks the guideline of the ICTR Rule but allows the ICTY Chamber to act with more discretion on the matter. In both the ICTY and ICTR Tribunals, the Defence after the commencement of its case, may also if it considers it in the interests of justice, apply for leave to reinstate the witness list or change its decision regarding which witnesses are called according to ICTY Rule 73 ter (D) and ICTR Rule 73 ter (E). Specifically at the ICTY, the Trial Chamber shall, after hearing from the Defence, “determine the time available to the defence for presenting evidence”, and during the trial the Chamber may at the request of the Defence grant “additional time to present evidence if this is in the interests of justice.”, according to ICTY Rule 73 ter (E) and (F) respectively.

The ICC may order the Defence on the same issues covered by Regulation 54, and could thus order the number of witnesses allowed without further criteria mentioned. There is no rule on a specific Pre-Defence Conference although the ICC Chamber may call a status conference.

To sum up, the Pre-Defence Conference is held at the discretion of the ICTY and ICTR Tribunals. If such a conference is held the ICTR Chamber may order the Defence to submit a list of admissions by the parties and matters not in dispute, along with a detailed witness list and list of exhibits. The ICTR Chamber may go further than then the ICTY Chamber as it can order the time allotted for the examination-in-chief for some excessively repetitive witnesses be shortened, where the ICTY can only request it. Both *ad hoc* Tribunals may fix the number of witnesses. An important discretion for the ICTY Chamber is that it may determine the time available to the Defence to present evidence in trial. All these changes by the Chambers have
a safe-guard option where the Defence may apply to the Chamber to have those changes undone or at least changed differently. The ICC may order on any of the issues as the ICTY/R under Regulation 54, yet has no specific rule on Pre-Defence Conferences.
3 Disclosure

3.1 Prosecutor's disclosure

Usually, the Prosecutor has more extensive obligations regarding disclosure of evidence than the Defence. Partly this is because the Prosecutor is for the most part responsible for collecting both incriminating and exculpatory evidence in the case in order to seek the truth. Also this facilitates that the Defence will be able to prepare its defence properly before the trial commences.

According to ICTY/R Rule 66(A)(i) the Prosecutor has to make available to the defence “within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment, when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused”. Further according to ICTY/R Rule 66(A)(ii) the Prosecutor also has to disclose all witness statements. In the ICTY Rule applies both to the witnesses which are to testify at trial and other written statements or transcripts under Rules 92 bis, 92 ter and 92 quater. Even though it does not say it directly, the ICTR Rule should be interpreted as to incorporate written witness statements under Rule 92 bis.

If the ICTY Prosecutor intends to call additional witnesses, those statements must be made available to the Defence, when the decision to call them is made, as stated in Rule 66(A)(ii). The ICTR does not have the same clear obligation as the ICTY in this regard, see Rule ICTR 66(A)(ii). The Defence must show good cause for the ICTR Prosecutor to disclose witness statements of additional (i.e. late additions) Prosecutions’ witnesses within a prescribed time. The ICTY Chamber has stated in the following decision in the Kordic & Cerkez case:

the obligation to provide witness statements pursuant to Rule 66 (A)(ii) is intended to assist the Defence in its understanding of the case against the accused in accordance with his rights under Article 21 of the Statute of the International Tribunal and should thus be provided to the Defence as far in advance of the trial as is possible, even if this means that statements are disclosed sequentially and that statements are disclosed of witnesses who eventually are not called to testify in the matter.

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81 This shall be done either at a time-limit described by the Chamber or at the ICTY most likely by the decision of the Pre-Trial Judge in order for the Prosecutor to fulfil his or her obligations under Rule 65 ter. The ICTR Rule 66(A)(ii) prescribes that this shall be done at the latest 60 days before the trial commences.
82 Robert Cryer, a.o.: An Introduction to International Criminal Law and Procedure, p. 381-2
83 ICTY, Prosecutor v. Kordic et al., Order on motion to compel compliance by the Prosecutor with rules 66 (A) and 68, IT-95-14/2, 26 February 1999, p. 4.
If the Defence intends to offer a defence of an alibi or any special defence, it has to inform the Prosecutor of that intention, according to ICTY Rule 67(B)(i)(a-b) and ICTR Rule 67(A)(ii). The Prosecutor then has to provide the Defence with the names of witnesses it intends to call to rebut that defence according to ICTY Rule 67(B)(ii) and ICTR Rule 67(A)(i).

The ICC has in essence adopted the same rules as the ICTY and ICTR regarding disclosure of witness lists as discussed above. The ICC requires the Prosecutor to provide the Defence with the names of witnesses he/she “intends to call to testify and copies of any previous statements of those witnesses.” in ICC Rule 76 para. 1. The same ICC Rule further states that the disclosure “shall be done sufficiently in advance to enable the adequate preparation of the defence.”. Thus there are no time-limits in the Rule but the Chamber could prescribe one with its powers under ICC Statute Article 64 para. 3(c). As with the ICTY/R Tribunals’ Rules, when the ICC Prosecutor decides to call additional witnesses, their names and any previous statements must be disclosed to the Defence. The ICC also makes it clear in Rule 76 para. 4, that this disclosure “is subject to the privacy and protection of victims and witnesses”, and “protection of confidential information” in the Statute and Rules 81 and 82, which will be discussed below.

In addition to the materials disclosed in ICTY and ICTR Rule 66(A), the Defence can also request to inspect evidence in the Prosecutor's possession, for example “books, documents, photographs” and other tangible objects according to ICTY/R Rule 66(B). The Prosecutor has to allow this, if the evidence is “material to the preparation of the defence” or evidence intended for use at trial by the Prosecutor or if the evidence belonged to or was obtained from the accused, according to Rule 66(B). ICC Rule 77 is near identical to the ICTY/R Tribunals’, adding that restrictions on disclosure in the Statute apply as well as the restrictions in Rule 81 and 82. The ICC Rule also adds that evidence which the Prosecutor intends to use for the purposes of the confirmation hearing is also subject to inspection.

The Prosecution does not have unlimited disclosure obligations as this could compromise “further or ongoing” investigations, “be contrary to public interest” or affect national “security interests of any State”, see ICTY/R Rule 66(C). In circumstances where the confidentiality of the relevant information (or materials) is important, especially from the Defence, Rule 66(C) allows the Prosecutor to apply the the Chamber “in camera” for an

84 One difference is that ICC Rule 76 para. 3 requires that the statements are to be “made available in original and in a language which the accused fully understands and speaks”.

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exception from disclosure to the Defence. With this application the Prosecutor must provide
the Trial Chamber with “the information that is sought to be kept confidential” according to
Rule 66(C). The ICTR adds to Rule 66(C) by specifying that disclosure under Sub-Rules (A)
and (B) can be limited for the above reasons. The ICC Prosecutor, when disclosure of specific
materials or information, might compromise “further or ongoing investigations”, can apply for
an ex parte hearing with the Chamber. If the Chamber decides to allow the evidence to remain
undisclosed for the sake of the investigation the Prosecutor may not introduce it into evidence
at the confirmation hearing or at the trial, according to ICC Rule 81 para. 2. As for the ICC,
when materials or information are considered by a State to affect its national security certain
proceedings take place under ICC Statute Article 72. Accordingly the State contacts the Court
and cooperative measures are sought first between the State, the Court and all parties. They
may try to obtain the information in question from other sources or agree on certain redactions
or summaries in order to exclude the sensitive information. If no satisfactory solution is found
in the opinion of the State it shall notify the Court to that conclusion according to ICC Rule
72 para. 6. The Court shall then decide whether the evidence is relevant and necessary to the
establishment of the accused guilt or innocence. If it decides it is so, certain actions in Rule 72
para. 7(a) can be brought against the State for its continued refusal or the Court may order
disclosure of the information in question and “To the extent it does not order disclosure, make
such inference in the trial of the accused as to the existence or non-existence of a fact, as may
be appropriate in the circumstances.”, according to Rule 72 para. 7(b).

To sum up, the Prosecutor has greater disclosure obligations than the Defence, due mainly
to the fact that the Prosecutor's investigation is done in order to seek the truth and he/she has
more extensive resources for it. At both the ICTY/R Tribunals and the ICC the Prosecutor has
to make available for the Defence the supporting materials of the indictment and any
statements of the accused. In addition, all witness statements must be disclosed, whether the
witness will testify at trial or admitted as written testimony. At both the ICTY/R Tribunals
and the ICC the Prosecutor shall permit the Defence to inspect tangible objects in its
possession or control, if the material to the preparation of the defence, was owned by the
accused or if the Prosecutor intends to use it at trial. All this is done in order for the Defence
to properly prepare itself for trial. All the Courts allow the Prosecutor to apply for the non-
disclosure of evidence when it could compromise ongoing or further investigations, or for the
sake of the security of any State (and ICTY/R contrary to public interest). The ICC starts
consultations with the respective State in order to resolve such disputes. As always the
interests of the Prosecutor to keep the information confidential should be weighed against the interests of the accused.

3.1.1 Disclosure of exculpatory evidence

As the Prosecutor is de facto the main investigator in the search for truth, he/she must also collect exculpatory evidence, as well as incriminating. In order for the Defence to be able to utilise such evidence it must be disclosed in due time.

The ICTY/R Prosecutor has an obligation to disclose to the Defence “any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence;” as soon as practicable, according to ICTY Rule 68(i) and ICTR Rule 68(A). The Prosecutor therefore has to disclose any exculpatory materials to the Defence. The wording as soon as practicable, allows the Prosecutor some time to take reasonable steps to lift any potential confidentiality of the materials in question which are obtained under Rule 70(B) and get the consent needed from the provider to disclose or notify the Defence as to its existence, according to Rule 68 ICTY (iii) and ICTR (C). The ICTY Chamber in the Kupreskic case issued a decision, which expresses the nature of this disclosure obligation of the Prosecutor:

However it should be noted that the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting;

The Prosecutor therefore has a broad obligation to submit to the Defence all the materials he/she considers to be exculpatory or mitigating for the accused, as well as all materials which can affect the credibility of the Prosecution's evidence. Witness rewards have been considered to affect the credibility of a witness testifying for the Prosecution, for example an accused person testifying in return for a reduced sentence and thus it should be disclosed under Rule 68 (i) or (A) in the ICTY and ICTR respectively. Here the ICC has adopted the same rule as the ICTY/R and obliges the Prosecutor to disclose such exculpatory evidence as described above, as soon as practicable according to Article 67 para. 2 of the ICC Statute. When the ICC

85 ICTY/R Rule 70(B) regards information from a confidential source solely used to generate new evidence.
Prosecutor is in doubt whether to disclose, he/she may request an ex parte hearing as soon as practicable with the Chamber, which then decides on the disclosure of that evidence according to the same provision and Rule 83. The ICC Chamber decides with an ex parte hearing, whether to allow the non-disclosure of potentially exculpatory evidence, obtained from a confidential source and only used to generate new evidence (ICC Statute Article 54(3)(e)).

The ICTY/R Prosecutor, same as with other materials, may also request the Chamber in camera to be relieved of his disclosure duties on exculpatory information if it “may prejudice further on-going investigations”, or “may be contrary to the public interest or affect the security interests of any State”. With the request the Prosecutor must submit the information sought to be confidential to the Trial Chamber (and only the Trial Chamber) according to Rule 68, ICTY (iv) and ICTR (D).

Thus at all three judicial organs the Prosecutor must disclose to the Defence as soon as practicable any exculpatory evidence, that may show the innocence of the accused, any mitigating circumstances or evidence which could affect the credibility of the Prosecution's witnesses. The last-mentioned could include lenience of sentencing in exchange for testimony from a fellow accused. The ICC allows its Prosecutor to apply for an ex parte hearing to decide on the disclosure of potentially exculpatory and sensitive confidential information. The ICTY/R also allow for such an hearing when the disclosure could compromise on-going or further investigations, public interest or a State's security.

3.1.2 Information and materials from a confidential source

It is to be expected that the Prosecutor receives some of his/her information from sources which wish to remain confidential for various reasons. The need to keep the source and any identifying information is great in order to be able to continue investigations and receive sensitive information.

Both the ICTY/R Tribunals and the ICC have the same rule regarding information received on a confidential basis and only used to generate new evidence (i.e. the evidence in question is only used to find additional evidence and is not intended for use at trial). The Prosecutor may not disclose the origin or the initial information, and thus may not introduce it.

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88 ICC, Prosecutor v. Lubanga Dyilo, Judgment on the appeal of the Prosecutor against the Decision of the Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", ICC-01/04-01/06 OA 13, 21 October 2008, para. 46.
a trial, unless the person or entity which provided the information consents to such disclosure. With such consent the evidence should be disclosed through normal routes to the accused. Rule 68(iii) dictates, that if such information includes exculpatory evidence, then the Prosecutor “shall take reasonable steps” to obtain the consent of the person or entity for disclosure or in order to notify the accused to the fact that the information exists. The ICC Rule does not place the same responsibility on its Prosecutor to actively seek the consent of that person. Yet the ICC Chamber has found that the Prosecutor shall seek consent if the information would normally be disclosed under the Rules had it not been obtained from a confidential source.

Specific to the ICTY and the ICC is the rule: “The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply mutatis mutandis to specific information in the possession of the accused”, according to ICTY Rule 70(F) and with different wording in ICC Rule 82 para. 5.

If the Prosecutor obtains the consent of a person or entity to lift the confidentiality of the information, then the Prosecutor may elect “to present as evidence the testimony, documents or other material so provided” according to ICTY/R Rule 70(C). Then special rules in Rule 70(C) apply for that evidence and protect the source. The ICTY/R Trial Chamber may not order either party to produce additional evidence received from the party or entity, that is other still confidential information, nor may the Chamber summon the person or representative of the entity as a witness or order their attendance to secure additional evidence from them, despite of Rule 98. The ICC adopted the same Rule as can be seen under Rule 82 para. 2. The consent is limited to certain confidential information and the Chamber may not use its powers to compel any additional evidence. Similarly if the Prosecutor calls a witness to introduce such information, the Trial Chamber may not compel the witness to answer any question if the witness refuses on grounds of confidentiality. The ICC also adopted this part of the Rule from the Tribunals, and as the ICTY allows the person so testifying refuses “to answer any question relating to the material or information or its origin” on grounds of confidentiality, the Chamber may not compel the witness to answer, according to ICC Rule 82 para. 3. In essence the Chamber is restricted to the consent of the provider of evidence or the witness in order to respect the sensitive nature of the situation and can not use its powers to

89 ICTY/R Rule 70(B) and ICC Rule 82 para. 1, with reference to ICC Statute Article 54 para. 3(e) for the same definition as is found in ICTY/R Rule 70(B).
90 Ibid., para. 48.
obtain other confidential information. In order to make it clear both ICTY/R Tribunals include in Rule 70(E) that the right of the accused to challenge this evidence remains unaffected, except that as sub-paragraphs (C) and (D) eliminate the possibility of the accused to request the Chamber to use its powers to order additional evidence. The ICC also adopted this part in Rule 82 para. 4, where the accused may challenge this kind of evidence, only subject to the limitations found to the Chambers powers in sub-rules 2 and 3. Even despite all these special rules, Rule 70 ICTY (G) and ICTR (F) dictates that the Chamber still retains the right as with all evidence to exclude evidence when “its probative value is substantially outweighed by the need to ensure a fair trial” under Rule 89(D). The ICC does not state it in Rule 82 while yet it retains the power to rule on the relevance and admissibility of any evidence in ICC Statute Article 69 para. 4.

To sum up, the Prosecutor at both the ICTY/R Tribunals and the ICC may withhold from disclosure evidence received confidentially and which was only used to generate new evidence. In that event the Prosecutor may not use it in trial without getting consent from the source of the information and then disclosing it to the Defence. If the Prosecutor gets consent then the evidence may be introduced and/or the person who gave the information or a representative of an organisation may also be called as a witness. The Chambers in all three courts may not compel that witness to answer if he/she refuses on grounds of confidentiality nor may it order additional evidence. In essence the person consenting to lifting the confidentiality must not be pressured to provide additional confidential information. These special limitations do in no way affect the right of the accused to challenge the evidence or witness (except for the lack of judicial back-up). The three courts may also exclude such evidence in order to ensure a fair trial.

3.1.3 Non-disclosure of witnesses

Witnesses and victims from such war-ravaged countries can be in danger due to their potential testimony and therefore certain protection methods are required at the ICTY/R Tribunals and the ICC.

The Prosecutor under ICTY Rule 69(A) in exceptional circumstances “may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.” The Chamber of the ICTY has interpreted “exceptional circumstances” as being more than a prevailing hostility in the territory of the former Yugoslavia. It must be a danger or risk specifically against the witness and can not be based only on a generalized fear of the
potential witness that he or she might be attacked because of it. There has to be some other indications in addition to the witnesses fear, that the he or she are in imminent danger or risk. The ICTR Rule affords the same possibilities for application of non-disclosure to the Defence. Presumably witnesses for the Defence could be at risk from enemies of the accused that may seek his downfall or simply because of their own participation in the conflicts. Rules of both ICTY/R Tribunals conclude that this non-disclosure of identity, subject to ICTY/R Rule 75, shall be lifted in sufficient time (the ICTR only says in time) in order for the Defence, (and at the ICTR also the Prosecution), as to allow adequate preparation of the defence (and Prosecution) according to Rule 69(C).

The ICC Rules provide, that if measures have been taken “in accordance with articles 54, 57, 64, 72 and 93” in order to protect victims and witnesses and their families, then that information shall not be disclosed unless by using those Articles, according to Rule 81 para. 3. Further in the same Rule the ICC states that the Chamber shall take measures to ensure that a witness shall be warned in advance if the disclosure could create risk to his or her safety. The Chamber shall when information is kept confidential in accordance with ICC Statute Article 68 (which is the main provision regarding the protection of victims and witnesses), take measures to ensure that it stays confidential and in that respect order non-disclosure of the identity of the victim or witness and their families until the commencement of the trial, according to Rule 81 para. 4. This can include the redactions of certain information in a document. In addition, where materials or information is in the possession or control of the Prosecutor, that could gravely jeopardize a witness or his/her family, the Prosecutor may withhold the information and only disclose a summary thereof prior to the commencement of the trial according to Article 68 para. 5. If the information is withheld the Prosecutor may not introduce it as evidence in the confirmation hearing or trial without disclosing it to the Defence first, pursuant to Rule 81 para. 5. The Defence is also afforded the same right to protect its witnesses pursuant to sub-paragraph 6.

At both ICTY/R Tribunals and the ICC when witnesses (the ICC adds the witness's family) who are deemed to be at risk, that is imminent and actual risk, their identity may be withheld from the Defence. The ICTR and the ICC also allows this mutatis mutandis for the Defence. In all cases the identity must be disclosed to the other party in due time so it can

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\[91\] ICTY, Prosecutor v. Brdjanin, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000, para. 11, 26, 28.
prepare properly before the commencement of the trial. The ICC has implemented more
details in its rules and also prescribes that redactions of documents can be appropriate, as well
as only disclosing summaries of materials in its possession which could jeopardize the witness
or his/her family.

3.2 Defence's disclosure

Typically a defence's obligation to disclose evidence is not as far-reaching as the Prosecutor's,
and it does not have to show all its cards until the start of its case. The ICTY pre-trial
proceedings have somewhat changed the Defence's obligations which was discussed in
chapter one.

The Defence's obligations to disclose their information has changed very recently in the ICTY
Rules, from being able to block the Prosecution from inspecting their files by simply not applying
to see theirs,\textsuperscript{92} to now having to allow the Prosecution access to their tangible evidence and
witness statements under Rule 67(A).\textsuperscript{93} The Defence has the obligation before the commencement
of its case, to allow the Prosecutor access to “any books, documents, photographs and tangible
objects” which it intends to use as evidence at the trial and which is in the custody of the Defence
or under its control according to ICTY Rule 67(A)(i). The ICC has the same rule, only it adds that
the evidence to be used at the confirmation hearing is also subject to inspection, according to Rule
78. The ICTY changed its rule in 2003, and the ICC Rules entered into force in 2002, so perhaps
the inspiration for the ICTY amendment to allow the reciprocal access came from the ICC Rule.
The ICTR has kept the original form of Rule 67(C) and only allows the Prosecutor to inspect
books, documents and other tangible evidence, if the Defence makes a request to see their
evidence first, as it is entitled to do under Rule 66(B).

The ICTY adopted a new rule on 28\textsuperscript{th} of February 2008, Rule 67(A)(ii), which requires the
Defence to provide the Prosecutor with copies of statements of the witnesses it intends to call
to testify and other written statements taken under Rule 92 \textit{bis}, Rule 92 \textit{ter} or Rule 92 \textit{quater}. This is similar to Rule 66(A)(ii) where the Prosecutor has to provide the Defence with its
witness statements, whereas the Defence has to provide copies only before its case commences. The ICTR does not uphold an obligation for the Defence to disclose the same
information, yet in the pre-trial proceedings the Trial Chamber or the designated Judge may
order the Defence to provide the Prosecutor with copies of the written statements of any

\textsuperscript{92} Older ICTY Rule 67(C), amended 12 December 2003.
\textsuperscript{93} Renee Pruitt: “Discovery: Mutual Disclosure, Unilateral Disclosure and Non-Disclosure under the Rules of
witnesses the Defence intends to call to testify, at the Pre-Defence Conference if it is held, pursuant to ICTR Rule 73 ter (B). The ICC Rules contain no obligation for the Defence to provide the Prosecutor with copies of witness statements, yet the ICC Chamber has the discretion to order it to do so under Regulation 54 (f).

To sum up the ICTY and ICC allow reciprocal access of both parties to inspect tangible objects in the possession or control of the Defence, if intended for use at trial. The ICTR only allows such access if the Defence requests to see the Prosecutor's materials first. The ICTY Defence shall provide the Prosecutor with copies of all witness statements intended for trial. The ICTR and ICC may order the Defence to provide such copies.

3.2.1 *Alibis or special defences*

The Defence may offer a defence of an alibi or any special defence in order to exclude criminal responsibility. In order for the Prosecutor to be able to collect rebuttal evidence or witnesses, such defences must be disclosed in advance.

At the ICTY the Defence has an obligation to notify the Prosecutor, within a certain time-limit set by the pre-trial judge or the Trial Chamber, that it intends to use the defence of an alibi or any special defence, according to ICTY Rule 67(B). The ICTR sets out the time-limit for notification of the defences: “as early as reasonably practicable and in any event prior to the commencement of the trial” in Rule 67(A). Both the ICTY/R Tribunals use the exactly same provisions regarding the content of the notification the Defence has to submit to the Prosecutor, when it intends to use an alibi or a special defence including defence “of diminished or lack of mental responsibility”.94 When the Defence intends to enter a defence of an alibi it has to: 1) specify where the accused was at the time of the charges; 2) “names and addresses of witnesses”; 3) “any other evidence upon which the accused intends to rely to establish the alibi”, according to ICTY Rule 67(B)(i)(a) and ICTR Rule 67(A)(ii)(a). The ICC also has the same Rule regarding the defence of an alibi, with the same criteria for the notification according to ICC Rule 79 para. 1(a).95

Regarding special defences, both of the ICTY/R Tribunals Rules add that “any special defence, including that of diminished or lack of mental responsibility” and the requirements there are for the Defence to include in the notification of intent that it shall specify: 1) “names

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94 ICTY Rule 67(B)(i); ICTR Rule 67(A)(ii).
95 The ICC Chamber also retains its power to order the advance disclosure of other evidence, according to Rule 79 para. 4. This power is not limited to evidence of defences found in Rule 79 and the Chamber may order any other evidence not subject to other non-disclosure provisions. See ICC, *Prosecutor v. Lubanga Dyilo, Decision on Disclosure by the Defence, ICC-01/04-01/06, 20 March 2008, para. 35.*
and addresses of witnesses” 2) “and any other evidence upon which the accused intends to rely to establish the special defence”, see ICTY Rule 67(B)(i)(b) and ICTR Rule 67(A)(ii)(b). The ICC Defence can raise grounds to exclude criminal responsibility due to mental disease, duress, self-defence and severe intoxication of the accused under ICC Statute Article 31 para. 1. This approach of the ICC effectively seems to include the same things as the ICTY/R special defence covers. The Defence has to notify the Prosecutor of its intention to raise such a ground, and the notification shall include the names of witnesses and any other evidence the accused will rely on to establish this defence according to Rule 79 para. 1(b). The ICC Statute adds a third mean of defence which in essence would seem to fall under the ICTY/R “special defence”. The Defence can raise other grounds than above in order to exclude criminal responsibility according to Article 31 para. 3, which is as follows:

At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

So if for example international law of armed conflicts express other grounds for excluding criminal responsibility than listed in Article 31 para. 1, the Defence could raise such a ground but both the Prosecutor and the Trial Chamber have to be notified. This should be done sufficiently in advance of the trial so the Prosecutor can adequately prepare according to ICC Rule 80 para. 1. The Trial Chamber then has to hear from both parties and then decide whether to allow a defence on those grounds. If the Chamber allows the defence, the Prosecutor may be granted an adjournment to address it, according to Rule 80 para. 2 and 3. This approach of the ICC seems to go a bit “overboard” regarding back-and-forth references to the ICC Statute and therefore is much more complex than it needs to be, compared with the simple Rule of the ICTY/R regarding special defence.

It is explicitly stated in ICTY Rule 67(C) that even though the Defence does not follow the above-mentioned rules and notify the Prosecutor of its intent to offer an alibi or special defence, the accused will still have a right to testify on that defence. That is not to say that the Defence will be able to proceed normally with the defence, otherwise the Defence could have a great interest in blind-sighting the Prosecution by simply not notifying them in advance, and which would upset the balance of equality of arms. This ICTY Rule 67(C) only states that the accused may testify on the alibi or special defence if notification had not been sent, and this has been interpreted in the way that the Defence could be denied from calling other witnesses in support of its defence unless the Chamber decides otherwise. In the Kvočka case weight
was given to the Prosecutor's announcement that he did not object and that the trial would not be delayed because of this Defence's motion.\textsuperscript{96} Instead of an interpretation of Rule 67(C), ICTY Rule 68 \textit{bis} could also be used by the pre-trial Judge or Trial Chamber which according to it may decide on its own initiative, that is \textit{proprio motu}, or by the request of either party on sanctions for failure to fulfil its disclosure obligations under the Rules. Rule 68 \textit{bis} is therefore not limited to failure of the Defence to notify the Prosecutor of its intent to use an alibi or special defence.\textsuperscript{97} The ICTR has nearly the same rule as the ICTY regarding the failure to notify the Prosecutor of a specific alibi or special defence in Rule 67(B). Instead of the ICTY rule stating that the accused is still allowed to testify, the ICTR Rule states that the accused can still rely on such defences. The ICC has not taken the same route as the \textit{ad hoc} Tribunals, and even though the Defence failed to notify there of its intent to offer a defence of an alibi or raise grounds to exclude criminal responsibility under Article 31 para. 1, it can still raise those matters and present evidence.

The Defence in all three courts can raise defences of an alibi or other special defences. The ICTY/R Tribunals have broad discretion under its Rules to admit any special defence such as of diminished or lack of mental responsibility. The ICC first lists mental disease, duress, severe intoxication and self-defence under ICC Statute Article 31 para. 1. Then the ICC also lists an open alternative to excluding criminal responsibility in Article 31 para. 3 if \textit{inter alia} international law or international treaties offer grounds to do so. In this author's view the ICC could have saved all this cross-referencing in its “special defences” as essentially the simple Rule of the ICTY/R Tribunals does the trick.

3.3 Shared disclosure rules
Following are some disclosure rules that are applicable to both parties and include the discovery of additional evidence, the power of the ICTY/R Tribunals's Chambers to order sanctions for tardy disclosure and exceptions for internal work documents.

In the event of the discovery of additional evidence, which has not previously been discovered and disclosed according to the Rules, ICTY/R Rule 67(D) becomes applicable. At the ICTR the party shall promptly notify the other party and the Chamber of the existence of such additional evidence, information or materials. At the ICTY the party has to disclose that


\textsuperscript{97} William A. Schabas: The UN International Criminal Tribunals, p. 400.
evidence or material immediately to the other party and the Trial Chamber. The ICTY thus has a stricter rule and requires disclosure immediately while the ICTR only requires that a notification as to its existence will be sent.

The ICTY has a special rule in Rule 68 bis regarding the power of the pre-trial Judge or Chamber proprio motu or by the request of either party, to impose sanctions on the party that has failed to fulfil its disclosure obligations under the Rules. The ICTR Rules do not have such a rule although it is within the powers of the Chamber to ensure that disclosure obligations are fulfilled. The ICTY Chamber has used this Rule for example to instruct the Prosecution to rectify its former disclosure of only summaries of exculpatory evidence, as the Chamber found that insufficient disclosure and accordingly the Prosecutor was to disclose the full evidence to the Defence under Rule 68(i) as soon as practically possible or within one week.

Rule 70(A) is identical for both the ICTY/R Tribunals. It excludes from disclosure under Rules 66 and 67, thus the exception does not extend to exculpatory evidence, “reports, memoranda, or other internal documents prepared by a party, and its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification”. The ICC has adopted the same rule in Rule 81 para. 1, although the ICC does not specify, whether exculpatory evidence is included in this exception. Conversely, in Article 67 para. 2 of the ICC Statute it appears that any exculpatory evidence must be disclosed. The exception for work-related internal documents applies to both the Prosecution team and the Defence team. Notes generated in witness interviews by a party have been considered internal documents, although questions put to the witness are not and should be included with the witness statement.

The ICC has a special provision in Rule 84 where the Chamber shall take the necessary steps to order the parties to disclose any information that has not previously been disclosed in due time before the beginning of the trial. This includes information which had previously

98 William A. Schabas: The UN International Criminal Tribunals, p. 400.
99 ICTY, Prosecutor v. Brdjanin, Decision on “Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters affecting Justice and a Fair Trial can be resolved”, IT-99-36-T, 30 October 2002, para. 29.
101 ICC Rule 84 is a following: In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.
been not been disclosed due to the protection of victims and witnesses (under ICC Statute Article 68 para. 5), and exculpatory or mitigating evidence in accordance with Article 67 para. 2. The Chamber can also order the production of additional evidence under Rule 84 as it is empowered to do so under Article 64 para. 6(d). The goal is to start the trial on time and afford the parties sufficient time to prepare the trial, which is why the Rule states that strict time-limits should be kept and are under the review of the Chamber.

To sum up, if additional evidence is discovered at either party of the ICTY/R, the ICTY requires the disclosure of the evidence immediately, while the ICTR only has to notify the opposing party. The ICTY can order sanctions on the party that does not fulfil its disclosure obligations under Rule 68 bis and in the ICTR it an inherent power of the Chamber to do so. At both the ICTY/R Tribunals and the ICC internal work-generated materials of the parties are not subject to disclosure unless they contain exculpatory materials. The ICC Chamber has the power to order the parties to disclose any additional evidence, that had not been previously disclosed, for example due to the protection of witnesses in due time in order to prepare for trial.
4 Rules of evidence

The nature of the cases heard by international criminal tribunals make it hard to rely upon the technical admission rules of evidence found in adversarial legal systems. Evidence is often hard to get and it would be next to impossible to prosecute criminals if traditional technical admission rules would apply. The ICTY, ICTR and ICC forgo lay jurors and rely instead on the competence of the international judges to give appropriate weight to the evidence in question.\textsuperscript{102} This is completely different from traditions of common law and the adversarial system of jurisprudence and foregoes the need to protect lay jurors from inappropriate evidence. Therefore, the ICTY has gone with a more open rule of admission of evidence namely Rule 89. This is a rather inquisitorial method, relying on the Chamber to determine the probative value of the evidence with certain ambiguous criteria fulfilled to ensure a fair trial. Like the Nuremberg and Tokyo trials (despite their predominantly adversarial nature), the ICTY has „no technical rules for the admissibility of evidence.“\textsuperscript{103}

4.1 The hierarchy of the rules of evidence

The two \textit{ad hoc} Tribunals, ICTY and ICTR, and the ICC of course employ Judges from all over the world from countries with tradition in common law and civil law and different rules of evidence admission. The international court and tribunals must have clear rules, otherwise this could lead to many diverse and unforeseeable decisions as the Judges have broad discretion as regards evidence.

Rule 89(A) in the ICTY and ICTR Rules are similar in wording and both clearly state the bottom line that their rules of evidence shall be used in the trial proceedings in the Chambers. Thus the ICTY/R Rules should be applied first, and only if they fall short, then other rules and laws should come into play. To that extent the ICTY/R may look to international law and so on with guidance by Article 38 para. 1 of the International Court of Justice (hereafter ICJ) Statute. Therefore, for the sake of transparency and in order to constrain the judges in their unilateral application of rules of evidence in the ICTY Rules of Evidence and Procedure (hereafter Rules), are not bound by any national rules, according to Rule 89(A). This is due to

\textsuperscript{102} ICTY, Prosecutor v. Delalic et al., Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, IT-96-21-T, para. 20.

the fact that the international judges presiding in the Chambers are from various countries with different legal systems and it would be actually impossible and discriminating to allow each judge to apply his or her own national rules of evidence, which would in turn make the defence of the accused highly problematic.

The ICC states the scope of the rules of evidence as Rule 63 para. 1 states that along with Article 69 of the Statute that the rules of evidence in this Chapter [that is Chapter 4 of the Rules] shall apply in all proceedings of the Court. The ICC has also in essence the same rule regarding national law as the ICTY and ICTR. ICC Rule 63, para. 5 states that “the Chambers shall not apply national laws governing evidence, other than in accordance with Article 21”. So the ICC Rule contains an exception that allows the use of national law in cases where ICC Statute, Rules and international law does not cover the disputed issue. Article 21 of ICC Statute lists in more detail than the Rules of the ICTY and ICTR Tribunals, which kind of law shall be applicable for the Court besides their hierarchy, which seems to correlate with the Tribunals practices. The applicable law for the ICC Court seems to be quite similar to the Article 38(1) of the Statute of the ICJ. Article 21 of the ICC Statute reflects the acceptable process the Chamber follows: that is first it is expected apply the ICC Courts’ Statute and Rules and when they fall short, to look to other means of law as appropriate. Second in the hierarchy are applicable treaties and principles and rules of international law, (Article 21(1)(b)) and as a last resort (in Article 21(1)(c)) general principles of law of legal systems in the world as derived by the Court itself, if the those general principles do not go against the first and second option or any internationally recognized norms and standards. The ICC Rules go a step further than the Rules of the ICTY and ICTR Tribunals, in ICC Statute Article 69 para. 8, as it states that the Court shall not rule on the application of the State's national law when deciding the relevance and admissibility of evidence, thus circumventing any claims of inadmissibility under the laws of the State they were obtained from. This is especially important for evidence obtained from common law countries as they have strict rules on admissibility of evidence which the ICC and the ICTY and ICTR have chosen not to follow. The subject of national rules of evidence is further discussed in the next sub-chapter.

To sum up, all three courts are not bound by national law. The ICTY and ICTR Tribunals apply their own Rules first and foremost as regards evidence. The ICC will apply its Statute first, as many rules on evidence are found in, and then its Rules. In all three courts if those legal instruments are not sufficient the Chambers may look to other options, that is international law and as a last resort general principles of national legal systems.
4.2 A Gap in the Rules

Rules can never account for all situations that can arise before courts and this is especially the case with relatively young international courts. For that reason it is important to view what options the Chambers have when an unforeseen situation arises during the trial proceedings and a solution must be found.

Rule 89(B) which is identical in the Rules of both The ICTY and ICTR Tribunals, is as following:

In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

As the Rule itself states it is only to be used if other rules of evidence do not apply to the situation at hand. The ICTY seems to be hesitant to use Rule 89(B) in practice and generally attributes the application of law outside of the Rules to other sources. This can be seen for example in the Tadic case where the Chamber stated that rather than using the sweeping provision of 89(B), that the debated disclosure was inherent in the jurisdiction and power of the Tribunal and the Trial Chamber had the power to order it. As with the other Rules of Evidence Rule 89(B) is meant to be flexible and advance the Rules purpose to have fair trials as well as expediting them. Rule 89(B) of both ad hoc Tribunals' Rules does not afford unlimited discretion to the Chambers to apply whichever rule of evidence they prefer. The judges have to determine how to fill the void in the Rules by fair determination in each case and it has to be harmonious with the spirit of the Statute, which implies that it has to be consonant with the Rules as well and general principles of law. In the opinion of Judge Patrick Robinson “a Chamber is not at large to act creatively on the basis of Rule 89(B).”

The Trial Chamber in the Delalic case decided to use the so-called “best evidence rule” from English common law to guide it on the contested evidence in the matter. That is to rely on “the best evidence available in the circumstances”.

105 ICTY, Prosecutor v. Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence, IT-95-14/1-AR73, 16 February 1999, para. 19.
106 ICTY, Prosecutor v. Aleksovski, Dissenting Opinion of Judge Patrick Robinson, IT-95-14/1-AR73, 16 February 1999, para. 22.
An ICTR Chamber used identical Rule 89(B) when faced with an unprecedented request from the Defence to call rejoinder witnesses in order to rebut the Prosecutors’ witnesses to an unexpected alibi defence, which the Defence neglected to send notification of as required by Rule 67(A)(ii)(a).\textsuperscript{108} The Chamber found that Rule 85 did not guide it in this area and therefore Rule 89(B) was used to fill up the lacunae in the Rules.\textsuperscript{109} The Chamber referred to Rule 89(B) and then proceeded to look at rules of common law regarding rejoinder witnesses and the approach taken by a ICTY Chamber in the \textit{Delalic case}\textsuperscript{110} regarding common law rules on rejoinder evidence and rebuttals.\textsuperscript{111} The ICTR Chamber then rejected the Defences’ request since the proposed rejoinder witnesses were only intended to buttress the Defences’ case and not to rebut unanticipated or new evidence from the Prosecutor.\textsuperscript{112}

On occasion Rule 89 (B) is maintained before the Chamber by a party wanting to stretch an existing provision in the Rules of Evidence section rather than actual lack of appropriate provisions. This is not accepted by the Chamber since it is presumed that the absence of a particular subject-matter in an otherwise covered subject of the Rules can be interpreted as the subject matter is prohibited or inherent in the provision itself and therefore Rule 89(B) should not be used in those instances.\textsuperscript{113}

The latter part of Rule 89(B) of the ICTY and ICTR Rules “the general principles of law” have been the subject of some decisions before the Tribunals. The Tribunals are international criminal courts and as such international law plays a fundamental role before them. It is helpful to view Article 38(1)(c) of the Statute of the International Court of Justice, (hereafter ICJ), as a guide to what constitutes international law. A short summary of the sources listed there are international conventions, international customs and general principles of law, judicial decisions on international law and academic work as a subsidiary sources. The ICTY and ICTR Chambers therefore have broad discretion on what law they apply, yet with the condition that the decision should not go against the spirit of the Statute and general principles of law as ICTY/R Rule 89(B) states.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{108} ICTR, Prosecutor v. Semenza, Decision on Defence Motion for Leave to Call Rejoinder Witnesses, ICTR-97-20-T, 30 April 2002, para. 4-5, 9.
\item \textsuperscript{109} Ibid, para. 3-4.
\item \textsuperscript{110} ICTY, Prosecutor v. Delalic, Decision on the Prosecution’s Alternative Request to Reopen the Prosecution’s Case, IT-96-21-T, 19 August 1998, para. 23-24.
\item \textsuperscript{111} ICTR, Prosecutor v. Semenza, Decision on Defence Motion for Leave to Call Rejoinder Witnesses, ICTR-97-20-T, 30 April 2002, para. 7.
\item \textsuperscript{112} Ibid, para. 12
\item \textsuperscript{113} ICTY, Prosecutor v. Aleksovski, Dissenting Opinion of Judge Patrick Robinson, IT-95-14/1-AR73, 16 February 1999, para. 22.
\end{itemize}
\end{footnotesize}
When creating the ICC the States representatives drafting its statute chose to almost reject any “legislative” powers of the Judges.\textsuperscript{114} This was obviously going against the established practice of the ICTY and ICTR as the Judges there are entitled to adopt Rules on their own initiative if there is a genuine gap in the Rules as described above. The ICC Judges may adopt provisional rules by a two-thirds majority, if there are no rules for a specific situation. These provisional rules are to be applied until the Assembly of State Parties adopts, amends or rejects them at their next meeting according to Article 51 para. 3. Therefore the Judges do not have a final say, although one might imagine that generally their amendments in order to resolve situations that arise outside the scope of the Rules will not be ignored by the Assembly when appropriate actions are taken.\textsuperscript{115} Any such amendments should according to ICC Statute Article 51 para. 4 not be applied retroactively to the detriment of a person being investigated, prosecuted or already convicted and be consistent with the Statute, as it ranks higher in status than the ICC Rules according to Article 51 para. 5.

To sum up, at the ICTY and ICTR where there is a genuine gap in the Rules i.e. no rule covers the situation the Judges may apply a rule which is considered fair in the case and consonant with the spirit of the Statute (and Rules) and general principles of law. General principles of law can be interpreted using ICJ Statute Article 38 para. 1, then other international law and as a last resort, general principles of legal systems. The ICTY/R Judges thus have broad discretion to find and apply a new rule when there is a genuine gap in the Rules. The ICC Judges to not have such broad discretion as the drafters of the ICC Statute all but eliminated the “legislative powers” of the Judges. However the ICC Judges may adopt temporary provisional rules subject to review by the Assembly of State Parties.

4.2.1 National law as a guidance

According to Rule 89(A) of the Rules of the ICTY and ICTR Tribunals, the Chamber is not bound by national law. This leaves an opening for Rule 89(B) since ICTY/R Rule 89(A) does not forbid the use of national law. Those decisions have looked to Article 38(1)(c) of the Statute of the ICJ, which states that general principles of law recognized by civilized nations can be viewed as part of international law.\textsuperscript{116} General principles of national law, especially

\textsuperscript{114} See Chapter 1.3.2.
\textsuperscript{115} Antonio Cassese; Paolo Gaeta and John R.W.D. Jones: The Rome Statute of the International Criminal Court, Volume 2, p. 1115
\textsuperscript{116} ICTY, Prosecutor v. Delalic et. al., Decision on the Motion to Allow Witness K, L and M to give their Testimony by Means of Video-link Conference, IT-96-21-T, 28 May 1997, para. 8 and 10.
when used by several influential nations in a particular field can therefore be considered to fulfil the criteria of general principle of law under Rule 89(B).\(^{117}\) The ICTY Chambers are though cautious in using national law and as it says in the “\textit{Tulica Decision}”.\(^{118}\)

Whilst the International Tribunal may look to municipal criminal law and procedure for assistance in its work, it is bound first and foremost by its own Statute and Rules, and to international law as it applies to its particular mandate to try persons alleged to have committed serious violations of international humanitarian law.\(^{119}\)

Using national law as a guide when other Rules or international law is absent is thus allowed but not favoured with the ICTY and ICTR.\(^{120}\) This practice though not reflected in detail in the Rules, has contributed to the more detailed approach of the ICC Statute regarding applicable law under ICC Statute Article 21 para 1(c). The ICC Article as mentioned before is similar to that of ICJ Statute Article 38(1)(c). As with the ICTY and ICTR, the ICC can therefore apply general principles of national law when all else fails, although the ICC offers more codified details on when it can apply such principles.\(^{121}\)

To sum up, none of the three courts outright ban the use of national law and they are not bound by it. The ICTY/R are hesitant to use national law unless the Statute and Rules offer no guidance and the ICC Article 21 puts the option of guidance by national law as a last resort.

4.3 Admission of evidence

The admission of evidence is important for the three courts and how and why evidence should be admitted is one of the most important issues argued before the courts in each case.

The ICTY chose to adopt (as did the WWII criminal tribunals) a “non-technical approach” to admission of evidence.\(^{122}\) The ICTY Tribunal itself has declared that this “approach

\(^{120}\) \textit{ICTY, Prosecutor v. Kordic and Cerkez, Decision on the Prosecution Application to admit the Tulica Report and Dossier into Evidence, IT-95-14-2-T, 29 July 1999}, para. 12. Hereafter the “\textit{Tulica Decision}”.
adopted by the Rules is clearly one in favour of admissibility". This resulted in the creation of ICTY/R Rule 89(C) which allows the admission of “any relevant evidence which it deems to have probative value”. None of these rules contain a description of what kind of evidence is admissible, and it is up to the Trial Chamber to rule on which types of evidence are considered to be so. Therefore all kinds of documents, different types of objects, witness statements and other evidence can be admissible if it is deemed to have some relevant and probative value under Rule 89. The reason for deviating from the strict common law principles on admission of evidence is because before the international tribunals there are no lay jurors to be influenced, only professional judges which are competent to assess each piece of evidence. Because of this “non-technical approach” to evidence for example hearsay is not totally excluded up front but is rather determined and evaluated on a case to case basis by the Chamber as to whether it is considered to be admissible under ICTY/R Rule 89(C). In the interests of justice and a fair trial ICTY Rule 89(C) is tempered by ICTY Rule 89(D) which allows the Chamber to “exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”. With ICTY Rule 89(D) the Chamber may thus exclude evidence which otherwise by form would be admissible, if the interests of a fair trial so demand. The ICTR only includes Rule 89(C), but as discussed further below has inherent power to exclude evidence under the same criteria as the ICTY Rule 89(D). Further exceptions to admission of evidence may be found in ICTY/R Rule 95 and 96. The Chamber has a lot of leeway to determine the admissibility of evidence but this should not be confused with how much weight the evidence will be afforded in the course of the trial.

Before the ICC the admission of evidence is in essence the same as at the ICTY and ICTR although in the ICC Statute and Rules there are more details as to how and when issues of admission are to be raised. The ICC Statute and Rules cross-reference back and forth on the subject and are a bit redundant. ICC Statute Article 69 para. 4 of the Statute was mainly influenced by the admission of evidence according to ICTY Rule 89 and the drafters chose to adopt a similar approach with the ICC. The ICC Trial Chamber, as the ICTY and ICTR Chambers, has the power to rule on admissibility or relevance of evidence, either by its own

124 Richard May and Marieke Wierda: “Evidence before the ICTY”, p. 253-4
125 Ibid. para. 20.
127 William A. Schabas: The UN International Criminal Tribunals, p. 454.
motion or at the application of a party according to ICC Statute Article 64 para. 9 and 9(a). Also, ICC Rule 63 para. 2 states that the Court shall assess freely all evidence submitted. The Parties can submit evidence according to ICC Statute Article 64 para. 3, which also contains a sense of mission statement for the Court as it can request the submission of evidence “that it considers necessary for the determination of the truth.”. Also it can order the production of evidence in addition to what the parties have already collected or presented according to ICC Statute Article 64 para. 6 (d). Thus it appears the Court is to be guided on the determination of the truth rather than limiting itself to the parties' submissions.129 ICC Statute Article 69 para. 4 elaborates further on the criteria for the Court to rule on the admissibility of evidence, indicating that the Court should take into account the probative value of evidence and the prejudice the evidence might “cause to a fair trial or to the fair evaluation of the testimony of a witness” in accordance with the Rules, and by that in essence mixing together ICTY Rules 89(C) and (D). The ICC has incorporated the Rule that any issues relating to the admissibility or relevance of evidence must be raised at the time when it is submitted to a Chamber according to Rule 64 para. 1. If exceptionally, the issue was not known at the time when the evidence was submitted, then it may be raised immediately after it became known according to the same ICC Rule. This gives the Chamber the discretion to refuse to hear issues related to the admissibility or relevance of evidence if it is not made at the proper time, although in the interests of obtaining the truth the Chamber might be persuaded nevertheless allow to such objections to be made.

To sum up, in all three courts the admissibility of evidence is open and non-technical (i.e. any evidence could be considered). The evidence in order to be admissible must though be relevant and have probative value (i.e. capable of proof of issues). The evidence in question must also not jeopardize a fair trial and could be excluded because of that. The ICC has in essence made a mission statement for itself regarding the admission of evidence as it may request the submission of evidence in order to determine the truth in the case beforehand.

4.3.1 Relevance and probative value
Evidence must have relevance and probative value to be admissible. Further clarification is needed for those conditions and when they can be considered fulfilled.

ICTY/R Rule 89(C) is designed to give the Chamber considerable discretion in evidentiary matters in accordance with the civil law way of thinking behind the rules of evidence. Rule

129 William A. Schabas: *An Introduction to the International Criminal Court*, p. 295.
89(C) states that “a Chamber may admit any relevant evidence which it deems to have probative value.” The word “may” is of course in order for the Chamber to use its discretion when dealing with admission of evidence, despite it does not have though absolute discretion in the matter. For one criteria the Chamber has to respect the rights of the accused as can be found in Article 21 of the ICTY Statute (ICTR Statute Article 20). Then there are some more open guidelines as Judge Patrick Robinson pointed out that:

for the proper exercise of the discretionary power to admit relevant evidence with probative value must be made in light of the general object and purpose of the Statute, and, more importantly, in the context of other provisions of the Statute and Rules which impact on that exercise. The discretion should not be exercised where to do so conflicts with other Rules and the general scheme for the admission and presentation of evidence established by the Rules; in particular, where special regimes are established by the Rules for the admission of certain types of evidence, the discretionary power under Rule 89(C) must yield to the operation of those regimes.

ICTY/R Rule 89(C) states that in order to be admissible evidence must be relevant and have probative value. When the evidence has probative value it has the competence to prove certain aspects. It is debatable whether included in the probative value test is the extra criteria of reliability of the evidence in question. The ICTY Trial Chamber has not excluded the criteria of reliability during the admissibility of evidence but has rather diminished its importance at that stage. In a decision in the Delalic case the Chamber determined that evidence at that stage should have “indicia of reliability” but does not have to be proven completely reliable at that time. The evidence should therefore have a perception of being reliable, although after admission the reliability can still be questioned and needs to be proven in regards to the weight afforded to the evidence and/or a later declaration of inadmissibility. Test of reliability should not be seen as an additional condition of Rule 89(C) but rather as supplementing the other conditions of relevance and probative value. In the Delalic case the Chamber states that:

131 ICTY, Prosecutor v. Aleksovski, Dissenting Opinion of Judge Patrick Robinson, IT-95-41/1-AR73, 16 February 1999, para. 5.
134 ICTY, Prosecutor v. Delalic, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, IT-96-21-T, 19 January 1998, para. 32.
It is clear that if evidence is unreliable, it cannot be either relevant or of probative value. As such, it is inadmissible under Sub-rule 89(C).\textsuperscript{135}

The ICTR Rules have the exact same rule in Rule 89(C), and as with the ICTY the evidence does not have to be shown to be extremely relevant or of great probative value. Clearly stated in the ICTR Musema case: “The admission of evidence requires, under sub-Rule 89(C), the establishment in the evidence of some relevance and some probative value”.\textsuperscript{136} The ICTR Chamber has also commented upon reliability of evidence at the admission stage and agrees with the ICTY findings in the Tadic and the Delalic cases.\textsuperscript{137} It goes on further and states that “The reliability of evidence does not constitute a separate condition of admissibility; rather, it provides the basis for the findings of relevance and probative value required under Rule 89(c) for evidence to be admitted.”\textsuperscript{138} As evidence without any indication of reliability is hardly suitable to assist in finding the truth in the matter and can hardly be considered of probative value and therefore not relevant to the proceedings.\textsuperscript{139}

The ICC puts the relevance of the evidence in question first and foremost as a condition for the admissibility. In Article 69 para. 4 of its Statute. The provision is not ignoring the probative value of the evidence (i.e. going to proof of matters) but only goes so far as to leave it to the Chamber to among other things take into account the probative value of the evidence in question. Without any probative value of evidence, it is hardly relevant for the case in whole, and should be discarded as unnecessary evidence. The ICC Chamber has referenced the Alekovski case in that evidence must at least have “indicia of reliability” in order to be found relevant and with probative value.\textsuperscript{140} The ICC Chamber has considered, that if there is no way to test the reliability of evidence, it does not have to exclude it, but would carefully

\textsuperscript{135} ICTY, Prosecutor v. Delalic et.al., Decision on the Motion of the Prosecution for the Admissibility of Evidence, IT-96-21-T, 19 January 1998, para. 18, supported in Prosecutor v. Kordic & Cerkez, Decision on Appeal regarding Statement of a Deceased Witness, IT-95-14/2-AR73.5, 21 July 2000, para. 24.
\textsuperscript{136} ICTR, Prosecutor v. Musema, Judgement and Sentence, ICTR-96-13-T, 27 January 2000., para. 56.
\textsuperscript{137} Ibid, para. 38.
\textsuperscript{138} Ibid.
\textsuperscript{139} See the direct reference above to: ICTY, Prosecutor v. Delalic et.al., Decision on the Motion of the Prosecution for the Admissibility of Evidence, IT-96-21-T, 19 January 1998, para. 18, supported in ICTY, Prosecutor v. Kordic & Cerkez, Decision on Appeal regarding Statement of a Deceased Witness, IT-95-14/2-AR73.5, 21 July 2000, para. 24.
William A. Schabas: An Introduction to the International Criminal Court, p. 294-5.
\textsuperscript{140} Ibid.
consider to do so upfront or after evaluating the evidence in the context of the case afterwards.\footnote{ICC, Prosecutor v. Lubanga Dyilo, Decision on the Admissibility of Four Documents, ICC-01/04-01/06, 13 June 2008, para. 28-30.}

To sum up, the ICTY and ICTR Rule 89(C) requires that evidence must be relevant and of probative value to the case. The ad hoc Tribunals have further concluded that the evidence in question must only have “some relevance” and “some probative value” (ICTR Musema case) in order to be admissible. In addition the evidence must contain “indicia of reliability” as evidence with no apparent reliability can hardly be considered relevant or of probative value. The ICC agrees for the most part with these conditions of the ad hoc Tribunals, although, ICC Statute Article 69 para. 4 only offers as a guideline that the Chamber may take into account the probative value of the evidence.

4.3.2 Hearsay evidence

Hearsay is evidence obtained from other sources than the author or the person who actually witnessed the events testified about. Hearsay can be especially important for the international courts, as the war-ravaged countries offer much evidence where the original author or witness cannot come forward.

Hearsay evidence may be admitted under ICTY/R Rule 89(C), as stated in the Tadic case “there is no blanket prohibition on the admission of hearsay evidence.”\footnote{ICTY, Prosecutor v. Tadic, Decision on the Defence Motion on Hearsay, IT-94-1-T, 5. August 1996, para. 7.} Hearsay evidence is a controversial aspect of the flexible admission under Rule 89(C). Its admission is quite restricted under the common law system but generally allowed in civil law system with due consideration to the appropriate weight of the evidence. In the ICTY Aleksovski case the Appeals Chamber defined hearsay evidence as:

As such, this evidence was hearsay, i.e., the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what that person says.\footnote{ICTY, Prosecutor v. Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence, IT-95-14/1-AR73, 16 February 1999, para. 14.}

Hearsay is thus not delivered straight from the source but rather delivered by a first-hand recount (or more removed) person which testifies to the sources’ account before the Tribunal or when the sources’ testimony is brought to the Tribunal by other methods. Hearsay is not
limited to statements but can also be used to introduce documents when the purported author is not known or will not testify. As such the Chamber in the Alekovski case found that:

Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose, or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence.

One kind of evidence typically brought as hearsay and admitted under Rule 89(C) are witness statements made in other proceedings before the Tribunal. The importance of hearsay before the Tribunals is likely to diminish after the introduction of ICTY/R Rule 92 bis and in the ICTY 92 and quater as now the parties can bring written witness statements with more ease to the trial without the witnesses having to attend or when the witness is deceased or otherwise unavailable.

The ICC does not have a codified rule on hearsay but the Chamber may rule on the relevance and admissibility of any evidence under ICC Statute Article 69 para. 4. The ICC Chamber has allowed the admissibility of certain documents even though the authors would not be called. The ICC Chamber further referenced the Alekovski case above as regards conditions for reliability but concluded that it would not be bound by the ICTY jurisprudence although it could be helpful. Finally the ICC Chamber admitted those hearsay documents since they bore “indicia of reliability” and especially since they did not seem fabricated and were internally consistent. The ICC Chamber lastly stated that it would evaluate later what significance (i.e. weight) should be given to the documents.

To sum up, admission of hearsay evidence is one of the clear differences between common law and civil law legal systems. In common law hearsay is generally not admissible. Due to the non-technical admission of evidence in the three courts, hearsay can be allowed. Hearsay as other evidence must be relevant and of probative value, and also bear “indicia of reliability. To that effect hearsay evidence is evaluated on a case-by-case basis and among

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144 ICTY, Prosecutor v. Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence, IT-95-14/1-AR73, 16 February 1999, para. 15.
145 Ibid. Alekskovski Decision, para. 17.
146 ICC, Prosecutor v. Lubanga Dyilo, Decision on the Admissibility of Four Documents, ICC-01/04-01/06, 13 June 2008, para. 28-30, 37, 40, 42.
other things looked at the circumstances the hearsay evidence was obtained in, whether the witness is only second-hand or further removed.

4.4 Verifying the authenticity of evidence

When a piece of evidence is introduced sometimes it is difficult to establish its authenticity (i.e. its source, author, location etc.). The evidence might be excluded because of this so the ICTY and ICTR Tribunals allow an option for the Chamber to request verification of the authenticity of evidence.

Rule 89 (E) in the ICTY Rules and Rule 89 (D) in the ICTR Rules gives Chambers the option to “request verification of the authenticity of evidence obtained out of court.” The ICC has no provision akin to this. This Rule can be used to assist a Chamber in determining whether a piece of evidence is reliable and probative enough to be admitted under Rule 89 (C) although as it says in a decision in the Delalic case: “Sub-rule 89 (E), [...] does not operate as a pre-condition to bar the admissibility of evidence under Sub-rule 89 (C).” The verification of authenticity of evidence can also add more credibility to evidence, which had enough indicia of reliability to be admitted under Rule 89 (C), but perhaps was not likely to attract much weight in the assessment of a Chamber. The ICTR Chambers have also confirmed this understanding in the Karamera case where the principle is stated as the following:

While a Chamber always retains the competence under Rule 89(D) to request verification of the authenticity of evidence obtained out of court, only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible.

The ICTY and the ICTR thus share the same principle regarding whether authenticity of evidence is fully required before deciding on the admissibility of evidence. The authenticity of evidence is not a separate requirement for evidence to be admissible under the common Rule 89 (C) if the evidence shows an indicia of reliability. However the authenticity of a piece of evidence may be so questionable that it would lead to the evidence being unreliable, and then a Chamber may use ICTY Rule 89 (E)/ICTR Rule 89 (D) to verify its authenticity.

Rule 89 (E) and (D) in the ICTY and ICTR Rules respectively do not limit or list in detail the ways that evidence should be authenticated and leave it to the discretion of the Chambers

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148 ICTR, Prosecutor v. Karamera et. al., Decision on Prosecutor’s Motion to Admit Prior Sworn Trial Testimony of the Accused Persons, ICTR-98-44-T 2/6, 6 December 2006, para. 4;
and perhaps the creativity of the parties themselves. If the author of the evidence in question appears in the trial and testifies to the authenticity and authorship of the evidence, it would generally not require any more verifications of authenticity, although the Chamber would not be obligated to take the testimony and evidence as absolute truth, and would as always use its own assessment of the evidence and weight attributed to it as the Chamber can freely assess its credibility.\footnote{ICTY, Prosecutor v. Delalic et.al., Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, IT-96-21-T, para. 20. Cited in ICTY, Prosecutor v. Brdjanin, Order on the Standards governing the Admission of Evidence, IT-99-36-T, 15 February 2002, para.18.} Authenticity can also be implied when the purported author is not available or is in fact the accused in the case, for example in the ICTY Appeals Chamber decision in the Delalic case the Chamber found that the surroundings where the evidence was found, that is a company site linked to the accused, and the establishment of the chain of custody by the Austrian police which seized the evidence was a sufficient indicia of authenticity and also reliability to allow its admission under ICTY Rule 89 (E).\footnote{ICTY, Prosecutor v. Delalic et.al., Decision on Application of Defendant Zejnil Delalic for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), IT-96-21-AR 73.2, 4 March 1998, para. 18, 20-21.} It says in the same decision in the Delalic case:

To require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Subrule 89 (C).\footnote{Ibid, para. 20.}

There is nothing in the Rules that forbid that evidence which has sufficient reliability and probative value to be admitted under Rule 89 (C) yet not authenticated at the time of admission may be authenticated later on in the proceedings using ICTR Rule 89 (D).\footnote{ICTR, Prosecutor v. Muvunyi, Decision on the Prosecutor’s Motion Pursuant to Trial Chamber’s Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D), ICTR-2000-55A-T, 26 April 2006, para. 1
ICTR, Prosecutor v. Muvunyi, Decision on Interlocutary Appeal, ICTR-00-55A-AR73(C), 29 May 2006, para. 6 and 8.}

To sum up, the ICTY and ICTR Chambers have the discretion to order verification on the authenticity of a piece of evidence when it is questionable. This does though not create a separate condition to the admission of evidence and is only used to add value to the credibility of the evidence in question.
4.5 Exclusionary Rules

4.5.1 Exclusion of evidence to ensure a fair trial

The open admission of all evidence of relevant and probative value could be very prejudicial to the right of the accused to a fair trial. Therefore a counterpart had to be created, to what extent this counterpart can exclude evidence is further discussed below.

ICTY Rule 89(D) states that “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.” That is the value of the evidence in question introduced to prove certain matters is highly prejudicial to the accused the Chamber may exclude it to ensure a fair trial. This Rule is the counterpart to the open admission card of Rule 89(C), as with the latter mentioned rule, Rule 89(D) gives a lot of discretion to the Chamber to decide whether to exclude evidence. A fair trial is not further clarified in the provision, and the Chambers would at the least have to fulfil the obligations put forth in Article 20 and protect the accused rights under Article 21 of the ICTY Statute. 153 Rule 89(D) can be used to exclude evidence for example when the evidence in question is to be introduced without being provided to the Defence early enough in order for it to properly examine it and prepare its defence. 154 Thus the Rule can be used when evidence is admissible under Rule 89(C) yet is so prejudice to the other party that admitting it would harm the rights of the accused under Article 21 of the ICTY Statute. 155 Rule 95 is more specialized than Rule 89(D) although in some cases they could overlap, and it seems that Rule 95 is intended for more serious incidences. 156

The ICTR Rules do not include a rule assimilating to Rule 89(D), but do none-the-less use the essence of the rule in practice. Reference is made in ICTR Rule 70(F) to the Chambers power to exclude evidence under Rule 89(C), interestingly the provision uses the same wording as the ICTY’s Rule 89(D) regarding probative value. ICTR Rule 70(F) is as following:

Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber’s power under Rule 89(C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

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153 Patricia Viseur Sellers: “Rule 89(C) and (D): At Odds or Overlapping with Rule 96 and Rule 95?”, p. 278-279.
154 Ibid.
ICTY, Prosecutor v. Delalic et.al., Decision on Motion by the Defendants on the Production of Evidence by the Prosecution, IT-96-21-T, 8 September 1997, para. 9
155 Patricia Viseur Sellers: “Rule 89(C) and (D): At Odds or Overlapping with Rule 96 and Rule 95?”, p. 278-279.
156 See Chapter 4.4.2.
It seems that the ICTR Rules are interpreted in a similar way as ICTY 89(D). As ICTR Rule 89(C) with its discretion on admission, also includes the right to exclude evidence in order to ensure a fair trial. This can be seen in the Bagosora case: “The decision to admit or exclude evidence pursuant to Rule 89(C) is one within the discretion of the Trial Chamber […]”\(^\text{157}\) In this author's view an implied rule is though less desirable than having the criteria clear in a separate rule.

The ICC essentially mixed together ICTY Rule 89(C) and (D), when ICC Statute Article 69 para. 4 was adopted. Thus the ICC Chamber can exclude evidence to ensure a fair trial as is the purpose of ICTY Rule 89(D). The ICC provision does not contain the requirement of the ICTY Rule that the probative value must substantially outweighed to ensure a fair trial. Instead ICC Article 69 para. 4 affords its Chambers the discretion an only requires that it takes into account the probative value of the evidence and any prejudice it could cause to a fair trial. The ICC Chamber therefore does not have to exclude evidence that could prejudice against a party, if it considers that it is not serious enough to break its obligation to ensure a fair trial under Article 64 para. 2.\(^\text{158}\)

To sum up, ICTY Rule 89(D) and the inherent power of the ICTR Chamber under Rule 89(C) allow the Chamber to counter the very open and free admission of evidence under common Rule 89(C) in order to ensure a fair trial. The ICTY and ICTR Tribunals’ Rule can exclude evidence, if the need to ensure a fair trial if that right substantially outweighs the probative value of the evidence (i.e. is not of material interest). The ICC affords more discretion to its Chamber in that the Chamber only has to consider whether the evidence could prejudice a fair trial and to take into account whether that outweighs the probative value of it.

4.5.2 Evidence obtained by questionable methods

ICTY/R Rule 95 excludes the admissibility of evidence that is “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.” Rule 95 is a last safe-guard for the integrity of the proceedings, and it has been called “a residual exclusionary provision.”\(^\text{159}\) It leaves a lot of discretion to the Chamber and can be used for every type of evidence. The Rule


\(^{159}\) ICTY, Prosecutor v. Delalic et.al., Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence, IT-96-21-T, 2 September 1997, para. 44.
splits into two parts: on the one hand it can exclude evidence based on where and how it was obtained if that casts substantial doubt on its reliability, this reliability test goes to the source. On the other hand the Chamber may exclude evidence that is in opposition to or would seriously damage the integrity of the proceedings.

If evidence (which would generally be admissible under ICTY/R Rule 89(C)) is obtained by questionable methods, it may be excluded under ICTY/R Rule 95. As noted in the Brdjanin decision on intercept evidence, “there is nothing in the Rules concerning the exclusion of illegally obtained evidence”.\footnote{ICTY, Prosecutor v. Brdjanin, Decision on the Defence “Objection to Intercept Evidence”, IT-99-36-T, 3 October 2003, para. 53.} The Chamber has some discretion when dealing with illegally obtained evidence and subjects that to scrutiny and in the same decision confirmed former decisions that “communications intercepted during an armed conflict are not as such subject to exclusion under Rule 95 and should therefore be admitted upon a challenge based on the grounds laid down in that Rule.”\footnote{Ibid.} If the accused rights during questioning, for example the right to counsel and to remain silent, have not been followed, that could be grounds for excluding evidence from that session using Rule 95.\footnote{ICTY/R Rule 42 details the rights of the accused during questioning.} In the Delalic case the ICTY Trial Chamber concluded that Rules 42 and 95 should be read together. If the procedure during the questioning of a suspect does not follow Rule 42 this probably would violate the integrity of the proceedings and fall under Rule 95.\footnote{ICTY, Prosecutor v. Delalic a.o., Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence, IT-96-21-T, 2 September 1997, para. 43-44.}

The ICC has in Article 69 para. 7 of the ICC Statute a similar rule as is in Rule 95 of the ad hoc Tribunals. The ICC Article is an exclusionary rule directed at evidence which was obtained in violation of the Statute or internationally recognized human rights. The ICC Article goes a step further than the ICTY/R Rule in connecting the inadmissibility of evidence to violations of international human rights, which was part of the older original ICTY Rule 95. ICC Statute Article 69 para. 7 (a) and (b) are near identical to the criteria of ICTY/R Rule 95, stating that “(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.” ICC Rule 63 para. 3 states that the Chamber shall rule on the admissibility or relevance of evidence, when challenged under Article 69 para. 7, either by its own motion or on application by a party in accordance with Article 64 para. 9 (a). Even

\footnote{ICTY, Prosecutor v. Brdjanin, Decision on the Defence “Objection to Intercept Evidence”, IT-99-36-T, 3 October 2003, para. 53.}
\footnote{Ibid.}
\footnote{ICTY/R Rule 42 details the rights of the accused during questioning.}
\footnote{ICTY, Prosecutor v. Delalic a.o., Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence, IT-96-21-T, 2 September 1997, para. 43-44.}
though the ICC Article is limited to violations of its Statute or internationally recognized human rights it is foreseeable that especially in the near future before establishing its own case-law it will look to the interpretation of Rule 95 of the ad hoc Tribunals. There are early indications that some violations of internationally recognized human rights will not be considered serious enough for the Chamber to exclude evidence on that ground. As can be seen in the *Lubanga Confirmation Hearing* where evidence introduced for admission was obtained through a violation of Congolese law. The Chamber concluded that the seizure of the accused's possessions constituted a violation of the right to privacy. In this case it also found that the offence went against the principle of proportionality as determined in the case-law of the European Court of Human rights. Therefore this offence was considered a possible violation of an internationally recognized human right. Yet the Pre-Trial Chamber decided to use its discretion under Article 69 para. 7 and found that the violation had not affected the reliability of the evidence nor was it serious enough to damage the integrity of the proceedings and therefore did not exclude the evidence.\textsuperscript{164}

In addition, Article 69 para. 8 of the ICC Statute states that “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.” This is to make absolutely clear that the Court will not rule on purely national issues of law regarding evidence. It is to use its own set of rules for admission of evidence. If the violation can also be considered a violation of internationally recognized human rights, Article 69 para. 7 becomes applicable as the *Lubanga case* above shows.\textsuperscript{165}

To sum up, ICTY/R allows evidence to be excluded if it was obtained by methods which cast substantial doubt on the evidence or its use would be antithetical to or seriously damage the integrity of the proceedings. This can include information obtained during questioning of the accused without respecting his rights to counsel. The ICC rule is similar and only adds to the ICTY/R Rule that evidence obtained in violations of internationally recognized human rights can be excluded as well. As seen already in the ICC case-law not every violation of an international human right will be considered serious enough to be automatically excluded. This in essence makes the ICTY/R Rule 95 and the ICC Statute Article 69 para. 4 the same which will probably be reflected in the future jurisprudence of the ICC.

\textsuperscript{164} William A. Schabas: *An Introduction to the International Criminal Court*, p. 299; *ICC, Prosecutor v. Lubanga Dyilo, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007*, para. 79-82, 84-90.

4.5.3 Evidence regarding sexual assaults

Victims of sexual violence related to the armed conflicts, as well as other victims, come before the courts to tell their story. They need to be protected by the courts as possible, so they will not be re-traumatized all over again, which could also lead to fewer willing to testify.

The ICTY and ICTR have the nearly an identical special rule regarding which evidence can not be admitted in the case of victims of sexual assault, namely the common Rule 96. Both the ad hoc Tribunals' Rule 96(i) requires no corroboration of the victim's testimony, which is a general rule regarding witness testimony as can be seen later in the chapter on corroboration of testimony. The ICC, with Rule 63 para. 4 has also adopted this special emphasis on no corroboration required in order to prove crimes of sexual violence. This is to accord the victims of sexual assault the same status as other witnesses and victims of other types of offences.166

Consent is not allowed as a defence if the victim was subject to coercion according to Rule 96(ii) and is carefully controlled via in camera proceedings according to Rule 96(iii). This is done to protect the victim, as otherwise it could traumatize the victim all over again, as one scholar wrote:

Without the protective language of Rule 96, a defense attorney could demoralize and devastate such a survivor on the stand. She did not resist, did not fight back, did not say “no”.167

Rule 96(ii) thus bans the defence of consent if the victim: “(a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or” “(b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear”. This takes into account the horrific circumstances victims of war can face, with methods such as systematic rapes, detention centres and other coercive means. The ICTR Chamber in the Akayesu Judgement noted that:

[…] coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed

167 Kelly Dawn Askin: War Crimes against Women, p. 304.
conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.\textsuperscript{168}

The Rule addresses both the subjection of the victim itself and the sexual assault upon him or her and also if the victim consented in order to save another from such terror. A victim's consent is a valid form of defence when no coercion has taken place but in the interests of protection a special in camera hearing is held, before evidence thereof can be admitted, where the accused must convince the Chamber that the evidence of consent is both relevant and credible according to Rule 96(iii). This is a procedural safeguard in order to fully block the possibility of the Defence circumventing or creatively dancing on the boundaries of the above-mentioned Rule with the victim on the stand. This way the Chamber will hear the evidence of consent beforehand and can determine whether it undermines the ban in Rule 96(ii) or if it can be admitted.

An important right for the victims is found in Rule 96(iv) where evidence of prior sexual conduct of the victim shall not admitted. This is a outright ban on admitting evidence of this type as “The nature of the crimes laid down in the Statute do not justify challenging the victim's prior or subsequent sexual conduct.”\textsuperscript{169} The ICTR adds to Rule 96(iv) that prior sexual conduct of a victim shall not be used as defence. This strengthens the Rule and clearly shows the will to exclude all such testimony and evidence from the proceedings. The ICC has also adopted in essence the same rule in Rule 71, which states that prior or subsequent sexual conduct of a victim or witness shall not be admitted into evidence. The ICTY Chamber states in a decision in the Delalic case is that evidence of prior sexual conduct “mainly serves to call the reputation of the victim into question.”\textsuperscript{170} It further states that when the Judges adopted the Rule it was to protect the victim from harassment and humiliation of such evidence and decided that such emotional trauma for the victim negates the miniscule is any value of such evidence for the trial.\textsuperscript{171} The ban on evidence of prior sexual conduct of the victim can even extend to the testimony of the victim itself, as in the Delalic case after the Defence improperly asked about contraception of the victim and the victim itself subsequently testified

\textsuperscript{168} ICTR, Prosecutor v. Akayesu, Judgement, ICTR-96-4-T, 2 September 1998, para. 688.
William A. Schabas: The UN International Criminal Tribunals, p. 342.
\textsuperscript{169} Karim A.A. Khan, Rodney Dixon and Judge Sir Adrian Fulford Q.C: Archbold International Criminal Courts, p. 477-8, para. 9-87.
\textsuperscript{170} ICTY, Prosecutor v. Delalic et.al., Decision on the Prosecution's Motion for the Redaction of the Public Record, IT-96-21-T, 5 June 1997, para. 48.
\textsuperscript{171} Ibid., para. 48.
about her abortion, it was prudent of the Chamber to grant the Prosecutor's motion by the victim's request to redact that statement from the public records. Prior sexual conduct can therefore have broad meaning and extends to contraceptives used, and abortion is of course due to prior sexual conduct.\textsuperscript{172}

The ICC has gone a slightly different route at its rule, and instead of stating as the Tribunals that consent shall not be allowed as a defence (ICTY/R Rule 96 (ii)), ICC Rule 70 only goes as far as to say that the Court shall be guided by and where appropriate apply the principles in the sub-paragraphs. Those principles are in ICC Rule 70 (a)-(d) and are as here follows:

(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent;

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

The ICC is thus taking into account some of the criticism of the common ICTY/R Rule 96 that it is the work of the Prosecutor to prove the absence of consent in cases of sexual violence.\textsuperscript{173} The ICC Rule takes into account several reasons why victims of sexual assault do not always object to the point of danger. Accordingly ICC Rule 70(c) is important for victims who essentially freeze when an attack occurs and (d) is linked to Rule 71 which forbids the admission of evidence of prior or subsequent sexual conduct of the victim or the witness. The ICC is more elaborate on the reasons where consent can be inferred from, yet the ICTY and ICTR case-law shows similar results and essentially looks to the conditions offered in the ICC Rule, so in the end the two sets of rules are fairly similar.\textsuperscript{174} In both sets of rules the interest lies in protecting the victim from unnecessarily subjecting it to a traumatizing testimony when it is appropriate to avoid it. This can be construed from ICC Statute Article 68 which places

\textsuperscript{172} Ibid., para. 2, 59, chapter IV..

\textsuperscript{173} William A. Schabas: \textit{The UN International Criminal Tribunals}, p. 498.


\textsuperscript{174} Ibid.
particular emphasis on protecting victims of sexual violence. In that interest the ICC when the issue of evidence related to consent for the alleged sexual violence, as the ICTY/R Rule 96 (iii) proposes as well, it is controlled by the Chamber and shall not be admitted without further scrutiny in accordance to ICC Rule 72.

Thereafter the ICC Rule and ICTY/R Rule start to differ, as Rule 96 (iii) of the ad hoc Tribunals simply requires the accused to convince the Chamber in camera as to the relevance and credibility of the evidence. ICC Rule 72 para. 1, requires notification has to be sent to the Chamber, when:

Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.

With ICTY/R Rule 96 (iii) only the accused is to convince the Trial Chamber of the relevance of the evidence proposed. In the ICC all parties are heard when the Chamber decides whether evidence as detailed above under Rule 72 para. 1 is admissible or relevant. The Chamber shall hear in camera from the Prosecutor, the defence and also from the victim or witness or their legal representatives according to ICC Rule 72 para. 2. The Chamber shall as well under the same Rule take into account whether the evidence in question has sufficient probative value and the prejudice that it might cause, as the general admission of evidence clause in Article 69 para. 4 elaborates on. The Chamber shall further have regard to ICC Statute Article 21 para 3 with regard to consistency with internationally recognized human rights as well as the rights of the accused in Article 67 and the protection of victims and witnesses in Rule 68. The principles in Rule 70 (a)-(d) when consent should not be inferred from, should also be regarded in this evaluation and especially “with respect to the proposed questioning of a victim”, according to ICC Rule 72 para. 2. When evidence after all this scrutiny is deemed admissible the Chamber shall place on record the specific purpose for which the evidence is admissible, that is it is admitted for a narrow purpose only and not in a sense a open admission of evidence, according to Rule 72 para. 3. The Chamber shall use the principles in Rule 70 (a)-(d) when evaluating the admitted evidence during the proceedings, also according to Rule 72 para. 3. The ICC provisions on the matter have much more detail on the matter when evidence of consent can be admitted. ICC Rule 72 is detailed and seems to limit the Judges discretion to evaluate evidence of that nature.
To sum up, all the three courts take into the account the extraordinary sensitive nature of the testimony of victims of sexual violence. If the Defence seeks to introduce evidence of consent of the alleged victim, the three courts further restrain this line of questioning and require either in camera hearings (ICTY/R) or notification of substance to the Chamber (ICC) beforehand. The ICC Rule has gone further than the two ad hoc Tribunals in listing in detail reasons, where consent can not be inferred. This is a commendable effort to strengthen the rights of victims of sexual violence. The ICC Chamber also has extensive guidelines on how it should evaluate such evidence of consent and shall look to inter alia evidence that consent could be inferred from, consistent with international human rights. None of the courts allow the introduction of evidence of prior or past sexual conduct.

4.5.4 Privileged communications

The ICTY Rule 97 and ICTR 97 (A) are identical, and all communications between the lawyer and his client are considered privileged and cannot be the subject of a disclosure order unless “(i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.” The Rule seems straightforward and expresses the principle that it is the accused right to be able to communicate privately and freely with his Counsel as otherwise the preparation of his defence would be impossible if the Prosecutor or the Chamber would be allowed to listen in on every detail. The term lawyer-client privilege is supposed to be interpreted as it is worded, only between a lawyer and his or her client, thus a Prosecutor and witness for the prosecution do not fall under that privilege. The ICC has the same rule on lawyer-client privilege as the ad hoc Tribunals do, in Rule 73 para. 1. ICC Rule 73 does not stop there, unlike the Tribunals Rule 97, as it also recognizes privileged communications with several other professional classes and their clients, and in addition the special status of ICRC staff has been recognized. After the ICTY Decision in the Furundzija case which concluded that statements regarding a rape victim's psychiatric treatment should be disclosed and the

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175 The ICTR added an extra exception in Rule 97 (B) as regards to illegal practices of the Counsel, for example fee-splitting with his client but that is not relevant here.
176 ICTR, Prosecutor v. Bizimungu et.al., Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing, ICTR-00-56-T, 1 April 2005 para. 31.
177 Although when the person consents to disclosure of such privileged communications it has to be done in writing in accordance with ICC Rule 73 para. 1(a).
witness cross-examined on that basis, it became the subject of much debate to what extent medical records should be disclosed for the rights of the accused.\textsuperscript{178}

This debate, among other things, may have lead the drafters of the ICC Rules to incorporate the second part of Rule 73 which allows the Chamber to regard as privileged communications in certain classes of a professional or other confidential relationships if the Chamber is decides that according to ICC Rule 73 para. 2:

(a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
(b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and (c) Recognition of the privilege would further the objectives of the Statute and the Rules.

As with lawyer-client privilege, communications in relationships that fall under sub-paragraph 2 above, are not subject to disclosure unless as with lawyer-client privilege, the person consents to disclosure or voluntarily discloses the communications to a third person who in turn gives evidence. Among those professional relationships ICC Rule 73 para. 3 shows examples which are particularly suitable for the abovementioned rule, that is medical doctors, psychiatrists, psychologists and counsellors particularly for victims, and other confidential relationship such as a sacred confession before a member of religious clergy.

The ICC Rules, namely Rule 73 para. 4-6, recognize the special international status of the International Committee of the Red Cross (ICRC) and the organization's need to be viewed impartial in order to do its humanitarian work. Therefore any testimony from present or past official or employees of the ICRC, any information, documents or other evidence which was obtained during or as a consequence of the performance of the ICRC under its Statutes, is considered privileged and thus exempt from disclosure unless certain conditions apply. The ICC Chamber has an option to start consultations with the ICRC if it considers that the information is of great importance to the case. In those consultations the participants should keep in mind “the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court’s and ICRC’s functions”, according to Rule 73 para. 6. After such a consultation if the ICRC does not object in writing to disclosure of such evidence then the privilege shall be considered lifted, according to ICC Rule 73 para. 4(a).

\textit{ICTY, Prosecutor v. Furundzija, Decision, IT-95-17/1-T, 16 July 1998, para. 18-19, 21.}
The ICRC can also waive the privilege under the same rule. Sub-paragraph 5 makes it clear that the privilege only goes to information and etc. obtained through the ICRC, if the same evidence is obtained through other means independent of the ICRC then no privilege applies. If the information (materials) in question are included in any public statement or documents of the ICRC, then it is not considered privileged anymore, according to Rule 73 para. 4(b). The ICTY has in a previous decision shown that it also affords privilege to ICRC officials and employees unless the privilege is waived as the ICRC has a right to non-disclosure under international law. This un-codified approach is less desirable than making it into a Rule as the ICC has done and thus shows its firm intention to safeguard the ICRC from disclosure unless it is of great importance to the case.

To sum up, all the three courts consider the communications between a lawyer and his client privileged and thus not to be disclosed. An exception is if the accused consents to such disclosure or broke the privilege by telling a third person, which then testifies about it. The ICC has gone further than the ICTY/R and extends privileged communications to other kinds of professional relationships with clients, such as the medical profession and religious confessions. The ICTY has in its jurisprudence formed the unwritten principle that the ICRC has privilege when it comes to its information unless the ICRC consents to waive it. The ICC has taken that approach a step further and affords the ICRC privileged status unless consent is waived or consultations have taken place. The ICC has thus firmly established the privileged status of the ICRC and recognized its special status in international law.

4.6 Witnesses

4.6.1 Oral Testimony

Numerous witnesses are called before the three courts in each case. The basic rule is that material witnesses should be heard directly, whereas for example the ICTY has moved considerable towards written testimony from other witnesses for the sake of time.

The ICTY changed to Rule 89(F) in order to expedite trials and allowed written testimony to be admitted more easily and gave the Chambers more discretion to admit written testimony when “the interests of justice” so allow, although material witnesses should in principle be heard orally. ICTY Rule 89(F) states “[…] may receive the evidence of a witness orally or,

179 ICTY, Prosecutor v. Simic et.al., Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, IT-95-9-PT, 27 July 1999, para. 74, 76, 80.
where the interests of justice allow, in written form”, so a Chamber has broad discretion regarding witness testimony. In later years though, for the purpose of expediting the trial proceedings, written testimony has become more common. This is quite understandable since generally so many witnesses are required in each case. In the past the ICTY had the principle of live testimony of witnesses with the former Rule 90(A) which was amended in December 2001. The former Rule 90(A) stated that “Subject to Rules 71 and 71 bis, witnesses shall, in principle, be heard directly by the Chamber.” The ICTR still retains a similar rule in Rule 90(A) and has not waived its principle of live testimony in its Rules although expeditious trials are also of concern for the ICTR. For the ICTR the main rule in Rule 90(A) is therefore to hear the witnesses directly and thus any written form of witness testimony is used as a subsidiary means, although a Chamber can order depositions under ICTR Rule 71. The ICC has adopted the approach that the principle is that witnesses at trial shall be heard in person, except when certain protective measures for victims and witnesses especially victims of sexual violence and children, according to Article 69 para. 2 of the ICC Statute. The ICC can also under the same Article permit oral testimony through video- or audio technology or prior written transcripts.

Material witnesses should still always be heard directly, if other circumstances do not prevent them from attending. If important witnesses are not heard live before the courts that undermines the accused's right to examine the witnesses against him. This right has been slightly limited in practice, since not all witnesses are testifying directly on the actions of the accused and thus are not particularly important to his defence.

To sum up, the ICC and ICTR in principle prefer live oral testimony with some exceptions for example, depositions (ICTR) and prior recorded testimony or to protect victims and witnesses (ICC). The ICTY still prefers live testimony, but has moved written testimony higher in the totem pole than the other two courts in order to expedite trials. In all cases material witnesses should on principle be heard live.

4.6.1.1 Corroboration of testimony
The situation can arise that there can only be found one eye-witness to testify on a charge. It is important to look at whether that lone witness could be the sole basis of conviction of the accused.

As a general principle witness testimony does not need any corroboration and the principle of civil law on unus testis, nullus testis (“one witness is no witness”) does not apply before the
Tribunals.\textsuperscript{180} The ICC has adopted the same view into its legal text as can be seen in Rule 63 para. 4 where it states that “Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.”\textsuperscript{181} Whether a witness's testimony needs corroboration is determined on a case-by-case basis and among other things looks to the reliability of the witness and the material evidence it testifies to.\textsuperscript{182} The \textit{Kupreskic Appeal Judgement} states:

the absence of corroboration is simply one factor to be taken into consideration by the Trial Chamber in weighing the evidence and arriving at its determination of witness credibility.\textsuperscript{183}

Thus an accused can be convicted on the basis of a single direct-witness's testimony, though of course corroborating evidence is desirable and most often needed since witness testimony most often can not express the whole story of the incident and eye-witness testimony can be faulty.\textsuperscript{184} In the \textit{Kupreskic judgement}, an eye-witness identification of an accused from 50 metres away, with an expert testifying to at that distance a witness would likely be mistaken, was thought to need corroboration.\textsuperscript{185}

Unsworn children testifying according to ICTY Rule 90(B) and ICTR Rule 90(C) are the exception to the general rule that witness testimony needs no corroboration. According to the Rule the accused can not be convicted on the basis of such testimony alone.

In Rule 96(i) both Tribunals emphasize that no corroboration of a victim's testimony is needed in cases of sexual assault. Because of the nature of sexual assault cases many times the victim is the only one able to testify against the accused and the Tribunals seem to acknowledge that fact with this Rule. As stated above, as a general rule witness testimony needs no corroboration. Rule 96(i) emphasises this principle regarding sexual assault victims Thus ultimately rejecting the common law approach of the need for corroborative testimony

\textsuperscript{180} This principle is of civil law origin but as pointed out in the Tadic Judgement the principle is almost obsolete in modern day countries. See \textit{ICTY, Prosecutor v. Tadic, Opinion and Judgment, IT-94-1-T}, 7 May 1997, para. 537.

William A. Schabas: \textit{The UN International Criminal Tribunals}, p. 484-5.

\textsuperscript{181} Geert-Jan Alexander Knoops: \textit{Theory and Practice of International and Internationalized Criminal Proceedings}, p. 196.


\textsuperscript{184} William A. Schabas: \textit{The UN International Criminal Tribunals}, p. 484-5.

of sexual assault victims, (see the Tadic judgment). The Tadic judgment further states that any inference from Rule 96(i) that other witnesses need corroboration is not justified.\textsuperscript{186} The ICTR Chamber in the Akayesu case confirmed the same interpretation and referenced the Tadic judgment in its judgement.\textsuperscript{187} The ICC as stated above, also emphasizes that the testimony of victims of sexual assault in particular shall not be imposed with any legal requirements of the Chamber as to need corroboration. In this regard the ICC and the \textit{ad hoc} Tribunals adhere to the same principle regarding corroboration of witness testimony and in particular in the situation of victims of sexual assaults.

To sum up, the ICTY and ICTR have adopted through case-law the general principle that witness testimony does not need corroboration, thus rejecting the civil law principle of “one witness is no witness”. The ICC codified this principle in its Rule 63 para. 4. The ICTY and ICTR have an exception from the principle as unsworn children's testimony needs corroboration. All three courts emphasise that the principle stays the same regarding victims of sexual violence and no corroboration is needed. That is not to say that corroboration with evidence is not desired, and in some cases needed when the direct witness's testimony is not sufficiently clear for conviction.

4.6.1.2 \textit{Solemn Declaration}

The three courts desire the truthfulness of its witnesses and thus they are required to take an oath of truth.

Under ICTY Rule 90(A) and ICTR Rule 90(B) every witness shall make a solemn declaration to speak the truth before testifying. An exception can be made for young children if the Chamber believes that the child does not understand the nature of such a declaration but is mature enough to testify to the facts of the matter and understands that it should speak the truth. Prof. Schabas pointed out, that this Rule is really not used in practice since the acts and events about which the witnesses are testifying, usually happened several years before and young children at the time of the atrocities are now in all likelihood sufficiently mature to understand the solemn declaration.\textsuperscript{188} The ICC also requires witnesses to make a solemn declaration before testifying, stating: “I solemnly declare that I will speak the truth, the whole

\textsuperscript{186} ICTY, Prosecutor v. Tadic, Opinion and Judgment, IT-94-1-T, 7 May 1997, para. 536.
\textsuperscript{187} William A. Schabas: \textit{The UN International Criminal Tribunals}, p. 484-5.
\textsuperscript{188} ICTR, Prosecutor v. Akayesu, Judgement, ICTR-96-4-T, 2 September 1998, para. 134-135.
\textsuperscript{188} William A. Schabas: \textit{The UN International Criminal Tribunals}, p. 471-2.
truth and nothing but the truth”, according to ICC Rule 66 para. 1 and is in accordance with ICC Statute Article 69 para. 1. As applies for the ad hoc Tribunals an exception is made for children, although the ICC states persons under eighteen, and adds also persons whose judgement is impaired, who in view of the Court do not understand the nature of this solemn undertaking may testify without taking it if the Court considers that they can orate the matters they have knowledge of and that they understand that they should speak the truth.

One of the reasons for this solemn declaration or undertaking is to mark the time from which the witness becomes a witness for the Tribunal/Court and after that the witness may be prosecuted for false testimony, in accordance with ICTY/R Rule 91 and ICC Article 70 para. 1(a) of the Statute.

At the ICTY and ICC the accused is entitled to make an opening statement without taking such an oath of truth first, according to ICTY Rule 84 bis and ICC Statute Article 67 para. 1(h). This exception is due the fact that the courts are mainly adversarial in nature, and thus allow the accused to make an unsworn opening statement. If the accused then decides to testify on his/her behalf, then he/she needs to be sworn in. ICTY Rule 84 bis (A) further states that the accused may no be examined about the contents of the opening statement, i.e. no cross-examination shall take place on its contents. The ICC does not comment on whether the accused may be examined on the statement. The opening statement of the accused, although unsworn, may nevertheless be evaluated as evidence in the trial. The Trial Chambers of the ICTY and the ICC may evaluate the probative value of such a statement, according to ICTY Rule 84 bis (B) and the general condition of ICC Statute Article 74 para. 2, that the decision of the Court will be based on the evaluation of evidence from the entire proceedings.

To sum up, all three courts require their witnesses to take a similar oath of truth before testifying. After this the witness may be prosecuted for false testimony or contempt of court. Children are exempted from taking an oath if they are believed not to understand the oath, yet are capable of understanding that they should speak the truth. At the ICC an exception is made as well for mentally impaired persons. At the ICTY and ICC the accused may make an unsworn opening statement and may be considered evidence for the eventual evaluation of the Chambers. The ICTY Rule expressly states the accused may not be cross-examined on it.

190 Ibid.
4.6.1.3 **Witness presence during another witnesses testimony**

Witnesses who are yet to testify shall not be present during another witness's testimony.\(^{191}\) If a witness disregards this and listens to the testimony of another witness, it is not barred from testifying on that reason alone as the Rules states but it could affect how the Chamber views the testimony of that witness. If that witness for example suddenly changes its story or the other witness was testifying on important issues regarding the case which touched upon the potential testimony of the first witness, it could affect the credibility of that witness and thus the Chamber would attach less weight to it. It is difficult to ensure that witnesses do not hear or learn about other witness's testimony before their own, since the hearings are public and are broadcasted on the internet on the website of the ad hoc Tribunals and the ICC. Therefore they are not disqualified from testifying just for that reason alone but of course it is an undesirable position for the judges and the parties to be left with.\(^{192}\)

An exception is made for expert witnesses in ICTY Rule 90(C) and ICTR Rule 90(D), and they can listen to other witnesses before their own testimony without repercussions. This is among other things due to the face that their testimony is quite often based on refuting the opposing party's experts and therefore knowledge of the opposing experts' testimony is pivotal. The ICTY has taken this a step further and now lists in Rule 90(D) that “an investigator in charge of a party's investigation” is not disqualified from being called as a witness because of his or her presence during another witnesses testimony.\(^{193}\) The ICC has opted for the same exception as the ICTY, that experts and investigators may listen to other witnesses testimony before their own, according to ICC Rule 140 para. 3.

To sum up, all three courts forbid their witnesses to listen to other witnesses testimony before their own. However if the witness ignores this it is not barred from testifying for that reason alone but it could affect its credibility. An exception is made for experts and at the ICTY and ICC the parties investigators as well.

4.6.2 **Incriminating testimony**

Witnesses before the courts are not all innocent victims of the conflicts. Therefore a special need arises in order to get those individuals to testify freely in order to determine the truth.

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\(^{191}\) ICTY Rule 90(C), ICTR Rule 90(D), and ICC Rule 140 para. 3 unless the Chamber decides otherwise.


\(^{193}\) William A. Schabas: *The UN International Criminal Tribunals*, p. 473.
The ICTY Rule and ICTR have a similar rule regarding the right of witnesses not to incriminate themselves with their testimony. The ICTY Rule 90(E) allows the witness to object to making a statement that could incriminate him/her, and the ICTR wording in Rule 90(E) is even stronger and allows the witness to refuse to make such a statement. Under both Rules the witness may be compelled by the Chamber to answer a question which could incriminate them, while if the Chamber does so, the testimony compelled shall not be used for prosecution of the witness other than for false testimony. It would be against the basic rights of witnesses if they were compelled to incriminate themselves and prosecuted with that testimony, when an accused would not be compelled to do so. The difference between the wording “object” to make a potentially incriminating in the ICTY Rule and “refuse” to do so in the ICTR one, therefore does not affect the end result that in both Tribunals Chambers the witness can in fact be compelled to make such a statement.

The ICC has gone a lot further with the right of a witness not to incriminate itself than the Tribunals. As with the two ad hoc Tribunals the witness can object to making a statement that incriminates him- or herself, according to ICC Rule 74 para. 3(a). The Court can offer a witness two types of assurances from subsequent prosecution based on the incriminating testimony, except for false testimony. On one hand the Court may offer potential witnesses or experts an assurance of confidentiality of such testimony, before he/she attends the trial, or when voluntarily appearing before the Court (ICC Statute Article 93 para. 1(e), according to Rule 74 para. 2. On the other hand the Chamber may offer an assurance to a witness when the problem of incriminating testimony arises in trial, according to Rule 74 para. 3(c). In both cases the Chamber should keep the incriminating testimony confidential from the public and any State and can only be used for prosecution of false testimony or misconduct in court, according to Rule 74 para. 3(c). In both cases after provided with an assurance a witness may be required to answer incriminating questions, according to Rule 74 para. 3(b) and (c).

Before deciding to give a witness such an assurance the ICC shall hear the Prosecutor's opinion in an ex parte hearing, according to Rule 74 para. 4. Before requiring the witness to answer an incriminating question the Court shall also take into consideration “the importance of the anticipated evidence”, the uniqueness of it, the possible incrimination if known (probably for a weighing of interests), and whether the protection will suffice in each case, according to Rule 74 para. 5. If the Court decides against giving the witness assurance of the

194 Regarding the accused, this right is found in the ICTY Statute Article 21(4)(g) and ICTR Statute Article 20(4)(g).
nature described above, it can not compel the witness to answer an incriminating question in accordance with sub-rule 6. When an assurance has been given, the Chamber has to put in motion certain protection measures to ensure the confidentiality of the incriminating testimony. The ICC Chamber shall order that the testimony of the witness (either in whole or part) be given in camera, and that the identity of the witness or the contents of its incriminating testimony not be disclosed, according to Rule 74 para. 7. The Chamber must also under the same Rule seal the records and take any protective measures necessary in any decision (i.e. all trials) of the Court to keep that information confidential.195

Further the Prosecutor has to request an in camera hearing if he/ she considers that a witness's testimony may raise issues of self-incrimination before the witness testifies and the Court may then decide to provide the protective measures (in ICC Rule 74 para. 7 above), according to Rule 74 para. 8. The accused, the Defence, or the witness itself shall also advise the Prosecutor or the Chamber if the same situation arises and the Chamber may also order such protective measures as in para. 7, according to Rule 74 para. 9. If issues of self-incrimination rise during a witness testimony the Chamber shall suspend the testimony of the witness and allow upon request the witness to seek legal advice on the application of Rule 74, according to Rule 74 para.10.

The ICC has incorporated a special rule which the two ad hoc Tribunals do not have, which is that although family members, (limited only to the accused's spouse, children or parents) shall not be required to make a statement, which might tend to incriminate the accused, they can make such a statement willingly, according to ICC Rule 75 para. 1. The Chamber in its evaluation of a witness statements from the above mentioned family members can take into account that the witness “objected to reply to a question which was intended to contradict a previous statement made by the witness, or the witness was selective in choosing which questions to answer”, according to Rule 75 para. 2. Thus the testimony of such a witness, when seemingly uncooperative and choosy, beyond simply protecting the accused, could weigh against his or her testimony.

To sum up, all three courts recognize the principle that witnesses shall not be compelled to incriminate themselves, unless protected from subsequent prosecution, except for false testimony. The ICC has afforded even more discretion to a witness when incriminating itself and offers assurance as to the confidentiality of the witness's identity and contents of his/her

195 The Court must advise the parties, legal representatives and Court staff present of the consequences of violating that non-disclosure which is subject to ICC Statute Article 71 of court misconduct.
testimony from the public and any State. The ICC Rule 74 offers a complex system of procedures when the problem of incriminating testimony arises and the Chamber has to put certain protective measures in place in order to compel the witness to answer. A unique feature to the ICC is also that it allows the spouse, children and parents of the accused to refuse to answer question potentially incriminating the accused.

4.6.3 Cross-Examination

Unlimited cross-examination would waste a substantial amount of time and therefore it has to be restricted according to the relevance to the case.

The ICTY and ICTR have the same Rule regarding cross-examination of witnesses and the Chamber's power to control the interrogation, namely ICTY Rule 90(F) and (H), and ICTR Rule 90(F) and (G). The party calling the witness starts with the examination-in-chief according to Rule 85(A) and (B) and then the opposing party may cross-examine the witness with certain limits as to what subject-matter is allowed according to ICTY Rule 90(H) and ICTR Rule 90(G). The main objective of the cross-examination is to allow the opposing party to contest the evidence-in-chief and to ultimately strengthen their own case by casting doubt on the opposing party's case. To this extent ICTY Rule 90(H)(i) and ICTR Rule 90(G)(i) limit the cross-examination “to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.” The cross-examination is thus not limited to the evidence-in-chief and the credibility of the witness. It also allows the cross-examining party to question the witness outside the scope of the aforementioned limitations, if the witness can give evidence relevant to the case of the cross-examining party and then the party can question the witness on the whole subject-matter of the case. During the “cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears, which is in contradiction of the evidence given by the witness”, according to ICTY Rule 90(H)(ii) and ICTR Rule 90(G)(ii). In addition to the above criteria the Chamber may permit enquiries into additional matters not covered above according to ICTY Rule 90(H)(iii) and ICTR Rule 90(G)(iii).

At the ICC the Presiding Judge may issue directions of the conduct of the proceedings under ICC Statute Article 64 para. 8(b) or the parties seek an agreement on the presentation of

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evidence. Fail that, the Chamber has to issue directions under ICC Rule 140. In all cases the parties can question a witness about the “relevant matters related to the witness's testimony, the reliability of evidence, credibility of the witness and other relevant matters”. Which is similar to that of the ICTY and ICTR Rules, yet the ICC Rule seems not as limited to the examination-in-chief. In addition the Trial Chamber may question a witness either before or after the parties question him/her. Oddly enough ICC Rule 140 para. 2(d) gives the right to the Defence to be the last to examine a witness, and this seems regardless of which party first presented the witness's testimony.\(^{197}\)

This goes hand-in-hand with ICTY/R Rule 90(F) which grants the Chamber control over the interrogation of the witnesses and presentation of evidence. The Chamber can thus stop the cross-examination or ban the continuation of certain irrelevant parts, in order to “i) make the interrogation and presentation effective for the ascertainment of the truth; and ii) avoid needless consumption of time.” The ICC has adopted a near identical rule in Regulation 43 of the Court. This is an important tool for the Chambers to manage the parties and assist in expediting trials with downsizing the time wasted in the trial on irrelevant and frivolous matters.

To sum up, witnesses can not be cross-examined on just any subject. At the ICTY/R the witness shall first and foremost be cross-examined on issues raised in the examination-in-chief and to challenge its credibility. The witness may also be questioned on the subject-matter of the whole case, if it can offer relevant evidence for the cross-examining party. The ICC has adopted a similar rule. In addition the ICC Chamber may question witnesses either before or after the other parties and the Defence shall always be allowed to be the last to examine a witness. In all three courts the Chambers may control the questioning of witnesses so as to avoid needless waste of time and to find the truth.

\subsection*{4.6.4 Written testimony}

Even though the courts have in general the principle of live testimony, written testimony is an important tool for the courts. Therefore it needs to be examined how the courts admit such testimony.

The ICTY Chambers can receive evidence of a witness in written form, if the interests of justice allow it, according to Rule 89(F). This is a vague condition and gives a Chamber broad

\footnote{Karim A.A. Khan, Rodney Dixon and Judge Sir Adrian Fulford Q.C: \textit{Archbold International Criminal Courts}, p. 372, para. 8-73.}
discretion, while however it must be considered to be a guiding light to the more specific rules regarding the admission of written testimony in Rule 92 bis, quater and ter. Live testimony is still higher in rank to written testimony with the ICTY even though Rule 89(F) did move written testimony closer to that rank to enable it to expedite proceedings while ensuring a fair trial which also relates to the length of the proceedings. The ICTR has not changed its preference for live testimony although it has adopted Rule 92 bis and can thus receive written statements or transcripts through that Rule. Rule 92 bis of both Tribunals is further considered lex specialis towards the lex generalis admission rule of evidence namely Rule 89(C). Thus the evidence must still first fulfil the criteria put forth in ICTY/R Rule 89(C) as to the probative value and relevance while weighing in the need to ensure a fair trial, pursuant to ICTY 89(D) and the inherent power of the ICTR Chamber to exclude evidence found in ICTR 89(C), in order to be admitted under Rule 92 bis (and with the ICTY also Rule 92 ter and quater). The ICC may introduce written testimony as stated in ICC Statute Article 69 para. 2. As with the ICTR the ICC has preference for live testimony and only allows written testimony under Rule 68. As with the ICTY and the ICTR, written testimony at the ICC should be held to the test of relevance and probative value.

When admitting transcripts from other proceedings in the ad hoc Tribunals, it has become the principle that exhibits (i.e. documents, tangible objects) accompanying the original witness testimony and were argued by the party in the other trial, can also be admitted under Rule 92 bis, (and ICTY ter and quater). This is the case if the exhibits are considered an inseparable part of the witness testimony and as the testimony itself does not regard any proof on the acts and conduct of the accused. Not every exhibit will be so inseparable from the testimony to be admitted, but if the written statement becomes incomprehensible or loses probative value without it, the exhibit should be admitted with along withit. Special caution

199 For example: ICTY, Prosecutor v. Gotovina et.al. Decision on Defendant Ivan Cermak's Motion for Admission of Evidence of Two Witnesses Pursuant to Rule 92 bis and Decision on Defendant Ivan Cermak's Third Motion for Protective Measures for Witnesses IC-12 and IC-16, IT-06-90-T, 11 November 2009, para. 8.; ICTR, Prosecutor v. Ntawukulilyayo, Decision on Defence Motion to Admit the Statement and Report of Mr. Vincent Chauchard, ICTR-05-82-T, 29 September 2009, para 7.
must be exercised when admitting exhibits under ICTY Rule 92 quater (regarding deceased and unavailable persons) as with the testimony itself.

To sum up, the ICTY has gone further than the ICTR and ICC and has placed the admission of written testimony much nearer to the rank of live testimony. The ICTR and ICC have a preference for live testimony and thus the written form is a subsidiary source. In all cases the written testimony has to, like any other evidence, fulfil the criteria of being considered relevant and to have probative value.

4.6.4.1 Written testimony and transcripts without the witness present

Written witness statements can save a lot of time in the trial, but it must not be to the prejudice of the accused. Thus Rule 92 bis was introduced, under which written witness statements may not be admitted, when they go to proof of the acts and conduct of the accused.

Rule 92 bis for both the ICTY and ICTR is intended to admit written statements or transcripts of evidence given by witnesses in other proceedings before the relevant Tribunal, which do not go to proof of the acts of conduct of the accused (i.e. do not directly or insinuate indirectly on the acts and conduct of the accused). The purpose is to dispense with the live testimony of potential witnesses, who are not testifying about the direct acts or conduct of the accused and therefore can be sufficiently heard by written statements. The Galic case stated a definition of what could count as evidence to the acts and conduct of the accused and should therefore be excluded:

(a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself,25 or (b) that he planned, instigated or ordered the crimes charged, or (c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or (d) that he was superior to those who actually did commit the crimes, or (e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or (f) that he failed to take reasonable steps to prevent such acts or punish those who carried out those acts.202

Acts and conducts of the accused also include the negative where the accused failed to act.203 Evidence that the proximate subordinates of the accused acted criminally and it can be inferred from that evidence that the accused knew or should have known of their behaviour

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202 ICTY, Prosecutor v. Galic, Decision on Interlocutory Appeal concerning Rule 92 bis(C), IT-98-29-AR73.2, 7 June 2002, para. 10.

203 ICTY, Prosecutor v. Galic, Decision on Interlocutory Appeal concerning Rule 92 bis(C), IT-98-29-AR73.2, 7 June 2002, para. 11.
can therefore be excluded. For example if the acts the subordinates are accused of in the written statement occurred in the presence of the accused. The Galic decision held that the intention of Rule 92 bis is to admit “crime-based” evidence and not indirect inferred evidence. In any case if the subordinates are so proximate or other indirect evidence so easily inferred from, then most likely the evidence would be considered important enough to the party's case to be excluded from being admitted in written form under Rule 92 bis and should go through oral cross-examination. Evidence about the acts and conducts of persons in the same position of power or line of work as the accused allegedly held, is thought to be indirect references to the acts and conduct of the accused himself are inadmissible under Rule 92 bis (A). The ICTR Chamber even held that evidence of the activities of para-commandos (i.e. special forces) was too close to implicating the accused as their superior and the para-commandos would be proximate subordinates. If the accused is charged with being in a joint criminal enterprise, then evidence that he participated in such an enterprise and that he share the requisite intent for the crimes with the persons that actually committed the crimes, is also excluded from being admitted under Rule 92 bis. The ICTR Chamber has looked to the aforementioned ICTY cases when dealing with Rule 92 bis regarding acts and conducts of the accused.

In Rule 92 bis (A)(i) are listed some factors in favour of admitting written statements, and in the ICTY Rule also transcripts from other proceedings before the Tribunal:

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204 ICTY, Prosecutor v. Galic, Decision on Interlocutory Appeal concerning Rule 92 bis(C), IT-98-29-AR73.2, 7 June 2002, para. 13.
205 ICTY, Prosecutor v. Galic, Decision on Interlocutory Appeal concerning Rule 92 bis(C), IT-98-29-AR73.2, 7 June 2002, para. 16.
209 ICTY, Prosecutor v. Galic, Decision on Interlocutory Appeal concerning Rule 92 bis(C), IT-98-29-AR73.2, 7 June 2002, para. 10.
(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;

(b) relates to relevant historical, political or military background;

(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

(d) concerns the impact of crimes upon victims;

(e) relates to issues of the character of the accused; or

(f) relates to factors to be taken into account in determining sentence.

ICTY Rule 92 bis (A) is not limited to these factors of the evidence in question but these guidelines constitute the most common line of evidence permitted under the Rule without touching upon the acts and conduct of the accused. It should be kept in mind that Rule 92 bis can not be used to admit unnecessary and repetitive evidence. ICTR Rule 92 bis (D) does allow transcripts of evidence, given by a witness in other proceedings before the Tribunal, to be admitted if they are to proof other matters than the acts and conduct of the accused. But the ICTR Rule regarding admission of transcripts from other proceedings does not have the same guidelines for favour of admission as for the written statements and therefore leaves an even broader discretion for the Chamber to decide upon the admission of such evidence.

Evidence based on these factors even though it does not go to proof of the direct acts or conduct of the accused, could nevertheless be an important part of a party's case and therefore both ad hoc Tribunals have also listed factors against admission of certain evidence by written statements, or in the case of the ICTY also transcripts from other proceedings. The factors listed against admitting evidence in the written form pursuant to Rule 92 bis (A)(ii) are:

(a) there is an overriding public interest in the evidence in question being presented orally;

(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

If the Chamber decides that this is appropriate, written statements or transcripts may be admitted under Rule 92 bis. Yet because of the nature of the statement and its importance to

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the case, it can still require the witness to attend cross-examination, if other criteria is fulfilled in order to save time with the examination-in-chief.\textsuperscript{212} If that happens in the ICTY, Rule 92 \textit{ter} becomes applicable according to Rule 92 \textit{bis} (C).

The written witness statements must fulfil certain criteria as attached to it there must be declaration from the person making the statement that the statement is true and correct to the best of the person's knowledge and belief. Further, the declaration on the truth of the statement must be witnessed by a person authorised to witness such a declaration under the applicable national law or procedure of the State, or a Presiding Officer appointed for that purpose by the Registrar of the Tribunal, pursuant to Rule 92 \textit{bis} (B)(i). The person witnessing the declaration must also verify in writing that the person making the statement is indeed the person identified in the statement, and that the person stated the truthfulness and correctness of the statement and that that the person was also informed that if the content of the written statement is not true than he or she could be subject to proceedings for false testimony and lastly the date and place of the declaration must be confirmed, according to ICTY/R Rule 92 \textit{bis} (B)(ii).

The ICTR has a special rule regarding the objections of the opposing party, namely Rule 92 \textit{bis} (E) which states that “a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party,” and that party has seven days to object, unless an order from the Chamber states otherwise. Then the ICTR Chamber shall decide after hearing from the parties whether to admit the evidence, in whole or in part, and whether to require the witness to appear for cross-examination. The ICTY Chamber, plain and simple, shall after hearing from the parties decide whether to require the witness to appear for cross-examination and if so then ICTY Rule 92 \textit{ter} shall apply.

The ICC does not per se have the same Rule on this as the \textit{ad hoc} Tribunals, but it can allow the introduction of previously recorded live testimony, documented evidence and written transcripts in accordance with Article 69 para. 2 of the ICC Statute, with the safeguard that “These measures shall not be prejudicial to or inconsistent with the rights of the accused.”. When admitting written statements ICC Rule 68 is applicable. It does not include any details on when to admit written statements and such admission is essentially left to the discretion of the Trial Chamber. ICC Rule 68(a) does offer the criteria that if the witness is

not present at the Court, its previously recorded testimony by video- or audio recording or the transcript thereof or other documented evidence of the testimony may only be admitted if both the Prosecutor and Defence had a chance to examine the witness during its recorded testimony.

To sum up, the ICTY and the ICTR allow the admission of written witness statements, which to not directly or insinuate indirectly about the acts and conduct of the accused by Rule 92 bis. This includes any evidence which the acts or conduct of the accused may be inferred from. Such evidence has been described as “crime-based” evidence. A declaration of truth must accompany the witness statement. Both ICTY/R Tribunals also allow the introduction of transcripts from other proceedings before the respective Tribunal. The ICTY/R Chambers also have an option to require the witness to appear before the Tribunals for cross-examination, if considered appropriate and necessary. The ICC has a different rule in Rule 68 where the written statement can only be introduced, when the witness is not present at the Court if the parties had the opportunity to examine the witness during its testimony. The ICC Rule is contrary to the ICTY/R, as it is not limited to “crime-based” evidence.

4.6.4.2 Written testimony with the witness present at the Tribunal

Rule 92 ter is unique to the ICTY. It was adopted on 13 September 2006 and appears to have replaced the understanding regarding admission of written testimony under Rule 89(F), which had a somewhat unclear border with Rule 92 bis.213 Rule 92 ter (A)(i)-(iii) states the following criteria for admission of written witness statements that either directly or indirectly go to proof of the acts and conducts of the accused:

(i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness’ declaration and what the witness would say if examined.

This way a lot of evidence can be admitted under this Rule and the trial expedited without jeopardizing the need for a fair trial, since the witness is available for questioning and cross-examination and attests to the accuracy of his/her declaration and the statement itself.

The ICC does not have the same principle as the ICTY to introduce written witness statements with regards to its principle of live testimony.214 The ICC in Rule 68(b) is broadly similar to ICTY Rule 92 ter, although it is not clear at the present how the ICC will interpret

213 ICTY, Prosecutor v. Milosevic, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, IT-02-54-AR73.4, 30 September 2003, para. 19 and Disposition.
214 See Chapter 4.5.3. and 4.5.3.1.
its Rule. The ICC may thus admit written witness statements when the witness is present in Court and does not object to the submission of his/her statement, according to ICC Rule 68(b). This only applies if the Prosecutor, Defence and Chamber had a chance to examine the witness during his/her testimony. One difference is that the ICC does not require the witness to attest to the accuracy of his/her statement.

To sum up, the ICTY and ICC have a unique rule when it comes to the admission of written testimony when the witness is present at the court. The witness statement is those instances can be about the acts and conduct of the accused. Since the witness is available for cross-examination the accused rights are not infringed. The ICTY in addition requires the witness to attest to the accuracy of his/her statement.

4.6.4.3 Written testimony from unavailable persons

Written testimony of subsequently deceased or otherwise unavailable persons is not outright rejected and can be admitted with certain conditions.

The ICTR and the ICTY have similar rules on the admission of written testimony (and transcripts in the ICTY) of persons that have subsequently died, or are physically or mentally incapable of testifying orally and for people who are missing and can not be traced with reasonable diligence, according to ICTY Rule 92 quater (A) and ICTR Rule 92 bis (C). The ICC Statute or Rules do not comment on this aspect, but with the limited admission of written transcripts or documents of previously recorded live testimony it is doubtful that this will be admitted unless as hearsay evidence.

Both ad hoc Tribunals' Rules on this subject were identical until the ICTY changed it slightly on 13 September 2006. As with all other evidence, the written statements (and/or transcripts with the ICTY) must be admissible under Rule 89(C) as it must have probative value and relevance to the case and be weighed against the need to ensure a fair trial pursuant to ICTY Rule 89(D). In the ICTR Rule 92 bis (C) it is stated that the written statement may still be admissible even though it lacks a declaration of truth as describe in Rule 92 bis (B). The ICTY Rule 92 quater (A) states whether or not the statement is in that same form as Rule 92 bis requires. ICTY Rule 92 quater is thus the main rule regarding admission of unavailable persons at the ICTY. If the ICTR Chamber “(i) is so satisfied on a balance of probabilities; and (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability”, it can admit the written statement, pursuant to Rule 92 bis (C)(i) and (ii). The ICTY Chamber has to be “(i) is satisfied of the person’s unavailability as set out above; and near identical to sub-paragraph (ii) of the ICTR above,
pursuant to ICTY Rule 92 quater (A)(i) and (ii). Even though the ICTY Rule changed from the phrase “indicia of reliability” as the ICTR still reserves to “reliable”, the ICTY Chamber still looks to the jurisprudence offered under the old rule in order to find criteria for Rule 92 quater (A)(ii). That is focusing on the circumstances in which the statement was made and recorded to determine its reliability. Factors which the ICTY Chamber still found relevant to the new rule was “whether the statement was given under oath”, if it was signed and attached a declaration similar to the one in Rule 92 bis (B) or by an interpreter qualified by the Registrar of the Tribunal. In addition if the statement was cross-examined, is corroborated by other evidence, especially regarding unsworn statements, and other “factors such as the absence of manifest or obvious inconsistencies in the statements”.

The ICTY Chamber may admit written statements and/or transcripts that are “to proof of acts and conduct of an accused as charged in the indictment” however that can factor against the admission of the evidence in question, pursuant to Rule 92 quater (B). Therefore the Chamber should be extra cautious when admitting such evidence as to ensure a fair trial and due to the fact that the witnesses are not available for cross-examination. The ICTY Chamber put emphasis on that the testimony from a subsequently deceased witness had been given in prior judicial proceedings in the Tribunal and that had been subjected to cross-examination and parts of his testimony was corroborated by other evidence.

To sum up, the ICTY and ICTR allow the introduction of written witness statements of persons, who are not available anymore. This can be due to their death, deteriorated physical or mental state or simply because the witness is missing. It is preferable in both sets of rules that the written witness statement is accompanied by a declaration of truth witnessed by persons so entitled under Rule 92 bis, but not required. Both the ICTY/R rule require that the evidence is found to be reliable (ICTY) or with “indicia of reliability” (ICTR). The ICTY may admit a written witness statement or transcript even if it goes to proof of the acts and conduct


216 ICTY, Prosecutor v. Popovic et al., Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quater, IT-05-88-T, 21 April 2008, para. 57.
of the accused, yet that very fact could factor against admitting it. The ICC does not have a specific rule on this, but such statements could be admitted as hearsay.

4.6.5 **Depositions**

Depositions are one of the tools the courts can use for taking of witness statements without the presence of the witness and under the supervision of a court official. The parties can submit questions to the witness and thus have the chance to examine him/her, either directly through the videoconferences or in writing.

The ICTY and ICTR both have a similar Rule 71, which allows taking the testimony of a witness through certain channels by a deposition for use at trial, including the appointment of a presiding officer to oversee the process. The main difference in the wording to the two sets of Rules is that the ICTY testimony only has to be in the interests of justice and can take place “whether or not” the person is physically able to appear before the Tribunal according to ICTY Rule 71(A). With the ICTR in addition to the request being in the interests of justice, there also has to be exceptional circumstances to allow depositions. The ICTR Chamber has found that exceptional circumstances can involve the inability to travel due to medical reasons.\(^{217}\) “In the interests of justice” has been interpreted in many ways but the ICTR Chamber stated the following criteria in one of its decision:

1) that the testimony of the witness is sufficiently important to make it unfair to proceed without it; 2) that the witness is unable or unwilling to come to the Tribunal; 3) that the Accused will not thereby be prejudiced in the exercise of his right to confront the witness; and 4) that the practical considerations (including logistical difficulty, expense, and security risks) of holding a deposition in the proposed location do not outweigh the potential benefits to be gained by doing so.\(^{218}\)

The party requesting the deposition shall submit a motion which is to “indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the circumstances justifying the taking of the deposition.”, according to ICTY Rule 71(B). The ICTR adds that this motion must be in writing and describe the exceptional


circumstances. The party requesting the deposition must if the motion is granted “give reasonable notice” to the opposing party which has the right to attend the deposition and cross-examine the person, according to ICTY/R Rule 71(C). Both ad hoc Tribunals' Rules allow for the depositions to take place in a video-conference under sub-rule (D), which is of course much more efficient than for the parties to attend depositions elsewhere. The ICTY Rule also adds that depositions may be taken at the Tribunal or away from it. The Presiding officer shall see to that the taking of the deposition is in accordance with the Rules and make a record of it, with any objections of the parties, so the Chamber can decide upon it, and cross-examination of the parties, the record then submitted to the Trial Chamber according to Rule 71(E).

The ICC does not have a rule on depositions as the two Tribunals do, but Rule 68 on prior recorded testimony comes closest to such a rule. However Rule 68 lacks the requirements of a deposition, including a Presiding officer to oversee the process and being in “the interests of justice”. ICC Rule 68 allows the introduction of prior recorded statements, either audio- or video recorded of a witness or a transcript or documentary evidence of such testimony. The closest the ICC comes to depositions as the ad hoc Tribunals is in ICC Rule 68 (a) where if the witness is not present for the trial such testimony as described above may be introduced if the parties have had the opportunity to examine the witness during the recording. The ICC Rule does not list any reasons, as the ICTY/R Rule, for taking such prior recorded testimony, which is unfortunate yet presumably it will be clarified further in the actual practice of the Court. Regarding the Rule the ad hoc Tribunals as to give depositions through video-link conference the ICC allows testimony to be taken that way, according to Article 69 para. 2 of its Statute and Rule 67 para. 1 of the Rules as further discussed below.

To sum up, the ICTY/R allow depositions with broadly similar rules. Depositions are thus allowed if it is considered in the “interests of justice” to do so, the ICTR also requires that it should only be taken in exceptional circumstances. Depositions have been used for example when the witness is incapable of travel due to medical conditions. A presiding officer is appointed to oversee the deposition and the parties have the chance to examine the witness either by attending the deposition or submitting written questions. Depositions may also be taken with video-conferences i.e. through the internet. The ICC Rule 68 does not have the same requirements as depositions at the ICTY/R as it lacks a presiding officer and does not

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require any special circumstances. Nevertheless ICC Rule 68 could be used as depositions as it has also the requirement that the parties should have had a chance to examine the witness during his/her testimony. The ICC also allows witness testimony through videoconferences.

4.6.6 Testimony through video-link or other audio technology

The courts have adapted to their international status with witnesses from all over the world. Thus the courts may allow oral testimony by the aid of video-link with the witness.

Under ICC Statute Article 69 para. 2, a Chamber may allow a witness to give evidence through the aid of video-link or other audio technology. Such testimony is allowed if the technology permits the parties and the Chamber to examine the witness at the time of his/her testimony, according to ICC Rule 67 para.1. This could include conferences through the internet which allow the parties, the Chamber and the witness to interact with the witness and question him/her. Besides the condition of the possibility of examination, the Chamber with the assistance of the Registry shall ensure that such a venue “is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness”, according to Rule 67 para. 3. The Chamber could perhaps request the assistance of the State where the witness presides in for assistance in providing a safe venue for the testimony, if that does not go against the conditions in sub-paragraph 3.

The ICTY has since adopted in 2007, an option for proceedings by video-conference link according to Rule 81bis. The Rule states that a Judge or a Chamber may order that proceedings will be conducted by video-conference link in the interests of justice and by the request of either party or proprio motu. As for the jurisprudence although the Delalic decision was made before the Rule was formally adopted, the criteria is still relevant and is referred to in more recent decisions, while these criteria are:

(a) the testimony of the witness is shown to be sufficiently important to make it unfair to proceed without it, and (b) the witness is unable or unwilling for good reasons to come to the International Tribunal at the Hague […] (c) that the accused will not thereby be prejudiced in the exercise of his right to confront the witness.220

The ICTY Chamber has used this Rule for witness testimony when the Prosecution made a request to cross-examine witnesses late in the Defence case and the Chamber felt that it would…

220 ICTY, Prosecutor v. Delalic et.al., Decision on the Motion to allow Witnesses K, L and M to give their Testimony by means of Video-Link Conference, IT-96-21-T, 28 May 1997, para. 17. This decision was referenced in: ICTY, Prosecutor v. Gotovina et.al., Reasons for Decision Granting Prosecution's Motion to Cross-Examine Four Proposed Rule 92 bis Witnesses and Reasons for Decision to hear Evidence of those Witnesses via Video-Conference Link, IT-06-90-T, 3 November 2009, para. 7;
be in the interests of justice to use this method for the short but important testimony of the witnesses which would otherwise have to travel to the Hague and most probably cause the postponement of the trial.\textsuperscript{221}

To sum up, the ICTY and ICC allow oral testimony with the aid of video-link or other audio-technology which allows the parties to interact with the witness. The ICC requires a safe venue conducive to elicit the truth from the witness and protects his/her privacy. The ICTY has put forth the criteria that the witness is important enough to make it unfair to proceed without it and that the witness is unable to come to the Hague and the accused would not be prejudiced in this approach.

4.6.7 Expert witnesses

Expert witnesses are routinely called to testify on specific matters within their area of expertise. They are different from regular witnesses as they are only to offer an outsider's opinion on the circumstances and evidence after the fact.

Expert witnesses are allowed to listen to other witness's testimony before their own, as explained here above in the oral testimony chapter, according to ICTY Rule 90(C) and ICTR Rule 90(D). The ICC also adopted this in Rule 140 para. 3. The ICTY/R Rule regarding expert witnesses is 94 \textit{bis}, and is similar with both Tribunals although variations are to be found regarding time-limits, and the recent amendment in 2006 of the ICTY 94 \textit{bis} which added the option of expert witnesses reports. ICTY/R Rule 94 \textit{bis} (A) requires the full statement of the expert witness to be disclosed before his/her oral testimony, in order to allow the opposing party to review it. ICTY Rule 94 \textit{bis} (B) requires that the opposing party files a notice indicating whether:

(i) it accepts the expert witness statement and/or report; or (ii) it wishes to cross-examine the expert witness; and (iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

The ICTR Rule 94 \textit{bis} (B) is near identical, except the opposing party does not have to state whether it challenges the relevance of the statement. ICTY Rule 94 \textit{bis} (B) requires this notification sent within 30 days of receiving the expert's statement or report. While ICTR Rule 94 \textit{bis} (B) only permits the opposing party 14 days from the filing of the statement to file such a notice to the Trial Chamber. This is done in part to expedite the proceedings and the

\textsuperscript{221} ICTY, Prosecutor v. Gotovina et.al. Reasons for Decision Granting Prosecution's Motion to Cross-Examine Four Proposed Rule 92 bis Witnesses and Reasons for Decision to hear Evidence of those Witnesses via Video-Conference Link, IT-06-90-T, 3 November 2009, para. 12.;
notice can limit the field that the opposing parties disagree on. Especially ICTY Rule 94 bis (B)(iii) on challenges of the relevance of specific parts of the expert's statement, which could shorten the time needed for his/her testimony. Last but not least if the opposing party accepts the expert's statement, the statement will then be admitted into evidence without the expert being called to testify according to Rule 94 bis (C).

Who qualifies as an expert witness is not defined in ICTY/R Rule 94 bis or elsewhere in the Rules. The experts are from many different fields and the Chamber will assess whether the proposed expert has enough qualifications and enough relevance and reliability to allow him or her to be called as expert witness. The opposing party can also as been said here above, object to the qualifications of the expert and make its case for denying the expert to testify, as Rule 94 bis, ICTR sub-paragraph (B)(i) and ICTY sub-paragraph (B)(iii), show. The ICTR has defined who can qualify to be an expert witness in its Guidelines on the Remuneration of Expert Witnesses appearing before the International Criminal Tribunal for Rwanda, which in Article 1 states that:

Anyone with specific and relevant information on and/or knowledge of the matter brought before the Tribunal. Such specific information or knowledge which qualifies an individual to appear as an expert witness may have been acquired through training or actual studies, special aptitudes, experience or some reputation in the field or through any other means considered by the party calling the witness to give testimony as being necessary and sufficient to qualify him as an expert witness.  

An expert's expertise has to be relevant for the case and has to be in the field which is the subject of his/ her statement and/or report. It is not enough to be clearly qualified in one area, if the expert is not testifying on a subject directly related to that area of expertise. The expert is called upon to provide the Chamber with his or her expertise on specific matters, for example handwriting experts, military experts and historians. An expert is not a direct witness and should not testify on the interpretation of specific events which are for the Chamber to adjudicate on. This is not to say that the expert can not assist the Chamber with his/ her conclusions, but the expert should be mindful not to overstep into the Chamber's role, as it is for the Chamber alone in the end to determine all the evidence in the case. The ICTR


Chamber in a decision in the *Bagosora case* has further defined what an expert witness can contribute to the trial:

The standard for admission of expert testimony is whether the specialized knowledge possessed by the expert, applied to the evidence which is the foundation of the opinion, may assist the Chamber in understanding the evidence.\(^2\) Having reviewed the witness's statement, the Chamber is of the view that his testimony may assist in understanding the evidence referred to therein.\(^2\)\(^2\)\(^4\)

The ICTY Trial Chamber has shown in several decisions “that expert reports can only be used to prove general events, not for the determination of the guilt of a specific alleged perpetrator.”\(^2\)\(^2\)\(^5\)

The ICC does not offer much guidance on expert witnesses but Regulation 44 of the Court states that the Registrar shall make a list of experts in relevant fields with an indication of their expertise. This could indicate that the ICC will not consider objections based on the qualifications of the expert, as the Registrar has formally approved them. This list shall be accessible for all participants and all organs of the Court and the Chamber may direct “the joint instruction of an expert by the participants” according to Regulation 44 para.1 and 2. After receipt of a jointly instructed report, the participant may apply to the Chamber to be allowed to “instruct a further expert”, the Chamber may also *proprio motu* instruct an expert according to sub-paragraphs 3 and 4. Most importantly “The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report”, in Regulation 44 para. 5. Thus the Chamber exerts great control over the instructions to the experts and controls the mode in which their evidence will be presented. Further guidelines for expert witnesses will without a doubt be shaped further in the relevant ICC case-law as it emerges gradually.

To sum up, the ICTY/R have near identical rules when it comes to expert witnesses found in Rule 94 *bis*. After the receiving the expert's statement or report the opposing party has to file a notification whether it challenges the qualifications of the expert, wishes to cross-examine or at the ICTY whether it challenges the relevance of the statement. The opposing party may also accept the statement, which then is admitted into evidence without the expert


*ICTR Newsletter August 2006*, p. 6.

\(^{225}\) Karim A.A. Khan, Rodney Dixon and Judge Sir Adrian Fulford Q.C: *Archbold International Criminal Courts*, p. 492, para. 9-123.
testifying. The expert must have specific expertise on the particular subject of the statement to be considered properly qualified. As the Chamber has final say regarding evaluation of the evidence on the innocence or guilt of the accused and the expert should be mindful not to overstep the Chamber's role. The ICC does not offer specific rules on experts other than that the Registrar shall make a list of experts in their relevant fields. This could indicate that the parties may not object to the qualifications of experts on that list. The parties may jointly instruct an expert, with the Chamber's permission. The ICC Chamber has then great discretion in instructing the expert on the subject of his/her report, the presentation of their evidence and so on. Future practice of the ICC will undoubtedly clarify the process for expert witnesses.

4.7 Powers of the Trial Chamber to order additional evidence

As the purpose of a trial is to ascertain the truth in the matter, the courts need to be able to go beyond the adversarial nature of the courts and be allowed to order additional evidence.

Rule 98 is identical for both the ICTY and the ICTR and gives the relevant Chamber the discretion to *proprio motu* order either party to produce additional evidence. Besides the Chamber can also summon witnesses and order their attendance. The ICTY in its annual report has further clarified why Rule 98 was adopted:

73. Secondly, while normally, in the adversarial system, the court must be content with the evidence produced by the parties, the Tribunal may order the production of additional or new evidence *proprio motu* (rule 98). This will enable the Tribunal to ensure that it is fully satisfied with the evidence on which its final decisions are based. It was felt that, in the international sphere, the interests of justice are best served by such a provision and that the diminution, if any, of the parties’ rights is minimal by comparison.226

Accordingly, in order to determine the truth which the Tribunals strive for, an inquisitorial aspect was adopted.

ICC adopted similar powers for its Trial Chamber as it has the authority to request the submission of any evidence “it considers necessary for the determination of the truth”, according to ICC Statute Article 69 para. 3. Further more the Chamber may under Article 64 para.6(d) order the additional production of evidence. As Prof. Schabas has pointed out it appears that the ICC Trial Chamber “may make wide use of the power” and references the Lubanga confirmation hearing where the Chamber allowed a previously non-disclosed NGO report, which should have been disclosed earlier. Yet the Judge decided in order to determine

the truth that the document would be admitted despite the breach of disclosure between the parties. The ICC Chamber has further confirmed this in the Katanga case, where it expressed that the late submission of evidence must be necessary for the determination of the truth and “does not jeopardise the Defence's right to have adequate time in order to prepare.”

To sum up, all three courts adopted an inquisitorial trait into its system in order to determine the truth. Thus all three courts have the power to order the parties to submit any evidence the Chamber considers lacking in the trial. The courts can order any additional evidence including witnesses. The ICC even used its rule to order the production of evidence despite the fact that the evidence had not been disclosed on time. All-in-all the courts have broad discretion to determine the truth.

228 ICC, Prosecutor v. Katanga et al., Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537), ICC-01/04-01/07, 3 November 2009, para. 17.
5 Judicial Notice and Evidence of a Consistent Pattern of Conduct

Judicial notice is a rule used to admit facts of common knowledge and adjudicated facts or documents from other proceedings, without requiring additional proof of that fact. The rule can thus save the courts and the parties a lot of time from proofing facts that are reasonably undisputable.

The two ad hoc Tribunals have an identical rule regarding judicial notice, namely Rule 94 which is twofold. Paragraph (A) gives the Trial Chamber obligation to take judicial notice without proof of facts of common knowledge, and paragraph (B) which allows the Chamber to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal related to the matter at hand. Judicial notice is defined as: “recognition by the court of a fact that is not reasonably disputable and without the introduction of supporting evidence”. Both these rules are intended to expedite the proceedings without jeopardizing the rights of the accused and limits the issues that need proof through the presentation of evidence. Other reasons for using judicial notice is the consistency of case-law and uniformity in findings of factual issues, as one must also not forget that one of the purposes of the Tribunals is to create a accurate record of the conflicts. The ICC does not have a special rule on judicial notice of adjudicated facts or documentary evidence from other proceedings.

5.1 Judicial Notice of Facts of Common knowledge

Facts of common knowledge have to be reasonably undisputed to be judicially noticed.

The matter of interpretation of Rule 94(A) is thus what can be considered common knowledge which the Tribunals have clarified in their case-law. The ICTR Chamber in the Bagosora case has summoned up the case-law for the clarification of what constitutes common knowledge in the understanding of Rule 94(A). The Chamber states:

Matters of common knowledge include, without limitation, facts which are not subject to dispute among reasonable persons, including common or universally known facts, such as

229 Merriam-Webster's Dictionary of Law, p. 270.
230 ICTY, Prosecutor v. Simic et.al., Decision on the Pre-trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, IT-95-9-PT, 25 March 1999.
historical facts, generally known geographical facts and the laws of nature, or facts that are generally known within the area of the Tribunal's territorial jurisdiction. In addition, "matters of common knowledge" captures those facts which are readily verifiable by reference to a reliable and authoritative source.232

Among facts that have been considered common knowledge and have been judicially noticed using Rule 94(A) are historical dates, as for example the date of the declaration of independence by Bosnia and Herzegovina on 6 March 1992 and the recognition of the European Community thereof.233 Among the facts rejected as being common knowledge was the assertion that the conflicts in the former Yugoslavia were international in character, which is one of the facts the Prosecutor has to prove and the Defence was allowed to bring evidence to rebut, such a fact can not be considered reasonably undisputed and has to be proved on a case-by-case basis.234 When the Chamber concludes that certain facts are common knowledge and are not reasonably disputed, it can take judicial notice of the facts even if the accused disputes those facts235, perhaps in order to stall the proceedings. To allow the accused to dispute every fact despite it being obviously common knowledge would negate the purpose of Rule 94(A) which is to expedite the trial and save the parties the time and resources of proving such facts.236 A Chamber would have to be cautious when taking judicial notice despite of the objections of the accused, since facts taken judicial notice under Rule 94(A) are generally considered so reasonably indisputable that they can not be challenged further at trial and no more evidence should be brought forth about this fact.237 Taking judicial notice of certain facts despite objections of the accused could affect his or her case and contradict his/her right to a fair trial and possibly be the subject of his/her appeal.

232 ICTR, Prosecutor v. Bagosora et. al., Decision on the Prosecutor's Motion for Judicial Notice pursuant to Rule 73, 89 and 94, ICTR-98-41-T, 11 April 2003, para. 44.
233 ICTY, Prosecutor v. Simic et. al., Decision on the Pre-trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, IT-95-9-PT, 25 March 1999.
234 Ibid.
236 ICTY, Prosecutor v. Simic et.al., Decision on the Pre-trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, IT-95-9-PT, 25 March 1999.
237 ICTY, Prosecutor v. Krajisnik, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for the Admission of Written Statements of Witnesses pursuant to Rule 92 bis, IT-00-39-PT, 28 February 2003, para. 16.
The ICC has decided to not apply ICTY/R Rule 94(A) as forcefully as the Tribunals do in practice which requires the Chamber to take judicial notice of facts of common knowledge and replaced the obligation with the discretion of the Court in the almost identical Article 69 of the ICC Statute. Article 69 thus states that as with the Tribunal's Rule “the Court shall not require proof of facts of common knowledge but may take judicial notice of them.”

To sum up, facts of common knowledge for example historical dates, geographical locations etc. may be taken judicial notice. With judicial notice the fact of common knowledge requires no more proof.

5.2 Judicial Notice of Adjudicated facts

Judicial notice of adjudicated facts is also a helpful tool for the Chamber and the parties to save resources and to expedite the trial. The Chamber may take judicial notice when the facts are not reasonably disputable and are not subject to appeal.

ICTY/R Rule 94(B) affords the Chamber discretion in taking judicial notice of adjudicated facts (i.e. facts decided in a trial) or documentary evidence from other proceedings of the Tribunal, when that evidence relates to the matter at hand currently before the Chamber. This Rule is thus an extra option for the Chambers to take judicial notice, when facts are not considered common knowledge.\(^{238}\) It is important to keep in mind that the Rule is limited to only taking judicial notice from other legal proceedings of the Tribunal and not from other international or national courts. The Rule requires the Chamber to hear the parties first and at then at the request of a party or proprio motu by the Chamber, it can decide to take judicial notice of such facts and evidence.

It is important for the Chambers to balance the need for judicial economy against the rights of the accused to a fair trial. Therefore material matters regarding the guilt or innocence of the accused or “central to the Prosecutor's case” should not be judicially noticed but should be proved at trial and evidence presented.\(^{239}\)

ICTY/R Rule 94(B) is limited in practice to facts that are adjudicated and documentary evidence and the Tribunals have interpreted that the facts must not be in reasonable dispute. This is the same way judicial notice is interpreted in Rule 94(A), and has to be final, that is have not been the subject of an appeal, or where there is an appeal, have been determined by

\(^{238}\) Karim A.A. Khan, Rodney Dixon and Judge Sir Adrian Fulford Q.C: Archbold International Criminal Courts, p. 466, para. 9-68.

the Appeals Chamber.\textsuperscript{240} The Rule is intended to judicially notice facts and not the legal consequences or interpretations of legal issues.\textsuperscript{241} The ICTR Chamber has been a little vague on whether it would take judicial notice of legal conclusions and has on some occasions only gone so far as to say that it is the preference of the Chamber to hear evidence on the matter regarding legal conclusions and interpretations and not to take judicial notice\textsuperscript{242} but in other cases that it “will not take judicial notice of facts which are essentially legal conclusions.”\textsuperscript{243} The ICTY Chamber has in the \textit{Krajisnik case} collected together a list of what a fact must fulfil before being considered truly adjudicated:

(i) it is \textit{distinct, concrete and identifiable}; (ii) it is restricted to \textit{factual} findings and does not include \textit{legal} characterizations; (iii) it was \textit{contested} at trial and forms part of a judgement which has either not been appealed or has been \textit{finally settled} on appeal; or (iv) it was \textit{contested} at trial and now forms part of a judgement which is under appeal, but falls within issues which are \textit{not in dispute} during the appeal; (v) it does not \textit{attest} to criminal responsibility of the Accused; (vi) it is \textit{not the subject of (reasonable) dispute} between the Parties in the present case; (vii) it is \textit{not based on plea agreements} in previous cases; and (viii) it does not impact on the \textit{right of the Accused to a fair trial}.\textsuperscript{244}

The ICTR Chambers have agreed on most of the points brought forth by the ICTY Chambers regarding the interpretation of Rule 94(B) and referenced them in their decisions, for example in the \textit{Bagosora case}.\textsuperscript{245} One of the reasons for this could be that the ICTR Rule 94(B) was only adopted 3 November 2000 and the ICTY Rule was adopted 10 July 1998 and thus the ICTY had some head start on the ICTR Chambers in this regard. The ICTR Chamber has agreed with the ICTY in that plea agreements, judgements based on guilty pleas or

\textsuperscript{240} ICTY, Prosecutor v. Aleksovski, Dissenting Opinion of Judge Patrick Robinson, IT-95-14/1-AR73, 16 February 1999, para. 13-15


\textsuperscript{241} ICTY, Prosecutor v. Simic, Decision on the Pre-trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, IT-95-9-PT, 25 March 1999.


Karim A.A. Khan, Rodney Dixon and Judge Sir Adrian Fulford Q.C: \textit{Archbold International Criminal Courts}, p. 469, para. 9-70.


\textsuperscript{244} ICTY, Prosecutor v. Krajisnik, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for the Admission of Written Statements of Witnesses pursuant to Rule 92 bis, IT-00-39-PT, 28 February 2003, para. 15.

\textsuperscript{245} See for example ICTR, Prosecutor v. Bagosora et. al., Decision on the Prosecutor’s Motion for Judicial Notice pursuant to Rule 73, 89 and 94, ICTR-98-41-T, 11 April 2003, para. 63 and 66.
admissions by the accused are not proper adjudicated facts since they are not as scrutinized by the Chamber itself.246

The party requesting the judicial notice of facts must point to specific facts or documentary evidence and can not request that a whole judgement to be judicially noticed. The party has to list specific parts of judgement or specific items such as certain facts from the witness testimony of a named witness.247 Documentary evidence can be judicially noticed under Rule 94(B) and has on several occasions been used, such as UN Documents including UN's Security Council's resolutions. However, as these documents most often contain legal conclusions and/or legal characteristics so the Chambers have often opted to judicially notice that these documents exist and their authenticity without judicially noticing their content.248

It has been the subject of many debates in the Chambers, what effect on the trial and for the parties cases judicially noticing adjudicated facts or documentary evidence has under Rule 94(B). In contrast with Rule 94(A) where facts of common knowledge are reasonably indisputable and require no more proof, Rule 94(B) has no such guidance as to whether evidence may be brought to strengthen or rebut the facts or evidence judicially noticed. Some Chambers have suggested that by taking judicial notice of a fact or document that it creates the presumption that such facts or documents are accurate and do not need more evidence to prove that accuracy. Even with this presumption it is allowed to rebut the fact or document and submit evidence to that affect.249 Others have objected to such a presumption in favour of the Prosecutor as it contradicts the presumption of innocence of the accused by shifting the burden of proof onto him/her.250 This objection has been countered with the fact that the adjudicated facts and documentary evidence have previously been reviewed in another

247 ICTY, Prosecutor v. Kupreskic et.al., Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to admit Additional Evidence pursuant to Rule 115 and for Judicial Notice to be taken pursuant to Rule 94(B), IT-95-16-A, 8 May 2001, para. 6 and 12.
249 ICTY, Prosecutor v. Krajisnik et.al., Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for the Admission of Written Statements of Witnesses pursuant to Rule 92 bis, IT-00-39-PT, 28 February 2003, para. 16.
proceeding in the Tribunal itself.\textsuperscript{251} It has to be reiterated that those adjudicated facts and documentary evidence are challengeable and it is within the discretion of the Chamber to allow evidence to rebut such facts or documents.\textsuperscript{252} These facts or documents which are judicially noticed are reasonably indisputable and as such should not affect the right of the accused to a fair trial since he/she could challenge it.

Where the parties agree on certain facts in the pre-trial proceedings the trend is, rather than taking judicial notice of the fact, to simply recorded under ICTY Rule 65 \textit{ter} (H) as an agreement between the parties.\textsuperscript{253} The ICTR Chamber has also expressed the view that when the parties agree on certain issues or evidence that it erases the need for judicial notice.\textsuperscript{254} Although the ICC does not have a rule on judicial notice on adjudicated facts or documents from other proceedings. The ICC does offer a similar solution as found above that is that if the Prosecutor and Defence agree “that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven according to ICC Rule 69. Unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims”, according to the same Rule,. Thus the ICC Chamber may, if the parties agree, (as the ICTY/R Chambers), consider the fact proven unless it considers that the presentation of evidence would be in the interests of justice.\textsuperscript{255}

To sum up, the ICTY/R may take judicial notice of adjudicated facts or other documentary evidence only from other proceedings before the respective Tribunal. Contrary to that of common knowledge facts, when adjudicated facts or documents are taken judicial notice the parties may still challenge those facts or documents. A presumption of accuracy by judicial notice is countered by the fact that those adjudicated facts and documents have already been argued in another trial. The ICTY has offered some criteria for adjudicated facts, for example that they must have been contested in trial, do not attest to the innocence or guilt of the accused, reasonably indisputable and not based on plea agreements. Legal characteristics (i.e.

\textsuperscript{251} ICTY, Prosecutor v. Krajisnik et.al, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for the Admission of Written Statements of Witnesses pursuant to Rule 92 bis, IT-00-39-PT, 28 February 2003, para. 16.

\textsuperscript{252} Ibid. para. 16-17.

\textsuperscript{253} William A. Schabas: The UN International Criminal Tribunals, p. 492.


\textsuperscript{255} Karim A.A. Khan, Rodney Dixon and Judge Sir Adrian Fulford Q.C: Archbold International Criminal Courts, p. 470, para. 9-72.
legal interpretations) are not considered adjudicated facts. For example UN Security Council Resolutions have been taken judicial notice but only to attest to their existence and not content. The ICC has no rule on taking judicial notice of adjudicated facts. A trend has been forming with the ICTY/R that when parties agree on certain adjudicated facts that judicial notice is not required and the facts is recorded as an agreement between the parties. The ICC offers a similar solution as if the parties agree the Chamber may consider that fact proven.

5.3 Consistent pattern of conduct

Evidence of a consistent pattern of conduct of the accused, when relevant to serious violations of international humanitarian law, can be admitted into evidence. This is circumstantial evidence and as such should be treated with care.

The two ad hoc Tribunals have a unique rule found in Rule 93(A), regarding the admissibility of evidence of consistent pattern of conduct of the accused “relevant to serious violations of international humanitarian law under the Statute”. The ICC has no rule regarding such evidence.256 This could be very prejudicial to the accused, as patterns established from other crimes he/she committed and are not included in the indictment, are being used to establish guilt in the ad hoc Tribunals' trial. In order to protect the interests of the accused, Rule 93 wisely includes a safeguard that the admissibility of such evidence relies on it being “in the interests of justice”, which would include weighing the prejudice against the accused and the need to ensure a fair trial against the probative value of the evidence. As with all evidence, any evidence admissible under Rule 93 must fulfil the conditions of lex generalis ICTY/R Rule 89(C) as it must be of probative value and relevant to the case-at-hand with at least an “indicia of reliability”.257 ICTY/R Rule 93 has been interpreted as generally not permitting the admissibility of evidence which is only intended to blacken the reputation of the accused, so-called “bad character evidence”.258 The evidence of a specific pattern of conduct must go beyond the mere “bad character” of the accused and that he is in general capable of committing cruel acts, as the evidence must be related to the offence charged for in

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257 Ibid. p. 462-4, para. 9-60.
the case.\textsuperscript{259} This type of evidence could be admissible to disprove an accused's statement that the alleged crime charged only happened due to coincidence, or that he had no intent to commit the crime.\textsuperscript{260} This Rule could also be used to show that the accused has certain special expertise to commit certain criminal acts, for example that he/she is an expert on explosives and based on previous bombings a pattern is visible. Evidence of a prior pattern of conduct of the accused is only circumstantial evidence and can be used to corroborate other evidence or witness testimony but could not be the sole basis for conviction.\textsuperscript{261}

ICTY/R Rule 93(B) states that acts tending to prove such consistent pattern of conduct shall be disclosed by the Prosecutor in accordance with Rule 66. With the ICTY this kind of evidence shall be included with the summary of evidence described in the Prosecutor's pre-trial brief under Rule 65 ter.\textsuperscript{262}

To sum up, evidence of a consistent pattern of conduct of the accused relevant to the crimes under the ICTY/R Statute can be admitted into evidence. The ICC has no such rule. The ICTY/R has interpreted this rule that “bad character” evidence of the accused is not admissible, it has go beyond that and be relevant for the crime charged for. It could be used to disprove the assertion of the accused that the alleged crime happened by coincidence or accident.


\textsuperscript{260} Ibid.

\textsuperscript{261} Karim A.A. Khan, Rodney Dixon and Judge Sir Adrian Fulford Q.C: Archbold International Criminal Courts, p. 464, para. 9-60.

\textsuperscript{262} Ibid.
6 Conclusions

The ICTY, the ICTR and the ICC all have very similar rules of evidence and it can even be thought of as an international criminal system of evidentiary rules. The ICC drafters learnt a lot from the Tribunals practice over the years. The Tribunals have gained from their experience and over the coming years both the ad hoc Tribunals and the Court will continue to learn from each others jurisprudence. In some respects though the ICC drafters incorporated rigid aspects, for example as to the “legislative powers” of the Judges, which may limit the flexibility of the Court and the fluency of proceedings. In whole the ICC system of Statute, Rules and Regulations is much more complex than that of the Tribunals and to the extent that is detrimental to the process, and the ICC drafters could have made more use of the simplicity of the two ad hoc Tribunals’ Rules and jurisprudence. On the other hand, it can be held that especially the ICTY Judges amend the Rules too often which can affect the credibility of the Tribunal and the ability of the parties to foresee whether the Rules might change during the several years of trial. The golden medium is somewhere between effectively taking away the Judges' power to amend the Rules as the ICC has done, and the frequent changes of Rules by the ICTY.

The pre-trial proceedings at the ad hoc Tribunals and the Court are intended to facilitate an expeditious trial and in order to do that the Judges or the Trial Chambers are given extensive powers to essentially scope the presentation of evidence of the parties. The ICTY especially and the ICTR have fairly detailed obligations for the Prosecutor and the Defence, as the parties can be expected to file pre-trial briefs and even the Defence at the ICTY has to disclose the nature of its defence in advance. The ICC does not have as detailed obligations, but it allows the Trial Chamber to order on all kinds of issues, which if ordered so will have the same effect on the Tribunals stricter rules. The approach of the ICC leaves almost too much discretion to the Chamber whether to act efficiently and order on numerous issues in the pre-trial stages, and create a division between Judges from common law and civil law traditions, as the former will most likely not use it as extensively as the latter which could stretch this very far. Time will tell whether this approach troubles the Court in the future.

Regarding disclosure of evidence the most important feature is that the obligation of the Defence has been stretched to include witness lists and copies of witness statements, which at the ICTR and ICC depend upon an order from the Trial Chamber. At the ICTY and ICC the
Defence now has to tolerate that the Prosecutor may inspect their documents, books, photographs and other objects according to ICTY 67(A)(i) and ICC Rule 78.

The admission of evidence at both Tribunals and the Court is open and flexible. This non-technical approach to admission of evidence is due to historical reasons and also to the account of the international character of the Tribunals and the Court. It is hardly prudent even in light of the mainly adversarial nature of the three institutions, to apply the strict technical admission rules of the common law countries, as there is no need to protect lay jurors and it would be next to impossible to try to obtain evidence under such rules in war-torn countries. The important condition for the admission of evidence is simply that it is of probative value and relevant to the case at hand. Thus evidence that would normally not be admissible in common law countries are in principle admissible unless detrimental to a fair trial.

Both the Tribunal and the Court have special exclusionary rules when it comes to victims of sexual violence as to protect the victims from being traumatized again, and this includes not using consent under coercive circumstances as a defence and not allowing any evidence on prior sexual conduct of the victims. The ICC has gone the farthest to protect victims, in accordance with Article 68, and has various solutions in order to protect the victim and his or her family from being put at risk because of the trial proceedings including disclosure of evidence.

Witness testimony is viewed differently at three institutions. The ICTY has adopted the view that live testimony is preferable but documentary evidence is a close second and to that extent the ICTY has adopted several rules on the admission of written witness statements whether made in other proceedings or by subsequently unavailable persons under Rule 92 bis, ter and quater. The ICTR may admit written witness statements without the presence of the witness under Rule 92 bis, yet its preference for live testimony affects the interpretation of that Rule and in practice is not as useful as with the ICTY. The ICC also has a principle of live testimony and as the ICTR limits the admission of written witness statements, which probably will lengthen trials. The Rules at the ICTY will likely serve to expedite the trial proceedings without jeopardizing the rights of the accused as several safeguards are in place and therefore the ICTY has found an ideal solution.

The ICC is such a recent institution and thus it will be highly interesting to follow its progress in the future and see how it adapts to its special status as the only permanent international criminal court in the world.
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