

PUBLIC
ANNEX E

6

COLLECTION OF EVIDENCE

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1. Introduction

Both prosecutors and accused persons have an interest in having clearly defined rules that apply to the collection of evidence in the lead-up to a criminal trial. An accused cannot enjoy meaningful rights—such as the right to silence or to counsel—at trial, if these rights were violated during the investigation process when he was a suspect. The prosecutor, meanwhile, wishes to collect evidence in compliance with applicable rules so that it is admissible at any future trial. And yet international investigations are a new creation. Each of the international criminal tribunals has a large investigations division, nourished by a substantial budget, but operating in relatively unknown and unprecedented circumstances. In some cases, investigations are even carried out in advance of the creation of a tribunal, or any rules governing admissibility.¹

While each international prosecutor has different powers and a unique mandate, they are all subject to rules that govern the way in which they can collect evidence. There is, however, no single document that international prosecutors can refer to for a description of these rules; no universal checklist to tick to make sure the rights of a witness or suspect are being protected or proper procedures followed. There is a plethora of manuals, treatises, UN instruments, regional conventions, as well as court statutes, rules and judicial decisions, but it is not always easy for the prosecutor's investigator, especially one on mission in a remote location, to identify the applicable law. Does an investigator have to grant a suspect the right

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¹ See, eg, UNSC Res. 1595 (2005) and S/2006/375 (2006) [111].

to counsel at an interview even if the national law of the state where the interview occurs does not require it? Does he have to video-record the interview or obtain a warrant to conduct a search? Can the notes of an unrecorded interview or the fruits of a warrantless search still be used in an international trial? Where could an investigator find the answers to these questions?

The answers lie in various types of rules—scattered across multiple sources of law—that apply to the collection of evidence for international prosecutions. These include: power-based rules that define the prosecutor's ability to collect evidence on the territory of states, or to request that states' authorities collect it on his behalf; rights-based rules that require him to accord certain privileges to suspects and witnesses during interviews or in collecting physical evidence; and procedural rules that govern the techniques he can use to gather and preserve evidence, such as the need to audio- or video-record certain interviews and maintain a chain of custody of physical items seized.

This chapter begins with an overview of the rules governing the collection of evidence by the international prosecutor and how these rules relate to the rules of the exclusion of evidence at trial (part 1). The rest of the chapter focuses on the specific rules that apply to the ICC prosecutor, as compared with his *ad hoc* tribunal counterparts, in the key areas that relate to the collection of evidence in international criminal investigations: the rules establishing the powers of an international prosecutor to collect evidence on the territory of states (part 2); the rules that govern how he should collect testimonial evidence (part 3); and the rules that govern how he should collect physical evidence (part 4). Each of these parts of the chapter will also describe the consequences of violating these rules when a prosecutor seeks to admit the evidence that he has collected at trial.² A conclusion will then draw together the types of factors that lead trial judges to refuse to admit evidence that a prosecutor has collected improperly, and the legal questions that remain unanswered.

2. Relationship between Rules on Collection of Evidence and Exclusion of Evidence

2.1 Rules on collection of evidence

Power-based rules

International prosecutors have a mandate to investigate, and then prosecute, those most responsible for the world's most serious crimes. Yet they have no arrest

² This chapter discusses the admissibility of evidence against an accused at trial, and in the ICC context, against a suspect at a confirmation-of-charges hearing. It does not address the use of evidence for other purposes such as the impeachment of a witness. A different standard may apply to the latter. See, eg, *Prosecutor v. Mrkšić* (Decision Concerning the Use of Statements Given by the Accused) IT-95-13/1-T (9 October 2006) [hereinafter '*Mrkšić* Statements Decision'].

powers, no swat teams, no intelligence services, and no general law enforcement mandate in the territories in which they operate. International prosecutors therefore have to act, to varying degrees, through *national* authorities in the states that are relevant to their investigation. Evidence might be collected in one state, a witness interviewed in another, and a suspect arrested in a third.

Power-based rules are contained in a court's founding documents—its Statute and Rules of Procedure and Evidence (Rules)—as well as for instance resolutions of the Security Council or agreements with states that regulate the scope of a prosecutor's powers to conduct investigations on states' territories. They define his or her ability to act alone on the territory of a state, as well as his or her power to request, or compel, via judicial order, a state to collect evidence on his behalf.

Rights-based rules

Rights-based rules define the rights of persons who are affected by a prosecutor's collection of evidence. A person might be affected in a variety of ways. He or she may be interviewed by prosecution investigators; have his or her house searched by a prosecutor or national police; be asked to produce documents in his or her possession, or even—unbeknownst to him—have his phone tapped to assist the investigation process.

In some areas, the procedure applicable before international criminal courts is divergent or even incompatible.³ There is also a fundamental difference between the ICC and the *ad hoc* tribunals in that the ICC Pre-Trial Chamber exercises some supervision over the prosecutor's investigation,⁴ including the prosecutor's obligation to search for both *inculpatory* and *exculpatory* evidence,⁵ whereas the *ad hoc* tribunal judges do not. When it comes to the rights of suspects or witnesses in investigations however, the courts' statutes and rules offer strikingly

³ For instance, international criminal courts have gone different ways on key issues such as victim participation, witness proofing and even the possibility of having proceedings *in absentia*.

⁴ This occurs at the outset in authorizing the prosecutor to initiate an investigation and then during the course of the investigation when a 'unique investigative opportunity' arises, necessitating measures to preserve evidence in the interest of a future accused. Finally, the Pre-Trial Chamber decides whether to confirm—following an adversarial hearing—that the charges against a suspect are based on 'substantial grounds' so that a trial on those charges can proceed. See ICC Statute, Art. 15(3) and (4) and Art. 56. See also ICC Statute, Art. 16 (allowing the Security Council to 'pause' an investigation for a renewable one-year period); ICC Statute, Art. 56.

⁵ See ICC Statute, Art. 54. See also *Prosecutor v. Katanga*, (Transcript) ICC-01/04-01/07-T-81-Red-ENG WT 1/79 NB T (25 November 2009) [hereinafter '*ICC Investigator Testimony*'] [16]–[17] ('Investigation into the potentially exonerating facts and themes is an inseparable part of the rest of the investigation process ... It is also a continuous process ... We [in the Office of the Prosecutor] discuss the themes of exoneration in the preparation of all our activities. ... mainly and most visibly in the preparation for witness interviews and interview outlines').

similar protections, being themselves based on the same international human rights instruments.⁶

(i) **Article 55 and ad hoc tribunal equivalents** The rights of persons affected by ICC investigations are codified in Article 55 of the ICC Statute. This Article sets out two categories of person that may be affected by the actions of an international prosecutor: (1) a suspect, ie a person in relation to whom 'there are grounds to believe that [he or she] has committed a crime within the jurisdiction of the court',⁷ but who has not yet been indicted and become an 'accused'; and (2) any other person, referred to in a generic sense in this chapter as a 'witness'.

Any person, witness or suspect, has four rights at the investigation stage under Article 55(1): (1) the right not to incriminate oneself; (2) the right not to be subjected to torture or other ill-treatment; (3) the right to have an interpreter translate an unfamiliar language; and (4) the right not to be arbitrarily arrested or detained. Another three rights, set out in Article 55(2), belong to suspects alone: (5) the right to be informed that one is a suspect; (6) the right to silence; and (7) the right to counsel. Article 55 requires that suspects, but not others, be informed of their rights, and also prescribes that those rights be respected regardless of whether the questioning is conducted by national or international investigators. Although non-suspects do not explicitly enjoy those entitlements, they are apparently routinely informed of their rights in practice by ICC investigators.⁸ Further, the rules and jurisprudence of the ICC suggests that the right *all* individuals should be respected regardless of who is conducting the investigation.⁹

⁶ See, eg, the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights [hereinafter 'ICCPR'].

⁷ See ICC Statute, Art. 55(2). The drafters of the ICC Statute did not use the term 'suspect', in part because some states thought that it would lead to prejudice against the person targeted by the investigation. See Christopher Hall, 'Article 55, Rights of Persons during an Investigation', in: O. Triffterer (ed), *Commentary on the Rome Statute, Observers' Notes, Article by Article* (2nd edn, Nomos Verlag, 2008) [hereinafter 'Triffterer'] 1097; see also Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford: OUP, 2003) [hereinafter 'Zappala'] 54. The word 'suspect' is used throughout this chapter for convenience, however.

⁸ See ICCOTP Regulations, Regulation 40; *Prosecutor v. Katanga* (Prosecution's Observations regarding Admission for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12 pursuant to Articles 61 and 69 of the Statute) ICC-01/04-01/07-336 (20 March 2008) [hereinafter '*Katanga* Admission Decision'] [21] ('Although neither the Statute nor Rules so require, the Prosecution has adopted, and consistently applied, a policy of informing all persons questioned—including under Article 55(2)—that their evidence may be used in subsequent proceedings'; n 230. Cf. *Prosecutor v. Prlić* (Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of *Naletelić and Martinović*) IT-04-74-PT (5 September 2007) [17]–[19] (failure to warn witness of right against self-incrimination at trial means that witness cannot be presumed to have been aware of the right and waive it).

⁹ ICC, Rule 111(2) requires that '[w]hen the Prosecutor or national authorities question a person, due regard shall be given to article 55' (emphasis added). Cf. *Prosecutor v. Lubanga* (Decision

The statutes and rules of the *ad hoc* tribunals confer the same rights on suspects as those set out in the ICC Statute, but the position of witnesses has been left to judicial interpretation and development. Article 55 is therefore a codification of a broader set of minimum guarantees and, as a result, has been described as a 'mini human rights convention for the period before trial'.¹⁰

(ii) **Internationally recognized human rights** In addition to Article 55, the ICC Statute expressly recognizes the applicability of 'internationally recognized human rights' to international criminal investigations. Article 21 of the ICC Statute sets out a hierarchy of four sources of law, of which the second is applicable treaties and the principles and rules of international law. All four sources of law must, moreover, be consistent with 'internationally recognized human rights'. As a result, 'the application of the Statute, Rules of Procedure and Evidence and other subsidiary sources of law [applicable at the ICC] will always have to produce a result compatible with internationally recognized human rights'.¹¹ The ICC Appeals Chamber has confirmed that '[h]uman rights underpin the Statute; every aspect of it including the exercise of jurisdiction of the Court. Its provisions *must be* interpreted and more importantly *applied* in accordance with *internationally recognized human rights*'.¹² Despite some reluctance in their early practice,¹³ the ICTY and ICTR Appeals Chamber have confirmed the same principle,¹⁴ including the

on the confirmation of charges) (29 January 2007) ICC-01/04-01/06 [hereinafter '*Lubanga* Confirmation Decision'] [62]–[90] (finding that a witness' right to privacy is an internationally recognized human right that applies to a search carried out by national authorities). Similarly, ICTY jurisprudence establishes that where national authorities take a statement for use at the ICTY the process must comply with international standards codified in the Tribunal's Rules. See *Prosecutor v. Delalić et al* (Decision on Zdravko Mucić's Motion for the Exclusion of Evidence) IT-96-21-T (2 September 1997) [hereinafter '*Mucić* Austrian Statements Decision'].

¹⁰ See Triffterer (n 7 above) 1091.

¹¹ See Gilbert Bitti, 'Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Göran Sluiter and Carsten Stahn (eds) *The Emerging Practice of the International Criminal Court* (The Hague: Brill, 2008) [hereinafter 'Bitti, Emerging Practice'] 303 (emphasis added); Göran Sluiter, 'Human Rights Protection in the ICC Pre-trial Phase', *Emerging Practice* 463; George E. Edwards, 'International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy' (2001) 26 *Yale J Intl L*, 323–412 at 340.

¹² *Prosecutor v. Lubanga* (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006) ICC-01/04-01/06-772 (14 December 2006) [hereinafter '*Lubanga* Appeals Decision'] [37] (emphasis added). See also *Prosecutor v. Bemba Gombo* (Decision on the Interim Release of Jean-Pierre Bemba Gombo) ICC-01/05-01/08 14/37 (14 August 2009) [35].

¹³ See Antonio Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals: Some Methodological Remarks', in Bergsmo (ed), *Human rights and Criminal Justice for the Down-trodden* (Leiden, 2003) 19–52.

¹⁴ See, eg, *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction IT-94-1-T (2 October 1995) [hereinafter '*Tadić* Jurisdiction Decision']; *Prosecutor v. Barayagwiza* (Decision of 3 November 1999) ICTR-97-19-AR72 (3 November 1999) [40].

applicability of internationally recognized human rights to the evidence-gathering process.¹⁵

'Internationally recognized' rights are not necessarily 'universally recognized'¹⁶ ones. ICC practice suggests instead that the phrase 'internationally recognized human rights' refers to both international and regional human rights treaties (even though they are explicitly applicable only to states) as well as the jurisprudence of the courts that interpret them. This includes decisions of the Human Rights Committee of the United Nations, that interprets the International Covenant on Civil and Political Rights; the Inter American Court of Human Rights that interprets the American Convention on Human Rights; and the detailed judgments of the European Court of Human Rights (ECtHR) interpreting the European Convention on Human Rights (ECHR). The judgments of these courts—in particular those of the ECtHR—have as a result consistently been cited in the decisions and pleadings of the ICC as well as those of the *ad hoc* tribunals.¹⁷

A key internationally recognized human right relevant to the collection of evidence, but not mentioned in the Statutes or Rules of either the ICC or *ad hoc* tribunals, is the right to privacy.¹⁸ ICC jurisprudence from the *Lubanga* case has confirmed, however, that the right to privacy is an 'internationally recognized human right' that applies to the collection of evidence in ICC investigations, just like the rights that are expressed in Article 55 of the Statute.¹⁹ The right to privacy has similarly been recognized in the jurisprudence of the *ad hoc* tribunals.²⁰

Procedural rules

Procedural rules are rules that apply to the collection of evidence by prosecutors at international criminal tribunals that do not specifically relate to either the powers of the prosecutor or the rights of the subjects of investigations. Rather, they impose requirements on the manner in which evidence should be collected for use at trial. Two types of procedural rule apply to collecting evidence: (1) rules on recording interviews; allowing third-party participation in interviews; and recording the chain of possession of physical evidence; and (2) the rules in

¹⁵ See, eg, *ibid*; *Prosecutor v. Rwamakuba* (Decision on Appropriate Remedies) ICTR-98-44C-T (31 January 2007) [hereinafter 'Rwamakuba Decision'] [45] and [49] (The Tribunal has an 'obligation to respect generally accepted international human rights norms').

¹⁶ This expression is used elsewhere in the Statute. See ICC Statute, Art. 7(1)(H).

¹⁷ See, eg, *Prosecutor v. Katanga* (Decision on the powers of the Pre-Trial Chamber to review proprio motu the pre-trial detention of Germain Katanga) (18 March 2008) [7]. See also Bitri, *Emerging Practice* (n 11 above) 301.

¹⁸ The right to privacy is enshrined in Art. 17 of the ICCPR, Art. 8 of the ECHR, and Art. 11 of the Inter-American Convention on Human Rights (ACHR).

¹⁹ *Lubanga* Confirmation Decision (n 9 above).

²⁰ See, eg, *Prosecutor v. Haraqija and Morina* (Judgment) IT-04-84-R77.4-A (23 July 2009) [hereinafter 'Haraqija Appeals Judgment'] [28].

Article 56 of the ICC Statute. Article 56 is an innovation unique to the ICC, providing that '[w]here the Prosecutor considers an investigation to present a *unique opportunity* to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber'.²¹ The Pre-Trial Chamber can then 'take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence'.

Article 56 may apply at any stage of the investigation, whether a suspect has already appeared before the court or not.²² The rationale for it has been linked both to the civil law concept of 'definitive and unrepeatable acts' undertaken by investigators, and common law principles on testing the evidence of a witness who will not be available at trial.²³ In both these scenarios it is the 'fear that a defendant is not capable of efficiently collecting his evidence and preparing for trial' that justifies judicial intervention, and '[t]his fear may ... be due [in part] to the experience in the ICTY and ICTR where defence counsel were facing major problems in the collection of evidence at great distance from the court under difficult circumstances'.²⁴

Article 56 does not create an investigating judge who can decide how evidence should be collected in general terms.²⁵ The Pre-Trial Chamber *can* order measures under Article 56 *proprio motu*, rather than at the request of the prosecutor,²⁶ but a stricter test applies to such measures. The prosecutor's failure to request measures must be unjustified, and the Chamber's proposed measures must be necessary 'to preserve evidence that it deems *would be essential for the defence* at trial'.²⁷

²¹ ICC Statute, Art. 56 (emphasis added). The prosecutor must also inform the suspect, if there is one, of such an opportunity. See ICC Statute Art. 56(1)(c) and Rule 114(1).

²² See Triffterer (n 7 above) 1109.

²³ Alphons Orie, 'Accusatorial v. inquisitorial approach in international criminal proceedings' in Antonio Cassese *et al* (eds), *The Rome Statute of the International Criminal Court* (Oxford: OUP, 2002) [hereinafter 'Orie'] Vol. 3, 1476 (internal citations omitted).

²⁴ See Triffterer (n 7 above) 1111.

²⁵ ICC Statute, Art. 56(3)(a) and ICC Regulation 48 (1) ('The Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth ... article 56, paragraph 3 (a)').

²⁶ ICC Statute, Art. 56(3)(a) (emphasis added).

²⁷ Although Art. 56(1)(c) refers to the prosecutor's obligation to provide relevant information to the 'person who has been arrested or has appeared in response to a summons', ICC jurisprudence confirms that it may apply at an earlier stage. See Situation in the Democratic Republic of the Congo (Decision on Prosecutor's Request for Measures under Article 56) ICC-01/04-21 (24 April 2005); see also Situation in the Democratic Republic of the Congo (Decision to Hold Consultation under Rule 114), ICC-01/04 (21 April 2005).

2.2 Rules on exclusion of evidence

All states have laws governing not only the collection of evidence by prosecutors, judges or police, but also provisions that address the consequences of violating those laws. Depending on the system, a court that is presented with evidence that has been collected illegally may choose: to admit it into the trial record; exclude it from consideration; or grant another type of remedy such as compensating the victim,²⁸ sanctioning the prosecutor²⁹ or even discontinuing the case.³⁰

Some national laws allow courts to admit any relevant evidence at trial, regardless of its provenance. Under this approach, as explained by an English judge in 1861, 'it matters not how you get it; if you steal it even, it would be admissible in evidence'.³¹ Other national courts apply an automatic 'exclusionary rule' that requires evidence to be *inadmissible* because of the way it was collected, for instance if the manner of collection was illegal or violated fundamental constitutional rights.³² The rationale for excluding illegally obtained evidence may be to deter improper practices by the police; to ensure the reliability of evidence; or to protect the integrity of the judiciary and rights of the defence in criminal trials.

International criminal courts, like many national systems, steer a middle course. Exclusion is not automatic, depending instead on the *impact* of the rule-violation on the accused's trial.³³ Under Article 69(7) of the ICC Statute, 'evidence obtained by means of a violation of this Statute or internationally recognized human rights *shall not be* admissible if (a) the violation casts substantial doubt on the *reliability* of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the *integrity* of

²⁸ See, eg, *Rwamakuba* Decision, (n 15 above).

²⁹ This chapter does not discuss the question of whether a prosecutor has a duty not to present illegally-obtained evidence to the Court nor whether sanctions can be imposed on a prosecutor for misconduct under ethical rules. See Guidelines on the Role of Prosecutors adopted at the Eighth United Nations Congress on The Prevention of Crime and the Treatment of Offenders (1990) [16]; Code of Conduct for Law Enforcement Officials adopted by UN General Assembly (1999); International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999). See generally, Frederic Megret, 'International Prosecutors: Ethics and Accountability', Leuven Centre for Global Governance Studies (2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313691>

³⁰ The ICTY has ruled that certain human rights violations 'are of such a serious nature that they require that the exercise of jurisdiction be declined'. See *Prosecutor v. Nikolić* (Decision on Interlocutory Appeal Concerning Legality of Arrest) IT-94-2-AR73 (5 June 2003) [hereinafter 'Nikolić Arrest Decision'] [30].

³¹ *R v. Leatham*, (1861) 8 Cox CC 498 at [501].

³² See, eg, US Constitution, Amendment IV; Police and Criminal Evidence Act 1984, s 78 (Eng.); Canadian Charter of Rights and Freedoms, RSC 1985, Appendix II, No. 44, Schedule B, Pt I, s 24.

³³ The Special Tribunal for Lebanon (STL) appears to be an exception to this rule, however, as its version of Art. 69(7) and Rule 95 provides that 'evidence *shall* be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture'. See STL Rule 162(b) (emphasis added).

the proceedings'.³⁴ In addition, Article 69(4) of the Statute provides that '[t]he Court *may* rule on the ... admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a *fair trial* or to a fair evaluation of the testimony of a witness'.³⁵ The ICC Trial Chamber in the *Lubanga* case clarified that Article 69(7) is '*lex specialis*' to general rules on admissibility scattered throughout the Statute, Rules and jurisprudence that require, *inter alia*, that evidence be relevant and probative.³⁶ It also held that the mandatory exclusion rule in Article 69(7) was *lex specialis* to its discretionary counterpart in Article 69(4).³⁷

Violation of Article 69(7) does not lead automatically to exclusion. As the *Lubanga* Trial Chamber explained, echoing previous decisions at the *ad hoc* tribunals:

[A]rticle 69(7) of the Statute rejects the notion that evidence procured in violation of internationally recognised human rights should be automatically excluded. Consequently, the judges have the discretion to seek an appropriate balance between the Statute's fundamental values in each concrete case.³⁸

Further, the exclusionary provision is triggered only when there has been a violation of the Statute or internationally recognized human rights; the violation of other norms, such as the rules, does not explicitly engage Article 69(7).³⁹ Nor is

³⁴ Emphasis added. Prior drafts contained language requiring the exclusion of evidence 'obtained directly or indirectly by illegal means which constitutes a serious violation of internationally protected human rights' or 'by means of a serious violation of this statute or other rules of international law'. See Preparatory Committee on the Establishment of an International Criminal Court, 1–12 December 1997, Decisions Taken by the Preparatory Committee at its Session held from 1 to 12 December 1997, 25 and 64. An earlier draft also required both an effect on reliability and the integrity of proceedings, but these requirements were ultimately made disjunctive. See Triffterer (n 7 above) 1310.

³⁵ *Prosecutor v. Lubanga* (Decision on the admission of material from the 'bar table') ICC-01/04-01/06-1981 (24 June 2009) [hereinafter '*Lubanga* Search Decision'] [34]. As a result, motions to exclude evidence are usually decided on the basis of the rules on exclusion of evidence, without first engaging in an analysis of whether evidence satisfies the general criteria for admissibility. See, eg, *Prosecutor v. Gotovina* (Decision on Defence Objections to the Admission of Witness 81's Suspect Interview under Rule 95) IT-06-90-T (8 July 2008) [7]. But see, eg, *Prosecutor v. Haragija and Morina* (Decision on *Morina* and *Haragija* Second Request for a Declaration of Inadmissibility and Exclusion of Evidence) IT-04-84-R77.4 (27 November 2008) [hereinafter '*Haragija* Trial Decision'] [21]–[25] (analyzing admissibility first, then whether there were grounds for exclusion).

³⁶ As a result, whereas Art. 69(4) allows a weighing of the probative value of the evidence, Art. 69(7) 'does not allow ... consideration' of the probative value of the evidence in question in deciding on admissibility under its terms. See *Lubanga* Search Decision (n 40 above) [43]. But see, at the Special Court for Sierra Leone [hereinafter SCSL], see *Prosecutor v. Brima et al* (Decision on Joint Defence Motion to Exclude all Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95) SCSL-04-16-T (24 May 2005) [24] ('the evidence in our view is so clearly relevant that the judicial process would be brought into disrepute by excluding it').

³⁷ *Lubanga* Confirmation Decision (n 9 above) [84]. See also *Prosecutor v. Brđanin* (Decision on the Defence Objection to Intercept Evidence) IT-99-36-T (3 October 2003) [hereinafter '*Brđanin* Intercepts Decision'] [54] ('the drafters of the Rules specifically chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained').

³⁸ At the ICC this is clear from the text of Art. 69(7) itself, which refers to either the Statute 'or' internationally recognized human rights as a ground for exclusion. See also *Lubanga* Search

National law determinative: a violation of national law on evidence gathering does not compel exclusion, nor does compliance with it guarantee admissibility.⁴⁰

The exclusionary provision at the ICTY and ICTR is broadly similar to that of the ICC. Under Rule 95, a Trial Chamber 'shall exclude' evidence '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'.⁴¹ A separate Rule, 89(d), provides that a Chamber can exclude evidence if it finds that its 'probative value is outweighed by the need to ensure a fair trial'.⁴² And other rules and jurisprudence deal with general principles of admissibility such as relevance and probative value.⁴³ So, like at the ICC, *ad hoc* tribunal trials are governed not only by general rules defining the admissibility of evidence at trial, but also a discretionary exclusion rule allowing a chamber to exclude evidence to ensure fairness at trial, and another rule requiring exclusion if reliability or integrity is called into question. As at the ICC, national law is not necessarily determinative of the propriety of investigative acts,⁴⁴ but unlike the ICC, the types of norms whose violation may lead to exclusion are not expressly delimited. Violations of the Rules may, accordingly, lead to exclusion.⁴⁵ This distinction may not lead to a

Decision (n 36 above). At the ICTY the *Delalić* Trial Chamber excluded a statement taken in accordance with internationally recognized human rights because it was in breach of the Tribunal's Statute. See *Mucić* Austrian Statements Decision (n 9 above) [47]–[55].

⁴⁰ Article 69(8) of the ICC Statute and Rule 63(5) provide that the Court shall decide on the admissibility of evidence collected by a state and in doing so shall not be bound by national law. See *Lubanga* Search Decision (n 36 above) [36]. But see Orić (n 23 above) 1486.

⁴¹ Emphasis added. The SCSL's Rule 95 reads 'No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute'. The Nuremberg and Far East tribunals did not have an exclusionary rule at all. It appears that any evidence was admitted if it was relevant and probative. See Report of the International Law Commission to the General Assembly on the Work of its Forty-Fifth Session, UN GAOR, 48th Session, Supp. 10, UN Doc. A/48/10 (1993) 122; Triffterer (n 7 above) 1308–9.

⁴² The ICTR Rules' equivalent of ICTY Rule 89(d) is ICTR Rule 70(f). In addition, the need to observe fair trial rights in admitting evidence has been recognized in its jurisprudence. See, eg, *Prosecutor v. Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence) ICTR-98-44-T (25 January 2008) [9].

⁴³ See Kai Ambos, 'The Structure of International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?', in Bohlander, Michael (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London, 2007) [hereinafter 'Bohlander'] 429–505, 478 n 336 (Rule 95 is '*lex specialis*' Rule 89(d) which is part of the general rule on admissibility of evidence. This means that there is not much value to Rule 89 as it is effectively 'subsumed' by Rule 95).

⁴⁴ ICTY/R, Rule 89(a); *Mucić* Austrian Statements Decision (n 9 above); *Haragija* Appeals Judgment (n 20 above) [24] ('the Trial Chamber properly determined that the admissibility of this evidence was not dependent on whether or not it was in conformity with the laws of a domestic jurisdiction'); *Prosecutor v. Orić* (Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings) IT-03-68-T (21 October 2004) [8]; see 'Brdanin Intercepts Decision'. But see *Prosecutor v. Bagosora* (Decision on Motion to Harmonise and Amend Witness Protection Orders) ICTR-98-41-T (1 June 2005) [15].

⁴⁵ Cf. *Prosecutor v. Kordić and Čerkez* (Decision on Appeal regarding the Admission into Evidence of Seven Affidavits and One Formal Statement) IT-95-14/2-T (18 September 2000) [32] (the Appeals Chamber has ... accepted non-compliance with the precise terms of a Rule, provided

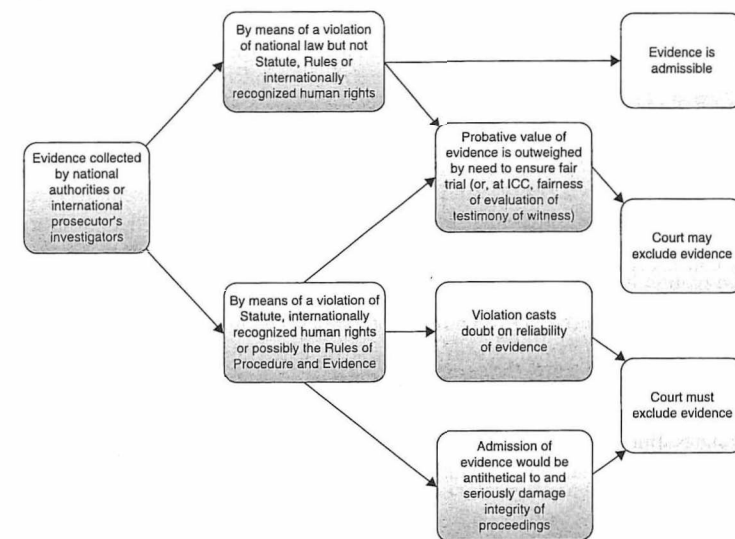


Figure 1 Effect of violations of rules regarding the collection of evidence on admissibility of evidence at trial at the ICC and *ad hoc* tribunals

substantial difference, however, as many of the key provisions defining suspects' rights that are found in the Rules of the *ad hoc* tribunals' appear in the ICC Statute.⁴⁶

A point that remains unclear, however, is the scope of the phrases 'obtained by means of' (in the ICC Statute) and 'obtained by methods which' (in the rules of the *ad hoc* tribunals). Some causal relationship between the evidence-collection and the rule-violation is required, but its scope is not clear. Could it extend, for instance, to what in some national jurisdictions is called the 'fruit of the poisonous tree'—ie evidence gathered on the basis of evidence that was obtained illegally?⁴⁷ In addition, both regimes could be subject to the criticism that the difference between a 'fair trial' and the 'integrity of proceedings' is not immediately

it has no adverse effect upon the integrity of the proceedings or the rights of the accused' and was 'of a technical procedural nature'. See also discussion on violations of Rule 43 on recording suspect interviews, below at pp 281–4.

⁴⁶ ICTY/R, Rule 42.

⁴⁷ See Triffterer (n 7 above) 1331. Cf. *Gäfgen v. Germany* (2009) 48 EHRR 253 [103] (evidence obtained as an indirect result of statements made following inhuman treatment in breach of Art. 3 of the ECHR may be admissible, notwithstanding a strong presumption that the use of such 'fruit of the poisonous tree' evidence renders the trial unfair).

obvious, and therefore that the applicability of a discretionary test in relation to the former versus a mandatory one for the latter is confusing.⁴⁸

3. Powers of an International Prosecutor to Collect Evidence

3.1 Division of power between international prosecutors and states in collecting evidence

To collect evidence, international prosecutors need to travel to the territory where the crimes occurred, where witnesses are located, and where physical evidence is stored. They may need, across a number of states, to conduct exhumations of mass graves, gather DNA from persons of interest, or search homes and offices in order to advance their investigation. On paper, the Statutes of the ICC and the *ad hoc* tribunals both give their prosecutor the right to collect evidence on the territory of states. But the scope of these powers, in particular the ability of the prosecutors to use their own staff to conduct coercive measures on the territory of a state, differs significantly.

There are two models for the relationship between an international prosecutor and the states in which evidence is located. The first model is 'horizontal', like the treaty-based system of 'mutual legal assistance' that is in place *between states* in the investigation of cross-border crimes. This horizontal model is based on sovereign equality—the requested state decides what measures it is prepared to take to assist the requesting state and will generally carry out these measures itself. The other model puts the international prosecutor above the state in a 'vertical' hierarchical relationship that not only allows the prosecutor to *request* cooperation, but also allows the court's judges to order it. The vertical model may also allow the international prosecutor to collect evidence within a state without the consent or participation of that state's authorities.

In general terms, the *ad hoc* tribunals have a 'vertical' relationship with all UN states, whereas the ICC has a relationship that is somewhere between vertical and horizontal with the more limited number of states that are parties to the Court's Statute or have agreed to cooperate with it.⁴⁹

⁴⁸ Chambers indeed sometimes conflate the two tests. See, eg, *Prosecutor v. Prlić* (Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the case of *Nalerelić and Martinović*) IT-04-74-T (5 September 2007) [12].

⁴⁹ In relation to seeking the arrest and transfer of suspects by states that are parties to its Statute, however, the ICC could be said to have a vertical relationship as states have strict obligations and very narrow grounds for non-compliance with those requests. See ICC Statute, Part 9; Triffterer (n 7 above) 1572. Other commentators believe that as a whole the relationship between the ICC and state parties is actually closer to horizontal. See T. Henquet, 'Mandatory Compliance Powers vis-a-vis States by the Ad Hoc Tribunals and the International Criminal Court: A Comparative Analysis' (1999) 12 LJIL 969–999 [hereinafter 'Henquet'].

Both models share an Achilles heel, however, which is that states may not live up to their cooperation obligations, thereby potentially thwarting a prosecutor's investigation. This may happen when a state does not support the court or a particular investigation. When, for instance, in 1999, cooperation from Serbian⁵⁰ authorities was not forthcoming, the ICTY prosecutor could not access crime scenes in Kosovo and her investigators could only interview victims and witnesses in neighbouring Macedonia and Albania.⁵¹ Ten years later, her ICC counterpart cannot reach crime scenes in Darfur and his investigators are forced to interview people in Chad or London as they cannot access those in western Sudan.⁵² As the ICTY's first President famously observed, an international court, without its own police force, 'is very much like a giant without arms and legs—it needs artificial limbs to walk ... And these artificial limbs are state authorities. If the co-operation of states is not forthcoming, [the Tribunal] cannot fulfill [its] functions'.⁵³

ICC

The ICC Statute is a treaty that has now been signed by 111 states. Representatives of these states drafted the Statute and carefully crafted a regime in Part 9 (Articles 86–102) to govern their cooperation with the Court. The Statute speaks exclusively in terms of 'requests'—not 'orders'—that can be made to states for assistance with investigations,⁵⁴ though Article 86 of the Statute provides that state parties 'shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Statute'.

⁵⁰ The formal name of the state at that time was the Federal Republic of Yugoslavia.

⁵¹ See Report 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, 25 August 1999 (A/54/846) 26; see also Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed can be Justice Delivered' (2009) 50 Harv Intl LJ 323, 335–336.

⁵² See *The Darfur Case*, ICC Prosecutor Luis Moreno-Ocampo's address to Council on Foreign Relations, 17 October 2008 ('we had to investigate Darfur without visiting Darfur ... We contacted victims all over the world and interviewed more than 100 witnesses in 18 countries'). See also Human Rights Watch, 'ICC Prosecutor Identifies Suspects in First Darfur Case, Questions and Answers' (27 February, 2007) <<http://hrw.org/english/docs/2007/02/25/darfur15404.htm>>.

⁵³ See Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 Euro J Intl L 2–17, 9. See also *Lubanga* Search Decision, (n 36 above) [45] ('the Court is said to be a 'giant without arms and legs'. It has not been endowed with any enforcement apparatus enabling it to readily obtain evidence [through searches], but instead it must rely on the assistance of sovereign States').

⁵⁴ See Rod Rastan, 'Testing Co-operation: The International Criminal Court and National Authorities', (2008) 21 LJIL [hereinafter 'Rastan'] 431–456, 436 ('the ICC cannot issue binding orders to states: it can only request their co-operation. The authority of the [*ad hoc*] Tribunals to do so ... rests on the exercise of delegated Chapter VII powers, which serves as an exception to the principle under customary international law that a sovereign state cannot be ordered by another state or international organization'); see also Henquet, (n 49 above) 15 ('in spite of the many arguments for granting the Court the explicit power to issue binding 'orders' to states, neither the ILC Draft Statute nor the final Draft Statute provided for such an option').

Articles 87–92 address states' obligation to comply with requests for arrest and surrender, whereas Article 93(1) governs states' obligation to assist in collecting evidence. It provides that states 'shall ... comply' with requests to provide 'other forms of cooperation' and lists eleven types of cooperation that can be expected.⁵⁵ These include: identifying persons and their whereabouts; interviewing witnesses and suspects; producing documents; conducting on-site visits to graves or crime scenes; and executing searches. Article 93(1) concludes with a catch-all provision in subparagraph (l) requiring '[a]ny other type of assistance which is not prohibited by the law of the requested state'. State parties must also, under Article 88, ensure that there are procedures available under their national law for all of types of assistance listed in Article 93.⁵⁶

States that are not party to the ICC Statute are not bound to assist the Court's prosecutor in collecting evidence. Article 87(5) provides, however, that the Court may invite any state not party to the Statute to provide assistance on the basis of an *ad hoc* arrangement, agreement or any other appropriate basis.⁵⁷ Non-state parties that accept the jurisdiction of the ICC in individual cases are also obliged to cooperate with the Court in the same way as those that are parties to the ICC Statute.⁵⁸ And, where the UN Security Council refers a situation to the ICC, the Council may require that UN Member States cooperate with the prosecutor and the Court, regardless of whether those states are parties to the ICC Statute or not.

A state may, once 'consultations have been exhausted', apply to an ICC Chamber for a ruling on the legality of a given request for cooperation.⁵⁹ If the Chamber rejects the application, it 'may grant the requested State additional time within which it *shall* execute the request'.⁶⁰ If a state party fails to comply with a request to cooperate, the Court cannot directly impose any sanction. A Chamber may instead make a finding that non-compliance 'thereby prevent[s] the Court from exercising its functions and powers', and transmit that finding to the Assembly of States Parties (ASP),⁶¹ or to the Security Council when there has been a referral from it.⁶² The measures available to the Security Council are well known; it is not clear, in contrast what the ASP could do apart from 'name and shame' the state in question.

⁵⁵ The formal requirements for requests for assistance, for instance regarding their language and content, are spelled out in Arts 87 and 96 of the Statute and Rules 176–180.

⁵⁶ Approximately half of the state parties to the ICC Statute had passed implementing legislation to this effect as of June 2009, some in an incomplete fashion. Speech by David Cattin, Programme Director Parliamentarians for Global Action (PGA), '11 years after the Adoption of the Rome Statute: Limits in the practise of States on Cooperation with the Court and Remedies available through the enactment of National Implementing Legislation,' T.M.C. Asser Institute, 3 June 2009.

⁵⁷ Agreements may be with the ICC as a whole or with the Office of the Prosecutor. See ICC Statute, Arts 87(5) and 54(3)(d).

⁵⁸ ICC Statute, Art. 12(3); ICC, Rule 44.

⁵⁹ ICC Regulation 108.

⁶⁰ Ibid. (emphasis added).

⁶¹ ICC Statute, Art. 87(5); cf. ibid at Art. 87(7).

⁶² Ibid.

Ad hoc tribunals

The powers of the *ad hoc* tribunals' prosecutors to collect evidence are, certainly on paper and to a significant extent in practice, more robust than those of their ICC counterpart. The tribunals' Statutes form part of a Security Council resolution, passed under Chapter VII of the UN Charter. Member States are obligated under Article 25 of the UN Charter to 'accept and carry out' Security Council decisions, and national law cannot be invoked as a reason to refuse to do so.⁶³

Article 29 of the tribunals' respective Statutes allows the judges to address 'orders' to all UN Member States on a broad variety of investigative matters including: the identification and location of persons; the taking of testimony; the production of evidence; the service of documents; and the arrest and transfer of suspects or accused.⁶⁴ The tribunals, on this basis, have developed an extensive practice of ordering states to assist the prosecutor with his collection of evidence, for instance by producing documents and information.⁶⁵ Such orders have been directed not only to states themselves but also directly to individuals and more broadly to international organizations, including NATO and the EU.⁶⁶ In addition, the tribunals have recognized only one ground that justifies refusal to cooperate with a valid request to assist the prosecutor's investigations: where national security warrants non-compliance.⁶⁷ Even then, however—unlike the ICC—the tribu-

⁶³ See Arts 25 and 103 of the UN Charter and Art. 27 of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 and entered into force on 27 January 1980; ICTY/R, Rule 58.

⁶⁴ See Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 [125] and [126] ('an order by a Trial Chamber ... shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations'); *Prosecutor v. Blaškić* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14-AR108bis (29 October 1997) [hereinafter '*Blaškić* Subpoena Appeals Decision'] [31] (Tribunal can issue orders after a party has attempted cooperative measures). See also Henquet, (n 49 above) 979 (noting that it is confusing that Art. 29 of the ICTY Statute uses the word 'request' as well as 'order').

⁶⁵ See, eg, *Prosecutor v. Milutinović et al* (Decision On Second Application Of Dragoljub Ojdanic For Binding Orders Pursuant To Rule 54bis IT-05-87-T (17 November 2005) [17]–[19]; *Prosecutor v. Simić et al* (Decision on Motion for Judicial Assistance to be Provided by SFOR and Others) IT-95-9 (18 October 2000) [hereinafter '*SFOR Decision*']; but see *Prosecutor v. Kovacevich* (Decision Refusing Defence Motion for Subpoena) IT-97-24-PT (23 June 1998).

⁶⁶ Ibid, [35]–[37]. See also *Prosecutor v. Simić et al* (Decision On Motion For Judicial Assistance To Be Provided By SFOR And Others) IT-95-9-PT (18 October 2000).

⁶⁷ See ICTY Rule 54bis. Cf. *Prosecutor v. Blaškić* (Decision on the Objections of the Republic of Croatia to the Issuance of Subpoena Duces Tecum) IT-95-14-PT (18 July 1997) [hereinafter '*Blaškić* Subpoena Decision'] [77] ('there are no specified grounds on which a State may refuse to comply with an order or request from the International Tribunal'), confirmed in *Blaškić* Subpoena Appeals Decision (n 64 above), [63]; *Prosecutor v. Simić, et al* (Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 Nov. 1999, and (3) Conditions for Access to Material) IT-95-9-PT (28 February 2000) [40] (noting that Rule 54bis 'enshrines the procedure first discussed in the *Blaškić* Subpoena Decision').

nals have the last word on what constitutes valid security interests.⁶⁸ If an ICTY or ICTR Chamber finds that a state has failed to comply with its obligation to cooperate with the court, or if the prosecutor 'satisfies' the President of such non-cooperation, the President 'shall' report the matter to the Security Council.⁶⁹ This triggers the possibility that the Council will sanction the relevant state for non-compliance.

3.2 International prosecutor's power to conduct their own investigation on the territory of states

ICC

The cooperation regime in Part 9 of the ICC Statute envisages that the prosecutor will send a 'request for assistance' to a state for an 'on-site'⁷⁰ investigative act to be carried out. The prosecutor generally cannot have his own investigators go in and autonomously collect evidence against the wishes of a state.

The ability of the ICC prosecutor to conduct his own on-site investigations was originally provided for in Article 26 of the International Law Commission's Draft Statute for the ICC. This provision was fiercely debated during early negotiations by states. As the United Kingdom delegation put it in a preliminary debate:

[T]he United Kingdom has reservations about the extent of the powers which it is proposed in the draft Statute should be vested in the Prosecutor. Under Article 26,⁷¹ he would appear to be able to do various things himself, such as to ask suspects and witnesses questions. We do not consider that his power need go this far ... [T]he better way to proceed ... and consistent with existing international judicial cooperation arrangements, would be for the Prosecutor to request the cooperation of the state where the person concerned is. If that state does not or cannot cooperate, then it is unlikely that the Prosecutor would be able to undertake the questioning there or conduct an on site investigation there himself. We see no point in empowering the Prosecutor to do this.⁷²

Under the ICC Statute as ultimately adopted, however, the prosecutor *can* conduct 'on-site' investigations on a state party's territory without the consent of that

⁶⁸ Cf. ICTY, Rule 54*bis* with ICC, Art. 72. ⁶⁹ ICTY/R, Rule 7*bis*.

⁷⁰ There is no definition of this term in the tribunals' Statutes or jurisprudence; it appears to be a generic formulation that may describe any investigative activity carried out on the territory of a state.

⁷¹ A precursor to Art. 93 of the ICC Statute was Art. 26 of the International Law Commission Draft Statute for an International Criminal Court entitled 'Investigation of alleged crimes'. See *Yearbook of the International Law Commission, 1994*, Vol. II (Part Two). Under Article 26, the prosecutor could 'request the presence of and question suspects, victims and witnesses ... collect documentary and other evidence ... conduct on-site investigation ...'.

⁷² Ad Hoc Committee on the Establishment of an International Criminal Court, Summary of Observations made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995, 7 April 1995, Press Release 32/95 (emphasis added). See also Cherif Bassiouni, *The Legislative History of the International Criminal Court* (Ardsey, NY: Translational Publishers, 2005) 362, [138] and 607, [225].

state in two situations: first, where the state's institutions have collapsed; and second where the act is voluntary and no compulsory measures are required.⁷³

Failed State Exception Under Article 57(3) of the ICC Statute, the Pre-Trial Chamber (PTC) can authorize, after consultation with the state, the prosecutor to take specific investigative steps on the territory of a state party 'due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation'.⁷⁴ This includes coercive measures that would normally be authorized only through judicial organs of the requested state. This provision has not yet been used by the ICC prosecutor, however, and it has been suggested that the Court is likely to interpret it as only being available under very narrow circumstances involving a total collapse of state institutions.⁷⁵

Non-Compulsory-Measures Exception Article 99(4) allows the prosecutor to execute a request directly on the territory of a state party without the consent of state authorities and even without prior judicial authorization if it is 'necessary for the successful execution of a request'.⁷⁶ Article 99(4) is limited to measures that can be executed without compulsory measures, such as questioning a witness who has volunteered to be interviewed and examining 'without modification' a public site like a mass grave.⁷⁷

If neither of these two exceptions applies, the ICC prosecutor may request that a state party carry out an on-site investigative act on his behalf. Eleven forms of cooperation are prescribed in Article 93(a)–(k). The state party may seek modification of such a request if compliance is prohibited under national law by an existing 'fundamental legal principle of general application'.⁷⁸ A request under the catch-all category in subparagraph (l) can be denied if any national law prohibits

⁷³ See ICC Statute, Art. 54(2).

⁷⁴ See ICC Statute, Art. 57(3)(d) and ICC, Rule 115. Since a prerequisite to the ICC exercising jurisdiction over a situation is that the state be 'unwilling or unable' to conduct prosecutions itself, it may be that states in the 'unable' category would fall under this exception. However, the total unavailability of any competent state authorities appears to refer to a more extreme situation than a state being merely 'unable' to conduct specific prosecutions.

⁷⁵ See Fabricio Guaruglia, Investigation and Prosecution, in: Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute* (The Hague, 1999) [hereinafter 'Lee'] 227–38.

⁷⁶ Other procedural conditions must also be met. See Art. 99(4)(a) ('When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19 [and...] following all possible consultations with the requested State Party') and Art. 99(4)(b) ('In other cases, ... following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party').

⁷⁷ See generally, Phakiso Mochochoko, 'International Cooperation and Judicial Assistance', in Lee (n 75 above) 314–5. Some state parties, such as The Netherlands, have entered into an agreement with the OTP that further regulates this matter.

⁷⁸ ICC Statute, Art. 93(3); 'Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Cooperation, Informal Expert Paper' (ICC, 2003) [hereinafter 'ICC Expert Paper'], 62 ('Weighty reasons based on the *travaux préparatoires* ... point to a narrow construction [of the term "fundamental legal principle"]').

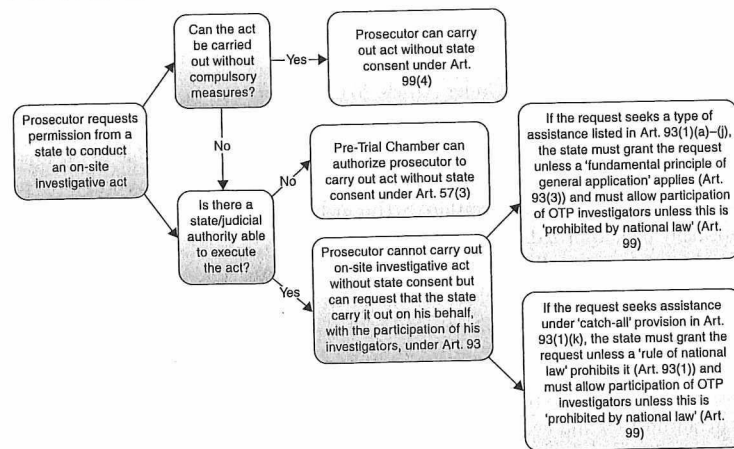


Figure 2 ICC prosecutor's power to conduct an on-site investigative act in a state party

it.⁷⁹ The state may also reject any request for assistance under Article 93 if its national security interests would be threatened.⁸⁰

Article 99 of the ICC Statute regulates the *manner* in which requests can be carried out. It provides that:

[r]equests for assistance shall be executed in accordance with the relevant procedure under the law of the requested state *and, unless prohibited by such law, in the manner specified in the request*, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.⁸¹

The prosecutor can therefore detail in each request whether he or she seeks to have his or her staff participate directly or have other modalities followed. A state party cannot base a refusal to comply with these modalities on an absence of relevant domestic laws or on the fact that these modalities differ from normal practice: nothing short of a specific prohibition will suffice.⁸²

⁷⁹ See also ICC Expert Paper (n 78 above) [51]; Henquet (n 49 above) 993.

⁸⁰ See ICC Statute, Arts 99(4) and 72. Articles 94 and 95 also provide grounds for postponement and Art. 73 provides a specific ground for refusal in the case of documents. The prevailing view appears to be that these grounds are exhaustive, so for instance reciprocity, which is not listed, could not be invoked as a precondition for cooperation. See, eg, Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) [hereinafter 'Cryer'] 407; cf. Göran Sluiter, 'Cooperation of States with International Tribunals', in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) [hereinafter 'Oxford Companion'] 196.

⁸² See Triffterer (n 7 above) 1572.

⁸¹ Emphasis added.

Ad hoc tribunals

In contrast to the ICC, the prosecutors of the *ad hoc* tribunals have a general statutory power to 'collect evidence and to conduct on-site investigations' on the territory of UN Member States. In carrying out these tasks, 'the Prosecutor may, *as appropriate*, seek the assistance of the state authorities concerned'.⁸³ Thus, they need not always seek state assistance in collecting evidence on-site. Moreover, Trial Chambers may issue 'binding orders' to states to facilitate investigations.⁸⁴ Such orders can be followed up by Security Council sanctions against a state or contempt proceedings against an individual in the event of non-compliance.

3.3 International prosecutor's power to collect testimonial evidence

Witness interviews

ICC The ICC prosecutor has the power to interview a witness on the territory of a state party if the witness agrees to participate in the interview. Under Article 99(4) of the Statute, the prosecutor can exclude national authorities from a voluntary interview where such exclusion 'is essential for the request to be executed'.⁸⁵ This may be the case, for instance, where a witness is less or not likely to be forthcoming in the presence of national authorities, perhaps as a result of crimes suffered at the hands of these authorities or a general mistrust of the system. If the state in which the prosecutor seeks to conduct the interview is the territorial state (ie the state where the crimes under investigation occurred), 'all possible consultations' are required before the state has to accept the prosecutor's direct access to witnesses.⁸⁶ For other states, it should suffice for the prosecutor to notify them that he will be carrying out an interview, but it may not be necessary for him to name the interviewee or state the reason for the interview.⁸⁷ The requested state can raise 'reasonable concerns' and propose 'reasonable conditions', which must be respected, but its consent is not required.⁸⁸

The prosecutor's power to conduct an interview is more limited in the event that a witness does not agree to be questioned at the investigation stage; it is indeed unclear whether he could successfully apply for a subpoena to compel a witness to attend an interview. According to Article 64(6)(b) of the Rome Statute, the Court can '[r]equire the attendance and testimony of witnesses...by obtaining if necessary, the assistance of states as provided in [the] Statute'. However, this Article

⁸³ ICTY Statute, Art. 18(2); ICTR Statute, Art. 17(2); ICTY/R, Rule 39 (emphasis added).

⁸⁴ *Blaškić* Subpoena Appeals Decision (n 64 above); ICTY, Rules 54 and 54bis; ICTR, Rule 54.

⁸⁵ ICC Statute, Art. 99(4).

⁸⁶ There must also have been a determination of admissibility pursuant to Arts 18 or 19. See ICC Statute, Art. 99(4)(a).

⁸⁷ ICC Expert Paper (n 79 above) [69].

⁸⁸ ICC Statute, Art. 99(4)(b) and ICC Expert Paper (n 79 above) [70]. See also n 76 above.

appears to relate only to the trial stage.⁸⁹ Moreover, the grounds for contempt of court listed in Article 70 of the ICC Statute do not explicitly include a violation of a subpoena to be interviewed or to testify as a witness.⁹⁰

As a result, most commentators consider the powers of the ICC as falling short of allowing the judges to issue a subpoena for a witness from a state party to testify *at trial*, let alone at a pre-trial prosecution interview.⁹¹ Other commentators argue or assume that a subpoena power *does* exist, though not necessarily in the context of a pre-trial interview as opposed to trial testimony.⁹² A final category of commentators is less sure, concluding instead that the 'ICC Statute gives conflicting messages as to whether the Court may compel an individual', other than a suspect or accused, 'to cooperate'.⁹³

The ICC prosecutor argued in the *Katanga* case that 'Article 64(6)(b) could be interpreted as allowing the Chamber to issue an order requiring the attendance of a witness'.⁹⁴ This key issue has yet to be resolved by the ICC judges, however, and the prosecutor has so far relied on the voluntary appearance of witnesses both at investigative interviews and at trial.⁹⁵

When the ICC prosecutor cannot himself conduct a witness interview, he can request under Article 93(1)(b) that a state '[take] evidence, including testimony under oath'; under subparagraph (c) that the state 'question ... any person being investigated or prosecuted'; or under subparagraph (e) that the state '[f]acilitat[e] the voluntary appearance of persons as witnesses or experts before the Court'. A state party to the ICC Statute must grant such a request unless its execution is prohibited

⁸⁹ It appears in the section of the Statute that relates to 'The Trial' and is entitled 'Functions and Powers of the Trial Chamber'. The Rules of Procedure and Evidence also suggest that this provision is limited to the trial stage. See ICC Rules, Chapter 6.

⁹⁰ See ICC Statute, Art. 70 (offences against the administration of justice).

⁹¹ See, eg, Karim Khan, Rodney Dixon (eds), *Archbold: International Criminal Courts: Practice, Procedure and Evidence* (3rd edn, London: Sweet & Maxwell) [hereinafter 'Archbold'] 132 ('the Statute does not oblige States to secure the presence of witnesses before the ICC'); Göran Sluiter, 'I Beg you, Please come Testify – The Problematic Absence of Subpoena Powers at the ICC', 12 New Criminal L. Rev. 4, 590–608 ('under the ICC Statute witnesses cannot be compelled to testify'). Cf. ICC Statute, Arts 93(1)(f) and 93(7).

⁹² See Rastan (n 54 above) 436 ('domestic legislation may recognize the ability of the ICC to issue orders or subpoenas directly to individuals on its territory, thereby bypassing the need to channel a request through its national authorities'); Fergal Gaynor, Subpoenas, Oxford Companion (n 80 above) 524; Cryer (n 80 above) 362. See also ICC Statute, Art. 54(3)(b) ('The Prosecutor may: (b) Request the presence of and question persons being investigated, victims and witnesses').

⁹³ Cryer (n 80 above) 409.

⁹⁴ *Prosecutor v. Katanga* (Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)) ICC-01/04-01/07 (30 March 2009) [89].

⁹⁵ ICC investigators have suggested that this has presented some difficulties with the collection of evidence. See ICC Investigator Testimony (n 5 above) 11 ('In this type of environment, it has been enormously challenging to find victims who have been willing to speak to a prosecutorial office').

under national law. In addition, if the prosecutor's request specifies that his investigators be present, this modality can only be refused if it violates national law.⁹⁶

Most commentators conclude that, like Article 64, which regulates the power of the Court to summon witnesses, the wording of Article 93(1) stops short of requiring the use of compulsory powers *by a state* to compel a witness to appear at an interview.⁹⁷ As one commentator has put it, that '[t]he sad truth is that States Parties are under no duty to compel witnesses to appear ... to testify ... [T]he duty of States Parties is limited to the facilitation of the voluntary appearance of a person as a witness'.⁹⁸

Ad hoc tribunals The Prosecutor of the *ad hoc* tribunals is authorized in the tribunals' Statutes to 'question suspects, witnesses and victims'.⁹⁹ Voluntary interviews of witnesses therefore present no problem and witness interviews of this nature are common practice. The prosecutor is under no explicit obligation to disclose the names of interviewees or to engage in any consultations with the state where the interviews take place.

The rules of the *ad hoc* tribunals also entitle the prosecutor to seek an order from tribunal judges requiring a witness appear to give testimony, even when it is a state official who is to be questioned about things he saw and heard while exercising his functions.¹⁰⁰ Moreover, at the *ad hoc* tribunals, a witness who fails to comply with a subpoena can be arrested and tried for contempt.¹⁰¹

⁹⁶ ICC Statute, Art. 99. See also Figure 2, p 248, above and preceding discussion. It is not clear whether 'being investigated' in Art. 93(1)(b) means that there must be 'grounds to believe' that the person has committed a crime within the jurisdiction of the court (ie that a person is a suspect); the phrase appears to set a more inclusive standard that would include a suspect but could also be used as a basis for a request that a state interview certain witnesses who have not yet reached suspect status.

⁹⁷ See n 91 above.
⁹⁸ C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 J Intl Crim. Justice 603–617, 616. See also Triffterer (n 7 above) 1572 ('article 93 creates a rather strong regime for cooperation ... Yet, the non-inclusion of a State obligation to compel witnesses before the Court if so requested constitutes a serious weakness of the cooperation scheme in article 93'); Oxford Companion (n 80 above) 197.

⁹⁹ ICTY Statute, Art. 18(2); ICTR Statute, Art. 17(2).

¹⁰⁰ *Prosecutor v. Krstić* (Decision on Application for Subpoenas) IT-98-33-A (1 July 2003) [hereinafter 'Krstić Subpoena Decision'] [27]. See also *Prosecutor v. Bagosora et al* (Decision on Request for a Subpoena ICTR-98-41-T (1 September 2006) (subpoena issued to Rwandan defence minister). Other types of witnesses, such as journalists, ICRC officials and UN officials, may also benefit from an immunity or privilege that allows them not to answer certain questions. See, eg, *Prosecutor v. Brđanin and Talić* (Decision in Interlocutory Appeal) IT-99-36-AR73.9 (11 December 2002); *Prosecutor v. Simić 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); cf. *Prosecutor v. Bagosora et al* (Decision on Request for a Subpoena of Major General Yaache and Co-operation of the Republic of Ghana) ICTR-98-41-T (23 June 2004).

¹⁰¹ ICTY/R, Rule 77(a)(3). A state may not be able to arrest persons charged with contempt, as opposed to the 'core crimes' in the tribunals' statutes, however. See Alexander Zahar, 'International Court and Private Citizen', Griffith Law School, Australia, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1346206> [hereinafter 'Zahar'].

The Appeals Chamber held in *Krstić* that this subpoena is not limited to testimony at trial and the power encompasses orders to witnesses to appear for an interview before trial.¹⁰² Judge Shahabuddeen dissented, arguing that there was no precedent in either domestic or international jurisprudence for issuing a subpoena to require an individual to attend an interview under criminal sanctions, and that such an expanded compulsion power represented an unwelcome 'invasion of the right to privacy'.¹⁰³ The *Krstić* ruling was related to an investigation at the pre-trial *post-indictment* stage, however, and it is not clear whether a subpoena could be issued in the same way *pre-indictment*.¹⁰⁴ Moreover, despite the ICTY's many years of practice, it appears that a tribunal subpoena compelling attendance at a pre-trial interview has never been issued either before or since the *Krstić* ruling.¹⁰⁵

As an alternative to requesting an order directly from ICTY or ICTR judges to compel a witness to attend an interview, the *ad hoc* tribunals' prosecutors may request that a state's authorities issue a subpoena to summon an individual for questioning by the national authorities.¹⁰⁶ This does not appear to have been done with any frequency, however.¹⁰⁷

¹⁰² See '*Krstić* Subpoena Decision' (n 100 above) [23]–[24], 29. See also *Prosecutor v. Mršić* (Decision of 30 July 2003, Discussion (b)) IT-95-13/1-AR73; *Prosecutor v. Halilović* (Decision on the Issuance of Subpoenas) IT-01-48-AR73 (21 June 2004) [hereinafter '*Halilović* Subpoena Decision'] [5]. According to the Appeals Chamber, a subpoena can be issued where: (i) the interview has a 'legitimate forensic purpose' and (ii) issuance of a subpoena is a 'last resort' in trying to obtain this information. See *Halilović* Subpoena Decision [7]. The *Blaskić* Subpoena Appeals Decision (n 64 above), held that, as a matter of terminology, a 'subpoena' carries criminal sanctions, and therefore cannot be issued directly to a state. In *Krstić* the Chamber ruled that if an official was a custodian of state documents, his attendance would also need to be sought by 'binding order' and not 'subpoena', because the request would essentially be a request for state documents and not the attendance of an individual at an interview. This is significant in that 'binding orders' to states are subject, at the ICTY, to special procedures set out in Rule 54*bis*, that allow a state to object to a proposed order on grounds of national security.

¹⁰³ See *Krstić* Subpoena Decision (n 102 above), Dissenting Opinion of Judge Shahabuddeen, [43]; *Halilović* Subpoena Decision (n 102 above), Declaration of Judge Shahabuddeen, [4]. See also *ibid*, Dissenting Opinion of Judge Weinberg de Roca [4].

¹⁰⁴ Rule 54 is limited to the 'Trial Chamber' issuing orders; and the test for a subpoena includes a threshold showing that the evidence to be collected relates 'to clearly identified issues relevant to the forthcoming trial'. *Krstić* Subpoena Decision (n 100 above) [10].

¹⁰⁵ A Trial Chamber rejected a similar request by the defence in *Halilović* on the basis that the test for issuing a subpoena under Rule 54 had not been met on the facts. See *Halilović* Subpoena decision (n 102 above). See also, in the ICTR context, *Prosecutor v. Bagosora* (Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of The United Republic of Tanzania) ICTR-98-41-T (29 August 2006).

¹⁰⁶ The domestic law providing for cooperation with the ICTY may include a power to compel witnesses to give evidence. See, eg, UK United Nations (International Tribunal) (Former Yugoslavia) Order 1996, Art. 9, available at: <http://www.opsi.gov.uk/si/si1996/Uksi_19960716_en_3.htm#mdiv9>.

¹⁰⁷ But see, eg, *Prosecutor v. Đorđević* (Transcript) (26 January 2009) [127]–[134] (in relation to a post-indictment witness interview).

Suspect interviews

ICC The ICC prosecutor has the power to question a suspect who volunteers to participate in an interview.¹⁰⁸ In addition, if there are grounds justifying a suspect's arrest, the prosecutor can request that a state arrest the suspect and transfer him to The Hague for questioning.¹⁰⁹ Outside the context of arrest, the prosecutor can also request the 'questioning by a State Party [with his investigators' participation] of any person being investigated or prosecuted' under Article 93(1) (c) of the Statute.¹¹⁰

Ad hoc tribunals The statutory powers of the *ad hoc* tribunals' prosecutors include the right to 'question ... suspects' on the territory of any UN Member state.¹¹¹ In addition, the prosecutor has the power under Rule 40*bis* to seek a suspect's provisional arrest and transfer to the Tribunal including for purposes of questioning. The ICTR prosecutor has made frequent use of this power.¹¹² The prosecutor can also request that a state interview a suspect on his or her behalf, and the judges can back up the request with a court order if necessary.

3.4 International prosecutor's power to collect physical evidence

Searches and documents

ICC The ICC prosecutor can only autonomously collect evidence on the territory of a state party, as discussed above, if the state consents; where state authorities have collapsed; or if he can do so without using coercive measures, such as for instance by merely visiting a site.¹¹³ He cannot unilaterally collect physical evidence using coercive means, such as by searching a suspect's home, in a functioning state without permission. The ICC prosecutor may, however, request that a state party collect physical evidence on his or her behalf or with the participation or presence of his or her investigators.¹¹⁴ Article 93(1), which lists types of cooperation state parties are bound to provide, specifically includes the 'execution of searches and seizures'¹¹⁵ and '[t]he examination of places or sites, including the exhumation and examination of grave sites'.¹¹⁶ A state may deny such a request if it violates an 'existing fundamental legal principle of general

¹⁰⁸ ICC Statute, Art. 99(4).

¹⁰⁹ See ICC Statute, Arts 58 and 92.

¹¹⁰ Emphasis added.

¹¹¹ ICTY Statute, Art. 18(2); ICTR Statute, Art. 17(2).

¹¹² See, eg, *Prosecutor v. Nchamihigo* (Order for Transfer and Provisional Release under Rule 40*bis* of the Rules of Procedure and Evidence) ICTR-2001-63-DP (21 May 2001); *Prosecutor v. Bagosora* (Decision: Order of Provisional Detention and of Transfer) ICTR-96-7-D (17 May 1996).

¹¹³ ICC Statute, Arts 57(3)(d) and 99(4). See, generally, ICC Statute, Part 9.

¹¹⁴ At least one state, the DRC, also allows UN peacekeepers to carry out a search at the ICC's request on its territory. See Memorandum of Understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, Art. 16.

¹¹⁵ ICC Statute, Art. 93(1)(g).

¹¹⁶ ICC Statute, Art. 93(1)(h).

application', for instance by asking for a search to be carried out immediately without a warrant even though one is required under that state's Bill of Rights.¹¹⁷ Such 'invalid' requests will presumably be rare, however.

The ICC prosecutor may also, under Article 93(i)(b), request the production of documents, including 'official records' and 'expert opinions'. State parties must comply with such a request, unless production threatens national security or is prohibited by a fundamental general principle of national law.¹¹⁸ Other types of physical evidence are not specifically mentioned in Article 93(i) but the ICC prosecutor may request that the state collect such evidence under the 'catch-all' category in sub-paragraph (l). Such a request would bind the state unless its laws prohibit the requested act.¹¹⁹

Ad hoc tribunals The prosecutors of the *ad hoc* tribunals have the power, under their Statutes, to 'collect evidence' and carry out 'on-site investigations' on the territory of UN member states.¹²⁰ In doing so 'the Prosecutor may, as appropriate, seek the assistance of the state authorities concerned'.¹²¹ The prosecutor therefore has a discretion to by-pass state authorities and seek that a search warrant be issued directly by a Trial Chamber.¹²² ICTY/R, Rule 54 provides that at 'the request of either party ... a Judge ... may issue such ... warrants ... as may be necessary for the purposes of an investigation'. In *Kordić*, an ICTY Trial Chamber issued warrants at the prosecutor's request for searches of government buildings across Bosnia, including the offices of the Ministers of Defence, Interior, Justice and Foreign Affairs.¹²³ The warrants were duly issued, and gave the prosecutor's team permission 'to force entry into the premises and collect evidence' if access

¹¹⁷ ICC Statute, Art. 93(3).

¹¹⁸ Another ground for refusal in this context arises if a state is requested to provide a document that was disclosed to it in confidence by another state or an international organization. In such a case the requested state must seek the consent of the originator to disclose the relevant document or information. See ICC Statute, Art. 73.

¹¹⁹ International organizations such as the UN are not parties to the ICC Statute and do not come under the Art. 93 umbrella. They may however agree to disclose certain documents to the Court or the OTP under the terms of an agreement that they negotiate. See ICC Arts 54(3)(c) and 87(5). See also *Prosecutor v. Lubanga* (Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I entitled 'Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised on the Status Conference on 10 June 2008') ICC-01/04-01/06-14862 (1 October 2008).

¹²⁰ ICTY Statute, Art. 18(2); ICTR Statute, Art. 17(2).

¹²¹ Ibid. See also ICTY/R, Rule 39.

¹²² The STL Statute contains the same language as the ICTY Statute on this point, and the STL Rules were amended in June 2009 in a manner that clarifies that making a request for such a measure to a state is an *alternative* to requesting authority to do so directly from a tribunal judge. See STL, Rule 77(b).

¹²³ *Prosecutor v. Kordić and Čerkez* (Submission of declarations in connection with Rule 95 Hearing on 31 May 1999) IT-95-14/2-T (28 May 1999) [hereinafter '*Kordić* OTP Declarations']. The prosecution stated that it informed the Bosnian authorities of the search on the morning of the search. *Prosecutor v. Kordić and Čerkez* (Decision stating Reasons for Trial Chamber's Ruling

to the buildings was not promptly granted or if evidence might be lost.¹²⁴ Days later, an OTP team¹²⁵ conducted five simultaneous searches, and thousands of pages of documents were seized and brought back to The Hague.¹²⁶ The *Kordić* defence challenged the prosecutor's searches on the basis that the prosecution does not have the 'power to take direct enforcement action within a sovereign state without the consent or participation of such state'.¹²⁷ The Trial Chamber found, however, that the ICTY prosecutor has the power under the Statute to conduct 'on-site investigations' and 'collect evidence' and that this power includes the power to conduct searches. The Chamber also noted that Rule 39 states that 'in the conduct of an investigation, the Prosecutor may ... seek ... the assistance of any state authority concerned, which does not mean that she is obliged to do so'.¹²⁸ This precedent has been followed in subsequent ICTY and ICTR cases.¹²⁹

The image of an *ad hoc* tribunal prosecutor breaking down a door to search a facility is somewhat at odds with the depiction of an international tribunal as a 'giant without arms or legs', and is an often-ignored exception to the ubiquitous phrase

of 1 June 1999 rejecting Defence Motion to Suppress Evidence) IT-95-14/2-T (25 June 1999) [hereinafter '*Kordić* Search Decision'] n 12.

¹²⁴ Other search warrants are phrased in similar terms and include this clause. See, eg *Prosecutor v. Karadžić* (Search Warrant for the Public Security Centre (CJB) Srpsko Sarajevo (Unsealed)) IT-95-05/18 (11 September 2003).

¹²⁵ At the time the search took place, SFOR—a NATO-led multinational force—was authorized by the Security Council to implement the military aspects of the 1995 General Framework Peace Agreement in Bosnia (see UNSC Res. 1088 (1996)). However, neither the ICTY prosecutor's request for warrants, nor the judicial decisions authorizing the searches, rested on SFOR's mandate or presumed SFOR involvement in the actual search, as opposed to its security aspects. See *Kordić* Search Decision (n 123 above) [(f)] ('SFOR took no part in the search but was purely present to ensure the security of all persons present').

¹²⁶ *Kordić* OTP Declarations (n 123 above) [55]–[58]. Defence counsel at the ICC has specifically distinguished this practice from that of the ICC. See *Prosecutor v. Lubanga* (Public Redacted Version of Request to exclude evidence obtained in violation of article 69(7) of the Statute) ICC-01/04-01/06 (7 November 2006) [10].

¹²⁷ See *Prosecutor v. Kordić and Čerkez* (Judgment) IT-95-14/2-T (26 February 2001) Annex IV [46].

¹²⁸ *Kordić* Search Decision (n 123 above) (emphasis added). See also *Tadić* Jurisdiction Decision (n 14 above).

¹²⁹ See *Prosecutor v. Naletilić and Martinović (Tuta and Stela)* (Judgment) IT-98-34-A (3 May 2006) [hereinafter '*Tuta and Stela* Appeals Judgment'] [230]–[238]; Miscellaneous 4 IT-02-55-Misc4 (17 July 2002); *Prosecutor v. Karadžić* (Decision on the Accused's Request for Copies of Search Warrants Case) IT-95-5/18-I (29 August 2008); Annual Reports of the ICTY, 1997–1999, available at: <<http://www.icty.org/sid/31>>; The ICTY Manual on Developed Practices, available at: <http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf> [hereinafter '*ICTY Manual*'] 18. The issue was raised, but not resolved, on appeal. See also *Prosecutor v. Ntabakuze* (Decision on the Defence Motion for Annulment of Proceedings, Release and Return of Personal Items and Documents) ICTR-97-34-T (25 September 1998). Some ICTR Trial Chambers appear to have assumed that such direct searches are not possible, however. See, eg, *Prosecutor v. Nyiramasuhuko* (Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized) ICTR 97-21-AR15bis (12 October 2000) [26]; *Prosecutor v. Kabiligi* (Decision on the Defence Motion for the Restitution of Items and Documents Seized) ICTR-97-34-I 5 (October 1998).

in international law books that the tribunals lack police powers and must rely on national authorities to conduct any coercive enforcement measure on the territory of states. In fact, the line appears to be drawn not between coercive and non-coercive measures,¹³⁰ but between conducting 'on-site investigations [and] collecting evidence', which the prosecutor has a statutory power to do, and effecting arrests, which he does not.¹³¹ In other words, while the OTP can itself enforce a search warrant issued by a tribunal judge, it cannot itself enforce an arrest warrant.

The exercise of the *ad hoc* tribunals' prosecutor's coercive power to collect physical evidence has not been universal, however. The *ad hoc* tribunal prosecutor's statutory power to collect evidence with the involvement of states 'as appropriate' is phrased as applying to all UN Member States on an equal basis.¹³² ICTY jurisprudence nevertheless establishes that the prosecutor's power to carry out his or her own coercive measures does *not* apply in *all* UN states.¹³³ Instead, the prosecutor may undertake investigations and gather physical evidence directly on the territory of a state, rather than request assistance from national authorities to do it on his or her behalf, if these measures are taken in a state of the former Yugoslavia or other 'former belligerent States', as opposed to a 'third state'.¹³⁴ The ICTY Appeals Chamber explained in *Blaškić* that although the 'International Tribunal must turn to the relevant national authorities to conduct on-site investigative activities' in 'third states', doing so in the former belligerent states of ex-Yugoslavia, 'might jeopardize investigations'.¹³⁵ Therefore 'on-site investigations [in these states] may justifiably be carried out by the International Tribunal itself'.¹³⁶

This distinction is perplexing. Indeed, as the late ICTY Judge May observed, there seems to be no principled legal reason why 'the tribunal may have wider

¹³⁰ Discussions on the Rome Statute appear to have been framed along these lines. See Ad hoc Committee, Judicial Assistance, cited in *Bassiouni* (n 80 above) 607 [225] ('Activities requiring coercive measures such as search and seizure or surrender should, however, be the exclusive prerogative of national police authorities, particularly as liability issues might arise') (emphasis added).

¹³¹ There has been a possible exception to the rule that arrests cannot be enforced directly by the Tribunal's investigators, however, in the *Dokmanović* case, where the arrest 'was at least partly carried out by Tribunal officers'. See Jones & Powles, *International Criminal Practice* (3rd edn, Transnational Publishers-OUP, 2003) 837.

¹³² See n 121 above.
¹³³ In *Kordić*, the Appeals Chamber denied leave to appeal the Trial Chamber's decision authorizing the search, noting that 'contrary to the Defence contention, the Decision did *not* proclaim that the Office of the Prosecutor ... had the authority to enter the territory of *any Member state of the United Nations* to conduct search and seizure'; that the government of Bosnia did not complain about the search; and that there was a treaty in place between the UN and the government of Bosnia and Herzegovina. See *Prosecutor v. Kordić and Čerkez* (Decision on Application for Leave to Appeal) IT-95-14/2-T (23 August 1999) (emphasis added).

¹³⁴ *Blaškić* Subpoena Appeals Decision (n 64 above) [29]–[30] and 53.

¹³⁵ *Ibid.*, [53]. Cf. ICC Statute, Art. 57(3).

¹³⁶ *Blaškić* Subpoena Appeals Decision (n 64 above) [55]. The Appeals Chamber reached this conclusion notwithstanding its general conclusion that 'the International Tribunal does not possess any power to take enforcement measures against States'. *Ibid.*, [25].

powers in the former Yugoslavia than elsewhere'.¹³⁷ The reason for the distinction seems to be more pragmatic than judicial; or, in Judge May's words, 'seems to be practical rather than legal: reliance on the national authorities of States or entities of the former Yugoslavia may, in some instances, be counterproductive if they seek to hinder the work of the tribunal'.¹³⁸ Moreover, attempts to break down doors in powerful 'friendly' states may have been considered problematic.¹³⁹

Where the prosecutor cannot, or chooses not to, conduct his own search, he may instead request that a state's authorities search certain premises on his or her behalf or produce documentary evidence for his or her use. ICTY and ICTR judges can compel a state to provide documents or information by issuing an order under Rule 54*bis* or Rule 54 respectively, if the standard set out in these rules is met.¹⁴⁰ Moreover, notwithstanding the fact that Security Council resolutions are directed at *states*, such orders have been made to international organizations,¹⁴¹ private entities,¹⁴² and individuals,¹⁴³ in addition to state authorities.¹⁴⁴

Biometric data and covert measures

Neither the ICC nor the *ad hoc* tribunal statutes or rules specifically address the circumstances under which the prosecutor can collect biometric data such as

¹³⁷ Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, 2002) 63.

¹³⁸ *Ibid.*
¹³⁹ See Zahar (n 101 above) ('I once had to prepare a judicial order authorizing a raid by UNMIK police and ICTY investigators on a ministerial building in Kosovo for the purpose of seizing evidence ... I remember thinking that we would never be issuing such an order to raid governmental offices located in, say, Switzerland, or, for that matter, Croatia or Serbia. However, in Kosovo, we could get away with it').

¹⁴⁰ Under Rule 54*bis*, the state can refuse to provide such documents or information on grounds of national security, or can request that the information be provided confidentially or in redacted form. It is the Tribunal that ultimately decides whether such 'protective measures' are justified and states have often lost the argument that national security should prevent the production of sensitive documents.

¹⁴¹ See n 66 above.
¹⁴² See *Prosecutor v. Furundžija* (Judgment) IT-95-17/1-T. (10 December 1998) [21]–[27] (subpoena to Medica Women's Therapy Centre for the production of medical records of a witness).

¹⁴³ The ICTY Appeals Chamber has held that when the Tribunal issues orders to private individuals for the production of documents, it is appropriate to turn to the relevant national authorities for cooperation or assistance in the implementation or enforcement of such orders. However, 'there are two situations where the International Tribunal may enter directly into contact with a private individual: (i) when this is authorized by the legislation of the State concerned; and (ii) when the authorities of the State ... having been requested to comply with an order of the International Tribunal, prevent the International Tribunal from fulfilling its functions'. See *Blaškić* Subpoena Appeals Decision (n 64 above) [55]; see also *ibid.*, [56]–[59].

¹⁴⁴ An OTP request for documents from a state should identify specific documents and not broad categories, though the use of categories is not prohibited as such. The OTP must also demonstrate that it has requested assistance from the state before seeking an order from the Trial Chamber. See *Milutinović et al* (Decision on Request of the United States of America for Review) IT-05-87-AR108*bis*.2 (12 May 2006) [15]; *Prosecutor v. Halilović* (Decision on Defence Motion for Access) IT-01-48-PT (4 December 2003) [2].

DNA or fingerprints from a witness or suspect, nor whether he can conduct covert measures.¹⁴⁵ And yet, such evidence is often key to modern investigations. At the national level, police make extensive use of DNA and fingerprint identification evidence as well as investigative techniques such as surveillance, phone-tapping and interception of electronic data. But does an international prosecutor's power to conduct 'on-site' investigations and 'collect evidence' mean he can take DNA, secretly record a conversation with a suspect or tap a person's phone? Can he request that state authorities do so?

At the ICC, to the extent that such measures are considered 'on-site' investigative acts, the general rules governing such acts should apply.¹⁴⁶ At the *ad hoc* tribunals, the prosecutor may seek to conduct such acts himself on a broader basis than his or her ICC counterpart. After all, if the prosecutor can conduct *overt* coercive measures such as searches using his own staff as part of his power to 'collect evidence' and conduct 'on-site investigations', there seems to be no principled reason why he could not also conduct *covert* coercive measures on the same basis, assuming he was able to make the showing required to procure a warrant from a tribunal judge. However, if the reasoning in the *Kordić* search case is followed, the prosecutor would only be able to collect evidence in this manner in a 'former belligerent' state or state where the crimes under investigation occurred.

When the international prosecutor cannot, or prefers not to, collect biometric data or conduct covert investigative acts himself, he can request that a state conduct such measures on his or her behalf. The ICC prosecutor can do so by making a request to a state party under Article 93(1)(l), the 'catch all' provision allowing requests for any type of assistance not prohibited under national law.¹⁴⁷ Similarly, the *ad hoc* tribunal prosecutors can request that a UN Member State carry out such a measure on their behalf under Rule 54 or, at the ICTY, Rule 54*bis*. Rule 54*bis* specifically covers an order for the production of 'information' from states and this has already been interpreted to include electronic data.¹⁴⁸ The tribunal's judges could therefore extend the reach of orders issued under these rules to

¹⁴⁵ See ICTY Manual which suggests, however, at [44] that it is permissible for the OTP to pay an informant in order to gather evidence. Cf. *Haraqija* Appeals Judgment (n 20 above).

¹⁴⁶ It is doubtful that the 'voluntary basis exception' could apply, however, since a person cannot volunteer to be the subject of a covert activity that they do not know about. Moreover, since a person's privacy rights are infringed, judicial authorization is ordinarily required, bringing the measure outside the scope of Art. 99(4). As a result, the basis for such a power would likely be the narrow 'failed state' scenario under Art. 57(3).

¹⁴⁷ See Rastan (n 54 above) 440 ('Additional assistance could take the form of the intercept of communications; the provision of forensic, DNA, or other specialist expertise'). The prosecutor may, under Art. 99(1), also request that his investigators participate in any such investigative act.

¹⁴⁸ *Prosecutor v. Milošević* (Decision in Part on Motion for Orders Pursuant to Rule 54*bis* against Serbia and Montenegro) IT-02-54-T (5 June 2003).

new factual scenarios such as the collection of DNA identification evidence or covertly-collected communications.

3.5 Overview of power-based rules on collection of evidence

At the ICC, the prosecutor can only conduct investigations using his own staff instead of state authorities where: (a) a state consents to him doing so; (b) the state has 'failed' so that no institutions can carry out his request; or (c) the act can be carried out on a voluntary basis. The *ad hoc* tribunals' prosecutors, on the other hand, have a general broad power to collect evidence 'on-site' even in the absence of state consent. ICTY investigators have thus conducted coercive searches authorized by ICTY Trial Chambers without state consent, and subpoenas have been issued to individuals for investigative interviews. Although these differences in the legal framework suggest that the powers of the *ad hoc* prosecutor are far more extensive than the ICC's, the jurisprudence of the tribunals has limited—on a clearly pragmatic but questionable legal basis—coercive investigative acts by OTP investigators to a narrow category of states. And the number of subpoenas that have been issued to compel a witness to attend a pre-trial interview is limited. So in practice the gulf is narrowed.

Moreover, ICC investigators routinely rely on having their investigators participate in on-site collection of evidence by simply specifying this in their requests.¹⁴⁹ The prosecutor may also in the future claim, under Article 57(3) of their Statute, the power to take coercive measures in uncooperative states on the basis that states' authorities are not 'available'. The extent of the ICC prosecutor's powers to collect evidence may also vary on account of the national law of the state in which he is operating. States may *supplement* their obligations to the ICC through legislation—or, indeed, written agreements or *ad hoc* arrangements—and in doing so give the ICC prosecutor more latitude to act alone on their territory. A state party may for instance be willing to allow the ICC prosecutor to independently take voluntary witness testimony without complying with the procedure contained in Article 99(4), or may allow for issuance of a subpoena to attend the prosecutor's interviews at the investigation stage.¹⁵⁰ So far, many states have fallen short of their obligations to implement obligations

¹⁴⁹ Interview with member of ICC Office of the Prosecutor, The Hague, January 2010. See also Situation in the Democratic Republic of Congo (Transcript) ICC-01/04-01/06-T-30-EN (9 November 2006) [153]–[154] ('it's in the view of the Prosecution compatible with Article 93 that a request for assistance [be] framed so as to seek maximum involvement of officials from the OTP in the execution process').

¹⁵⁰ See ICC Statute, Arts 99(1)(l) and 87(5); Triffterer (n 7 above) 1577. But see Göran Sluiter, Co-rapporteur, International Law Association, Toronto Conference, International Criminal Court, Second Report [hereinafter 'International Law Association Report'] 9 (rejecting argument that states can 'supplement' baseline obligations contained in Part 9 and in doing so give the Court subpoena power *vis-à-vis* witnesses).

arising under the ICC Statute.¹⁵¹ Others, however, have gone further than what is strictly required under the Statute.¹⁵²

Perhaps more importantly, both the ICC and *ad hoc* tribunal regimes face problems in *enforcing* states' obligations to render assistance with the collection of evidence. While neither the ICC nor the *ad hoc* tribunal regime allows much leeway for relevant states to validly refuse a request—with national security concerns being the most significant, or in the case of the *ad hoc* tribunals the *only* justification for non-compliance—both systems have had to deal with states that refuse to live up to their legal cooperation obligations. Even the ICTY, with its robust Chapter VII establishment and ability to issue 'binding orders' to states under the Security Council's authority, has had arrest warrants scoffed-at and orders for the production of documents ignored.

The lack of 'police force' may therefore not be the real problem when it comes to the power of an international prosecutor to collect evidence. After all, if a police force is a group of investigators with the power to collect evidence in a state—including through coercive measures—under certain circumstances, then both the ICC and the *ad hoc* prosecutors have police power. These powers may in some circumstances be too narrow. Or investigators may face security and logistical problems in physically executing them in post-conflict states without their own intelligence apparatus or powers of arrest. But the most fundamental challenge facing international prosecutors in collecting evidence in states' territory is their common one: the inability to enforce the legal obligations of states to cooperate. Prosecutors have to rely—via their judges—on the Security Council or the ASP to take action when cooperation is not forthcoming. And although the Security Council has more 'teeth' than the ASP, in practice the teeth have been reluctant to bite. Successive ICTY Presidents have reported non-compliance by states of the former Yugoslavia, including non-compliance with arrest warrants and orders for the production of documents that were essential to the prosecutor's work. But the Council has taken little overt action as a result.¹⁵³ Nor has the Council taken

¹⁵¹ Ibid; see also Matthias Goldmann *et al*, *Project on ICC National Implementation Legislation: Questionnaire*, *Finnish Yearbook of International Law*, Vol. 16 (2005/2008) 5–29, 23 ('in all states parties with implementing legislation, national security is seen as a reason for denying cooperation. Italy's draft legislation goes even further than that by including "essential interests" as a reason for denial. ... Norwegian law requires that the request does not violate domestic law') (internal citations omitted).

¹⁵² See International Law Association Report (n 150 above) 9 ('Interestingly, it occurs that States exceed the forms of cooperation set out in the Statute ... in South Africa. Sec. 19 of its cooperation act stipulates that any person summoned by the Court who, without sufficient cause, fails to attend at the time and place specified in the summons, is guilty of an offence. As was already mentioned, the ICC Statute obliges States only in art. 93 (1) (e) to facilitate the *voluntary* appearance'). See also *ibid*, 13–14.

¹⁵³ Mark Harmon and Fergal Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' (2004) 2 *J of Intl Crim. Justice* 420 ('Successive ICTY Presidents have repeatedly reported state non-compliance

any action as a result of the so-far-unexecuted ICC arrest warrant for Sudanese President Bashir, despite the resolution posing an obligation on the government of Sudan to arrest him.¹⁵⁴

Nevertheless, the existence of a legal obligation to cooperate with a prosecutor's investigation can only *help*, and in many cases may be a *de facto* pre-requisite to a state's cooperation. In this sense, the *ad hoc* tribunals, which enjoy more 'vertical' power-based rules regulating their relationship with states, may be in a better position than their ICC counterpart to expect cooperation from states with evidence-collection. Pragmatic practitioners have therefore concluded that 'the only timely and practical approach for accomplishing the purpose of [international courts] involves the voluntary cooperation of states in recognition of their duties'.¹⁵⁵

3.6 Effect of violations of power-based rules on admissibility of evidence

No ICC Trial Chamber has yet addressed whether an investigative act that exceeds the prosecutor's powers *vis-à-vis* states could lead to exclusion of evidence at trial. At the ICTY, evidence allegedly obtained by the prosecutor in excess of her authority was not excluded in the *Tuta & Stela* case because the applicant had not shown how the alleged violation of state sovereignty affects the reliability of the evidence obtained and/or is antithetical to and would seriously damage the integrity of the proceedings'.¹⁵⁶ Since complementarity is a fundamental value in the ICC Statute, one might expect such claims to have greater force. Indeed, one ICC chamber has already suggested that 'state sovereignty' is a 'core value' in the Statute and that its violation may therefore undermine the integrity of proceedings, and thereby lead to the exclusion of evidence under Article 69(7).¹⁵⁷

4. Rules on Collecting Testimonial Evidence: Witness and Suspect Interviews

Once a prosecutor has established that he has the power to collect evidence in the state where it is located, he will move on to decide on the manner in which

in very clear terms to the Security Council, to little effect'). Cf. UNSC Res. 1120 (1997); UNSC Res. 1207 (1998).

¹⁵⁴ See Tenth Prosecutor's Statement to the United States Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005).

¹⁵⁵ Remarks on the Status and Future of State Cooperation with the ICTR, OTP Presentation to the NPA Forum, Arusha, 26–28 November.

¹⁵⁶ *Tuta & Stela* Appeals Judgment (n 129 above) [238]. Cf. *Nikolić* Arrest Decision (n 30 above) [24].

¹⁵⁷ *Lubanga* Search Decision (n 36 above) [42]. Such a violation would presumably always affect the 'integrity' and not the 'reliability' prong of Art. 69(7).

this evidence will be collected. The question of *whether* he can collect the evidence must of course precede the question of *how* to do so. The '*how*' will in turn depend on what type of evidence he is seeking to collect, ie testimonial evidence, for instance through interviews of witnesses or suspects, or physical evidence, for instance through searches. This section will discuss the rules that apply to the collection of testimonial evidence, and the consequences for a prosecutor who flouts those rules when it comes to later seeking to admit that evidence at trial.

4.1 Rights-based rules

Witness interviews

Article 55(1) of the ICC Statute provides for four rights that any person, witness or suspect, has during an international criminal investigation: (1) the right not to incriminate oneself; (2) the right not to be subjected to torture, ill-treatment or duress; (3) the right to an interpreter and translations; and (4) the right not to be subject to arbitrary arrest or detention. Of these, the first three rights are directly relevant to the collection of testimonial evidence through interviews and it is therefore these rights that will be discussed below.¹⁵⁸

The right not to incriminate oneself or confess guilt A person, whether a suspect or not, has the right not to be compelled to incriminate himself or to confess guilt in the course of an investigation. This right is set out in Article 55(1) of the ICC Statute and is recognized in international human rights jurisprudence.¹⁵⁹ The jurisprudence of the *ad hoc* criminal tribunals also confirms that the privilege against self-incrimination applies to interviews conducted by the ICTY or ICTR prosecutor before a person becomes an accused,¹⁶⁰ and it has specifically been applied in the context of suspect interviews.¹⁶¹

Courts often refer to the privilege interchangeably with the right to silence, but the ICC Statute makes clear that they are separate rights available at separate

¹⁵⁸ This chapter does not discuss other rights in the ICC Statute or other internationally recognized human rights that may apply at the pre-trial stage, but are not specifically related to rules on the collection of evidence by a prosecutor during investigations that may lead to the exclusion of that evidence. See, eg, ICC Statute, Art. 57(3)(c) (protection of suspects, victims and witnesses); Arts 55(1) and 58-59 (rights relating to arrest); Arts 54 and 61(3) (right to have exculpatory material collected and evidence disclosed prior to confirmation hearing).

¹⁵⁹ See ICCPR, Art. 14(3)(g); ACHR, Art. 8(7). The privilege is not mentioned in the ECHR but the ECtHR has confirmed that 'the privilege against self-incrimination [is a] generally recognized international standard[] which lie[s] at the heart of the notion of a fair procedure under Article 6' of the ECHR. See *JB v. Switzerland* [2001] Crim. LR 748 [64] [hereinafter '*JB*'].

¹⁶⁰ See ICTY Statute, Art. 21(4); ICTR Statute, Art. 20(4). The privilege also applies but has a different application to an accused at trial. See ICC, Rule 74; ICTY/R, Rule 90(E); see also Kai Ambos, 'The Right of Non-Self-Incrimination of Witnesses Before the ICC' (2002) 15 *Leiden J Intl L*, 155-177.

¹⁶¹ The ECtHR has held that the privilege applies from the moment a person is 'substantially affected' by an investigation ie exposed to the risk of incriminating himself during questioning

stages of the investigation process. The right to silence attaches once someone is a suspect and protects him or her from having to say anything at all when questioned by investigative authorities.¹⁶² The right not to incriminate oneself is both narrower and broader than this. It is narrower in that it does not allow a person to refuse to say anything, only what may be incriminating.¹⁶³ But it is also broader because, unlike the right to silence, the privilege can cover non-oral statements such as those contained in documents.¹⁶⁴

The privilege is one of the most complex and controversial rights that applies in criminal investigations. The ICTY Appeals Chamber explained that, in its view, the privilege 'protect[s] the innocent by insulating him from the effects of coercion from law enforcement authorities'.¹⁶⁵ English jurist Jeremy Bentham, on the other hand, has called the privilege 'one of the most pernicious and most irrational notions that ever found its way into the human mind'. In his view, '[i]f all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence'.¹⁶⁶ National systems that recognize the privilege have also built inroads to its reach over the years.

The *ad hoc* tribunals have recognized that the privilege may be invoked at an interview in three scenarios: (i) where improper promises were made; (ii) where threats or 'oppressive' questioning were used; or (iii) where trickery was used to mislead the interviewee. Some decisions do not explicitly invoke the privilege or the right to silence¹⁶⁷ in their reasoning, speaking instead more generally of the 'oppressiveness' versus 'voluntariness' of the statement,¹⁶⁸ but it is clearly these rights that are at issue.

if not granted appropriate protection. See, eg, *Heaney and McGuinness v. Ireland* (2001) 33 EHRR 264.

¹⁶² In the view of one commentator, an exception to the privilege is the obligation to provide one's name. See Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford, New York: OUP, 2005) [hereinafter '*Trechsel*'] [354]-[355].

¹⁶³ Article 55 of the ICC Statute makes clear that the privilege encompasses not only the right not to 'confess guilt' but also the right not to 'incriminate himself'.

¹⁶⁴ See, eg, *Funk v. France* (1993) 16 EHRR 297 [hereinafter '*Funk*']; *JB* (n 159 above).

¹⁶⁵ *Prosecutor v. Delalić* (Decision On The Prosecution's Oral Requests For The Admission Of Exhibit 155 Into Evidence And For An Order To Compel The Accused, Zdravko Mucić, To Provide A Handwriting Sample) ICTY IT-96-21-T (19 January 1998) [58].

¹⁶⁶ Jeremy Bentham, *A Treatise on Judicial Evidence* (M. Dumont (ed)) (1825) 241. Similarly, academic commentator Wigmore has argued that the privilege 'tie[s] the hands of the police ... To disable the detective police from the very function they were set to fulfil is no less than absurd'. *Wigmore on Evidence* VIII (1961) 851.

¹⁶⁷ Some decisions relate to the right of silence of an accused, rather than a suspect, but the rights are phrased in the same way in the courts' Statutes. But see ICTY/R, Rule 92 (burden is reversed where there is a video-recorded confession by an accused).

¹⁶⁸ Some decisions provide that voluntariness of a statement must in all instances be proved 'beyond reasonable doubt'. See, eg, *Prosecutor v. Delalić* (Decision on Hazim Delić's Motion

Scenario 1: promises, incentives and inducements The case law of international criminal courts establishes that investigators may provide a witness or suspect with an 'incentive' to cooperate, but not where this incentive rises to the level of an 'inducement' or improper hope of favour by persons in authority. Where the 'will of the maker of the statement is constrained, coerced or induced into making the statement' it becomes unreliable and therefore 'ought not to be taken seriously in the making of a judicial determination improper'.¹⁶⁹

In the words of the ICTY Appeals Chamber:

Prosecutorial offers that serve as inducements to the accused's cooperation may, *if the inducement is sufficiently powerful*, render statements made pursuant to that cooperation involuntary. In other cases, however, the inducement is simply an incentive; the fact that the accused may have taken this incentive into account when deciding whether to cooperate does not mean that the defendant was not acting voluntarily.¹⁷⁰

For this reason, it is standard practice at the *ad hoc* tribunals to inquire whether an interviewee has received an inducement of any kind. Similarly the Regulations of the ICC Office of the Prosecutor provide that '[n]o inducement whatsoever shall be offered to a person in exchange for questioning or a statement'.¹⁷¹

In *Halilović*, the ICTY Appeals Chamber considered an investigator's promise during a suspect interview that if the suspect cooperates this 'could have a positive influence on the Prosecution's position in respect of [a future] application for provisional release'.¹⁷² The Chamber recognized that a suspect 'has the right to refuse to give statements incriminating himself' and found that the investigators' promise was an inducement because it provided 'a possible reward for cooperation'.¹⁷³ This was so even though the OTP's support for provisional release would not in itself guarantee that release would be granted.¹⁷⁴

Pursuant to Rule 73) ICTY IT-96-21-T (1 September 1997) [hereinafter '*Delalić* Rule 73 Decision'] [42]; see also *ibid*, [48]. According to others, it is only where there is *prima facie* evidence of improper conduct by the prosecution in an interview that the OTP has the burden of proving beyond reasonable doubt that a person's statement was voluntary. See, eg, *Prosecutor v. Martić* (Decision Adopting Guidelines on the Standards Governing the Admission of Evidence) IT-95-11-T (19 January 2006) Annex A [9].

¹⁶⁹ *Delalić* Rule 73 Decision (n 168 above) [15].

¹⁷⁰ *Prosecutor v. Halilović* (Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table) IT-01-48-AR73.2 (19 August 2005) [hereinafter '*Halilović* Bar Table Decision'] [38] (emphasis added).

¹⁷¹ ICC OTP Regulations, Final version April 2009, Regulation 43, Compensation for expenses. See also Extraordinary Chambers in the Courts of Cambodia, Rule 21 ('No form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview').

¹⁷² *Halilović* Bar Table Decision (n 170 above) [34]–[35].

¹⁷³ *Ibid*, [15].

¹⁷⁴ Cf. *Prosecutor v. Sesay et al* (Written reasons – Decision on the admissibility of certain prior statements of the Accused given to the Prosecution) SCSL-04-15-T-1188 (30 June 2008) [51] (where investigators called the accused a 'suspect', told him he could become a mere 'witness' and

The Court went on to find, however, that the inducement in question was not of a nature 'that coerced or overbore the will of the accused', rendering the statement involuntary. The judges nevertheless excluded the interview transcript, holding that the inducement, along with other factors—including uncertainty as to whether a promise of withdrawal of the indictment was made during a break in questioning, and indications that counsel was incompetent—made the questioning improper.¹⁷⁵

The reasoning applied in *Halilović* leaves open the question of what promises constitute incentives, inducements, or inducements that are sufficiently powerful to 'coerce the will' of a suspect. It also leaves open the circumstances under which an inducement that does *not* coerce the suspect's will may nevertheless (in combination with or in the absence of other factors) violate the right not to make self-incriminating statements.

It appears that, for instance, a promise to bring a witness into a protection program would be considered legitimate, especially where pre-articulated criteria apply equally to all witnesses seeking this benefit.¹⁷⁶ It is not clear from the case law so far, however, whether an offer of immunity from prosecution would constitute an impermissible inducement. The practice has been explicitly condoned in the context of the ICTY,¹⁷⁷ but defence counsel may challenge it on the basis that it constitutes an impermissible inducement.¹⁷⁸

Scenario 2: threats, coercion, or oppression International criminal courts have found that sticks can be as dangerous as carrots when it comes to the privilege against self-incrimination. In the *Mucic* case, an ICTY Trial Chamber stated that '[t]here is no doubt statements obtained from suspects which are ... obtained

made promises about allowing him to see his family and protecting them if he cooperated, this 'border[ed] on a semblance of 'arm twisting' that violated the right to silence and privilege against self-incrimination).

¹⁷⁵ *Halilović* Bar Table Decision (n 170 above) [38], [41], and [62].

¹⁷⁶ Cf. ICC Investigator Testimony (n 5 above) 63; ICTY Manual (n 129 above) [52] ('Measures taken to assist witnesses, including protective measures, may ... subsequently be portrayed by the defence as an inducement to the witness to give favourable evidence. Investigators should therefore keep detailed records of all dealings with witnesses').

¹⁷⁷ Prosecutor's Regulation 1, 1994 ('it is permissible, provided the accomplice agrees to truthfully give certain specified testimony against [a] suspect...for the Prosecutor not to indict the accomplice'). See also ICTY Manual (n 129 above) [44] and [84].

¹⁷⁸ Some commentators question whether the ICC prosecutor can grant immunity-from-prosecution to suspects. See eg, Daniel Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals', available at: <<http://www.isrcl.org/Papers/Nsereko.pdf>> 15. The ICC OTP has taken 'statements of limited use', however, and sought to have them admitted into evidence at trial. See *Prosecutor v. Lubanga* (Transcript) ICC-01/04-01/06-T-113-ENG WT 30-01-2009 1/71 NB T (30 January 2009) 13–14; *ibid*, (Decision on the 'Prosecution's Submission pursuant to the Trial Chamber's "Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on 21 Apr. and 8 May 2008") ICC-01/04-01/06 (20 January 2009).

by oppressive conduct' are improper under the Rules.¹⁷⁹ The rationale for this is presumably that oppressiveness as a 'background factor' in an interview can, like threats or individual coercive tactics, lead an interviewee to feel coerced into saying something he otherwise would not have said, thereby calling into question his right not to incriminate himself and, in the case of a suspect, his right to silence.

In *Delalić*, an ICTY Trial Chamber held that 'coercion, force or fraud, or oppressive conduct which saps the concentration and ... the free will of the suspect ... and weakens resistance rendering it impossible for the suspect to think' may constitute 'oppressive conduct' in violation of the privilege against self-incrimination.¹⁸⁰ Whether or not an interview is oppressive is a question of fact. What may be oppressive to a child or old man or someone not experienced in the law may not be oppressive to a mature and well-informed young adult.¹⁸¹ Relevant factors include the characteristics of the person making the statement,¹⁸² the duration and manner of questioning, and refreshments or periods of rest during questioning.¹⁸³

Applying this test, the ICTY found that a five-hour interview involving five questioners that left the interviewee tired did not, alone, constitute oppressive conditions as the interviewee 'was in complete control and was master of the situation'.¹⁸⁴ The Tribunal reached this conclusion on the basis that '[t]here was no evidence that the duration of the interview excited in him hopes of release or any fears which made his will crumble thereby prompting statements he otherwise would not have made'.¹⁸⁵ Nor, the ICTY has found, does 'aggressive questioning' necessarily constitute impermissible coercion; it is 'within the limits of normality and in no way affects the integrity of [an] [i]nterview'.¹⁸⁶

¹⁷⁹ *Prosecutor v. Delalić et al* (Decision on the Tendering of Exhibits 104-108) ICTY IT-96-21-T (9 February 1998) [hereinafter '*Mucić* Search Decision'] [41] (emphasis added). Similarly the Special Court for Sierra Leone cited with approval case law from Canada to the effect that 'the absence of oppression is important in its own right and also in the context of the overall voluntariness analysis'. *Prosecutor v. Sesay et al* ('Written reasons – Decision on the admissibility of certain prior statements of the Accused given to the Prosecution') SCSL-04-15-T-1188 (30 June 2008) [hereinafter '*Sesay* Statements Decision'] [54] (citing Canadian jurisprudence).

¹⁸⁰ *Mucić* Austrian Statements Decision (n 9 above) [66]. ¹⁸¹ *Ibid*, [67].

¹⁸² *Ibid*. However the ICTY has held that an interviewee's cultural background is not relevant. *Ibid*, [58]–[60].

¹⁸³ In *Sesay*, the Sierra Leone court rejected defence arguments that 'the manner in which the questioning was carried out [was] oppressive', being convinced, from the video recording of the interview, that the accused 'was questioned in comfortable surroundings, was fed and given water, was granted breaks throughout the interviews, and that the Investigators in the process, spoke professionally and politely to him'. *Sesay* Statements Decision (n 187 above) [55]. It also found that although the accused was ill during the interview, his ailments were 'not sufficiently grave to render the manner of questioning oppressive'. *Ibid*, [59].

¹⁸⁴ *Mucić* Austrian Statements Decision (n 9 above) [69]. ¹⁸⁵ *Ibid*.

¹⁸⁶ *Prosecutor v. Orić* (Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89(d) and 95) IT-03-68-T (7 February 2006) [hereinafter '*Orić* Statement

Scenario 3: subterfuge or trickery The prosecutor of the Special Court for Sierra Leone (SCSL) argued in the *Sesay* case, quoting the Canadian Supreme Court, that investigating authorities, in dealing with shrewd and often sophisticated criminals, must sometimes 'resort to tricks or other forms of deceit[,] and should not ... be hampered in their work' unless their trickery rises to the level that would 'shock the conscience of the community'.¹⁸⁷ In the Canadian Supreme Court's view, the community's conscience would not be shocked by a policeman posing as a drug addict to break a drug ring but it would be shocked by a policeman pretending to be a chaplain or Legal Aid lawyer in order to hear a suspect's confession.¹⁸⁸ The SCSL Chamber quoted this judgment with approval, but not on this specific point, and thus did not clearly decide where the line between permissible and impermissible trickery lies in the international arena.

At the ICC, this situation has not yet arisen. OTP investigators have indicated that they do not approach witnesses or conduct interviews in a manner that would conceal their identity,¹⁸⁹ but it is not clear whether other 'tricks' are used and, if so, whether they would be sanctioned by the Court. The ICTY, for its part, found no breach of the privilege or the right to silence where the 'police of a ... country ... in consultation with the [ICTY] Prosecutor,¹⁹⁰ fitted [a witness] with hidden electronic recording devices in order to covertly record the conversations' between the witness and a person suspected of contempt by the ICTY prosecutor. The Trial Chamber found the circumstances of the interview acceptable, reasoning that since the suspect initiated the meeting, this 'remove[d] any suggestion that [he] was somehow entrapped or coerced into participating in the conversations'.¹⁹¹

Similarly, in a case before the ICTR, the chamber disposed of a defence argument that there had been impermissible trickery resulting in an involuntary statement when the suspect had been questioned by investigators who introduced themselves as ICTR representatives rather than members of the Office of the Prosecutor. The chamber found that this did not result in impermissible trickery

Decision'] [28]. See also *Prosecutor v. Orić* (Motion to Exclude the Alleged Record of Interview Pursuant to Rules 89(d) and 95) IT-03-68-T (23 January 2006) [41]–[42].

¹⁸⁷ *Prosecutor v. Sesay et al* (Transcript) SCSL Transcript (21 June 2007) 7 (Lines 22–27), quoting *Regina v. Oickle* (2000) SCC 38. ¹⁸⁸ *Ibid*, [66].

¹⁸⁹ See ICC Investigator Testimony (n 5 above) 10 ('The OTP does not conduct secret missions to the field ... despite us trying to keep a low profile on the field').

¹⁹⁰ It is unclear what this consultation involved. However, it was described during the case as a 'permission from' or 'request from' the OTP for the investigative act to take place. *Prosecutor v. Haragija and Morina* (Transcript) IT-04-84-R77.4 (10 September 2008) 94 ('According to your superior, the condition for it to go ahead was the permission of the Prosecutor of this Tribunal? A. Yes.'). *Ibid*, Transcript of 8 September 2008, 97 ('the police said yes to the Prosecutor's request about this meeting'). ¹⁹¹ *Haragija* Trial Decision (n 36 above) [20].

that threatened the subsequent use of the suspect's statements at trial.¹⁹² This line of decision at the *ad hoc* tribunals appears to be consistent with ECtHR jurisprudence on this point.¹⁹³

The right not to be subjected to torture or other cruel, inhuman or degrading treatment Article 55 of the ICC Statute provides that any person, whether a suspect or not, has the right not to be 'subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment' by investigators. Variations on this right are contained in international human rights instruments.¹⁹⁴ The *ad hoc* tribunals and other international courts do not explicitly state that this right exists in their Statutes or Rules, but the prohibition on torture and other forms of cruel, inhuman or degrading treatment is recognized in their jurisprudence.¹⁹⁵

Although the prohibition on torture and other ill-treatment has the same broad purpose as the privilege against self-incrimination, in that it aims to protect a person from confessing to a crime due to improper pressure or abuse, torture can also itself constitute illegal conduct over which international courts may have jurisdiction. Its prohibition is indeed part of customary international law and of a *jus cogens* character.¹⁹⁶

In a case before the ICTR, an accused claimed that he was tortured when he was arrested by Kenyan authorities, in the presence of OTP investigators, because they handcuffed him and threatened him with return to Rwanda if he did not answer investigators' questions.¹⁹⁷ However, no allegation of torture by OTP investigators at the *ad hoc* tribunals has been upheld in the context of interviews, and the jurisprudence on the use of torture in international criminal investigations is limited. The jurisprudence of international human rights courts, however,

¹⁹² *Prosecutor v. Nyiramasuhuko and Ntahobali* (Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators In July 1997) ICTR-97-21-T (15 May 2006).

¹⁹³ See *Allan v. UK*, 48539/99 (2002) EHRR 702; *Bykov v. Russia*, ECtHR, 2009, Application No. 4378/02.

¹⁹⁴ ICCPR, Art. 7; ACHR, Art. 5; ECHR Art. 3; African Charter on Human Rights, Art. 5.

¹⁹⁵ See, eg, *Prosecutor v. Furundžija* (Judgment) IT-95-17/1-T (10 December 2008) [hereinafter '*Furundžija* Judgment'] [153]. See also David Scheffer, 'Memorandum on the Application of International Standards of Due Process by the Extraordinary Chambers in the Courts of Cambodia', available at: <<http://pdc.ccu.hu/archive/00005686/>> 13 ('This right is not found as an explicitly stated right in any ... statute or rule for ... international criminal tribunals [other than the ICC]. However, it is a right that is part of international customary and treaty law with respect to all persons and thus may be viewed as redundant in the context of a criminal tribunal's governing rules').

¹⁹⁷ *Prosecutor v. Kabiligi* (Decision on the Defence Motion to Lodge Complaint and Open Investigations into Alleged Acts of Torture Under Rules 40(C)) ICTR-97-34-I (6 October 1998). See also *Prosecutor v. Dokmanović* (Decision on the Motion for Release by the Accused) IT-95-13a-PT (22 October 1997).

fleshes out in detail the circumstances under which the acts of investigators can constitute torture or degrading treatment.¹⁹⁸

The ICC Statute provision on torture is broader than the equivalent right recognized at the *ad hoc* tribunals and human rights instruments, in that it also excludes the use of 'coercion, duress or threats'. Neither the Statutes of the *ad hoc* tribunals nor international human rights instruments explicitly recognize the right not to be subjected to these less severe forms of mistreatment, although each of these types of conduct—coercion, duress, and threats—is a ground for arguing that there has been a violation of the privilege against self-incrimination and a suspect's right to silence.¹⁹⁹ It will be for the ICC, through its decisions, to define the terms in this context, ie as prohibited conduct *per se* rather than a way of violating another right.²⁰⁰ As a result, the Court may provide broader protection to subjects of its investigations than would be available under internationally recognized human rights.

The right to an interpreter Article 55(1) of the ICC Statute provides that a person 'who is questioned' in an investigation, 'if questioned in a language other than a language the person fully understands and speaks' shall have, 'free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness'. This right is broader than the one articulated in the founding instruments of the ICTY and ICTR. First, it applies explicitly to witnesses as well as suspects, whereas in the *ad hoc* tribunals' founding instruments it is limited to suspects. Second, in the ICC Statute the right applies explicitly to translations as well as interpretation whereas in the *ad hoc* tribunals' Statutes it does not. And third, the ICC version of the right explicitly requires *competent* interpretation whereas the others do not.

Notwithstanding this difference in the language of the courts' Statutes and Rules, their practice has so far followed a similar line. The ICC has held that interpretation must be provided when the official languages used by the Court are not languages 'that the [person] fully understands and speaks'.²⁰¹ A similar,

¹⁹⁸ See, eg, *Gäfgen v. Germany* (2009) 48 EHRR 253; *Ireland v. UK* (1978) 2 EHRR 25; Human Rights Committee, General Comment 20, Art. 7 (Forty-fourth session, 1992).

¹⁹⁹ See pp. 265–7, above.

²⁰⁰ The prohibition of 'duress' will have to pass some minimum threshold—it cannot be for instance that merely compelling a witness to attend an interview pursuant to a subpoena where there is a legal basis to do so would constitute duress. See <http://www.iclklamberg.com/Statute.htm#_ftn1009 infra.>

²⁰¹ *Prosecutor v. Katanga* (Judgment of the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages') 01/04-01/07 (OA 3) (27 May 2008) (*fully* understanding a language means being fluent in the language in ordinary, non-technical conversation; if a chamber is in doubt, a request for language assistance should be granted). This decision concerned the right of the accused under Art. 67 of the Statute, which is worded in the same way as that of a suspect in Art. 55.

but slightly lower, standard has been applied at the *ad hoc* tribunals.²⁰² The ICTY has also decided that although 'defective' interpretation may render an interview unreliable, there is no need for the interpreter to be a native speaker of the language or dialect used in the interview.²⁰³ This jurisprudence of the ICC and *ad hoc* tribunals is consistent with that of the ECtHR.²⁰⁴

Suspect interviews

A suspect has the same rights as a witness in interviews, plus, under Article 55(2) of the ICC Statute, three additional ones.²⁰⁵ These are: (1) the right to be informed that one is a suspect; (2) the right to silence; and (3) the right to counsel. These rights apply whether or not the suspect is in detention.²⁰⁶ A suspect must be informed of his rights when he is 'about to be questioned',²⁰⁷ and his rights must be respected when he is questioned by national investigators at the request of the prosecutor as well as in interviews conducted by the prosecutor's own staff.²⁰⁸ The suspect rights listed in Article 55(2) are also explicitly provided for in the Statutes and Rules of the *ad hoc* tribunals²⁰⁹ and in international human rights instruments.²¹⁰

Under the ICC Statute, a person is a suspect when there are *grounds to believe* that he has committed a crime within the jurisdiction of the court. The *ad hoc* tribunals adopt a similar threshold, defining a suspect as 'a person concerning whom the Prosecutor possesses *reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction*'.²¹¹

²⁰² Article 21 of the ICTY Statute and Art. 20 of the ICTR Statute grant the right to interpretation to an accused if he does not 'understand' a language of the Tribunal. This has been read to mean that interpretation is required where the accused does not understand 'sufficiently in order to allow for the effective exercise of his right to conduct his defence'. See *Prosecutor v. Karadžić* (Decision on Interlocutory Appeal of the Trial Chamber's Decision on Prosecution Motion Seeking Determination that the Accused Understands English) IT-95-5/18-AR73.3 (4 June 2009).

²⁰³ *Orie* Statement Decision (n 186 above).
²⁰⁴ Like the ICTY, Arts 5–6 of the ECtHR, Art. 14 of the ICCPR and Art. 8 of the ACHR use the standard of a language which a suspect or accused 'understands', rather than 'fully understands'. See also, eg, *Amer v. Turkey*, ECtHR, 2009, Application No. 25720/02.

²⁰⁵ An accused enjoys equivalent rights at trial. See ICC Statute, Art. 67. Conversely, the right of an accused to be presumed innocent under Art. 66(1) applies to 'everyone'.

²⁰⁶ See Triffterer (n 7 above) 1097.

²⁰⁷ ICC Statute, Art. 55(2).

²⁰⁸ *Ibid.*

²⁰⁹ ICTY Statute, Art. 18(3); ICTR Statute, Art. 17(3); ICTY/R, Rules 42. But see *Mucić* Austrian Statements Decision (n 9 above) [58] ('The Trial Chamber does not accept... that the investigators had a duty to *explain* the provisions of Rule 42... the duty is only to interpret to the suspect the rules in a language he or she understands') (emphasis added).

²¹⁰ See, eg, ICCPR, Arts 14 and 15. Some commentators argue that suspects' rights under Art. 55(2) indeed surpass those guaranteed under international human rights law or evolved national systems. See William Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2004) 253–54; Scheffer & Cox, 'The Constitutionality of the Rome Statute of the International Criminal Court' (2008) 98 J of Crim. L and Criminology 3, n 353.

²¹¹ ICTY/R, Rule 2 (emphasis added).

If someone who is interviewed as a witness says something that turns them into a suspect, the interview should be stopped and the person should be informed of his newly-acquired rights.²¹² A person who is a suspect can later either 'drop' to being a witness or have an indictment against him or her confirmed and become an accused.

There is no formal trigger for when a person becomes a suspect, nor is there a requirement on the prosecutor of an international criminal court to formalize the date on which someone becomes a suspect, for instance by filing a document or notification to the Registry or defence counsel. OTP investigators at the ICC have indicated that they conduct a pre-interview screening to determine whether a person they wish to speak to is a suspect, and the modalities of the interview that will follow as a result; but otherwise practices on designating suspects are a matter of unpublished internal policy.²¹³

Since the designation of a suspect is an internal process that involves neither the defence nor the court, it is rarely subject to judicial review. An exception arises when the prosecutor seeks a suspect's arrest.²¹⁴ Another is when a prosecutor seeks to admit into the trial record a statement taken at the investigation stage; the court will then review whether the interview complied with applicable rules, and those rules vary depending on whether a person's status is either witness or suspect.²¹⁵

In reviewing the designation of a suspect in this context, the ICTY Appeals Chamber has stated that the definition of 'suspect' is 'unequivocally objective' in nature.²¹⁶ It is 'insignificant whether the Prosecution, or another authorized person, *believes that* the person is a suspect or not' or whether the prosecution *calls* that person a 'witness' or 'suspect'.²¹⁷ Rather, 'as soon as there is reliable information which tends to show that the person may have committed a crime under the [tribunal's] Statute, the person automatically becomes a suspect'.²¹⁸ In applying this objective test, a chamber may itself analyze the content of a statement to determine whether there were sufficient indications to warrant suspect status. Prosecutors would therefore be advised to err on the side of caution; where there is good reason to think that a person may have committed a crime within their jurisdiction, and irrespective of their own intention to prosecute the person

²¹² ICC OTP Regulation 41(2); ICTY/R, Rule 42.

²¹³ See ICC Investigator Testimony (n 5 above) 12.

²¹⁴ See ICC Statute, Arts 58–19; ICTY/R, Rules 40*bis*. At the ICC, unlike at the ICTY, a suspect is usually arrested *before* charges are confirmed against him.

²¹⁵ See *Prosecutor v. Halilović* (Judgment) IT-01-48-A (16 October 2007) [hereinafter '*Halilović* Appeals Judgment'], Separate Opinion of Judge Schomburg [4]. See also ICTY, Rule 40*bis*(ii).

²¹⁶ *Halilović* Appeals Judgment (n 215 above), Separate Opinion of Judge Schomburg [4].

²¹⁷ *Ibid* (emphasis added); *ibid*, Separate Opinion of Judge Shahbuddeen [6].

²¹⁸ *Ibid*.

for that crime,²¹⁹ they should designate the person a suspect and grant him the additional rights to which he would then become entitled.

Suspect's right to be informed of suspect status Article 55(2) of the ICC Statute gives a suspect the right to be 'informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court'. This right is also available at the *ad hoc* tribunals.²²⁰ The purpose of informing a suspect that he is a suspect is of course to make him aware of the special set of rights that his status affords and to ensure that any waiver of these rights is express and informed.²²¹ But there can be other consequences of conveying this information. In many international investigations, the prosecutor may be investigating senior officials in a government, but will at the same time need to have contact with those officials in order to obtain cooperation from the state to access the crime scene and conduct investigations. A prosecutor would therefore have to think carefully before undertaking to question an official who is a suspect since doing so will trigger his right to know his status and thereby potentially stymie cooperation efforts.²²²

Under the ICC and *ad hoc* tribunal regimes, the right of a suspect to know his 'status' can arise either the first time he is questioned after the belief that he is a suspect has been formed, or when he is arrested; whichever comes first.²²³ Because the right arises early in the criminal process, it is fairly narrow. There is no specific requirement to tell the suspect, in the context of an interview, exactly *what the grounds of culpability are* or what evidence supports them;²²⁴ it suffices to notify him *that* such grounds exist.²²⁵ In the *Morina* case before the ICTY, the suspect had been informed that he 'may be a suspect responsible for committing acts which may be chargeable under the Tribunal's statute' and that there was a 'possible contempt of Court issue, in which a potential witness ... may have been contacted and influenced in an attempt to either give false evidence or no

²¹⁹ An exception to this may be where a no-prosecution deal has been struck with the subject. See nn 177–8 above.

²²⁰ This right is not explicitly stated in the ICTY/R Statutes or Rules, but ICTY/R, Rule 42(a) requires that a suspect be informed of his 'suspect rights' prior to questioning. See also *Haraqija* Appeals Judgment (n 20 above) [37] ('A suspect should be informed of the nature of the investigation prior to an interview in order to make an informed decision about the waiver of his rights').

²²¹ See, eg, *Haraqija* Appeals Judgment (n 20 above) [37].

²²² A key issue in this context will, of course, be what constitutes a 'questioning'. Cf. pp 247–9.

²²³ ICC Statute, Arts 55(2) and 58–59; ICTY Statute, Art. 18(3); ICTR Statute, Art. 17(3); ICTY/R, Rules 42 and 40bis.

²²⁴ International human rights jurisprudence suggests that even when it comes to an *accused's* more extensive right to be informed 'in detail' of the charges against him before trial, this would not include the evidence on which the charge is based. See Amnesty International Fair Trials Manual, available at: <http://www.amnestyusa.org/international_justice/fair_trials/manual/8.html>

²²⁵ This is clear from the language 'informed that there are grounds' as opposed to 'informed of the grounds' in Art. 55(2).

evidence'. This limited information was considered by the Tribunal to be sufficient information at the questioning stage,²²⁶ and this holding appears to be in conformity with internationally recognized human rights.²²⁷

Suspect's right to remain silent The right of a suspect who is questioned by investigators to remain silent is enshrined in ICC, Article 55(2)²²⁸ as well as the Statutes of the *ad hoc* tribunals and international human rights instruments.²²⁹ The *ad hoc* tribunals' Statutes also require that the suspect be cautioned that any statement he makes shall be recorded and may be used in evidence, a practice that appears to be followed at the ICC as well.²³⁰

The central question in the context of the suspect's right to silence is whether such silence can be used against him at a subsequent trial.²³¹ The ICC Statute explicitly prescribes that a suspect's silence '*may not be considered* in the determination of guilt or innocence' against him at a subsequent trial.²³² Similarly, in the *Celebici* case, the ICTY Appeals Chamber found 'that an absolute prohibition *against* consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules, reflecting what is ... expressly stated in the Rome Statute'.²³³ This goes further than international human rights jurisprudence, which provides that an inference of guilt may be permissible under certain circumstances, for instance, where the factual circumstances clearly call for an explanation of the suspect's location or conduct and none is forthcoming.²³⁴

Suspect's right to counsel A suspect has the right, under ICC, Article 55(2), as in the Rules of the *ad hoc* tribunals, 'to be questioned in the presence of counsel'.²³⁵ A suspect also has the right '[t]o have legal assistance of [his] choosing, or ... to have legal assistance assigned to him or her, in any case where the interests of justice so require ... without payment by the person ... if the person

²²⁶ *Haraqija* Appeals Judgment (n 20 above) [34]–[37].

²²⁷ See ECHR, Art. 6(3)(a) and ACHR, Art. 8(2)(b) (reserving the right to know 'in detail' the nature and cause of the charge against them to *accused* persons). See also *X v. Belgium* (7628/76), 9 DR 169, 9 May 1977; *Ofner v. Austria*, 3 Yearbook 322, 19 December 1960.

²²⁸ The right to silence for suspects contained in Art. 55 (2) of the ICC Statute is worded in the same way as Art. 67(1)(g) in relation to an accused.

²²⁹ ICTY Statute, Art. 18(3); ICTR Statute, Art. 17(3); ICTY/R, Rule 42; ICCPR, Art. 14; ACHR, Art. 8; ECHR, Art. 6 and *Heaney and McGuinness v. Ireland*, Application No. 34720/97 [40].

²³⁰ *Katanga* Admission Decision (n 8 above) [21].

²³¹ Most cases involving the invocation of a suspect's right to silence during a criminal investigation also involve the privilege against self-incrimination, and have been discussed in that context. See pp 262–8, above.

²³² *Prosecutor v. Delalić et al* (Judgment) ICTY IT-96-21-T (20 February 2001) [hereinafter '*Delalić* Appeals Judgment'] [783].

²³³ See *John Murray v. UK* (1996) 23 EHRR 29 [47]. See also Trechsel (n 162 above) 354–5.

²³⁴ ICTY Statute, Art. 18; ICTR Statute, Art. 17; ICTY/R, Rule 42(b).

does not have sufficient means to pay for it'.²³⁶ This includes the right to a lawyer at the time of arrest.²³⁷

The right to counsel is closely linked to the right to silence and the privilege against self-incrimination. Assistance by counsel during a suspect interview is designed to ensure that the suspect is aware of his rights and to protect him against improper questioning by prosecution investigators.²³⁸ A suspect is less likely to understand the scope of his rights if he does not have counsel to advise him. Conversely, where counsel is present, there may be a presumption that a suspect was in-the-know.²³⁹

An indigent suspect may not always have the right to choose which counsel is assigned to him.²⁴⁰ But, like a paying client, he has the right to *competent* representation.²⁴¹ Competence is presumed, however, and the burden is on the suspect to prove it is lacking. The bar for incompetence has also been set high. In the *Orić* case, for instance, an ICTY Trial Chamber found no grounds for concluding that counsel's conduct rose to the level of being 'flagrantly incompetent',²⁴² and in another case the Appeals Chamber found that absent 'specific evidence' showing 'misconduct, lack of necessary qualifications and competence or otherwise ... inappropriate behaviour', counsel would not be considered incompetent.²⁴³

A person may waive the right to assistance of counsel, but, according to Article 55(2)(d) of the ICC Statute and the jurisprudence of the *ad hoc* tribunals, the waiver must be shown to be voluntary. In the words of one ICTR chamber, the prosecutor bears a 'heavy burden' to prove 'convincingly and beyond a reasonable doubt' that a suspect voluntarily waived the rights in relation to the interview.²⁴⁴ Signing a form waiving the right to counsel is not necessarily sufficient evidence of waiver—the genuineness of that consent must be considered in the context

²³⁶ ICC Statute, Art. 55(2); ICTY Statute, Art. 18; ICTR Statute, Art. 17; ICTY/R, Rule 42(b); cf. ICCPR, Art. 14(3)(d)); ACHR, Art. 8; ECHR, Art. 6 and related jurisprudence.

²³⁷ See ICC, Rules 20(1)(c) and 117(2); ICC Regulation 76(1). See also ICTY/R, Rule 40bis.

²³⁸ *Prosecutor v. Gotovina et al* (Reasons for the Decision on the Admission of Two Statements and Related Exhibits of Witness Zdravko Janić into Evidence Pursuant to Rule 92ter) IT-06-90-T (24 July 2008) [hereinafter '*Gotovina* Counsel Decision'] [4].

²³⁹ See *Halilović* Bar Table Decision (n 170 above) [15] ('there is ... a presumption that he knows about [the] right [to silence] if he is assisted by counsel').

²⁴⁰ *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-A (1 June 2001) [61]–[62].

²⁴¹ *Gotovina* Counsel Decision (n 238 above) [4].

²⁴² *Orić* Statement Decision (n 186 above) [26].

²⁴³ *Prosecutor v. Popović et al* (Decision on Appeals Against Decision Admitting Material related to Borovčanin's Questioning) IT-05-88-AR73.1 (14 December 2007) [35]. But see *Halilović* Bar Table Decision (n 170 above) [61]–[62].

²⁴⁴ See, eg, *Prosecutor v. Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) [hereinafter '*Bagosora* Decision'] [17]–[19]; cf. *Delalić* Appeal Judgment (n 233 above) [551]–[552].

of the entire conversation preceding his signature'.²⁴⁵ Where, on the other hand, investigators checked 'several times' during the course of an interview whether the suspect was content to continue in the absence of counsel, this led to the conclusion that the statement was taken in an appropriate manner.²⁴⁶

Another key question in relation to the right to counsel is what constitutes 'questioning' or 'the interests of justice', either of which justify imposition of a lawyer at the pre-trial stage. The ICC has held that brief questioning by an investigating judge in the context of arrest proceedings requires the presence of counsel;²⁴⁷ but in another decision found that the right to counsel does not apply to every interrogation at the pre-trial stage, including proceedings before a national military prosecutor.²⁴⁸ This position was justified as being consistent with international human rights law.²⁴⁹

4.2 Procedural rules

Witness interviews

Procedural rules governing the conduct of interviews can be grouped into two categories: (1) rules on recording interviews; and (2) rules contained primarily in Article 56 of the ICC Statute that may require defence or judicial participation in an interview.²⁵⁰

Recording the interview ICC, Rule 111 provides that 'a record shall be made of formal statements made by any person who is questioned in connection with an investigation'. According to this Rule, the record must be signed by: (i) the person who conducts the questioning; (ii) the person who is questioned and their counsel, if present; and (iii) any prosecutor or judge who is present. The record must note the date, time and place of the interview and all persons present

²⁴⁵ *Bagosora* Decision (n 244 above) [15].

²⁴⁶ *Mucić* Austrian Statements Decision (n 9 above) [62]. See also *Prosecutor v. Haraqiya and Morina* (Decision on Bajrush Morina's Request for a Declaration of Inadmissibility and Exclusion of Evidence) IT-04-84-R77.4 (28 August 2008) [28].

²⁴⁷ *Prosecutor v. Bemba* (Decision on application for interim release) ICC-01/05-01/08 (20 August 2008) [45].

²⁴⁸ *Prosecutor v. Katanga* (Decision on the confirmation of charges) ICC-01/04-01/07 (30 September 2008) [93].

²⁴⁹ *Ibid.*, [97]–[99] (referring to ECtHR jurisprudence to support the proposition that the right to assistance of a lawyer at initial stages of police interrogation may be subject to restriction for good cause). Cf. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2nd General Report, CPT/Inf (92)(3), 36–8.

²⁵⁰ Some procedural 'best practice' guidelines are also contained in the ICTY Manual. These include the suggestion that it is good practice for investigators rather than prosecutors to take witness statements so that they are in a position to testify about the circumstances under which the statement was taken; the suggestion that a witness should be required to present proof of identity at the beginning of an interview; and the special procedures that apply when showing a witness a photograph of a suspect for identification. See ICTY Manual (n 129 above) [61], [63], and [72].

during the questioning. It must also note anyone who was present but did not sign the record, as well as the reasons for this.

The requirement in Rule 111 that 'a record' be made contemplates that a written record will suffice. This contrasts with Rule 112, which provides that *suspect* interviews must be 'audio- or video-recorded'.²⁵¹ Rule 112(4) provides, however, that the prosecutor may *choose* to follow the procedure in Rule 112 requiring audio- or video-recording when questioning certain types of *witnesses*, 'in particular where the use of such procedures could assist in reducing any subsequent traumatization of a victim of sexual or gender violence, a child or a person with disabilities in providing their evidence'.²⁵² Moreover, the Pre-Trial Chamber may 'order that the procedure in Rule 112 be applied to the questioning of any person'.²⁵³

In contrast to the ICC rules, the *ad hoc* tribunals' Rules only require that suspect statements be audio- or video-recorded. The rules of the *ad hoc* tribunals do not require that written or electronic records be made during a witness interview, although such records are often made in order to comply with notice and disclosure obligations, to ensure that a written statement can be admissible at trial, as are discussed in the next chapter.

Participation of defence and/or a judge in the interview Under Article 56 of the ICC Statute, the questioning of a witness or suspect during an investigation may constitute a 'unique investigative opportunity' that triggers the requirement of special measures, such as the participation of the defence in an interview. During consultations on the drafting of the ICC Statute, there was some disagreement about what types of circumstances constitute 'unique' investigative opportunities under Article 56. The classic case that was cited for inclusion was an interview with a dying witness, as that witness would clearly be unavailable at a future trial to be cross-examined by the defence.²⁵⁴ Delegates at the Rome conference on the ICC Statute, academic commentators and expert *amici* before the Court have since speculated that Article 56 could apply to *other* interviews, for instance that of a child or victim of sexual violence or of a witness for whom repeated questioning may be harmful.²⁵⁵ Victim-witnesses who are likely to be

²⁵¹ In addition, since under Art. 93(10) of the ICC Statute the Court may transmit statements to a state party upon its request, the witness should be asked if he agrees to his statement being provided to a state. The witness' response should be reflected at the end of the statement. See ICC Expert Paper (n 78 above) [80]. See also ICC Investigator Testimony (n 5 above) 13 ('We... explain... the possibility that the Court might decide to transmit the statement to a State Party').

²⁵² See ICC Investigator Testimony (n 5 above) [11] ('despite the fact that the OTP tries to take all possible precautionary measures to provide assistance for victims who might have severe trauma about what they have experienced, there is always the possibility of re-traumatization through the interview process').

²⁵³ ICC, Rule 112(5) (emphasis added). The Rule further provides that this can be done 'in pursuance of Article 56, paragraph 2'. Ibid.

²⁵⁵ Ibid.

harassed or intimidated by militias or state officials may also require Article 56 measures to be applied.²⁵⁶

Factors relevant to determining whether an interview constitutes a unique opportunity include the fact that the passage of time tends to make eyewitnesses' testimonies fade or become blurred; and the fact that some categories of witnesses—such as persons in Internal Displaced Persons camps—talk to each other about their personal experiences with the result that their testimonies can be subject to deformation.²⁵⁷

If an investigative interview is considered to be within the scope of Article 56, it is up to the ICC's Pre-Trial Chamber to determine what measures should be taken. Paragraph (2) of the Article contains a non-exhaustive list of possible measures, leaving it to the judges to determine what measure is proportionate to the uniqueness of the opportunity. Audio- or video-recording an interview is unlikely to be considered sufficient where a dying witness is interviewed, for instance, as this would not 'cure' the loss of the defence's right to confront the witness at trial. Appropriate measures are more likely to include allowing a defence counsel to attend and participate.²⁵⁸ Paragraph 2(e) also provides that a judge may attend and participate in the questioning, effectively turning the interview into a deposition.²⁵⁹

In addition to Article 56 of the ICC Statute, Rule 68(a) of the ICC Rules, entitled 'Prior recorded testimony', provides that at trial the 'Trial Chamber may... allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony', in the absence of the witness at trial, if 'both the Prosecutor and the defence had the opportunity to examine the witness during the recording'.²⁶⁰ This means that, where

²⁵⁶ Situation in Darfur, Observations on Issues concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur pending before the ICC, ICC-02/05 (25 August 2006) [8].

²⁵⁷ Ibid, 9.
²⁵⁸ Article 56(2) provides that where an interview constitutes such an opportunity, the measures that may be ordered by the Pre-Trial Chamber include: '(a) [m]aking recommendations or orders regarding procedures to be followed... [and] (d) [a]uthorizing counsel... to participate... and represent the interests of the defence'. See also Triffterer (n 7 above) 1112.

²⁵⁹ Article 56(2)(e) provides that a possible measure is '[n]aming... [a] judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding... the questioning'.

²⁶⁰ ICC, Rule 68(a) (emphasis added). Cf. ICC, Rule 68(b). See also *Prosecutor v. Lubanga* (Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses) ICC-01-04-01/06 (15 January 2009). See also *Prosecutor v. Katanga* (Prosecution's Consolidated Response to 'Defence Objections to Admissibility in Principal [sic] and in Substance') ICC01/0401/071558 and 'Requête de la Défense en vue d'obtenir une décision d'irrecevabilité des documents liés aux témoins décédés référencés sous les numéros T167 et T258', ICC01/0401/071556, ICC-01/04-01/07-1645 (16 November 2009) [10(b)] ('Rule 68 applies to situations where the witness is alive but his or her presence is deemed either inconvenient or undesirable or his/her imminent death is foreseeable. Accordingly, arrangements can be made for these witnesses to be questioned in the presence of the Prosecution and the Defence').

it is possible or likely that the ICC prosecutor will seek to admit the interview transcript into evidence at trial in the absence of the witness, *even where Article 56 is not triggered*, he may wish to allow direct participation by the defence.²⁶¹

The *ad hoc* tribunals' closest equivalent to these provisions is Rule 71, which provides that where it is in the interests of justice to do so, a Trial Chamber may order, at its own initiative or at the request of a party, 'that a deposition be taken for use at trial'. A deposition requires that the Trial Chamber 'appoint a Presiding Officer' and that the other party has 'the right to attend the taking of the deposition and cross-examine' the witness. A record of the deposition is thereafter sent to the Trial Chamber, which decides whether or not to admit it. However, the placement and language of this Rule (referring to, for instance, 'the other party') suggests that it is only relevant post-indictment and not at the investigation stage proper. Moreover, in practice its use has largely been limited to instances where the witness was physically unable to travel to the trial site to give evidence.²⁶² It is therefore applied under much narrower circumstances than those contemplated by Article 56 of the ICC Statute.²⁶³

Suspect interviews

Article 55 of the ICC Statute provides that a suspect must be informed of his rights prior to being questioned, in a language that he understands, and that this process, like the questioning itself, should be audio- or video-recorded.²⁶⁴ In addition, any waiver of the right to be questioned in the presence of counsel must be recorded in writing and, if possible, be audio- or video-recorded.²⁶⁵ The suspect may refuse to be audio- or video-recorded, in which case a written record can be taken, as it would be with a witness under Rule 111.²⁶⁶

Rule 112 specifies that any interruption in the course of questioning must be noted. And, at the conclusion of the questioning, the suspect must be offered the opportunity to clarify anything he said and to add anything he may wish

²⁶¹ This also means that where the ICC prosecutor requests national authorities to conduct such questioning, he should request that the questioning take place with the participation not only of prosecution investigators but also of the defence. Furthermore, it may be possible to request that the testimony be taken under oath, by making a solemn declaration before testifying as the witness would in court under Rule 66. See Expert Paper (n 78 above) [79] and [81].

²⁶² See *Archbold* (n 91 above) 793–4.

²⁶³ Third-party contact with the witness is also called for at the *ad hoc* tribunals where the prosecutor takes a witness statement that he may later seek to introduce as written evidence at trial. See ICTY, Rule 92bis.

²⁶⁴ ICC, Rule 112. If substantive conversations take place 'off-tape', it is advisable to refer to them on the record after the break or to ask the suspect to sign a form confirming their content. See *Halilović* Bar Table Decision (n 170 above) [41]; *Prosecutor v. Karemera et al* (Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse) (2 November 2007) [20]–[22].

²⁶⁵ ICC, Rule 112(a).

²⁶⁶ ICC, Rule 112(b).

to add. The time of conclusion²⁶⁷ of the questioning should be noted. The original tapes²⁶⁸ must be sealed in the presence of the person questioned and their counsel, if present, under the signature of the OTP investigator who conducted the questioning, the suspect, and his counsel, if present. The recording must then be transcribed 'as soon as practicable' after the interview and a copy or original of both the recording and the transcript supplied to the suspect. Rule 112 allows '[a]s an exception' that a person may be questioned without the questioning being audio- or video-recorded 'where the circumstances prevent such recording taking place. In this case, the reasons for not recording the questioning shall be stated in writing and the procedure in rule 111 shall be followed'.²⁶⁹ The Trial Chamber in *Katanga* has held that the procedural requirements in Rule 112 are *additional to* those in Rule 111, so that the requirement to produce a written statement contained in Rule 111 must be followed for *every* interview.²⁷⁰

Rule 43 of the *ad hoc* tribunals' rules contain an almost identical set of requirements on recording the questioning of suspects as ICC, Rule 112, with two exceptions. One is that, at the *ad hoc* tribunals, the recording must be transcribed *only if* the suspect becomes an accused; and second, no explicit exception to the Rule is made where 'circumstances prevent' recording from taking place, as in ICC, Rule 112.

A suspect interview at the ICC or *ad hoc* tribunals may require the participation of the defence and/or a judge on the same conditions as that of a witness.²⁷¹

4.3 Violations of rules governing the collection of testimonial evidence

In interpreting the provisions on excluding evidence at trial, both the ICC and the *ad hoc* tribunals have concluded that the correct approach 'is to provide for the exclusion of evidence by judges only in cases in which very serious breaches have occurred, leading to substantial unreliability of the evidence presented' or an adverse impact on the integrity of the trial.²⁷² The courts have found, however, that some violations are by their very nature so serious that admitting evidence collected in such circumstances would always be antithetical to the integrity of proceedings or result in unreliability, thus automatically satisfying one of the two grounds for exclusion.

²⁶⁷ As well as, presumably, the beginning.

²⁶⁸ Or, presumably, other digital recording media.

²⁶⁹ In such a case the suspect must also be provided with a copy of their statement. See ICC, Rule 112.

²⁷⁰ *Prosecutor v. Katanga* (Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence) ICC-01/04-01/07-1553 (23 October 2009) [35].

²⁷¹ See pp 276–8, above.

²⁷² See Zappala (n 7 above) 149.

The jurisprudence of the ICC and *ad hoc* tribunals suggests that evidence obtained in violation of absolute or non-derogable rights such as the prohibition of torture would always be excluded.²⁷³ Exclusion of evidence obtained by torture is indeed demanded by the terms of the UN Convention against Torture, which provides, in relation to states, that 'any statement which is established to have been made as a result of torture *shall not be invoked as evidence in any proceedings*, except against a person accused of torture as evidence that the statement was made'.²⁷⁴

The *ad hoc* tribunals have also referred to a near-automatic exclusion of evidence in the case of certain rights violations other than torture, most notably violations of the suspect's key trio of rights codified in Rule 42: the rights to counsel, silence, and an interpreter. In *Mucic*, for instance, the ICTY excluded a statement where the right to counsel was violated. In doing so it stated that 'it seems to us extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95 which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on its reliability'.²⁷⁵ Judge Schomburg, in a separate opinion to the Appeals Chamber Judgment in the *Halilović* case, went even further than this, finding that 'it is uncontested that statements of a suspect that were gained in violation of the requirements of Rule 42 *cannot be used* against him at trial'.²⁷⁶ The *Mucic* decision also suggests that where the privilege against self-incrimination is violated in a manner that renders the questioning 'oppressive', this will also lead to a violation of Rule 95 and therefore exclusion. Thus it found that 'there is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95'.²⁷⁷

²⁷³ *Prosecutor v. Lubanga* (Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)) ICC-01/04-01/06-1703 (17 February 2009) [14] ('This is not evidence obtained through coercion or torture which would seriously cast doubt on its reliability'); *Prosecutor v. Lubanga* (Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006) ICC-01/04-01/06 (17 November 2006) [n 34] ('The Prosecution notes that in respect of evidence obtained under torture, this would be inadmissible before this Court under Article 69(7)'); *Prosecutor v. Karadžić* (Decision on the Accused's Holbrooke Agreement Motion) IT-95-5/18-PT (8 July 2009) [85].

²⁷⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 15, [1], GA Res. 46, at 197, UN GAOR, 39th Session, Supp. No. 51, UN Doc. A/39/51 (10 December 1984). But see Michael Scharf, 'Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?', (2008) 65 Washington and Lee L Rev 1.

²⁷⁵ *Mucic* Austrian Statements Decision (n 9 above) [43]. See also *Bagosora* Decision (n 244 above) [21]; *Prosecutor v. Zigiranyirazo* (Decision on the Voir Dire Hearing of the Accused's Curriculum Vitae) ICTR-2001-73-T (29 November 2006). Cf. *Prosecutor v. Kordić and Čerkez* (Decision on Appeal regarding Statement of a Deceased Witness) IT-95-14/2-T (21 July 2000).

²⁷⁶ But see *Halilović* Appeals Judgment (n 215 above), Dissenting Opinion of Judge Shahabuddeen [7] ('Rule 42 ... [does] not explicitly state what the remedy should be when a suspect's rights are violated').

²⁷⁷ *Mucic* Austrian Statements Decision (n 9 above). See also *Archbold* (n 91 above) 817 ('A violation of the right not to incriminate oneself should ordinarily lead to exclusion'). The Chamber in *Mucic* stated, confusingly, in relation to the right to silence, that while the Austrian provision

Similarly in the *Nchamihigo* case, an ICTR Chamber excluded a statement on the basis that the questioning was conducted without the assistance of counsel, finding that '[i]t is well settled that a statement taken from a suspect would not be admitted into evidence at his trial if his rights during the investigation were not respected'.²⁷⁸ Early ICC jurisprudence confirms that the exclusion of evidence is appropriate when the right to counsel is violated, though it appears to be more flexible about when the right attaches at the pre-trial stage.²⁷⁹

These holdings come closer to an *automatic* exclusion of evidence in the case of certain rights violations than the explicit language of Rule 95 requires, and indeed many of the decisions do not make clear on which basis—reliability or damage to integrity—exclusion is warranted.

When there is a breach of procedural, as opposed to rights-based rules, relating to the conduct of interviews, the effect on the admissibility of evidence is less clear. The ICC has not yet explicitly stated its position on statements taken in violation of Rules 111–112 requiring the recording of interviews. A strict reading of Article 69(7), however, suggests that violations of the Rules, as opposed to the Statute or internationally recognized human rights, do not warrant exclusion.²⁸⁰ Violations of Article 56,²⁸¹ on the other hand, may fit the criteria for mandatory exclusion under Article 69(7) because they arise from a provision of the Statute.²⁸²

fell short of the right as guaranteed by the Statute in that it allowed investigators to encourage the suspect to speak, this was not a sufficient basis for exclusion 'because though the rules relating to silence and confession are contradictory to the relevant rules in Rule 42, they do not fall below fundamental fairness and such as to render admission antithetical to or to seriously damage the integrity of the proceedings. However violation of Sub-rules 42A(i) and 42(B) by themselves would be sufficient by virtue of Rule 5 to render the statements before the Austrian Police null and inadmissible in proceedings before us and to be excluded'. *Mucic* Austrian Statements Decision (n 9 above) [55] (emphasis added). This reasoning was based on Rule 5 as it was then drafted, which stated that any act in violation of the Rules would be rendered 'null' if 'the act was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice'. However, this Rule was amended in 1997 and now provides that any act in contravention of the Rules will lead to 'such remedy as the Trial Chamber considers appropriate to ensure consistency with the fundamental principles of fairness'. This raises a question as to whether the same facts would lead to exclusion under the current Rules.

²⁷⁸ *Prosecutor v. Nchamihigo* (Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defense's Request to Hold a Voir Dire Article 17 of the Statute Rules 42 43 and 95 of the Rules of Procedure and Evidence) ICTR-2001-63-T (5 February 2007) [hereinafter '*Nchamihigo* Statement Decision'] [21].

²⁷⁹ See nn 247–8 above.

²⁸⁰ Admissibility of an unrecorded interview would therefore appear to be governed by Art. 69(4), which gives the Chamber *discretion* to exclude unrecorded statements. However, such statements may simply fail the test for *admissibility* on the basis that non-recording does not comply with the specific requirements for admitting 'prior recorded statements' in Rule 68.

²⁸¹ Such violations could arise: (1) where the prosecutor collects 'unique' evidence without alerting the Pre-Trial Chamber of this fact and therefore in the absence of special measures; or (2) where measures ordered under Art. 56 are not complied with.

²⁸² Since measures under Art. 56 are intended to protect the right of the defence to test the evidence against him, violation of the provisions of Art. 56 may well be deemed to affect reliability

At the *ad hoc* tribunals, the ICTY Appeals Chamber had occasion in the *Halilović* case to address head-on whether a statement taken in violation of the procedural rules on audio- and video-recording in Rule 43 could be admitted into evidence. The statement at issue had been made by the accused at a time when he was considered by the ICTY prosecutor to be a witness. Thus, in compliance with the rules governing witness interviews, his statement was not electronically recorded. Instead, a written summary of the statement was compiled from notes taken by the investigator during seven days of interviews, conducted over a period of four months, and that summary-statement was signed by the interpreter and the witness. The Trial Chamber considered the reliability of the statement to be in doubt and noted that its accuracy and interpretation could not be tested without a recording of it, or without undermining the accused's ability to challenge the content of the statement without forfeiting his right to remain silent.²⁸³

The Appeals Chamber ruled unanimously that the unrecorded statement should be excluded from the trial record.²⁸⁴ But the judges were deeply divided on why this was the correct outcome. In the view of the majority, the statement could be excluded under the Chamber's discretionary power in Rule 89(d) to decide whether the statement's probative value is outweighed by the need to ensure a fair trial. The other three judges excluded the statement under the terms of Rule 95, but even then for different reasons.

In Judge Meron's view, the requirements on audio- or video-recording in Rule 43 can be applied retroactively to a statement that is properly taken as a 'witness statement', if that witness later turns out to be an accused.²⁸⁵ Moreover, in his view, any violation of Rule 43 would *automatically* result in exclusion of a statement;²⁸⁶ and the fact that the prosecution acted in good faith, based on the interviewee's status at the time, does not change this conclusion. In his words:

Rule 43 reflects a substantive judgment that unrecorded statements by the accused are, by definition, insufficiently reliable. A Trial Chamber normally assesses reliability on a case-by-case basis under Rule 95 and excludes evidence when there is 'substantial doubt' about its reliability. Similarly, it determines probativeness under Rule 89(D). The discretion that a Trial Chamber normally exercises pursuant to

of the evidence or the integrity of the trial. Indeed 'integrity' is the governing concept in both Arts 56 and 69(7) and Art. 56 itself makes clear that a statement taken under its terms should later be judged against the standards in both Arts 69(4) and 69(7). See also Triffterer (n 7 above) 1110; M. Karnavas, *Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer*, in Bohlander (n 43 above) 98.

²⁸³ *Prosecutor v. Halilović* (Decision on Motion for Exclusion of Statement of Accused) IT-01-48-T (8 July 2005) [25].

²⁸⁴ *Halilović* Appeals Judgment (n 215 above) [38]–[40].

²⁸⁵ Ibid, Separate Opinion of Judge Meron [5].

²⁸⁶ Ibid, [7] ('The Appeals Chamber [in the *Celebici* case] clearly contemplated that, despite scrupulous adherence to all procedural safeguards, some evidence might still be unreliable. It did not indulge the converse (ie that despite procedural violations, some evidence might still be sufficiently reliable). A violation of Rule 43 thus incurably taints the evidence').

these rules is inapposite, though, because an unrecorded statement by an accused is *per se* unreliable under Rule 43. As an unrecorded statement by an accused is *never* sufficiently reliable, the only appropriate remedy is exclusion of that statement.²⁸⁷

Judge Schomburg agreed that exclusion was the only appropriate remedy for violations of the rules on recording interviews, because, in his view:

Rule 43 ... reflects the decision of the legislator that unrecorded statements by a suspect who later becomes an accused are, *in principle*, insufficiently reliable. Consequently, if a statement is taken in violation of Rule 43, there is no discretion vested in the Trial Chamber to assess its probative value pursuant to Rule 89(D) or its reliability pursuant to Rule 95. Thus, the only appropriate remedy is the exclusion of such an unrecorded statement.²⁸⁸

Judge Schomburg added two caveats to this, however. One is that the statement need only be excluded 'in cases like this one where the use of the statement is sought in *proceedings against the former suspect himself* and against his will'.²⁸⁹ And second, it only applies if the interviewee was a suspect entitled to have his interview electronically recorded under Rule 43. Rule 43 could not be applied retroactively to a witness who happened to become a suspect at a later stage; otherwise the prosecutor would have to electronically record all statements, just in case, and this would be too burdensome.²⁹⁰

Judge Shahabuddeen, for his part, reasoned that exclusion of an unrecorded statement was *not* automatic because, unlike other rules, there was no specific sanction of exclusion contained in the text of Rule 43 itself.²⁹¹ He contrasted this to Rule 90(E) which, in the context of trial, provides that '[t]estimony [of a witness] compelled [in violation of the privilege against self-incrimination at trial] *shall not be used as evidence* in a subsequent prosecution against the witness for any offence other than false testimony'.²⁹² Thus he concluded that:

Evidence is not excluded simply because it has been obtained in noncompliance with an authorised method ... Some judicial judgement has to be exercised on whether the method followed has cast 'substantial doubt' on the reliability of the evidence [under Rule 95].²⁹³

The *Halilović* Appeals Chamber decision, rendered in 2007, shows that almost 15 years into the practice of the ICTY, there is disagreement among the Tribunal's

²⁸⁷ Ibid. See also *ibid*, [5] ('Notwithstanding that a Prosecutor might have acted in good faith by not applying Rule 43 when questioning someone who, at the time, was not a suspect, Rule 43 embodies a substantive policy judgment that only statements memorialized on a video or audio tape are sufficiently reliable to be admitted into evidence against an accused').

²⁸⁸ Ibid, Separate Opinion of Judge Schomburg [7] (emphasis added).

²⁸⁹ Ibid. (emphasis added).

²⁹⁰ Ibid, [8].

²⁹¹ See also ICTY, Rule 96(iv) ('prior sexual conduct of the victim shall not be admitted in evidence').

²⁹² Emphasis added.

²⁹³ Judge Shahabuddeen also reasoned that since even the confession of an accused can be admitted at trial despite non-compliance with Rule 43, the same must be true of a suspect. See ICTY, Rule 92.

most senior judges about what standard applies to exclusion of evidence taken in violation of procedural rules. Though Rules 95 and 89(d)—establishing a mandatory and discretionary exclusion rule, respectively—are clear, the judges differed as to whether they were triggered or how they applied.

The common denominator in the judges' reasoning, however, establishes two things. One is that a statement that the prosecutor takes from a witness or suspect: (i) can be excluded on the basis of a procedural violation, not just one that is directly derived from the 'rights' of the person interviewed; and (ii) can be excluded where the violation stems from a Rule of Procedure as opposed to a provision in the tribunal's Statute. Moreover, and more worryingly for the prosecutor, some judges consider that exclusion can be *automatic*, so that neither Rule 89(d) nor 95 are even triggered. In addition, Judge Meron's opinion that if a witness later becomes an accused, any statements taken from them when they were a 'witness' would not be admissible at trial confirms that the prosecutor should be very cautious in determining who is a suspect entitled to additional rights and a stricter procedural framework for recording. Not only will the judges review, applying an objective test, the designation of a person as 'witness' versus 'suspect', but some favour exclusion of testimonial evidence even where a person correctly determined to be a witness later becomes a suspect who is indicted.

5. Rules on Collecting Physical Evidence: Searches, Covert Measures, Biometric Data, and Documents

5.1 Rights-based rules

Search and seizure

The rights of witnesses and suspects in relation to the collection of testimonial evidence are set out in Article 55 of the ICC Statute and corresponding provisions in the *ad hoc* tribunals' Statutes and Rules. In some cases, internationally recognized human rights provide the same protection as the courts' instruments or jurisprudence; in others they provide rules that are consistent (eg on the right to interpretation); more detailed (eg on torture); or even divergent (eg on the right to silence). When it comes to collecting *physical* evidence, primarily through searches but also potentially through covert measures or other means, the key right of a witness or suspect is the right to privacy. This right is not mentioned in the ICC Statute or the *ad hoc* tribunals' founding documents at all. But both the ICC and the *ad hoc* tribunals have held that it is an internationally recognized human right that applies to both witnesses and suspects during investigations on that basis.²⁹⁴

²⁹⁴ See *Lubanga* Confirmation Decision (n 9 above); *Lubanga* Search Decision (n 36 above); *Prosecutor v. Katanga* (Decision on the Prosecutor's Application for Protective Measures and the

Other rights that may apply to the collection of physical evidence include the privilege against self-incrimination and the right not to be subject to torture or degrading treatment.

Although the right to privacy has been recognized by international criminal courts, it has not been clearly defined either at the ICC or the *ad hoc* tribunals. According to the ECHR, it protects a person from arbitrary or unlawful interference with family life, home, or correspondence.²⁹⁵ In the context of a criminal investigation, it might protect a person against an unlawful search of his house or belongings. It could prevent him from having his phone tapped, his office bugged or his car fitted with a probe. Or it might provide grounds to refuse to submit to a DNA test or physical examination.

The right to privacy is not absolute. An investigative act that interferes with it can, according to the ECtHR, be justified if it: (i) has a legitimate aim; (ii) is lawful;²⁹⁶ and (iii) is proportionate to its aim. A legitimate aim is one that is 'necessary in a democratic society' and one such aim is the 'prevention of disorder or crime'.²⁹⁷ This requirement should therefore be satisfied whenever the interference is relevant to advancing a criminal investigation.²⁹⁸

The other two requirements—lawfulness and proportionality—are not as easy to satisfy. Lawfulness requires that infringements be sufficiently precise and detailed to 'enable the citizen to regulate his conduct'.²⁹⁹ He must 'be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.³⁰⁰ And proportionality requires that an investigative act not be more intrusive of a person's privacy than is strictly justified by the needs of the inquiry.³⁰¹

(i) **Lawful** Depending on the factual circumstances, the lack of a judicial warrant to carry out a search may mean that the search violates internationally recognized human rights. According to ECtHR jurisprudence, a warrant will usually, but not always, be required.³⁰² A warrant may not be required for the search of a public place as a person has no reasonable expectation of privacy in such a place.³⁰³ It may also be unnecessary if the person resident at the premises

Redaction of Information Contained in Rule 77 Material (Witnesses 132, 249 and 287) of 2 July 2009) (8 July 2009); *Mucic* Search Decision (n 179 above) [14].

²⁹⁵ ECHR, Art. 8.

²⁹⁶ See Trechsel (n 162 above) 538.

²⁹⁷ ECHR, Art. 8(2).

²⁹⁸ See Trechsel (n 162 above) 540 and 555.

²⁹⁹ *Malone v. UK* (1985) EHRR 14 [hereinafter '*Malone*'] [66].

³⁰⁰ Ibid.

³⁰¹ See, eg, *Camenzind v. Switzerland* (1997) 28 EHRR 458 [45].

³⁰² See Trechsel (n 162 above) 559 (citing ECtHR jurisprudence).

³⁰³ See Model Code of Criminal Procedure issued by the Institute for Peace, in collaboration with the Irish Centre for Human Rights, the UN Office of the High Commissioner for Human Rights and the UN Office on Drugs and Crime [hereinafter '*Model Code*'] 190.

validly consents to the search.³⁰⁴ Moreover, a warrant must be issued on the basis of a clear law governing the circumstances under which it can be granted.

In the *Lubanga* case, an ICC Pre-Trial Chamber found that a search carried out by Congolese authorities complied with international human rights requirements that it be lawful because 'the order to conduct the search and seizure was given by the competent authority [under Congolese law] in order to gather evidence for the purpose of lawful criminal proceedings' and there was no suggestion of 'improper interference by force'.³⁰⁵ The Trial Chamber confirmed this reasoning.³⁰⁶

The ICTY and ICTR Statutes and Rules give the prosecutor the power to 'conduct on-site investigations' and 'collect evidence' but fail to provide how they must do so to ensure respect for the right to privacy. Despite the many years that the *ad hoc* tribunals have been operating and the fact that a number of searches have been carried out by or with the participation of OTP investigators, it is unclear what 'law' was applied. The prosecutor's applications for warrants issued by Tribunal judges have been filed under seal, and ensuing warrants do not explain the basis on which they were granted.³⁰⁷ In an appeal brief filed at the ICTY in 2005, twelve years after the Tribunal began to operate, the defence sought 'the establishment of some standard of review for search warrants in order to protect against prosecutorial capriciousness and zeal', suggesting that 'probable cause should be a minimum'.³⁰⁸ Neither the prosecution nor the Chamber addressed this argument, however.

In a case at the ICTR, the prosecution responded to a defence complaint that a suspect's³⁰⁹ home had been searched, and documents seized by the OTP without a warrant, on the basis that the Rules 'permit the prosecutor to carry out on site investigations and to seize property that belongs to a suspect for the purposes of proceeding with the investigations' and that these rules 'make no specific mention of the manner in which searches and seizures should proceed'.³¹⁰ The Chamber apparently agreed, concluding tersely that 'rule 39(i) of the Rules ... enables the

³⁰⁴ Ibid, 192. At the national level, other grounds for warrantless searches may include, for instance, where police are in 'hot pursuit' of a suspect. Such grounds are unlikely to be of relevance in an international context as international investigators do not have general police powers including the power to arrest. See also Christopher Safferling, *Towards an International Criminal Procedure* (Oxford: OUP, 2003) 101 ('The only reason why a court warrant might be unnecessary in order to implement what is a justified human rights infringement is ... if time is pressing').

³⁰⁵ *Lubanga* Confirmation Decision (n 9 above) [76]–[77].

³⁰⁶ *Lubanga* Search Decision (n 36 above) [77].

³⁰⁷ *Prosecutor v. Naletilić and Martinović* (Prosecutor's Response to Naletilić Appeal) IT-98-34-A (21 March 2005) [n 86] ('The Bench did not address the meaning of the probable cause standard, or its applicability to Tribunal proceedings').

³⁰⁸ Ibid, (Mladen Naletilić's Revised Appeals Brief) IT-98-34-A (6 October 2005) [23] (emphasis added).

³⁰⁹ The motion uses the word 'accused' but he was in fact a suspect. See *Prosecutor v. Ntabakuze* (Decision on the Defence Motion for Annulment of Proceedings, Release and Return of Personal Items and Documents) ICTR-97-34-T (25 September 1998) [5].

³¹⁰ Ibid, [4].

OTP to collect evidence and conduct on-site investigations and it is the opinion of the Trial Chamber that the seizures of some items belonging to the accused were authorized'.³¹¹ Although there is an unfortunate lack of reasoning employed in the decision, the Chamber clearly did not require either a warrant to be issued by the Tribunal or a specific test to be met before the prosecutor could conduct a search. Other decisions imply the same conclusion.³¹²

The tribunals' law is equally murky when it comes to searches carried out by national police on the prosecutor's behalf. In *Mucic*, the ICTY prosecutor had requested that Austrian authorities search for evidence related to alleged crimes. Austrian authorities, upon a warrant issued by an Austrian court, searched Mr Mucic's Vienna apartment and seized incriminating evidence, including various travel documents, and the ICTY prosecutor later sought to use these documents against Mucic at trial. Though conceding that 'a number of irregularities' occurred in the search of Mr Mucic's apartment and that the search as a whole violated Austrian law, the OTP argued that it was lawful. The Chamber decided to allow the evidence to be admitted, but it is not clear whether it found that there had been no breach of Mucic's internationally recognized right to privacy or whether a breach had occurred but did not warrant exclusion of the evidence collected under Rule 95.³¹³ The effect of this jurisprudence is that the tribunals' 'law' on the invasion of privacy is unclear and lacking in guarantees against arbitrariness.

The Model Code of Criminal Procedure issued by the Institute for Peace, in collaboration with the Irish Centre for Human Rights, the UN Office of the High Commissioner for Human Rights and the UN Office on Drugs and Crime³¹⁴

³¹¹ Ibid, [6].

³¹² See, eg, *Prosecutor v. Ntabakuze* (Decision on the Defence Motion for Annulment of Proceedings, Release and Return of Personal Items and Documents) ICTR-97-34-T (25 September 1998); *Prosecutor v. Nyiramasubuko* (Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized) ICTR-97-21-T (12 October 2000); *Prosecutor v. Ngirumpatse* (Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items) ICTR-97-44-I (10 December 1999) [hereinafter 'Ngirumpatse Search Decision']; *Prosecutor v. Nzirorera* (Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized) ICTR-98-44-T (7 September 2000) [hereinafter 'Nzirorera Search Decision']; *Prosecutor v. Stakić* (Decision on Defence Request to Exclude Evidence as Inadmissible) IT-97-24-T (31 July 2002). Cf *Prosecutor v. Karemera* (Decision on the Defence Motion for the Restitution of Documents and Other Personal or Family Belongings Seized – Rule 40(C) of the Rules of Procedure and Evidence, and the Exclusion of such Evidence which may be used by the Prosecutor in Preparing an Indictment against the Applicant) ICTR-98-44-I (13 April 2000) [hereinafter 'Karemera Search Decision']; *Prosecutor v. Karemera* (Decision on the Prosecution's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-AR73 (25 January 2008) [16].

³¹³ *Mucic* Search Decision (n 179 above). See also *Prosecutor v. Stakić* (Decision) IT-97-24-AR73.5 (10 October 2002).

³¹⁴ Model Code (n 303 above). The drafting history of the ICC Statute suggests that the phrase 'internationally recognized human rights' was intended to cover 'non-treaty' standards in addition

suggests that the standard for issuance of a search warrant should be first that 'probable cause' must exist that a specific person has committed a crime within the jurisdiction of the court (ie is a suspect); and second that 'probable cause' exists that 'the search will result in the apprehension of a suspect or seizure or preservation of traces of a crime within the jurisdiction of the court or objects relevant to the investigation of such a crime'.³¹⁵ This standard appears to conform to internationally recognized human rights requirements regarding lawfulness in this context and could be a useful guide for international criminal courts in the future.³¹⁶

(ii) **Proportionate** In addition to being 'lawful', international human rights jurisprudence requires that in order not to violate the right to privacy, a search be proportionate to its aim.³¹⁷ This means in practice that a warrant—and the actual search that is carried out—must be narrowly tailored to its objectives and that no less intrusive measures are possible in light of the seriousness of the offence being investigated and the importance of the material being seized. It also means that special consideration must be given to certain professional environments such as lawyers' offices.³¹⁸

The ICC Pre-Trial Chamber in the *Lubanga* case found that there had been an infringement of the proportionality component of the right to privacy in a search carried out by Congolese authorities, and that this infringement 'can be characterized as a violation of internationally recognized rights'.³¹⁹ The Chamber based this conclusion on the fact that 'hundreds of documents were confiscated, including correspondence, photographs, invitations, legislation, reports, diaries' and other 'personal information'.³²⁰ For this reason, the search 'infringed the principle of proportionality sanctioned by the ECtHR, first, because the interference did not appear to be proportionate to the objective sought by the national authorities and secondly, because of the indiscriminate nature of the search and seizure involving hundreds of items'.³²¹

to treaty standards and can also include 'recognized norms and standards developed by the UN in the field of criminal justice'. See Triffterer (n 7 above) 1333, citing Preparatory Committee Decisions, 1997, p 38 n 30.

³¹⁵ See Model Code (n 303 above) 189. A different test is suggested for the search of a person. *Ibid*, 195.

³¹⁶ See also UNMIK law, below at pp 290–1. A prior draft of the ICC Statute included a standard of 'adequate cause', but this is rather vague. See Report Of The Preparatory Committee On The Establishment Of An International Criminal Court, 15 June–17 July 1998, A/CONF.183/2/Add.1, 107.

³¹⁷ See *Camenzind v. Switzerland* (n 301 above); *Mialhe v. France*, 1993, Application No. 12661/87; *Garcia v. Peru*, ACHR, Case 11.006, Decision of 17 February 1999, Report No. 1/95.

³¹⁸ See, eg, *Stefanov. v. Bulgaria*, 1998, Application No. 65755/01.

³¹⁹ *Lubanga* Confirmation Decision (n 9 above) [82].

³²⁰ *Ibid*, [81]. The Trial Chamber reached the same conclusion. See *Lubanga* Search Decision (n 36 above) [80] (hundreds of documents that were seized 'were not related to the purpose of the search').

At the ICTY, search warrants that were issued to the Office of the Prosecutor appear to take into account the proportionality requirement in that applications for warrants have been required to be sufficiently precise and not to constitute a 'fishing expedition'.³²² The warrants themselves also specify the details of the execution that are authorized, such as the timing and process for the search, the materials that can be seized and any use of force permitted. The Chambers have not, however, provided detailed guidance on what proportionality means in this context.³²³

Covert measures

Outside the context of search and seizures, the case law of the ICC and *ad hoc* tribunals has yet to deal extensively with questions at the intersection of the right to privacy and covert techniques that can be essential to investigations such as telephone tapping or secret audio- or video-recordings. The ICTY has developed some jurisprudence holding that neither telephone conversations intercepted by national authorities during a time of war,³²⁴ nor covert police recordings of a suspect's conversation in times of peace, need be excluded from evidence at trial.³²⁵ However, the Chambers have sometimes reached these conclusions without explicitly articulating whether the right to privacy was violated, or whether such violation did not justify exclusion of evidence, and have generally avoided providing a clear standard on how such questions are to be addressed.

While investigations at the *ad hoc* tribunals are largely complete, the ICC is likely to deal with such issues in its forthcoming investigations. In doing so, it will need to articulate standards that are in line with internationally recognized human rights. The requirement of lawfulness in the context of covert measures is particularly important, as the impact on privacy is potentially more pronounced when covert techniques are involved. Persons subject to covert surveillance by definition do not know that they are being watched or recorded and they are not necessarily entitled to know about it even after the tracking has ceased, especially where

³²² Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delalić and Zdravko Mucić (*Mucić* Notes Decision) [40] ('As with any search or seizure warrant, the Prosecutor cannot simply conduct a "fishing expedition" through the Registrar's records'); In *Re: The Republic of Macedonia case* (Reconsideration of Order of 9 May 2002) IT-02-55-Misc 4 (17 July 2002) available at: <http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp39-e/misc.htm>.

³²³ In the *Tuta & Stela* case at the ICTY, the defence argued that unreasonable force was used by ICTY investigators in executing a search warrant. The Appeals Chamber confirmed the Trial Chamber decision holding that excessive force would primarily be an issue for the territorial state but that from the record, including photos of the search, this allegation did not appear to be substantiated. *Tuta & Stela* Appeals Judgment (n 129 above) [239]–[242].

³²⁴ See, eg, *Brđanin* Intercepts Decision (n 38 above).

³²⁵ See *Haraqija* Trial Decision (n 36 above) [40].

this would jeopardize the working methods or agents of the police or intelligence services.³²⁶ As a result, covert investigative acts should be 'subject to an effective control which should normally be assured by the judiciary'.³²⁷ Investigators must also ensure that covert surveillance measures such as the use of a wired informant do not constitute 'entrapment', in other words do not provoke criminal activity by inciting a person to commit an offence that the person would not have committed but for the intervention of the investigator.³²⁸

In the context of telephone 'tapping', the ECtHR has held that relevant minimum safeguards in a national context are that the relevant law provide: (1) a definition of the categories of people liable to have their phone tapped by judicial order; (2) the nature of the offences which may give rise to such an order; (3) a limit on the duration of telephone tapping; (4) the procedure for drawing up summary reports containing intercepted conversations; (5) the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the Judge and by the defence; and (6) the circumstances in which recordings may or must be erased or the tapes destroyed, in particular where an accused [is] discharged ... or acquitted...³²⁹ Moreover, the ECtHR has held that interception should have safeguards in place to deal with privileged conversations that may be caught in the net.³³⁰

The UN Interim Administration Mission in Kosovo (UNMIK), which has a mandate to 'enforce law and order according to international standards',³³¹ has codified a procedure for phone tapping and other covert measures in its investigations in the following terms:

Covert monitoring of conversations in private places ... interception of telecommunications ... the use of tracking or positioning devices ... or an undercover investigation may be ordered against a particular individual if ... (a) [c]ertain facts substantiate the suspicion that that person has committed [certain specified crimes] [and] (b) [t]he information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative measure without unreasonable difficulty or potential danger to others.

The UNMIK law also sets out detailed requirements for interception of mail or computer data, the metering of phone calls, disclosure of financial data and covert photography or video surveillance, as well as rules on destroying data that has

³²⁶ See, eg, *Klaas v. Germany* (1978) 2 EHRR 21 [hereinafter 'Klaas']; *Malone* (n 299 above).

³²⁷ See *Klaas* (n 326 above) [55]. See also Model Code (n 303 above) 223.

³²⁸ *Teixeira da Castro v. Portugal* (1998) 28 EHRR 101 [36].

³²⁹ *Valenzuela Contreras v. Spain* (1998) 28 EHRR 483 [46]. The ECtHR has found that subsequent notification to the person whose phone was tapped is sometimes, but not always, required. See *Klaas* (n 326 above) [58].

³³⁰ *Ibid.*, [50]–[60].

³³¹ See <<http://www.unmikonline.org/civpol/mandate.htm>>

been collected.³³² It appears to comply with internationally recognized human rights and could be used (in addition to or instead of national law and detailed human rights jurisprudence) as a guide for prosecutors or judges in future proceedings before an international criminal court.³³³

Biometric data

Neither the ICC nor the *ad hoc* tribunal Rules address the circumstances under which biometric data such as DNA or fingerprints can be taken by international prosecutors from a witness or suspect in light of privacy rights. ICC Rules include a provision that a suspect can be physically examined upon authorization by the Pre-Trial Chamber even if the person does not consent.³³⁴ But this rule concerns 'medical, psychological or psychiatric examinations' for purposes of determining an accused's state of health, not for identification. Moreover, even this Rule fails to establish the test for allowing such an examination to take place in light of privacy issues that arise.

Internationally recognized human rights recognize that taking DNA or fingerprints from a person without their consent is an infringement of their right to privacy unless it is done in a manner that is lawful and proportionate. Where a person does not consent to a bodily search or examination, a warrant will therefore usually be required and the taking of DNA or fingerprints must be proportionate to the purpose for which it is sought.³³⁵

Taking DNA or fingerprints may also violate a person's privilege against self-incrimination. The ECtHR has clarified however that the privilege does *not* cover material 'obtained ... through the use of compulsory powers [such as a warrant, or] which has an existence independent of the will of the suspect such as, inter alia ... breath, blood and urine samples and bodily tissue for the purpose of DNA testing'.³³⁶ This appears to leave an important aspect of modern

³³² The ECtHR has also indicated that DNA and similar identification data cannot be stored indefinitely, particularly where an individual is ultimately acquitted of the crime that he was suspected of committing. See *S & Marper v. United Kingdom* (2009) 48 EHRR 50.

³³³ See also Model Code (n 303 above) 222–3.

³³⁴ ICC, Rule 113.

³³⁵ See above pp 285–9; Model Code (n 303 above) 242. Certain national case law establishes that this is not the case where the individual 'abandoned' property which had his biometric data on it. See, eg, *R v. Stillman* [1997] 1 SCR 607 (DNA evidence taken from a tissue that was used and discarded by a suspect while in custody was not a search as the suspect had abandoned the tissue and ceased to have a reasonable expectation of privacy in it). See also *R v. Nguyen* [2002] OJ No. 3, 57 OR (3d) (CA) (where police offered the suspect a piece of gum and then collected it when he discarded it, the trick was passive because the police created the opportunity and nothing more; they did not cause him to subvert his rights; and the DNA collected in this manner was admissible).

³³⁶ *Jalloh v. Germany* (2007) 44 EHRR 667 [hereinafter 'Jalloh'] [102]. The contours of the privilege are not entirely clear under the jurisprudence of the ECtHR, however. See, generally, Andrew Ashworth, 'Self-Incrimination In European Human Rights Law—A Pregnant Pragmatism?' available at: <<http://www.cardozolawreview.com/content/30-3/ASHWORTH.30-3.pdf>>

investigations—the ability of prosecutors to obtain biological identification evidence—untouched by the privilege.

The taking of DNA or fingerprints may however in extreme cases also constitute degrading treatment. In *Jalloh v. Germany*, the ECtHR reviewed a case in which four police officers had held down a suspect while a doctor administered a pill which made him regurgitate a plastic bag full of drugs. Although the Court found no breach of the privilege against self-incrimination, it held that there was a violation of the right not to be tortured or be subject to degrading or inhuman treatment because the force used to obtain the bodily evidence was excessive and went far beyond that normally required to take a sample of blood or hair.³³⁷

The Model Code of Criminal Procedure proposes that the physical examination of a person, including taking DNA and fingerprints, should be authorized by a judge where the prosecutor can show that *either*: (a) the examination is necessary to determine facts important to the investigation of a criminal offense; *or* (b) specific evidence of a criminal offence may be found on or in the body; *and* (c) the physical examination will not be detrimental to the health of the person of whom it is sought.³³⁸

It remains to be seen how the ICC or *ad hoc* tribunals may deal with this question, as well as other privacy-related issues that may arise in future investigations. The ICC has confirmed that the right to privacy applies in investigations, even though it is not mentioned in Article 55 of the Court's Statute, and it has traced the contours of this right in the search-and-seizure context based largely on the jurisprudence of the ECtHR. Future investigations may involve questions about the taking of fingerprints and DNA samples or covert acts that raise privacy concerns, and will require careful examination by the Court.

The *ad hoc* tribunals' jurisprudence may provide some guidance to the ICC, but it fails to explicitly analyze the right to privacy in detail or to articulate clearly the standards that make infringements of it justifiable in the context of international investigations. The ICC will therefore be left to carve out its own course, taking into account internationally recognized human rights requirements that a search, covert surveillance measure, extraction of a fingerprint or DNA sample, or other such intrusive measure be both lawful and proportionate.

Documents

The right to privacy does not generally prevent a person from being compelled to produce documents for a criminal investigation, unless for instance the documents are part of a specially protected category of material such as medical

³³⁷ See *Jalloh* (n 336 above).

³³⁸ Model Code (n 303 above) 240.

records.³³⁹ The privilege against self-incrimination, however, may be invoked by a person who is compelled to produce documents by a prosecutor, where the latter has the power to do so.

The ICC and *ad hoc* tribunals both recognize the privilege against self-incrimination but do not clearly define its scope. Under international human rights law, the privilege does not generally prevent a person from being compelled to produce documents, even those that contain incriminating statements, if the person is required to do so pursuant to a judicial order.³⁴⁰ If, however, a person facing criminal charges is ordered to *create* the documents, or to identify and provide documents that the authorities do not know exist, this may be a violation of the privilege against self-incrimination.³⁴¹ Where producing documents makes use of mental processes, the act of production has a testimonial aspect and may therefore implicate the privilege.³⁴² Conversely, where compelled acts are not testimonial—ie where the act does not imply a fact or belief—one might expect that the privilege should not apply, even if performing the act has the effect of providing incriminating evidence. This would mean for instance that the privilege should not be a basis for a witness or suspect to refuse to provide a voice recording or handwriting sample, even though that could be matched with another piece of evidence and used against them.

Interestingly, the ICTY has given the privilege broader application in this area in the context of an accused. During the *Delalić* trial, the prosecution requested that a letter allegedly written by the accused be admitted into evidence and that the accused be ordered to provide a handwriting sample for identification. The Trial Chamber granted the request for the letter but denied the request for the sample on the basis that ordering the accused to provide a writing sample would involve the accused testifying against himself. This was not permissible because 'there is no duty in law ... to fill a vacuum created by the investigative gap of the Prosecution ... an accused person can stay mute without reaction to the allegation'.³⁴³ A prosecutor may therefore have to limit any request for the seizure of documents to those that do not implicate the privilege as defined by the court in which he operates.

³³⁹ See, eg, *Prosecutor v. Stakić* (Order to the Registry of the Tribunal to Provide Documents) IT-97-24-T (5 July 2002).

³⁴⁰ See *Jalloh* (n 336 above) [102].

³⁴¹ *Funke* (n 164 above) [44]; *JB* (n 159 above) [69]. Cf. Trechsel (n 162 above) 354.

³⁴² *Funke* (n 164 above) (violation of right to fair trial where Funke asked to provide financial statements 'which the officers believed must exist, although they were not certain of the fact'); *United States v. Doe* 465 US 605 (1984) (interpreting scope of privilege against self-incrimination in US constitutional law).

³⁴³ *Mucić* Notes Decision (n 322 above). This conclusion was couched in terms of the right to silence but should have alluded to the privilege against self-incrimination as it concerns non-oral statements.

5.2 Procedural rules

Two procedural rules are particularly germane to the collection of physical evidence in international criminal investigations: (1) the requirement that a chain of custody for evidence be maintained; and (2) special measures taken when there is a 'unique investigative opportunity' under Article 56 of the ICC Statute.

Chain of custody

Chain of custody is the record of possession of physical evidence once it is removed from a scene or a person relevant to an investigation.³⁴⁴ It is required in many national systems when an original document or physical object—such as a weapon, DNA sample, or recording of an intercepted telephone conversation—is collected from a scene and is later sought to be used as evidence at trial. The 'chain' is normally recorded in a log or register that lists the names of persons who handled the document or object and when. The purpose of the log is to prove at trial that an item that a party seeks to tender into evidence at trial is the same item that was recovered from the relevant person or site, and that it has not been or could not have been tampered with or replaced.

Neither the ICC Statute nor its Rules specifically mention 'chain of custody', but the Prosecutor's Regulations provide that '[t]he Office shall ensure an uninterrupted chain of custody of documents and all other types of evidence ... [and] [t]he maintenance of the chain of custody shall be recorded'.³⁴⁵ Moreover, an ICC investigator has testified that the OTP attempts to maintain the chain of custody when collecting physical evidence.³⁴⁶

The *ad hoc* tribunals, like the ICC, do not mention chain of custody in their Statutes or Rules.³⁴⁷ Trial chambers have however held that chain of custody may be relevant to establishing the probative value of a document or other physical material at trial.

³⁴⁴ See also Bryan A. Garner, (ed) *Black's Law Dictionary* (8th edn, West Group, 2004) ('Chain of Custody. In evidence, the one who offers real evidence, such as the narcotics in a trial of [a] drug case, must account for the custody of the evidence from the moment in which it reaches his custody until the moment in which it is offered in evidence, and such evidence goes to weight not to admissibility of evidence').

³⁴⁵ OTP Regulation 22(1).
³⁴⁶ ICC Investigator Testimony (n 5 above) 14 ('to the extent possible we try and collect original documents, and we try to establish the chain of custody of those documents; the origin where they came from').

³⁴⁷ But see ICTY Manual (n 129 above) [94] ('Because challenges about how evidence was collected may arise during subsequent judicial proceedings, it is good practice to establish detailed procedures designed to preserve an unbroken record detailing the handling of a piece of evidence. Guidelines created in the Prosecutor's Office emphasise [that] chain of custody commences the moment evidence is collected, and continues up to and beyond its presentation in court; [that] the chain of custody should not be broken, and the evidence should remain secure at all times; [and that] all movements of evidence must be recorded and the chain-of-custody documentation must be readily available for court purposes').

Article 56

The procedure in Article 56 of the ICC Statute must be followed where an investigative opportunity is 'unique', but what constitutes uniqueness in the context of collecting physical evidence is not entirely clear. Article 56 may be relevant where for instance the ICC prosecutor is in possession of evidence that may disintegrate or that he must return to its owner.³⁴⁸ This may be the case where official documents run the risk of being deliberately altered or where a state provides original physical material for a limited period of time. In addition, sites that have been the object of attacks may gradually deteriorate, or security conditions may make access to them more difficult in the future. Similarly, as mass graves can become more difficult to identify, Article 56 could apply to exhumations.

Although Article 56 has not been given a broad interpretation to date,³⁴⁹ it has already been invoked in the *Lubanga* case, when the ICC prosecutor informed the Court's Pre-Trial Chamber that he had obtained certain physical evidence that he was only allowed to keep for six months. The prosecutor argued that as the items were potentially relevant but unlikely to be available at trial, the NFI, an independent forensics laboratory, should 'perform an objective, independent and impartial examination of the evidence in accordance with well-established scientific criteria'.³⁵⁰ The Pre-Trial Chamber agreed and appointed an *ad hoc* counsel to protect 'the general interests of the [future] defence' during this process.³⁵¹ The *ad hoc* counsel's role was clearly circumscribed to the analysis of the evidence; he was not permitted to raise general motions attacking the investigation or jurisdiction of the Court. He was however able to put 27 questions to the NFI laboratory that would otherwise have not been addressed.³⁵² There is, as a result, a clear precedent at the ICC for both judicial supervision and defence-counsel participation over the prosecutor's collection of physical evidence under 'unique' circumstances.³⁵³

³⁴⁸ See, eg, Triffterer (n 7 above) 1110.

³⁴⁹ See Simon De Smet, 'A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC' in *Emerging Practice* (n 11 above) 405–41.

³⁵⁰ Situation in the Democratic Republic of Congo, (Decision on the Prosecutor's Request for Measures Under Article 56) ICC-20050426-102 (26 April 2005) [2].

³⁵¹ Situation in the Democratic Republic of Congo (Appointment of Mr Tjarda van der Spoel as Ad Hoc Counsel for the Defence Pursuant to the Decision of Pre-Trial Chamber I Dated 6 April 2005) ICC-01/04-76 01-08-2005 3/4 UM (1 August 2005). Another possibility is allowing the defence to appoint its own expert. See Triffterer (n 7 above) 1112.

³⁵² 'Communication of Mr Tjarda van der Spoel dated 11 November 2005', reproduced in Bohlander, (n 43 above) 88.

³⁵³ It remains to be seen how the involvement of 'ad hoc' counsel at the investigation stage, before a 'real' defence team has been constituted to represent a specific accused, will be handled at trial. Defence counsel representing an accused may argue that the participation of *ad hoc* defence counsel at the investigation stage fell short of what is in the interest of a specific accused who is later faced with evidence that was collected under Art. 56 at trial.

5.3 Violations of rules on collecting physical evidence

The principal right relevant to the collection of physical evidence is the right to privacy. Unlike violations of certain other rights enumerated in international courts' Statutes, such as the right not to be tortured or to be silent at a suspect interview, which will almost always (if not always) lead to exclusion of evidence,³⁵⁴ evidence obtained in breach of the right to privacy has been subject to a balancing by the courts. The fact that evidence has been obtained in violation of the right to privacy has therefore not always led to its exclusion, and international courts have indeed so far declined to exclude evidence on this basis.³⁵⁵

In *Lubanga*, the ICC rejected a defence challenge that evidence seized by Congolese authorities during a search should be excluded from the suspect's confirmation-of-charges hearing or trial. Although the Chamber found that the search violated the internationally recognized human right to privacy as it was not proportionate to its legitimate aim, it nevertheless allowed the evidence to be used by the prosecution against the accused.³⁵⁶

The *ad hoc* tribunals' Appeals Chamber also found that a secret recording of a conversation between a suspect and a third party in a hotel lobby did not 'in and of itself' satisfy the conditions for exclusion from evidence under Rule 95. The Appeals Chamber invoked ECtHR jurisprudence which holds that 'secretly taped material' obtained in violation of the right to privacy 'does not *per se* conflict with the requirements of a fair trial', especially when an accused has the opportunity to challenge the authenticity or accuracy of the material at trial.³⁵⁷ The Chamber went on to allow the recordings to be admitted,³⁵⁸ presumably—though not explicitly—on the basis that even though the recording infringed the suspect's privacy, exclusion was not warranted under either Rule 95 or 89(d). The ICTY also concluded in the *Brđanin* case that even though intercepts of telephone communications may violate the right to privacy, they need not be excluded from the trial record.³⁵⁹ Similarly, where the defence in another ICTY case alleged that an accused had been subjected to an illegal search of his bag by prosecution investigators, the Appeals Chamber held that '[e]ven if [it] were to

³⁵⁴ See pp 279–81, above.

³⁵⁵ International human rights jurisprudence confirms that violation of the right to privacy can, but does not always, threaten the fairness of the trial and require the exclusion of evidence. Cf. eg, *Khan v. United Kingdom* (2001) 33 EHRR 1357, with *Garcia v. Peru* Case 11.006, Report No. 1/95, Inter-Am.CHR, OEA/Ser.L/V/II.88 rev.1 Doc. 9, 71 (1995).

³⁵⁶ *Lubanga* Confirmation Decision (n 9 above); *Lubanga* Search Decision (n 36 above).

³⁵⁷ *Haraqija* Appeals Judgment (n 20 above) [27].

³⁵⁸ *Ibid.*, [28].

³⁵⁹ See also *Brđanin* Intercepts Decision (n 38 above) ('admitting illegally obtained intercepts into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings'). See also *Prosecutor v. Haraqija Morina* IT-04-84-T (Transcript) (8–11 September 2008) (Prosecutor admitted intercepted text messages as Prosecution Exhibits P12 and P13 (under seal) and an 'intercept of telephone conversation' as Prosecution Exhibit P 18).

conclude that the search and seizure [was] illegal, the exclusion of the documents from evidence would not be appropriate, as the circumstances of the search do not meet the standard for exclusion as contained in Rule 95 of the Rules'.³⁶⁰

The ICTR has taken a similar approach. It has held, for instance, that conversations secretly recorded by a journalist that allegedly captured the voice of the accused speaking of 'exterminations' need not be excluded.³⁶¹ The Tribunal reasoned that intercepted conversations, whether or not they violate national law, are not *per se* subject to exclusion and that there was no other reason (including, presumably, a violation of the right to privacy) to exclude the recordings in that case.³⁶²

Violations of *procedural* rules relating to the chain of custody are even less likely to result in the exclusion of physical evidence than violations of the right to privacy according to the jurisprudence of international criminal courts. The ICC considered a chain of custody issue in the first trial before the Court when the defence in the *Lubanga* case argued that the prosecution had not established chain of custody for many of the physical items it sought to use at the confirmation hearing. According to the defence, the prosecution failed for instance to provide any source or date for 10 video items. The PTC nevertheless allowed the material to be admitted for purposes of the confirmation hearing, holding that 'nothing in the Statute or the Rules expressly states that the absence of information about the chain of custody and transmission affects the admissibility or probative value of Prosecution evidence' at a confirmation hearing.³⁶³ The judges may however apply a stricter standard at trial.

ICTY jurisprudence also stops short of establishing that physical evidence will not be admitted when the chain of custody is broken or nonexistent. In the *Orić* trial, the defence complained that the authenticity of 186 prosecution documents was called into question by the fact that practically no evidence has been led on their chain of custody. According to the defence, 'a complete "chain of custody" exists ... when the Prosecution has adduced evidence as to who created and/or signed a document and evidence as to all the subsequent hands through which it passed until it became a Prosecution exhibit'.³⁶⁴ In that case, however, the prosecution had, according to the defence, purported to adduce evidence of 'chain of custody' through 'nothing more than a recording of *the source from which the Prosecution received the document*'.³⁶⁵ The defence conceded that it was not proposing an 'iron-clad rule' that documents which have no complete chain of

³⁶⁰ *Prosecutor v. Stakić* (Decision) IT-97-24-AR73.5 (10 October 2002).

³⁶¹ *Prosecutor v. Renzaho* (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-T (20 March 2007) [15–16].

³⁶² *Ibid.*, [96].

³⁶⁴ *Prosecutor v. Orić* (Defence Filing Regarding Authenticity) IT-03-68-T (10 March 2006) [9].

³⁶⁵ *Ibid.*, [12] (emphasis added).

custody are *per se* inadmissible, but argued that the court should nevertheless take chain of custody into account when determining whether there were grounds to exclude evidence at trial.³⁶⁶

The *Orić* Trial Chamber, in a ruling not disturbed on appeal, concluded that '[w]hile undoubtedly the chain of custody of [documentary evidence] is largely incomplete and the Prosecution has not been able to prove authorship, this in itself is not fatal and needs to be weighed against the probative value of its contents'.³⁶⁷ It added that it 'does not consider that proof of chain of custody is a *sine qua non* requirement for admissibility'³⁶⁸ and that, as a result, 'gaps in the chain of custody are not fatal, provided that the evidence as a whole demonstrates beyond reasonable doubt that the piece of evidence concerned is what it purports to be'.³⁶⁹

The *Orić* Trial Chamber justified its conclusions on the basis that the types of crimes that international courts deal with often required evidence to be collected from war-zones, a situation that does not typically lend itself to perfect evidence-management.³⁷⁰ As a result, rather exclude the evidence, the Chamber preferred to lower the bar for admissibility and take into account chain-of-custody issues when assessing the weight that is given to evidence at the end of the trial. It remains to be seen whether, at the ICC, the fact that the prosecutor has explicitly included a provision on 'chain of custody' in his Regulations, phrased in mandatory terms, means that in the future more drastic remedies may be employed at trial when the chain cannot be established.

Unlike violations of the chain-of-custody rule, evidence collected in violation of procedural measures ordered under Article 56 of the ICC Statute may be deemed *inadmissible* and not just of lesser *weight*. As Article 56 is part of the ICC Statute, its violation can trigger exclusion under Article 69(7). Moreover, the terms of Article 56 itself make clear that non-compliance with its terms triggers an exclusion analysis under Article 69(4) or 69(7).³⁷¹ Commentators have also stated that evidence collected under circumstances that constitute a 'unique investigative opportunity' in the *absence* of or in *violation* of measures ordered under Article 56 will likely lead to the exclusion of that evidence at trial.³⁷²

³⁶⁶ *Prosecutor v. Orić* (Transcript) IT-03-68-T (6 April 2006) 16412, line 10.

³⁶⁷ *Prosecutor v. Orić* (Judgment) IT-03-68-T (30 June 2006) (hereinafter '*Orić* Trial Judgment') [28].

³⁶⁸ *Ibid.*, [27].
³⁶⁹ See also, eg, *Brđanin* Trial Judgment, IT-99-36-T (1 September 2004) [hereinafter '*Brđanin* Trial Judgment'] [34] ('The Trial Chamber is ... satisfied beyond reasonable doubt of their reliability even though the chain of custody was not perfect').

³⁷⁰ *Orić* Trial Judgment (n 367 above) [27]. See also *ibid.* (Transcript) (3 April 2006) 16177, lines 5–23. Cf. *Prosecutor v. Bagosora* (Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole) ICTR-98-41-T (13 September 2004) [10]–[11].

³⁷¹ It states that '[t]he admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69'.
³⁷² See n 282 above.

6. Conclusion

There are three types of rules that apply to the collection of evidence by international prosecutors at the ICC and *ad hoc* tribunals: power-based rules that define the circumstances under which a prosecutor may collect evidence on the territory of states, or request that states collect it on his behalf; rights-based rules defining the rights of witnesses and suspects who are the subject of investigations; and procedural rules that control the manner in which evidence can be collected.

These rules apply both to the collection of testimonial evidence, through interviews, and the collection of physical evidence through searches and other overt or covert techniques. The content of these rules is similar at both sets of courts. Both, for instance, grant witnesses and suspects certain protections when questioned, and both have technical rules requiring the recording of interviews under certain circumstances. But the ICC Statute and rules regulate the powers of the prosecutor to collect evidence with greater precision. There are detailed provisions regulating *when* he can start an investigation, *where* he can investigate, *what* evidence he can ask states to collect on his behalf, and *how* he—and they—must do so. Article 56 of the ICC Statute, requiring defence or judicial intervention in the prosecutor's collection of 'unique' evidence under certain circumstances, is also exclusively applicable at the ICC. Moreover, early ICC jurisprudence suggests that the judges anticipate a more general supervisory role over the collection-of-evidence process. Investigators may be called to the stand to explain how the investigation was conducted, why certain lines of inquiry were not followed, and whether exculpatory evidence was properly sought out.³⁷³

In addition to defining the rules that apply to the collection of evidence, the statutes and rules of international criminal courts set out the principles governing when evidence that is presented at trial will be admitted versus excluded. A review of the jurisprudence shows that courts have viewed violations of the rules governing interviews more harshly than those relating to the collection of physical material. Violations of a suspect's rights to silence, counsel and an interpreter

³⁷³ See *Prosecutor v. Katanga* (Transcript) ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009 1/79 NB T (25 November 2009) [5], lines 7–14 ('the Court ... wish[ed] to start the beginning of ... trial, [by having] the person leading the investigations of the Office of the Prosecutor appear with a view to making it possible ... to describe the methods that were used to also investigate exonerating evidence'). The Court also asked why certain lines of inquiry were not pursued; *ibid.*, lines 20–1 ('Could you give a clarification to the Court as to why you have not considered it necessary to question these witch doctors, to the extent that a certain number of witnesses do make reference to these witch doctors?'). Cf. *Prosecutor v. Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09-243-Red (8 February 2010) [46]–[48] (defence allegation that the prosecution's investigative team never requested certain exculpatory evidence offered by a witness 'may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold').

in an interview are therefore more likely to lead to the exclusion of evidence than violations of the right to privacy as a result of a search.

Unlike in some national systems, however, there is no 'automatic' exclusionary rule requiring that evidence that has been collected in violation of a power-based, rights-based or procedural rule be disregarded. Rather, a mandatory rule, codified in Article 69(7) of the ICC Statute and Rule 95 of the *ad hoc* tribunals' rules, requires exclusion under a dual test: where a violation of a court's provisions or international human rights leads to unreliable evidence, or where its admission damages the integrity of proceedings. In addition, the ICC and *ad hoc* tribunals have discretion—under Article 69(4) of the ICC Statute and Rule 89(d) of the ICTY Rules—to exclude evidence where its probative value is outweighed by the need to ensure fairness at trial.

Despite an ostensibly coherent and unified approach to the collection—and exclusion—of evidence, however, the jurisprudence of the courts reveals some uncertainties and contradictions.

First, at the *ad hoc* tribunals, decisions do not always make clear what rights are at issue when a challenge to the collection of evidence is raised. Decisions on interview statements are often phrased in terms of 'voluntariness', or 'oppressiveness', rather than the privilege against self-incrimination or silence; and questions relating to searches or secret recordings are frequently discussed in general terms, without an explicit analysis of the right to privacy.

Moreover, at both the ICC and the *ad hoc* tribunals, there are uncertainties about the extent to which 'internationally recognized' human rights are used to interpret or supplement rights contained in the courts' statutes and rules. These rights are not codified in one place, nor are their contours easy to define. It is as yet unclear, for instance, whether it is the *volume* of human rights jurisprudence, or the application of a right across *different human rights court or instruments*, or other factors, that make a human right 'internationally recognized'.³⁷⁴ It is clear that the right to privacy is considered an internationally recognized human right that can be invoked in the context of international criminal investigations despite its omission from the courts' founding instruments. But are there others? And when human rights jurisprudence is invoked, is the different context in which the judgments of such human rights courts, which are ruling on the compatibility between states' laws and a supra-national treaty, rather than measuring conduct of a prosecutor against specifically defined rules that apply to his own investigations, taken into account?

³⁷⁴ Nor is it an easy task to determine when a right can properly be considered part of customary international law or a general principle of law. See Göran Sluiter, 'International Criminal Proceedings and the Protection of Human Rights', 37 New Eng L Rev 935 [hereinafter 'Sluiter'] 938 ('Not all of the rights set out in the various international and regional human rights treaties reflect customary international law or general principles of law. A complicating factor in making that determination, furthermore, is that a considerable number of human rights may be derogated from under certain conditions').

In addition to uncertainty about the content of certain rules defining the rights that are relevant to the collection of evidence, there is some uncertainty about the circumstances under which a violation will lead to exclusion of evidence, and the principles underlying how the courts will make such determinations. At least four grey areas emerge from the jurisprudence of the courts to date.

1. Relevance of who collects the evidence

The ICC and *ad hoc* tribunals have held that evidence presented by their prosecutor at trial may be excluded even though it has been collected by national authorities and not the international prosecutor himself, and even when national actors are not collecting evidence at the prosecutor's request.³⁷⁵ They have also found that evidence collected by national authorities may be excluded regardless of whether its collection violated national law.³⁷⁶ In the ICC *Lubanga* case, as in the ICTY *Delalić* case, the Trial Chamber measured the collection of evidence by national police not against national law but the law that would apply if the prosecutor were collecting the evidence himself.

Having established this principle in the *Lubanga* case, however, the ICC noted that the 'mere presence at [a the Congolese search by an OTP investigator] does not serve to engage th[e] exclusionary rule'.³⁷⁷ This implies that if the ICC investigator had done more than merely be present at a search conducted by national authorities this may have 'engaged' the rule and resulted in exclusion of the evidence collected. Other jurisprudence also suggests a lowering of the admissibility-of-evidence bar where national authorities collect evidence on the prosecutor's behalf, or an engagement of the exclusionary rule only where the evidence was collected at the international prosecutor's request.³⁷⁸

2. Whether the violation is of a 'minor' or 'serious' nature

The ICC Trial Chamber in *Lubanga* found that 'the Statute does not "quantify" the violation of the Statute, or the internationally recognized human right, by reference to the degree of "seriousness". Therefore even a non-serious violation may lead to evidence being deemed inadmissible, provided that one of the two limbs of

³⁷⁵ See *Lubanga* Confirmation Decision (n 9 above) (search involving mere presence of OTP investigator considered to be a violation of human rights); *Mucić* Austrian Statements Decision (n 9 above) (statement given by Mucić to Austrian police in violation of Statute was excluded even though interrogation was not conducted at the behest of the ICTY). See also Sluiter (n 374 above) 943 ('it is irrelevant whether the Tribunal in any way requested or was involved in the collection of evidence, although involvement of the Prosecutor in obtaining evidence in violation of human rights could result in remedies *additional to* the exclusion of evidence').

³⁷⁶ See nn 40 and 44, above. ³⁷⁷ *Lubanga* Search Decision (n 36 above)[46].

³⁷⁸ See *Mrkšić* Statement Decision (n 2 above); *Prosecutor v. Nyiramasubuko* (Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized) ICTR 97-21-AR15bis (12 October 2006); *Ngirumpatse* Search Decision (n 312 above); *Karemura* Search Decision (n 312 above); *Nzirorera* Search Decision (n 312 above).

the test in Article 69(7) is satisfied'.³⁷⁹ In support of this conclusion the Chamber cited the drafting history of Article 69(7), which shows that a requirement that the type of rights violation that triggers the dual test be 'serious' was deleted from the final version of the Statute.³⁸⁰ But in the same decision, the Chamber noted three factors relevant to its decision not to exclude evidence, one of which was that 'the violation was not of a particularly grave kind'.³⁸¹ Other ICC jurisprudence also provides that 'the Chamber endorses the ... jurisprudence which focuses on the balance to be achieved between the seriousness of the violation and the fairness of the trial as a whole'. These statements therefore seem contradictory.

ICTY jurisprudence is equally murky on this point. In *Brdanin*, the ICTY found that only 'serious' violations could trigger the application of the test for exclusion under Rule 95, and that indeed, to hold otherwise 'would constitute a dangerous obstacle' to the system of international justice.³⁸² And yet, while the ICTY has refused to exclude evidence collected in 'breach of the fundamental right to privacy'³⁸³, the ICTY Appeals Chamber unanimously found that violation of the procedural rule on recording suspect interviews should result in exclusion. This jurisprudence makes it difficult to judge what is considered a 'minor' versus 'serious' rights violation, as well as the relevance of this factor to an exclusion-of-evidence analysis.

3. Whether some violations of rules on evidence-collection lead to automatic exclusion of the evidence

The ICC Trial Chamber in *Lubanga* rejected the view of 'some scholars' who 'have suggested that any violation of internationally recognized human rights will necessarily damage the integrity of proceedings before the ICC'.³⁸⁴ This conclusion flows logically from Article 69(7), and its *ad hoc* tribunal equivalents, that require a further showing of prejudice under the dual test.

But the ICC prosecutor has stated that 'evidence obtained under torture ... would be inadmissible before this Court under Article 69(7)'.³⁸⁵ Similarly an

³⁷⁹ *Lubanga* Search Decision (n 36 above).

³⁸⁰ Ibid, [35]–[39] and n 67 (citing drafting history showing that earlier drafts included language that a violation should automatically lead to inadmissibility or that inadmissibility be triggered 'by means of a serious violation of this statute or other rules of international law' or 'illegal means which constitutes a serious violation of internationally recognised human rights'). Cf. STL, Rule 162 (apparently establishing automatic exclusion rule for violations of internationally recognized human rights).

³⁸¹ *Lubanga* Search Decision (n 36 above) [47].

³⁸² *Brdanin* Intercepts Decision (n 38 above) [63]. See also *Prosecutor v. Kordić and Čerkez* (Decision on Appeal regarding the Admission into Evidence of Seven Affidavits and One Formal Statement) IT-95-14/2-T [32].

³⁸³ *Lubanga* Search Decision (n 36 above) [48] (emphasis added).

³⁸⁴ Ibid, [41], citing Zappala (n 7 above) 152.

³⁸⁵ *Prosecutor v. Lubanga* (Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006) ICC-01/04-01/06 (17 November 2006) [n 34] (emphasis added).

ICTR Chamber held that '[i]t is well settled that a statement taken from a suspect *would not be* admitted into evidence at his trial if his rights during the investigation were not respected'.³⁸⁶ ICTY jurisprudence in turn recognizes that 'statements of a suspect that were gained in violation of the [rights to silence and counsel in] Rule 42 *cannot be used* against him at trial'.³⁸⁷ This implies that there is a set of 'super' rights whose violation automatically results in exclusion, either because a violation will always satisfy one or both prongs of the dual test, or because the test is not triggered at all. Moreover some Appeals Chamber judges have held that evidence is automatically excluded even outside the context of violations of 'super rights', when procedural rules on recording of interviews are not respected.³⁸⁸ It therefore remains unclear whether the dual test always governs exclusion of evidence or whether exclusion is automatic when certain violations occur.³⁸⁹

4. Relevance of whether the crime that an accused is charged with is 'serious' or not

The ICC Trial Chamber in *Lubanga* stated that whether the crime charged in a trial is 'serious' or not is of no relevance to whether improperly obtained evidence should be excluded under Article 69(7). It reasoned that all the crimes dealt with by the Court are serious 'but the public interest in their prosecution and punishment cannot influence a decision on admissibility [of evidence] under this statutory provision'.³⁹⁰ The *Brdanin* Trial Chamber at the ICTY, on the other hand, in a decision quoted with approval by the *Lubanga* Chamber on another point, found the opposite. In its view, it is precisely the 'seriousness of the crimes that this Tribunal is entrusted to adjudicate' that makes it 'utterly inappropriate to exclude relevant evidence due to procedural considerations'.³⁹¹

³⁸⁶ *Nchamihigo* Statement Decision (n 278 above) [21].

³⁸⁷ *Halilović* Appeals Judgment (n 215 above), Separate Opinion of Judge Schomburg [7]. But see *ibid*, Separate Opinion of Judge Shahabuddeen [7] ('[t]he Rules do not explicitly state what the remedy should be when a suspect's rights are violated') (internal citation omitted).

³⁸⁸ *Halilović* Appeals Judgment (n 215 above), Separate Opinions of Judges Meron and Schomburg. See also pp 281–4 above. It is also not clear whether the fact that it is the rights of the future accused, as opposed to those of a third party, that are violated. Cf. *Lubanga* Search Decision (n 36 above) [37] and [47].

³⁸⁹ Moreover, the dual test has in some decisions included a third factor—'the manner and surrounding circumstances in which evidence is obtained'—as being determinative. See *Brdanin* Intercepts Decision (n 38 above) [55]; *Haraqija* Trial Decision (n 36 above) [19].

³⁹⁰ Ibid, [44].

³⁹¹ *Brdanin* Intercepts Decision (n 38 above) [7] ('considering the seriousness of the crimes that this Tribunal is entrusted to adjudicate, it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.'). *Lubanga* Search Decision (n 36 above) [42]. In addition, in defining the concept of 'integrity' for the purposes of Art. 69(7), the Chamber noted that it is 'made up of the core values which run through the Rome Statute' including 'the effective punishment of those guilty of grave crimes'. *Lubanga* Search Decision (n 36 above) [42].

These uncertainties in the factors that are relevant to the exclusion of evidence that has been collected improperly result, at least in part, from unclear foundations. The courts have not clearly articulated *why* they exclude evidence in some cases but not others.

In national systems, exclusionary rules may be designed to deter human rights violations in evidence-gathering: if police know that material found during an illegal search cannot later be used to convict, the theory goes, they will be less likely to conduct an illegal search the next time around. In the international system, the prosecutor will often be using evidence collected not only by his own investigators but by national police forces in cooperating states; therefore, the deterrence rationale is said to be attenuated.³⁹² But deterrence *is* relevant to the international prosecutor's *own* collection of evidence, for instance the collection of testimonial evidence through his investigators' interviews. It is also relevant to national authorities collecting evidence on his behalf, as the prosecutor may be turning to the same states repeatedly to gather evidence in support of his investigations. This suggests that the courts should focus not for instance on whether an OTP investigator was or was not *present* when the evidence was gathered, but rather on whether evidence was collected at the behest of the international prosecutor or as part of a concerted action between the two authorities. This has been the courts' approach in cases involving arrest by state authorities, and there is no principled reason why the same rationale should not apply.³⁹³

Moreover, the question of whether international prosecutors have acted, through their own or national investigators, in *good faith*—a factor dismissed as irrelevant by both the ICC and ICTY³⁹⁴ but considered relevant by a number of

³⁹² See *Brđanin* Intercepts Decision (n 38 above) [63]; *Lubanga* Search Decision (n 36 above) [46]. This reasoning is similar to the 'silver platter' doctrine in US law which establishes that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act. See *United States v. Janis* 428 US 433, 455 n 31 (1976). It contrasts with the view that what matters is whether there has been a breach of rights, regardless of who committed it. See, eg, Sluiter (n 374 above) 942 (international war crimes tribunals 'must take account of every human rights violation that occurs in the framework of the criminal proceedings', regardless of who committed it).

³⁹³ In cases dealing with arrests carried out by national authorities, international criminal courts have focused on the division of responsibility between the international prosecutor and national authorities in determining what remedy is appropriate for the violation. The 'at the behest of' test was used in *Barayagwiza* and 'concerted action' in *Lubanga* in the context of deciding whether the international prosecutor could be held responsible for violations relating to the accused's arrest and detention in the national state. See *Lubanga* Appeals Decision (n 12 above); *Prosecutor v. Barayagwiza* (Prosecutor's Request for Review or Reconsideration) ICTR 97-19-AR72 (31 March 2000) [74].

³⁹⁴ Cf. *Haragija* Appeals Judgment (n 20 above) [18] and [28] (noting finding of good faith by Trial Chamber).

national jurisdictions³⁹⁵—also seems important. Honest mistakes that are made by investigators should not necessarily meet with the same penalty as a deliberate and flagrant disregard for the rules, at least when it comes to the 'integrity' prong of the dual test. In other words, where evidence is not unreliable (the basis for exclusion under the first prong of the dual test in ICC, Article 69(7) or ICTY Rule 95) and its admission does not threaten the fairness of the trial (a basis for exclusion under the discretionary test in ICC Statute Article 69(4) or ICTY Rule 89(d)), evidence should rarely be excluded unless willful prosecutorial misconduct can be shown. This is all the more true if another type of remedy—such as compensation to the accused or a third party—is a more appropriate way to 'cure' the violation in question.³⁹⁶

Ultimately, there is good reason for judges to retain discretion when it comes to evidence collected in violation of the rules that apply to the collection of evidence at international criminal courts. Rather than be bound to automatically exclude such evidence, the judges at these courts must determine that a violation leads to unfairness at an accused's trial, unreliability of evidence collected or is damaging to the integrity of the proceedings as a whole. Where violations do not lead to inadmissibility, this does not mean that they must go unpunished; other remedies may apply. The accused should not always go free 'because the constable has blundered'.³⁹⁷ The truth-finding process of a trial need not always be compromised by excluding proof of guilt. But neither should an accused's right to a fair trial be compromised if a violation of his rights during an investigation is incurable by any other means than excluding the evidence that has been obtained. It will be for the courts to achieve the right balance in each case, but they should, in doing so, clearly identify the rights that are at issue, the tests that are triggered, and the factors that are relevant to applying these tests. It is only fair to both accused and prosecutors to know what the rules of the game are, and what happens if they are broken.

³⁹⁵ See, eg, *United States v. Leon* 468 US 897 (1984); *R. v. Collins* [1987] 1 SCR 265, (1987) SCC 11; UK Police and Criminal Evidence Act 1984, s 78.

³⁹⁶ See, eg, *Miscellaneous (Kabuga Family 01-A)* (Decision (Appeal of the Family of Felicien Kabuga against Decisions of the Prosecutor and President of the Tribunal) (22 November 2002); *Rwamakuba* Decision (n 15 above). But see *Prosecutor v. Nyiramasuhuko* (Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized) ICTR-97-21-T (12 October 2000) [26].

³⁹⁷ *People v. Defore* 242 NY 13, 21 (1926).