

**(A . 4)****ICC Evidence Rules:****Analysis of the Rome Statute and the Rules of Procedure and Evidence
with Considerations and Recommendations for NGOs Involved
in Evidence Gathering****Question**

What kinds of evidence will ICC courts admit and how should evidence gathering NGOs use this information?

Summary

Understanding these rules of evidence is far more important for prosecutors than for evidence gathering NGOs. Generally, NGOs should keep detailed records of information the prosecutor may find, and how and where the prosecutor may find it. However, NGOs should not usually record detailed witness testimony or remove physical evidence because NGO errors could stop prosecutors from being able to use a witness or evidence at trial. Instead, NGOs should focus on recording details of crimes into a database that the prosecutor can use to conduct an official investigation, and to help the prosecutor understand relevant local cultural issues.

Still, NGOs may benefit from understanding what kind of evidence prosecutors can eventually use at trial. The ICC Rules of Evidence say that the judges may allow any evidence, including hearsay, but they can choose not to allow evidence. Instead, the judges will think about the importance of the evidence before ruling on the evidence's admissibility. While national evidence rules do not apply, national evidence rules might show which evidence judges are more likely to admit.

ICC Rules protect witnesses and victims. ICC Rules give the court and prosecution many options to protect witnesses and victims, including testimony by video, protection of witness identity before trial, and protection of confidential information given to the prosecutor by witnesses.

ICC Rules do not stop prosecutors from using non-admissible evidence in their investigation to find admissible evidence. However, prosecutors must have "a reasonable basis to believe" a crime has been committed before investigating. If the prosecutor thinks they will be able to find admissible evidence, they will be more likely to investigate than if they do not believe they will find much admissible evidence.



Discussion

I. Considerations and Recommendations for NGO Evidence Collection: Detailed Databases Summarizing Cases, Explanations of Cultural Issues, but Not Full Witness Testimony

While it is important for information gathering NGOs to consider the ICC Rules of Evidence, it is also important that NGOs do not make decisions for the prosecutor, and potentially harm the prosecution's case. Many human rights groups suggest that NGOs should summarize and categorize information that the prosecutor can use to start an investigation, but NGOs should not investigate like a prosecutor because the NGOs might hurt the prosecutor's case.¹ Instead, NGOs should use the strengths of their particular organization to help the prosecutor meet, interview, and protect witnesses and victims.

A. Collect as much detailed information as possible in a database, but avoid making audio, video, or written recordings of witness testimony. The prosecutor should make these recordings.

When possible, NGOs should give the prosecutor detailed information in the form of a database. There are many pieces of information NGOs should collect and place into categories such as: the incident's location; the time, date, and duration of the incident, the chronology of the incident; the nature of the crime and the methods used to commit the crime; possible reasons for the crime; identity of alleged perpetrators; identity of the victim including name, age, gender, occupation, address, ethnicity, religion, or other relevant affiliation; and a list of other information that may be available to the prosecutors.²

However, NGOs should avoid recording witness testimony with much detail if they want to be sure the prosecutor can use the witness at trial. If an NGO records witness statements with too much detail, there is a better chance that slight errors would stop the prosecutor from using the witness during trial. For example, if a statement is incorrectly recorded, and differs from testimony in court, the defense will be able to raise questions about the reliability of the witness. Similarly, witnesses may incorrectly remember some details of an incident, or may not understand it is okay to tell an investigator they do not remember some key facts, and may guess about details. If this happens, and the details of the crimes are unclear, the defense will be able to attack the prosecution's case. Therefore, it is best to summarize information to the prosecutor about possible witnesses, and let the experienced prosecutors record witness testimony.



In some circumstances, there might be exceptions. For example, if someone was the only witness to an incident, and they are unlikely to live until a possible trial, it may be better to record their testimony. Similarly, it is better to let the prosecutor collect physical evidence, but NGOs may need to collect this evidence if it would be destroyed before the prosecutor can get to it. Still, collecting either recorded witness testimony or physical evidence should only be done when absolutely necessary: only when the risk a piece of evidence will be completely lost outweighs the increased risk the evidence will not be admissible when collected by an NGO instead of the prosecutor.

B. NGOs should use their understanding of an area's customs and cultures to help best connect the victims and witnesses with prosecutors.

NGOs should remember that what they know about how a region's culture or customs is extremely important to the prosecutor. The prosecutor will not be able to investigate properly without this information, and any evidence submitted to the prosecutor should explain cultural, political, or historical background. With this knowledge, NGOs can also help the prosecutor better protect victims and witnesses.

Ultimately, NGOs should provide the prosecutor enough information to believe she should open an investigation and information that will help the prosecutor conduct a trial or investigation better. However, an NGO should not think it has to conduct the investigation for the prosecutor.

II. ICC Rules of Evidence Overview: Broad Court Discretion on Evidence Admission, Witness Protection, and the Prosecutor's Power to Use Non-admissible Evidence to Start an Investigation

A. ICC Rules say that any evidence can be admitted at trial. However, this does not mean the court must admit all evidence.

The ICC Rules say a court can admit or ask for any evidence the court wants.³ But, this does not mean that the court *will* allow evidence, or that the court *must* allow evidence. The rules say the court should think about the evidence and decide (1) if the evidence is truthful and (2) if the evidence is important to the case.

1. The ICC Rules probably allow hearsay, but the court must think this evidence is important.

First, the ICC Rules say the accused can ask witnesses questions (or "examine" witnesses).⁴ Second, the ICC Rules also say an ICC court can admit *any* evidence if the ICC court thinks is important.⁵ It is important to know if



these rules allow hearsay. Hearsay evidence is when a first person tells a second person some information, and the second person testifies about what the first person said. Although the first rule by itself might not allow hearsay, the second rule probably allows hearsay.

Before the ICC was formed, an international court said that courts can admit hearsay if it is important.⁶ The international court also said that courts must think about the "truthfulness, voluntariness, and trustworthiness of the evidence." Together, these words seem to say that the court should think about everything and decide if the witness is telling the truth. If the court thinks the witness is telling the truth, the court can admit hearsay.

2. National evidence rules do not apply to the ICC. However, national evidence rules may be good guidelines.

ICC Rules state that national evidence rules do not apply.⁷ Because of this, evidence can be admitted at the ICC even if it could not be admitted in Burma. However, national evidence rules might be good guidelines. National evidence rules might show what evidence the ICC is more likely to admit. Therefore, national evidence rules are not binding, but they can be persuasive authority.

B. ICC Rules require witness protection as a general principle.

The ICC Rules say the court and the prosecutor will protect witnesses and victims. Generally, the Rules are very broad and flexible to protect the witness. ICC Rules say these witnesses and victims should be protected as a "general principle."⁸ This means the ICC will physically protect witnesses and their families. For example, as long as the defense can still question the witness, the ICC will also allow witnesses to testify by video or in another location outside of court where the victim will feel safe.⁹

Also, to protect witnesses before trial, the prosecution may submit a summary of testimony for certain witnesses, but does not have to give information that would put the witness at risk until the actual trial.¹⁰

1. ICC Rules say certain groups are even more likely to need protection.

The ICC Rules say all witnesses should be protected, but they specifically say that courts and prosecutors should carefully consider the need to protect women, children, the elderly, the disabled, and victims of sex crimes. The ICC Rules say that the prosecutor must protect the safety and dignity of all witnesses, and these witnesses are often most vulnerable.¹¹



2. ICC Rules require prosecutors to keep confidential information secret to protect witnesses.

If a witness gives the prosecutor confidential information, the prosecutor must keep this information and the witness secret. The confidential information is not admissible at trial, but the prosecutor can use confidential information in the investigation to find admissible evidence.¹²

3. ICC Rules allow prosecutors to force witnesses to testify. However, there are some exceptions, including self-incrimination and testimony about confidential information.

ICC Rules say that a witness can be forced to testify in court.¹³ However, there are several exceptions: (1) witnesses cannot be forced to testify about privileged relationships, such as a lawyer about the lawyer's client¹⁴; (2) witnesses cannot be forced to incriminate themselves¹⁵; (3) witnesses cannot be forced to incriminate family members¹⁶; and (4) witnesses cannot be forced to testify about confidential information.¹⁷ Even if a witness agrees to testify about *some* confidential information, the witness cannot then be forced to testify about other confidential information about which they did not agree to testify.

Also, courts may consider public policy arguments about why a group or individual should not be forced to testify. For example, courts may not make NGOs like the Red Cross testify so that they are not stopped from giving aid to an area where government leaders are afraid anything the Red Cross workers see while working can be used in court.¹⁸

C. ICC Rules allow prosecutors to use non-admissible evidence in their investigation. Evidence the prosecutor finds can be admissible even if the evidence used to help the investigation is not admissible.

ICC Rules do not stop prosecutors from using inadmissible evidence in their investigation to find admissible evidence. However, this does not mean prosecutors will start an investigation with evidence that will be inadmissible in court. To start an investigation, the prosecutor must think the evidence shows "a reasonable basis to believe that a crime...has been or is being committed."¹⁹ If the evidence brought to a prosecutor does not give the prosecutor this "reasonable basis to believe a crime...has been committed," the prosecutor cannot start an investigation. Therefore, evidence does not have to be admissible, but it does have to give the prosecutor this "reasonable" belief that a crime has happened or is happening. Section I of this report describes good evidence collecting in more detail.



1. *There is no time limit to bringing a case or starting an investigation, but the case must have occurred after the ICC was created.*

There is no statute of limitations,²⁰ but the ICC does not apply to crimes committed before the Rome Statute became active July 1, 2002.²¹ This means crimes can still be prosecuted no matter how much time has passed since they were committed as long as they were committed after July 1, 2002.

Conclusion

Under ICC Rules, courts can choose to admit or not admit any kind of evidence. Without more specific rules, it may be helpful to consider domestic evidence laws to determine what evidence the court is more likely to admit.

Still, evidence gathering NGOs do not need to submit admissible evidence to the prosecutor. Instead, NGOs should collect data giving prosecutors a reasonable basis to believe a crime has been committed, and that an investigation into the crimes would reveal significant evidence.

While the NGOs should keep certain kinds of detailed information that will help the prosecutor conduct an investigation, NGOs should also be careful not to harm a potential investigation or trial by incorrectly recording testimony or improperly removing physical evidence. Ultimately, NGOs should provide the prosecutor with information to understand the complexity and seriousness of the situation, but not conduct the investigation for the prosecutor.

(Endnotes)

¹ See Human Rights Watch, *The International Criminal Court: How Nongovernmental Organizations Can Contribute to the Prosecution of War Criminals* (Sep. 2004) (http://www.iccnw.org/documents/HRW_iccProsecutions_0904.pdf); Human Rights First, *The Role of Human Rights NGOs in Relation to ICC Investigations* (Sep. 2004) (http://www.iccnw.org/documents/HRF-NGO_RoleInvestigations_0904.pdf).

² Human Rights First, 15-16.

³ Rome Statute, Art. 69(3).

⁴ R.S. Art. 67(1)(e).

⁵ "The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth." R.S. Art. 69(3). "The Court may rule on the relevance or admissibility of any evidence, taking into account...the probative value of the evidence and any prejudice that such evidence may cause..." R.S. Art. 69(4).

⁶ *Prosecutor v. Tadic*, Decision on Defence Motion on Hearsay (August 5, 1996).

⁷ R.S. Art. 69(8).

⁸ Rules of Procedure and Evidence, Rule 86.

⁹ R.P.E. Rule 67.

¹⁰ R.S. Art. 18(1)

¹¹ R.S. Art. 68(1).



¹² R.S. Art. 54(3)(e) and (f), R.P.E. Rule 46.

¹³ R.P.E. Rule 65.

¹⁴ R.P.E. Rule 73.

¹⁵ R.P.E. Rule 74.

¹⁶ R.P.E. Rule 75.

¹⁷ R.P.E. Rule 82.

¹⁸ Human Rights Watch.

¹⁹ R.S. Art. 53(1)(a).

²⁰ R.S. Art. 29.

²¹ R.S. Art. 12 and 13.

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