

The Crucial Role of Evidence and Witness Testimony in International Criminal Court War Crimes Prosecutions.

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Received: 19 Feb 2025; Received in revised form: 20 Mar 2025; Accepted: 25 Mar 2025

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Abstract

This paper delves into the pivotal role of evidence and witness testimony in the prosecution of war crimes by the International Criminal Court (ICC). The International Criminal Court, tasked with addressing the most severe crimes of international concern, relies heavily on solid evidence and credible witness testimonies to secure convictions. This study scrutinizes the processes and challenges involved in collecting and presenting evidence, as well as the importance of witness protection and support mechanisms. Through an in-depth analysis of past International Criminal Court cases, the paper underscores the impact of evidence and witness testimony on the outcomes of war crimes prosecutions. The findings highlight the necessity for stringent evidentiary standards and effective witness management to ensure justice and accountability in international criminal law. This research contributes to a broader understanding of the complexities and significance of evidence and witness testimony in the pursuit of justice for war crimes.

Keywords— Evidence, Witness Testimony, ICC, War Crimes, Prosecution

INTRODUCTION

It is important for one to determine what is just and fair during war. The majority view led us to the path of fairness and justice. War is not a normal circumstance and war crimes are not normal crimes as contemplated by national laws.¹ Arm conflict is when two states have differences, and they resort to the intervention of members of the armed forces.² It is safe to state that when states resort to armed force, they are declaring a war. We have two types of arm conflicts, namely the International and the internal. The International Criminal Court is the jurisdiction of the international arm conflicts, meanwhile the internal arm conflicts are referred to regional criminal courts which are specialized tribunals that address war crimes, crimes against humanity, and genocide within specific regions.

These courts may operate under international law or be established by regional agreements and entities to ensure

accountability and justice for atrocities committed during armed conflicts. In both courts or jurisdictions evidence and witness testimony are important, one can is not found guilty if there is no evidence. This study investigates the processes and challenges involved in collecting and presenting evidence and how witnesses are protected and supported. The study will use old and recent case laws and the adopted protocols or declarations of humanitarian law and arm conflicts to investigate the impact of evidence and witness testimony on the outcomes of war crimes prosecutions. The findings highlight the necessity for stringent evidentiary standards and effective witness management to ensure justice and accountability in international criminal law. This research contributes to a broader understanding of the complexities and significance of evidence and witness testimony in the pursuit of justice for war crimes.

¹ Halpern, M. (2018). Trends in Admissibility of Hearsay Evidence in War Crime Trials: Is Fairness Really Preserved? *Duke Journal of Comparative & International Law*, 29(1), pp. 103-126. Available at:

<https://scholarship.law.duke.edu/djcil/vol29/iss1/3/> [Accessed 8 Jan. 2025].

² International Committee of the Red Cross (ICRC). (2008). How is the Term "Armed Conflict" Defined in International Humanitarian Law?

Armed conflicts within states may involve a group of people who are armed and ready to fight to seize governmental power.³ Sometimes conflicts are matters of organized crime as opposed to politics. We can use the Mozambique issue as an internal arm conflict which arose due to political conflicts. The Mozambique conflicts involve citizens and the current leaders who are fighting for internal change, the change of political leadership. During the development of this study, it was reported that over 1 500 prisoners have escaped from a maximum-security prison in Maputo, Mozambique and have managed to steal AK47 guns from the police officials during the escape.⁴ Having such a huge number of people who are heavily and fighting against the system can led to a war though out the entire country, because already the citizens were not happy about the elections outcomes and have been protesting ever since the release of the election results. This might lead to a state of emergency where a certain area of the country will be regarded as a war zone, and other neighbouring countries might offer assistance to avoid internal war which will lead the collapse of Mozambique. Fighting in most conflicts in developing countries occurs not on well-defined battlefields but in and around communities and is often characterized by personalized acts of violence.

INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW DURING ARM CONFLICTS

The law of arm conflicts or the law of war. International humanitarian law (IHL) is a set of rules designed to limit the impact of armed conflict for humanitarian reasons.⁵ It aims to protect individuals who are not or are no longer involved in hostilities and restricts the methods and means of warfare. IHL applies specifically to situations of armed conflict and is part of the law governing the conduct of hostilities (*ius in bello*), which is distinct from the law governing the justification for the use of force (*ius ad bellum*). The United Nations Charter prohibits the use of force, but IHL must be applied equally by all parties in any

armed conflict, regardless of the justification for their actions. This principle of equality between belligerents differentiates armed conflict, where IHL is applicable, from criminal acts, which are governed by criminal law and human rights law on law enforcement.⁶

For a long time, it was believed that international human rights law applied during peacetime, while international humanitarian law was relevant during armed conflicts. However, modern international law now recognizes that this distinction is not accurate. The international community widely acknowledges that human rights obligations stem from the recognition of inherent rights of all individuals, which can be affected in both peace and war.⁷ Therefore, international human rights law continues to apply even in armed conflict situations. Additionally, human rights treaties do not indicate that they are inapplicable during armed conflicts. Consequently, international human rights law and international humanitarian law are seen as complementary sources of obligations in armed conflict situations. For instance, the Human Rights Committee, in its general comments Nos. 29 (2001) and 31 (2004), affirmed that the International Covenant on Civil and Political Rights also applies in armed conflict situations where international humanitarian law is relevant.

The Human Rights Council, in its resolution 9/9, further recognized that human rights law and international humanitarian law are complementary and mutually reinforcing.⁸ The Council emphasized that all human rights require equal protection and that human rights law continues to provide protection during armed conflicts, considering international humanitarian law as *lex specialis*.⁹ The Council also reiterated the need for effective measures to guarantee and monitor the implementation of human rights for civilian populations in armed conflict situations, including those under foreign occupation, and to provide effective protection against human rights violations in accordance with international human rights law and applicable international humanitarian law.¹⁰ In recent years, the application of international human rights law and international humanitarian law in armed conflict situations

³ United Nations. (2001). *Armed conflicts and their consequences*. United Nations.

⁴ Al Jazeera. (2024). *Mozambique president-elect urges 'unity' amid unrest, citizens fleeing*. Al Jazeera.

⁵ African Charter on Human and Peoples' Rights (ACHPR) Adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 REV. S, 21 ILM, (1982) 58.

⁶ M Hailbronner 'Laws in conflict: The relationship between human rights and international humanitarian law under the African Charter on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 339-364
<http://dx.doi.org/10.17159/1996-2096/2016/v16n2a2>.

⁷ Office of the High Commissioner for Human Rights (OHCHR), 2011. *International Legal Protection of Human Rights in Armed Conflict*.

⁸ Human Rights Council. (2008). *Protection of the human rights of civilians in armed conflict*. RightDocs.

⁹ *Ibid* 8.

¹⁰ United Nations. (2022). *Delegates in General Assembly Support Human Rights Council's Monitoring of Crises Worldwide, Yet Some Say Double Standards Ignore Impact on Developing Countries*. United Nations Press.

has raised questions about the implementation of specific protections guaranteed by both bodies of law. Their concurrent application has led to confusion regarding the obligations of conflict parties, the extent of these obligations, the standards to be applied, and the beneficiaries of these protections.

Common Article 3 of the Geneva Conventions is a vital component in safeguarding human rights during internal conflicts or civil wars, imposing obligations on all parties involved to adhere to its principles.¹¹ It outlines fundamental guarantees designed to protect individuals caught in the throes of conflict. However, effectively applying this mini-treaty, alongside Additional Protocol II, presents challenges, particularly in determining the specific circumstances under which each set of provisions becomes operative. Common Article 3 sets a lower threshold for applicability compared to Additional Protocol II, yet both aim to ensure the protection of victims in situations of internal strife.

To invoke Common Article 3 during an internal conflict, two key conditions must be fulfilled: there must be at least two distinct parties engaged in hostilities, and the conflict itself must reach a certain intensity.¹² This distinction is essential, as it helps separate conflicts that meet the criteria of Common Article 3 from less severe violent situations that may not warrant the same legal framework. Each conflict must be carefully analyzed based on these criteria to ascertain which set of legal provisions applies. The provisions of Common Article 3 are comprehensive in nature. They explicitly prohibit acts of violence against life and person, including murder, mutilation, cruel treatment, and torture.

It forbids the taking of hostages and any conduct that could be deemed to outrage personal dignity, such as humiliating or degrading treatment. A critical safeguard it establishes is the prohibition against executing individuals without a prior judgment rendered by a regularly constituted court that offers the judicial guarantees recognized as essential by civil societies. Furthermore, Common Article 3 mandates the collection and care of the wounded and sick,

highlighting the obligation of all parties to ensure humane treatment.¹³ It also allows for the involvement of impartial humanitarian organizations, like the International Committee of the Red Cross (ICRC), to assist in these efforts. Crucially, the principles enshrined in Common Article 3 are widely accepted as reflecting customary international law, reinforcing their authority and applicability across various contexts of internal conflict.¹⁴ This broad acceptance underscores the universal commitment to uphold human rights and dignity even in the most challenging circumstances of civil unrest.

EVIDENCE AND WITNESS TESTIMONY IN INTERNATIONAL CRIMINAL COURT PROCEEDINGS.

The role of evidence in international law, particularly within the realm of international criminal law, is essential in upholding justice and accountability.¹⁵ Evidence not only aids in establishing jurisdiction but also plays a crucial part in the overall prosecutorial process. Uncovering reliable sources and types of evidence remains a challenge amidst the evolving landscape of international law.¹⁶ Evidence in international law encompasses a wide range of materials and information that are utilized to substantiate claims and arguments within legal proceedings.¹⁷ It serves as a foundation for establishing facts in international criminal cases and influences the outcomes of judicial decisions.

Types of evidence.

Types of evidence include testimonial evidence, documentary evidence, digital evidence, physical evidence and forensic evidence.¹⁸ Testimonial evidence refers to statements made by witness under oath.¹⁹ This can include testimonies from the survivors, experts, or officials who provide firsthand accounts of events. Documentary evidence refers to written or recorded materials that substantiate claims. This includes legal documents, treaties, official records, reports and communications.²⁰ Physical evidence refers to tangible objects that can be inspected in court. Examples include weapons, clothing, photographs, and forensic materials like DNA samples. Digital evidence refers to electronic data such as emails, digital photographs

¹¹ Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals. 1949.

¹² International Committee of the Red Cross. (2020). Commentary of 2020 Article 3 - Conflicts not of an international character. Geneva Convention (III) on Prisoners of War.

¹³ International Committee of the Red Cross. (1949). Article 3 - Conflicts not of an international character. *Geneva Convention (III) on Prisoners of War*.

¹⁴ Pejic, J. (2011). The protective scope of Common Article 3: more than meets the eye. *International Review of the Red Cross*, 93(881), pp. 189-225.

¹⁵ International Law Editorial. (2024). The Role of Evidence in International Law: A Crucial Component. *World Jurisprudence*.

¹⁶ Gandžalová, D. (2024). The importance of taking evidence as part of the court proceedings. *Legestic*, 2, pp. 7-15.

¹⁷ LawTeacher. (2019). Rules of Evidence Before the International Court of Justice. *LawTeacher.net*.

¹⁸ Ahmad, N. (2022). Types of Evidence and How They Are Used in Investigations. *Legal Inquirer*.

¹⁹ Torres, R. (2016). Testimonial Evidence. *Scribd*.

²⁰ LegalBrief AI. (2024). Documentary Evidence - Meaning in Law and Legal Documents, Examples and FAQs. *LegalBrief AI*.

videos, and other digital records that can be used to support claims and establish facts. These types of evidence are crucial in international criminal law to ensure that justice is served and that those responsible for war crimes and other violations are held accountable. The collection, preservation, and presentation of this evidence must adhere to strict legal standards to maintain its integrity and reliability in court.²¹ Evidence not only helps to solve the case but assist one to identify the jurisdiction by determining the authority of a court over a case.

Challenges in collecting evidence.

During trial the Registry, the Court and the Prosecutor are the ones responsible to come with the measures to protect the witness and support him or her. The key responsibility of the court is to protect the witness by all means as his or presence in court is indispensable for the good proceedings. Victims too are protected during this time to avoid further victimization. Certain concerns, including but not limited to the threat of reprisals are noted to protect both the witness and the victim. The Geneva Convictions Protocol additional was of the believe that it is necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.²² According to Article 2 of this protocol in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.²³

The protocol supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions. Such cases may include but not be limited to armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.²⁴

²¹ Neel, A., 2024. Digital Evidence: Collection, Preservation and Forensic Analysis. Legal Bites.

²² Additional Protocol to the Geneva Convention of 12 August 1949, and Relative to the Protection of Victims of Non-International Armed Conflicts (PROTOCOL II). 1977.

²³ International Committee of the Red Cross (ICRC), 2007. International humanitarian law: Answers to your questions.

²⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR), 1949. Protocol Additional to the Geneva Conventions of 12 August 1949.

During investigations prosecutor as part of the applicant is required to protect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.²⁵ The prosecutor has a discretion to withhold disclosure of evidence if this may lead to the grave endangerment of a witness or his or her family. In terms of Article 54 the Prosecutor shall take necessary measures, or request that necessary measures be taken, in order to ensure the protection of any person.²⁶ These responsibilities of the Prosecutor are similar to the ones imposed to the International Trial Court. It has must take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of the victims and the witnesses. The Trial court too takes into consideration all relevant factors, including age, gender, health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

Witness protection and Support mechanisms.

The registrar plays a role to ensure the safety of the victims and the witnesses by giving Victim and Witnesses Unit a statutory mandate to protect, support and provide other assistance to victims and witnesses.²⁷ The registrar should set up the victims and witnesses unit within the Registry and in consultation with the Prosecution office to provide protective measures, security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the trial court, and others who are at risk on account of testimony given by witnesses.²⁸

Physical protection refers to measures taken to ensure the safety and security of individuals who may be at risk due to their involvement in legal proceedings. This includes protecting them from physical harm, threats, or intimidation. The VWU is a specialized unit within the International Criminal Court responsible for the protection and support of victims and witnesses involved in

²⁵ Nkashe, M.S., 2015. Title of the dissertation. Unpublished dissertation. University of South Africa.

²⁶ Southern Africa Litigation Centre (SALC), 2020. Policy Brief: ICC Witness Protection Programme.

²⁷ International Residual Mechanism for Criminal Tribunals (IRMCT), 2019. Practice Direction - Provision of Support to Victims and Witnesses (MICT-40).

²⁸ International Criminal Court (ICC), 2008. Prosecutor v. Katanga.

International Criminal Court proceedings.²⁹ The VWU provides psychological support to help witnesses and victims cope with the emotional and mental stress associated with testifying in court.³⁰ This includes therapy sessions, stress management techniques, and emotional support. This encompasses a range of support services tailored to the needs of the individuals.

It may include medical care, relocation services, financial assistance, and legal advice. The act of testifying in court can expose individuals to retaliation, threats, or harm from those who may be adversely affected by their testimony. This risk necessitates comprehensive protection measures. The VWU may arrange for secure transportation, safe housing, and personal security details to protect individuals from potential threats.³¹ Ensuring that the identities and locations of witnesses and victims are kept confidential to prevent them from being targeted. Implementing legal measures to protect the rights and safety of witnesses and victims, such as non-disclosure agreements and protective orders.

Rule 16 to 19 of the International Trial Court takes these provisions into details by covering the responsibilities of the Registrar and the Victims and Witnesses Unit. meanwhile Rule 87 and 88 state that the Court may grant protection and special measures.³² The Registry of ICC is responsible for the non-judicial aspects of the administration of the Court's work and for 'servicing of the Court'.³³ This paper examines three instances in which the Registry of the ICC has specific obligations with respect to: victims' and witnesses' protection and support; legal aid for defendants and victims; and the organization of family visits to detained persons. I find it as a common cause for a witness to feel free when giving testimony. He or she should be before court without fear of retribution or further harm.

The witness plays a crucial role in every case, they assist the court to reach a decision which is just and fair. It should always be the Registry of the International Criminal Court and other Courts to protect witnesses and victims. I point out the Registrar over the Court and the Prosecutor because the Registry is serving as the channel communication of the Court. The Judges know us through the Registrar of the Court. One of the biggest challenges for the Court during its

operations have been that the provision of appropriate protective measures, as stipulated in Article 68(1) of the Statute. The Court's operations are mainly conducted in demanding conflict or post-conflict areas, where the law-enforcement structures are generally weak, and the overall security situation is often subject to sudden changes.

The establishment and implementation of a comprehensive, appropriate and adequate system of witness protection aims the addressing of these challenges in the best possible manner.

In terms of Rule 75 of the Rules of Procedure and Evidence a witness may give testimony remotely.³⁴ This is part of protecting the witness, as sometimes witnesses get assassinated when they are on their way to give testimony to court. In terms of the statute of the International Tribunal for Former Yugoslavia it was stipulated that the Tribunal has at its disposal a number of protective measures ranging from Tribunal records through testimony under a pseudonym. electronic facial distortion, voice distortion and closed session which align to Rule 75 of the Rules of Procedure and Evidence.³⁵

A judge or chamber has the authority to order appropriate measures for the privacy and protection of victims and witnesses, either on their own initiative (*proprio motu*) or at the request of either party involved in the case, the victim, or the witness. The Victims and Witnesses Section can also make such requests. These measures must be consistent with the rights of the accused. It is also the responsibility of the chamber to regulate how questioning is conducted to prevent any form of harassment or intimidation. Once protective measures have been ordered for a victim or witness in any proceedings before the Tribunal (referred to as the "first proceedings"), these protective measures will continue to apply in any subsequent proceedings before the Tribunal (referred to as the "second proceedings").³⁶ This continuity remains in effect unless the protective measures are rescinded, varied, or augmented according to the established procedure.

However, these protective measures do not prevent the Prosecutor from fulfilling any disclosure obligations under the Rules in the second proceedings. The Prosecutor must notify the Defence, to whom the disclosure is being made,

²⁹ Coalition for the International Criminal Court (CICC), 2015. Enough is Enough: Protect ICC Witnesses.

³⁰ International Criminal Court (ICC), n.d. Victims and Witnesses Unit: Assistance to Victims and Witnesses.

³¹ Ibid 30.

³² International Criminal Court (ICC), 2019. Rules of Procedure and Evidence.

³³ International Criminal Court, 2025. The Registry. International Criminal Court.

³⁴ International Criminal Tribunal for Rwanda, 2025. Rules of Procedure and Evidence. International Residual Mechanism for Criminal Tribunals.

³⁵ Ibid 34.

³⁶ International Criminal Tribunal for the former Yugoslavia, 2005. Decision on Prosecution Motion for Protective Measures for Witnesses. International Criminal Tribunal for the former Yugoslavia.

about the nature of the protective measures ordered in the first proceedings. This ensures that the Defence is aware of the existing protective measures while the Prosecutor complies with disclosure requirements. The Victims and Witnesses Section of the International Criminal Tribunal for the former Yugoslavia was established under Article 22 of the Tribunal's Statute and Rule 34 of the Tribunal's Rules of Procedure and Evidence.³⁷ This section operates as a neutral and impartial body within the Registry. Its primary function is to ensure that all witnesses can testify safely and securely, without experiencing further harm, suffering, or trauma as a result of their testimony. The Victims and Witnesses Section is dedicated to providing the necessary support and protection to witnesses, thereby facilitating their participation in the judicial process.

The Victims and Witnesses Section of the International Criminal Tribunal for the former Yugoslavia provides comprehensive protection and support to all witnesses who appear before the Tribunal, regardless of whether they are called by the Prosecution, the Defence, or the Chambers.³⁸ The Victims and Witnesses Section offers counselling and assistance to victims and witnesses, ensuring their safety and security needs are adequately met. It recommends and implements measures to protect witnesses who have testified or will testify before the Tribunal. The Victims and Witnesses Section informs witnesses of the proceedings and their rights, and makes necessary travel, accommodation, financial, and other logistical and administrative arrangements for witnesses and their accompanying persons. The Victims and Witnesses Section maintains close contact with the trial teams regarding all aspects of the witnesses' appearance before the Tribunal. A significant technological advantage in the International Criminal Tribunal for the former Yugoslavia's protection measures is the 30-minute delay in the broadcast of proceedings. This delay allows the parties to seek redaction of any inadvertent reference to a protected witness or potentially identifying information, thereby enhancing the security and confidentiality of the witnesses.

It should be noted that everything has limitations, so is the protection of the witness. In terms of Article 67 in the International Criminal Court the accused is given a right to

examine the witness against him before the court proceedings.³⁹ It is reasonable for one to give evidence or testimony unmasked. Court rooms should remain to be safer spaces for both parties involved in the proceedings. In terms of Article 68 of the Rome Statute the protection measures must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁴⁰ Thus, then makes me to conclude that hiding the witness identity to the accused, prejudice the accused as the trial will not be fair and impartial. The witness being known by the defense or the accused will make them be prepared for cross-examination or be able to defend the witness's testimony. The accused will be better able to specifically refute testimony made by the witness if the accused has personal knowledge of the situation and the person involved. There is no legitimacy if the identity of the witness is hidden. The court also has a discretion to ensure the legitimacy of the witness's statement is vital to a proper trial. For the court to reach such conclusion the accused and his or her legal representatives should be allowed to monitor the witness. Thus, then give court the discretion to limit the witness protection measures for the trial to be fair and to honor the rights of the accused person.⁴¹

Collecting evidence on an international scale poses numerous challenges that significantly hinder the effectiveness of international criminal law.⁴² One of the primary issues is the variation in legal frameworks across nations, which complicates the process of evidence collection. Different jurisdictions often have distinct regulations regarding the admissibility and procedures for evidence, leading to inconsistencies that can obstruct cooperation between states.⁴³ These legal discrepancies make it difficult to ensure that evidence gathered in one country will be recognized and accepted in another, ultimately impeding collaborative efforts to address international crimes. Geopolitical factors also play a crucial role in evidence collection. The dynamics of international relations, including existing conflicts, diplomatic ties, and national interests, can create barriers to obtaining vital information or access to witnesses.

In some situations, individuals tasked with gathering evidence may face threats or even violence, further

³⁷ International Criminal Tribunal for the former Yugoslavia, 2009. Statute of the International Criminal Tribunal for the former Yugoslavia. International Criminal Tribunal for the former Yugoslavia.

³⁸ Ewald, U., 2002. The International Criminal Tribunal for the former Yugoslavia and the Crime of Genocide. Max Planck Institute for Foreign and International Criminal Law.

³⁹ International Committee of the Red Cross, 1998. Article 67 - Rights of the accused. Statute of the International Criminal Court.

⁴⁰ International Committee of the Red Cross, 1998. Article 68 - Protection of the victims and witnesses and their participation in the proceedings. Statute of the International Criminal Court.

⁴¹ Ibid 40.

⁴² International Law Editorial, 2024. Limitations of International Criminal Law: An In-Depth Analysis. World Jurisprudence.

⁴³ Ren R. THE DICHOTOMY BETWEEN JURISDICTION AND ADMISSIBILITY IN INTERNATIONAL ARBITRATION. International and Comparative Law Quarterly. 2024;73(2):417-446. doi:10.1017/S0020589324000022

detering their efforts to collect essential testimonies or documentation.⁴⁴ This reality underscores the inherent risks involved in international investigations, where the safety of personnel can be jeopardized by hostile environments. Cultural differences further complicate the international evidence collection process. Practices and standards that are deemed acceptable in one legal system may not hold the same validity in another. For instance, evidence that is obtained under coercion might be permissible in certain jurisdictions but completely inadmissible in others, leading to potential legal conflicts and complications in international proceedings.

These cultural variations can create significant hurdles, requiring careful navigation to ensure that evidence aligns with the diverse legal norms of different countries. Logistical difficulties also emerge when collecting evidence across borders. Factors such as transportation challenges, language barriers, and the high costs associated with international investigations can limit the ability to conduct comprehensive and effective assessments. These logistical issues can delay the investigative process and hinder the thoroughness of evidence-gathering efforts. Ultimately, the role of evidence in international law is deeply intertwined with the need to address these complex and multifaceted challenges, highlighting the necessity for enhanced collaboration and shared understandings among nations to ensure justice on a global scale.⁴⁵

Case studies and analysis.

The evolution of international criminal procedure regarding the use of written witness statements in place of oral testimony reflects significant responsiveness to developments in jurisprudence.⁴⁶ A key change was the removal of the preference for oral testimony in Rule 90(A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁴⁷ This was accompanied by the introduction of Rule 92, which permits the admission of written witness statements that do

not aim to prove the acts and conduct of the accused. These amendments were clearly influenced by judgments from the Appeals Chamber in the cases of Kordić and Čerkez, which addressed the admissibility of statements from deceased witnesses. Initially, Rule 92 was less stringent than the previous Rule 94, which dealt with affidavits. Under Rule 92, statements from deceased witnesses were not required to conform to domestic law, allowing Chambers to admit such evidence based on reliability and other considerations.⁴⁸ The earlier stipulation that affidavits could only be used for corroborative purposes and had to be presented before the witness being corroborated had testified was eliminated.

Over time, Rule 92bis underwent further amendments, including the removal of the requirement for a 14-day notice period to the opposing party and the provision that allowed the Trial Chamber to mandate the appearance of a witness for cross-examination though the option for the Chamber to do so remained.⁴⁹ In 2003, the Special Court for Sierra Leone (SCSL) amended its Rule 90(A) to eliminate the preference for oral testimony, subsequently adopting its own version of Rule 92bis in 2004.⁵⁰ In contrast, the International Criminal Tribunal for Rwanda (ICTR) still maintains a preference for oral testimony in Rule 90(A), although it has also implemented a Rule 92bis concerning prior statements that do not pertain to the acts and conduct of the accused.⁵¹

Following the Appeals Court's ruling in the Milošević case, which allowed the introduction of prior statements under the flexible Rule 89(F) when a witness was present to attest to their accuracy, the ICTY established Rule 92ter to formalize this approach.⁵² The SCSL later adopted a similar Rule 92ter in November 2006.⁵³ In a notable case in 2006, the ICTY faced a request to admit the prior recorded testimony of two deceased witnesses, Ibrahim Rugova and

⁴⁴ Thomas, D. A., Edge, Ian David, Clarke, Donald C., Bernard, Thomas J. and Allott, Antony Nicolas (2024, December 16). crime. Encyclopedia Britannica.

<https://www.britannica.com/topic/crime-law>

⁴⁵ International Law Editorial, 2024. The Role of Evidence in International Law: A Crucial Component. World Jurisprudence.

⁴⁶ McDermott, Y., 2013. The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis. *Leiden Journal of International Law*, 26(4).

⁴⁷ Ibid 46.

⁴⁸ Ibid 46.

⁴⁹ ICTY, 2008. Statements under Rule 92 bis ICTY. ICTR/ICTY/IRMCT Case Law Database.

⁵⁰ Prosecutor v. Kallon, Decision on the Defence application for leave to appeal 'decision on the prosecution's motion for

immediate protective measures for witnesses and victims and for non-public disclosure.', SCSL-03-07-PT-148 (SCSL TC I, Dec. 10, 2003).

⁵¹ Boost, C.M.H., 2023. The Legitimacy of the International Criminal Tribunal for Rwanda (ICTR). *Contemporary International Criminal Law Issues*.

⁵² ICTY, 2003. Kosovo, Croatia and Bosnia, Prosecutor v. Milosevic, Decision on Prosecution Motion for the Admission of Evidence-In-Chief of Its Witnesses in Writing, IT-02-54 (ICTY TC, Apr. 16, 2003).

⁵³ SCSL, 2008. Prosecutor v. Taylor, Decision on Prosecution Notice under Rule 92Bis for the Admission of Evidence Related to Inter Alia Kenema District and on Prosecution Notice under Rule 92Bis for the Admission of the Prior Testimony of TF1-036 into Evidence, SCSL-03-01-T-556 (SCSL TCII, Jul. 15, 2008).

Antonio Russo.⁵⁴ The Tribunal denied the admission of Rugova's testimony as it related to the accused's conduct, while Russo's statement was accepted due to its relevance to the crime base evidence. Subsequently, the Tribunal introduced Rule 92quater, allowing the written statements of deceased witnesses to be admissible even if they pertained to the acts and conduct of the accused. The transcript of Rugova's testimony was ultimately admitted under this new rule. The SCSL adopted its own Rule 92quater in May 2007, while the ICTR continues to adhere to Rule 92bis(C), which restricts such testimony from being used to prove the acts and conduct of the accused.⁵⁵

The most recent addition to the ICTY's procedural rules is Rule quinquies, implemented in response to allegations of witness intimidation during the Haradinaj and Limaj trials, as well as recommendations from a working group on contempt proceedings. This rule allows for the introduction of a written transcript or statement when a witness fails to testify due to "improper interference." Similar to Rule 92quater, this provision does not prohibit such evidence from relating to the acts and conduct of the accused, although this factor may influence its admissibility. It should also be noted that there are no corresponding rules in the SCSL and ICTR regarding this issue, highlighting the unique adaptations made by the ICTY in response to emerging challenges in international criminal law.⁵⁶ Admissibility had no bearing on weight. Not every evidence admitted will be relied in the final judgement.

It is extremely difficult to measure the precise weight given to particular pieces of testimony, given that the evidential record is assessed as a whole, entirely to simplify it and there is no obligation on the International Criminal Court to address each relevant piece of admitted evidence in its judgement. In the current analysis, we operate under the assumption that if a piece of testimony is referenced in a trial judgment and the judgment does not later dismiss that testimony or express doubts about the credibility of the witness, it can be inferred that the Court has accepted the truthfulness of the testimony's content. However, this approach introduces a significant challenge, as it may prioritize form over substance. The underlying premise is that oral testimony, or *viva voce* testimony, is not automatically more reliable than written statements. Instead, *viva voce* testimony offers the Court a greater opportunity to assess the witness's credibility in a more

nuanced manner than what limited cross-examination of a written statement under Rule 92ter would allow.⁵⁷

Despite these limitations, there are critical questions that this analysis aims to address. For instance, do Courts tend to value oral testimony more highly than written testimony? Can testimony that has not undergone cross-examination be corroborated by another unexamined testimony as valid proof? Does the more lenient approach to admissibility adopted by some Courts align adequately with the broader principle of evaluating evidence based on the totality of the evidence? It appears that the answers to these questions are not uniform and can vary significantly from one Court to another. This inconsistency raises concerns, particularly as a lack of clarity regarding the weight assigned to specific pieces of evidence can create misunderstandings in subsequent stages of legal proceedings. The appeal judgments in the cases of Gotovina and Perišić serve as illustrative examples of how such ambiguities can manifest in practice.

The International Criminal Tribunal for the former Yugoslavia (ICTY) recently introduced a significant update to its procedural rules with the implementation of Rule quinquies.⁵⁸ This change was primarily a response to serious concerns regarding witness intimidation that emerged during the trials of Ramush Haradinaj and Fatmir Limaj, as well as recommendations from a working group focused on contempt proceedings. Rule quinquies permits the introduction of written transcripts or statements when a witness is unable to testify due to "improper interference."⁵⁹ This rule is like Rule 92quater, which allows for evidence related to the acts and conduct of the accused, although the relevance of such evidence may affect its admissibility. There are no equivalent provisions in the Special Court for Sierra Leone or the International Criminal Tribunal for Rwanda, illustrating the ICTY's unique adaptations to emerging challenges in international criminal law. One crucial aspect of these developments is that the admissibility of evidence does not necessarily correlate with its weight in final judgments. Not all admitted evidence will be relied upon in the court's conclusions.⁶⁰

Impact of evidence and witness testimony on case outcomes.

Assessing the precise weight of individual testimonies is inherently challenging, as the evidential record is evaluated

⁵⁴ Ibid 46.

⁵⁵ Ibid 46.

⁵⁶ Ibid 46.

⁵⁷ Immigration and Refugee Board of Canada, 2021. Weighing Evidence - Chapter 5: Viva Voce evidence.

⁵⁸ Ibid 38.

⁵⁹ Ibid 38.

⁶⁰ Theophilopoulos, C. and Bellengère, A., 2022. Relevance, Admissibility and Probative Value in a Rational System of Evidence: A South African Perspective. Potchefstroom Electronic Law Journal, 25.

as a comprehensive whole.⁶¹ The International Criminal Court is not obligated to address every piece of admitted evidence in its judgments.⁶² In this context, it can be assumed that if testimony is referenced in a trial judgment without subsequent dismissal or doubts about the witness's credibility, the court has accepted the truthfulness of that testimony. However, this assumption poses a challenge, potentially prioritizing form over substance, as oral testimony, or *viva voce* testimony, is not inherently more reliable than written statements. While oral testimony allows for a more nuanced assessment of a witness's credibility, the limitations of cross-examination of written statements under Rule 92ter must also be considered.⁶³

This analysis raises critical questions about the judicial treatment of evidence. For example, do courts generally assign more weight to oral testimony compared to written statements? Is it possible for testimony that has not undergone cross-examination to be corroborated by another unexamined testimony? Does the more lenient admissibility approach adopted by some courts align with the broader principle of evaluating evidence based on its totality? The answers to these questions are not consistent across different courts, which raises concerns about the potential for misunderstandings in subsequent legal proceedings. The appeal judgments in the cases of Gotovina and Perišić exemplify how such ambiguities can manifest in practice, demonstrating the complexities involved in evaluating testimony and the implications of differing judicial standards across various courts.⁶⁴

Proponents of a broad admissibility regime argue that it allows judges to assess evidence based on the overall context provided by numerous individual pieces of evidence.⁶⁵ This "totality of the evidence" approach enables judges to reach conclusions through a holistic evaluation of the evidential record. However, the flip side is that it can be challenging to determine the weight assigned to any specific piece of evidence when there is no clear declaration regarding the credibility or reliability of that witness. In the Đorđević case, for instance, the Chamber acknowledged that it sometimes accepted evidence with inconsistencies while rejecting seemingly consistent evidence, asserting that it acted in light of the other evidence available.⁶⁶

Similar approaches were noted in the cases of Nyiramashuko and Perišić.

While the right to a reasoned verdict does not guarantee insight into how a Trial Chamber evaluates the reliability of individual pieces of evidence, the ICTY Appeals Chamber has stated that the standard of proof should not rely on a piecemeal approach but should consider the totality of the evidential record. Challenges can arise at the appeals stage when the Appeals Chamber finds certain pieces of evidence inadequately addressed. For example, in the Perišić Appeals Judgment, the Chamber criticized the Trial Chamber for its "paucity" of evidence regarding the accused's command abilities, believing it had failed to adequately consider the testimonies of witnesses Rašeta and Orlić. Although the Trial Chamber had noted these testimonies, it reached a different conclusion based on other evidence.

The Appeals Chamber emphasized that a Trial Chamber need not reference every piece of evidence as long as it does not completely disregard any relevant evidence. The Perišić Trial Chamber's acknowledgment of contrary evidence and reliance on the totality of the evidence indicated that it had not disregarded any critical information in a legally erroneous manner. In both the Gotovina and Perišić cases, the Appeals Chambers expressed concerns about the adequacy of the Trial Chambers' evaluations of evidence, suggesting that their findings could not be upheld without thorough discussion and analysis of contrary evidence. This raises broader questions about the Appeals Chamber's function and standard of review, particularly as both judgments reflect an interpretation of the "totality of the evidence" approach that may not align with the established principle that Trial Chambers are best positioned to assess the evidential record.

CONCLUSION

In conclusion, the prosecution of war crimes by the International Criminal Court heavily relies on robust evidence and credible witness testimonies. This research has highlighted the intricate processes and significant challenges involved in collecting and presenting evidence, as well as the critical importance of witness protection and support mechanisms. The analysis of past ICC cases

⁶¹ Oliver, 2024. Witness Testimony: Credibility and Challenging Witness Statements. Law Defence.

⁶² United Nations, 1998. Some Questions and Answers. United Nations Department of Public Information.

⁶³ Ibid 60.

⁶⁴ Jayawardane, S. and Divin, C., 2014. The Gotovina, Perišić and Šainović Appeal Judgments: Implications for International Criminal Justice Mechanisms.

⁶⁵ FasterCapital, 2024. The Broad Evidence Rule: Shedding Light on the Admissibility of Evidence.

⁶⁶ International Justice Resource Center, 2014. With Đorđević Appeals Judgment, ICTY Concludes Final Case Concerning Kosovo.

underscores the profound impact that evidence and witness testimony have on the outcomes of war crimes prosecutions. To ensure justice and accountability in international criminal law, it is imperative to maintain stringent evidentiary standards and effective witness management. This study contributes to a deeper understanding of the complexities and significance of evidence and witness testimony in the pursuit of justice for war crimes, emphasizing the need for continuous improvement in these areas to uphold the principles of fairness and justice.

RECOMMENDATIONS

It is essential to establish and enforce rigorous standards for the collection, preservation, and presentation of evidence to ensure its integrity and reliability in court proceedings. The ICC should continue to develop and implement comprehensive witness protection programs that address both physical and psychological needs, ensuring the safety and well-being of witnesses throughout the judicial process. Greater collaboration between states and international bodies is necessary to overcome legal, geopolitical, and logistical challenges in evidence collection and witness protection, fostering a more unified approach to international criminal justice.

ACKNOWLEDGEMENTS

I would like to express my deepest gratitude to all those who have supported me throughout the process of researching and writing this paper. Special thanks to my mother and father for their endless patience, understanding, and encouragement. Their love and support have been my constant source of strength.

FUNDING

No funding

CONFLICT OF INTEREST

I declare that there is no conflict of interest regarding the publication of this paper.

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