Lexsitus Lecturer: Professor Héctor Olasolo Alonso (Universidad del Rosario)
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Article 69 is the key provision on evidence in the ICC Statute. During the Preparatory Works, a decision was taken that the Statute should only contain the fundamental principles governing evidence. Hence, additional details and secondary rules were to be left for the Rules of Procedure and Evidence and the case law of the ICC.

The purpose of this provision is to provide the ICC with the necessary flexibility to amend the rules of evidence and adopt new ones in light of its practice. As a result, this preliminary presentation will be limited to describe the eight evidentiary principles provided for in article 69.

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

The purpose of this provision is to enhance the reliability of the testimony. Hence, the undertaking must be given before starting to give evidence. Refusal to give the undertaking without good cause may amount to misconduct under article 71, paragraph 1 of the Statute.

The witness' failure to give the undertaking does not render the evidence automatically inadmissible. On the contrary, it brings about the following two consequences: First, the probative value of the testimony will be diminished; and second, the witness will not be liable for giving false testimony.

The second principle:

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

As Trial Chamber I has stated in the *Lubanga* case: '[t]he statutory framework of the Court establishes the clear presumption that the evidence of a witness at trial will be given orally'. The

reason for this principle is that oral testimony provides the best opportunity for the parties to examine the witness and for the Court to ask questions and assess the conduct and credibility of the witness.

Nevertheless, Trial Chamber III has highlighted in the *Bemba* case, that the presumption of orality does not preclude the admission of non-oral evidence. Hence, nothing in the ICC legal framework prevents a Trial Chamber from *prima facie* admitting non-oral evidence, whether written - such as written statements or transcripts-or by means of audio or video.

The general requirement for live testimony in the courtroom is subject to exceptions. The first involves the implementation of protective measures authorized in article 68. The second involves the use of prior recorded testimony as provided for in rule 68 of the Rules of Procedure and Evidence. According to this rule, 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 following three scenarios, provided that this would not be prejudicial to or inconsistent with the rights of the accused.

In the first scenario, both the Prosecutor and the defence had the opportunity to examine the witness during the recording, and the prior recorded testimony goes to the proof of a matter other than the acts and the conduct of the accused.

In the second scenario, the prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In this scenario, the Trial Chamber may only authorise that they use of prior recorded testimony if it is satisfied that the person is unavailable, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability. Moreover, the fact that the prior recorded testimony goes to the proof of acts and conduct of the accused may be a factor against its introduction in whole or in part of it.

In the third scenario, prior recorded testimony comes from a person who has been subjected to interference. In this scenario, the Trial Chamber may only authorise the use of prior recorded testimony if the following five criteria are met. First, the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony. Second, the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion. Third, reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness. Four, the interests of justice are best served by the prior recorded testimony being introduced. And, finally, the prior recorded testimony has sufficient indicia of reliability.

The requirements that have to be met in each of these three scenarios have been developed by the ICC case law in the following cases: *Ruto and Sang, Ntaganda, Bemba et al, Gbagbo and Blé Goudé,* and *Ongwen.*

The third principle:

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

In the *Lubanga* case, the Appeals Chamber highlighted that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, that is, the Prosecution

and the Defence. Nevertheless, it did not fully foreclose the possibility for other participants, such as the victims, to do so. According to the Appeals Chamber, this will have to be decided on a case-by-case basis.

The Appeals Chamber has also stated in the *Lubanga* case that article 69, paragraph 3 makes it clear that "the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth".

The issue of whether the rules considering evidence in paragraph 3 of article 69 apply also to the pre-trial stage of the proceedings has been discussed in *Katanga* and *Bemba* cases with different outcomes. In *Katanga*, Pre-Trial Chamber I, came to the conclusion that article 69, paragraph 3 is not applicable at this stage of proceedings because the Pre-Trial Chamber is not a truth-finder, while in *Bemba*, Pre-Trial Chamber III concluded that this provision establishes a general principle that applies to all stages of the proceedings.

The fourth principle:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

According to this principle, relevant evidence - which has probative value - is admissible if such evidence is not affected by an exclusionary issue.

Relevance and admissibility are related but distinct concepts. Relevance is not an absolute concept, but it is a nexus between the proposed item of evidence and the fact or proposition that is meant to prove or disprove. As a result of this relationship, the proposed item of evidence makes it more probable than not that the fact or proposition exist or does not exist. As a consequence, the proposed item of evidence will be considered irrelevant if it does not tend to prove or disprove the relevant fact or if the specific fact which it intends to prove is not at issue in the case.

The fact that an item of evidence tends to prove or disprove a fact or proposition that is at issue in the case does not guarantee, per se, its admissibility. There are other policy considerations that may outweigh its admission, such as, for instance, the existence of a legally recognised privilege or the need to exclude the evidence to protect national security.

Concerning the timing for the decision on admissibility, the ICC has two possibilities. It can rule first on whether the evidence possesses sufficient relevance to justify its admissibility, taking into consideration the above-mentioned factors, and assess, at the end of the trial, the weight of any admitted evidence as part of the evaluation process. Nevertheless, the ICC may also admit evidence and consider its relevance, admissibility and weight all-together at the end of the trial.

The fifth principle: "The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence".

The main object of this principle is to prevent disclosure of privileged communications. According to rule 73 of the Rules, privileged communications will not be disclosed at trial, unless the accused consents to disclosure or has already voluntarily disclosed the content of the communication to a third party, thereby indicating that he or she did not in fact regard the communication as strictly confidential

The ICC is not entitled to order the defence to disclose the statements given by a witness or the accused under the privilege. This may also apply to statements made by the accused prior to being fully informed of the charges against him or her.

The sixth principle: “The Court shall not require proof of facts of common knowledge but may take judicial notice of them”.

Facts of common knowledge are facts of which an informed and reasonable person has knowledge or can learn from reliable and publicly accessible sources. They may include, for instance, historical data, geographical circumstances, or United Nation documents, including General Assembly and Security Council Resolutions.

The question, whether a fact is commonly known, can only be decided with regard to the circumstances of the case. It is for the Court to decide whether a given fact will require proof, or whether it can be regarded as a fact of common knowledge. An important factor to take such a decision will be how widely the document or data in question is available, and how widely it has been accepted as common ground.

The seventh principle:

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if the violation casts substantial doubt on the reliability of the evidence or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

This principle provides for the non-admission of certain items of evidence, as long as the following two conditions are met. The first condition requires some sort of causal link between the collection of the evidence by either the Prosecutor or national authorities, and a violation of the ICC legal framework, or a violation of internationally recognized human rights standards. These standards are not limited to those specifically mentioned in the ICC Statute, and include non-treaty standards, such as those contained in norms developed by the United Nations in the field of criminal justice.

The second condition that has to be met is comprised of two alternative scenarios. According to the first scenario, the manner by which the evidence was obtained must cast serious doubt on its reliability. This will be the case of confession obtained under duress during interrogation. This scenario is also applicable to evidence that requires preservation or collection in a manner that safeguards its integrity and reliability from tampering, corruption or tainting.

The second alternative scenario, deals with the situation in which the fact that an item of evidence was collected in violation of the ICC legal framework or internationally recognized human rights, does not cast substantial doubts as to its reliability. Under these circumstances, the item of evidence may still be inadmissible because it would be antithetical to the ICC purposes and integrity to admit and use evidence that was obtained by means of a violation of its own legal framework or internationally recognized human rights.

Some authors have rightly pointed out that this principle permits the violation of the ICC Legal Framework or of human rights, so long as that violation is not of such degree so as to produce the detrimental effects referred to above.

Nevertheless, the scope of the problem is limited by article 21, paragraph 3 of the ICC Statute, according to which there are some violations that, by their nature, are always egregious or inconsistent with international human rights standards. As a result, the admission of evidence obtained by means of such violations will always be antithetical or would seriously damage, the integrity of the proceedings. This will be case, for instance, with any conduct amounting to torture under the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

The eighth principle: “When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law”.

This last principle precludes the ICC from ruling on how national law should be applied in the collection of evidence or on the validity of any decision made by a national court. These are matters of domestic jurisdiction within the sovereignty of the particular State. As a consequence, the ICC is only to apply its own applicable law in deciding on the relevance and admissibility of any item of evidence.

This brings our presentation on article 69 of the ICC Statute to an end.

Thank you very much.