

**Draft Rules of Procedure and Evidence of the
International Criminal Court: Parts 7 (Evidence)
and 10 (Offences Against the Administration of Justice)**

Prepared by a Working Group of the American Bar Association
Section of International Law and Practice

Officers of the Working Group

Monroe Leigh, Chair
David Stoelting, Vice Chair
D. Lea Browning, Vice Chair
Bruce C. Swartz, Reporter
Donald J. Munro, Reporter
Maury D. Shenk, Reporter

PART 7: RULES OF EVIDENCE

Introductory Commentary:

The ABA Working Group proposes only a moderate number of rules of evidence, on the theory that the Court should generally have discretion to determine which evidence is relevant and admissible, subject to the general principles set out in proposed rule 98. However, we suggest several rules on a limited number of important substantive principles of evidence, for which the experience of other international tribunals suggest that more detailed rules are appropriate.

Rule 96 General Provisions

(A) The rules of evidence set forth in this Part together with article 69 of the Statute shall apply in proceedings before all Chambers of the Court. The Chambers shall not be bound by national legislation or rules governing evidence.

(B) In cases not otherwise provided for in this Part or article 69, a Chamber shall apply rules of evidence that will best favour a fair determination of the matter before it and are derived in accordance with article 21 of the Statute.

(C) A Chamber shall place on the record the reasons for any rulings it makes on evidentiary matters.

Source: ICTY Rule 89; ICC Statute Art. 69; PCNICC 99/DP.10 (French Proposal)

Commentary: The language of parts (A) and (B) of this rule is based on the Yugoslav rule and the French proposal, which we believe are appropriate. Rule 96(B) vests discretion in the Court to handle matters not dealt with in these rules by reference to the Statute, international law, relevant national law, and prior precedent. Rule 96(C) is from the Australian draft, and serves to ensure judicial candor in rulings on evidence.

Parts (A) and (B) of this rule are the same as Rule 85(A) and (B) in the ABA's original draft. The rest of the original ABA Rule 85 (parts (C) - (G)) have been moved to other rules to match the Australian template.

Rule 97 Agreements as to Evidence

(A) The Prosecutor and the defence may agree that the contents of a document or the expected testimony of a witness or a specific fact is not contested and may be considered as evidence by a Chamber.

(B) In the interests of justice, a Chamber may accept or decline an agreement under subrule (A) as it deems appropriate.

Source: ICTY Rule 89; PCNICC 99/DP.10 (French Proposal)

Commentary: This rule is designed to streamline proceedings by allowing for stipulations as to evidence. It is essentially the same as the Australian and French drafts. We have modified the language of the Australian draft slightly in Part (A) to make clear that the Court is not required to accept the parties' stipulations. There may be cases in which it is important for witnesses, including victims, to be heard, notwithstanding an agreement between the parties. Rule 97(b) provides the Court the discretion to allow such testimony.

Rule 98 Rulings on the Relevance or Admissibility of Evidence

(A) "Relevant evidence" means evidence having any tendency to prove or disprove any fact that could be of significance to the Court in reaching judgment.

(B) A Chamber may admit any relevant evidence which it deems to have probative value, subject to Sub-Rules (C), (D) and (E).

(C) A Chamber shall not admit evidence if its probative value is substantially outweighed by the danger that the evidence would prejudice the right to a fair trial or a fair evaluation of the testimony of a witness.

(D) A Chamber shall not admit any evidence that was obtained by means of a violation of the Statute or internationally recognized human rights 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.

(e) A Chamber may exclude evidence if its probative value is substantially outweighed by considerations of undue delay or needless presentation of cumulative evidence.

Source: ICC Statute Art. 69(4) & 69(7);PCNICC 99/DP.10 (French Proposal)

Commentary: The Australian Draft notes the need for a rule to elaborate on article 69(4) of the Statute, which provides as follows:

"4. 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 a witness, in accordance with the Rules of Procedure and Evidence."

This proposed rule adopts and expands on the "probative value versus prejudice" test set forth in the Statute as a means of guiding the Court's rulings on the relevance and admissibility of evidence. Rule 98(A) sets forth a general definition of relevance that is broad enough to ensure a liberal approach to admissibility while still limiting attempts to introduce matters that clearly have nothing to do with the proceeding. Rule 98(B) is the operative rule on admissibility and is based on the "probative value" standard of article 69(4).

Rule 98(C), (D) and (E) are the exceptions to admissibility of relevant evidence. Each of these exceptions serves a slightly different purpose. Rule 98(C) sets forth the "prejudice" standard of article 69(4). The importance of this rule is somewhat lessened by the fact that proceedings will be in front of judges, not a jury, meaning that the danger of unfair prejudice will ordinarily not be high. Thus, we believe that this balancing of probative value versus prejudice may be left to the discretion of the Court.

Rule 98(D) is closely based on the language of article 69(7). It requires exclusion of evidence that, although relevant, was obtained by means that are unacceptable, such as torture. The purposes of this rule are to protect the integrity of the Court's proceedings and to limit perverse incentives in evidence-gathering. Rule 98(E) is the final exception to admission of relevant evidence, and is designed to limit delay, in accordance with article 64(2)'s requirement that trials be both fair and expeditious.

Rule 98 bis Testimony of Witnesses

(A) The testimony of a witness at trial shall be given in person except to the extent provided in Articles 68 and 69 of the Statute and Rule 89 [Aust. Draft] or if the Court otherwise finds exceptional circumstances to exist.

(B) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

(C) A party may challenge the competency or capacity of a witness called by another party. A witness may be judged incompetent only when, in the opinion of the Trial Chamber, the witness lacks understanding of the nature of a solemn declaration to tell the truth.

(D) A child or any individual lacking competency or capacity, who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child or individual is sufficiently mature or has sufficient competency or capacity to be able to report the facts of which the child or individual had knowledge and understands the importance of telling the truth. A judgement may not be based on such testimony alone.

(E) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. A witness who has heard the testimony of another witness in court may be disqualified from testifying.

(F) Notwithstanding SubRule (E), upon order of the Chamber, an investigator or investigators in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings.

(G) A witness other than the accused may object to making any statement which might tend to incriminate the witness. After a hearing, the Chamber may compel the witness to answer the question. Testimony compelled in this way shall not be used, directly or indirectly, as evidence in a subsequent prosecution before the Court against the witness for any offence other than giving false testimony, within the meaning of Article 70.

(H) The Trial Chamber shall exercise control over the mode and order of questioning witnesses and presenting evidence so as to:

(1) make the examination and presentation effective for the ascertainment of the truth;

(2) avoid needless consumption of time; or

(3) avoid harassment and intimidation of witnesses.

(I) Cross-examination shall be limited to the subject-matter of the direct examination and matters affecting the credibility of the witness. However, the Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters as if on direct examination.

Source: ICTY Rule 90; ICC Statute arts. 69, 70

Commentary: The Australian draft does not include a rule on testimony of witnesses in the section on evidence. We believe that the references to witness testimony in article 69(1) - (2) of the Statute make this an appropriate topic for the rules of evidence.

Rule 98 bis (A) sets forth the fundamental proposition that testimony must generally be live and in person. We believe such a rule is critical to protecting the right of an accused person to fairly meet the case against him or her. Rule 98 bis (B) provides the oath called for by article 69(1).

Rule 98 bis (C) and (D) deal with competency of witnesses. These provisions are closely based on the Yugoslav Tribunal rules. They are designed to balance the competing considerations of potential unfairness to defendants from incompetent testimony and the need to allow children and other possibly incompetent witnesses to present evidence where appropriate. Because standards for competency have proven elusive in application, the question of competency is left to the discretion of the Court, subject only to the limitation that it must be based on a lack of understanding of a solemn declaration to tell the truth. This limitation is designed to ensure that questions of competency may not be raised with respect to religious beliefs, conviction of a crime, or other invalid bases.

Rule 98 bis (E) and (F) deal with exclusion of witnesses. Rule 98 bis (E) seeks to minimize the influence on prior testimony on witnesses yet to be called, on the theory that such exposure to earlier testimony may unfairly alter a witness's approach to his or her own testimony. The Court retains discretion under this rule to exclude testimony by witnesses who heard courtroom testimony of prior witnesses. Rule 98 bis (F) is an exception to part (E) that permits the parties' investigators to be present in the courtroom.

Rule 98 bis (G) ensures that compelled testimony may not be used against a witness (other than in cases of perjury). The sanction if a witness refuses to answer despite an order from the Court is provided in Rule 126 bis of this draft.

Rule 98 bis (H) explicitly acknowledges the Court's inherent power to control the evidentiary hearing and to issue such orders as may be necessary to keep the parties and witnesses focused on the issues at hand. The rule is broad so as to allow the Court discretion to deal with specific situations as it sees fit.

Finally, Rule 98 bis (I) limits the subject matter of cross-examinations. Aside from limiting opportunities for excessive consumption of time on cross, this rule promotes orderly presentation of the case. The Court is permitted to waive this rule in appropriate circumstances

Rule 98 ter Testimony of Expert Witnesses

(A) If scientific, technical, or other specialized knowledge will assist the Chambers to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(B) Notwithstanding the provisions of Rules 66 and 67 [Aust. Draft], the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber sufficiently in advance of the date on which the expert is expected to testify so as to allow the opposing party time to prepare a response.

(C) Within a time limit specified by the Court but no later than fourteen days after the filing of a statement of an expert witness, the opposing party shall file a notice indicating whether it:

(1) accepts the expert witness statement; or

(2) objects to the qualifications of the proposed expert witness; or

(3) objects to the expert witness statement, including a summary of the grounds for such objection(s).

The notice shall also indicate whether the opposing party wishes to crossexamine the proposed expert witness in the event the testimony is admitted.

(D) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

Source: ICTY Rule 94 bis

Commentary: This rule sets out procedures for consideration of opinion testimony and other testimony by experts with scientific, technical, and other specialized knowledge. Parts (B) and (C) require advance notice of expert testimony to the opposing party in order to eliminate the possibility of surprise.

Rule 99 Evidence of Consistent Pattern of Conduct

(A) Evidence of a consistent pattern of conduct relevant to violations of international humanitarian law under the Statute is inadmissible to prove the character of a person in order to show action in conformity therewith, but may be offered for other purposes, subject to the provisions of Rule 98, with specific prior approval of the Trial Chamber.

(B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence pursuant to Rule 66 [Aust. Draft].

Source: ICTY Rule 93

Commentary: This proposed rule modifies Rule 99 of the Australian draft to limit the admissibility of evidence of a consistent pattern of conduct. First, the proposed rule requires Trial Chamber approval for admission of such evidence. Second, the proposed rule makes such evidence inadmissible for the purposes of showing the character of a person, on the theory that character evidence is virtually always fraught with potential for bias or prejudice and is of

questionable probative value. Pattern of conduct evidence would remain admissible, however, for purposes such as showing intent, motive, knowledge, identity, opportunity, preparation, plan or absence of mistake or accident. Of course, pattern of conduct evidence would also remain subject to exclusion under the general provisions of Rule 98 if its probative value is substantially outweighed by prejudice.

Rule 100 Confessions

A confession by the accused given during questioning by the Prosecutor or his or her agents shall, provided the requirements of Rule 46 [ABA Draft] were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

Source: ICTY Rule 92

Commentary: This proposed rule is identical to the proposal in the Australian draft and ICTY Rule 92. The ABA Working Group believes that this is an acceptable rule.

Rule 101 Evidence in Cases of Sexual Violence

In cases of sexual violence:

- (1) no corroboration of the victim's testimony shall be required;
- (2) all issues relating to victim consent shall be addressed in an in camera hearing;
- (3) consent shall not be allowed as a defence if the victim:
 - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
 - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (4) in cases where the Court has found that the circumstances of part (3) above do not exist, the accused shall satisfy the Trial Chamber that evidence of the victim's consent is relevant and credible before such evidence is admitted;
- (5) prior sexual conduct of the victim shall not be admitted in evidence.

Source: ICTY Rule 96; ICC Statute art. 68(2)

Commentary: This proposed rule is similar to the proposal in the Australian draft and ICTY Rule 96. The ABA Working Group believes that the Australian rule appropriately strikes the difficult balance between the interests of the victim and the interests of the defendant in cases of sexual

assault. We have modified the structure of the rule slightly to make clear that all issues of consent, whether raised in connection with part (3) or part (4), should be addressed in a private setting. We also modified the language of part (4) from the Australian draft to make clear that even when the factors discussed in part (3) are not present, the accused still must make a special showing of relevance and credibility before evidence of consent is admitted.

Rule 102 Testimonial Privileges

(A) All communications between lawyer and client for purposes of giving or receiving legal advice shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

(1) the client consents to such disclosure; or

(2) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

(B) The Court may treat other communications as privileged under the same terms as sub-rule (A), if such communications were made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure.

Source: ICTY Rule 97; ICC Art. 69(5)

Commentary: Part (A) of this proposed rule is identical to the proposal in the Australian draft and ICTY Rule 97, adding only the qualification that the communication must involve legal advice. The ABA Working Group believes that this is an acceptable provision to protect the lawyer-client privilege, which is essential to the ability of defendants to fully exercise their rights. Part (B) gives the Court the power to accord similar privileged treatment to communications made in the course of other confidential relationships (e.g. husband-wife, doctor-patient, counselor-patient, priest-penitent) in which candor should be encouraged.

Rule 102 bis Judicial Notice

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) At the request of a party or proprio motu, a Trial Chamber, after hearing the parties, may decide to take judicial notice of documentary evidence from other proceedings of the Court relating to matters at issue in the current proceedings, except to the extent that this would deny the accused the right to a fair trial.

Source: ICTY Rule 94

Commentary: This proposed rule is designed to streamline the trial process by eliminating the requirement of proof of (1) facts of common knowledge, and (2) documentary facts from other proceedings of the Court.

Rule 102 ter Power of Chambers to Order Production of Additional Evidence

A Trial Chamber may order either party to produce additional evidence, subject to Article 72 of the Statute. It may proprio motu summon witnesses and order their attendance.

Source: ICTY Rule 98

Commentary: This rule makes express the power of the Court to order production of evidence and to call witnesses. These powers are considered, in many countries, to inhere in the authority of a court in any event.

PART 10: OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE AND SANCTIONS FOR MISCONDUCT BEFORE THE COURT

Rule 126 bis Contempt of the Court

(A) Any person who

- (1) being a witness before a Pre-Trial or Trial Chamber, contumaciously refuses or fails to answer a question,
- (2) discloses information relating to those proceedings in knowing violation of an order of the Chamber,
- (3) without just excuse fails to comply with an order to appear before or produce documents before a Chamber, or
- (4) disrupts Court proceedings, refuses to comply with Court directions, or otherwise commits misconduct before the Court,

commits a contempt of the Court.

(B) When a Chamber has good reason to believe that a person may be in contempt of the Court, it may inform that person that he or she may be found to be in contempt. After affording such person an opportunity to appear and answer personally or by counsel, the Chamber may, if satisfied beyond reasonable doubt, find the person to be in contempt of the Court.

(C) The Penalty for contempt shall be a fine not exceeding ECU 100,000 for each day such contempt is found to exist. The Chamber may also impose other such administrative penalties, such as temporary or permanent removal from the courtroom, as the Chamber deems appropriate.

(D) Any person called upon for contempt shall, if that person satisfies the criteria for determination of indigency established by the Registrar, be assigned counsel in accordance with Rule 33.

(E) Any decision rendered under this Rule shall be subject to appeal in cases where leave is granted by the Appeals Chamber, upon good cause being shown, except as provided in Sub-Rule (F). Applications for leave to appeal shall be filed within fourteen days of the impugned decision. Where such decision is rendered orally, the application shall be filed within fourteen days of the oral decision, unless:

(1) the party challenging the decision was not present or represented when the decision was pronounced, in which case the timelimit shall run from the date on which the challenging party is notified of the oral decision; or

(2) the Pre-Trial or Trial Chamber has indicated that a written decision will follow, in which case the timelimit shall run from filing of the written decision.

(F) Payment of a fine shall be made to the Registrar.

(G) Nothing in this Rule affects the inherent power of the Court to hold in contempt those who knowingly and wilfully interfere with its administration of justice.

Source: ICTY Rule 77; ICC Statute Art. 71

Commentary: This provision is called for by article 71(2) of the Statute and is largely based on the Yugoslav rule. It lists the primary bases for contempt, noting in part (G) that the Court retains discretion to find other grounds for contempt.

The rule contains several safeguards against abuse of the contempt power. It provides for a formal hearing on the charge of contempt of court, and requires the Court to find contempt beyond a reasonable doubt. It also provides for representation by counsel in cases of indigency, and for a right of appeal to the Appeals Chamber.

The primary sanction for contempt is a fine, as opposed to imprisonment. The sanction may be ratcheted up in cases of ongoing contempt -- such as a continued refusal to answer despite a Court order to do so -- by extending the fine for each day of such disobedience. The Court may also order administrative penalties, such as exclusion from the courtroom in the case of a disruptive individual. We note that there may be circumstances where such penalties would be ineffective, such as against a witness who refuses to answer despite an order to do so, and remains unswayed by the threat of a fine because of either total poverty or enormous wealth. However, article 71(1) appears to restrict the ability of the Court to order a term of imprisonment

for contempt. If article 71 was not in fact intended to limit the Court's authority in this fashion, we would propose a provision allowing the Court to order imprisonment only in circumstances where it finds that all other measures would be ineffective in addressing the contempt.

Rule 126 ter Offences Against the Administration of Justice

(A) The Court shall have jurisdiction over the offences against its administration of justice set forth in Article 70 of the Statute, when those offences are committed intentionally.

(B) When a Chamber has good reason to believe that a person may have committed a violation specified in Article 70 of the Statute, it shall refer the matter to the Prosecutor for investigation, subject to the provisions of Section [2] of Part [3] of these Rules. The Prosecutor may also initiate a preliminary examination and investigation of offences under Article 70 in accordance with Part 3 of these Rules and Articles 14 and 15 of the Statute. The Prosecutor may also seek a warrant for arrest or summons to appear in accordance with Part [4] of these Rules.

(C) If the Prosecutor determines that there is a substantial basis for a prosecution, he or she may, subject to Rule [57(A)], charge one or more of the offences specified in Article 70, which shall be presented to a Pre-Trial Chamber for confirmation in accordance with Rule [58].

(D) The Rules of Procedure and Evidence in Parts [5] to [7] shall apply *mutatis mutandis* to pre-trial and trial proceedings under this Rule.

(E) No Judge who sat as a member of the Pre-Trial or Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.

(F) In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with Rule 106, or both.

(G) Appeals from Judgements or sentences under this Rule shall be subject to the provisions of Part [8] of these Rules.

Source: ICC Statute Art. 70

Commentary: This rule sets forth the provisions required by article 70. In general, this rule is designed to route the handling of offenses against the administration of justice into the standard procedures for criminal matters under these rules. Thus, it directs potential cases to the prosecutor's office for investigation and charging (the references to rule numbers in brackets are the rules of the original ABA draft). Such cases then proceed through the standard pre-trial, trial, and appellate phases.