

IBA ICC Programme Legal Opinion



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Rule 68 Amendment Proposal

Assembly of States Parties 12 November 2013

The International Bar Association (IBA) supports the adoption of the proposed amendments to Rule 68 of the Rules of Procedure and Evidence (RPE), but urges a cautionary approach to its implementation by the Chambers of the International Criminal Court (ICC or the ‘Court’), in recognition of fundamental fair trial guarantees and the integrity of the historical records of international crimes being established by the Court. Additionally, the IBA – as one of the foremost organisations engaged in monitoring the Court’s application of international fair trial standards in its proceedings and policies – will closely monitor the use of these new provisions to ensure that they are applied only in exceptional circumstances (in particular new sub-Rules 68(2)(c) and (d)), do not erode fundamental fair trial guarantees, nor are sought to substitute already-existing mechanisms to ensure witness protection and security.

The proposed amendments to Rule 68 are aimed at promoting the efficiency of the criminal process by ‘increasing the instances in which prior recorded testimony can be introduced instead of hearing the witness in person.’¹ Broadly speaking, the proposed amendments borrow heavily from the provisions and practices of the two *ad hoc* tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)), particularly those of the ICTY.

In terms of the express intention behind the proposal, however, the proposed amendments contemplate two quite distinct sets of scenarios: the first generally concerns – indeed, as

1 [Draft] Report of the Study Group on Governance, 20 September 2013, para 18.

outlined – the introduction of prior recorded testimony with the aim of *reducing the length* of ICC proceedings (proposed sub-Rule 68(2) (b)).² The second, however, is primarily designed to *overcome obstacles* to witnesses appearing in person to give evidence (proposed sub-Rules 68(2) (c) and (2) (d)).³

It should be stated at the outset that the contemplated admission of prior recorded ‘crime-base’ testimony (ie, pursuant to proposed new sub-Rule 68(2) (b)) is generally less controversial than the type of evidence purportedly admissible under proposed sub-Rules 68(2) (c) and (2) (d). The admission of crime-base testimony under the equivalent provision of the ICTY and ICTR RPEs has often assisted in reducing the amount of live witness testimony on less controversial issues (ie, undisputed facts) either within a case, or from one case to another. One notable difference, however, between the factual matrixes covered by ICTY and ICTR and those before the ICC, is that the *ad hoc* tribunals prosecuted numerous cases arising from the same geographical territories and conflicts (the former Yugoslavia and Rwanda, respectively). Suffice to say that before a court with global reach, limited resources and based on the principle of complementarity, the usefulness of this provision from one case to another before the ICC is likely to be more limited.⁴ Within a particular case, though, it may be of assistance in reducing the amount of repetitive evidence on uncontested facts, thereby contributing to the efficiency of proceedings.

The proposed amendments to Rule 68 are situated within a network of highly relevant legal provisions that regulate the admission of evidence before the ICC and guarantee the right to fair trial. For example, Article 69 of the Rome Statute generally governs the admission of evidence. Article 69(2) states that the testimony of a witness at trial *shall be given in person* subject to certain exceptions, provided that the implementation of any such exception is not ‘prejudicial to or inconsistent with the rights of the accused’. Article 69(4) introduces fundamental concepts in the determination of evidence admissibility and the weight afforded to it, if admitted, including the relationship between prejudicial and probative value and the place of fair trial considerations. Additionally, Article 67(1) (e) recognises that, as a fundamental fair trial guarantee, an accused person has the right to, *inter alia*, ‘examine, or have examined, the witnesses against him or her’. These texts also contemplate a witness testifying at trial via audio-visual means,⁵ as well as the need for the prosecutor, or the Pre-Trial Chamber to take steps to preserve evidence during the pre-trial phase of a case in circumstances where that evidence may

2 This sub-paragraph concerns testimony that ‘goes to proof of a matter other than the acts and conduct of the accused’ and is commonly known to refer to ‘crime-base’ evidence, such as – for example – evidence of the widespread and systematic nature of sexualised violence for the purposes of establish the core elements of a crimes against humanity charge; or evidence of mass killings of a particular ethnic group for the purposes of establishing genocidal intent.

3 Sub-paragraph (c) concerns testimony of a person who has subsequently died (or cannot otherwise be located); and sub-paragraph (d) concerns testimony of a person who has been subjected to improper interference (for example, of a physical, psychological, economic, or other nature). The collateral effect of the admission of such testimony would likely be to reduce the length of proceedings otherwise required for the witness/es to appear in person, but this is not the primary purpose of these particular provisions.

4 The ICC’s situation and case history thus far show investigation and indictment of limited suspects within the same geographical territory, and generally the most high-ranking individuals (politically or militarily-speaking), though ICC Prosecutor Fatou Bensouda’s recently-released strategy shows the intention to alter this past approach, instead investigating and targeting low to mid-level perpetrators also (www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf).

5 Art 69(2) of the Rome Statute. See also, Art 68(2) which provides for an exception to the principle of public hearings, when necessary ‘to protect victims and witnesses or an accused [...]’. See also, Rule 67 of the RPE which provides that a witness may give testimony ‘by means of audio or visual technology *provided that such technology permits the witness to be examined* by the Prosecutor, *the defence*, and by the Chamber itself, *at the time the witness so testifies*.’ [Emphases added].

no longer be available at a later time.⁶ Taken together, therefore, the relevant provisions of the ICC's legal texts clearly favour in-court witness testimony that has been tested through cross-examination. This is in conformity with international human rights standards.

The IBA welcomes the particular language in the proposed Rule 68 amendment text, which highlights the paramount nature of fair trial rights in consideration of the Rule's application.⁷ The IBA also welcomes the language in the proposed text that requires a determination of admissibility of material to be made only after the parties have been heard on the issues. The IBA also welcomes that part of the proposed Rule amendment that envisages a set of circumstances in which part of a witness' testimony might be admitted in written (or other) form with that witness appearing in person for further examination/cross-examination/re-examination by the Chamber and the Parties (Rule 68(3)).⁸ Taken together, these excerpts of the proposed amendments provide some built-in safeguards to the Rule's implementation.

Nonetheless, the proposals raise certain issues which underscore the need for their exceptional application, particularly in respect of proposed sub-Rules 68(2)(c) and (d). These include: (i) the broad category of material potentially admissible under the provision; and (ii) the fact that the proposed amendments contemplate the admission of untested evidence that 'goes to proof of the acts and conduct of the accused'.

Category of material for admission under new Rule 68

Proposed Rule 68(1) allows for the admission of 'previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony'. The proposal does not further define the type of audio or video testimony, transcript material or indeed 'other documented evidence' which could be admitted under the Rule. Proposed Rule 68(2)(b)(i) requires that the material 'has sufficient indicia of reliability' and is 'accompanied by a declaration' that conforms to certain technical requirements.⁹ Proposed sub-Rules 68(2)(c) and 68(2)(d) also require that the material 'has sufficient indicia of reliability' but do not provide further specification. Perhaps a drafting oversight, Rule 68(2)(b)(i) – which loosely concerns 'crime-base' evidence, or in the language of the provision, 'testimony [that] goes to proof of a matter *other than* the acts and conduct of the accused' – actually has more onerous technical requirements than Rule 68(2)(d), pursuant to which untested evidence that goes directly to the acts and conduct of the accused *could be* admitted.

6 Art 56 of the Rome Statute, entitled, 'Role of the Pre-Trial Chamber in relation to a unique investigative opportunity'. Sub-para (1)(b) recognises the need to protect the rights of the defence and to ensure the efficiency and integrity of the proceedings in such as case, including (para (2)(d)) by appointing counsel to represent an accused person's interests in such a case.

7 Proposed Rule 68(1) states that '...the Trial Chamber may [allow the admission of prior recorded testimony] [...] *provided that this would not be prejudicial to or inconsistent with the rights of the accused...*'

8 Of all of the equivalent amendments to the ICTY's RPE, the most commonly applied provision has indeed been this one (Rule 92 *ter*, which is the equivalent of proposed Rule 68(3)) which allows for the admission of a written statement (or transcript of evidence) while requiring a witness to appear for in-court cross-examination.

9 See Proposed Rule 68(2)(b)(ii).

The category of material potentially admissible pursuant to the proposed amendment is very broad, and notably broader than that admissible before either of the *ad hoc* tribunals under the provisions to which the proposed amendments generally correspond. Generally speaking, the equivalent provisions of the ICTY and ICTR RPE only allow for the admission of written statements and/or transcripts of proceedings which were given by witnesses *in proceedings before those tribunals*, except in respect of a witness who has subsequently died.¹⁰ Conversely, the proposed amendments to Rule 68 would allow for the admission of witness statements, audio recordings, video recordings and transcripts of proceedings from national jurisdictions and/or other fora. Undoubtedly, this has the potential to raise many issues for establishing ‘sufficient *indicia* of [the] reliability’ of such material,’ including around the provenance of the material. A significant amount of resources could be required to establish sufficient *indicia* of reliability, including for the opposing party to challenge the reliability, and this should certainly be considered in the context of the object and purpose of the Rule which is to promote the efficiency of the proceedings.

The admission of untested evidence which ‘goes to proof of the acts and conduct of the accused’

In relation to proposed new sub-Rules 68(2)(c) and 68(2)(d), the fact that the prior recorded testimony goes to proof of acts and conduct of an accused ‘may be a factor against its introduction, or part of it’. It is noteworthy that a similar provision to proposed sub-Rule 68(2)(d) (which concerns admission of prior recorded testimony in circumstances where a witness has been subjected to interference) appears in the ICTY RPE only (and does not appear in the ICTR RPE). Examples of the use – in practice – of the equivalent provision of the ICTY RPE (Rule 92 *quinques*) are negligible, at best. These proposals raise a number of concerns about the potential admission of untested evidence that goes directly to establishing the acts and conduct of the accused (albeit recognised in the proposed text that this may be a reason for not admitting the prior recorded testimony). Therefore, it is paramount to highlight the need for exceptional application of these provisions. Any provision that might facilitate the admission of evidence against an individual – particularly evidence central to the case against them – in the absence of affording that person an opportunity to test the evidence, should be applied in the most exceptional of cases. In fact, it is difficult to conceive of a case in which such evidence could be used as the (unique) basis for conviction (or indeed to establish an instrumental adverse fact) without resulting in an unsafe verdict.

10 For example, Rule 92 *bis* of the ICTY RPE – which generally equates to the new Rule 68 (2)(b) – refers to ‘a written statement or a transcript of evidence,’ which was *given by a witness in proceedings before the [ICTY]* [emphasis added]. Rule 92 *ter* of the ICTY RPE – which generally equates to the new Rule 68 (3) – also uses this language. Rule 92 *quater* of the ICTY RPE – which generally equates to the new Rule 68(2)(c) – refers to ‘a written statement or transcript’ of a person who has subsequently died, etc, and the ‘circumstances in which [it] was made and recorded [are] reliable’. Rule 92 *quinques* – which generally equates to the new Rule 68(2)(d) – also refers to ‘a written statement or a transcript of evidence, which was given by a witness in proceedings before [the ICTY]’ and states that in considering whether the interests of justice are served by the admission of the material, the Chamber should have regard to the circumstances in which it was made and recorded.

Rule 92 *bis* (A) of the ICTR RPE refers to the admission of the evidence of ‘a witness in the form of a written statement’ which meets certain technical requirements (proscribed by paragraph (B)), and waives the technical requirements in circumstances where the maker of the statement has subsequently died etc, and ‘the circumstances in which [it] was made and recorded [indicates] satisfactory *indicia* of its reliability’. Rule 92 *bis* (D) – which generally equates to the new Rule 68 (2)(b) – refers to ‘a transcript of evidence *given by a witness in proceedings before [the ICTR]*.’

Conclusion

- In recognition of both the principle of orality and the exceptional nature of any provision which limits the right of the accused to cross-examination, *the IBA urges the Trial Chambers to exercise caution* in its application of Rule 68, particularly vis-à-vis sub-Rules 68(2)(c) and (2)(d). Sub-Rules 68(2)(c) and (2)(d) should be evidentiary mechanisms of last resort, in deference to live testimony via video-link and/or the taking of depositions with representatives of both prosecution and defence having the opportunity to question witnesses.
- Proposed sub-Rules 68(2)(c) and (2)(d) (and in particular sub-Rule 68(2)(d)), *should not be used* as a ‘back-door’ substitution for victim and/or witness protection mechanisms which already exist before the ICC. In this respect, the IBA recalls its recent recommendations calling upon the ICC Registry, States Parties and other stakeholders to strengthen the Victims and Witnesses Unit (VWU). It also welcomes the steps taken thus far by the Registry and others to assess the performance of the VWU and to strengthen its management and overall capacity.
- The IBA will closely monitor implementation of all proposed amendments to Rule 68 with a view to ensuring its cautionary use, and ensuring the integrity of ICC trial records.

– ENDS –

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