

# Admissibility of Illegally Obtained Evidence in Proceedings before International Criminal Courts

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## 1 Introduction

Without any doubt, the subject of the admissibility of illegally obtained evidence in proceedings before international criminal courts is a complicated and controversial one. This complexity is reflected in the very multiplicity of solutions existing in various countries<sup>1</sup> and the number and nature of controversies around the possibility of using illegal evidence in a trial, including those which affect its legitimacy. The discussed subject is of equal importance for criminal proceedings heard by domestic courts and international criminal courts. It is thus worth attempting to answer the question of whether or not an illegally obtained piece of evidence may be used in proceedings before an international criminal court. The analysis presented by this paper will be limited to the core international criminal justice system and cover proceedings before the Yugoslavia Tribunal, the Rwanda Tribunal and the International Criminal Court.

## 2 Admissibility of Illegally Obtained Evidence in the Light of the ICC (Rome) Statute and the Rules of Procedure and Evidence of the Yugoslavia and Rwanda Tribunals

At the outset, the rules on the admissibility of illegally obtained evidence laid down in the ICC Statute and the Rules of Procedure and Evidence applicable to proceedings before the ICC, Yugoslavia Tribunal and Rwanda Tribunal should be discussed. It must be noted that neither the ICC Statute nor the Rules of Procedure and Evidence of the said criminal tribunals explicitly use the expression “illegally obtained evidence”. However, Article 69(7) of the ICC Statute provides that any evidence obtained by means of a violation of the Statute or of internationally recognized human rights is inadmissible. The provision in question does not refer directly to the notion of illegality but indicates the

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<sup>1</sup> Cf. e.g. S. Thaman (ed.), *Exclusionary Rules in Comparative Law* (2013).

types of illegal evidence which, as a rule, may not be used in a trial. At the same time, Article 69(7) states that evidence will be inadmissible only in a situation where the violation of the Statute or human rights casts substantial doubt on the reliability of the evidence or where the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.<sup>2</sup> This approach implies the conclusion that questions of illegally obtained evidence should be reviewed at the stage of the admission of evidence and not during its assessment. It is thus worth noting that Article 69(4) of the ICC Statute reads that 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. ICC Rules of Procedure and Evidence, Rule 64, provides that an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to the Court. Exceptionally, when those issues were not known at the time when the evidence was submitted, they may be raised immediately after the issue has become known. The Chamber may request that such an issue be raised in writing. This written motion should then be communicated by the Court to all parties participating in the proceedings, unless otherwise decided by the Court. Evidence ruled irrelevant or inadmissible may not be considered by the Court's Chamber.

Unlike Article 69(7) of the ICC Statute, the Rules of Procedure and Evidence of Yugoslavia and Rwanda Tribunals fail to mention any concrete categories of inadmissible evidence. The Rules contain only general provisions on the inadmissibility of evidence. In the Rules of Procedure and Evidence applicable at the Yugoslavia Tribunal, the issue of admissibility of evidence is governed principally by Rules 89(C) and (D) which provide that the Tribunal's Chamber may admit any evidence with probative value which is relevant to a case. A Chamber may also exclude evidence if the need to ensure a fair trial substantially outweighs its probative value. On the other hand, Rule 95 provides that no evidence is admissible if it has been obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda contain

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2 Interestingly, as the ICC Statute was under development, a proposal was made to create a rule obliging the exclusion of evidence obtained in violation of human rights. However, such a rule was considered too broad. Cf. H.J. Behrens, "The Trial Proceedings", in R.S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute: Issues, Negotiations and Results* (1999) p. 246.