

## APPENDICES

# BASICS OF INTERNATIONAL CRIMINAL LAW

## APPENDIX 1

### INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

This section outlines the basic concepts and history of international criminal law in practice over the past several decades. It is not a substitute to a law, history, or international relations degree, and to supplement your knowledge, you are encouraged to consult the resources and organizations listed throughout this guide.

As you start developing a trial monitoring program, it is important to know the trial you are working on is not happening in isolation. There are multiple ways in which the system of international criminal justice has developed over time. Having a basic understanding of this background will help you better appreciate the current context in which atrocity crimes trials are happening.

#### Terminology

The language used during atrocity crimes trials can be highly complex. It is important for you, the trial monitor, to understand the terms being used in the courtroom so you can better inform your audience. There are glossaries of legal terms available, such as <https://www.ijmonitor.org/glossary-of-legal-terms/>. Here we cover some of the basic terms.

The trials you monitor may concern a variety of specific crimes, ranging from torture to violations of immigration law. There are three broad categories of crimes that you are likely to come across regularly:

- War crimes;
- Crimes against humanity; and
- Genocide.

These are crimes either under treaty law or under customary international law. Treaty law exists when states have signed on to an international agreement. Customary international law is the unwritten

body of law that has developed through consistent state practices that, according to the International Committee of the Red Cross, are so “widespread, representative and virtually uniform” that they are universally accepted as general rules by which states are bound. The terms “war crimes,” “crimes against humanity,” and “genocide,” as well as other important terms, are defined below, in alphabetical order.

## **Complementarity**

Complementarity is a principle enshrined in the Rome Statute of the International Criminal Court, which states that the ICC “shall be complementary to national criminal jurisdictions.” It means that the ICC can only investigate and prosecute crimes under its jurisdiction when national institutions are unable or unwilling to do so genuinely.

## **Crimes Against Humanity**

Under the Rome Statute, crimes against humanity are defined as:

“[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer of population;
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- Enforced disappearance of persons;
- The crime of apartheid;
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

Crimes against humanity can be committed during war or peacetime.

## Fair Trial Rights

Any accused is entitled to a fair trial. The fair trial principle contains a set of rules that protect anyone who is accused of a crime, including:

- Right to a public hearing
- Right to a legally-constituted, competent, independent, and impartial tribunal
- Right to appeal
- Right to be defended by a lawyer and to legal aid
- Right to be presumed innocent until proven guilty according to the law
- Right to a reasoned judgment
- Right to an equal position to make their case under conditions that do not place them at a substantial disadvantage to the prosecutor
- Right to a trial within reasonable time
- Right to know what the charges are
- Right to remain silent
- Right to have time to prepare the defense
- Right to attend the trial

Some of those rights can be restricted for certain reasons. For example, hearings can be closed to the public if it is necessary to protect a witness.

The fair trial principle is enshrined in many international treaties and national constitutions. The detailed rules are mostly based on domestic laws and international jurisprudence.

## Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide came into effect in January 1951.

The treaty defines genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.” These acts include:

- Killing members of the group
- Causing serious bodily or mental harm to members of the group
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- Imposing measures intended to prevent births within the group
- Forcibly transferring children of the group to another group.

More than 130 nations have ratified the 1951 treaty, requiring them to take measures to prevent and punish actions of genocide committed in war or in peacetime. However, it was many years later with the establishment of international criminal tribunals, which included genocide as a crime in their statutes, that prosecutions took place.

## **International Humanitarian Law**

International humanitarian law is a set of rules that intends to limit the harmful effects of an armed conflict by protecting certain people and prohibiting certain methods of warfare. It is not based on a single document; instead, it is based on a series of conventions, including what is generally referred to as the Geneva Conventions, which define many of the rules.

International humanitarian law does not regulate whether a state may or may not wage war. Instead, it applies to all parties to the conflict once an armed conflict is underway. Its aim is to limit civilian casualties and to minimize suffering.

## **Modes of Liability**

This is an evolving field. It focuses on which individual is responsible and thus can be prosecuted for a crime. This depends on how the person is linked to the crimes.

Crimes can be committed directly by a person. They can also be committed by several people together according to a joint plan, making all of them responsible. A person who orders or helps another person to commit a crime can also be responsible for that crime. If a commander or leader has control over someone who commits the crime, the commander or leader can be responsible if he or she knew about the crime and did not prevent it or punish the direct perpetrator.

These are examples of different modes of liability. They depend on the law that applies in each case. For example, if it is a domestic court, it will use domestic laws.

Sometimes the technical aspects of a case need to be the focus of the monitoring and form the basis of your reporting. Misinformation based on misunderstanding can spread quickly. Getting the balance between complex legal language and clarity is not always easy.

### **Example: Explaining Modes of Liability**

In this example, the report examines the issue of modes of liability in a case at the International Criminal Court. The defense lawyer is submitting that the pre-trial chamber did not adequately link the defendant to the crimes as charged. For an audience that was not reading the full submission itself, the report needed to provide sufficient context to explain the defense submission.

“[The defense lawyer, Odongo] said Pre-Trial Chamber II’s decision confirming the charges did not specify Ongwen’s role in relation to some of the charges. Odongo said the decision also did not define Ongwen’s intent when allegedly committing those crimes he has been charged with. In the language of the Rome Statute, the ICC’s founding law, these are the modes of liability.

Odongo said there are counts Ongwen has been charged with that are broad and have many elements to them, but the decision confirming the charges does not specify which of those elements apply to him...‘In plain language, does the CoC [Confirmation of Charges] Decision articulate or ‘make out’ the elements of the crimes and modes of liability charged against Mr Ongwen and support each element with factual allegation?’”



<https://www.ijmonitor.org/2019/02/defense-asks-judges-to-dismiss-41-counts-against-ongwen/>

## Sexual and Gender-Based Crimes

Sexual crimes can include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

Gender based crimes are those crimes committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.

**“It’s important to recognize that sexual violations aren’t just limited to wartime, but are deeply rooted in discrimination and structural issues in every society. Sexual and gender crimes are characterized by humiliation and domination.”**

**Alix Vuillemin Grendel**, Senior advisor at Women’s Initiatives for Gender Justice

It is important to know the context in which sexual violence occurs and why it is being prosecuted as an international crime.

### Example: Sexual Violence as a Crime Against Humanity

Below is an excerpt from a report about a trial in a national court discussing sexual violence as a crime against humanity.

“A court in Guatemala has found two former senior military officers guilty of crimes against humanity in a case involving murder, sexual slavery and other atrocities committed at the Sepur Zarco army base in the east of the country in 1982 and 1983...

In delivering the judgment to a crowded courtroom on Friday, February 26, presiding judge Yassmin Barrios said that rape had been deliberately used at Sepur Zarco as a weapon aimed at destroying the local indigenous Maya Q’eqchi’ community.

The Sepur Zarco trial is the first known example of the prosecution in a national court of the crime of sexual slavery during armed conflict as a violation of international humanitarian law.”



<https://www.ijmonitor.org/2016/02/guatemala-court-finds-both-sepur-zarco-defendants-guilty/>

## Transitional Justice

Transitional justice comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past human rights abuses, in order to ensure accountability, serve justice, and achieve reconciliation.

Traditionally, there have been four pillars or approaches to transitional justice. These are: criminal prosecution, reparations, establishing truth, and guarantees of non-recurrence.

## Universal Jurisdiction

Universal jurisdiction usually refers to a situation where a state is allowed under its domestic laws to prosecute crimes committed outside of its territory. The specific crimes covered by universal jurisdiction and the requirements to be met for prosecution vary, depending on the laws of each state. In many states that have passed legislation recognizing war crimes, crimes against humanity, and genocide, the laws allow the prosecution of these crimes even if they are committed abroad.

Most states can prosecute such crimes (even when committed abroad) if the perpetrator is their own national. Some states also allow this if the victim is their own national. A few states can prosecute such crimes even if neither the perpetrator nor the victim is their own citizen. In such states, however, the authorities often require that the perpetrator is located in their country. In addition, some treaties, such as the Convention Against Torture, require states to prosecute or extradite perpetrators if they are found in their country.

## War Crimes

A war crime is a serious violation of international humanitarian law (which is a mixture of multilateral treaties and customary international law) committed during an international or non-international armed conflict.

Under the Rome Statute—the treaty that established the ICC—war crimes include grave breaches of the Geneva Conventions, such as willful killings and torture, among other acts. It also includes other “serious violations of the laws and customs applicable in international armed conflict.” A non-exhaustive list of examples includes:

- Intentionally directing attacks against the civilian population
- Pillaging a town or place

- Committing outrages upon personal dignity, in particular humiliating and degrading treatment
- Committing rape, sexual slavery, enforced prostitution, or forced pregnancy
- Intentionally using starvation of civilians as a method of warfare
- Conscripting or enlisting children under the age of 15 years into armed forces or using them to participate actively in hostilities.

## **APPENDIX 2**

# **INSTITUTIONS**

Institutions dealing with atrocity crimes may be national, international, or a hybrid of the two, and may deal with many different types of crimes.

### **Why Use Courts to Address Atrocity Crimes?**

Most people have heard of the International Criminal Court, based in The Hague, the Netherlands. It came into being in July 2002 and is the first permanent international court for trying individuals accused of international crimes.

However, establishing the ICC took a long time, and its powers are limited because it is based on a treaty. It is worth understanding what came before it, as well as what other courts exist. Listed below are some of the courts that have addressed or currently are seeking to address atrocity crimes.

### **Nuremberg**

At the end of World War II in 1945, Allied governments created the International Military Tribunal in Nuremberg, Germany and indicted 24 Nazi leaders. This was the first time that leaders of a major state had been put on trial by the international community for committing crimes against peace and humanity. It was a watershed in strengthening the rule of law internationally by acknowledging the existence of crimes against humanity. A similar court was created in 1946, the International Military Tribunal for the Far East, in order to prosecute Japanese war criminals.

After Nuremberg, there was renewed determination to ensure that such crimes would never again go unpunished, and a new body of international rules on the conduct in war was created. However, for nearly half a century, until the ICC came into being, there was no permanent international court to enforce these rules.

### **UN Tribunals**

There have been ad hoc (meaning temporary) UN tribunals.

In May 1993, the UN Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY). It was the first atrocity crimes tribunal since Nuremberg. A year later, in November 1994, following the genocide in Rwanda, the Security Council voted to create the International Criminal Tribunal for Rwanda (ICTR).

Both tribunals had a mandate to try atrocity crimes suspects from all sides of the conflict, but only a limited number—those most responsible—could be pursued because of limited resources.

At both the ICTY and ICTR, prosecutors investigated and brought indictments, which had to be confirmed by the judges. Trials were conducted in an adversarial manner, with prosecutors and defense lawyers presenting their arguments to judges. With no jury, the judges handed down the final decision.

The ICTY, based in The Hague, has indicted people from all ethnic groups and all sides involved in the wars in the former Yugoslavia, including former Yugoslav President Slobodan Milosevic.

The ICTR was headquartered in Arusha, Tanzania, with the prosecutor having offices in both Arusha and Kigali, Rwanda. Its legacy includes indicting members of the extremist Hutu leadership.

Both tribunals are now closed, but the remaining functions of both are being carried out by the International Residual Mechanism for International Tribunals, based in The Hague and Arusha.

## **Hybrid Courts and War Crimes Chambers**

These are locally based courts, sometimes with international involvement or specialized mandates.

### **Special Court for Sierra Leone**

Sierra Leone's brutal war, which included mass killings, mutilations, and sex crimes, ended in 2002, with international commitment to support a court to punish the worst perpetrators.

To avoid the expense of establishing a new UN tribunal and to ensure that the justice meted out would resonate in Sierra Leonean society, the UN and the government of Sierra Leone agreed to establish the Special Court for Sierra Leone (SCSL) with both Sierra Leonean and international staff, judges, prosecutors, and defense lawyers. The court was based in Sierra Leone's capital, Freetown.

Like the ICTY and ICTR, the SCSL has jurisdiction over international crimes—war crimes and crimes against humanity—as well as crimes under Sierra Leonean law, which include abusing girls under 13 years of age and setting fire to public buildings and dwellings. Genocide was not listed in the court's statute because it is not believed to have taken place in Sierra Leone.



## Extraordinary Chambers in the Courts of Cambodia

A similar hybrid court was created in Cambodia based on an agreement between the UN and the Cambodian government for trials of the few surviving Khmer Rouge leaders, who were responsible for the deaths of at least 1.7 million people during four years of terror from 1975 to 1979. Based in the capital Phnom Penh, the Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the Khmer Rouge Tribunal, has both Cambodian and international staff, judges, prosecutors, defense lawyers, and victims' representatives.

The court began operating in 2006 and has jurisdiction over the same international crimes as the ICTY and ICTR, including genocide, and over crimes under Cambodian law.

## Extraordinary African Chambers

After heavy lobbying by victims' groups and massive research by human rights investigators, the Extraordinary African Chambers was established under an agreement between the African Union and Senegal to try atrocity crimes committed in Chad between 1982 and 1990 under the regime of former Chadian President Hissène Habré. The Extraordinary African Chambers opened in 2013 in Dakar, Senegal.

## Other Hybrids

In East Timor, the United Nations Transitional Administration established Special Panels, which were specialized units with international staff, but within the local judicial system, to hold war crimes suspects accountable.

In Bosnia and Herzegovina, in the former Yugoslavia, a War Crimes Chamber has been established in close cooperation with the ICTY, and with international staff to try those responsible for crimes committed during the wars in the Balkans. Prosecutions have included individuals whom the tribunal in The Hague considers too low-level for it to deal with.

In neighboring Croatia and Serbia, the judicial systems have also been given international support to overhaul their courts to meet European standards so that they can run effective war crimes trials on their own.

In Iraq, former president Saddam Hussein and other top Iraqi leaders were tried at the Iraqi High Tribunal created jointly by the US-led Coalition Provisional Authority and Iraqi officials.

Other examples include numerous trials involving atrocity crimes in Kosovo run by the United Nations Mission. And more recently, a new set of chambers—part of Kosovo's national system, but based in The Hague with only international judges and staff—has been established to look at atrocity crimes committed during and in the aftermath of the 1998-1999 Kosovo conflict.

## National Courts

Many national jurisdictions are taking on atrocity crime trials. Below are two examples.

Uganda has adopted many of the provisions on the Rome Statute into its domestic law and created its own International Crimes Division (ICD) as part of the High Court of Uganda. The ICD deals with terrorism cases, as well as war crimes, crimes against humanity, and genocide. It was established in 2008 as a fulfillment of the peace agreement signed between the government of Uganda and the Lord's Resistance Army rebel group. However, it has taken several years to get started, and only one trial for atrocity crimes has been brought.

In Guatemala, the International Commission against Impunity in Guatemala was established by the Secretary-General of the UN and the government of Guatemala in 2006. Although its mandate primarily focused on the investigation and prosecution of corruption, the creation of high-risk courts in the domestic judiciary also led to several trials for atrocity crimes committed during the country's 36-year internal armed conflict.

This is a non-exhaustive list, intended to provide some sense of the range of efforts to address atrocity crimes.

## International Criminal Court

The aim of the International Criminal Court is to try individuals most responsible for atrocity crimes. It is the first permanent court with a global mandate to investigate and try such cases. Until 2002, when it came into being, war crimes trials had been conducted by domestic courts or under the auspices of temporary international or hybrid tribunals.

The Rome Statute—the treaty that established the ICC—was adopted by an overwhelming majority of UN states on July 17, 1998. However, the court could only start operating once 60 countries had ratified the treaty, which took another four years.

The ICC is empowered to try war crimes, crimes against humanity, and genocide. It can also examine aggression, under very strict circumstances.

Contrary to popular belief, it does not have the power to prosecute anyone, anywhere in the world for atrocity crimes. It can only try crimes that were committed after July 2002 and only has jurisdiction over crimes committed in states that have ratified the Rome Statute, or over nationals of those states. However, the UN Security Council can refer to the ICC a state that has not ratified the Rome Statute. Non-member states can also accept the ICC jurisdiction on their own initiative.

A case could be triggered by the court's independent prosecutor, by a country, or by the UN Security Council. As a court of last resort, ICC investigations will only proceed if the court is convinced that the country concerned is unwilling or unable to carry out a trial. Opposition to the court from permanent members of the UN Security Council with veto powers, including the United States, Russia, and China, has meant that referrals from the UN Security Council are very limited.

## **Trust Fund for Victims**

The Trust Fund for Victims is an independent body affiliated with the ICC and has two major functions. It assists victims, for example by giving material support for education and vocational training and access to physical and psychosocial rehabilitation, which is overseen by an independent board of directors. Support for the Trust Fund for Victims comes from governments, foundations, and private donors. The second function is to administer any reparations the court has ordered convicted persons to pay.

## **APPENDIX 3**

# **COURT PROCEDURE**

This appendix explains what happens during a trial. All courts are different, but the processes you will have to deal with are similar. The terms are presented below in roughly the chronological order in which judicial processes usually unfold.

## **Indictment**

An indictment is a detailed list of the crimes a suspect is alleged to have committed. The indictment describes the facts of the case, the evidence gathered to date, and the applicable law. The indictment can go by different names in different jurisdictions; for example at the ICC, an indictment is called the "document containing the charges," and elsewhere it may be known as a "charge sheet."

Once an indictment is issued, it often becomes a public document, and you can quote from it. However, there may be elements of an indictment that are redacted, or not available for the public. It is important to read this document carefully because the information in the indictment forms the basis for your future reports. At this stage, you can describe the suspect as (for example) "a war crimes suspect," but never forget that an accused person is innocent until proven guilty.

An indictment can contain useful background information and lists the charges against a person as a number of "counts." Generally, an incident or series of incidents is described and the counts relating to that incident are listed. Some of the people on trial at the ICC have tens of counts against them.

An indictment is usually prepared by prosecutors at the end of their investigation and before a trial. It serves as the basis for what needs to be proven at trial to convict this person. In some jurisdictions, the indictment issued by the prosecutor has to be confirmed by the judge(s) before the case can go to trial.

## **Sealed Indictment**

In some cases, the names of the individuals and the charges against them are not made public in the indictment. A sealed indictment provides the prosecution a better chance of arresting the indicted person. It is common practice at many tribunals.

## **Warrant for Arrest**

An arrest warrant is a document issued by a court or a prosecutor that gives the police permission to arrest someone because that person is suspected of having committed certain crimes. The arrest warrant usually sets out who the suspect is, what the alleged crimes are, and why this person needs to be arrested, such as if the person is a flight risk.

Arrest warrants are not issued in every single case. If the suspect voluntarily comes before the police, prosecutor, or court, they do not need to be arrested but can simply be summoned. Summonses can also be unconditional or conditional; for example, a judge can order a summons be issued with the condition that the suspect not interfere with witnesses either directly or indirectly.

Arrest warrants can be issued at various stages of an investigation, depending on the applicable law. If the suspect is arrested based on an arrest warrant, they can be detained until the trial starts (called pre-trial detention), or released (usually under certain conditions) until the trial begins. Pre-trial detention or pre-trial release usually require approval by a judge.

## **Initial Appearance**

A suspect will usually make an initial appearance before the court, after an indictment has been issued but before the trial begins. This may be to state their identity, be informed of their rights, and to set a date to confirm the charges. Suspects will already have been given time to choose a defense lawyer.

## **Pre-trial Proceedings**

The period before the start of the trial is often called the pre-trial stage. More detailed information about the charges against the defendant often becomes available during the pre-trial phase.

During the pre-trial proceedings, different procedural steps may be taken. The indictment is confirmed by judge(s) where the law requires

this. This is also when the prosecutor usually discloses to the defense the evidence they want to use at trial, so the accused can prepare his/her defense. In some courts this is the point when the pre-trial chamber or single judge may order that assets of the accused be frozen.

### Example: Capturing the Details

This report, regarding a guilty plea at the ICC, provides details of exactly what was said in court, and context about what will happen next.

“Ahmad Al Faqi Al Mahdi has informed the International Criminal Court (ICC) that he would like to plead guilty to a single war crime charge of destroying or partially destroying historic buildings in the northern Mali city of Timbuktu. Al Faqi informed the court of his decision on March 1, but the details of what he said have only become public this week.

The Malian Islamic rebel leader made his intention known during a hearing Pre-Trial Chamber I held on March 1 to listen to the prosecution argue why the chamber should confirm the charge against him. During the pre-trial phase of a case, a suspect is not required to enter a plea. The focus of the pre-trial phase at the ICC is on whether the prosecution’s evidence shows there is ‘substantial grounds’ for a case to go to trial.”



<https://www.ijmonitor.org/2016/03/al-faqi-tells-chamber-he-intends-to-plead-guilty-to-war-crime-charge/>

## Opening

The prosecution opens, or begins, the trial by explaining the charges and outlining the case. The defense replies. That pattern continues throughout the trial: prosecution first, followed by defense. These initial arguments are sometimes called opening briefs or statements, and they spell out what each side is setting out to prove. They can contain a lot of useful information. In some jurisdictions, lawyers representing victims can also make an opening statement, and sometimes the accused may make an unsworn statement during the opening of a trial.

There may have been meetings before the trial, to sort out technical disputes. These can be more interesting than they may sound: a suspect may be preparing to change a plea to guilty, for instance. The technical side of the trial is guided by the statute and procedures of the tribunal—and these can change. The judges can meet to try to streamline the procedures. It is important to stay on top of any changes.

**“Different judges run their courtrooms in different ways. At the Ongwen trial at the ICC, the presiding judge, Judge Schmitt, is very hands-on and tries to make all the parties stick to time.”**

**Tom Maliti**, Trial monitor for OSJI

## Presentation of Evidence

Depending their arguments, the prosecution and defense may produce evidence in court to support their theory of the case; for example, they can call witnesses or present recordings or documents that show the role of the accused. The prosecution presents its evidence first, then the defense picks away at that material, trying to show that the prosecution does not have enough proof.

The key way that lawyers from each side try to prove their case is by presenting evidence through witnesses, documents, objects, and, increasingly, other data obtained with new technology. Witnesses can appear in person, remotely via video link, or may submit a written statement. Other evidence can come from documents, such as military orders. Some witnesses are termed “expert” witnesses and provide the court with insight into a specific issue. Expert witnesses are people who did not see or hear anything directly about the alleged crime or the accused, but who have expertise on a specific topic, such as military structure, that is important to the case.

The presentation of evidence is the heart of the trial. It is very important to be able to convey accurately what has been said in court, to pick the most important quotes, and to put daily developments into context for your audience.

## Witness Questioning

Each witness testifies by answering questions. In the case of a prosecution witness, the prosecution starts asking questions first. In the case of a defense witness, the defense will question the witness first. When the calling party questions their own witness, it is referred to as direct examination. After that, the other party can ask questions, which is called cross-examination. If needed, sometimes the calling party will ask further questions of their witness, which is known as re-direct examination. In some jurisdictions, the judges and victims’ lawyers can also ask questions.

There can be a lot of robust cross-questioning and if there are several defendants, with several lawyers, they can keep a witness on the stand for hours, if not days. The idea is to give the judges ample opportunity to decide whether a witness is reliable or not.

At the ICC, witnesses will have been made familiar with the courtroom setting by courtroom officials before they testify. In general, lawyers will know what their witnesses will be saying. In some cases, they will have met their own witness to talk through the questions and make sure they know the answers. They will also have tried to anticipate the questions the other side will ask. However, in some court systems this practice, also known as “witness-proofing,” is not allowed.

## Protected Witnesses

Witnesses are often worried about possible retaliation and do not want their identities known to the public. The court can offer a range of measures to help protect them, including giving them a pseudonym, concealing their face, disguising their voice, or allowing them to testify behind closed doors. The court may also assist with relocating especially sensitive witnesses. Journalists have been charged with contempt for their roles in revealing the identities of protected witnesses. Any trial monitor could likewise be held in contempt for revealing details related to the identity of protected witnesses.

### Example: Covering Witness Testimony

In the trial at the ICC of former DRC Vice President Jean Pierre Bemba, witnesses for the defense were cross-examined by the prosecution about why they had not told their stories earlier to the prosecution.

“A former soldier in the militia group led by Jean-Pierre Bemba today told International Criminal Court (ICC) judges that he refused to meet with prosecutors because he feared he would be prosecuted....

‘Witness D04-13’ is the 34th defense witness in Mr. Bemba’s trial. He was part of the contingent of Movement for the Liberation of Congo (MLC) fighters who intervened in the Central African Republic during 2002 and 2003....

Prior to the opening of the defense case, Mr. Bemba’s lawyers said that unlike prosecutors, they intended to call witnesses who had ‘tangible knowledge’ of the five-month period during which the accused’s soldiers were deployed in the conflict country. However, the defense has in the past stated that some of its witnesses had a fear of self-incrimination....

Most of the prosecution’s questioning of ‘Witness D04-13’ was done in closed session. He is testifying via video link from an undisclosed location with his image and voice distorted in order to conceal his identity.

Also today, prosecutors questioned the witness about inconsistencies between his testimony and documents tendered by the prosecution about the date on which the MLC arrived in the conflict country.”



<https://www.ijmonitor.org/2013/11/former-mlc-soldier-says-he-was-scared-of-being-prosecuted/>

## Evidence via New Technology

Investigators and prosecutors are becoming more adept at using new technology in situations where atrocities have occurred. Satellite imagery may offer evidence regarding the destruction of villages.

Analysis of telephone call data is used to link suspects to crime scenes. Recordings of crimes shared on social media may be used. Independent journalists and investigators are specializing in the analysis of such evidence. Human rights groups and lawyers have been working on mechanisms for activists to safely share material and to establish standards by which such evidence can be judged and clearly understood. While this evidence is still relatively new to courtrooms, it is important to be aware of and document how it is used.

**“I'm starting to see more technological evidence in the trials I monitor at the ICC. There are lots of challenges though: where does the evidence come from, how can the courts have robust mechanisms to prevent manipulation and do the judges understand how to evaluate it?”**

**Tom Maliti**, Trial monitor for OSJI

## Closing Arguments

Once all of the evidence has been presented and the prosecution and the defense have made their cases, the two sides will use their closing arguments to again tell the judges why the defendant is guilty or not guilty of the charges. This is another important moment in the trial. Each lawyer will summarize the most salient points they have made and will try to dismantle their opponent's case. In some jurisdictions, this is accompanied by a written submission. These can be very useful summaries for trial monitors.

In some countries, victims can give a statement about how the crime affected them, called a victim impact statement. It is used by the court to determine the guilty party's sentence. Sometimes the accused may also make an unsworn statement during the closing stage of the trial.

## Judgment and Sentence

The judges normally have a set period for delivering a verdict, so you should know when to expect it. This is often the most important part of the trial, and you have to be prepared. The judgement has three main elements:

- whether the person is guilty or not guilty of all or any of the counts against them;
- what sentence they may have to serve; and
- the judges' reasons for coming to this conclusion.

The sentence may be given immediately after a judgment, or may be delivered at a later date. The judges can decide to take into account factors such as the degree of remorse an accused has expressed, the gravity of the crimes, and the degree of the convicted person's



participation in the crimes. In the case of a guilty verdict, some jurisdictions also allow victims of the crimes to request the court to order reparations for their benefit.

**“It's important to read carefully how judges have decided on a particular sentence. They can look at all kinds of factors. At the ICC, they've really taken into account how a convicted person has behaved and whether they've expressed remorse. They also consider the gravity of the crimes, [and] the degree of an accused person's participation in their commission. But where there are many counts charged, it is important to understand on which ones a person was convicted, and whether they committed the crime directly or through other people.”**

**Wakabi Wairagala**, Trial monitor for OSJI

If the defendant is found not guilty of all crimes, judges can order the immediate release of the defendant. In some places, the defendant is entitled to compensation for the time spent in detention before and during trial under certain conditions.

## Reparations

In some jurisdictions, in case of a guilty verdict, victims of crimes are entitled to reparations. Reparations can take various forms, including monetary relief, rehabilitation programs, and symbolic measures. Courts can order reparations directly to individual victims, or they can be collective, meaning they can benefit an entire community that has been affected by atrocity crimes.

## Appeal

After a judgment, one side or the other—or sometimes both—may want to challenge the verdict. A different set of judges is usually tasked with hearing the appeal and rendering a final decision. In some jurisdictions, victims may have the right to appeal as well.