

## Max Planck Encyclopedias of International Law



### **Documentary Evidence**

**Miriam Cohen**

**Content type:** Encyclopedia entries

**Product:** Max Planck Encyclopedias of International Law [MPIL]

**Module:** Max Planck Encyclopedia of International Procedural Law [MPEiPro]

**Article last updated:** January 2022

**Subject(s):**

Admissibility of evidence — Burden of proof — Production of documents — Standard of proof

Published under the direction of H el ene Ruiz Fabri, with the support of the Department of International Law and Dispute Resolution, under the auspices of the Max Planck Institute Luxembourg for Procedural Law.

## A. Introduction

**1** This entry examines ‘documentary evidence’ from a comparative perspective within different international courts and tribunals. It aims to provide a comparative account and a critical assessment of the rules and practice governing the collection, admissibility, and assessment of documentary evidence. Within international dispute settlement mechanisms, the term ‘documentary evidence’ is commonly understood to refer to all evidence that is not testimonial. In other words, documentary evidence ‘before international courts and tribunals comprises all information submitted by the parties in support of the contentions contained in the pleadings other than expert and witness testimony’ (Wolfrum and Möldner, 2013, para 26). This entry thus excludes the discussion of rules and principles applicable to witness and expert testimonial evidence.

**2** Depending on the cases heard by different tribunals, different types of documentary evidence may be used, such as maps in inter-state boundary disputes, forensics in international criminal trials, and affidavits, as a substitute for oral testimony, which are regularly submitted in proceedings before international tribunals. The question of what is understood as ‘documentary’ evidence has been interpreted broadly as including various types of ‘documents’: texts of treaties, maps, charts, video recordings, national legislation and jurisprudence, commentaries, press statements, diplomatic correspondence, and others (Wolfrum and Möldner, 2013, para 27).

**3** This entry focuses on the existing rules in certain international dispute mechanisms, namely the → *International Court of Justice (ICJ)*, the → *International Criminal Court (ICC)*, the ad hoc international criminal tribunals, the → *International Tribunal for the Law of the Sea (ITLOS)*, the → *Iran-United States Claims Tribunal* (‘IUSCT’), the → *World Trade Organization (WTO)*, *investor-State arbitrations*, and the three regional human rights courts. This selection provides an overview of various courts and tribunals, including those in inter-State dispute settlement, international criminal law, international arbitration, and regional human rights litigation.

**4** The literature on comparative documentary evidence, and → *forms of evidence*, in international courts and tribunals (‘ICTs’) is underexplored (Melillo, 2021, para 2). As the rules on documentary evidence are found in the different statutes and rules of ICTs, this entry addresses this topic by first examining the main rules pertaining to documentary evidence in different courts and tribunals. It then discusses some overarching convergent themes relating to documentary evidence in international dispute resolution. In this context, the aim of this entry is not to address a comprehensive discussion of all rules for documentary evidence in every ICT, but rather to analyse the main issues and concepts on this topic.

## B. Documentary Evidence in Different International Courts and Tribunals

### 1. International Court of Justice

**5** As an inter-State court with written and oral proceedings, of all the international courts and tribunals analysed in this entry, the ICJ has the most extensive rules on various aspects of documentary evidence in the inter-State dispute resolution category (→ *Evidence: International Court of Justice*). At the ICJ, the Statute of the International Court of Justice (‘ICJ Statute’), the Rules of Court, and the Practice Directions dictate rules concerning documentary evidence. The ICJ Statute clarifies that the procedure before the Court shall be written and oral (Art 43 (1)). A certified copy of all documents produced by one party must be communicated to the other party in the proceedings (Art 43 (4) ICJ Statute). The ICJ Statute also stipulates that the Court may request the Parties to produce evidence

before hearings (Art 49). The timing of the submission of evidence is also stipulated and the Court may refuse to accept any additional documentary evidence unless the other party consents (Art 52). Practice Direction IX clarifies that the Court may accept the production of a document if the Court 'considers it necessary and if the production of the document at this stage of the proceedings appears justified to the Court'. Practice Direction III, which was amended in 2021, limits the page number of annexes to 750.

**6** Concerning videos shown during proceedings, in the practice of the ICJ and the ITLOS, they must be communicated to the party prior to being shown (→ *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)*; → *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*; and *The 'Camouco' Case*, 2000, para 17).

## **2. International Tribunal for the Law of the Sea**

**7** Proceedings before the ITLOS, another inter-State international tribunal, consist of written and oral phases. The rules pertaining to documentary evidence are mostly contained in the Rules of the ITLOS and are largely similar to those at the ICJ. Article 63 Rules of the ITLOS clarifies that parties shall annex certified copies of documents adduced to support arguments in the pleadings. A translation into one of the official languages shall be provided by the party submitting it (Art 64 Rules of the ITLOS). Furthermore, the Rules of the ITLOS stipulate that documents annexed to pleadings shall be communicated to a State or other entity that can appear before the tribunal and which has requested a copy (Art 67). Interestingly, the Rules of the ITLOS provide that documentary evidence annexed to the pleadings will be accessible to the public on the opening of oral proceedings or earlier (Art 67 (2)). The Guidelines concerning the Preparation and Presentation of Cases before the Tribunal ('ITLOS Guidelines') provide that during the oral hearings a party may show 'maps, charts, diagrams, illustrations of texts' (ITLOS Guidelines, para 18).

## **3. Arbitral Tribunals**

**8** Differently from the inter-State courts and tribunals, arbitral tribunals are not permanent and come into existence to deal with a specific dispute that has arisen between the parties. There are many institutional arbitration rules depending on the arbitration institution, and thus each provides a specific set of rules of procedure, but 'arbitrators usually enjoy more leeway in selecting their rules of procedure, including the rules on evidence' (Melillo, 2021, para 24).

**9** The → *Permanent Court of Arbitration (PCA)*, an international organization that provides a host of dispute resolution services to the international community, contains few express rules pertaining to documentary evidence, mostly in the PCA Arbitration Rules (→ *Arbitration Rules (2012): Permanent Court of Arbitration (PCA)*). The PCA has drafted various sets of model rules. Additionally, many of the investor-State and contract-based arbitrations administered by the PCA are actually governed by United Nations Commission on International Trade Law Rules. Article 20 (4) PCA Arbitration Rules explains that the statement of claim should have 'all documents and other evidence' on which the claimant relies. Article 21 states similarly concerning the statement of defence. The PCA Arbitration Rules make it clear that statements by witnesses and expert witnesses can be presented in writing and signed by the witness (Art 27 (2)). The Rules also make it possible for the arbitral tribunal to require parties to 'produce documents, exhibits or other evidence' within a time period determined by the tribunal. Finally, it is interesting to note that the rules expressly state that it is for the tribunal to 'determine the admissibility, relevance, materiality and weight' of the evidence presented (Art 27 (4) PCA Arbitration Rules).

**10** The International Bar Association ('IBA') Rules on the Taking of Evidence in International Arbitration ('IBA Rules') were adopted by a resolution of the IBA Council 17 December 2020. Documents are defined as 'a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means'. Regarding the admissibility or assessment of evidence, Article 9 IBA Rules provides that '[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence'. Parties shall submit documentary evidence 'as early as possible', and in exceptional circumstances, a party may request to produce documents at a later stage in the arbitration (Art 4 IBA Rules).

#### **4. Iran-United States Claims Tribunal**

**11** The IUSCT, an arbitral tribunal that settles disputes between individuals and governments of Iran and the United States, and between those governments with respect to certain categories of disputes, provides documentary evidence rules in its Tribunal Rules of Procedure ('IUSCT Rules')—a modified form of UNCITRAL rules. If authorized by the arbitral tribunal, written evidence may be served by actual delivery to the party's representative at the hearing or its prehearing conference, in which case the Secretary-General will make a record and sign it, and then forward it to the Registrar (Art 2 (4) IUSCT Rules). The Registrar has the right to refuse any document if the deadline set has passed or against the applicable rules; but, in the event of refusal, the party may contest the decision within 30 days (Art 2 (5) IUSCT Rules). The IUSCT may require that documents submitted in the original language be accompanied by a translation into a language chosen by the parties or the Tribunal, including two copies in English and two in Farsi (Art 17 (2) IUSCT Rules and related notes to Art 2). Article 19 (2) IUSCT Rules provides specific requirements pertaining to the Statement of Defence, including annexing the documents used for the defence with 'a reference and a summary' of the key facts and relevant quotations. The Rules also make it possible for the arbitral tribunal to require parties to provide, within a fixed timeframe, a summary of 'documents, exhibits or other evidence' that the party intends to use in its statement of claim or statement of defence (Art 24 IUSCT Rules). It should be noted that the written statement of a witness is accepted as evidence if signed by the witness (Art 25 IUSCT Rules). The literature on the IUSCT noted 'the Iran-United States Claims Tribunal's decided preference for contemporaneous documentary evidence. Reflecting to some degree the civil law tradition, the awards of the Iran-United States Claims Tribunal exhibit a tendency to regard documentary evidence as being more reliable than verbal testimony. As a result the claimants must meet a higher burden of proof' (Brower, 1994, 52).

#### **5. Court of Justice of the European Union**

**12** At the Court of Justice of the European Union ('CJEU'), the Statute of the Court of Justice of the European Union ('Statute of the Court') and the Rules of the Procedure of the General Court dictate rules concerning documentary evidence. The Statute of the Court clarifies that the procedure before the Court shall be written and oral (Art 20 (1) Statute of the Court). A certified copy of all documents produced by one party must be communicated to the other party in the proceedings (Art 20 (2) Statute of the Court). If there is no 'new point of law', the Advocate General's submissions may be dispensed with by the Court (Art 20 (5) Statute of the Court). The Statute of the Court also specifies that the Court may request the production of documents from the parties before the hearings and from external parties such as the Member States, organizations or other bodies to provide any information necessary for the Court's proceedings (Art 24).

**13** It should be noted that Title III of the Rules of the Procedure of the General Court contains provisions that are specifically applicable to Direct Actions and Title IV to proceedings relating to intellectual property rights. As for Direct Actions, Articles 76 to 83 apply to the written part of the proceedings, while Articles 106 to 115 apply to the oral part of the proceedings, which must also observe a length of written pleadings provided for in Article 75. For proceedings relating to intellectual property rights, Articles 177 (5) and 180 provide additional rules as to the manner of filing the application and response, as well as to when the written part of the procedure shall be closed in Article 181 and the length of written pleadings in Article 189.

## **6. European Court of Human Rights**

**14** The → *European Court of Human Rights (ECtHR)*, a court responsible for ensuring compliance of Member States with their obligations under the European Convention on Human Rights and Fundamental Freedoms, contains express rules regarding documentary evidence, primarily in the Rules of Court of the ECtHR and the Practice Directions, which specifically address written pleadings.

**15** Public documents are filed in the Registry, except those that are part of friendly settlement negotiations or to which the President of the Chamber decides to restrict access *ex officio* or after receiving a request for confidentiality for all or part of the hearing from a party or a person concerned (Rule 33 ECtHR Rules of Court). Each application form must be signed by the applicant or its representative and must be accompanied by copies of documents and decisions showing that the applicant has exhausted domestic remedies and their limitation periods, as well as other international proceedings if any, and the certificate of representation if the applicant is a legal person (Rule 47 (3.1) ECtHR Rules of Court). At any time, the Court may also ask the applicant for other information or documents relevant to the case within a time limit set by the Court (Rule 47 (5.2) ECtHR Rules of Court).

## **7. Inter-American Court of Human Rights**

**16** The → *Inter-American Court of Human Rights (IACtHR)*, a judicial institution charged with ensuring compliance with the provisions of the American Convention on Human Rights ('ACHR') by State parties through its judicial and advisory functions, has rules regarding documentary evidence contained in the Rules of Procedure of the IACtHR ('IACtHR Rules of Procedure'). 'Evidence' is submitted with the files of the cases (Arts 35–36, 40–41 IACtHR Rules of Procedure). The Court has the power to acquire 'on its own motion, any evidence it considers helpful and necessary' (Art 58 (a) IACtHR Rules of Procedure).

## **8. African Court on Human and Peoples' Rights**

**17** At the → *African Court on Human and Peoples' Rights (ACtHPR)*, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('Protocol'), the Rules of Court, and the Practice Directions dictate the rules regarding documentary evidence. The Protocol provides that the Court may conduct an enquiry at its discretion following the hearing of submissions from the parties, and that it bases its decision on written or oral evidence as well as on expert testimony (Art 26 of the Protocol).

**18** Commencement of proceedings is provided for in Article 40 ACtHPR Rules of Court. The original copy of an Application shall be signed and filed with the Court in one of its official languages and shall contain a summary of the facts, evidence, alleged violations, orders or injunctions sought, all relevant documents, including the exhaustion of local remedies with supporting documents and evidence, all at the same time or within a period set by the Court. An application in contentious cases must be made on the application form, signed by the applicant or his representative, and include copies of documents related to

the complaint, the exhaustion of domestic remedies, any other international procedure already undertaken, if applicable, and the certificate of representation if the applicant is a legal person or a non-governmental organization (Art 41 ACtHPR Rules of Court). Note that in some instances under Article 41, a request for nondisclosure may be granted by the Court regarding an applicant's identity, in which case a pseudonym will be used in the documents made public. It is also worth noting that the Court may request additional information or documents from the applicant, within a time limit set by the Court, if necessary (Art 41 (10) ACtHPR Rules of Court), as well as invite parties to file additional documents with their signatures or to provide more information (Art 51 ACtHPR Rules of Court).

## **9. International Criminal Court**

**19** Documentary evidence rules are primarily contained in the Rome Statute of the ICC ('Rome Statute') and the Rules of Procedure and Evidence of the ICC ('ICC Rules'). The Rome Statute provides that witnesses shall be heard at the hearing unless the Court authorizes them to give oral or written testimony and, under certain conditions, some other type of prior recording (Art 69 (2) Rome Statute). The Court may also request that additional evidence be presented (Art 69 (3) Rome Statute) and even rule on the 'relevance or admissibility of any evidence' according to its probative value (Art 69 (4) Rome Statute). Article 72 Rome Statute explicitly provides a procedure for the protection of national security information, including in cases where a State believes that it would prejudice its interests, despite prior concertation or cooperative means, and notifies the Prosecutor or the Court in writing of the specific reasons. The Rome Statute also provides that the Court may request a State Party to provide any 'document or information' even though it is from a third party, in which case Article 73 sets out the procedure for obtaining disclosure consent.

**20** The general evidentiary provisions relating to evidence are set out in Article 63 ICC Rules, which specify that no corroboration is required for crimes of sexual violence (Art 63 (4) ICC Rules). The ICC Rules also limit the disclosure of specific evidence, including 'reports, memoranda and other internal documents' provided in the context of an investigation or pre-trial proceedings (Art 81) and other 'material and information' covered by confidentiality under Article 54 (3) (e) Rome Statute (Art 82 ICC Rules).

## **10. The International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia**

**21** The → *International Criminal Tribunal for Rwanda (ICTR)*, which was the first ad hoc International Criminal Tribunal, active from 1994 to 2015, created to prosecute war criminals from the Rwandan conflict (genocide). Procedures were governed by the ICTR Rules of Procedure and Evidence ('ICTR Rules'), Section 3 of which provided for the production of evidence. The Prosecutor was required to disclose copies of exculpatory evidence to the defence, ie supporting materials and prior statements of the accused(s) related to the indictment, within 30 days of the date of the initial appearance, as well as statements of witnesses called to testify within 60 days of the trial's date (Art 66 (a) ICTR Rules). Upon request by the Defence, the Prosecutor was also to provide access to other evidence necessary for the defence of the accused (Art 66 (b) ICTR Rules), but subject to an application for exemption from disclosure where the Trial Chamber was in-camera for public interest reasons, among others (Art 66 (c) ICTR Rules). The Prosecutor was also required to disclose, in electronic or paper format, evidence to the defence that was likely to exonerate the accused, unless it would prejudice ongoing or future investigations, in

which case the Prosecutor could request a waiver to disclose such confidential information exclusively to the Trial Chamber sitting *in camera* (Art 68 ICTR Rules).

**22** Regarding evidence, it should be noted that the Trial Chamber could admit written statements of a witness ‘*in lieu*’ of oral testimony, if they were not intended to prove an act or conduct alleged in the indictment and that certain factors justified their inclusion in the record (Art 92*bis* ICTR Rules). The declarant had to join to the written statement a declaration stating that the statement was true and correct (Art 92*bis* (b) ICTR Rules), unless it came from a deceased, disappeared, or incapacitated person by permission of the Trial Chamber (Art 92*bis* (c) ICTR Rules). A 14-day notice to the opposing party was required to submit a written statement, which allowed him/her to object within seven days, if need be (Art 92*bis* (e) ICTR Rules).

**23** The → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* was another ad hoc international criminal tribunal, active from 1993 to 2017 to prosecute war criminals following the Yugoslavian conflicts of the 1990s. Like the ICTR, the ICTY had Rules of Procedure and Evidence (‘ICTY Rules’), Section 4 of which provided for the production of evidence. The Prosecutor was required to provide the Defence copies, in a language understood by the accused, of the indictments and the accused’s prior statements within 30 days of the initial appearance, as well as the statements of all witnesses and transcripts records of testimony within a timeframe set by the Trial Chamber or Pre-Trial Judge (Art 66 (a) ICTY Rules). Upon request of the Defence, the Prosecutor was to provide access to other materials in the record that was to be used as evidence at trial or that might be necessary to prepare the accused's defence (Art 66 (b) ICTY Rules), subject to a request for waiver of disclosure when the Trial Chamber was sitting *in camera* for public interest reasons, among others (Art 66 (c) ICTY Rules). The defence, on the other hand, had to give access to the evidence in its file to the Prosecutor, who could make copies or request the transmission of them, including statements of witnesses to be called or other written statements already collected for the trial but not yet called, at the latest one week before the Defence case (Art 67 (a) ICTY Rules). Article 85 provided the sequence to respect when presenting evidence.

**24** Similar to the ICTR Rules, Article 89 ICTY Rules provided for general evidentiary provisions, such as the fact that national rules of evidence would not bind the Chamber, that it may refer to other rules of evidence as long as it did so in a manner that achieved a ‘fair determination of the matter’, that it was allowed to admit evidence based on its probative value and require verification of its authenticity if necessary. However, the ICTY added that the Chamber could exclude evidence where its probative value fell below the requirement of a fair trial and could accept either oral or written testimony at its discretion and in the interests of justice.

**25** The International Residual Mechanism for Criminal Tribunals (‘IRMCT’) was created to perform some functions previously carried out by the ICTR and the ICTY. It has its own Rules of Procedure and Evidence and Practice Directions and addresses the use of evidence produced before the ICTY and ICTR. For example, the Trial Chamber, under certain circumstances, may admit, *in lieu* of attendance of a witness in person, a written statement or transcript of evidence which was given by a witness in proceedings before the ICTY, the ICTR (Rule 110 IRMCT Rules of Procedure). Rules 111, 112, and 113 provide other instances where a written statement of transcript of evidence may be accepted.

## C. Overarching Themes and Principles

**26** Upon reviewing some of the main rules concerning documentary evidence, certain overarching principles can be discussed. Rules concerning documentary evidence in inter-State disputes are generally similar and differ from rules in regional human rights courts as well as in international criminal courts and tribunals. In this section, some overarching principles concerning documentary evidence are examined within the particularities of the fields in which they are applicable.

**27** An overview of the different courts and tribunals described above demonstrates that parties adduce evidence to prove their claims and support their arguments. There exists a difference between producing documents and producing evidence, and the focus of this entry is on the production of evidence. The documentary evidence which the parties submit is meant to prove factual claims (Wolfrum and Möldner, 2013). That being said, the parties can also agree on certain facts, in which case, documentary evidence is not required to prove such facts. There is usually the possibility for the court or the tribunal to request a party to the proceedings to submit documentary evidence. In fact, however, it is not always straightforward to distinguish facts from law.

**28** The timing of the submission of the evidence is generally within the written proceedings in most cases reviewed in this entry. However, documentary evidence may also be submitted during the oral proceedings in certain circumstances, for example, to support an answer to a question asked by judges or arbitrators during a hearing. This means that parties shall generally submit their evidence as annexes to the written proceedings, unless the other party consents to the submission of additional documents during the oral proceedings, or if the court or tribunal allows it (Art 56 (1)-(2) ICJ Rules of Court; Art 71 (1)-(5) ITLOS Rules of the Tribunal). At the ICJ, Practice Direction IX states that parties should refrain from submitting evidence after the closure of the written proceedings, and that in the absence of consent of the other party, the Court would authorise it only in exceptional circumstances.

**29** As to the submission of evidence, each party submitting evidence to the Court or Tribunal shall provide either the original version of the document or a certified copy. The communication of the evidence to the other party is done via the Registry (Art 50 (1)-(2) ICJ Rules of Court; Art 63 (1)-(2) ITLOS Rules). There is also the possibility of submitting only relevant extracts of documents to avoid very voluminous annexes, and a copy of the entire relevant document has to be filed with the registry (Wolfrum and Möldner, 2013, para 31).

**30** When a party fails to prove a claim by evidence, the opposing party may challenge and the court or tribunal may decide to regard it as an unproven claim (Wolfrum and Möldner, 2013, para 33).

### 1. Admissibility and Assessment of Documentary Evidence

**31** The rules at the ICJ and ITLOS do not provide detailed guidance as to the admissibility or exclusion of evidence other than general rules on the timing and form of submitting evidence. Thus, at the ICJ and ITLOS, if evidence is submitted too late in the proceedings, it may be inadmissible, and as a consequence the parties cannot refer to it in the oral proceedings (Art 56 (4) ICJ Rules), and similarly if it is not in the mandated form, in the event the opposing party requests the exclusion of the evidence. Inadmissibility of evidence means that no reference may be made to the contents of the document during the oral proceedings (see eg Art 56 (4) ICJ Rules).

**32** ICTs have a wide flexibility in the admission and evaluation of evidence. Generally, as noted by some scholars (Brown, 2009, 90–91; Devaney, 2016a, 31), documentary evidence is given more weight than oral evidence, although in practice, the matter is mostly dealt with on a case-by-case basis, and in light of the type of documentary evidence (Melillo, 2021, para 48). ICTs’ assessment of documentary evidence is dependent upon a variety of factors, for example, the source, the author, the chain of custody, etc.

**33** The 2022 judgment of the ICJ in *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v Uganda* (→ *Armed Activities on the Territory of the Congo Cases*) clarified some important issues regarding the assessment of documentary evidence: ‘[i]n practice, the Court has applied various criteria to assess evidence ... The Court considers that the standard of proof may vary from case to case and may depend on the gravity of the acts alleged’ (Uerpmann-Witzack, 2013, para 102).

**34** The ICJ further affirmed that:

In the circumstances of the case and given the context and the time that has elapsed since the facts in question occurred, the Court considers that it must assess the existence and extent of the damage within the range of possibilities indicated by the evidence. This may be evidence included in the case file by the Parties, in the reports submitted by the Court-appointed experts or in reports of the United Nations and other national or international bodies. Finally, the Court considers that, in such circumstances, an assessment of the existence and extent of the damage must be based on reasonable estimates, taking into account whether a particular finding of fact is supported by more than one source of evidence (‘a number of concordant indications’) (Uerpmann-Witzack, 2013, para 126).

## 2. Investigative Powers

**35** In comparison to other international courts and tribunals discussed in this entry, human rights courts present one particularity in relation to evidence, they have greater investigative powers than inter-State courts. There is a possibility for the ECtHR to collect evidence *ex officio* (Rule A1 Annex to the EctHR Rules), which can be done in the form of a hearing. The reasoning behind greater inquiry, investigative, and fact-finding powers of regional human rights courts is due to the fact that claimants are in a weaker position compared to States (Wolfrum and Möldner, 2013, para 83).

## 3. Burden and Standard of Proof

**36** As to the standard of proof, there are two main standards: preponderance of evidence and proof beyond reasonable doubt. In general, the latter standard is used in international criminal proceedings to prove allegations, whereas the former standard is used in inter-State disputes, except when ascertaining the jurisdiction of the international court or tribunal. Furthermore, when human rights violations are alleged, a stricter standard of proof may be applied (*Bosnia and Herzegovina v Serbia and Montenegro*) (*Merits*), 17).

**37** The → *international criminal courts and tribunals* seen in this entry show some particularities compared to inter-State courts and tribunals. One of the core principles in criminal proceedings is that of a fair trial, the burden of proof lies with the prosecution and the accused benefits from the presumption of innocence.

**38** Evidence in international criminal trials are admitted on the basis of relevancy and probative value. The judges in the trial chambers decide on the weight to accord to the evidence. The exclusion of evidence, in contrast with other courts and tribunals examined in this entry, can occur in cases where such evidence was obtained in a way that jeopardizes its reliability or when its admission could damage the integrity of proceedings—trial chambers also have the power to request that additional evidence be submitted (see Arts 64 (6) (b), 69 (3) ICC Statute; Rule 98 ICTY Rules; Rule 98 ICTR Rules of Procedure and Evidence; see Wolfrum and Möldner, 2013, paras 89–92).

## D. Conclusion

**39** This entry has examined the rules concerning documentary evidence specifically of a sample of international courts and tribunals in three main categories: inter-State disputes, human rights courts, and international criminal tribunals. The entry describes documentary evidence in some of the main courts and tribunals within these three leading categories.

**40** A comparative overview of the rules pertaining to documentary evidence in the courts and tribunals examined herein demonstrate that there are significant differences in relation to some key areas: admission of evidence, the standard and burden of proof, as well the powers of the judges to adduce additional evidence. While international criminal tribunals provide detailed rules on documentary evidence, they are comparatively less extensive in inter-State litigation. This analysis has also shown that while within the three categories the rules may be similar (eg the rules concerning documentary evidence at the ICJ and ITLOS), a larger comparison of the realm of international courts and tribunals in different areas indicate that there are many areas of divergence.

**Miriam Cohen** 

## Cited Bibliography

CN Brower, 'Evidence before International Tribunals: The Need for Some Standard Rules' (1994) 28 *International Lawyer* 47–58.

C Brown, *A Common Law of International Adjudication* (OUP Oxford 2009) 83–118.

R Uerpmann-Witzack, 'Armed Activities on the Territory of the Congo Cases' in *Max Planck Encyclopedia of Public International Law* (OUP 2013) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1248>>.

R Wolfrum and M Möldner, 'International Courts and Tribunals, Evidence' in *Max Planck Encyclopedia of Public International Law* (OUP 2013) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e26?prd=OPIL>>.

JG Devaney, *Fact-Finding before the International Court of Justice* (First paperback edition, Cambridge University Press Oxford 2016a) <<https://doi.org/10.1017/CBO9781316498972>>.

M Melillo, 'Forms of Evidence', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press Oxford 2021) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3571.013.3571/law-mpeipro-e3571>.

## Further Bibliography

M Aghahosseini, 'Evidence before the Iran-United States Claims Tribunal' (1999) 1 International Law FORUM du droit international 208-14.

JJ van Haersolte-van Hof, 'Issues of Evidence in the Practice of the Claims Resolution Tribunal for Dormant Accounts' (1999) 1 International Law FORUM du droit international 215-18.

M Bohlander, 'Evidence before the International Criminal Court — Basic Principles' (2005) 6 ERA Forum 543-54.

M Kamto, 'Les Moyens de preuve devant la Cour internationale de justice à la lumière de Quelques affaires récentes portées devant elle' (2006) 49 GYIL 259-92.

F Pocar, 'International Criminal Tribunal for the Former Yugoslavia (ICTY)' in *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2007) 1--29 <<https://opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e44?prd=OPIL>>.

T Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights' (2007) 50 GYIL 543-88.

M Knust and R Afshar, 'International Courts and Tribunals, Rules and Practice Directions (ECJ, CFI, ECtHR, IACtHR, ICSID, ITLOS, WTO Panels and Appellate Body)' in *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2008) 1-10 <<https://opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1936?prd=OPIL>>.

CE Foster, 'Burden of Proof in International Courts and Tribunals' (2010) 29 AustYBIL 27-86.

M Bothe, 'Verification of Facts' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press Oxford 2011) 1-19 <<https://opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1127?prd=OPIL>>.

M Caianiello, 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models' (2011a) 36 North Carolina Journal of International Law 288-318.

—, 'First Decisions on the Admission of Evidence at ICC Trials: A Blending of Accusatorial and Inquisitorial Models?' (2011b) 9 Journal of International Criminal Justice 385-410.

M Kohen, R Kolb, and DL Tehindrazanarivelo, *Perspectives of International Law in the 21st Century / Perspectives Du Droit International Au 21e Siècle: Liber Amicorum Professor Christian Dominicé in Honour of His 80th Birthday* (Brill Nijhoff Leiden 2011) <<https://brill.com/view/title/19986>>.

MM Mbengue, 'International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 5380.

J-M Grossen, 'À propos du degré de la preuve dans la pratique de la Cour internationale de Justice' in M Kohen, R Kolb, and DL Tehindrazanarivelo, *Perspectives of International Law in the 21st century / Perspectives du droit international au 21e siècle* (Brill Nijhoff Leiden 2012) 257-68 <<https://brill.com/view/book/edcoll/9789004203068/B9789004203068-s014.xml>>.

L Carter and F Pocar, *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar Publishing Cheltenham 2013) <<https://www.elgaronline.com/view/edcoll/9780857939579/9780857939579.xml>>.

C Skinner and WM Reisman (eds), 'The Iran-United States Claims Tribunal: Burdens of Proof' in *Fraudulent Evidence Before Public International Tribunals: The Dirty Stories of International Law* (Cambridge University Press Cambridge 2014) 101-26.

A Appazov, *Expert Evidence and International Criminal Justice* (Springer International Publishing Switzerland 2016) <<https://link.springer.com/book/10.1007/978-3-319-24340-5>>.

M Benatar, 'Site Visit' in *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press Oxford 2016) 1-11 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1915.013.1915/law-mpeipro-e1915>>.

JG Devaney (ed), 'Rules of Evidence before the International Court of Justice', in *Fact-Finding before the International Court of Justice* (Cambridge University Press Oxford 2016b) 14-72 <<https://www.cambridge.org/core/books/factfinding-before-the-international-court-of-justice/rules-of-evidence-before-the-international-court-of-justice/84ED300D6826B7C1D0E46C6271EAEC1F>>.

L Malintoppi, 'Fact Finding and Evidence Before the International Court of Justice (Notably in Scientific-Related Disputes)' (2016) 7 *Journal of International Dispute Settlement* 421-44.

P Viebig, *Illicitly Obtained Evidence at the International Criminal Court*, vol 4 (TMC Asser Press The Hague 2016) <<https://link.springer.com/book/10.1007/978-94-6265-093-0>>.

JG Devaney, 'Evidence: International Court of Justice (ICJ)' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2018) 1-27 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3430.013.3430/law-mpeipro-e3430>>.

G Gros, 'Experts: International Tribunal for the Law of the Sea (ITLOS)' *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2018) 1-14 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3501.013.3501/law-mpeipro-e3501>>.

C Heri, 'Evidence: European Court of Human Rights (ECtHR)' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2018) 1-25 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3431.013.3431/law-mpeipro-e3431>>.

MM Mbengue, 'Experts: International Court of Justice (ICJ)' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2018) 113 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3500.013.3500/law-mpeipro-e3500?prd=OPII>>.

A Paúl, 'Evidence: Inter-American Court of Human Rights (IACtHR)' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2018) 1-14 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3429.013.3429/law-mpeipro-e3429?prd=OPIL>>.

C Volpin, 'Proof: Court of Justice of the European Union (CJEU)' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2018) 1-14 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3434.013.3434/law-mpeipro-e3434?prd=OPIL>>.

CE Foster, 'Court-Appointed Expert' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2019) 1-27 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3244.013.3244/law-mpeipro-e3244>>.

W Schomburg and JC Nemitz, 'International Criminal Courts and Tribunals, Procedure' in *Max Planck Encyclopedia of Public International Law* (OUP Oxford 2019) 1-16 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1678?prd=OPIL>>.

S Wordsworth and K Parlett, 'Advocacy' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2019) 1-12 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3490.013.3490/law-mpeipro-e3490>>.

S Alagendra, V BBăieșu, and KAA Khan, 'Fact-Finding Powers of International Prosecutors' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2020) 1-22 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2790.013.2790/law-mpeipro-e2790>>.

HM Al-Jubouri and NH Waheed, 'Types of Evidence Before the International Criminal Court' (2020) 20 *Medico Legal Update* 1885-90.

G Chlevickaitė, B Holá, and C Bijleveld, 'Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There "Standard Practice" in International Criminal Justice?' (2020a) 18 *Journal of International Criminal Justice* 185-210.

—, 'Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There "Standard Practice" in International Criminal Justice?' (2020b) 18 *Journal of International Criminal Justice* 185-210.

A Donati, 'Oral Hearing: Court of Justice of the European Union (CJEU)' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2020) 1-13 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3819.013.3819/law-mpeipro-e3819?prd=OPIL>>.

S Mansour Fallah, 'The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals' (2020) 19 *The Law & Practice of International Courts and Tribunals* 147-76.

K De Meester, 'Audio and Video Recordings' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2020) 1-18 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2602.013.2602/law-mpeipro-e2602>>.

TJ Gunn, 'Limitations Clauses, Evidence, and the Burden of Proof in the European Court of Human Rights' (2020) 15 *Religion & Human Rights* 192-206.

T Renno, 'Circumstantial Evidence' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2020) 1-20 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3035.013.3035/law-mpeipro-e3035>>.

XH Oyarce, 'Translation: International Tribunal for the Law of the Sea (ITLOS)' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2020) 1-7 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3370.013.3370/law-mpeipro-e3370>>.

R Aniruddha, 'Standard of Proof' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2021) 1-32 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3243.013.3243/law-mpeipro-e3243?print=pdf>>.

B Garamvölgyi, K Ligeti, A Ondrejova, and M von Galen, 'Admissibility of Evidence in Criminal Proceedings in the EU' [2021] *eucri* 201-208.

MA Plagis, 'Jurisdiction and Admissibility: African Court on Human and Peoples' Rights (ACtHPR)' in *Max Planck Encyclopedia of International Procedural Law* (OUP Oxford 2021) 1-21 <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3760.013.3760/law-mpeipro-e3760?prd=OPIL>>.

## Cited documents

African Court on Human and Peoples' Rights, 'Rules of Court' (adopted 1 September 2020).

African Court on Human and Peoples' Rights, 'Rules of Court' (adopted 2 June 2010).

Inter-American Court of Human Rights, 'Rules of Procedure' (approved 28 November 2009).

International Bar Association, 'Rules on the Taking of Evidence in International Arbitration' (adopted by a resolution of the IBA Council 17 December 2020).

International Court of Justice, 'Practice Directions'.

International Court of Justice, 'Rules of Court' (adopted 14 April 1978, entered into force 1 July 1978).

International Criminal Court Assembly of States Parties, 'Rules of Procedure and Evidence' (3-10 September 2002) ICC-ASP/1/3.

International Criminal Court, 'Regulations of the Court' (adopted 26 May 2004, as amended) ICC-BD/01-05-16.

International Tribunal for the Law of the Sea, 'Guidelines concerning the Preparation and Presentation of Cases before the Tribunal' (adopted 14 November 2006) ITLOS/9.

International Tribunal for the Law of the Sea, 'Rules of the Tribunal' (adopted on 28 October 1997, as amended on 15 March and 21 September 2001 and on 17 March 2009).

Permanent Court of Arbitration, 'Arbitration Rules 2012' (effective 17 December 2012).

Permanent Court of Arbitration, 'Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment' (effective 19 June 2001).

Permanent Court of Arbitration, 'Optional Rules for Arbitration of Disputes Relating to Outer Space Activities' (effective 6 December 2011).

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) (1999) 20 HRLJ 269.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

Statute of the International Criminal Tribunal for Rwanda (8 November 1994) UN Doc A/RES/955(1994).

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

United Nations International Criminal Tribunal for Rwanda, 'Rules of Procedure and Evidence (as amended)' (adopted 29 June 1995) UN Doc ITR/3.

United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

## **Cited Cases**

*The 'Camouco' Case, Panama v France*, Prompt Release, Judgment, 7 February 2002, ITLOS Case No 5.