The Right of Non-Self-Incrimination of Witnesses Before the ICC

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Abstract. An unlimited right of non-self-incrimination of *witnesses* before international criminal tribunals exists only during the *pre-trial investigation* (Article 55 ICC Statute); during *trial* the right is *not unlimited*, as the witness can be compelled to answer any question, either on the basis of an *ex ante assurance* of non-use of the evidence against him/her coupled with an assurance of confidentiality (ICC Rule 74(3)(c)) or on the basis of a guarantee of non-use *without* an explicit assurance to that effect (ICTY/ICTR Rules 90(F)). It is doubtful whether these rules are compatible with the principle *nemo tenetur se ipsum accusare* since this principle protects not only the accused but also the witness from a criminal prosecution which is based on her *own* statements.

1. INTRODUCTION

The following paper attempts to shed light on an area which has not drawn much attention so far in the writings on the International Criminal Court ('ICC'):[1] the right of non-self-incrimination of witnesses before international criminal tribunals, especially the ICC. The article consists of four sections, each of which finishes with a separate conclusion. The first section addresses the applicable law, *i.e.*, the ICC Statute and Rules of Procedure and Evidence ('RPE') comparing these sources with the law of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR') (Section 2). Then, the scope of this law will be analysed in the light of its theoretical foundation: the *nemo tenetur principle* (Section 3). The historical origin

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1. Unfortunately, the comprehensive and highly illuminating contribution of C. Kreß, *Witnesses in Proceedings before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure*, *in* H. Fischer, C. Kreß & S. Lüder (Eds.), International and National Prosecutions of Crimes under International Law 327 (2001) appeared only after the first draft of this article had been finished. Nevertheless, given its importance, it was still taken into account in the footnotes.

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of this principle and its scope *ratione personae* and *materiae* will be examined in the light of comparative law. It will be shown that it has different consequences in common and civil law jurisdictions. The third section examines in fact a preceding question, namely, whether individuals, in particular witnesses, are under an obligation to cooperate with International Criminal Tribunals at all, *i.e.*, whether such tribunals can exercise "direct effect" over individuals (Section 4). In this regard, in light of the *Blaškić* precedent, a distinction between Security Council and treaty based tribunals is necessary. Finally, problematic aspects of the assurance given to the witness are discussed (Section 5): Does it violate the *nemo tenetur* principle? Does it conflict with the duty to prosecute the crimes within the jurisdiction of the ICC? Does the assurance also protect from the use of indirect evidence?

2. The Law of the ICC Compared to the Ad Hoc Tribunals

2.1. The International Criminal Court

2.1.1. The Statute

The ICC Statute divides the procedure into the investigation and the trial phase. During the *investigation* a *person* shall not be compelled to incriminate himself or herself or to confess guilt (Article 55(1)) but have the right to remain silent. This right is based on Article 14(3)(g) of the International Covenant on Civil and Political Rights ('ICCPR'), albeit with the difference that it is expressly extended to "a person" and not limited to the accused. In other words, it equally comprises an accused and *witnesses*.[2]

During the *trial* the situation is different. The right of non-self-incrimination is only explicitly provided for with regard to the accused. Article 67 contains a list of minimum guarantees in favour of the accused; paragraph (1)(g) establishes that he or she has the right not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence. It is generally understood that Article 67 refers only to the accused and cannot be invoked by other persons, especially witnesses.[3] As to witnesses, Article 69 only contains some general rules about evidence and refers to the Rules of Procedure and Evidence ('RPE') which shall specify the rules of evidence, including the rights of witnesses (Article 69(1) and (5)). Thus,

2. Ch. Hall, *Commentary on the Rome Statute of the International Criminal Court Art. 55*, *in* O. Triffterer (Ed.), Commentary on the Rome Statute of the International Criminal Court, marginal note 5 (1999); H. Friman, *Rights of Persons Suspected or Accused of a Crime*, *in* R.S. Lee (Ed.), The International Criminal Court: The Making of the Rome Statute 251 (1999). Generally on the definition of the term "witness" *see* Kreß, *supra* note 1, at 333–334.
3. W. Schabas, *Commentary Art. 67*, *in* Triffterer, *id.*, marginal note 47, n. 115 (1999).

the Statute does *not* contain *an explicit provision of non-self-incrimination* during trial with regard to witnesses; it can only be found in the RPE.[4]

2.1.2. The Rules of Procedure and Evidence

According to Rule 65 a witness who appears before the Court is compellable by the Court to provide testimony; this obligation can be enforced with a fine (Rules 65(2) and 171). However, according to Rule 74(3)(a), a witness may object to making any statement that might tend to incriminate him or her. This right can be overruled by an *assurance* given by the Chamber (Rule 74(2)) that the evidence provided in response to the questions will be kept confidential and not be disclosed to the public or any state, and will not be used either directly or indirectly against that person in any subsequent prosecution by the Court, except under Articles 70 and 71[5] (Rule 74(3)(c)). Where the witness has attended after receiving such an assurance, the Court may require the witness to answer the question or questions (Rule 74(3)(b)). Thus, it clearly follows that the witness has *not a full right to remain silent*; he or she only possesses the right to receive an *assurance of confidentiality and non-use of the evidence* received against him or her.

Apart from the problem of the scope and legal effects of such an assurance which will be examined later (Section 5) the question arises whether Rule 74 is *applicable to the investigation, the trial or both*. The RPE do not give a clear-cut answer to this question since Chapter 4 (part of which is Rule 74) does not distinguish between these two phases of the proceedings but only refers to "various stages of the proceedings." This seems to imply that these Rules are not confined to the trial stage.[6] On the other hand, Section I of Chapter 4, which includes Rule 74, refers to the evidence presented "in proceedings before all *Chambers*" (emphasis added), *i.e.*, it refers to the trial proceedings of part 6 of the Statute (Article 62 *et seq.*), in particular the testifying of witnesses according to Article 69 of the Statute. The "Chambers" do not take witness testimony during the investigation. The Pre-Trial Chamber, established for that phase, only serves as a kind of judicial control organ of the Prosecution (*cf.* Article 56 *et seq.*) but it does not usurp its investigative functions, in particular the interrogation of witnesses.[7] In addition, the wording of Rule 74 itself also refers

4. Art. 93(2) only refers to an assurance not to be *prosecuted* in respect of "any *act or omission*" committed before the departure to the Tribunal but not to the assurance given by the Chamber to the witness within the framework of taking evidence (emphasis added).
5. Offences against the administration of justice – giving false testimony –, sanctions for misconduct before the Court.
6. *Cf.* Kreß, *supra* note 1, at 336.
7. *See also* M. Bergsmo, C. Cissé & C. Staker, *The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, *in* L. Arbour, *et al.* (Eds.), The Prosecutor of a Permanent International Criminal Court 121, at 143 *et seq.* (2000).

to the trial proceedings. The Rule defines the rights of witnesses in giving testimony before the Chamber, *i.e.*, as part of the evidence presented during trial within the meaning of Article 69 of the Statute. The Rule does not refer to the witness testimony during investigation. For this purpose Article 55 ICC Statute exists which, as explained above, covers witnesses using the general term "person(s)." Thus, for these reasons, Rule 74 only applies to the trial stage.

2.2. The Ad Hoc Tribunals (ICTY and ICTR)

The law of the ICTY and ICTR which strongly influenced the drafting of the ICC Statute differs only in form but not in substance. First of all, the *Statutes* only contain a rule on the accused which, for the same reasons as above, is not applicable to witnesses. As to the substance the rule is identical to Article 67 of the ICC Statute in that it grants certain minimum guarantees to the accused, including the right not to be compelled to testify against himself or to confess guilt (Article 21(4)(g) ICTY Statute/20(4)(g) ICTR Statute). This provision is not, however, limited to the trial proceedings since the Statutes do not distinguish between the investigation and the trial and, more importantly, do not contain a provision for the investigation similar to Article 55 of the ICC Statute.

Interestingly enough, however, unlike the ICC Rules the *RPE* of the ICTY/ICTR explicitly distinguish between the rights during investigation and during trial: during *investigation* only the *suspects* have the right to remain silent (Rule 42 ICTY/ICTR), during *trial* also the *witness* has the right to object to any statement which might incriminate him or her (Rule 90(F) ICTY/ICTR). This right seems to be more severely restricted than ICC Rule 74, however, since the Chamber may compel the witness to answer the question *without* giving him or her a formal *assurance* not to use the evidence received against him or her. Rule 90(F), however, guarantees that the testimony "shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury". Thus, in fact, the witness before the ICTY/ICTR has – as the one before the ICC – the right of the non-use of evidence against him or her albeit without the right to receive a formal assurance to that effect.[8] While this is a minor difference, also reflected in comparative (Canadian and US) law (*infra* Sections 3.3.2.2 and 3.3.2.3), it seems to be of more importance that the ICTY/ICTR witness has not the right to a promise of confidentiality as contained in ICC Rule 74.

8. Another matter, not following from the law, is that the ICTY Trial Chambers do normally give such an assurance.

2.3. Conclusion

The analysis of the law makes clear that the right of non-self-incrimination exists only in an unlimited manner with regard to the accused. As to witnesses, it only exists, taking the wording of Article 55 ICC Statute seriously, during the *investigation*; during the *trial* it is *not unlimited* since the witness can be compelled to answer any question, either on the basis of an *ex ante assurance* of non-use of the evidence against him/her and of confidentiality (ICC Rule 74(3)(c)) or on the basis of a normative guarantee of non-use *without* an explicit assurance to that effect (ICTY/ICTR Rules 90(F)). As will be seen below (Section 5.1), the relationship between Article 55 ICC Statute and Rule 74 requires further analysis. Before that, however, the historical genesis and foundation of the right of non-self-incrimination must be examined.

3. Theoretical Foundation and Scope: "*Nemo Tenetur se Ipsum Accusare*"

3.1. Historical origin

The right of non-self-incrimination originates in the principle *nemo tenetur se ipsum accusare*: no one can be compelled to incriminate himself or herself. This principle goes back to the Jewish law of the Talmud and to the canonic law.[9] It was practically abolished in the medieval period when the *accused's* right to remain silent was sacrificed on the altar of the inquisitorial search for the truth.[10] Later, English common law became the cradle of the principle, establishing it step by step, first for the accused in 1640 and then also for *witnesses* in 1679.[11] At latest in 1848, the principle was fully established with an Act that contained the obligation of the justice of peace to inform the accused of his or her right to remain silent.[12]

9. K. Rogall, Der Beschuldigte als Beweismittel gegen sich selbst. Ein Beitrag zur Geltung des Satzes '*Nemo tenetur se ipsum prodere*' im Strafverfahren 67 (1977). R. Müller, *Neue Ermiltlungsmethoden und das Verbot des Zwangs zur Selbstbelastung*, 28 EuGRZ 546 (2001).
10. T. Dingeldey, *Das Prinzip der Aussagefreiheit im Strafprozessrecht*, 16 Juristische Arbeitsblätter 407 (1984).
11. Rogall, *supra* note 9, at 81.
12. *Id.* For a recent historical account of both common and civil law *see* M. Böse, *Die Verfassungsrechtlichen Grundlagen des Satzes "Nemo tenetur se ipsum accusare"*, 149 GA 98, at 108 *et seq.* (2002).

3.2. The scope *ratione personae*

3.2.1. Comparative law[13]

(a) In *US law* the principle of *nemo tenetur* is enshrined in the Fifth Amendment to the Constitution: "No person […] shall be compelled in any Criminal Case to be witness against himself." Although the wording of this provision ("witness against himself") seems to exclude other persons than the accused, it is generally understood that the drafting is misleading and that all persons taking part in the proceedings are covered by the provision.[14] This view has been confirmed by the Supreme Court in *Counselman* v. *Hitchcock*:[15]

> It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

(b) In *Germany*, the principle can be found in the Codes of Criminal Procedure for the first time in the 19th century when the accused converted from the mere object of the truth-seeking exercise of the organs of the inquisition into an autonomous and responsible subject of the trial. Thus, the Code of Criminal Procedure ('*Strafprozessordnung*-StPO') of Braunschweig of 1849[16] established that the suspect is not obliged to answer the questions addressed to him or her.[17] The first comprehensive Code of Criminal Procedure for the German Empire ('*Reich*') of 1871 recognized the principle in a general manner extending it also to witnesses.[18]

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13. For a methodological foundation of the recourse to comparative law as a source within the meaning of Art. 21(1)(c) ICC Statute *see* Kreß, *supra* note 1, at 332–333.
14. Rogall, *supra* note 9, at 83; Schabas, *supra* note 2, Art. 67, marginal note 47 (1999).
15. *See* Counselman *v.* Hitchcock, 11 January 1892, 142 U.S. 547, at 562 (1892).
16. Braunschweig was a small and independent Princedom before the creation of the German Empire in 1871.
17. H. Rüping, *Zur Mitwirkung des Beschuldigten und Angeklagten*, 1974 Juristische Rundschau 135, at 136. *See* for the general context of the "Reformed Criminal Process", Böse, *supra* note 12, at 113 *et seq.*
18. The corresponding Sec. 54 (today Sec. 55) read:

    > Jeder Zeuge kann die Auskunft auf solche Fragen verweigern, deren Beantwortung ihm selbst oder einem […] Angehörigen die Gefahr strafgerichtlicher Verfolgung zuziehen würde.
    >
    > Any witness may refuse to answer any questions the reply to which would subject him, or one of the relatives specified in section 52 subsection (1), to the risk of being prosecuted for a criminal offense or a regulatory offense (unofficial translation of the German Ministry of Justice, at http://www.bmj.de/frames/eng/ministry/federal law).

    (According to F.O. von Schwarze, Kommentar zur StPO, at 182 (1878); W. Rosenberg, StPO-Kommentar, 8th Ed., at 268 (1898)). *See also* Dingeldey, *supra* note 10, at 407 and 408.

As a consequence, it is generally agreed that the principle in the existing law does not only protect the suspect/accused but also other parties of the trial, in particular the witnesses.[19]

3.2.2. International sources

(a) As already mentioned, Article 14(3)(g) of the *ICCPR* contains as a minimum guarantee the *accused's* right not to be compelled to testify against himself, or to confess guilt. The wording of the provision seems clearly to indicate that other persons than the accused are not covered by the right.[20] However, Article 14(3)(g) ICCPR must be interpreted broadly taking into account the character and purpose of the provision.[21] Unlike Article 67 ICC Statute which refers to the "rights of the accused" in a specific phase of the proceedings before a criminal court (the ICC), Article 14(3)(g) ICCPR forms part of the first comprehensive human rights treaty by which it was intended, *inter alia*, to codify the principle of a fair trial in a general manner without specifically thinking in terms of the procedural distinctions between investigation and trial or between suspect, accused and witnesses. The drafters intended to codify the *nemo tenetur* principle, for the first time, as a general principle of law and were guided by the Fifth Amendment of the US Constitution. Thus, they understood the principle in its most comprehensive form including the accused as well as witnesses.[22]

(b) Article 6 of the 1950 *European Convention on Human Rights* ('ECHR') guarantees the right to a fair trial as a right of the *accused* but does not explicitly encompass the *nemo tenetur* principle. However, the European Court of Human Rights found in principle that "the fair hearing requirement in Article 6 of the European Convention implies that an accused has the right to remain silent and not contribute to incriminating himself or herself."[23] Given the clear wording of Article 6 it is difficult, however,

19. *See* Judgement of the German Federal Constitutional Court of 8 October 1974, BVerfGE 38, 105, at 113; *also* Bundesgerichtshof ('BGH'), Vol. 38, 302, at 305–306; K. Rogall, *in* H. Rudolphi (Ed.), Systematischer Kommentar zur Strafprozessordnung, *before* Sec. 133, marginal note 130 (1997); Müller, *supra* note 9, at 552; T. Verrel, Die Selbstbelastungsfreiheit im Strafverfahren 269–270 (2001), with further references in n. 1553. This study provides for a detailed analysis of the German case law and aims at a restriction of the principle in the light of its expansion in the last decades.
20. N. Bosch, Aspekte des nemo-tenetur-Prinzips aus verfassungsrechtlicher und strafprozessualer Sicht 25 (1998); Nowak, U.N. Covenant on Civil and Political Rights, Art. 14, marginal note 59 (1993).
21. Dingeldey, *supra* note 10, at 407 and 409; Rogall, *supra* note 9, at 118.
22. Rogall, *supra* note 9, at 117.
23. Funke *v.* France, Judgement of 25 February 1993, 1993 ECHR (Ser. A) No. 256-A, at para. 44. *See also* C. Safferling, Towards an International Criminal Procedure 122 (2001); Müller, *supra* note 9, at 547, 550 *et seq*.

to extend its rights to witnesses.[24] The case law of the Court is rather silent on the matter since in most *nemo tenetur* cases only the right of the accused was at stake.

In *Funke* v. *France*, the Court affirmed a violation of the accused's right no to incriminate himself since he was compelled to produce incriminating evidence.[25] This has been criticized as a too broad interpretation of the *nemo tenetur* principle.[26] In *Murray* v. *U.K.* the Court considered that (English) legislation that allows to draw certain conclusions from the silence of the accused does not violate the *nemo tenetur* principle:[27]

> On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.[28]

3.2.3. Conclusion

Despite the wording of the international human rights treaties *a systematic and teleological interpretation*, supported by comparative law, leads to the conclusion that the *nemo tenetur* principle *also protects witnesses* against self-incrimination. This obviously implies that the witness – as the accused – be informed of this right.[29]

3.3. The scope *ratione materiae*: comprehensive protection of the right of personality?

3.3.1. The witness' "right of personality"

Apart from giving rise to criminal prosecution, incriminating statements may also do harm to the *reputation* of the accused or witness. If the *nemo tenetur* principle is understood in a comprehensive way as protecting the human dignity,[30] it may be argued that it reaches well beyond the mere protection from criminal prosecution and extends to any harmful social

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24. *See* J.A. Frowein & W. Peukert, Europäische Menschenrechtskonvention, 2nd Ed., Art. 6, marginal note 4 (1996).
25. Funke *v.* France, *supra* note 23.
26. *See* A. Butler, *Funke v. France and the Right against Self-incrimination: A Critical Analysis*, 11 Criminal Law Forum 461 (2000).
27. John Murray *v.* United Kingdom, Judgement of 8 February 1996, 1996(I) ECHR Reports, para. 47 *et seq.*
28. *Id.*
29. *Cf.* Safferling, *supra* note 23, at 121, 124.
30. *Cf.* T. Weigend, *Unverzichtbares im Strafverfahrensrecht*, 113 Zeitschrift für die gesamte Strafrechtswissenschaft 271, at 293 (2001).

consequence of an incriminating statement. In this understanding, the *nemo tenetur* principle would protect the "general right of personality" ('*allgemeines Persönlichkeitsrecht*') as developed by the German Constitutional Court[31] based on the principle of human dignity (Article 1(1) Basic Law, *Grundgesetz* ('GG')) and the right to the free development of the personality (Article 2(1) GG). Accordingly, everyone has the right to decide on one's own if and how matters of his personal life are exposed to the public.[32]

If one interprets the *nemo tenetur* principle broadly so as to encompass the right of personality it could be argued that it would exclude any obligation of the witness to make statements which may be of an incriminating nature. In this sense, even an assurance as provided for in ICC Rule 74 does not sufficiently protect the witness since a testimony in front of persons present at a hearing does, even if these persons assured not to use the testimony, harm to the witness' reputation and entails the risk that the information exposed will, sooner or later, be known publicly. It is certainly true that the assurance gives the witness a strong guarantee that his testimony is kept confidential but he or she still remains in a weaker position than the accused who enjoys an *unlimited* right to remain silent. On the other hand, it must not be overlooked that, as will be seen in the following section, virtually no legal system attributes to the *nemo tenetur* principle a meaning as wide as to encompass the right of personality.

3.3.2. Comparative law

3.3.2.1. Germany

In German law the *nemo tenetur* principle protects the witness from a situation where he or she is put under such a pressure that he cannot but confess a criminal act committed by himself or a family member (Section 55 *Strafprozessordnung*-StPO).[33] Although the witness' right to object any incriminating statement is based on the respect for the personality of the witness,[34] this right does not want to prevent the witness from any false statement[35] nor from statements which may be harmful to the social reputation or "honour" of the witness or his family.[36] In sum, German law

31. *See* Judgements of the German Federal Constitutional Court 31 January 1973, BVerfGE 34, at 238; and 15 December 1983, BVerfGE 65, at 1.
32. *See also* Kreß, *supra* note 1, at 352 with further references in n. 78. More detailed Böse, *supra* note 12, at 99 *et seq*.
33. *See* Judgement of the German Federal Constitutional Court, *supra* note 19; T. Kleinknecht & L. Meyer-Goßner, Strafprozessordnung Sec. 55, marginal note 1 (1997).
34. *See* Judgement of the German Federal Constitutional Court, 13 January 1981, BVerfGE 56, at 37 and 41; V. Berthold, Zwang zur Selbstbezichtigung aus § 370 Abs. 1 AO und der Grundsatz *nemo tenetur* 4 (1993).
35. Von Schwarze, *supra* note 18, at 183; Kleinknecht & Meyer-Goßner, *supra* note 33, Sec. 55, marginal note 1.
36. Kleinknecht & Meyer-Goßner, *supra* note 33, at § 55, marginal note 5; K. Rogall, *in* H. Rudolphi (Ed.), Systematischer Kommentar zur Strafprozessordnung, before Sec. 133, marginal note 150 (1997).

does not go so far as to give the right to object to any statement which would have harmful social consequences but only to statements on the basis of which the witness could be prosecuted. Thus, *insofar* ICC Rule 74 would be compatible with the *nemo tenetur* principle as understood in German law.

3.3.2.2. United States

Similarly, in the US the privilege against self-incrimination only protects from criminal prosecution; it is not affected by mere harm to the reputation.[37] A broader interpretation only existed shortly after the introduction of the Fifth Amendment and was soon abolished.[38]

The privilege only exists as long as the witness can be held responsible; it ceases to exist if the witness was convicted or absolved or exempted from punishment by any definitive measure (amnesty, pardon, statute of limitation).[39]

According to the rule of *transactional immunity*[40] the prosecutor may request the Court to grant a witness immunity from prosecution for all offenses related to matters arising out of the "transaction" that was the subject of the compelled testimony.[41] The so-called "*immunity from use*" is narrower in that it protects the witness only from use of the compelled testimony and evidence directly or indirectly derived from that testimony.[42] The witness is obliged to testify and the privilege against self-incrimination is converted into the mere "immunity from use." The rule goes back to the Supreme Court's decision in *Kastigar et al.* v. *United States*:

> The United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity […] from use of the compelled testimony in subsequent criminal proceedings, as such immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over a claim of the privilege.[43]

Thus, the US law, similar to ICC Rule 74, knows a situation where a witness can be compelled to testify and is only protected against the *subsequent use* of the incriminating evidence.

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37. N. Schmid, Strafverfahren und Strafrecht in den Vereinigten Staaten, 2nd Ed., 128 (1993).
38. Rogall, *supra* note 9, at 85.
39. J. Wigmore, Evidence in Trials at Common Law, Vol. 8, McNaughton rev. 1961, Sec. 2281, at 490 *et seq.* (1961).
40. S. Thaman, *Landesbericht USA*, *in* W. Perron (Ed.), Die Beweisaufnahme im Strafverfahrensrecht des Auslands 527 (1995).
41. J.W. Strong (Ed.), McCormick on Evidence, Vol. 1, 5th Ed., Sec. 143, at 515 (1999) (hereinafter 'McCormick on Evidence'); *see also* California Penal Code Sec. 1324.
42. McCormick on Evidence, *id.*
43. Kastigar *et al. v.* United States, 22 May 1972, 406 U.S. 441 (1972).

3.3.2.3. Canada

The Canadian law similarly provides for an *ex post protection* of the witness who made an incriminating statement. The witness must not refuse to answer a question on the ground that the answer might incriminate her but if the testimony in fact has this effect it cannot be used as evidence against her. Section 13 of the Canadian Charter of Rights and Freedoms states: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence." This solution, in fact, corresponds to the one provided for in ICC Rule 74 in that it grants the witness only a protection *ex post* against the *use* of incriminating evidence. The difference lies in the fact that the Canadian law, as ICTY/ICTR Rule 90(F) (*see supra* Section 2.2), gives the witness an automatic right against the use of self-incriminating evidence while Rule 74 makes this right dependant on the assurance given by the Chamber.

3.3.2.4. United Kingdom

In the UK the principle originally had a broader meaning including cases in which the witness ran the risk to harm his reputation by the testimony. Later, however, the principle was also limited to cases of a threat of criminal prosecution by the testimony.[44] Recent legislation and case law limited the principle even more allowing, *inter alia*, to make inferences from the silence of the accused or witness.[45]

3.3.2.5. France

In France, the accused has the right to remain silent or even lie during the whole proceedings.[46] The search for the truth does not justify the use of any means[47] (so-called principle of '*loyauté*'[48]). There is, however, no explicit provision which protects the witness against self-incrimination. The invocation of the applicable human rights treaties, ratified by France, is not very helpful since they equally do not explicitly extend the right to witnesses (*supra* Section 3.2.2).

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44. Rogall, *supra* note 9, at 81.
45. B. Huber, *Landesbericht England und Wales*, *in* Perron, *supra* note 40, at 39; *see also* John Murray *v.* United Kingdom, *supra* note 27, at para. 47 *et seq*.
46. H. Barth, *Landesbericht Frankreich*, *in* Perron, *supra* note 40, at 103.
47. *Id.*, at 110.
48. P. Bouzat, *La Loyauté dans la recherche des preuves*, *in* Institut de Droit Comparé de l'Université de Paris, Travaux de la Section de Droit Pénal et de Science Criminelle IV: Problèmes Contemporains de Procédure Pénale – Recueil d'Etudes en Hommage à M. Louis Hugueney 155 (1964).

3.3.2.6. Spain

According to Article 24(2) of the Spanish Constitution everyone is entitled not to incriminate oneself.[49] Article 418 of the Code of Criminal Procedure ('*Ley de Enjuiciamiento Criminal*') extends this right to any response which could do any "material or moral, direct and important" harm to the witness or a family member.[50] Thus, at first sight, Spanish law extends the protection of the witness beyond mere criminal prosecution to any harm to his social reputation; the right itself, however, is severely limited since it does not apply to certain serious crimes against the security of the state, public peace or the Crown.[51]

3.3.3. Conclusion

An over-view of the comparative law shows that the scope afforded to the *nemo tenetur* principle differs widely.[52] However, it seems to be clear that the prevailing and generally agreed purpose of the principle is to protect the accused or the witness from criminal prosecution on the basis of his or her *own* statements. This protection is either granted *ex ante*, by a prohibition to *take* any evidence which may incriminate the witness (Germany); or *ex post*, by a prohibition to *use* any incriminating evidence against the witness (US, Canada). Thus, *a grosso modo*, one can argue that *common law* protects the witness (*ex post*) by an assurance of "non-use" while *civil law* prohibits the taking of the testimony (*ex ante*) in the first place. The common law solution corresponds to the one provided for in ICC Rule 74 in that the witness basically must rely on a promise or assurance not to be prosecuted on the basis of his or her statement.[53] This solution obviously implies a narrower interpretation of the *nemo tenetur* principle which is less favourable to the witness and which may create

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49. *See* Art. 24(2) of the Spanish Constitution: "*Asimismo, todos tienen derecho […] a no declarar contra sí mismos, a no confesarse culpables […].*" ("Likewise, all have the right […] not to make self-incriminating statements; not to plead themselves guilty […].")
50. *See* Art. 418 of the Spanish Code of Criminal Procedure:

    > Ningún testigo podrá ser obligado a declarar acerca de una pregunta cuya contestación pueda perjudicar *material o moralmente y de una manera directa e importante*, ya a la persona, ya a la fortuna de alguno de los parientes a que se refiere el artículo 416. Se exceptúa el caso en que el delito revista suma gravedad por atentar a la seguridad del Estado, a la tranquilidad pública o a la sagrada persona del Rey o de su sucesor. (Emphasis added.)
    >
    > (No witness shall be obliged to answer a question, the answer to which may prejudice *materially or morally in a direct or important way* either the person or the fortune of any of the relatives mentioned in Article 416, except when the crime is of such gravity that it affects the State's security, public order or the sacred person of the King or his successor.)

51. *See* Art. 418, 2nd sentence, Spanish Code of Criminal Procedure, *supra* note 49.
52. *See also* Weigend, *supra* note 30, at 293.
53. *See also* Kreß, *supra* note 1, at 346, drawing on the Preparatory Committee ('PrepCom') negotiations.

problems for lawyers trained in a civil law system. It attains particular importance in the light of the apparent conflict between Article 55(1)(a) ICC Statute and ICC Rule 74 (*see infra* Section 5.1)

The over-view also shows that any further infringement in personal rights as a consequence of a witness statement is not covered by the *nemo tenetur* principle. *Insofar*, therefore, ICC Rule 74 is compatible with the principle. In addition, one must not overlook that the RPE take into account the rights of the witnesses by other means.[54]

4. Do the Statute and the Rules of the ICC Have a "Direct Effect" on the Witness?

Having clarified that a witness may be compelled to testify before the ICC under certain circumstances the further question arises whether *individuals* are, at all, under an *obligation to cooperate* with an International Criminal Tribunal, in particular the ICC.[55] Only if this is the case the Tribunal has the power to order the appearance of a witness. The question must be strictly separated from the question of *individual criminal responsibility* of perpetrators of individual crimes. While such a responsibility is undoubtedly recognized since the Nuremberg trials[56] and one may, therefore, speak of a "direct effect" towards the accused,[57] it is quite another question if this effect can be extended to persons other than the accused.

4.1. Direct effect of Security Council Tribunals: the *Blaškić* precedent

In *Blaškić*,[58] the question arose whether the International Tribunal may issue binding orders to *state officials* or to individuals acting in their *private* capacity to obtain relevant evidence.[59] While the Appeals Chamber

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54. *See*, *e.g.*, Rule 88(5):

> Taking into consideration that violations of *the privacy* of a witness […] may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness […] so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence (emphasis added).

See also Kreß, *supra* note 1, at 352–353 and 375 *et seq*.

55. On the cooperation regime in general *see* G. Sluiter, *Cooperation with the International Criminal Tribunals for Rwanda and Yugoslavia*, *in* Fischer, *et al.*, *supra* note 1, at 681.
56. K. Ambos, *Individual Criminal Responsibility*, *in* G.K. McDonald & O. Swaak Goldman (Eds.), Substantive and Procedural Aspects of International Criminal Law I, 1, at 5 (2000).
57. *See also* S. Furuya, *Legal Effect of Rules of the International Criminal Tribunals and Court upon Individuals: Emerging International Law of Direct Effect*, 47 NILR 111, at 112 (2000).
58. The Prosecutor *v.* Blaškić, subpoena Appeals Chamber Judgement, Case No. IT-95-14-AR108bis, Appeals Chamber, 29 July 1997.
59. On the power of *national* courts to compel the production of evidence in comparative law *see* the *amicus curiae* brief of the Max Planck Institute for Foreign and International Criminal Law by A. Eser & K. Ambos, 6 Eur.J.Crime Cr.L.Cr.J. 3 (1998).

– against the Trial Chamber – held that Judges or Trial Chambers "cannot address binding orders to *State officials*" since they are representatives of the corresponding state[60] (*i.e.*, such orders must be channelled through the competent state organs which then themselves may select the competent official), the matter is different with regard to *private* individuals. In this case, the Statute itself grants the Tribunal the power "to question suspects, victims and witnesses" (Article 18(2)) and to issue any order "as may be required for the conduct of the trial" (Article 19(2)). This power, according to the Appeals Chamber, is based on the "general object and purpose of the Statute, as well as the role of the International Tribunal" which was established as an organ of the UN Security Council and as such possesses "*vertical*" powers *vis-à-vis* the states and its citizens.[61] As a consequence, the Tribunal has "an incidental or ancillary jurisdiction over individuals *other than those* whom the International Tribunal may prosecute and try. These are *individuals who may be of assistance* in the task of dispensing criminal justice entrusted to the International Tribunal."[62] This characterization does not only refer to exclusively private individuals but also to state officials who, for example, witness the commission of a crime before taking up official duties or even while on official duty since in this case "the State official is no longer behaving as an instrumentality of his State apparatus" and "it is sound practice to 'downgrade' […] the State official to the rank of an individual acting in a private capacity and apply to him all the remedies and sanctions available against non-complying individuals […]."[63]

From this argumentation it follows that International Criminal Tribunals established by the Security Council may not only issue binding orders to *private* individuals – indeed, this was not even disputed between the parties in *Blaškić*[64] – but also to *state officials* acting in their private capacity. Obviously, such powers include the possibility to order witnesses to appear in court. Such witnesses can even be addressed directly by the Tribunal if the competent state authorities are not willing to cooperate and thereby jeopardise the discharge of the Tribunal's fundamental functions.[65] In this sense, Security Council Tribunals exercise "direct effect" over individuals.

However, this argumentation deserves some criticism.[66] It is indeed a doubtful construction to infer from the vertical relationship between

60. The Prosecutor *v.* Blaškić, *supra* note 57, paras. 39–43 (emphasis added).
61. *Id.*, at para. 47.
62. *Id.*, at para. 48 (emphasis added).
63. *Id.*, at paras. 49–51. On the legal remedies *see id.*, at para. 57 *et seq.*
64. *Id.*, at para. 46.
65. *Id.*, at paras. 55 and 56.
66. *See also* A. Klip, *Witnesses before the International Criminal Tribunal for the Former Yugoslavia*, 67 Revue Internationale de Droit Penal 267, at 275 (1996); K. Oellers-Frahm, *Cooperation: The Indispensable Prerequisite to the Efficiency of International Criminal Tribunals*, *in* American Society of International Law, 89 Proceedings of the Annual Meeting of the American Society of International Law 304, at 310 (1995).

Security Council Tribunals and states, *i.e.*, from a hierarchical relationship between *collective* entities, powers of the superior entity (the Tribunal) towards *individual* persons. In fact, the relationship between the Tribunal and the individual who is not a suspect or an accused can only be channelled through the individual's home state. Be that as it may, even if one accepts, for the sake of argument, the Appeals Chamber's argumentation it is still another question whether such a direct effect can also be exercised by a treaty-based Tribunal like the ICC.

4.2. Direct effect of a treaty-based court: the ICC?

If one carries the Appeals Chamber's argument of the ICTY's *verticality vis-à-vis* states to its logical conclusion, one can certainly argue that a *non-vertical*, treaty-based court cannot invoke the same powers as a *vertical*, Security Council Tribunal. Furthermore, while a Security Council resolution is binding on all UN member states, a treaty only binds its parties. In other words, the ICC can only, if at all, exercise a direct effect *vis-à-vis* individuals subject to the jurisdiction of a state party to the 1998 Rome Statute. In any case, verticality as an abstract legal principle developed for a quite specific category of tribunals is not an adequate concept to justify direct powers of a treaty-based court *vis-à-vis* individuals.[67] Rather, one must examine the rules of the treaty and of its additional instruments, *i.e.*, the ICC Statute and the RPE.

As to the question under examination, Article 64(6)(b) ICC Statute grants the Trial Chamber the right – "[i]n performing its functions prior to trial or during the course of a trial" – to "require the attendance and testimony of *witnesses* and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute" (emphasis added). Analysing this provision, it is quite clear that it does not imply an obligation of the witness to cooperate *directly* with the ICC or, *vice versa*, the power of the ICC to address potential witnesses directly. The ICC may only "*require* the attendance and testimony of witnesses" (emphasis added) and it must, even in the light of the *Blaškić* precedent, channel such a request through the competent state organs.[68] One can go further and argue that Article 64 does not refer to the relationship between the ICC and states/individuals – this relationship is regulated in Part 9 of the Statute on cooperation – but has only the function to delimitate the competence of the Trial Chamber *vis-à-vis* the other organs of the ICC, *e.g.*, the Prosecutor (Article 54) and the Pre-Trial Chamber (Article 57). Thus, with or without *Blaškić*, on the basis of Article 64(6)(b) a direct effect cannot be inferred.

State organs of state parties are under the general obligation to cooperate with the ICC (Article 86 ICC Statute). Thus, if they clearly demon-

67. Furuya, *supra* note 57, at 131.
68. *See* references in *supra* note 66 and accompanying text.

strate their unwillingness to cooperate, the ICC may have the power to bypass the state and address the witnesses directly. While, however, in the case of a Security Council Tribunal this power may be based on the concept of *verticality*,[69] it is difficult to justify it in case of a court that – as the ICC – is created by the consent of states and may only *complement* their national jurisdictions (paragraph 10 Preamble, Article 1 ICC Statute). Such a court cannot claim any superiority towards states but depends, in the final result, on their willingness to cooperate. Indeed, it is an euphemism if Article 64(6)(b) makes cooperation dependent on its necessity, using the formulation "if necessary." In fact, the assistance of the competent state will always be "necessary" to obtain evidence; at least, as far as evidence from certain witnesses or documents located on state territory is concerned. The ICC Statute itself clearly demonstrates the tight relationship between the ICC and the state parties. They are not only needed to facilitate "the *voluntary* appearances of persons as witnesses or experts before the Court" (Article 93(1)(e))[70] but also will have to gather directly evidence for the Court as the list in Article 93(1)(a) to (d) indicates. In particular states will themselves be requested to take evidence, including testimonies (Article 93(1)(b)), or carry out this task, without request, on a voluntary basis. In fact, the ICC, through the prosecutor, can only directly execute a request of cooperation under the conditions spelled out in Article 99(4): if it does not involve compulsory measures, the execution is essential and takes place on the territory of a state where a crime has allegedly been committed. Even in this case, though, the prosecutor must consult with the state authorities before the execution of the request (subparagraphs (a) and (b)) and requires the authorization of the Pre-Trial Chamber which itself must have regard to the views of the state concerned and determine that this state is unable to execute the request (Article 57(3)(d)).

Even if one takes the view, for the sake of argument, that the principle of complementarity can also be read in the sense of a mechanism which confers upon the ICC the power to address witnesses directly if the competent state is either unwilling or unable to cooperate in the prosecution of an international crime, the ICC would not be able to make a witness directly appear in court. This follows from the general thought that the ICC's power to enforce the obligation to cooperate in substitution of a state cannot go further than this state's original duty as provided for in the Statute. Thus, if according to Article 93(7)(a)(i), the temporary transfer of a person for, *inter alia*, obtaining testimony is only possible if the "person *freely* gives his or her informed *consent* to the transfer" (emphasis added), the ICC cannot compel a witness to appear in court without his

69. *See* Blaškić, *supra* note 65 and accompanying text.
70. Emphasis added. At this moment already, the Court must instruct the witness about Rule 74, *see* Rule 190.

or her consent since the transfer – which again requires state cooperation (Article 93(1)(e), *supra*)! – is the necessary prerequisite of the appearance in court. Similarly, Article 93(1)(e), already quoted above, presupposes a "*voluntary* appearance." Finally, while in case of a suspect a summon to appear in court can be issued (Article 57(7)), no similar coercive measure can be taken with respect to witnesses.

These provisions also show that the Statute does not confer on the ICC the power to issue binding order to witnesses. Indeed, the ICC does not only depend on the cooperation of the states but also on the (voluntary) cooperation of persons subject to their jurisdiction as potential witnesses of crimes;[71] they can only be compelled, in accordance with international human rights standards, by national laws. While this possibility is not disputed,[72] it deserves further analysis whether the Security Council, by way of a Chapter VII resolution, could confer on the ICC the power to directly compel witnesses.[73] In a way, this would be the consequence of stringent application of the *Blaškić* precedent and the verticality principle.

4.3. Conclusion

In sum, the ICC Statute does not provide for an obligation of individuals to cooperate with the ICC.[74] The ICC cannot – unlike the ICTY according to *Blaškić* – address individuals directly and expect them to follow its orders; it needs to channel its cooperation requests through the competent state organs. Only the states can order their nationals[75] – in a specific case or by a general (cooperation) law – to cooperate with the ICC.[76] As state Parties they are obliged to do so, but still only to facilitate the *voluntary* appearance of the witnesses (ex Article 93(1)(e)).

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71. *See also* Kreß, *supra* note 1, at 342: "the appearance of witnesses before the ICC will be voluntarily only." The same author criticizes this "undue deference to State sovereignty" and hopes that it "will not hamper too seriously the ICC's efficiency." (*Id.*, at 343.) Similarly, Bohlander, *Int. Criminal Tribunals and their Power to Punish Contempt and False Testimony*, 12 Criminal Law Forum 91, at 115–116 (2001) discussing the possibility of contempt sanctions but recognizing that the ICC Statute "does not explicitly provide for compelling the testimony of a witness […]."
72. *See also* Kreß, *supra* note 1, at 343.
73. Left open by Kreß, *id.*
74. *See* C. Kreß, *Commentary Art. 86*, *in* Triffterer, *supra* note 2, marginal note 7 (1999).
75. On the criminal procedural law from a comparative perspective in this regard *see* Eser & Ambos, *supra* note 59, at 5 *et seq*.
76. M. Ubéda, *L'obligation de coopérer avec les jurisdictions internationales*, *in* H. Ascensio, E. Decaux & A. Pellet, Droit International Pénal 951, at 957 (2000). On the implementing legislation *see* C. Kreß & F. Lattanzi (Eds.), The Rome Statute and Domestic Legal Orders, Vol. I (2000).

5. Problematic Aspects of the Assurance

5.1. Violation of *nemo tenetur*?

The *nemo tenetur* principle grants the right not to make *any* statement of incriminating nature. The person "[s]hall not be compelled to incriminate himself or herself […]" (Article 55(1)(a) ICC Statute). The right seems to be unlimited, there is no qualifier and no reservation. The person may object to any statement which could possibly incriminate him or her. It grants a protection already at the stage of *taking evidence*, it establishes a prohibition to *take* evidence which would incriminate the person. Thus, *prima facie*, this right is not satisfied by an assurance not to use incriminating evidence against the witness (ICC Rule 74(3)). As a consequence, Rule 74(3) violates Article 55(1)(a) ICC Statute since it allows something which the Statute forbids (Article 51(4) and (5) ICC Statute). Article 93(2) ICC Statute does not lead to another result since it only refers to prosecution for acts or omissions committed before the departure of a witness from a state to the ICC.[77]

The apparent conflict between Article 55(1)(a) and ICC Rule 74 can only be remedied in two ways. Either one applies Article 55 and Rule 74, as has been argued above (Section 2.1.2), to different stages of the proceedings. This would imply, however, that the protection of the witness during the trial is considerably weaker than during the investigation. Such a *formal* or *formalistic solution* makes little sense and actually shows that, for teleological reasons, Article 55(1)(a) cannot be limited to the investigation stage.[78] If this were the case, the other prohibitions contained in Article 55(1)(b)–(d), *e.g.*, the prohibition of torture, the right to have an interpreter, freedom from arbitrary detention, would equally not be applicable in the trial stage. This would make no sense since Article 55(1) only establishes general human rights of persons during a criminal investigation which, as consequences or specific dimensions of the fair trial principle, must apply to the whole proceedings. In any case, a clear-cut temporal separation between investigation and trial does not solve the underlying problem since it would still leave us with a Rule which contradicts the essence of a provision (Article 55(1)(a)) of the Statute.

The *other* possible *remedy* would be to interpret the *nemo tenetur* principle in a more generous way so that the *taking* of evidence is allowed if it is only made sure that evidence which incriminates the witness will *not* be *used* against him or her in *subsequent* proceedings. Such a *substantive solution* in the sense of the "immunity from use" doctrine of the US Supreme Court[79] has the advantage that it takes into account practical considerations. From a practical point of view, a strict application of the *nemo*

77. *See* already *supra* note 4.
78. *See also* Kreß, *supra* note 1, at 345 and 363.
79. *See supra* Section 3.3.2.2.

tenetur principle to witnesses during trial would be counterproductive. International criminal trials for war crimes and crimes against humanity strongly depend on witness testimony.[80] It would virtually impede successful prosecutions if witnesses in such cases were granted unlimited rights to remain silent. In fact, the solution provided for by ICC Rule 74 is the best one to be possibly achieved[81] on the basis of a *balancing of the interests* involved: on the one hand, the interest of the international community to prosecute international crimes efficiently and successfully and, on the other hand, the individual interests of the witness to be safe from prosecution on the basis of his or her testimony. In addition, it must not be overlooked that witnesses must, in the absence of compulsory national legislation, only appear voluntarily before the Court.[82] Thus, witnesses involved in the crime under investigation or any other crime will very rarely appear in the first place and the recourse to the assurance will, therefore, be limited.[83]

For these reasons, the conflict between Article 55(1)(a) ICC Statute and ICC Rule 74(3) must be solved by a narrower interpretation of the *nemo tenetur* principle in accordance with the common law "immunity from use" rule. Accordingly, the assurance not to use incriminating evidence derived from the witness statement against the witness does not violate the *nemo tenetur* principle enshrined in Article 55(1)(a) ICC Statute. A further consequence of this interpretation is that once an assurance has been given to the witness, he or she is under an obligation to testify (Rule 74(3)(b): "require the witness to answer") and this obligation can be enforced by a fine according to Rule 171.[84] On the other hand, it is clear that the narrower interpretation of the *nemo tenetur* principle only applies to *witnesses* in trials before *international* criminal tribunals; it does neither apply to an *accused* in an international trial – her situation and role is very different to that of a witness – nor preclude the maintenance of the stricter inter-

80. The importance of witness testimony has been recognized by the ICTY in its Decision on the Prosecution's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995, para. 23. *See also* the most recent Appeals Judgement in Prosecutor *v.* Kupreskic *et al.*, Case No. IT-95-16-A, 23 October 2001, paras. 77 *et seq.* and 247 *et seq*. It must not be overlooked, however, that the importance of documentary evidence, as can be seen in the major war crimes trials from Nuremberg to Arusha, increases with the status of the accused in the chain of command; *see* R. May & M. Wierda, *Trends in International Criminal Evidence etc.*, 37 Colum. J. Transnat'l L. 725 (1999); *also* Kreß, *supra* note 1, at 331, n. 9.

81. *See* the similar positive general evaluation of the witness regime by Kreß, *supra* note 1, at 403–404.

82. *See supra* Section 4.2.

83. *Cf.* Kreß, *supra* note 1, at 347.

84. *See supra* Section 2.1.2. and *also* Kreß, *supra* note 1, at 346:

> […] it appears to be the essence of the compromise reached in New York that once all the strict conditions for a request under Rule 74(3) are satisfied the witness will be under an obligation to answer and such an obligation would be seriously devaluated if no sanction under Rule 171 were available.

pretation of the principle, as known in civil law countries, for *national* trials.

5.2. Conflict with the duty to prosecute crimes within the jurisdiction of the Court

The crimes within the jurisdiction of the Court constituting "the most serious crimes of concern to the international community" must not remain unpunished.[85] The Court is above all a mechanism to reduce impunity for serious international crimes. The prosecutor "*may* initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court" (Article 15(1) (emphasis added)), *i.e.*, he or she has discretion.[86] In the light of the gravity of the crimes within the jurisdiction of the Court, however, this discretion is limited. One can even argue that the prosecutor is obliged to investigate any crime which comes to his or her knowledge since "the most serious crimes of concern to the international community" fall under a duty to prosecute.[87] Thus, the prosecutor "shall" initiate an investigation (Article 53(1); *see also* Article 15(2) and (3)). The *substantive* duty to prosecute leads to a *procedural* obligation to investigate and prosecute in the sense of the *principle of procedural legality*. In other words, the substantive duty is backed and implemented by a procedural one.

In the light of this obligation to investigate and prosecute, the question arises whether the assurance not to use incriminating evidence against the witness can be maintained if that evidence points to "the most serious crimes of concern to the international community." Article 93(2) of the Statute goes even further allowing the ICC to abstain from prosecution for a previous "act or omission" if a witness or expert testimony is of particular relevance. This provision more clearly shows that the matter must be resolved by a *balancing of interests* in the concrete case taking into account, on the one hand, the importance of the evidence to be expected from the witness or expert and, on the other hand, the consequence of her immunity from prosecution (on the basis of her statements) in the light of her possible criminal involvement and role in the criminal organization. Thus, it seems to be clear that the "intellectual author" of war crimes or crimes against humanity, the "perpetrator behind the desk," can never obtain immunity from prosecution on the basis of a witness testimony since

85. *See* paras. 4 and 5 of the Preamble of the ICC Statute.
86. *See also* Bergsmo, Cissé & Staker, *supra* note 7, at 134 *et seq*.
87. K. Ambos, *Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen*, 37 Archiv des Völkerrechts 318 (1999); K. Ambos, Impunidad y derecho penal internacional, at 66 *et seq*. (Buenos Aires, 1999); K. Ambos, *Judicial Accountability of Perpetrators of Human Rights and the Role of Victims*, 6 International Peacekeeping 67 (2000); all with further references. For a more limited scope of the duty to prosecute M. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Cornell International Law Journal 507, at 514 *et seq*. (1999).

her testimony can never be important enough to weigh up her guilt. On the other hand, if a little subordinate can give crucial evidence as a witness to convict a major criminal, it can be justified that the former obtains immunity from prosecution.

In any case, the major difference between this form of immunity and individual or general exemptions from punishment (pardons or amnesties) in the course of a process of reconciliation[88] lies in the fact that the latter do not normally require a contribution of the person concerned to the clarification of the truth in a *concrete* criminal *trial*. Yet, only this *concrete* contribution legitimizes the immunity from prosecution. In this case one can also argue that it would be in the "interests of justice" (Article 53(1)(c) and (2)(c) ICC Statute) not to initiate an investigation or close the case with respect to a particular witness.[89]

In any case, the assurance cannot, from a *legal* point of view, hinder *national prosecutions*. It may, as a matter of *fact*, have this effect in the light of the confidentiality rule in Rule 74(3)(c)(i), since this could prevent national organs from being informed of possible crimes of a witness. From a *legal* point of view, however, the assurance is made by a Chamber of the ICC and is as such not binding on national organs of prosecution or adjudication. A binding effect would require a corresponding provision in the national legislation, *e.g.*, in an ICC cooperation law.[90] The *practical* need of such a provision is obvious, *legally* states may be obliged to extend the effect of the assurance into the national sphere of jurisdiction since otherwise they would violate the *nemo tenetur* principle (human rights argument).

5.3. Scope of the assurance: use of indirect evidence

According to Rule 74(3)(c)(ii) the evidence produced by the witness "[w]ill not be used either directly or indirectly against the person in any subsequent proceedings […]." Does this prohibit the use of any "fruit" which is a result of the witness statement? If, for example, the witness confesses his or her participation in a massacre and gives the crucial information to find the mass graves where the victims of the massacre are buried, it is clear that the confession to have participated in the massacre must not be used against the witness. What happens, however, to further evidence

88. *See* Scharf, *id.*, at 508 and 521 *et seq.* concluding that the ICC Statute does not remove amnesty as a bargaining chip to mediators in international or internal conflicts (at 508). As far as the ICC Statute is concerned, the only loophole for the Prosecutor to abstain from an investigation in case of an amnesty is the "interests of justice clause" mentioned in the text. Scharf does not present another argument. The reference to the deferral power of the Security Council under Art. 16 is misplaced since it is only a consequence of Chapter VII of the UN Charter.
89. Such a decision can be reviewed by the Pre-Trial Chamber, Art. 53(3)(b).
90. Similar Kreß, *supra* note 1, at 347 who calls upon state authorities to refrain from using witness testimony under Rule 74.

which the investigators find in one of the graves and which incriminates the witness: can this evidence be used against him or her or is it also covered by the assurance and its use therefore prohibited?

The question is dealt with differently in *comparative law*. In *US law* the *fruit of the poisonous tree* doctrine extends the prohibition to evidence derived from any illegally obtained evidence. The accused can only be convicted on the basis of evidence which is not tainted by illegality.[91] One of the main reasons is that the police must not obtain any advantage from illegal and unethical behaviour.[92] There are various exceptions however. The use of the evidence is not prohibited if the relationship between the evidence obtained and the illegal act is only weak ("attenuation of the taint"), if the evidence would have been obtained anyway independent of the illegal act ("independent source") or inevitably through legal means of investigation ("inevitable discovery").

In *German law* the fruit of poisonous tree doctrine is not recognized as such.[93] The prohibition to use evidence derived from illegal acts depends on a balancing of interests taking into account, on the one hand, the nature of the individual right violated and the gravity of the violation and, on the other, the gravity of the crime committed and to be prosecuted.[94] In the result, the evidence can be used for the same reasons as provided for in the US law.[95]

The Rule 74 situation and the situation covered by the fruit of the poisonous tree doctrine are only slightly different in that in the latter the indirect evidence obtained is based on illegal acts against existing individual right while in the former the use of the evidence may (only) violate a specific right given to the witness (the assurance). In fact, if one takes the wording of Rule 74 seriously one cannot but consider the use of *indirect* evidence based on the witness statement against the witness as a violation of the assurance. The Rule clearly forbids the *indirect* use of evidence. The use of such evidence *against the witness* is a violation of the assurance and as such unlawful. There is no room for a balancing of interests in the sense of the German law. Such a balancing would, given the gravity of the crimes involved, always lead to the use of the evidence and thus deprive the witness of the right granted by the assurance. In fact, the balancing decision is already taken by the Chamber if it offers the

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91. *See* Silverthorne Lumber *v.* United States, 26 January 1920, 251 U.S. 385 (1920); *see also* K. Harris, *Verwertungsverbot für mittelbar erlangte Beweismittel: Die Fernwirkungsdoktrin in der Rechtsprechung im deutschen und amerikanischen Recht*, 11 Strafverteidiger 313, at 315 (1991).
92. *See* Nardone *et al. v.* United States, 308 U.S. 338, at 340 (1939):

> To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty'.

93. Harris, *supra* note 91, at 313 and 318.
94. *See* Judgement of Federal Court of Justice, 18 April 1980, BGHSt 29, at 244.
95. Harris, *supra* note 91, at 313 and 319.

witness the assurance.[96] It would be a *mala fide* use of this power and violate the *venire contra factum proprium* principle if this right were later to be taken away from the witness invoking the gravity of the crimes. In any case, the protection of the witness is severely limited by the fact that the assurance, in principle, does not have a legal effect for national courts (*supra* Section 5.2. *in fine*); from a human rights perspective and in light of the complementarity principle, however, national systems should abide by the assurance recognizing it in the national legislation.

It is clear, however, that the indirect evidence – as the direct one – obtained on the basis of the witness statement can be used in *other investigations against other suspects*. Rule 74(3)(c)(ii) clearly refers to "*that* person," the rights of other persons are not affected at all. The rationale of the assurance is only to protect the specific witness who puts him- or herself at risk by giving evidence.

5.4. Conclusion

The assurance contained in ICC Rule 74(3) entails various problems. As to its compatibility with the *nemo tenetur principle*, as embodied in Article 55(1)(a), it is necessary to restrict this principle to a mere rule of "immunity from use" as known in the common law systems. For only such a narrow interpretation of the *nemo tenetur* principle makes the assurance compatible with the principle. This does not preclude, however, the maintenance of the stricter interpretation of the principle, as known in civil law countries, as far as national trials are concerned. Similarly, this more restrictive interpretation does not apply to the accused.

As to the principle of procedural legality and the substantive duty to prosecute serious crimes within the jurisdiction of the ICC it seems clear that major criminals can never be exempted from prosecution and punishment on the basis of an assurance. Thus, the Chamber must, in deciding about an assurance, undertake a *balancing of interests* taking into account, on the one hand, the importance of the evidence to be expected from the witness or expert and, on the other hand, the consequence of her immunity from prosecution in the light of her possible criminal involvement and role in the criminal organization. In any case, the assurance cannot hinder national prosecutions as long as it is not recognized in the national legislation. On the other hand, once an assurance is given it also extends to indirect evidence, *i.e.*, it is forbidden to use such evidence against a witness who received an assurance of non-use.

96. *See also* Kreß, *supra* note 1, at 346.