Global Rights Compliance

BIS GUIDE: INTRODUCTION TO EVIDENCE

This Guide provides an introduction to information and evidence; the various types and categories of evidence; and the rules governing the admissibility of evidence.

Information and Evidence: The Difference

International crime investigations usually involve a significant body of **information**. CSOs may wish to ensure that collected information can be used as **evidence** during further proceedings, i.e., that it is admissible before a national or international court or tribunal including the International Criminal Court. **Not all information is evidence**. A large part of the information gathered during an investigation may only serve as a lead or merely help with the appreciation of the circumstances.

Information

Any facts, data, or objects that is of investigative value, regardless of its form:

- Testimonial
- Documentary
- Physical
- Electronic
- Audio-visual
- Telecommunications
- Open-Source, etc.

Evidence

Information which meets the standards of legality, relevance and probative value, and is admitted in a criminal trial.

Only evidence can be used to prove or disprove an alleged crime.

Type of Evidentiary Materials

Evidence can come in many forms, which can be broadly divided into testimonial, documentary, physical and, in more recent years, audio-visual digital. This is the type of information practitioners should attempt to collect as each can be relevant for proving the commission of international crimes before domestic and international courts.

Testimonial

- The evidence or statement(s) that a witness gives under oath whether written, oral or through a recorded deposition.
- Examples include information from: victims, a wide range of corroborative witnesses, insider witnesses or the suspect/ accused. Experts can testify orally to discuss and elaborate on the results of their analytical reports in court. Victims can also deliver victim impact statements at sentencing.

Physical

- Objects, including materials detected through scientific means.
- Examples include: remains of weapons or ammunition, uniforms, items collected at a crime scene, etc.

Documentary

- Any piece of evidence that can be introduced at a trial in the form of documents, as distinguished from oral testimony. Documentary information can be gathered from a variety of public and private sources.
- Examples include: laws, regulations, transcripts, medical records, prison records, newspapers, court records, public statements or announcements, diaries, orders, minutes, decrees and official logbooks (e.g., vehicle usage, guard shift changes and visitor logs), reports, among others.

Open-Source

- Information that is publicly available or available through request or purchase.
- While open-source information is "not defined by its specific source", it can broadly be split into online and documentary information (see below).

Documentary Open-Source

- Documentary evidence accessible through public means, such as in print or online. Useful in establishing the background of a conflict and the extent to which certain information is known.
- Examples include: books, magazines, articles, microfiche materials, reports, public statements, testimonies, press releases, public records, library holdings, newspapers.

Online Open-Source

- Information publicly available on the internet. Verification and authentication can demonstrate the reliability and authenticity of this type of evidence.
- Examples include: online news articles; expert and NGO reports; images/videos posted on social media (Facebook, YouTube, Twitter, Instagram, LinkedIn, etc.).

Digital and Audio-Visual

- ***Any privately owned*** digital or audio-visual content that would not otherwise be classified as open-source information. Digital evidence may help establish the perpetrator's intent, whereabouts at the time of a crime, relationship with other suspects, pattern of movement or existence of a common plan.
- Examples include: electronic health records, videos or photographs, etc.

Telecommunication

- Falls under the umbrella of audio-visual and digital evidence and covers a wide range of potential forms of information relating to telecommunications. Can be helpful for corroboration and may provide indications of networks, such as familial ties or chains of command.
- Examples include: communications service providers' records, such as subscriber records; handset details (including applications and audio-visual files); etc.

Categories of Evidence

The above types of evidentiary materials may fall into the following categories:

Direct

- Directly proves a fact without the need for additional inferences to be made.
- **Example:** The testimony of a witness who saw a missile hitting a school or a soldier shooting an unarmed civilian.

Indirect

- Does not directly prove a fact, but, when corroborated, allows for a reasonable inference to be made that a fact exists. It can be important for establishing a fact in international trials, e.g., where there are no eye-witnesses or related documents.
- **Example:** Witnesses who did not see the exact moment of the attack on the residential district, but were able to identify the consequences, including the character of the damage and injuries.

Hearsay evidence

- Can be in oral or documentary form. First hand (i.e., a witness recounts information provided to them by another person); second hand; or more remote (i.e., information that has passed between two or more persons before being conveyed to the witness appearing in court). It is generally admissible, but its weight will depend on the circumstances.
- **Example:** a witness who testified that she heard from another person who the perpetrator of a crime was.

Exulpatory

- Evidence that may point to the innocence of the accused. Practitioners should make every effort to explore any exculpatory evidence.
- **Example:** video footage that the accused was in a different location when the crime was committed.

Corroborative

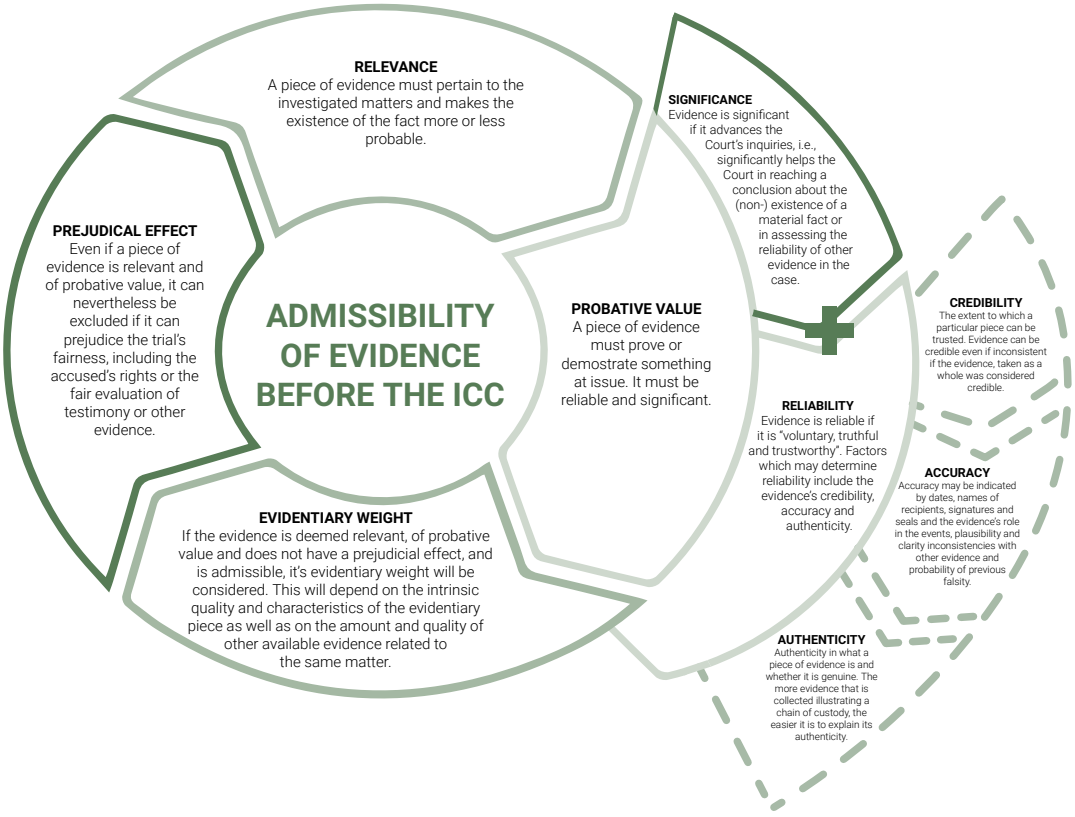
- Evidence from which a reasonable inference can be drawn that confirms and supports other categories of evidence or in some material way connects the relevant person with the offence. It strengthens or confirms what other evidence shows.
- **Example:** bullet casings found at the scene of a crime consistent with a witnesses testimony.

Expert

- Experts are persons with specialised skills and knowledge acquired through training who may be called to assist the court in dealing with issues that are beyond the understanding and experience of the average judge, such as specific issues of a technical nature, or requiring knowledge in a particular field.
- **Example:** military expert who can provide evidence of the command structure and weaponry used by a military organisation.

Overview of the Principal of Admissibility

Information source(s) must meet the characteristics above to be classified as evidence, and that evidence must be admissible. Those collecting evidence of international crimes should be cognisant of the applicable domestic rules on admissibility and the rules in any international court (i.e., the ICC) that also has jurisdiction.



In addition, when determining whether a piece of information is admissible, consider:

Has a violation of an internationally recognised human right taken place to obtain the information?	
No	The information can be admitted provided that other requirements (relevance, probative value, etc. – see above) are met.
Yes	The information is not automatically excluded. Assess whether the violation of the accused's rights was so serious and substantial as to impact the reliability of the information.

Evidentiary Weight

Provided that these admissibility tests are satisfied, the court will also assess the relative importance attached to each item of evidence (i.e., the 'evidentiary weight').

Evidentiary weight is the relative importance attached to an individual item of evidence in deciding whether a certain issue is proven or not.

When considering the weight of evidence, courts will consider the overall nature of the evidence and whether it is direct, indirect or hearsay.

For instance, an authentic but low clarity video of a suspect waving a knife may be given less weight than an eyewitness to the attack, provided that the witness's testimony is deemed reliable and credible.