Evidence before the International Criminal Court – Basic Principles

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I. Introduction

In 1998 the Rome Statute was signed, in 2002 the International Criminal Court (ICC) became operational, in 2005 the first arrest warrants were handed down. In due course, with several situations currently being under investigation, there will be the first pre-trial proceedings and eventually, the first trial. For lawyers interested in the work of the ICC, the law and practice of evidence before that court will be of primary importance. This paper tries to set out some of the basic principles that will govern the proceedings before the ICC; it does, of course, not even begin to address any and all potential problems of evidence that may arise. There is as yet no relevant case law at the ICC, but it is to be expected that the ICC will look to the jurisprudence of the ad hoc tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) for guidance; they will therefore need to be considered here. I will not deal with the separate and complicated issue of fresh evidence on appeal, but restrict myself to exploring the evidentiary issues up to the trial level.

II. General Issues – Evaluation, Burden and Standard of Proof

The law and practice before international criminal courts so far has often come as a culture shock to the lawyers from many different nations and legal traditions working there, be they judges, other staff members or independent defence counsel. Everyone recognises familiar characteristics, but also marvels at strange transplants from other legal systems that, in the particular state of amalgam they have reached in the international courts, somehow seem to be ill at ease with each other. I refer, naturally, to the great divide between the so-called “common” and “civil” law or “adversarial” and “inquisitorial” traditions, which still dominates the debate and which at times brings out a rather astonishing degree of emotion in the participants to that discussion. It has repercussions with regard to the interplay of the parties before the court, and most impressively with respect to the judicial role, where the key issue is just how far judicial activism and proactive involvement in the proceedings should go. One area where such activism may have a large impact is the law of evidence.

If one looks at the overall structure it soon becomes clear that at the ICC, although many more “building blocks” from the civil law are present than at the

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1 See the ICC website www.icc-cpi.int for more information about the present status of the cases.


3 It is, however, clear that the systems are more and more converging on the national level and as a consequence, the old dichotomy has lost some of its edge. See D. Amann, Harmonic Convergence? Constitutional Criminal Procedure in an International Context, [2000] 75 Indiana Law Journal 809 et seq.
ICTY and ICTR, the procedural setup is still to a large extent moulded to the shape of the adversarial model, which usually then entails a preponderance of arguments from common law jurisprudence as far as the substance of the law is concerned. Research into the use of domestic sources at the ICTY has shown that the recourse to common law materials is almost overwhelming, and this even applies to cases where civil law judges are in the majority on a certain panel. The adversarial approach covers the investigation and pre-trial phase, where this becomes clear at the example of the disclosure of evidence, and also the trial stage, where the presentation of evidence follows the sequence of “prosecution” and “defence” cases, something which is alien to systems that use pro-active judges who are in control of the case and who call the evidence in the order they consider best to ascertain the truth and manage a difficult case.

Be that as it may, the ICC subscribes to the same presumption of innocence as any developed domestic legal system does, when its Statute (ICCS) provides in Article 66:

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 66(2) ICCS also establishes clearly the first consequence of the presumption, namely the onus or burden of proof in relation to the guilt of the accused, which is put squarely on the prosecution. Article 66(3) ICCS defines the standard of proof as the conviction beyond reasonable doubt. Much has been written about the apparent problem that civil law systems, based, for example, on French or German terminology, use different expressions such as “intime conviction” or “Überzeugung” or “satisfaction” which to many common lawyers seem to imply a lesser and thus unacceptable standard of judicial persuasion. I was a judge in the German judiciary for over 13 years, and I have had conversations with judicial and academic colleagues from other jurisdictions, both common and civil law, which, in addition to comparative academic research, would appear to justify my conclusion that this whole problem is in its entirety based on an unfortunate misconception entertained by many common and human rights lawyers, the reasons for which I shall not go into. The standard of proof is for all practical purposes the same everywhere – beyond reasonable doubt. One may, however, legitimately ask whether the international tribunals and courts provide the appropriate framework for such a standard of proof, in