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The Rules of Procedure and Evidence in front of International Criminal Courts: a system *sui generis*

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Abstract
International Criminal Courts have been created to prosecute individuals allegedly accused of specific crimes such as war crimes, genocide, ethnic cleansing, and the judgment of these crimes is only endorsed by these Courts. A lot has been written concerning the procedures of prosecution; however, few jurists have dealt with the rules of evidence. Our goal is to give a thorough knowledge of the method used by those specific legal Institutions in the collecting and the processing of evidence to decide their judgment.
In a first part, we have tried to shape a general definition of the notion of 'evidence' in International Criminal Law, bearing in mind that this judicial system is at the same time an internationalized and an independent one.
In a second part, the analysis focused on the processing of evidence in trials before the International Criminal Courts, mainly confidentiality of evidence; these must not be shown out of the trial Chamber, all means to bring evidence is possible, the protection of witnesses, and the absolute independence of judges to consider the validity of evidence.
The study has emphasized on the newness of this legal system and on the necessity of filling up judicial voids.
Key-words: International Criminal Courts, system of evidence, Rules of procedure and evidence, the Statute of Rome, UN Resolutions.

Questions

1) What is the general status of the system of evidence in front of International Courts?
2) What distinguishes the system of evidence compared to national systems?
3) What is the source of legitimacy of the system of evidence?
4) What are the means to collect and process evidence?
5) Why are testimonies so important in the system of evidence?
6) What are the prerogatives of the judges to assess the system of evidence?

Methodology

This research is based on the qualitative research methodology, where the adopted methods to be used in achieving the objectives of research are the following:

- Synthesis approach
- Analytical research method.
- Comparative study
- Empirical study
- The study has to go through the study of specific legal documents to develop the main characteristics of the rules of procedure and evidence in International Criminal Courts.
- The necessity of comparing the work of judges in different Courts.
- The analysis of specific lawsuits helps to end up with a general legal framework

1. Introduction
In the past two decades, there was a paradigm shift in the International Criminal justice, where the International community has created several specialized International Criminal tribunals to consider crimes committed in

particular armed conflicts. They fulfilled the long-held dream of many International lawyers[1] to bring war Criminals in front of the International justice. The culmination of this phenomenon was the creation of the International Criminal Court, a permanent International Court of jurisdiction over the most serious crimes on the International community[2], and until the present moment, these Courts operating side by side, to realize the concept of International Criminal justice.

As a result of the multiplication and the rapid emergence of these Courts, bearing in mind that every Court has a different independent operating system, many questions were asked about the mechanisms of action of these Courts, and their ability to accomplish the International Criminal justice. But these International Criminal tribunals has subjected to criticisms in terms of their International legitimacy. Indeed, a lot of controversy erupted about each of the Tribunals for Former Yugoslavia and for Rwanda, since they both were established based on the Resolutions of the UN Security Council[3]. There was also doubt about the effectiveness of these Courts in achieving the purpose for which they were established in the first place, which is the punishment of those responsible for the breach of the rules of International humanitarian law[4], as what was reported by the Special Criminal Court for the Former Yugoslavia in its judgment in the case of the General Tadic:"

> Considering the specificity of the purpose for which the International Criminal Tribunal of the Former Yugoslavia was created, which is the restoration of International security and peace and strengthen the cooperation among nations, so the sanctions should follow the following concept: the duty of punishing the individuals who did not respect the rules of International humanitarian law, since they violated the law itself, and then deterring anyone intending to commit the same breach of these laws in the future[5] ".

The Special Criminal Court Rwanda pronounced the same principle, as the concept of punishment is including both the punishment for breaking the law and then the deterrence from repeating it, and the statements made by the International Criminal Court express the same approach.

A study discussing the rules of procedure and evidence taken in these special Courts is of great importance in determining the ability of this Court to achieve justice for the victims and ensure the integrity of the Court itself; it is important to be aware of the rapidity of the development of the rules of procedure and evidence in the International Criminal Courts, especially as the International Criminal rules of procedure and evidence are new [6], and the searching is ongoing to find an independent identity for this system in order to distinguish it from the rules of procedure and evidence in the National Courts. Despite that, there are many common elements between the concept of proof in National Criminal law and in the International Courts, the concept of prove in the International Criminal tribunals has special features rooted from the nature of the crimes being considered by the Court.

In addition to the above, there is a substantial variation in the activities and experiences of these Courts; indeed, some of these Courts ruled and imposed sanctions in many cases, such as the International Criminal Tribunal for the Former Yugoslavia, and some others did only apply one criminal judicial decision. Therefore, we shall ask if there are unified rules of procedure and evidence before the International Criminal Courts or if there is a collection of systems of Procedure and Evidence in each Court separately which linked to a set of political and legal circumstances and which led to the establishment of such Courts in the first place. Consequently, we may

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[1] Article 227 of the Treaty of Versailles, at the end of World War I in 1919, considered as the first attempt to prosecute a head of state Emperor Guillaume II; however, his asylum to the Netherlands which refused to extradite him made of this article as ink on paper.

[2] Article (5) of the basic Charter of ICC stated that "the jurisdiction of the Court shall be limited to the most serious crimes of concern to the International community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: the crime of genocide, crimes against humanity, war crimes, the crime of aggression."

[3] Itani, Z. the International Criminal Court and the evolution of International Criminal law, Alahabi Human Rights Publications, Syria , i 1, p.(135-137).

[4] See the preamble to the Statute of the International Criminal Court: " Affirming that the most serious crimes of concern to the International community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing International cooperation".

[5] "Le Tribunal International a pour mission et devoir, tout en œuvrant à la réconciliation des peuples, de dissuader de commettre de tels crimes et de lutter contre l'impunité. Il est juste que l'auteur de l'infraction soit puni non seulement parce qu'il a enfreint la loi (punitur quia peccatur) mais également pour que personne ne soit plus tenté de l'enfreindre (punitur ne peccatur). La Chambre de Première Instance considère que la peine a deux fonctions importantes, le châtiment et la dissuasion".

[6] Après une première phase caractérisée par l'importance des controverses juridiques et la mise en place d'une procédure adaptée (1993-1999).

consider what results from the scattering of texts about evidence and the coexistence of International Criminal justice going in different paths.

It is appropriate in this area to emphasize on the role of judicial decisions passed by the International Criminal Courts in order to understand and analyze the elements of evidence and proof[1], especially when there is a paucity of jurisprudence literature specialized in this field, and because the International Criminal tribunals in several occasions found itself compelled to determine the way the ICC judges would deal with the evidence. Based on the above, the study of the International Criminal rules of procedure and evidence requires first to determine the characteristics of the International Criminal procedure of evidence which distinguish them from the National Criminal rules of procedure and evidence (Chapter I), then to study the elements and means of proof in front of International Criminal Courts among which witnesses' testimonies are primordial. (Chapter II).

2. The rules of evidence *sui generis* in International Criminal Courts

Even if the concept of proof in front of International Criminal justice has been influenced by previous legal experiences, either in International or domestic cases, like the International Criminal tribunals after World War II cases (the Nuremberg Tribunals), and by the European and the Inter-American tribunals for Human Rights Courts, the rules of procedure and evidence in the International Criminal tribunals have many exclusive features that differentiate them from any other rules of evidence. The system of evidence in International Courts is *sui generis* (a system made specially by and for the International Courts), which will be discussed in the following sections:

2.1 The Independence of procedures of evidence in International Criminal Courts

The independence of the procedure of evidence before the International Criminal tribunals is illustrated in a formal and in a substantial way; technically, none of the International Organizations intervenes in the process of developing the rules of procedure of evidence in the International Criminal tribunals, which ensures an unambiguous application of the judicial independence principle and its impartiality; as the judges, through their work, do not rely on a particular national legal system, but in a system of specific rules valid to allow the judges to fulfill justice. This independence justifies in two elements: firstly, the nature of the crimes being considered by the International Criminal tribunals which were not committed by a single individual but by a group of individuals who are accomplishing joint criminal enterprise. Secondly, the achieving of the goal for which the International Criminal Courts were established in first place, which is the punishment of the war Criminals in order to ensure International peace and security.

International Criminal Courts consider crimes that take place during International and domestic military conflicts, and in these contexts, the difficulty of the International Courts job consists in collecting evidence and accordingly for several reasons: political reasons (i.e. veto, non-intervention principle) and the difficulty to collect evidence on the ground of the conflict; especially in domestic armed conflicts when the structure of the State may go through destruction and disintegration, and the displacement of people among all State positions, can result in the loss of a lot of evidence.

It is well known that the International Criminal Courts set up to consider crimes committed during certain conflicts by Resolutions of the UN Security Council; and that is so because of the need for a rapid application of fair sanctions, and a guarantee of stability after a conflict. However, this put the light on the heavy political aspect of Security Council Resolutions, which prompt some States not to cooperate with these Courts and even challenge the legitimacy of the Court itself. This complicates, subsequently, the process of obtaining the needed information and evidence in order to prove alleged crimes. Despite the fact that the UN Security Council was the founder of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, it did not exercise its authority[2], neither in the writing of the Statute of the Court, nor the system of evidence, or in the application of the Court's judgment.

Adding to that, the question to be raised is the way the Court would handle the Party that had committed war crimes in case that this Party was the winning side in an armed conflict, knowing that in every previous case that the special International Criminal tribunals dealt with, the party who committed the crimes was the defeated

[1] Atlam, H." The protection of non-combatants in the non-International character conflicts", International Humanitarian Law, p. 244.

[2] Amr , M. Relationship with the Security Council of the International Criminal Court, the Arabian .2008 p. (104-107)

party; this helped the Courts to get the needed information and evidence and even to arrest the culprits. Another obstacle that faced the International Criminal Courts are the keenness of the parties of the conflict to get rid of any evidence which may incriminate them in committing war crimes before they reach the International justice; in this case, the Prosecutor of the International Criminal tribunals plays a key role in the way to deal with and to preserve the evidence in maintaining confidential communications with the Parties who provided the evidence to the International Criminal Court, in the conservation, in recording, finally, in processing the evidence[1]during the proceedings.

2.2 The International qualities of the rules of procedure and evidence

The rules of procedure and evidence before the International Criminal Courts are associated closely with the concept of the law application on the International Criminal Courts, and researches in this area show that there is an orientation to depend primarily on the independent International rules of procedure and evidence for this Criminal Courts which occurred with the Nuremberg trials. Firstly, this application ensures the independence of the International Criminal judiciary in front of the national judiciary; and secondly it guarantees equality for all of the accused who are in front of the International Courts, because of the differences between the national and international legal systems in the field of proof. Thirdly, the Courts rely on the International law since their establishment, which originated either by Resolutions of the UN Security Council, or by International Treaties. The first experience of the Special International Criminal tribunals is the Resolution (808) of the Security Council, which is related to the establishment of the International Criminal Tribunal for the Former Yugoslavia, did not determine the rules of procedure and evidence. The Secretary-General of the United Nations reported at that time about the International Criminal Court for the Former Yugoslavia the following: "that the judges of the Court have to develop Special rules of procedure and evidence for the Court[2] ".

And that is what actually happened as reported[3] in Article 15 of the Statute of the International Criminal Court for the Former Yugoslavia; judges were responsible for developing special rules of procedure and evidence for the Court. This was the same case for the International Criminal Court for Rwanda, where the decision- t No. (955) for the year 1994 appeared largely similar to the Former Yugoslavia one, with the exception of crime of violation of laws and customs of war which were dropped from the indictment, by the fact that the conflict in Rwanda was not an International armed conflict[4]. However, this has been rectified in the Statute of the International Criminal Court, which made the International Criminal Courts able to consider crimes of non-International conflicts, where Article No. (21) of the Statute of the International Criminal Court reported that " The Court shall apply[5]:

> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of International law, including the established principles of the International law of armed conflict[6];
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world. "

The rules of procedure and evidence of the International Criminal Courts are defined in two essential documents: first, the International Criminal Court established document, and the second, the independent rules of procedure and evidence document, which derives its legitimacy from the first one[7]. And in the case of inconsistency

[1]See Report of the Secretary -General's about the application of Paragraph (2) of the UN Security Council Resolution (808) on the establishment of the International Criminal Tribunal for the Former Yugoslavia.

[2] Article (15)

Règlement du Tribunal

Les juges du Tribunal International adopteront un règlement qui régira la phase préalable à l'audience, l'audience et les recours, la recevabilité des preuves, la protection des victimes et des témoins et d'autres questions appropriées.

[3] See the Statute of the Criminal Court for the Former Yugoslavia.

[4] Mattar, E. the International humanitarian law, p. 301.

[5] Article 21 of the Statute of the International Criminal Court.

[6] Srour, A. the International humanitarian law, p 9.

[7] Explanatory Note: The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. In elaborating the Rules of Procedure and Evidence, care has been taken to avoid rephrasing and, to the extent possible, repeating the

between the Statute and the rules of procedure and evidence, the one should refer to the Statute of the International Criminal Court[1].
For that, it is necessary to analyze the nature of these two documents:

2.2.1 The Statute of the International Criminal Courts

The Statute of the International Criminal Court is an International Treaty and as such, that applies to it what applies to International Treaties in terms of its entry into force, its application and its possible amendments. It is worth mentioning that the Statute of the International Criminal tribunals usually comes drawing an outline, but with respect to the procedure it has collected rules of procedure and evidence in different legal regulations. The maximum penalty is life imprisonment; as regards to death penalty, the Statute has left to the States' discretion the right to apply this punishment according to their national laws[2].
The Statute of the International Criminal Courts has not considered the issue of proof in details, but came up with general rules to ensure the most important principles internationally recognized and then it forwarded the details of proof to the International Criminal Court rules of procedure and evidence. This is explicitly stipulated in the instructions of the Courts or the interim system for the International Criminal Court, which came in the text of Article (89) of the Evidence of the International Criminal Tribunal for the Former Yugoslavia which included:

> " With regard to the procedures in these instructions its apply to all organs of the Court , and the Court is not bind to application of the national provisions in the field of Procedure and Evidence[3]" and that was emphasized by the International temporary Criminal Court for Rwanda, which stated the following: " With regard to International Criminal Court the paragraph (5) of the rules of procedure and evidence that " the Chambers of the Court shall not apply the national laws governing evidence, except with respect to Article (21)" , usually after the selection and the appointment of International judges of the International Criminal Court, the President of the Court invited the judges to the General Meeting in order to consider the Court system organization and to develop their rules of procedure and evidence, as well as to discuss the annual reports of the Court .

2.2.2 The Rules of Procedure and Evidence for each special International Criminal Court.

The International custom granted absolute freedom to the International judges to create special rules of procedure and evidence that would suit the nature of the crimes being considered by the Court, as judges also have the right to modify these rules when it is necessary. In general, these rules are detailed in order to cover all the issues that the International judges may face to while considering the disputes before them; and this is what gives the International Criminal Courts the freedom in estimating their rules of procedure and evidence and being able to make the required adjustments whenever needed or being able to fill the gap in the rules of procedure with the proper actions if it is not mentioned [4], as stated in the Statute of Charter of the Sierra Leone Special Court, although the International Criminal Courts can rely on International custom in this field.

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provisions of the Statute. Direct references to the Statute have been included in the Rules, where appropriate, in order to emphasize the relationship between the Rules and the Rome Statute, as provided for in article 51, in particular, paragraphs 4 and 5. In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute. The Rules of Procedure and Evidence of the International Criminal Court do not affect the procedural rules for any national Court or legal system for the purpose of national proceedings. The explanatory note of the rules of Procedure and Evidence of the International Criminal Court that approved in 2004.

[1] Article (51) of the founding charter Branch (4) and branch (5).

[2] Bassiouni , M. the Statute of the International Criminal Court, research published in " Studies in International humanitarian law", p. (457).

[3] See the text of the article contained in French, "En matière de preuve les règles énoncées dans la présente section s'appliquent à toute procédure devant les chambres. La chambre saisie n'est pas liée par les règles de droit interne régissant l'administration de preuve.

[4] Les juges du Tribunal spécial réunis en plénière peuvent modifier le Règlement de procédure et de preuve ou adopter des dispositions supplémentaires lorsque les dispositions existantes ne prévoient pas un cas particulier ou ne permettent pas de le régler. Dans l'exercice de cette fonction, les juges peuvent s'inspirer, selon que de besoin, du Code sierra-léonais de procédure pénale de 1965.

For this reason, the rules of procedure and evidence of the International Criminal Court for the Former Yugoslavia, which had twelve legal amendments since it was written in 1994 helped in creating a relatively advanced system[1], which was the result of the scientific expertise that the International judges processed and gained during the hearing of the debates that they considered.

Finally, it is essential to remind that the International nature of the International Criminal Courts' rules of procedure and evidence requires from the International Criminal Courts to be committed to the texts of International human rights as well as the rights of the defense and finally to the concept of fair trial[2]. This is stated expressly in Article 69 of the Statute of the International Criminal Court when it reported in its paragraph (7) that " Evidence obtained by means of a violation of this Statute or Internationally recognized human rights shall not be admissible if:
(a) The violation casts substantial doubt on the reliability of the evidence; or
(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. "

Thus, the International Criminal tribunals relied on the International Covenant on civil and political rights of Human Rights, especially on Article (14), which relates primarily to the conditions of a fair trial; Sherif Atlam[3] indicated that " the judicial guarantees stated in International humanitarian law are almost match with those granted by the regional and the International human rights instruments, however, it possible to suspend some of these guarantees in certain circumstances, (...) ". In addition to that, none of the texts that the International Criminal tribunals were established by, would absolutely prevent the judges from taking advantages from former International Criminal Courts decisions, and it was the judicial decisions that came after World War II which played a major role and had a significant impact on the Criminal Court for the Former Yugoslavia where it was clearly indicated during the evaluating process of the presented evidence to it. With hindsight, judges of the International Criminal Court for the Former Yugoslavia seemed to have, eventually, considered the Former Court decisions as being precedents.
The impact of the International Criminal Court on the subsequent Criminal Courts clearly shows in the field of rules of procedure and evidence that the International Criminal Court followed the same approach that International Criminal Court for the Former Yugoslavia with regards to its rules of procedure and evidence, and the last source which remains to the International judges in a matter of proof is the general principles of Criminal justice.

Since the principles of the Criminal justice are internationally agreed, they are often found in National Criminal laws, and can be applied in International Criminal law and are considered as the most important guidelines that direct the judges of the International Criminal Court. The Articles (22-25) stipulate the most important principles, namely: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court, the principle of the original patent person until proven guilty. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute, A person convicted by the Court may be punished only in accordance with this Statute, and also enters in this context some of the general principles of procedural law, such as the rule of law does not need to prove, and the principle of Judging the offender without undue delay, and the rule of accepting the presumptions as evidences, and the rule of the equality between the parties[4].
In this field, the Statute of the International Criminal Court clearly shows the cases that the judge can rely on the general principles in the national laws either in terms of the subject or the term of the rules of procedure and evidence, without breaching the Statute during the application of these rules, as decided in paragraph (c) of Article (21): " Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with International law and Internationally recognized norms and standards ". Concerning the role of the general principles of law, Hervé Ascensio wrote in the French Public International law annuals:

[1] This system has been modified more than ten times and is now working in the last amendment, which was in 2012.
[2] See Article (20) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, as well as Article (21) of the Rules of the Special Court for Rhonda.
[3] Atlam , S. the application of International humanitarian law at the national, published in International humanitarian law, versions of the Red Cross, Cairo, 2003, p. (318).
[4] Abu al-Wafa , A. a mediator in public International law, p. (568-569).

> "Les juridictions Internationales se trouvent fréquemment placées dans une situation délicate en raison de l'insuffisance du droit écrit et des incertitudes sur le contenu de la coutume. Les principes généraux de droit permettent à l'occasion de combler certaines lacunes, mais leur existence, comme celle de la coutume, dépend très largement de la formalisation résultant de la décision juridictionnelle elle-même. De ce fait, le juge International est créateur de droit (6), phénomène bien connu des systèmes de droit interne plaçant les juridictions au cœur de l'activité normative. Pourtant, sur ce plan, les TPI se trouvent sans doute dans une situation plus difficile, en raison des particularités de la matière pénale et notamment du poids des principes de sécurité juridique et de non-rétroactivité des règles substantielles. Ils doivent donc justifier, par le recours à des éléments préexistants, les solutions de droit auxquelles ils parviennent, en l'absence de droit écrit[1]"

To sum up, the previous paragraph asserts that the International justice finds itself in many cases in an embarrassing position because of the insufficiency of the written law, adding to the lack of certainty in the field of International custom; and in this case, the International justice would resort on the general principles in order to cover the shortfall in the first two sources. According to the general principles based on the Statute of Rome, the International judge will be the originator of the law; and this phenomenon is well known for the domestic law where the judge lays at the heart of the legislative process, but the ICC finds itself in a more complicated position because of the nature of the Criminal law and in particular because of the principle of non-retroactivity, which means that the Court should justify the application of pre-existing rules and legal solutions in the absence of a written text.

3. Reliance of the International Criminal rules of procedure and evidence on testimony

Providing evidence that an International offense has been committed is not the major goal of the International Criminal Courts; it is just a method for the International Criminal judges to collect incriminating evidence in order to release their judicial verdicts on the defendants. Not only is the substance of the proof important on releasing a verdict, but it also requires to guarantee the legitimacy of the way that led to the verdict. Any judgment may be tainted with any kind of doubt in its impartiality or in its legitimacy as stipulated in Article (69/7) expressly stating: "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible."

On this basis, the parties in a case have the right to use any evidence they have to support their claims, as stipulated in Article (69/3), as follows: "The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth." The Court as well has the ability to demand any evidence that it needs and has the right to accept the evidence or not. This is confirmed by the English jurisprudence:"to be admissible, evidence must be relevant and necessary".

In order to be accepted by the Court, the evidence must be relevant to the subject of the case and necessary too. The evidence should be credible in front of the Court; indeed, the most important element that links all the elements of the evidence is credibility of the evidence upon which judicial decisions are based, even it is not mentioned explicitly in the article (69) but it is an implicit requirement.

The rules of procedure and evidence before International Criminal Courts has raised a lot of controversy between the Court and the defense parties in many cases, where the International Criminal judges found themselves at many judicial decisions justifying the methods that they have applied to form the Court self-conviction, and in this regard, the Criminal Court for the Former Yugoslavia in more recent judicial decisions dated 15/4/2011 reported the following: " according to the text of Article (21/3) of the Statute of the Court and in accordance with Article (87) of the rules of Procedure and Evidence of the Court that the accused is innocent until proven guilty, and the Court should take the evidence that generate the conviction which has no doubt that the defendant is guilty, and in the case of doubt the validity of the evidence, the Court shall release the accused ". So the Court, while working on its decisions, should balance between the rights of victims and the application of the judgment on the convicted criminals and the guarantees of the accused. To illustrate we shall remind of the International Criminal Court judicial decision against the accused Thomas Lubanga[2] from the Democratic Republic of Congo who was convicted of war crimes, in recruiting children, and sentenced to imprisonment for a period of 15 years.

[1] Herve Ascensio, L'actualité des juridictions pénales Internationales: analyse International, 1999, AFDI.

[2] See the first verdict issued by the International Criminal Court, the issue of Thomas Lubanga, who was charged with the recruitment of children under the age of fifteen, in March 14, 2012 and which was published in the International Criminal Court Official Documents. ICC-01/04-01/06.

The International Criminal Courts system of proof tends to take into account the following principles: First, judges rely on witnesses' testimonies on a large extent. Secondly, judges are granted autonomy in using the means of proof in the process of a Court case. Thirdly, the Court asserts broad authority in evaluating the evidence in its possession.

This topic will be divided into three sections. The first section studies the prevalence of the testimonies before the International Criminal Courts, while, the second section will concentrate on other categories of evidence and the principle of freedom of proof and finally, the third section will discuss the absolute authority of the International Criminal tribunals in the assessment of evidence.

3.1 The prevalence of testimonies as evidence before International Criminal Courts.

The International Criminal Courts largely depends on the witnesses' testimonies as main sources of evidence. Witnesses generally want to testify in order to talk about the sufferings of the victims pushed by the desire to achieve justice and to let the whole world be aware of the crimes committed against them, and who hope that such crimes will not repeat in the future.

Generally, these witnesses can be divided into two categories: the first group of witnesses are victims subjected to war crimes, and the second group are eyewitnesses, who saw the defendants while they were committing crimes and who are usually close to the criminals, as, for example, colleagues at work, as stated: "and so within the judicial decision of the International Criminal Court against Thomas Lubanga stated that the Court listened to more than 66 witnesses, including the experts, and they have listened to more than thirty witnesses in the early stages of the trial " (the victims and the experts). It was declared in paragraph 107 of the judicial decision that " the Charter of Rome has given preference to the direct testimony in the Court", or in Article 69[1], paragraph 2: " The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68"; measures undoubtedly necessary to guarantee the protection of witnesses. But both (defendants and witnesses) require the same protection in order to ensure the effectiveness of the Criminal Court.

And as known the testimony meant" to report what the person have seen or heard by himself or generally recognized by his senses[2]". Pursuant thereto, testimonies before the International Criminal Tribunals are processed following a special procedure that differs from the national Courts procedures. As a matter of fact, on account of the special nature of the International Criminal Courts, to access to the witnesses' testimonies and to convince them to testify before the Court may be a most sensitive issue to handle for the International Criminal justice. Adding to these difficulties to bring up people to testify, other significant parameters related to witnesses may be considered.

3.1.1 The problematic of witnesses belonging to various ethnic groups

In this respect, one of the most important issues raised in front of the International Criminal Courts is the reliability of witnesses[3] due to its ethnic identity. In the case of a particular ethnic group who may have been tortured by another group, the credibility and authority of the testimony therefore may be prejudiced by the racial hatred fuelled by the atrocities undergone. The International Criminal Tribunal for Former Yugoslavia took into account this possibility in its ruling: "(....), it is not appropriate nor correct, the conclusion that the witness is inherently dishonest for a sole reason that he was the victim of a crime committed by a person of the same creed, or the same ethnic group to which the defendant belongs to[4]". Likewise, in the case of Lubanga, regarding the identity of the victims witnesses, the ICC has decided that " considering the situation in the Democratic Republic of Congo and the difficulty of obtaining official identification documents, it is entitled to the victims to prove their identities through a series of various documents of official and non- official ones " as stated Article 68, Paragraph (3) of the Statute of the Court.

The ICC's decision came consistent with the International Criminal Tribunal for Former Yugoslavia about the validity of the testimony even though from a different ethnic group; this point was discussed for the first time in the Tadic case where defense lawyers requested the refusal of witnesses who belong to other ethnic to whom the Court responded at the time as: " it is absolutely unacceptable to lose the testimony credibility of witnesses who come from the party does not share the same language, religion, customs and traditions, and for this reason the Court taking the testimony of witnesses individually then evaluated it within its field with other evidences and

[1] See Article 69, paragraph 2, "The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence (…)."
[2] Srour, A. The Mediator in the Code of Criminal Procedure, p. 591.
[3] See Marco Sassoli. How Law provides protection in the War, Cairo, versions of the Red Cross , 2012, p. 345.
[4] Sassoli, ibid, p. 347.

the defense has ability to examine the witnesses[1] or evidence it owned to prove that a specific testimony was based only on the ethnic hatred . "

The International Criminal Court decided in the case of Lubanga that " in order to evaluate the witness oral statement the Court will examine the complete testimony, as well as examining the way of providing testimony, and the level of its credibility with other testimonies and how much contradiction is between current and primary testimony in order to evaluate how serious is this contradiction taking into account the long time period between the testimonies made in 2002 and those made in 2010, and so the Court shall accept a part of the testimony, and reject the other part of the same certificate[2] ". In the same Resolution, the Court has stated that it would use psychology experts as witnesses to help in assessing the children's testimony, and acknowledged that they greatly benefited from this expertise in evaluating those testimonies.

Thus, the established custom of the International Criminal Courts started to accept testimonies from the victims regardless of the ethnic group to which they belong, especially in the domestic armed conflicts with ethnic or religious differences. The matter is the approach to get access to and collect the witnesses' testimonies and how to encourage the victims to testify without the fear of reprisals against them personally or their families or assist them in talking about their mental state at the time of being subject to those crimes, especially for women and children. Consequently, the issue of protection of witnesses before the International Criminal tribunals is raised.

3.1.2 The confidentiality of the evidence and the special protection system for Criminal Courts witnesses.

The process of collecting proof begins from the time when the Prosecutor of the International Criminal Court start to work on the evidences collection, which shows the importance of the methods of collecting evidence. At this stage, the ICC has the right to enforce confidentiality on the evidence in its possession until the moment of facing the accused directly. The confidentiality of the evidence has a great importance in the International Criminal Courts in order to ensure the trial of the accused, and to preserve and protect these evidence from any possible peril. For this reason, the Special Tribunal for Rwanda (ICTR) has stated explicitly in the article (53)[3] of the Statute that "In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order[4].

The Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or an International body where the Prosecutor deems it necessary to secure the possible arrest of an accused. The Article (72) of the Statute of the International Criminal Court declared that it is the Court's duty to protect the information which, if disclosed, would prejudice the national security interests. And the same thing occurred in the Court who has the duty to ask permission of the State or of the International Organization that provided information or the list of assumed witnesses to the International Criminal Court[5]. For example, what was

[1] Article (67 / e) of the Statute of the Court :"To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her".

[2] The ruling of the International Criminal Court, Thomas Lubanga case, Paragraph 103.

[3] Article 52: Caractère public de l'acte d'accusation Après la confirmation par le juge de première instance, et sous réserve de l'Article 53 l'acte d'accusation est rendu public.Article 53: Non-divulgation au public

A) Lorsque des circonstances exceptionnelles le requièrent, un juge ou une Chambre de Première Instance peut ordonner dans l'intérêt de la justice la non-divulgation au public de tous documents ou informations, et ce, jusqu'à décision contraire.

B) Lorsqu'il confirme un acte d'accusation, le juge peut, après avis du Procureur, ordonner sa non-divulgation au public jusqu'à sa signification à l'accusé, ou en cas d'injonction d'instances, à tous les accusés.

C) Un juge ou une Chambre de première instance peut également, après avis du Procureur, ordonner la non-divulgation au public de tout ou partie de l'acte d'accusation, de toute information et de tout document particuliers, si l'un ou l'autre est convaincu qu'une telle ordonnance est nécessaire pour donner effet à une disposition du Règlement ou pour préserver des informations confidentielles obtenues par le Procureur ou encore que l'intérêt de la justice le commande.

D) Nonobstant les paragraphes A), B) et C) ci-dessus, le Procureur peut divulguer tout ou partie de l'acte d'accusation aux autorités d'un Etat ou à une autorité compétente ou une Institution Internationale lorsqu'il l'estime nécessaire pour se ménager une chance d'arrêter un accusé.

Article 53 bis: Signification de l'acte d'accusation: L'acte d'accusation est signifié à l'accusé en personne lorsqu'il est placé sous la garde du Tribunal ou le plus tôt possible ultérieurement.

E) L'acte d'accusation est signifié à l'accusé lorsque copie certifiée, conformément aux dispositions de l'Article 47 lui en est donnée.

[4] Makhzoumi , O. International humanitarian law in the light of the International Criminal Court, p. 219.

[5] Article 73 of the Statute of the International Criminal Court.

accepted by the International Criminal Court is a special system of "middlemen" to gain access to witnesses in order to persuade victims to talk about the violations they were subjected to, without the knowledge of the details of case against Lubanga, so that they have the courage to appear before the International Criminal Court.

The confidentiality applies also to the list of victims to facilitate in the protection of witnesses, according to the text of the rules of procedure and evidence of the International Criminal Court in addition to the Statute of the International Criminal Court in Article 68, paragraph(1) which expressly provides that the Court shall take appropriate measures to protect the safety, the physical and psychological well-being, dignity and privacy of victims and witnesses[1], in order to ensure the functioning of the trials, as well as to ensure the victims to testify freely and without any fear of any threat or exposure to any type of supplemental abuse either directly to them or indirectly like the threatening of their families. Due to all of these concerns, the rules of procedures and evidence of the International Criminal Court are complying with a range of important texts dedicated on the protection of witnesses. Accordingly, the Court registry coordinates a special unit within the Court whose primary mission is to protect witnesses and support them in the preservation of evidence; the basic modus operandi of this unit is to train people who meet the victim witnesses to collect testimonies without exposing the witnesses to any possible risk, like using a contact system with witnesses in order to protect them either by taking them away from their whereabouts, whether at their country or abroad, and finally the actions that can be taken directly by the judge during the trial to protect the witnesses.

The Court has the right to arrange the witnesses' turns as they testify in a trial, as long as the witnesses are being questioned in an effective, fair and truth-revealing as well as a rapid manner[2].

To guarantee the protection of witnesses, the Court has the right, with the exception of public hearings sessions, to perform any part of the proceedings *in camera* or to allow the presentation of evidence by electronic or other special means, as well as the submission of written testimonies, forcing the Court to the use of fashionable styles to obtain their testimony, such as the circle closed media (video conferencing) or working on the transfer of some of the witnesses at the Court's expenses. The Court also is forced in many cases to use closed sessions in order to keep cameras away which would expose the identity of the witnesses and endanger their lives when the witness return to his country. One of the main reasons that prompted the Court to use the testimony remote method is because, in most cases, the witnesses may have been forced to leave their areas where the crimes occurred and have been scattered in countries in Western Europe or in the United States; this happened for the Former Yugoslavia or for Rwanda, that causes a Diaspora towards the neighboring countries, which were in turn politically unstable, making difficult to approach and to transfer witnesses.

In the same field the Court forced to use modern methods to hide the identity of the witness, especially in cases of sexual assault, taking into account the psychological state of the victims and their families, and may be the reveal of the witness's identity would have a significant impact on other issues being prepared.

In the same way, the Special Criminal Courts are forced to give *nolle prosequi* that is to say a guarantee for the witnesses not to be victims of acts of vengeance; this way, the witnesses would give a poignant testimony before the Court, because they will not want to appear in the future before the Court.

3.1.3 Recognition System accused by prosecution witnesses

To examine the validity of the witnesses, the Court may ask them to identify the accused among others before they are presented to testify. The International Criminal Courts use the method of identifying the accused in a professional manner and despite the reservations that may arise on this method especially from the defense lawyers who argue that this method is pointless because of the intense media coverage of Court hearings that would permit the witnesses to know the defendant's appearance. The Court's response to this criticism is the necessity to accept the method of identification of the accused through photo albums following a specific methodology. The most important points of this methodology there are pictures of other people from the same ethnic group among the accused wearing clothes close to the conflict region costume; each witness will present the description that he has of the accused before looking at this album, then the Court registry will attempt to make any suggestion about the character of the defendant before the prosecution witnesses. Despite following this method, it is often that the victims would be already known accused since they come from the same region or country but the Court had taken this approach only as a precaution.

[1] Article (68) of the Statute of the International Criminal Court stated that "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses (....)".

[2]Article (43) of the Regulations of the International Criminal Court judges approved by the Court on May 26, 2004.

3.2 From witnesses' testimony to the freedom of proof in International Criminal Courts.

The juridical decision of the International Criminal Court on the case of Lubanga stated in Paragraph 107 Paragraph 4 that " the Statute of the International Criminal Court has given the Court a wide and a very important margin with regard to the evidence before it "; the Court judges concluded in the same paragraph, Branch 24, that the drafters of the Statute of the Criminal International Court may discuss clearly and deliberately to avoid identifying categories of evidence which may be understood as a restriction on the authority of the Court in appreciating evidences: "(...), Les auteurs du cadre défini par le statut ont clairement évité de proscrire certaines catégories ou types d'éléments de preuve, une mesure qui aurait limité-d'emblée-la capacité de la Chambre d'évaluer «librement» les moyens de preuve. (...)[1] . "

It appears from the above mentioned that the International Criminal tribunals depend a lot on the witnesses testimony as a mean to prove, however, that the International Criminal Courts do not adhere to one special kind of evidence, but left it open to the discretion of the Prosecutor of the Court and the Court panel that considers the charges brought before them. The Article (64) of the Statute of the Court decided in its paragraph VI the following:

"In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: - Require the attendance and testimony of witnesses and production of documents and other evidence", and by analogy, we believe that the Prosecutor of the Criminal Court has the right to request all the evidence of the parties involved, and these parties should cooperate by providing evidence to the Court. It gives the freedom of the Prosecutor of the International Criminal Court to obtain evidences from various sources, like the two parties involved in a military conflict. On account of the specificity of the cases considered by the International Criminal Courts, relating to conflicts that lasted during relatively long periods of time, and also because of the mental state that the parties to the conflict experienced, the Court had to reduce the restrictions on the elaboration and presentation of evidences. The prevailing criterion is that evidence should be convincing and unambiguous, which means "that all evidence should be clear and influential in the trial event and any useful one the Court should accept it."

This flexibility appears in the case of the time and date the crime was committed; as long as there is no doubt that a crime was perpetrated, then the lack of precision in determining the exact date or time will not be a key element to prove the crime itself, except in certain cases involving the confirmation of the existence of aggravating circumstances, or vice versa.

The same flexibility can be observed in the processing of some of the terminology--often loose- by which the witnesses expressed themselves; their testimonies are accepted as relevant even if their language is imprecise. For example, when a witness is asked by the Court to determine the number of victims using approximate terms (like almost, nearly, the estimated figure, between and among); all of these terms, though inaccurate, may be acceptable to the Court, especially if it does not affect the account of the facts of the crime, or because of repeated material element of the crime, acknowledging the physical and psychological condition of the witness at the time of the crime.

The most important obstacles facing the process of collecting evidences is that States usually get rid of written evidence either by the destruction of the written documents which relate to cases brought before it, or using verbal orders during the time of the dispute; another important issue is the accused parties' (a State or a group of rebels) failure of cooperation like what actually happened in the cases that were pending before the Special Criminal Court for the Former Yugoslavia, where Serbian authorities banned residing individuals on its territory from traveling outside the country and especially to the Netherlands as fearing from the possibility of individuals testifying in Court.

3.3. The absolute authority of the International Criminal tribunals in the estimation of evidence.

The system of proof of the International Criminal Courts distinguishes itself in being a system independent of any political party and of any International Organization; the Paragraph (9) of Article 64 insists on that: " The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to: (a) rule on the admissibility or relevance of evidence, (...) [2]". This is what the International Criminal Court has already completed with the estimation of the evidences presented against the accused Lubanga.

In another case, the Appellate Jurisdiction [3]of the Criminal Court for the Former Yugoslavia approved the full power of the First Instance Court (Trial Court) in the Case of the Appeal accused (Vlastimir) which stated that

[1] See the Decision of the International Criminal Court, Op, p.61.

[2] Article 69, Paragraph 4 of the Statute of the Court.

[3] D'après la jurisprudence du Tribunal, c'est d'abord à la Chambre de Première Instance d'examiner les éléments de preuve présentés au procès, de les apprécier et de décider du poids à leur accorder. Par conséquent, la Chambre d'appel doit toujours accorder quelque crédit aux constatations de la Chambre de Première Instance. Ce

the judicial custom of the International Criminal Court of the Former Yugoslavia settled on the trial Court's right to examine, consider, and evaluate and, while ruling, to confer the weight it judges to be appropriate on the elements of evidence presented, and that the Court of Appellate usually acknowledges that the trial Court does not intervene except in the case that the trial judge did not draw the logical conclusions from the evidence before him, or when the trial Court had totally erred in the process of appreciation the evidence, then the Court of Appellate has the right in this case to build conviction in light of the evidence before it. In conclusion, the ICC owns the right to be the sole assessor of the importance of the evidence before it.

In one of the cases, a ruling of conviction in which the defendant before the International Criminal Tribunal for the Former Yugoslavia has been released was called (Vlastimir); the Court relied on a lot of forensic evidence and the forensics experts, who played an important role in unearthing mass graves, have been reported by the Court in the operative part of its judgment as follows:

" That a lot of forensic experts went to different parts of Kosovo to reveal the bodies of the victims to write reports on the causes of death, and then was appointed by Mr. ERIC BACARD in order to ensure the scientific methods and methodology by which the medical reports was written were consistent with the International standards in this field and presented at the end of his mission a report entitled (Medico-Legal Analysis and Synthesis Report about the Forensic Expertises Missions conducted in Kosovo " [1]

Like this the International Criminal Court in the case of Lubanga goes when the Court decided that nothing in the Charter of Rome prevents the Court from building a self conviction on indirect evidence as long as they comply with the Court conviction objectivity[2].

4. Conclusion

The study of the system of evidence before International Criminal Courts shows that the processing of proof before the International Criminal Courts is not an easy task, considering the seriousness of the crimes committed during the armed conflicts, as well as the high number of victims subsequent. It is a far more difficult work to collect evidence before their possible destruction and to use any methods and means to ensure the rapidity and the effectiveness of the International justice.

The tendency of the International Criminal Courts is to develop a system of proof which is special and significantly independent from the national systems of proof, both in a technical way (the procedure of developing systems of proof), or in an substantive matter (the way judges of the Criminal Courts deal with the concept of proof). The system of evidence in International Courts is independent and different of any national system, since the judges assigned have the role to achieve international justice, and because the nature of the crimes under consideration before these Courts are more complex. The collection of evidence by the initial investigation teams is very complex, and evidence are often collected by intermediaries, as in the case of Lubanga; in this specific case, International investigators were unable to access to the places of the considered military conflict, and would work in during the conflict to preserve as much as possible the evidence that will be examined later by the International Criminal Courts.

The study of the concept of proof in front of the International Criminal Courts demonstrates the originality of this system and the main role played by the judges of the Court themselves. This system is based mainly on the independence of each International Criminal Court rules of procedures and evidence, and in spite of this formalist independence, the study shows clearly that the system of proof in the International Criminal Court is influenced by two previous precedents, thanks to which judges became more experienced in the system of proof. It is arguably that International Criminal law is moving steadily forward to achieve an integrated and a comprehensive system of evidence.

There is no question that the concept of proof in front of the International Criminal tribunals has been influenced by many of the Anglo-Saxon jurisprudence relating to evidence; it has emerged from this jurisprudence the freedom to seek evidence, the broad authority of the Court in developing self-conviction. The system is furthermore fully independent, despite sharing similarity elements with national systems of evidence.

Adding to that, the system of proof is par excellence an International system, and we are witnessing the birth of the International Criminal Procedure and Evidence Law, which is linked directly to the development of the International Criminal justice and the concept of International Criminal responsibility.

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n'est que lorsque aucun juge du fait [...] n'aurait [pu raisonnablement] accept[er] les éléments de preuve sur lesquels s'est fondée la Chambre de première instance, ou que l'appréciation de ces éléments est «totalement entachée d'erreurs», que la Chambre d'Appel peut substituer sa propre conclusion à celle tirée en première instance.

[1] Medico-Legal Analysis and Synthesis Report about the Forensic Expertises Missions conducted in Kosovo during the year 1999.

[2] See paragraph 111 of the Court's ruling in Lubanga case, p. 62.

However, a lot of concepts remained imprecise in the system of Procedure and Evidence in International Courts, as for example, the concept of non-disclosure of documents that may threat the safety and security of the State, the concept of accepting written testimonies from the Heads of States, and the concept of determining the damage happened to the victims. This system is still at its beginnings and it needs, at this stage, a lot of International audits in this field to develop this system through the International judges' work. Finally, the future will tell predictably that the system of proof before International Criminal Courts would have a significant impact on the national proof systems.

Recommendations

-The necessity of a system of codification for the rules of procedure and evidence in International Criminal Courts.
-The Courts require more efficient techniques to collect evidence.
- More studies on this subject will lead to a more appropriate and reliable system of evidence.

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