

# ANALYSIS OF DEFENCE ISSUES BEFORE THE ICC

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## I. Introduction

The establishment of the International Criminal Court (ICC) will provide an extraordinary opportunity for defence counsel to meet new challenges of law and proceedings. Taking a case before the ICC will certainly be different to the practices one is accustomed with at home when defending a case before a domestic court. The ICC is a new court and we don't know yet how the novelty legal system will turn out to be in reality. When I got involved in the first case before the ICTY I was sailing the uncharted waters of international trials and had no one to assist me. Now we know about international trials because of the experience of both the ICTY and the ICTR. The nature and the impact of such kind of trials is no longer a mystery but rather a matter of habituation for those who have done cases before the ad hoc's. Fresh lawyers will have the advantage of experienced layers to shepherd them through the new system.

The new system, however, is not entirely new as the ICC's competence for violations of international humanitarian law is practically the same as the subject-matter jurisdiction of the ICTY and the ICTR. The Statutes of these ad hoc tribunals provide only for a general description of the crimes, but their case law established more detailed elements. And, indeed, the Report of the Preparatory Committee for the ICC on the elements of crimes clearly took the matter further on basis of the jurisprudence of ad hoc's. So, there is little reason to believe that much will change in this respect before the ICC.

The most challenging part of the new court will be its procedures and practices. That will be the subject of my contribution and I will briefly explore three issues: the blend of civil, common law and other legal approaches from a Defence Counsel's perspective with a focus on the role of Defence Counsel in the pre-trial phase and matters of conduct for Defence counsel, when taking a case before an international criminal court.

## II The relation among Common Law, Civil Law and International Law

It was clear from the very beginning of the negotiations for the establishment of the ICC that the court would have to be acceptable to both common law countries that follow the accusatorial procedure and the civil countries that apply the inquisitorial method of criminal procedure. As the first drafts were originally written by the International Law Commission it was obvious that the new legal system of the ICC would also reflect the state of affairs in international law and the latest developments of the ad hoc's with respect to new standards for international trials.

Different to the ICTY Statute and Rules of Procedure and Evidence the ICC Statute and Rules of Procedure and Evidence are not dominantly oriented on an accusatory system but a compromise between the major criminal justice systems blended with typical international norms. This result was of course the result of negotiations by States over a period of several

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years with involvement by experts from several jurisdictions, rather than a system significantly prepared by common law experts and adopted by the Security Council under severe time constraints. The development of the procedural rules of the ICC will be different as well. The Tribunal's procedural rules are developed by the judges of the tribunal and adopted by them. Although judges of different legal systems are members of the tribunal, they adopted an essentially adversarial form of proceedings. Over time civil law elements have been introduced into the tribunal proceedings. The judges were able, after careful consideration, to amend the tribunal rules to meet the needs of the tribunals as they became apparent. This will be different in the ICC system as the Assembly of States is responsible for amendments to the rules. This approach is different from the precedents of all existing international tribunals, such as the International Court of Justice and the International Tribunal for the Law of the Seas, as well as – as I mentioned – from the ICTY and the ICTR. The direct involvement of states in the drafting and development of the Rules of Procedure and Evidence resulted to a new hybrid system and will lead to a strengthening of the international character of the proceedings before the ICC.

This approach may result in a shift in the character of procedural rules of trials. The novelty status of the Prosecution under the Statute of both ad hoc tribunals is strengthened in the new system of the ICC. The Prosecution is not only a party to adversarial proceedings, but also an organ of international criminal justice, whose object is not simply to secure a conviction but to present the case for the prosecution but to assist the Chamber to discover the truth in a judicial setting. Under the Tribunal's Statutes the Prosecution is an independent organ of the tribunal and not accountable for its prosecution decisions. A decision not to prosecute cannot be challenged before a Chamber. Such kind of decisions, as for example the criticized decision not to prosecute officials for certain events during the NATO campaign against Yugoslavia, cannot be remedied. The same issue is now emerging from the power of the Prosecution on *nolle prosequi* of accomplices when assist the Prosecution in testifying against an accused person in a prosecution brought before a Chamber of the Tribunal. Rumour has it that – for example - for this reason charges as genocide were dropped in the Plasić-case. Under the ICC system, the Prosecutor is not able to initiate investigation, drop charges or even decide not to prosecute at all without a remedy for an interested party, which may well be an suspected or accused person, before a Chamber of the court. Despite the judicial supervision, some States are reluctant to recognize the ICC Prosecutor's *ex officio* powers and raised concerns that he may use his powers inappropriate.

Where the provisions of the ad hoc tribunals are silent on the rights of suspects during the initial phase of pre-trial when investigations are started and prosecutions are considered, the interests of suspects and accused persons seems to be better secured under the ICC legal system. And indeed, the rights of a suspected person during this initial phase of pre-trial is an important issue that will keep more Defence counsel busy than perhaps most of them realize. The first cases will raise all kinds of issues of admissibility under the article 15 to 20 of the ICC Statute. The first decisions will deal with challenges to the exercise prosecutorial powers under the Statute. I expect that it will take some years before the first cases will have past that hurdle. So, Defence counsel will focus on these kinds of issues first before arriving at the substances of cases and the usual ins and outs of case preparation during pre-trial. The first serious battles will be before the Pre-trial Chambers for that reason it seems not likely that the ICC will deal with any trial before the next few years. Defence Counsel should prepare themselves for these specific issues of pre-trial and one may hope that the new ICC

Bar will anticipate to this expectation by organizing their training programs with a specific focus on this issue.

Now let me deal with more general issues during pre-trial and the logical first step is to focus on the fairness of the ICC system in this respect. The concept of fair trial is a first generation human right and is considered to be essential to a democratic society. The right to a fair trial is internationally enshrined in the International Covenant, which came into force in 1976 alongside with four regional instruments: the American Declaration of Rights and Duties of Man of 1948, the European Human Rights Convention of 1950, the American Convention on Human Rights of 1969 and the African Charter on Human and Peoples Rights of 1981. The digest of fair trial principles has become international customary law and is reflected in the Statutes of the ICTY, ICTR and the ICC. The core of fair trial issues is not really a matter under debate, but rather how the concept of fair trial is applied in the legal system in which it functions. Norms of due process of law cannot be applied in all jurisdictions in the same way because features of fair trial may not be the same in all legal systems. They differ, as the dynamics of legal system are not the same due to the different character of the proceedings. What may be right in one system may turn out to be unfair in the other. So the mere declaration that specific norms of due process are applicable is not enough. It is more important to analyse the way these norm are applied in the legal system at hand. The vulnerability of a new legal system may well be that the Rules of Procedure and Evidence look right but may in reality – in practice – function in a fair way. The legislator may not have foreseen all practical consequences and the parties may have to face issues vital for the fairness of the proceedings. The usual way legislators anticipate these kinds of problems is to leave sufficient room for the judges to address such loopholes, but the downside of such approach may turn out to be the uncertainty of the procedural rules and Defence counsel are not very fond of uncertainties. In this respect it is relevant to observe the difference between in the way rules of procedure are amended by the Assembly of Parties in the ICC system and the more flexible powers of the judges in the legal system of both ad hoc tribunals.

Let me give you some examples during pre-trial. The ICC is a jurisdiction without a territory, based in a State, which is most likely in most cases far away from the territory of the State where the crimes were committed. Witnesses may live and documents may be found in States far away from the seat of the court. This reality is not properly addressed in the Statute and the Rules of Procedure and Evidence. The ICC legal system is pretty unclear about the consequences for the Defence of a trial based on case presentation by the parties, which supposes an obligation to put one's case, before a court that is not a part of the legal system of a State. Defence Counsel in cases before the ICC do not have a standing before the courts of the State where prosper witnesses live and where relevant documents can be found. In a party driven trial system it is hard to understand how the judges will deal with various ways an accused may address himself to the court, like unsworn statements by the accused in court as a part of the communication between the accused and the judges and the giving evidence under oath as a witness in his own case. The issue is what the status of these kinds of communications will be and how the judges will deal with such communications, as for example the weight that will be given to the various statements of the accused. The Rules of Procedure and Evidence are not clear about these issues.