CHAPTER 8

Principles of Criminal Evidence before ICTs

1 Introduction

Pradel's remark that "of all branches of (international) criminal procedure, evidence is probably the most vital and certainly the most complex and, as a result, the least fixed," is self-explanatory. Criminal evidence attempts to balance two antagonistic elements, namely that of the (defense) rights of the accused on the one hand and the legal interests of society to suppress criminality on the other. The integrity of international criminal trials is especially challenged within the ambit of criminal evidence, which is complex in terms of its sources, content, presentation and application. This chapter will look into four major themes related to criminal evidence before ICTs, namely:

- the requisite standard of proof in the various statutes and RPE of ICTs throughout all stages of the proceedings (paragraph 2);
- disclosure of evidence (paragraph 3); the collection and admissibility criteria of said evidence, including the phenomena of hearsay evidence and anonymous witnesses and circumstantial evidence (paragraph 4); and
- the presentation and appreciation of evidence before ICTs; special attention will be paid to expert witnesses and forensic evidence at trials before ICTs (paragraph 5).

2 Requisite Standards of Proof before ICTs

2.1 Introduction

The obligation of the prosecution to prove all the facts in the indictment in order to establish guilt beyond reasonable doubt constitutes an important element for the legitimacy of trials before ICTs. In this context, this paragraph examines five subjects:

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(i) the standard of proof for issuing an arrest warrant within the Rome Statute (2.2);
(ii) evidentiary standard at the confirmation of the charges phase (2.3);
(iii) procedure for judgment of acquittal (2.3);
(iv) the standard of proof for conviction (2.4); and
(v) the standard of proof for defenses (2.5).

2.2 Standard of Proof for Issuing an Arrest Warrant
The proceedings before the International Criminal Court (ICC) reflect three evidentiary standards:

(a) Prior to issuing a warrant of arrest the Prosecution has to prove that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."²

(b) At the confirmation of the charges stage – a special procedure during which the Prosecution seeks approval from the Pre-Trial Chamber to proceed to trial – the Prosecutor has to meet a higher burden of proof, i.e. it has to convince the Pre-Trial Chamber that sufficient evidence exists "...to establish that there are substantial grounds to believe that the person committed each of the crimes charged."³

(c) At the trial stage, the requisite burden of proof is that of "beyond reasonable doubt," i.e. the Court must be convinced of the guilt of the accused beyond reasonable doubt in order to convict the accused.⁴

² Article 58(1)(a) ICCSt. reads: "At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."

³ Article 61(7) ICCSt. reads: "The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall: (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed; (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence; (c) Adjourn the hearing and request the Prosecutor to consider: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court."

⁴ Article 66(3) ICCSt.