The Trial Proceedings before the ICC

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The Prosecutor at the International Criminal Court has decided to open investigations into three situations and therefore it is reasonable to expect that in some cases the charges will be confirmed leading up to the first trial before the ICC. However, it is hard to foresee in detail, how this first trial will be conducted, since the Statute and the Rules of Procedure and Evidence leave a considerable margin as to how the hearing of evidence will be carried out.2

In order to stimulate the discussion with regard to this margin, the following article sets out the provisions governing the conduct of the trial and the hearing of evidence within the legal framework of the ICC, before turning to some more general thoughts with regard to the nature of the proceedings before the ICC that need to be taken into consideration when thinking about possible trial scenarios (I.). After outlining the trial practice before the ICTY and the ICTR (II.) the article turns to the major differences between the “procedural macrocosm” of the ad hoc-Tribunals and the ICC (III.). Finally, it will introduce a legal instrument that – although having had no bearing on the essentially adversarial trial practise before the two ad hoc-Tribunals – might become a relevant legal tool in the practise before the ICC: The request to order the hearing of evidence (“Beweisantrag”) (IV.).

I.

The Rome Statute does not contain any detailed provisions regarding the conduct and phasing of the proceedings. However, Article 64 (6)(d) ICC-Statute, the wording of which did not emerge until the third week of the Rome Conference,3 sets out that the Trial Chamber may “order the production of evidence in addition to that already collected prior to the trial or presented during

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the trial by the parties”. As has been noted, this provision gives an ex-officio power to the Trial Chamber to ascertain the truth.4

Furthermore, according to Art. 69 (3) of the Statute the Court “shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth”. The content of Art. 69 (3) of the Statute5 was first introduced by a German proposal during the session of the Preparatory Commission in August 1996,6 wherein it was proposed to amend Art. 44 of the ILC Draft as follows:

“In order to determine the truth, the court shall, ex officio, extend the taking of evidence to all facts and evidence that are important for the decision. The court will decide on the taking of evidence according to its [free] conviction obtained from the entire trial.”

The proposal was amended during the August 1997 session of the Preparatory Committee to read:

“The Court has the authority and duty to call all evidence that it considers necessary for the determination of the truth. The Court’s decision shall be based on its evaluation of the evidence and the entire proceedings.”

However, the reference to a “duty” of the Court to call all evidence that it considers necessary for the determination of the truth was thought to go too far and was therefore dropped in the December 1997 session.8 Notwithstanding that, the following annotation was made by the Preparatory Committee:

“This provision is meant to indicate that the relevant evidence cannot be determined by the parties alone, but has also to be determined by the...