INSPIRATION FROM THE INTERNATIONAL CRIMINAL TRIBUNALS WHEN DEVELOPING LAW ON EVIDENCE FOR THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

The law and the experiences of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) were of importance generally for the procedural law of the International Criminal Court and the law of evidence was no exception. In turn, the law of evidence of international criminal tribunals and courts is influenced by principles and procedures of national law, whereby a distinction can be made between national legal systems based upon a common law or a civil law tradition. Although the law of evidence of the Tribunals and the ICC exposes many similarities it is not identical and one may ask to what extent the former influenced the latter.

The origins of the procedures for the two *ad hoc* Tribunals (ICTY and ICTR) and for the International Criminal Court (ICC) are very different. The procedural regimes of the Tribunals were only outlined in the Statutes1 and were thereafter to be developed in more detail by the judges. The initial influence came mainly from lawyers with a common law background with procedures that were from the outset very adversarial in

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nature. Some basic features of the regimes were not, however, what is normally found in common law jurisdictions. In respect of the law of evidence, some safeguards that are commonly in place to protect jurors from irrelevant and confusing information were not included. Instead the Tribunals, designed for professional judges only, were provided with a system where evidence is treated rather unhindered by technical rules on admissibility. The focus is more on the assessment of the evidentiary value (weight) of evidence that is presented than on the question whether certain evidence should be admitted or not. Furthermore, the principles of adversarial proceedings were not fully upheld, since not only the parties but also the judges are entitled to call evidence at trial. Irrespective of whether one would like to describe the procedures as “unique” or as a “hybrid” of the common law and civil law traditions, they indeed represent a combination of adversarial and inquisitorial procedures. The law of evidence of the Tribunals builds upon a foundation laid with International Military Tribunals in Nuremberg and Tokyo as well as later developments.

The approach to admissibility of evidence is also a reflection of the nature of the crimes in question and the difficulties facing the parties in obtaining evidence in international criminal proceedings, not the least for

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4 The differences between the two legal traditions run deeper than procedural practices and are said to reflect also views on the structure of authority and on matters relating to social and political philosophy. It is beyond the scope of this paper, however, to assess whether this amalgamation really represents a true synthesis of criminal procedures or whether it rather represents pragmatism and a “marriage of convenience” for the purpose of actually achieving a forum for international adjudication. See further, M. Findlay, “Synthesis in Trial Procedures? The Experience of International Criminal Tribunals”, *ICLQ* 50/1 (2001) 26.