WITNESS EVIDENCE BEFORE INTERNATIONAL CRIMINAL TRIBUNALS

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I. INTRODUCTION

Despite continuing doubts over the possibility of accurately evaluating witness evidence, and notwithstanding the increase in the use of forensic science and other non-oral based forms of testimony (such as CCTV evidence), witness evidence still plays a large role in the proceedings before national courts. The same applies to proceedings before the two ad hoc international criminal tribunals, the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). As much is clear from a perusal of many of the judgments of those courts. Indeed, many of those who support international (or national) trials for international crimes do so on the basis that there is an important cathartic effect for victims (who are often prosecution witnesses) to have their “day in court” and to tell their story. In the light of these considerations, and the experience of the ad hoc tribunals, there is little doubt that the International Criminal Court (ICC) will also have to deal with large quantities of witness evidence. A point not

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1 The international criminal law equivalent of which is the use of “spy-satellite” photography.
4 Although the trial procedure may not be the best place for this, see M. Minow, Between Vengeance and Forgiveness (Boston, Beacon, 1998), pp. 61–79.

The issue of witness evidence before the ICTY and ICTR has engendered a great deal of controversy and debate.\footnote{See, for example, M. Leigh, “Use of Unnamed Witnesses Against Accused”, 90 American Journal of International Law (1996) 235; C. Chinkin, “Due Process and Witness Anonymity”, 91 American Journal of International Law (1997) 75; M. Leigh, “Witness Anonymity is Inconsistent With Due Process”, 91 American Journal of International Law (1997) 80; N. Affolder, “Tadic, Anonymous Witnesses and the Sources of International Procedural Law”, 19 Michigan Journal of International Law (1998) 445; J. Alvarez, “Rush To Closure: Lessons of the Tadic Judgment”, 96 Michigan Law Review (1998) 2031.} It is likely to do the same in the ICC. It is therefore worth looking at the practice of the ad hoc tribunals for the lessons that may be drawn from them, both as to what should and what should not be done in relation to witness evidence.\footnote{For statistics relating to the large number of witnesses that have been brought before the ICTY see R. May and M. Wierda, “Evidence Before the ICTY”, in R. May, D. Tolbert, J. Hocking, K. Roberts, B. Bing Jia, D. Mundis and G. Oosthuizen, Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (The Hague, Kluwer, 2001) 249, p. 250.} This article will set out the legal framework within which witnesses must give their evidence before the ad hoc tribunals and the ICC and attempt to identify the problems that have arisen and are likely to arise again. The practice of the Nuremberg and Tokyo International Military Tribunals is of less importance for our purposes given that much of the Nuremberg and a substantial portion of the Tokyo prosecution cases were based on documentary sources.\footnote{See R. May and M. Wierda, “Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha”, 37 Columbia Journal of Transnational Law (1999) 725, especially pp. 743–744.} Nonetheless, where their practice casts light on problems with witness evidence it will also be referred to.

II. THE LEGAL FRAMEWORK FOR WITNESS EVIDENCE

Unlike the post-war tribunals, which had terse provisions dealing with evidence, the ICTY and ICTR have detailed rules regulating procedure and evidence.\footnote{See IT/32/Rev. 24, ITR/3/Rev. 11.} Indeed Richard May and Marieke Wierda go as far as to describe