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Foreword

Proof in International Criminal Trials

Yvonne McDermott and John D Jackson*

As international criminal tribunals have proliferated over the past two decades, so too has an interest in their procedure.[1] More recently, academics have expanded their attention beyond the traditional focus on admissibility and the rules of evidence to questions of proof in international criminal trials.[2] The tribunals themselves continue to grapple with deciding how much weight to attach to certain pieces of evidence,[3] determining the extent of evidence needed to authorise a warrant of arrest or confirm the charges against an accused,[4] and framing their analysis of the evidence so that each piece of evidence is given due consideration, but in the light of other evidence on record.[5]

This symposium focuses on these issues of proof as they pertain to international criminal trials. Broadly speaking, there are two main themes to the symposium. The first is that there is a rich body of evidence scholarship, which international criminal law and procedure could benefit from. Thus, papers in the symposium introduce theories of evidence and proof from the domestic law context and discuss their relevance to international criminal justice. The second theme of this symposium focuses on some of the unique challenges faced by international courts and tribunals when dealing with fact-finding and the different standards of proof applicable at different stages of proceedings. Papers note, *inter alia*, the issues surrounding the practice of witness proofing, the standards of proof imposed by Pre-Trial Chambers in the ICC when issuing an arrest warrant or confirming the charges, and the tribunals' approach to the evaluation of evidence. Together these two themes highlight the need for scholarship on proof and evidence in the international courts and tribunals to draw

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[1] Amongst many others, monographs in the field include G. Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013); C. Safferling, *International Criminal Procedure* (Oxford University Press, 2012); L. Carter and F. Pocar (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar, 2013); C. Safferling, *Towards an International Criminal Procedure* (Oxford University Press, 2001); S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2005).

[2] N. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2013); M. Klamberg, *Evidence in International Trials* (Martinus Nijhoff, 2013); K. Khan *et al.*, *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010).

[3] See further, the jurisprudence discussed in Y. McDermott, 'The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis' 27 *Leiden Journal of International Law* (2013) 971.

[4] See further, the jurisprudence discussed in T. Mariniello, 'Questioning the Standard of Proof: The Purpose of the ICC Confirmation of Charges Procedure' and M. Ramsden and C. Chung, '"Reasonable Grounds to Believe": An Unreasonably Unclear Evidentiary Threshold in the ICC Statute', both in this issue.

[5] Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, Judgment on the Prosecutor's Appeal against the Decision of Trial Chamber II entitled 'Judgment Pursuant to Article 74 of the Statute', *Chui* (ICC-01/04-02/12-271-AnxA), Appeals Chamber, 7 April 2015.

upon domestic experience while recognising that the international context poses its own particular challenges.

Paul Roberts offers a sustained defence of the importance of procedure in international criminal justice, and he argues that procedure is normatively, conceptually and developmentally prior to substantive law, as opposed to being an incidental aside. His article then turns to the importance of fact-finding in criminal trials, and argues in favour of a conception of evidence in international criminal law that goes beyond rules of evidence to incorporate a more holistic view, encompassing the logic of inferential reasoning and fact-finding. To this end, he introduces an approach to inference that was first developed by the American evidence scholar, John Henry Wigmore, over a century ago and explains the key concepts of modified Wigmorean analysis, in the hope that some international criminal law scholars and practitioners will rise to the challenge of trying the method for themselves, and ultimately 'pioneering the development of a sophisticated, comprehensive, forensic epistemology of evidence and proof'.

Yvonne McDermott's article continues on this theme, by providing a further examination of the benefits of modified Wigmorean analysis and discussing its potential applicability to international criminal trials with some illustrations from recent trials. She argues that Wigmorean analysis may be useful as a trial preparation tool for lawyers, in helping them to structure their arguments by breaking them down into simple propositions, and charting the relationships between those propositions. It can also help lawyers to identify the 'jugular facts' of an opponent's case, and subject those facts to rigorous analysis. McDermott argues that the method might also be useful as a tool for fact-finding, in helping judges and Chambers staff to break down and analyse the evidential propositions that support or do not support relevant inferences leading to a finding on the guilt or innocence of an accused. McDermott's hypothesis relates quite closely to a recent debate on fact-finding before the ICC, specifically the question of whether pieces of evidence should be assessed in a fragmentary or holistic manner. She argues that, while it is correct that evidence should be assessed in light of the evidential record as a whole, the weaknesses of individual pieces of evidence cannot be overlooked or brushed aside in this assessment. Where there is uncertainty on a particular fact, one cannot be more certain of a finding based on that fact – this is a basic tenet of probability theory.

Mark Klamberg builds upon this theme in his study of how evidence should be evaluated in international criminal trials. He introduces some key concepts from evidence literature that might inform our understanding of this question, including concepts of robustness, probabilistic reasoning, inference to the best explanation, and the alternative hypothesis approach. Rather than suggesting that just one of these approaches would be suitable, Klamberg argues in favour of a combined approach to evaluating evidence before international criminal tribunals. He suggests that, in principle, there is no real difference between how evidence should be weighed in international criminal trials to that taken in domestic criminal trials, given that both types of proceeding operate in accordance with the 'beyond reasonable doubt' standard of proof. To that end, he acknowledges that only some of

the elements of his approach to evaluating evidence might be used at earlier stages of proceedings, such as at the confirmation of the charges or the issuance of an arrest warrant stages before the ICC.

Michael Ramsden and Cecilia Chung's article deals with the earliest of those stages – the issuance of an arrest warrant – and they argue that the ICC has (perhaps inadvertently) lowered the standard of 'reasonable grounds to believe' for the issuance of an arrest warrant through the lack of clarity in its reasoning on this standard. Ramsden and Chung recall that the drafting history of the Statute reveals that the words 'serious reasons' or 'probable cause' to believe were also mooted as possibilities for the wording of Article 58. They contend that the reliance by the ICC on the jurisprudence of the European Court of Human Rights on 'reasonable suspicion' under Article 5 of the European Convention is misplaced, given that, in their view, the issuance of an arrest warrant under Article 58 is commensurate with the bringing of charges, which the ECtHR has explicitly excluded from the remit under Article 5, and that 'suspicion' is distinct from belief. To this end, the authors conclude that the approach where the possible guilt of the accused is simply 'one of the reasonable conclusions' that can be drawn from the evidence sets the threshold too low for the issuance of an arrest warrant, and that has serious potential consequences for accused persons before the ICC.

While Ramsden and Chung believe that the ICC has set the standard of proof for the issuance of an arrest warrant too low, Triestino Mariniello argues that a decision of Pre-Trial Chamber I on the confirmation of the charges imposed too high a standard. Therein, the Chamber found that a confirmation of the charges decision should be based on 'the strongest possible case based on a largely completed investigation'.[6] Mariniello argues that this standard would disrupt proceedings in that it blurs the boundaries between pre-trial and trial stages, and would ultimately be detrimental to the rights of the accused, both in terms of the right to a speedy trial and the presumption of innocence.

Mariniello's critique of the differing interpretations of the standard of proof for the confirmation of the charges before the ICC perhaps highlights some of the difficulties of the ICC's mixed procedural model and its unique features. By arguing in favour of a model that ensures coherence with the ICC's own legal framework, Mariniello's paper is forward-looking and attempts to establish a best practice that is not rooted in any one procedural paradigm. In a similar vein, John Jackson and Yassin Brunger's examination of the practice of witness proofing strongly argues in favour of moving beyond adversarial and inquisitorial ideologies and towards a position of what they term 'principled pragmatism'. Their concept of principled pragmatism is founded on two key principles: the well-being of the witness and the integrity of the evidence. By drawing on the experience of practitioners in international criminal law, Jackson and Brunger have been able to reflect upon ethical best practices for witness preparation, and they ultimately find that the ICC's recent move in the *Kenya* cases towards a more open approach to the question, which allowed witness proofing subject to some

[6] Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, *Gbagbo* (ICC-02/11-01/11-432), Pre-Trial Chamber I, 3 June 2013.

safeguards, was pragmatic and 'provided a focused cost-benefit analysis of the practice within the international setting'.

The majority of the papers in this symposium were first presented as part of a conference on Proof in International Criminal Trials, held at Bangor University, UK, in June 2014. To this end, we would like to take this opportunity to express our gratitude to the British Academy, which funded part of the research that underpins this symposium, and those present at the conference, especially Terence Anderson, Nancy Combs, Simon De Smet, Judge Teresa Doherty, and William Twining, for offering helpful critique and feedback on our earlier work. We would also like to thank the Editorial Board of the *Journal*, all of the anonymous peer-reviewers who offered suggestions to strengthen each of the pieces, and Urmila De for invaluable editorial assistance. We hope that this symposium will mark just the beginning of a new direction for international criminal law scholarship, with a sustained focus on questions of proof and evidence, which are fundamental to the work of the international criminal tribunals.