PROBLEMATIC ISSUES OF SUBSTANTIVE AND PROCEDURAL LAW IN WAR CRIMES AND CRIMES AGAINST HUMANITY

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ABSTRACT: *The subject of this paper is to analyse the practical implications of the establishment of the International Criminal Court, seeking to identify the legal obstacles to the proper functioning of this institution. In terms of substantive law, the need to incriminate the offence of aggression and the offence of using nuclear weapons in national legislation is highlighted. In terms of procedure, the article deals with aspects of the ne bis in idem principle, the problems and specificities of gathering the evidence needed to prove war crimes and crimes against humanity, as well as possible conflicts between the legal principles of the judicial systems of the States Parties to the Statute of the International Criminal Court, in particular between the principles of Anglo-Saxon law and those of Romano-Germanic law.*

KEYWORDS: *International Criminal Court, genocide, crimes against humanity, war crimes, war in Ukraine.*
JEL Code: *K00, K33*

There is no doubt that crimes against humanity, genocide and war crimes, by their scale and consequences, are at the upper limit of the most serious criminal offences. The 20th century is rightly said to have been the century of genocide, and this claim is covered by the aftermath of the two world conflagrations, the Holocaust, the use of nuclear weapons, the war in the former Yugoslavia, the civil massacre in Rwanda, and, more recently, the genocide in Darfur/Sudan[1], to mention but a few of the most serious events of this kind. The 21st century continues in force the series of aggressions against humanity, the headline being the war on the territory of Ukraine unleashed by Russia, without neglecting, however, the treatment applied by the Communist regime in Beijing to the Muslim

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[1]Birtu-Pîrăianu A.-M., *A fi sau a nu fi genocid? Drama femeilor din Darfur/Sudan-piesa unui genocid ascuns*, in the Annals of „Ovidius" University, series Istorie, vol. 6, 2009, pp. 173-196.

minority of the Uighurs in the Xinjiang region, described as ''genocide'' by the Canadian Parliament[2], or the crimes against humanity committed in Venezuela[3].

Given that, more often than not, the crimes to which we refer are committed under conditions of international armed conflict, and that the population attacked by its own State is unable to develop on its own legal means of defending itself and holding its oppressors accountable, in the light of the older and more recent armed conflicts between States and within a State, of the serious violations of the right to life and survival of large groups of persons or collectivities, the existence of an effective and efficient international criminal justice system has become, and is becoming, more and more necessary[4].

The first international courts to deal with crimes against humanity and crimes against peace were the Nuremberg and Tokyo tribunals, set up after World War II in connection with the atrocities committed in that conflagration by the German Nazis and Japanese military. Even though these tribunals had some negative aspects related to their establishment, which raised doubts about their independence, they were of great importance for the development of international criminal law, as they demonstrated the necessity and effectiveness of establishing non-national institutions for the prosecution and punishment of crimes of international dimensions, and also defined crimes against humanity and crimes against peace. Not least, their judicial practice has allowed the establishment of new standards of accountability, such as the abolition of the immunity of the Head of State, the rejection of the defence of invoking the order of the superior[5], etc.

The civil war in Yugoslavia, which began in 1991 with the Serbian army bombing the towns of Vukovar and Dubrovnik, soon led to atrocities that were considered war crimes and crimes against humanity, committed on a massive scale. Following the conclusions of the Commission of Inquiry appointed by the UN Security Council, the creation of an international criminal court was proposed, and in May 1993, Resolution 827 adopted the report of the UN Secretary-General establishing the legal and procedural basis for the new institution, thus establishing the first international tribunal as a subsidiary body of the UN Security Council[6].

Finally, the 100-day massacre of the Tutsi population by the Hutu in Rwanda, which resulted in more than 800,000 victims, required the establishment by the UN Security Council of a new international tribunal to hold the perpetrators of this genocide criminally responsible.

The experience of the ad hoc establishment and the actual judicial work of these last two international criminal tribunals has led to the identification of essential problems, such as the lack of efficiency in taking political decisions to set up these courts, the logistical difficulties in ensuring their effective functioning (establishment of the seat, staffing, appointment of judges and prosecutors, other such issues), as well as differences in legal views on the application of the law, in particular the procedural law.

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[2] HotNews.ro https://www.hotnews.ro/stiri-international-24623572-canada-adoptat-motiune-prin-care-acuza-china-genocid.htm .

[3]https://www.ushmm.org/genocide-prevention/blog/un-mission-finds-crimes-against-humanity-in-venezuela?from=page-prev-link ; https://www.icc-cpi.int/venezuela-i .

[4]Cîndea, D.-L., *Crimele împotriva păcii și securității umanității și potențialul preventiv al instanțelor penale internaționale*, Doctoral Thesis, 2007, p. 8.

[5]Cîndea, D.-L., op. cit., p. 73.

[6] Cîndea, D.-L., op. cit., p. 84.

Thus, on the basis of the many proposals put forward throughout history, starting as far back as the Middle Ages, for the establishment of a permanent international criminal Court, steps were taken in 1947-1948 to codify international crimes and draw up a draft statute for such a court, in the belief that this would ensure unitary international justice and eliminate the need to set up ad hoc tribunals.

The process was completed with the adoption of the Statute of the International Criminal Court (hereinafter referred to as the ICC Statute) at the Rome Conference on 17 July 1998 by the Assembly of States Parties to that Conference. The ICC Statute entered into force on 1 July 2002. Romania played an active role in the run-up to the adoption of the Statute and accepted the jurisdiction of the Court from the date of its entry into force by ratifying it[7].

The International Criminal Court was established as a permanent institution which may exercise jurisdiction over individuals for the most serious crimes of concern to the international community as a whole, namely[8]: a) the crime of genocide; b) crimes against humanity; c) war crimes; d) the crime of aggression. The ICC Statute is supplemented, as regards the work of the Court, by the Rules of Court, the Rules of Procedure and Evidence, the Rules of the Office of the Prosecutor, and the Elements (constitutive) of Crimes, all of which have been adopted or, as the case may be, validated by the Assembly of States Parties to the ICC Statute. The typical aspects of these crimes are therefore defined in the Statute and further developed in the document entitled "Elements of Crimes".

Under the Rome Statute, the ICC is complementary to national criminal jurisdictions and can only investigate and prosecute the four core international crimes in situations where states do not have the functional capacity or do not wish to do so. The Court has jurisdiction over crimes only if they are committed in the territory of a State Party to the ICC Statute or if they are committed by a national of a State Party; as an exception, it may also have jurisdiction over other crimes if its jurisdiction is authorised by the United Nations Security Council.

In the following we will highlight some aspects of the relationship of the International Criminal Court with Member States or third States, in the field of prosecution and trial of crimes under its jurisdiction, which may raise issues of substantive or procedural law.

1. Romania's Criminal Code, like the criminal laws of other countries, contains extensive incriminations for crimes of genocide, crimes against humanity and war crimes. A comparative examination of these provisions [9] with the corresponding provisions of the ICC Statute reveals that Romanian law takes over in a similar form the content of the international regulation, but limited only to these three categories of criminal acts, and not to the crime of "Aggression", which is found in the Statute in Article 5(d). Of course, in the original form of this document, the offence in question did not have defined constituent elements, given the disputes between States on this issue, stipulating that, as regards the crime of aggression, the Court would exercise jurisdiction when a provision defining this crime and laying down the conditions for the exercise of the Court's jurisdiction in relation to it was adopted. It was therefore normal for the Romanian legislator of the Criminal Code (Law No 286/2009) to wait for a unanimously or majority internationally accepted

[7] Law No. 111 of 13 March 2002, Official Gazette No. 211 of 28 March 2002.
[8] Art. 5 of ICC Statute.
[9] Art. 438-445 of Criminal Code.

definition of the crime of aggression, which it would incorporate into domestic law. The delay in incorporating this crime into domestic law was all the more natural given that, at the time the Criminal Code was adopted, there were no acute problems in the immediate vicinity relating to a war of aggression.

In the meantime, however, the crime of aggression was defined, with its constituent elements, at the Review Conference of the Rome Statute, held in Kampala (Uganda) from 31 May to 11 June 2010, and the ICC Statute was supplemented in this respect by the Resolution adopted at the Conference. At the same time, a war is being waged on Romania's northern border which, in any case, the world's authoritative political voices say is a war of aggression by the Russian Federation.

All this would justify the inclusion in the Criminal Code of the offence of aggression, among those provided for in Title XII, which essentially incriminates the act of a person who, being in a position to control or direct the political or military actions of a State, plans, prepares, initiates or commits an act of aggression consisting in the use of armed force against the sovereignty, territorial integrity or political independence of another State, or other acts contrary to the Charter of the United Nations, knowing that such use of armed force, by its character, gravity and scale, is incompatible with the Charter of the United Nations.

We believe that regulating this offence is not without practical importance, given some of the legal implications that may arise.

Thus, supposing that Romania, as a Member State of the ICC Statute, alone or together with other Member States, were to wish to refer a case to the Prosecutor of the International Criminal Court for investigation of such a crime, it would be placed in a situation of logical contradiction, in which, on the one hand, by not regulating this crime in domestic law, it implicitly conveys the idea that it does not recognize it as a criminal offence, and in which, on the other hand, it asserts that a crime of aggression has been committed, demanding that the perpetrator be held accountable.

Then, to the extent that Romania is a state directly suffering the consequences of the decision of aggression by armed force taken by the leaders of another state, it cannot be left to the International Criminal Court alone to hold the perpetrators criminally responsible, since its jurisdiction is restricted, it is decided by the Court on the basis of factual elements relating, inter alia, to the gravity of the facts, and, in any event, the judicial mechanism would be set in motion with a delay that could be significant. There is therefore a possibility that the Prosecutor or the International Court may consider that the conditions of its jurisdiction are not met, in which case Romania, through its domestic judicial bodies, would have no legal basis to open its own trial in relation to a crime of aggression.

A notable absence among incriminations relating to crimes against humanity (in the general sense), both in Romanian national law and in international regulations - including the Rome Statute - is that relating to the use of nuclear or thermonuclear weapons. Indeed, although a significant number of states possesses tactical and strategic nuclear weapons, although nuclear weapons were actually used in the Second World War, although the danger of using them again cannot be excluded or minimized, neither the ICC Statute nor the Romanian Criminal Code expressly establishes as a crime the use of nuclear weapons, a weapon of mass destruction without discrimination, both against armed forces and the civilian population, not to mention the long-term consequences on populations in large areas or on the environment. If such indecision at international level can be explained in

the context of the political interests of nuclear-armed states, the same cannot be said of Romania, which has the possibility of incriminating such a crime, even if it is unique in the international legal landscape.

It could be objected that there are other provisions of the Penal Code (art. 443 or/and art. 444 Penal Code)[10] which can punish an act of using a nuclear or thermonuclear bomb; in this respect, the provisions which would lend themselves to such application [11] are:

- Art. 443 para. 1 lit. a): "The act of a person who (...) initiates an attack by military means against the civilian population or civilians not taking direct part in hostilities";

- Art. 444 letter c): "The act of a person who (...) uses weapons causing unnecessary physical suffering".

It can be seen, however, that the first provision only sanctions attacks against the civilian population and not against enemy armed forces, while the second is questionable in relation to whether or not the nuclear weapon causes unnecessary physical suffering in relation to the purpose for which it would be used. Beyond this, however, it is worth noting the unsatisfactory punishments in terms of the amount that could be imposed, namely 7 to 15 years' imprisonment, whereas, for example, genocide in wartime is punishable by life imprisonment.

2. *Ne bis in idem* is the universally applied principle that no one can be prosecuted or tried for committing a crime when that person has previously been convicted of the same crime. This principle is regulated by Article 6 of the Romanian Code of Criminal Procedure and Article 20 of the ICC, which reads as follows:

„1Except as otherwise provided in this Statute, no person shall be tried by the Court for acts constituting crimes for which he has already been convicted or investigated by the Court.

2. No one shall be tried by another court for a crime referred to in Article 5 for which he has already been convicted or acquitted by the Court.

3. Anyone who has been tried by another court for conduct also falling under Articles 6, 7 or 8 cannot be tried by the Court unless the proceedings are before another court:

(a) was intended to shield the persons concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) was not conducted independently or impartially, in accordance with the safeguards required by international law, but in a manner which, in the circumstances, was inconsistent with the intention of prosecuting the person".

In the wording of the text, the notion "has been investigated", in our opinion, means that the Court has pronounced a final decision to terminate the prosecution against the person being prosecuted.

The first paragraph refers to the authority of res judicata of the ICC's own previous decisions in relation to a new judgment of the ICC, while the second paragraph establishes the authority of res judicata of the Court's decisions in relation to a subsequent judgment of a national court, obviously for the same material acts.

The problem that can be foreshadowed is that the national court initiating a new trial for the same facts tried by the ICC belongs to a State that has not acceded to the Statute

[10] Art. 443 of Criminal Code: Use of prohibited methods in combat operations; Art. 444 of Criminal Code: Use of prohibited means in combat operations.

[11] Of course, apart from common law offences relating to murder, manslaughter, bodily harm, etc.

and therefore does not recognise the Court's jurisdiction. Thus, the court of the third State is not bound by the provisions of Article 20(2) of the Statute, which do not produce legal effects in the domestic order; however, we consider that the person convicted or acquitted by the International Criminal Court may invoke before the national court the provision of domestic law relating to the *ne bis in idem* principle, which does not differentiate, in principle, between final criminal judgments of domestic courts and those of foreign courts, including international courts.

However, we do not exclude the possibility that, as a result of the non-recognition of the ICC's jurisdiction, the third State may not itself recognise its judgments, considering them invalid for its legal order[12], in which case the subject of the facts would be subject to a second trial, and possibly a second conviction, or a conviction after acquittal by the Court.

Paragraph 3 sets out an exception to the *ne bis in idem* principle, according to which the Court may try a person who has previously been the subject of a trial before a national court if it establishes that the purpose or intended consequence of that first trial was in fact to evade criminal responsibility.

The application of this exception presupposes a finding of controversial situations, such as: the fact that the crimes tried fall within the jurisdiction of the Court; the fact that the initial trial was intended to create impunity for the perpetrator by invoking the *ne bis in idem* principle; the fact that the circumstances of the trial demonstrate a lack of intention to hold the perpetrator truly accountable. The requirements of the text lead us to conclude that a mere acquittal by a national court meeting the requirements of independence and impartiality, and following a trial which has respected the guarantees of fairness, is not sufficient for the case to be retried before the International Criminal Court, even if the Court has concluded, on the basis of the information available, that there are indications of the commission of a crime within its jurisdiction.

3. The gathering of evidence by the Office of the Prosecutor in order to substantiate an indictment before the ICC is in itself a problematic activity, atypical in relation to traditional domestic prosecution, from multiple points of view, including:

- the passage of a relatively long period of time from the date of the crimes until the ICC Prosecutor is in a position to effectively start the criminal investigation, which makes it impossible to identify and preserve important evidence;

-the high volume of prosecution activities, given the scale and diversity of the crimes of genocide, crimes against humanity and war crimes potentially committed, which may be found cumulatively in some situations, which may lead to the failure to discover some of them;

-the impossibility of carrying out criminal investigation activities in a given territory or at a given target, due to the fact that they are under the control of the aggressor State's forces and the aggressor State does not allow access to ICC representatives;

[12]https://www.digi24.ro/stiri/externe/reactia-rusiei-dupa-ce-pe-numele-lui-putin-a-fost-emis-mandat-de-arestare-mandatele-de-la-cpi-sunt-nule-2286267 (,,The decisions of the International Criminal Court, which is not recognized by the Russian Federation, have no significance" - statement by Kremlin spokesman).

-lack of cooperation or ineffective cooperation of the judicial authorities of the State of investigation with the investigators designated by the Office of the Prosecutor.

With regard to the first situation, it should be noted that, according to the provisions of the ICC Statute, the commencement of the investigation is preceded by procedural steps, such as: the referral by the UN Security Council or by States Parties to the Statute, the gathering of the minimum information necessary to establish the commission of a crime within the jurisdiction of the International Criminal Court, the consent of the Office/Office of the Prosecutor to the commencement of the investigation and an appeal against this decision, possibly, the resolution of the request to take over the trial by the State on whose territory the crimes were committed, etc. A relevant example of this is the investigation into crimes against humanity allegedly committed in Venezuela. Thus, the referral to the Office of the Prosecutor of the ICC by several member states to the treaty took place on 27 September 2018 for a situation triggered as early as February 2014, and after the submission of this request to the Pre-Trial Chamber only in 2020, the Office concluded that there was a reasonable basis to suspect that crimes against humanity had been committed at least since 2017. Subsequently, on 3 November 2021 the Prosecutor announced that the decision had been taken to commence investigations, concurrent with the conclusion of an agreement between the Office of the Prosecutor and the Venezuelan judicial authorities to provide support for the prosecution. However, on 16 April 2022, the Office of the Prosecutor notified the Pre-Trial Chamber that it had received a request from Venezuela to transfer proceedings to national authorities under Article 18 of the ICC Statute. Finally, in November 2022, the Prosecutor submitted the request to close the investigation into the situation in Venezuela to the Pre-Trial Chamber. The analysis of this course of the proceedings over time reveals that the decision to actually start an investigation took place 4 years after the alleged crimes against humanity were sufficiently clearly outlined, and more than 7 years after the first events related to them, which may lead to difficulties in discovering and gathering evidence, failure to fully know some facts, failure to investigate such crimes.

It is true that the Prosecutor may exceptionally ask the Pre-Trial Chamber for authorisation to take the necessary investigative steps to preserve the evidence if the opportunity to gather important evidence no longer arises or if there is an appreciable risk that such evidence will no longer be available, but the risk of the evidence being permanently lost nevertheless remains.

With regard to the specific ways in which the ICC Prosecutor may obtain information, either in the pre- or post-investigation phase, about the commission of crimes, the Statute refers to some of them; thus, sources of information may be State authorities, United Nations bodies, intergovernmental and non-governmental organisations or other reliable sources that the Prosecutor deems appropriate[13]. We believe that this includes the media, in particular teams of independent journalists who do not belong to the countries involved in one way or another in the events under investigation, who fulfil the conditions of neutrality and impartiality and have the possibility of obtaining conclusive evidence from the scene or during the events: photographs, videos, establishing the exact location where certain actions took place, interviewing people, etc. Such evidence can be used successfully in court proceedings, perhaps even more credibly than evidence obtained by

[13] Art. 15 para. (2) of ICC Statute.

national authorities, as the accused could defend that the evidence was given in bad faith or is false. In this connection, attention is drawn in the Russian-Ukrainian conflict to the contradictory statements made by the parties, whereby each side accuses the other of being responsible for a particular attack, bombing, destruction or killing of civilians, and such statements may be repeated in a possible future criminal trial, raising the question of establishing on an objective basis the reality of the defences put forward.

The prosecutor may investigate in the territory of a State in accordance with the provisions of Chap. IX of the ICC Statute or with the authorisation of the Pre-Trial Chamber. The Prosecutor is empowered to collect and examine evidence and to summon and question persons under investigation, victims and witnesses. In addition, the Prosecutor may request the cooperation of any State or governmental organization or instrumentality, consistent with their powers or mandate, and may enter into such arrangements or agreements as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person[14].

As the cooperation mechanisms between the ICC's investigative body and State authorities are designed, a large part of the evidence-gathering work is carried out through national bodies, in particular the conduct of expert examinations, searches and seizures of physical evidence, the gathering of information through technical warrants, etc.

However, the provisions of the Statute and the Rules of Procedure and Evidence suffer from an important shortcoming which cannot be overcome: The International Criminal Court and its investigative body are not able to conduct an investigation on the territory of a State, even a State Party to the Statute, if that State explicitly or implicitly objects. If a State Party disagrees with a request for cooperation by the Court, contrary to the Statute, and thereby prevents it from exercising its functions and powers conferred upon it, the Court may only take note of it and inform the Assembly of States Parties or the Security Council when it has been seized by the latter. In such circumstances, the possibilities of investigation are seriously restricted.

4. Finally, another problematic issue in the investigation and prosecution of crimes within the jurisdiction of the International Criminal Court is the uniform understanding and application of the rules of procedure by the prosecutor and the judges of the three chambers of the Court, given that they come from different judicial systems. Among such procedural rules, vital to the case are those relating to the admissibility, relevance and probative value of evidence, including the criteria on the basis of which evidence is maintained or excluded from the trial. However, in this respect, even if the principles in question can be found in all legal systems, and even if their wording is similar, in reality there are differences, sometimes difficult to detect, between the way in which each of them is applied in a specific case. In addition, there are differences in meaning between the official language translations of the Statute (English, Arabic, Chinese, Spanish, French and Russian), which are also not very noticeable but may lead to different legal solutions, as has been found with other international standards. It is pointed out[15], for instance, even in

[14] Art. 54 para. (2) of ICC Statute.

[15] Constantinescu-Mărunțel, C., *Noțiunea de constrângere. Comparație între dreptul penal român și standardul impus în dreptul internațional penal prin Statutul de la Roma*, in Universul Juridic Magazine, 2 May 2023, https://www.universuljuridic.ro/notiunea-de-constrangere-comparatie-intre-dreptul-penal-roman-si-standardul-impus-in-dreptul-international-penal-prin-statutul-de-la-roma/ .

relation to the grounds for excluding criminal liability provided for in the ICC Statute, that there has been a confusion of terminology between the notions of *necessity* and *duress*, due to the predominant use of the English language, which covers the notion of necessity with the term 'duress of circumstances'. Another similar example is the European Court of Human Rights' analysis in Mihalache v. Romania on the meaning of Article 4 of Protocol No. 7 to the Convention [16], The Court observing that there is a difference in the wording between the two authentic versions, in English and in French, the French version stating, with reference to the conditions for the existence of the *ne bis in idem* principle, that the person concerned must have been acquitted or convicted by a judgment, whereas the English version states that the person must have been finally acquitted or convicted, without mentioning the procedural form by which that is done. Faced with the texts of the same normative treaty, equally authentic but not entirely concordant, the European Court preferred the English version, considering this interpretation to be the most appropriate for achieving the object and purpose of the Convention. The practical result of this case law, which stems from the preference for one of the authentic versions of a treaty, at least for Romania, was that a person who is definitively sanctioned for an act which is in reality a criminal act, can no longer be prosecuted, tried and punished criminally.

For the conduct of the investigation and trial, the International Criminal Court shall apply [17]:

a) first, the Statute, the Elements of Crimes and the Rules of Procedure and Evidence;

b) secondly, where applicable, the applicable treaties, principles and rules of international law, including the principles established by the international law of armed conflict;

c) in default, general principles of law drawn by the Court from national laws representing different legal systems of the world, including, where applicable, the national laws of States under whose jurisdiction the crime would normally be committed, if these principles are not incompatible with the ICC Statute and recognised international law, rules and norms.

After the adoption of the Rules of Procedure and Evidence, in urgent cases where the particular situation before the Court is not provided for by the Rules, the judges may, by a two-thirds majority, establish provisional rules to apply until the Assembly of States Parties, at its next ordinary or extraordinary meeting, adopt, amend or reject them[18].

It has been pointed out in the literature that this solution was adopted in order to enable judges to be able to decide a case even if it raises questions of law not regulated (or not completely regulated) by the Court's own statute, by consulting other sources of law[19], given that international criminal law does not have sufficient rules of its own in this respect.

In matters of evidence, the Court may rule on the relevance and admissibility of evidence, in accordance with the Rules of Procedure and Evidence, taking into account in particular its probative value and the possibility that it may prejudice the fairness of the trial or a fair assessment of the testimony of a witness. The Chambers are empowered, by

[16] ECHR, Mihalache v. Romania case, para. 94.
[17] Art. 21 of ICC Statute.
[18] Art. 51 para. (3) of ICC Statute.
[19] Constantinescu-Mărunțel, C., *op. cit.*

virtue of their discretion, to freely assess all evidence presented for the purpose of determining its relevance or admissibility. Evidence obtained by a means that violates the ICC Statute or internationally recognised human rights is not admissible:

(a) if the violation seriously calls into question the credibility of the evidence; or

(b) if the admission of such evidence would be likely to compromise the proceedings and seriously undermine their integrity [20].

A number of comments can be made on the issues raised by these provisions:

As regards the application in a specific case of, inter alia, the principles and rules of international law, the general principles of law contained in national laws representing different legal systems of the world, it can realistically be expected that there will be differences between the judges of the panel appointed to decide a particular issue or the merits of the case itself, especially when they come from judicial systems based on different philosophies. The same assessment can be made in relation to the establishment by the judges of provisional rules of procedure, with the proviso that they may relate, in the absence of a limitation, to any aspect of the conduct of the trial, including the rules of admissibility of evidence. However, the balance of the decision may be tipped decisively in favour of acquittal or conviction, depending on whether or not evidence is used in the trial, which in turn depends on the interpretation of the general rules of law or the provisional rules of procedure laid down by a qualified majority of the judges of the Court.

Evidentiary value, fairness of the trial, fair assessment of the testimony of a witness, are notions that are given different weight in different national legal systems. A hearsay statement has no probative value as to the elements of the offence in the English or American systems, but it has such probative value in continental systems, depending on its corroboration with other evidence. From this point of view, the fairness of the evaluation of such evidence is different in the two main legal systems. Likewise, the overall fairness of a given trial can take on different meanings, depending on how it is assessed by a judge inclined to give priority to respecting the rights of the defence (specific to Anglo-Saxon law), or by a judge who gives priority to finding the objective truth by exploiting all available evidence (specific to Romano-Germanic law).

The meaning given by Anglo-Saxon jurists and the meaning given by Romano-Germanic jurists to the notions of "credibility of the evidence", "compromising the procedure" or "the possibility that the evidence may prejudice the fairness of the trial", by concrete reference to a particular piece of evidence or to a particular violation of the procedural rules, may be different or even contradictory. In other words, according to his or her legal culture, one judge would be inclined to say that the way in which evidence was given compromised the credibility of the evidence, while another would be of the opposite view, or one judge would determine that a particular violation of the accused's procedural rights had led to a compromise of the proceedings, while another would judge that the harm had been or could be redressed and the integrity of the proceedings restored.

Such divergences that may arise in the act of justice of the International Criminal Court are also problematic issues on whose proper resolution may depend the criminal liability of those guilty of the most serious crimes.

[20] Art. 69 para. (7) of ICC Statute.

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