

Questions and Answers on the article
“Hearsay and the Rights of the Accused: A Comparison of U.S. Law and Anticipated Practices of the International Criminal Court”

What is hearsay evidence?

In most cases, hearsay evidence is second hand information provided in testimony or through documents. With live witnesses, testimony is considered hearsay when the testimony describes not what the witness him/herself witnessed, but rather repeats information that somebody else told him. Documents are considered hearsay if they are being used at trial to prove facts stated in the documents. Both the US and the ICC systems recognize that hearsay evidence is especially likely to be unreliable and may violate the fundamental principle in the US Constitution and the ICC’s Rome Statute that defendants have the right to confront witnesses against them.

What are the two approaches to hearsay?

The ICC and common-law jurisdictions like the United States have different rules for admission of hearsay evidence. However, their practical effects are usually much the same. In the US, hearsay evidence is generally barred, however, it can be admitted if it falls into one of several categories of exceptions. For example, a witness may be allowed to report the statements of someone who spoke in excitement and spontaneously. In any case, hearsay will be admitted if no one objects to it even if it does not fit into one of the exceptions. At the ICC, hearsay evidence is generally admissible, but judges can exclude it or disregard it if they believe it is unreliable. The main operational difference between the two is that in the US system, the types of hearsay that can be admitted are specifically described in the rules, whereas before the ICC, the reliability of hearsay is evaluated on an item-by-item basis. In both systems, hearsay will not be excluded unless objected to by one side or the other.

What about testimonial hearsay?

There is a special kind of hearsay evidence that has been described in the US as “testimonial hearsay.” This is testimony taken outside the trial but under official auspices such in a grand jury proceeding or by police or prosecutors. US and ICC approaches to the use of testimonial hearsay both require that the defense have a chance to cross-examine the person testifying if the testimony is to be introduced as evidence at trial. In the United States, the cross-examination would take place when the testimony is initially given since testimonial hearsay may not be admitted in court if the witness is present. At the ICC, defense counsel must consent to admission of testimonial hearsay and, if the witness is also available at trial, must have the right to cross-examine the witness at trial as well as in the original proceeding.