"SPOILING EVERYTHING" – BUT FOR WHOM? RULES OF EVIDENCE AND INTERNATIONAL CRIMINAL PROCEEDINGS

I. INTRODUCTION

Six freight cars filled with over 300,000 affidavits and meticulous records gathered from Allied-captured German buildings proved to be the foundation of the prosecution's case during the post-World War II Nuremberg Tribunal.[1] From this massive cache of material, attorneys created hundreds of summaries that were entered into evidence. They also selected what evidence would be admitted in original form. Chief Prosecutor Robert Jackson later boasted that 331 documents had been entered into evidence during the first four hours of the Trial of the German Major War Criminals (the first, and most prominent, of the proceedings).[2] The sheer volume of material included in the summaries led the tribunal to change its rules several times, first requiring that all summaries and the documents on which they were based be included, later ruling that only documents orally read into court would be included in the record,[3] and finally allowing summaries to be submitted *absent* a formal court reading.[4] In addition to paper documentation, the prosecution showed footage taken when Allied forces first discovered the concentration camps. In contrast with the mounds of documentary evidence, only 113 witnesses testified for any of the parties.[5] The critical evidence at this and subsequent trials at Nuremberg lay in the Nazi's own record of their atrocities. The evening following the prosecution's introduction and playing of the concentration camp footage, the ever stoic and unrepentant Herman Göring was overheard saying, "[I]t was such a good afternoon, too—and then they showed that awful film, and it just spoiled everything."[6]

International criminal proceedings have proceeded cautiously, attempting to consolidate the volumes of evidence available into a manageable form. Coupled with this concern is the tribunal's need to balance efficiency with fairness to the parties by allowing them to

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1 Robert Shnayerson, *Judgment at Nuremberg, in* WAR CRIMES 64, 65 (Henny H. Kim ed., 2000).

2 TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 174 (1992). Few of these documents' authenticity were challenged by the defense. Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 748 (1999).

3 TAYLOR, *supra* note 2, at 173-77.

4 *Id.* at 203.

5 May & Wierda, *supra* note 2, at 744.

6 Shnayerson, *supra* note 1, at 69.

present all relevant evidence. These objectives arise in each case, as the tribunal's rulings on the admission of evidence inform both the immediate trial and their effects on each of the participants. With each ruling, the tribunal assists one individual by allowing his position to advance; for the opposing party, these rulings potentially "spoil everything."

The focal point of the evidence presented has varied in each international court's context. At Nuremberg, the crucial evidence consisted of Nazi records. The Tokyo Tribunal of the same era, in contrast, relied much more heavily on witness testimony and secondary sources of documentation—the record included the testimony of 419 witnesses and 4,836 documents, including 779 affidavits.[7] These components reflected, in part, the lack of primary documentation due to Japanese officials' own destruction of thousands of documents prior to their surrender.[8] The *ad hoc* tribunals for the former Yugoslavia and Rwanda have also reflected the nuances of those conflicts. Eyewitness victim testimony has proven indispensable for the International Criminal Tribunal for the Former Yugoslavia (ICTY).[9] Evidence presented in each of its cases has generally been much more balanced between witness testimony and documentation.[10] The International Criminal Tribunal for Rwanda (ICTR) has also relied heavily on witness testimony. In many of the cases, some of the most critical evidence has been propaganda, primarily radio messages, promulgated during the crisis and actively endorsing the killing of specific individuals.[11] Each tribunal is responsible for adopting and applying appropriate rules of

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[7] RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 5 (1971); May & Wierda, *supra* note 2, at 744.

[8] *See* James Blount Griffin, Note, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 418-19 (2001). While documents at the Nuremberg trials were primarily composed and used by Nazi leadership, the documents submitted at the Tokyo trial could—at best—only be indirectly traced to Japanese leadership. Some of the admissible documents included: press releases, letters from private Japanese citizens to the War Ministry, a book entitled *My 25 Years in China*, diaries, and newspaper clippings. MINEAR, *supra* note 7, at 119-21.

[9] Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 107 (2001).

[10] *See generally Case Information Sheets*, *at* http://www.un.org/icty/glance/index.htm (last updated Aug. 28, 2003) (providing links to general information for each ICTY case). In *Tadic* (IT-94-1), there were a total of 126 witnesses and 465 exhibits; in *Kupreskic* (IT-95-16), 160 witnesses and 717 exhibits; in *Jelisic* (IT-95-10), forty-four witnesses and eighty-two exhibits; in *Furundzija* (IT-95-17/1), fourteen witnesses and twenty-six exhibits. *Id.*

[11] *See* Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81, 88 (1997). The prosecutor's office has approximately eighty hours of broadcast tape reporting the live reading of "death lists" that were played on the radio. *Id.*

evidence to encompass the special considerations involved in prosecuting and defending alleged participants in each of these contexts.

This note analyzes the key rules of evidence promulgated and interpreted by the international criminal tribunals. It explains the issues confronting international criminal courts as they develop a framework for evidentiary rulings. This note is silent as to the efficacy or legitimacy of any of these proceedings. Nor does it articulate reasons for or against American involvement in the International Criminal Court. Rather, it seeks to develop patterns for understanding and evaluating important evidentiary standards that have been developed by the post-World War II and *ad hoc* tribunals and to discuss briefly the rules of evidence that will govern the International Criminal Court.

The first section provides an historical basis for understanding the establishment of the tribunals. Following this exposition is a brief discussion of the unique context in which the rules of evidence for the tribunals are formed. Then the key rules of evidence as established and enforced by the tribunals are explained and analyzed. Lastly, the evidentiary rules for the International Criminal Court are reviewed in light of the experience of the *ad hoc* tribunals.

II. ESTABLISHING THE COURTS AND THE RULES OF EVIDENCE

A. Post-World War II – Nuremberg and Tokyo

The horrors of World War II stand as a harsh indictment on the evil to which humankind can descend. The specific atrocities need not be detailed here, but they must remain a firm foundation upon which to analyze the landscape of the Nazi war crimes trials.[12] As World War II drew to an end, the international community reached a novel decision: to hold individuals *personally* responsible for the war's most atrocious events, and to do so before an international forum.[13] Modern scholars are

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[12] Too many accounts of the brutalities inflicted and endured on both the Eastern and Western fronts of the war exist. For a brief summary of the Nazi atrocities that were the focal point of the Nuremberg trials, see generally YVES BEIGBEDER, JUDGING WAR CRIMINALS 29-31 (1999).

[13] As Jackson stated during the negotiations establishing the International Military Tribunal, "[w]e want this group of nations to stand up and say . . . that launching a war of aggression is a crime and that no political or economic situation can justify it." MINEAR, *supra* note 7, at 14 (quoting Jackson at the London Charter). And, famously, in his opening statement before the Nuremberg Tribunal, Jackson argued that

> [t]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason.

apt to discredit these proceedings as being "victor's justice" imposed upon the vanquished enemy.[14] In some part, these critics are correct; the proceedings *did* favor the prosecution. Defendants, for example, were denied certain defenses, were subject to trial *in absentia,* and lacked access to exculpatory evidence.[15] Many of these alleged errors were acknowledged by the participants themselves as the trial proceeded;[16] others reflect recently acknowledged and ever-increasing awareness of human rights standards. Nonetheless, a careful study of the proceedings, especially those in Nuremberg, reveals a deliberate attempt by the tribunals to carry out their mission in accordance with contemporary notions of justice.

1. Nuremberg

Even before World War II ended, leaders of the Allied nations began meeting to discuss the establishment of an international criminal body to hold accountable those guilty of war crimes and other violations of prevailing, albeit embryonic, international legal standards.[17] The failures associated with the post-World War I policy encouraging collective guilt upon German citizens—a primary impetus to the Second World War—impressed upon the Allied nations the importance of an international means of exacting penalties only from those responsible for particular criminal conduct.[18] Similarly, the Leipzig Trials had tutored the international community in the limited success of relying solely on

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TAYLOR, *supra* note 2, at 167.

[14] *See, e.g.*, BEIGBEDER, *supra* note 12, at 40; THEODOR MERON, WAR CRIMES LAW COMES OF AGE 210 (1998); Griffin, *supra* note 8, at 417-18.

[15] *See, e.g.*, MINEAR, *supra* note 7, at 120 (listing entire categories of evidence declared inadmissible at the Tokyo trials; for example, evidence showing the Japanese-Chinese relationship at the time and evidence relating to the development and use of nuclear weapons were both forbidden); Kellye L. Fabian, Note and Comment, *Proof and Consequences: An Analysis of the* Tadic & Akayesu *Trials*, 49 DEPAUL L. REV. 981, 982 (2000) (delineating certain protections and rules used in the post-World War II trials that are no longer deemed acceptable practice). *See generally* Michael P. Scharf, *Report of the International Law Association: Published Jointly with Association Internationale de Droit Penal, 13 Nouvelles Etudes Penales 1997: A Critique of the Yugoslavia War Crimes Tribunal*, 25 DENV. J. INT'L L. & POL'Y 305 (1997) (comparing the Nuremberg trial with the ICTY for purposes of showing improvements in policies and rules since the World War II trials).

[16] *See* MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 3 (1997). Jackson himself admitted, "Many mistakes have been made and many inadequacies must be confessed. But I am consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future." *Id.*

[17] *See generally id.* at 3-15 (chronicling the negotiations and compromises between the United States, Britain, France, and the Soviet Union); TAYLOR, *supra* note 2, at 56-77 (chronicling the London Council's meetings and negotiations).

[18] SCHARF, *supra* note 16, at 5-6.

domestic trials for accused war criminals.[19] Representatives met for several months discussing the development of a court. They debated the scope of its jurisdiction, its structure, and its basic procedural and evidentiary rules during this time.[20] The result was the Charter of the International Military Tribunal.[21]

Nuremberg, home to many of the Nazi party rallies, was chosen as the location for the Military Tribunal. The first trial began November 20, 1945.[22] The "Trial of the German Major War Criminals," as it became known, included among its defendants Herman Göring, Rudolf Hess, Alfred Rosenberg, Hans Frank, and other high-profile Nazi leaders.[23]

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[19] In the aftermath of World War I, the Allies established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. Its purpose was to determine a viable means by which individuals would be prosecuted and punished for the war. In early 1920, the Allies submitted to German officials a list of 896 individuals to be extradited for the purpose of being tried in a multi-national forum. BEIGBEDER, *supra* note 12, at 29. Reaction in Germany was strongly adverse, not only to the number of individuals listed, but also to the formation of an *international* body to try German citizens. Germany argued that it should be allowed to prosecute its own war criminals. After rigorous debate, the Allies agreed to Germany's plan and submitted a list of forty-five individuals for immediate prosecution. ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 32-34 (2003). In all, Germany tried twelve individuals; of these, only six were convicted. *Id.* at 34. The defendants were charged with violations of international criminal law; German law was used for procedural and sentencing aspects of the trial. *Id.* at 28, 32. The Allies were so dissatisfied with these proceedings that Commission observers to the Leipzig proceedings withdrew in protest. *Id.*

[20] *See generally* TAYLOR, *supra* note 2, at 56-77 (chronicling the London Council's meetings and negotiations).

[21] Charter of the International Military Tribunal, Aug. 8, 1945, *reprinted in* TAYLOR, *supra* note 2, app. A [hereinafter IMT Charter].

[22] The original plan was to have a series of multi-national trials. The slow pace of the first trial, the high cost in terms of money and staff, the massive amounts of documentation required (copies of all printed material were required in each of the tribunal's four official languages), and rising tensions between Russia and the other Allied countries quickly rendered the plausibility of pursuing additional joint trials moot. *See* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, 26 (1997) (report filed Aug. 15, 1949) [hereinafter FINAL REPORT]. The most expeditious manner to proceed was a series of individual trials occurring within the jurisdiction (territorial and personal) of each Allied nation. *Id.* The Allied Control Council Law Number 10 was initially established to supplement the London Charter and to establish "a uniform legal basis" for the many independent trials that would proceed against German officials. Many of its provisions were similar to those controlling the first trial. *Id.* at 7-9; WOETZEL, *supra* note 19, at 219-20.

[23] The other defendants were: Supreme commander of the Navy and Hitler's chosen successor, Karl Dönitz; Minister of the interior Wilhelm Frick; Ministerial Director and radio propaganda leader Hans Fritzsche; Minister of Economics and President of the Reichsbank Walter Emmanuel Funk; Chief of Army operations, Alfred Jodl; Chief of the Reich Main Security Office Ernst Kaltenbrunner; Chief of Staff of the High Command of the Armed Forces Wilhelm Keitel; Hitler's Minister of Foreign Affairs until 1938, Constantin von Neurath; former Chancellor of Germany Franz von Papen; Commander in Chief and Grand Admiral of the Navy Erich Raeder; Minister of Foreign Affairs Joachim

The most controversial decision—even in that era—was to try *in absentia* Martin Bormann, the Deputy for Nazi Party Affairs and Hitler's confidante.[24]

From the beginning, the tribunal faced important difficulties in creating an international set of rules to govern procedure and evidence. The two primary traditions represented by the drafters were the common law adversarial model and the continental or civil law's inquisitorial model. Although both models established balanced protections for all parties involved, fundamental differences had to be resolved and preferences determined to establish a basic framework. Perhaps the most important factor for all decisions relating to procedure and evidence was that the triers-of-fact for all proceedings would be judges, not, as is prominent in common law systems, a jury of laymen.[25]

2. The International Military Tribunal for the Far East

The International Military Tribunal for the Far East (responsible for the Tokyo trials) was initiated and controlled by American forces stationed in Japan following the war.[26] Whereas the Nuremberg trials resulted from a formal charter developed by the Allied forces, General Douglas MacArthur drafted and executed the Tokyo Charter.[27] He also appointed all of the judges.[28] Allied forces were consulted only after the executive decree was issued and their role in the proceedings remained limited.[29] Although this facet of the trials was partly due to MacArthur's dominating presence in post-war Japan, it also resulted from the international community's myopic focus on the Nuremberg Tribunal. As one contemporary magazine reflected, next to the Nuremberg proceedings, the Tokyo trials appeared "like a third-string road company."[30]

The trials began on May 3, 1946 and lasted two and a half years. In all, twenty-eight high-ranking Japanese officials were indicted for their roles in the war.[31] Many countries felt that Japan's Emperor, Hirohito,

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von Ribbentrop; Labor leader Fritz Sauckel; Minister of Economics Hjalmar Schacht; Nazi architect Albert Speer; Head of the Hitler Jugend (and Reich Governor in Vienna) Baldur von Schirach; Commisar of the Netherlands Arthur Seyss-Inquart; and Editor and Propaganda Minister Julius Streicher. *See generally* TAYLOR, *supra* note 2, at 78-115 (discussing the selection of defendants for the first trial).

[24] *See, e.g.*, JOSEPH E. PERSICO, NUREMBERG INFAMY ON TRIAL 360-61 (1994).

[25] *See* MINEAR, *supra* note 7, at 119.

[26] *See generally id.*

[27] *Id.* at 20.

[28] CHRISTOPH J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 33 n.128 (2001).

[29] *See* MINEAR, *supra* note 7, at 20.

[30] *Id.* at 3 (quoting *Time*, May 20, 1946).

[31] *Id.* at 23.

should have been tried as well, but the United States actively opposed that view.[32] The decreased international participation in this proceeding, coupled with the active supervision of General MacArthur, are two of the reasons that the Tokyo trials are more criticized than those at Nuremberg.[33]

B. The International Criminal Tribunals: Yugoslavia and Rwanda

1. The International Criminal Tribunal for the Former Yugoslavia

When United Nations Security Council Resolution Number 827 established the International Criminal Tribunal for the Former Yugoslavia, it was the first international criminal court since World War II.[34] The United Nations created the tribunal in response to violations of international law that took place by all sides of what has been called "a war of intimate betrayals."[35] Although conflict in the Balkan region was nothing new, a rise in Serb nationalism beginning in 1991 provoked Bosnian Serbs and Croats, leading to civil war.[36] The fighting soon spread to neighboring regions. Neighbors and friends turned on one another in rage and fear.[37] Charges of ethnic cleansing followed as 90% of the 1.7 million non-Serbs who had lived in Serbian-controlled areas of Bosnia were expelled, imprisoned, or killed by the end of 1994.[38] Thousands more were tortured and raped.[39] Entire towns were

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[32] Griffin, *supra* note 8, at 415-16.

[33] *See, e.g.*, SAFFERLING, *supra* note 28, at 33; Griffin, *supra* note 8, at 415-18.

[34] Upon its inception, the tribunal began formal investigations that continued for almost two years. The documentation center catalogued over 64,000 documents and computerized archives of testimony and footage of the events even before any of the indictments were entered. Soon after the tribunal's Commission finished its report, nearly two-dozen indictments were entered. *See generally* SCHARF, *supra* note 16, at 37-39 (detailing the collection of evidence and other facets of the tribunal's beginning phases).

[35] Fabian, *supra* note 15, at 984. For background information relating to the conflict, *see generally* SCHARF, *supra* note 16, at 21-36, 229-40 app. A (providing a chronological overview of the conflict within the region).

[36] There were two components to the conflict, a primarily ethnic conflict between the Serbs and Croats, and an internal Serbian tension between the majority of Serbs, who are Christian and Bosnian Serbs, the minority Muslim Serbian population. *See* SCHARF, *supra* note 16, at 21-36, 229-40 app. A; Fabian, *supra* note 15, at 984-88.

[37] *See generally, e.g.*, SCHARF, *supra* note 16, at 139-73 (discussing eyewitnesses at the *Tadic* hearing, many of whom knew the accused well before the war).

[38] *Id.* at 29, xii (four times as many civilians were killed during this war than soldiers).

[39] *See generally* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmayer ed., Marion Faber trans., 1994); Kate Nahapetian, *Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 14 BERKELEY WOMEN'S L.J. 126, 130-33 (1999) (chronicling the atrocities endured by victims of rape and sexual assault in the Yugoslavian conflict).

destroyed, concentration camps were filled, and an estimated 3.5 million people became refugees as the terror continued.[40]

Certainly, these atrocities were not the first—or even the most egregious—committed since World War II.[41] But for the first time, the political climate favored stronger international action and the international community rose in protest. Upon its inception, the tribunal began formal investigations that continued for almost two years. The documentation center catalogued thousands of documents and hours of video footage.[42] At the time of this note's publication, the tribunal has tried forty-one individuals, twenty-one of whom have received final judgment; twelve judgments are under appeal; nine accused are awaiting sentencing; thirty-two individuals are currently being tried or are awaiting trial; many indictments are still pending.[43] The most influential of these proceedings has been the trial of Slobodan Miloševic, the first international criminal case brought against a former head-of-state.[44]

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[40] BEIGBEDER, *supra* note 12, at 147, 150; SCHARF, *supra* note 16, at 29-30.

[41] While Stalin's policies within the Soviet Union are amongst the clearest of examples, other countries also faced oppression from their leadership. Between one and three million individuals were killed during the Khmer Rouge regime (led by Pol Pot) that governed Cambodia from 1975 to 1979. Many individuals were slaughtered by the government, thousands more died from government-induced famine. *See, e.g.*, Matthew J. Soloway, *Cambodia's Response to the Khmer Rouge: War Crimes Tribunal vs. Truth Commission*, 8 APPEAL 32 (2002); Carsten Stahn, *Current Development: Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT'L L. 952 (2001). During the major conflict in East Timor "an unknown number of East Timorese were killed, nearly 500,000 were forced to flee their homes, and much of the territory was destroyed." Mark Rothert, Note, *U.N. Intervention in East Timor*, 39 COLUM. J. TRANSNAT'L L. 257, 260 (2000).

[42] SCHARF, *supra* note 16, at 47. The documentation center included over 64,000 documents and computerized archives of testimony and footage of the events even before any of the indictments were entered. *Id.*

[43] *Fact Sheet on ICTY Proceedings*, *at* http://www.un.org/icty/glance/profact-e.htm (last updated Oct. 17, 2003).

[44] Chris Jones, *Milosevic Tribunal Begins*, W. MAIL (EUROPE INTELL. WIRE), Feb. 13, 2002. The trial began February 12, 2002, to much publicity; he is not only the first former state President to be tried before an international body, but also the first accused before the ICTY to represent himself without assistance of defense counsel. *Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. SCOR, 57th Sess., Agenda Item 45, para. 103, U.N. Doc. A/57/379-S/2002/985 (2002) [hereinafter 2002 ICTY Annual Report]. In many respects, the legitimacy of the ICTY and the international criminal arena as a whole rests on the integrity with which this trial progresses. *See generally, e.g.*, Jones, *supra*; 2002 ICTY Annual Report, *supra*, at paras. 103-05.

2. The International Criminal Tribunal for Rwanda

Like the Tokyo Tribunal, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994 (ICTR, short for the International Criminal Tribunal for Rwanda) suffers from poor visibility in the shadow of the ICTY.[45] The tribunal was established in 1994, earning praise from many scholars who saw it as evidence of the truly international (and non-eurocentric) nature of the revitalized international criminal arena.[46] The tribunal is charged with prosecuting individuals who participated in the conflict that arose between two groups of Rwandans: the Tutsi and the Hutu.

Conflict between these two groups had occurred off and on for decades.[47] But the assassination of the Hutu President of Burundi in 1993 by a Tutsi extremist led to a "torrent of propaganda" by the Hutu. A second suspicious death several months later led to widespread radio propaganda by the government, encouraging the slaughter of the Tutsi. Within two weeks, almost 500,000 people, most of them Tutsi, were slaughtered.[48] (Approximately another 500,000 Tutsi were killed in related hostilities.[49]) Almost 75% of the Tutsi population was killed in what has been described as the "most ferocious mass slaughter in recorded history."[50]

At the time of this note's publication, the tribunal has prosecuted thirteen individuals (twelve convicted, one acquitted). Four trials (involving eight accused) are in their final stages, and an additional two trials (involving ten accused) are also underway. Thirty-one accused are awaiting trial.[51]

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[45] *See* Griffin, *supra* note 8, at 445.

[46] *See, e.g.*, MERON, *supra* note 14, at 283-84; SCHARF, *supra* note 16, at 226-27.

[47] *See* Robert F. Van Lierop, *Report on the International Criminal Tribunal for Rwanda*, 3 HOFSTRA L. & POL'Y SYMP. 203, 207-11 (1999).

[48] Fabian, *supra* note 15, at 992-93.

[49] Peter Landesman, *A Woman's Work*, N.Y. TIMES, Sept. 15, 2002, § 6 (Magazine), at 82.

[50] *Id.* In addition, thousands of women were raped and brutally tortured; most were subsequently killed. *Id.*

[51] *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994*, U.N. SCOR, 58th Sess., Agenda Item 54, paras. 1-3, U.N. Doc. A/58/140-S/2003/707 (2003).

C. The International Criminal Court

> A person has a better chance of being tried and judged for killing one human being than for killing 100,000.
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> – United Nations Commissioner for Human Rights[52]

Since the early days of the League of Nations, individuals have advocated the development of an international body with jurisdiction to try individuals for violations of international criminal law.[53] Initially, there were few guidelines for what actually constituted "international criminal law."

Following World War II, prospects for an international criminal court looked promising.[54] The International Military Tribunals in Nuremberg and Tokyo had, for the most part, walked a fine line, holding individuals accountable for their actions while invoking traditional principles of justice common to civilized society. Additionally, the United Nations was much more widely supported and had garnered more strength than its predecessor. Despite these factors, however, public sentiment softened as time passed and calls for a permanent international criminal court fell on deaf ears in the midst of the emerging Cold War.[55]

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[52] SCHARF, *supra* note 16, at xiv (quoting then-U.N. High Commissioner for Human Rights, Jose Anala Lassa).

[53] *See generally* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1-5 (2001) (detailing post-World War II initiatives to start a permanent international criminal body); Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391, 395 (2001-2002). Numerous reasons are given for the value of establishing a court to prosecute violations of international criminal law. Among them are the traditional arguments for any criminal court—the need to punish offenders, to provide an opportunity for rehabilitation and healing, and to deter those who would commit such crimes in the future. *See, e.g.*, Neil J. Kritz, *War Crimes on Trial, in* WAR CRIMES 91 (Henry H. Kim ed., 2000); SCHARF, *supra* note 16, at 217-19; Mark W. Janis, *The Utility of International Criminal Courts*, 12 CONN. J. INT'L L. 161, 164 (1997). The international context elicits even greater incentive as national courts systems are often either highly biased or left in disarray in the wake of international criminal actions. *See generally* Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 187-90 (2000) (discussing the state of the Rwandan judicial and legal system following the 1994 genocide). It can also establish a permanent record of the atrocities from which international awareness of the "paramountcy" of international standards can evolve. MERON, *supra* note 14, at 203. *See also* Janis, *supra*, at 166-67 (discussing the role of international criminal tribunals in preserving a record of international atrocities). Likewise, an international body could provide closure to the event and allow for the clear demarcation of past and future conduct. Kritz, *supra*, at 91.

[54] *See* SCHABAS, *supra* note 53, at vii; TAYLOR, *supra* note 2, at 636.

[55] *See* TAYLOR, *supra* note 2, at 636; SCHABAS, *supra* note 53, at 8-9.

Violations of international standards continued to occur in Cambodia, East Timor, and Burundi, to name a few examples.[56] Each crisis blossomed with some public outcry but soon withered with no international body capable of holding individual perpetrators responsible for their conduct.[57] Proponents heralded the establishment of the Yugoslavian and Rwandan international tribunals; the moment was ripe for renewed debate over a permanent court.[58]

After numerous debates and draft proposals, the Rome Statute creating an International Criminal Court (ICC) was adopted in July 1998.[59] After only four years, by April 2002, the requisite number of states ratified the statute;[60] the ICC officially entered into force July 1, 2002.[61] No cases have yet been brought before the court and it is still in the initial stages of development.[62] Throughout this process, the legacy of the World War II trials and the recent experiences of the *ad hoc* tribunals have influenced the development of the International Criminal Court's rules of procedure and evidence.[63]

III. CONTEXT FOR DEVELOPING INTERNATIONAL RULES OF EVIDENCE

Several preliminary considerations are necessary to understand the context in which the *ad hoc* tribunals and International Criminal Court are developing evidentiary standards. The most fundamental of these precepts is that no clear, coherent set of international rules of evidence on which the courts can base their decisions currently exists.[64] Although the International Military Tribunals provides some guidance, their significance has lessened due to subsequent changes in human rights standards and notions of a fair trial.[65] Similarly, the International Court

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56 *See supra* note 41.

57 SCHARF, *supra* note 16, at xiii-xiv.

58 *See* MERON, *supra* note 14, at 283; SCHABAS, *supra* note 53, at vii.

59 SCHABAS, *supra* note 53, at vii.

60 Colum Lynch, *War Crimes Court Created over Fierce U.S. Objection*, WASH. POST, Apr. 12, 2002, at A20. Many had predicted that the ICC would not receive the sixty state ratifications needed for it to go into force for another decade or two. *See, e.g.*, Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A3.

61 Simons, *supra* note 60.

62 For more information on these preliminary documents, visit the ICC's website: http://www.un.org/law/icc/index.html; *see also* Reed Brody, *Despots Should Not Rest in Peace: Idi Admin at Death's Door*, INT'L HERALD TRIB., July 25, 2003, at 8 (speculating on the movement to make crimes in the Congo potentially the ICC's first case).

63 *See, e.g.*, MERON, *supra* note 14, at 297.

64 *See* Dixon, *supra* note 11, at 82.

65 *See* SCHARF, *supra* note 16, at 70. Although many rules of procedure and evidence are the same, several facets of the Nuremberg and Tokyo trials have come under significant attack. Perhaps the most significant aspect has been an increased protection of the accused's rights. *See* Dixon, *supra* note 11, at 84. The post-World War II trials

of Justice and regional courts such as the European and Inter-American Courts of Human Rights provide little insight because they have jurisdiction only over states and do not impose criminal penalties.[66] While the ICTY used these sources for initial inquiries, it had to rely on its own consensus to develop a coherent standard to apply. Throughout International Criminal Court's development, the legacy of the World War II trials and the recent experiences of the *ad hoc* tribunals have informed the development of the ICC's proposed rules of procedure and evidence.[67] But none of these bodies' decisions is binding on any of the others and each institution has interpreted the same general rules according to its own particular concerns.[68]

Uncertainty regarding the function of precedent in determining a tribunal's interpretation of its own rules merely adds to the confusion. To speak of "the tribunal's" interpretation of evidentiary rules is somewhat misleading as each tribunal consists of three trial chambers and a shared appeals chamber. Cases are assigned to each trial chamber and a three-judge panel presides over each proceeding.[69] Consequently, the composition of the panel can play an important role in determining

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permitted trials *in absentia*, that is without the accused's presence, something that has been expressly prohibited in modern international criminal proceedings. SCHARF, *supra* note 16, at 70. In many cases, counsel for the defense were denied access to key documents or exculpatory evidence held by the prosecution. This policy, too, has been changed. *Id.* Another change from the Nuremberg and Tokyo trials was that in those proceedings the defendants were entirely denied certain defenses or precluded from introducing various pieces of evidence. Defendants now have the option of challenging the *ad hoc* or ICC's entire jurisdiction over their case, a defense previously denied to them. MERON, *supra* note 14, at 215. In both tribunals, defense counsel could not enter into evidence any information implicating Allied involvement in war crimes and other potential complete or partial defenses. *See, e.g.*, MINEAR, *supra* note 7, at 120 (listing entire categories of evidence declared inadmissible at the Tokyo trials; for example, evidence showing the Japanese-Chinese relationship at the time and evidence relating to the development and use of nuclear weapons were both forbidden); May & Wierda, *supra* note 2, at 761.

[66] *See, e.g.*, Dixon, *supra* note 11, at 84.

[67] *See, e.g.*, MERON, *supra* note 14, at 297.

[68] The ICTY and the ICTR share an appeals chamber, with judges from each tribunal serving as judges at the appellate level for both bodies. As such, there is a measure of continuity for challenges to evidentiary rulings from either tribunal that are heard by the appeals chamber. The decision itself is binding only on the case at hand, however, and provides merely instructive guidance to the other tribunal.

[69] Statute of the International Tribunal, art. 12, 32 I.L.M. 1192, 1195, [hereinafter ICTY Statute], *available at* http://www.un.org/icty/basic/statut/stat2000.htm, *adopted by* S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. s/RES/827 (1993); Statute of the International Tribunal for Rwanda, art. 11, 33 I.L.M. 1602, 1606, [hereinafter ICTR Statute], *available at* http://www.ictr.org/ENGLISH/rules/260503/270503e.pdf, *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. 5/RES/955 (1994), 33 I.C.M. 1600. The ICTY recently approved measures to elect *ad litem* judges to aid in hearing cases; two of these temporary judges and one full-time judge may preside over cases. ICTY Statute, *supra*, art. 11. To date, the ICTR consists of only fourteen full-time judges. ICTR Statute, *supra*, art. 12.

how the rules are interpreted. Issues rising in different chambers may be resolved in slightly different ways. Thus far, interpretations have not been widely disparate, but this flexibility fosters the potential for diverging approaches to the rules depending on the judges assigned to a particular case.[70]

A second requisite to the development of international evidentiary standards is an understanding of the cases in which these rules develop. The ICTR has jurisdiction over grave breaches of the Geneva Conventions, genocide, and crimes against humanity.[71] The ICTY's jurisdiction is the same, with the additional ability to prosecute violations of the laws and customs of war.[72] The ICC's jurisdiction is similar, encompassing (1) genocide, (2) crimes against humanity, (3) war crimes, and (4) crimes of aggression.[73] The statutes list specific components of each of these crimes. The gravity of these crimes, the need to prove ongoing conflicts, the systematic destruction of towns or peoples, and the direct targeting of entire population groups each presents its own evidentiary challenges.[74]

A component of this consideration is that, in contrast to World War II and its subsequent tribunals, the conflicts that the ICTY and ICTR prosecute were not fully resolved at the time of their creation.[75] The duration of the conflict and the continued co-existence of the groups involved present particular challenges in preventing future violations, protecting witnesses, ensuring the legitimacy of the proceedings, and obtaining accurate and comprehensive evidence.[76]

Another important, albeit lesser, factor is purely process-oriented and reflects the reality that any international proceeding involves different languages, each with its own nuances. This consideration raises issues not only for the judges, but for everyone involved in the proceeding. For most of the judges, their native language is neither French nor English, the official languages of the tribunals.[77] This may lead to problems in understanding the nuances of evidentiary standards and resolutions. Likewise, it has some effect on the judge's ability to

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70 *See* Christensen, *supra* note 53, at 414.

71 ICTR Statute, *supra* note 69, arts. 2-4.

72 ICTY Statute, *supra* note 69, arts. 2-5.

73 Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.18319 (1998), 37 I.L.M. 999, *reprinted in* SCHABAS, *supra* note 53 [hereinafter Rome Statute]. *See generally* SCHABAS, *supra* note 53, at 21-53 (chronicling the events leading up to and surrounding adoption of the Rome Statute).

74 Dixon, *supra* note 11, at 87-89.

75 May & Wierda, *supra* note 2, at 733.

76 *See* Fabian, *supra* note 15, at 982-83; Wald, *supra* note 9, at 105. Interference or lack of cooperation from new local leadership, fearful of appearing to sympathize with the former policy-makers, is often a bar to defense counsel. *See* Wald, *supra* note 9, at 105.

77 Wald, *supra* note 9, at 92-94.

discern the totality of a witness's testimony—the verbal cues that can prove invaluable in assessing testimony.[78]

Of even greater concern are the problems associated with gathering accurate and complete evidence in light of the plethora of languages spoken by witnesses and parties. These obstacles can have a substantial influence in the importance of certain testimony. This problem has been especially acute for the ICTR. For example, words in the primary Rwandan language of Kenyarwanda tend to eliminate distinctions between seeing and hearing—that is, the same word could be interpreted to mean either function.[79] For the tribunal, however, differences between an individual seeing an event and merely hearing about it have important bearing on the evidence's admissibility and even more significance in determining its reliability and the weight or credibility to be given to it.[80] Similarly, multiple words in the Rwandan language are credibly translated into English as "rape."[81] Subtle differences in these words, however, could negate the criminal implications of such a translation.[82] Likewise, difficulties in obtaining complete or accurate translations of statements have led to surprise responses on the stand when counsel asks a question of his or her own witness.[83]

These examples illustrate the necessity of precise translations for the tribunal to assess accurately the true circumstances surrounding an event. Similar considerations are especially important when an expert witness's testimony based on hundreds of interviews is admitted without the opportunity to question the witness on his or her exact statement.[84] It also illuminates the broader understanding of the evidentiary rules, as interpreted by the tribunals, as they negotiate language barriers and weigh all of the evidence presented.

Lastly, the common law (adversarial) and the civil law (inquisitorial) traditions, and the decision to adopt aspects of each, enlighten the entire analysis of trends in international criminal proceedings. These traditions have taken root and evolved over centuries, reflecting the cultural identities in which the basic constructs

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78 SCHARF, *supra* note 16, at 148. "With testimony coming in largely through interpreters, many of the traditional cues to judging witness veracity—voice inflection, presence of a stutter or hesitation—are absent . . . ." *Id.* (quoting ICTY defense attorney Steven Kay).

79 Fabian, *supra* note 15, at 1033.

80 *Id.*

81 *Id.* at 1034.

82 *Id.*

83 *See, e.g.*, SCHARF, *supra* note 16, at 162.

84 *See* Fabian, *supra* note 15, at 1022. During direct examination at the *Tadic* trial, a prosecutor asked the witness to describe a particularly gruesome incident. When he followed up the testimony with the question, "Was the defendant there during this incident?," the witness's answer was, surprisingly, "No." SCHARF, *supra* note 16, at 161-62.

were shaped.[85] The rules of evidence adopted by each country greatly parallel the procedural foundation already in place.

The dominant difference distinguishing these systems is the common law's traditional reliance on trial by jury and the continental system's use of trial by judge.[86] In the American adversarial model, for example, the trial proceeds with the two parties presenting evidence and arguing their case before the jury. The judge decides issues of law, while a jury determines the ultimate issue of guilt. In light of experience with lay jurors, technical and sometimes complicated rules of evidence have been developed to streamline the presentation of evidence so that even lay jurors could reach a verdict based on legally significant facts. The rules of evidence seek to eliminate confusion for the trier-of-fact by limiting the testimony presented at trial; one consequence is the inadmissibility of hearsay.[87]

In contrast, the judge is the focal point in the inquisitorial model. The judiciary undertakes most of the investigation and has much greater control over what evidence is gathered and who testifies. The trials are usually much shorter in length, in part because the judge is presented at the outset with a complete dossier of evidence. The need for live testimony is greatly reduced as statements are already included in the dossier. The judge analyzes all of the evidence, including hearsay, and is expected, as an expert in the law, to weigh appropriately each piece of information.[88] As such, there is no need for a formal or detailed listing of evidentiary rules.

Recent scholarship reflects a view that the differences between these systems are not as great as this simple schematic suggests.[89] Nonetheless, the national and cultural contexts in which the rules of procedure and evidence developed provide a richer appreciation of the choices and difficulties encountered by the tribunals as they endeavor to

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[85] Each country has its own contextual basis on which the systems develop, but the foundation of an inquisitorial system can be identified throughout Western Europe, Central and South America, and many Asian and African nations. Christensen, *supra* note 53, at 399. The adversarial model dominates the United Kingdom and its former colonies, most notably the United States, Canada, and Australia. CRIMINAL PROCEDURE: A WORLDWIDE STUDY xv (Craig M. Bradley ed., 1999) (examining the procedural and evidentiary rules under girding several of the world's civil and common law systems) [hereinafter CRIMINAL PROCEDURE].

[86] *See generally* SCHABAS, *supra* note 53, at 95-96 (contrasting the inquisitorial and common law systems).

[87] *See, e.g.*, SCHABAS, *supra* note 53, at 95-96. *See generally* CRIMINAL PROCEDURE, *supra* note 85 (explaining the general traits of a common law system).

[88] *See generally* CRIMINAL PROCEDURE, *supra* note 85.

[89] *See, e.g.*, MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT (1997) (analyzing trends in evidence law in both the common law and civil law traditions).

create and apply their own rules.[90] "Law is a form of cultural expression and is not readily transplantable from one culture to another."[91] Consequently, understanding these traditions assists in recognizing how these models have shaped the rules of evidence in international proceedings and where unique aspects of the international forum have required certain concessions from both models.

IV. THE RULES OF EVIDENCE

A. Developing an International Approach to Evidence

There was surprisingly little debate during the development of the post-World War II tribunals as to what procedural model would apply.[92] It was clear from the beginning that a panel of judges would preside over the entire proceeding. Recognizing the relationship between procedural models and many evidentiary matters, the framers of the Nuremberg Tribunal deliberately determined not to be bound by "technical rules of evidence designed for jury trials."[93] Rather, the tribunal was instructed to "adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and [to] admit any evidence which it deem[ed] to have probative value."[94] With this guiding principle in mind, the tribunal

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[90] As one of the prosecutors for the Nuremberg Trials articulated,

> It is important to keep clearly in mind that we are applying international penal law and that we should not, and cannot, approach these questions solely from the standpoint of any single judicial system. International law has made substantial strides in the development of both substantive and adjective law, and in both fields international law must derive from a variety of legal systems, including both civil and common law. Many auxiliary principles and doctrines in international law must be drawn from a variety of legal systems. These and other internationally constituted tribunals cannot work exclusively in the medium of German law, or American law, or even a combination of the two. That is not the genius of international law.

May & Wierda, *supra* note 2, at 728 (quoting Brigadier General Taylor during the *I.G. Farben* case).

[91] Christensen, *supra* note 53, at 393-94 (quoting Mary Ann Glendon in COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 1, 10 (1982)).

[92] MINEAR, *supra* note 7, at 6. *But see* TAYLOR, *supra* note 2, at 63-74 (chronicling the lengthy "intractable problem" of resolving detailed differences between the two). It is also important to keep in mind the difference between deciding on the hybrid compromise and understanding how it would actually function. Lawyers from common law systems were unsure how to proceed if most of their evidence was included in an initial report (i.e., dossier) to the tribunal. *See* TAYLOR, *supra* note 2, at 64. Civil law lawyers were similarly confused by the entire process of conducting cross examination. *Id.*

[93] MINEAR, *supra* note 7, at 118 (quoting Robert Jackson at the London Conference).

[94] IMT Charter, *supra* note 21, art. 19. In terms of the basic rules of procedure and evidence, the Tokyo Tribunal much resembled Nuremberg. Tokyo's Charter included the instruction that the technical rules of evidence were inapplicable to the proceeding and key determination of any item's admissibility was its probative value. MINEAR, *supra* note 7, at

was freed from the often constricting rules of evidence in common law systems and allowed to weigh each item's admissibility according to its own judgment.

Although their statutes both permit the *ad hoc* tribunals to develop their own rules of procedure and evidence,[95] the basic scheme developed by the Nuremberg and Tokyo Tribunals has continued. The trials are conducted by judges, and as such, many of the rules of evidence were deemed unnecessary.[96] This is not to say that the approach of the *ad hoc* tribunals toward evidentiary matters went undisputed. In fact, many of the preliminary debates focused on the mechanics of what sort of system would develop—what rules of evidence were necessary to protect the parties and witnesses as opposed to those rules that were simply rudiments of the jury system.[97] What has developed reflects a hybridization of both models—certain aspects of each have been incorporated into a new framework for understanding criminal procedure and evidence within the international arena.[98]

The debate continues as scholars and the attorneys and judges themselves discuss how to resolve inherent conflicts between the common and civil law approaches. Some argue that by departing from either tradition, the tribunals adopt new rules lacking the procedural and substantive safeguards that have developed over time within those traditions.[99] Others view the tribunals as a unique opportunity to construct an entirely new approach, with conflicts representing not simply a divergence between common law and civil law traditions, but rather arising from varying interpretations of human rights standards.[100]

118-24. Because of the lack of primary documentation of Japanese actions, the rules were generally more liberally applied by the Tokyo Tribunal than in Nuremberg. Griffin, *supra* note 8, at 418-19.

[95] ICTY Statute, *supra* note 69, art. 15; ICTR Statute, *supra* note 69, art. 14.

[96] *See, e.g.*, May & Wierda, *supra* note 2, at 727.

[97] *See* Christensen, *supra* note 53, at 421.

[98] *See generally* Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT'L L. 759, 765 (2000); Wald, *supra* note 9, at 91. In many ways the ICTY "demonstrates the difficulties inherent in melding civil law and common law rules and human rights standards into a truly 'international' body of procedure and substantive criminal law." SAFFERLING, *supra* note 28, at 2 (quoting Faiza Patel King & Anne-Marie La Rosa, *International Criminal Tribunal for the Former Yugoslavia: Current Survey: Introduction: The Jurisprudence of the Yugoslavia Tribunal 1994-1996*, 8 EJIL 123, 125 (1997).

[99] *See, e.g.*, Christensen, *supra* note 53, at 406-07. "[A]dher[ing] to a novel, untested synthesis of procedural and evidentiary rules borrowed from both common law and civil law traditions. The interpretation of these rules divides the very judges charged with their application." *Id.* at 413-14.

[100] By way of illustration, all three judges deciding on a five-prong test for anonymous witnesses were from common law systems, yet the ruling was not unanimous.

B. A General Standard for Admissibility

Rule 89(C) of the Rules of Procedure and Evidence for the ICTY and ICTR tribunals provides, "A Chamber may admit any relevant evidence which it deems to have probative value."[101] From this foundation, all other rules of evidence are formulated. And while national rules of evidence may instruct the tribunal's decisions, they are not binding.[102] The rules provide little guidance specifying how the tribunal is to apply them.[103] Chambers may, but are not required to, admit any evidence as long as it is relevant to the case and has some probative value. This rule alone has excluded virtually no evidence and is viewed by some as demonstrating the "true strength" of the entire tribunal structure—its flexibility in light of the evidence presented.[104] In most instances, the tribunal appears to resolve disputes by admitting evidence on the condition that it may later be excluded if deemed to violate the rules.[105]

Section (B) of the same rule articulates the basic premise that chambers should apply all of the rules in a manner that "best favour[s] a fair determination of the matter before it."[106] The tribunal has used this allowance to mold the rules to best suit the evidence presented.[107] Implicit within this concept is the tribunal's determination of the evidence's reliability. The rules, however, do not require reliability, nor has any chamber expressly adopted this requirement.[108] As one chamber

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Mercedeh Momeni, Note, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*, 41 HOW. L.J. 155, 157 n.12 (1997).

[101] ICTY R.P. & EVID. R. 89(C), http://www.un.org/icty/basic/rpe/IT32_rev28.htm (amended July 17, 2003) [hereinafter ICTY Rules]; ICTR R.P. & Evid. R. 89(C), http://www.un.org/ENLGLISH/rules/260503/270503e.pdf (amended May 27, 2003) [hereinafter ICTR Rules]. (Although each tribunal established its own rules, most of the provisions mirror one another.).

[102] ICTY Rules, *supra* note 101, R. 89(A); ICTR Rules, *supra* note 101, R. 89(A).

[103] As one judge complained, "[T]here is little guidance to know what the rules mean. We face a lot of interpretive problems." Christensen, *supra* note 53, at 404. Part of the problem lies in the fact that the "specific" rules are barely more detailed than the general standard articulated for all evidence. *See* Fabian, *supra* note 15, at 998.

[104] *See, e.g.*, Cristian DeFrancia, Note, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1397 (2001).

[105] *See* Dixon, *supra* note 11, at 94; Fabian, *supra* note 15, at 1024.

[106] ICTY Rules, *supra* note 101, R. 89(B); ICTR Rules, *supra* note 101, R. 89(B).

[107] As the chamber in *Tadic* stated, it is imperative that the tribunal be free to interpret the rules so as to "fit the task at hand" and "to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace." Prosecutor v. Tadic, ICTY Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (Aug. 10, 1995); *see also* Wald, *supra* note 9, at 90.

[108] *See* Prosecutor v. Delalic et al., ICTY Case No. IT-96-21, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an

described it, reliability forms the "invisible golden thread which runs through all the components of admissibility."[109]

One facet of reliability surely rises when the means of obtaining a piece of evidence casts doubt on its credibility. When challenged on this point, the tribunal has express authority to exclude from admission any evidence that would be "antithetical to, and would seriously damage, the integrity of the proceedings."[110] In these instances, the chambers have weighed the value of the evidence and the threat that it poses to the legitimacy of the case and to the tribunal as a whole.[111] The importance of admitting only reliable evidence, even if not central to each individual piece of evidence, cannot be overlooked when examining the integrity of the proceeding as a whole.

C. Hearsay

In light of the general standards of admissibility and the absence of another rule on point, much more testimony is admissible in international criminal proceedings than in most common law systems. The tribunal adopted the inquisitorial system's willingness to admit out-of-court statements to prove the truth of the matter asserted.[112] Hearsay, as it is commonly called, is generally inadmissible in common law systems because of its inherent unreliability and the inability to cross-examine the declarant. Because trials in the inquisitorial and international arena do not involve juries, judges are considered to have the skill and knowledge to analyze hearsay; therefore, it is admissible. As the chamber in *Prosecutor v. Tadic* first announced, judges are "by virtue of their training and experience to hear the evidence in the context in which it was obtained and accord it appropriate weight."[113]

Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample (Jan. 19, 1998) [hereinafter Handwriting Sample Decision].

[109] *Id.* at para. 32.

[110] ICTY Rules, *supra* note 101, R. 95; ICTR Rules, *supra* note 101, R. 95. The original title of this rule was "[e]vidence obtained by means contrary to internationally protected human rights" and seeks to protect the accused's right to a fair trial by requiring a certain measure of care taken in carrying out investigations and the trials themselves. *See* SAFFERLING, *supra* note 28, at 294-95.

[111] For example, when an alleged confession was obtained following an interrogation by national authorities of a government which does not recognize certain rights of the accused, the confession may be inadmissible. The burden is on the prosecution to prove that basic human rights standards were upheld during the process of acquiring the confession. *See* Prosecutor v. Delalic et al., ICTY Case No. IT-96-21, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence (Sept. 2, 1997).

[112] ICTY Rules, *supra* note 101, R. 89; ICTR Rules, *supra* note 101, R. 89.

[113] Prosecutor v. Tadic, ICTY Case No. IT-94-1, CC/PIO/102-E, Defense Motion on Hearsay Rejected (Aug. 7, 1996). "Summary of Decision on Defense Motion on the Non-Admission of Hearsay," *Bulletin of the International Criminal Tribunal for the Former Yugoslavia* 9:3, Aug. 14, 1996.

The only limitations on the admissibility of hearsay are the general requirements of probative value and relevance.[114] As such, the admissibility of hearsay is determined on a case-by-case basis, but is routinely permitted.

Nonetheless, a chamber's decision to admit hearsay does not always go unchallenged. In one case, the chamber admitted expert testimony that was based solely on the summarized accounts of hundreds of post-war interviews with survivors.[115] The defense argued, albeit unsuccessfully, that the testimony precluded them from being able to challenge the veracity of the allegations by cross-examining the witnesses.[116] In another instance, the chamber admitted hearsay from a witness who would not otherwise have been able to establish the defendant's presence—let alone his actions—at the scene of a particular murder.[117] Despite the innate unreliability of this hearsay, these and many more accounts have been admitted.

As long as specific testimony is admitted to bolster the tribunal's findings, hearsay serves merely to assist in obtaining a more complete record and context of the case.[118] And in the case of summarized interviews, allowing expert testimony based on hearsay accounts may prove to be the most expedient means of acquiring a broader perspective on the events alleged. The context in which the hearsay is used is just as, if not more, important than the context in which the original statements were made. Giving judges sole discretion to admit hearsay and how much weight to afford it does not necessarily violate the accused's right to a fair trial. It does, however, highlight the need for continued monitoring of how the tribunal uses hearsay in reaching its verdicts.

D. Judicial Control in the Proceeding

Early in the development process, the drafters recognized the importance of establishing an independent judiciary in the international arena.[119] They preserved certain rights to the judges, rights that have been frequently utilized.[120] As noted, a hallmark of the inquisitorial system is the active participation of the judges in moving the case forward, seeking additional evidence, and questioning witnesses. Although the tribunals have adopted the adversarial system's reliance on the prosecution and defense counsel to develop and argue the case, chambers are given substantial room to contribute as well. In this sense,

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[114] ICTY Rules, *supra* note 101, R. 89; ICTR Rules, *supra* note 101, R. 89.

[115] SCHARF, *supra* note 16, at 128.

[116] *Id.*

[117] Fabian, *supra* note 15, at 1030.

[118] *See* DeFrancia, *supra* note 104, at 1426.

[119] *See, e.g.*, Christensen, *supra* note 53, at 412; Mundis, *supra* note 98, at 764-65.

[120] *See, e.g.*, May & Wierda, *supra* note 2, at 742; Mundis, *supra* note 98, at 764-65.

judges act as both impartial deliberators and advocates of obtaining all relevant evidence. Admittedly, aspects of this control are found in both common law and civil law countries, but with most of the judges coming from a civil law background, application of these rules more closely resembles the practice dominant in that type of system.[121]

The Rules of Procedure and Evidence allow chambers to exercise discretion in determining the order of the trial, excluding cumulative witnesses, halting repetitive or irrelevant testimony, and requiring the parties to produce particular pieces of evidence.[122] Judges can also stop counsel from harassing or intimidating witnesses.[123] They have the authority to not only request the production of additional evidence by either party, but also to order additional witnesses to appear.[124] Judges have exercised all of these discretionary measures.[125] Even so, a recent report issued by a group of experts selected to examine ways of making the ICTY more efficient strongly encouraged increasing the use of these measures within the courtroom.[126]

One of the more controversial exercises of judicial authority resides with the power of judicial notice. Two factual circumstances allow for the tribunal to take judicial notice rather than requiring the parties to prove the point. The first is items of "common knowledge."[127] The second, a recently added provision, allows judges to take notice of "adjudicated facts or documentary evidence from other proceedings of the tribunal relating to matters at issue in the current proceedings."[128] The latter method can be used only following a hearing on the issue, allowing both sides the opportunity to support or oppose the action.[129] The scope of both of these rules has come under much debate.

The difficulty emerges in determining whether to take notice of facts that are essential elements of the prosecution's case.[130] For instance, Article 3 of the ICTY Statute allows prosecution for violations of the laws and customs of war.[131] One of the obvious components of

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[121] *See generally* CRIMINAL PROCEDURE, *supra* note 85.

[122] *See, e.g.*, ICTY Rules, *supra* note 101, R. 75, 85, 90(F); ICTR Rules, *supra* note 101, R. 75, 85, 90(F).

[123] ICTY Rules, *supra* note 101, R. 75(D); ICTR Rules, *supra* note 101, R. 75(C).

[124] ICTY Rules, *supra* note 101, R. 98; ICTR Rules, *supra* note 101, R. 98.

[125] *See, e.g.*, SAFFERLING, *supra* note 28, at 218-19.

[126] Mundis, *supra* note 98, at 764. The group found that examinations of lay witnesses were too often long, rambling, vague, repetitive, or even irrelevant. *Id.*

[127] ICTY Rules, *supra* note 101, R. 94(A); ICTR Rules, *supra* note 101, R. 94.

[128] ICTY Rules, *supra* note 101, R. 94(B); *see also* ICTR Rules, *supra* note 101, R. 94 (referring to the matter at issue).

[129] ICTY Rules, *supra* note 101, R. 94(B); ICTR Rules, *supra* note 101, R. 94.

[130] *See generally* Dixon, *supra* note 11, at 88-89; Mundis, *supra* note 98, at 765; Wald, *supra* note 9, at 111.

[131] ICTY Statue, *supra* note 69, art. 3.

proving this point is to establish that, at the time of the accused's actions, a war was ongoing. And for either tribunal to even have *jurisdiction* over the case, the conflict must have been of an international nature.[132] Either of these factors could plausibly fall within the category of "common knowledge." Yet, in *Tadic*, the chamber refused to take judicial notice of the international nature of the conflict.[133] Consequently, the prosecution took an exceedingly detailed approach to the issue and spent the first weeks of the trial establishing through various policy witnesses the international character of the conflict.[134]

The same difficulty applies to the second ambiguous standard of previously adjudicated facts. At what point can the tribunal take judicial notice of certain facts and not deny the accused his right to require the prosecution to prove every element of the case? Such concerns have led the tribunals to take a generally conservative approach to the use of judicial notice.[135] Nonetheless, when, for example, the parties agree on the facts but disagree as to the effect of those actions, the chamber has been willing to take judicial notice of certain historical facts.[136]

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[132] ICTY Statute, *supra* note 69, art. 1; ICTR Statute, *supra* note 69, art. 1.

[133] *See* SCHARF, *supra* note 16, at 137. *See also* Prosecutor v. Simic et al., ICTY Case No. IT-95-9, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina (Mar. 25, 1999).

[134] SCHARF, *supra* note 16, at 137.

[135] *See* Mundis, *supra* note 98, at 765.

[136] *See, e.g., Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January and 31 December 1994*, U.N. SCOR, 57th Sess., Agenda Item 46, para. 47, U.N. Doc. A/57/163-S/2002/733 (2002) (*Semanza*); *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. SCOR, 55th Sess., para. 35, U.N. Doc. A/55/273-S/2000/777 (2000). In *Prosecutor v. Kvočka et al.* (IT-98-30/1), the chamber recognized:

> at the times and places alleged in the indictment, there existed an armed conflict; that this conflict included a widespread and systematic attack against notably the Muslim and Croat civilian population; and that there was a nexus between these armed conflicts and the widespread and systematic attack on the civilian population and the existence of the Omarska, Keraterm and Trnopolje camps and the mistreatment of the prisoners therein.

Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994, U.N. SCOR, 55th Sess., Agenda Item 53, para. 35, U.N. Doc. A/55/435-S/2000/927 (2000) [hereinafter 2000 ICTR Annual Report]. *See also* Prosecutor v. Kvočka et al., ICTY Case No. IT-98-30/1, Decision on Judicial Notice (June 8, 2000).

E. Witness Testimony

In most trials, the testimony of lay witnesses proves to be an important part of both parties' cases. In contrast, during the Nuremberg trials, the weight of the evidence was in the accused's own documentation. The record of the tribunals for the former Yugoslavia and Rwanda indicates the critical role that witnesses, both lay and expert, have played in supporting and fending off claims. There are three basic types of witnesses who appear before courts: (1) expert witnesses who provide historical or contextual insight; (2) general lay witnesses who were present, but uninvolved, during the conflict (reporters, human rights advocates, etc.); and (3) victim lay witnesses who suffered first-hand through the conflict. Most of the tribunal's rulings, and the subsequent debates, focus on the last category.

1. Solemn Declaration and Competency

Before testifying, all witnesses are required to take the following oath: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."[137] There is no record of any witness challenging this rule. In at least one case before the ICTY, the chamber ordered that witnesses not communicate with the parties or their counsel at any point after they took the solemn declaration.[138] The chamber reasoned,

> [p]ermitting either Party to communicate with a witness after he or she has commenced his or her testimony may lead both witness and Party, albeit unwittingly, to discuss the content of the testimony already given and thereby to influence or affect the witness's further testimony in ways which are not consonant with the spirit of the Statute and the Rules of the Tribunal.[139]

If a chamber determines that a child is incapable of comprehending the significance of the oath, then the child may be allowed to testify even absent the declaration.[140] Even so, the tribunal must take reasonable measures to ensure that the witness understands his duty to tell the truth.[141]

Chambers may, *sua sponte* or at either party's request, warn witnesses of their duty to tell the truth and order an investigation into whether a witness knowingly and willfully testified falsely.[142] Chambers

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[137] ICTY Rules, *supra* note 101, R. 90(A); ICTR Rules, *supra* note 101, R. 90(B).

[138] Prosecutor v. Kupreskic et al., ICTY Case No. IT-95-16, Decision on Communications Between the Parties and Their Witnesses (Sept. 21, 1998).

[139] *Id.*

[140] ICTY Rules, *supra* note 101, R. 90(B); ICTR Rules, *supra* note 101, R. 90(C).

[141] ICTY Rules, *supra* note 101, R. 90(B); ICTR Rules, *supra* note 101, R. 90(C).

[142] ICTY Rules, *supra* note 101, R. 91(A)-(B); ICTR Rules, *supra* note 101, R. 91(A)-(B).

may enforce this rule by imposing a fine, imprisonment, or both, at their discretion.[143]

2. Privileges

The Rules expressly provide for the protection of all communications between lawyers and their clients.[144] This rule applies both to the accused and to any other witnesses.[145] The privilege may be waived by the client and may be forfeited if the client voluntarily disclosed the information to a third party.[146]

Arguments have been made for the adoption of other commonly recognized privileges, including the traditional relationships of clergy-parishioner, doctor-patient, and husband-wife.[147] The rationale for all privileges is based on the basic precept incorporating the "spirit of the Statute and the general principles of law" into the purview of tribunals' analysis as to the admissibility of evidence.[148] This foundation has proven successful, and the tribunals have generally supported incorporating each of these precepts into their interpretation of evidentiary rules.[149]

Ironically, the ICTY has repeatedly rejected arguments for establishing a privilege protecting the medical or psychological treatment records for witnesses who are victims of rape or sexual assault.[150] This policy results in a privilege extending to *communications* between doctor or psychologist and patient, but not to the *records* that result from their communications. It also indirectly subjects victim witnesses to the very trauma that Rule 96, providing special protection to victims of sexual assault, seeks to avoid.[151]

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[143] ICTY Rules, *supra* note 101, R. 91(G); ICTR Rules, *supra* note 101, R. 91(G).

[144] ICTY Rules, *supra* note 101, R. 97; ICTR Rules, *supra* note 101, R. 97.

[145] ICTY Rules, *supra* note 101, R. 97; ICTR Rules, *supra* note 101, R. 97.

[146] ICTY Rules, *supra* note 101, R. 97; ICTR Rules, *supra* note 101, R. 97.

[147] *See, e.g.*, Robert John Araujo, *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the "Priest-Penitent" Privilege Under International Law*, 15 AM. U. INT'L L. REV. 639, 642 (2000).

[148] ICTY Rules, *supra* note 101, R. 89(B); ICTR Rules, *supra* note 101, R. 89(B).

[149] *See generally* ICTY Rules of Decision, *available at* http://www.un.org/icty/ind-e.htm (last visited Oct. 28, 2003).

[150] Wald, *supra* note 9, at 113. In *Furundzija* (IT-95-17/1), the tribunal ruled that the prosecution was required to disclose records in its possession relating to a rape victim witness's counseling and treatment. It also subpoenaed a non-governmental organization to deliver records in its possession relating to the victim. *Id.*

[151] *See* ICTY Rules, *supra* note 101, R. 96; ICTR Rules, *supra* note 101, R. 96. Rule 96 states, in relevant part, that before such evidence is admitted the Trial Chamber must ensure its credibility and relevance; in addition, the testimony of such victims need not be corroborated, the defense cannot argue consent under certain circumstances, and the victim's sexual history cannot be admitted for any purpose. ICTY Rules, *supra* note 101, R. 96; ICTR Rules, *supra* note 101, R. 96; *see also infra* notes 194-99 and accompanying text.

Another protected right is that against self-incrimination.[152] This right is not absolute, however, because chambers may compel testimony as long as they simultaneously declare the testimony inadmissible in subsequent proceedings against the witness.[153] Closely associated with this right is the accused's right to silence, an issue that is discussed later. Internationally recognized protection against self-incrimination has existed only in recent decades and well after the Nuremberg and Tokyo trials.[154] The right is not only expressed in the rules of the *ad hoc* tribunals themselves, but it is protected in other sources of international law, most significantly the International Covenant for Civil and Political Rights.

Given the widespread support for humanitarian aid organizations like the International Red Cross and Red Crescent, privilege has been extended to aid workers in at least one case before the ICTY.[155] Workers are formally prohibited from disclosing information obtained in the course of official humanitarian endeavors as a matter of internal policy.[156] The decision of the tribunal to recognize this privilege has maintained the organization's ability to provide assistance in difficult conflicts without jeopardizing its neutrality.

Journalists have enjoyed a fair measure of protection from testifying as to the identity of their sources; a recent decision of the Appeals Chamber has extended qualified immunity to journalists from having to testify at all.[157] The Appeals Chamber held that journalists would not be required to testify for either party unless the testimony is both "direct and important" to essential issues in the case and not readily obtainable from other sources.[158] Dicta within the opinion left the implication that this standard, though not unattainable, would be difficult to establish. It

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[152] ICTY Rules, *supra* note 101, 90(E); ICTR Rules, *supra* note 101, R. 90(E). For an interesting article discussing trends in self-incrimination policy domestically and internationally, see Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201 (1998).

[153] ICTY Rules, *supra* note 101, 90(E); ICTR Rules, *supra* note 101, R. 90(E).

[154] Amann, *supra* note 152, at 1251-53.

[155] Prosecutor v. Simic, ICTY Case No. IT-95-9, Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross (June 7, 2000).

[156] Tracy Sutherland, *Witness to War Crimes: Must a Reporter Testify?*, AUSTRALIAN, Sept. 19, 2002, at B09.

[157] Glenn Frankel, *Reporter Wins Tribunal Appeal; Judges Back Journalist's Refusal to Testify in War Crimes Trial*, WASH. POST, Dec. 12, 2002, at A40.

[158] *Id.* Journalists have long faced battles over their role as neutral reporters of factual events and yet are sometimes the only eyewitnesses to evidence that could be used to support a claim or defense. Many journalists have voluntarily testified before the tribunals; in the present controversy, a Washington Post reporter refused to testify on behalf of the prosecution citing concerns for maintaining a free exchange of information unthreatened by fear of future adverse testimony. *See id.*; Sutherland, *supra* note 156.

appears, then, that the tribunal has positively received arguments for at least partial privileges.

3. The Right to Cross-Examine

At the last meeting before the first Nuremberg trial, a Russian lawyer on the prosecution's team queried, "[W]hat is meant in the English by 'cross-examine'?"[159] This perplexity is typical of many practitioners in the international criminal arena. The art of cross-examination remains an elusive, although protected, right granted to both parties. This right is not only included in the tribunals' rules themselves, but also in fundamental modern human rights standards protecting a defendant's right to a fair trial by granting him the ability to "examine or have examined" adverse witnesses.[160] As a general rule, it is limited to issues raised on direct examination or relating to the credibility of the witness.[161] Additional matters may be raised if a chamber so allows.[162]

Because most of the lawyers and judges come from a civil law background, cross-examination is a phenomenon with which most of them are wholly unfamiliar.[163] As one former judge with the ICTY complained, many attorneys—especially the defense lawyers—were inexperienced and often ineffective cross-examiners. While some learned quickly, most were "painfully awkward and unfocused . . . sometimes argu[ing] with or even criticiz[ing] the witnesses."[164] Cross-examination should play a critical role in the trials before the *ad hoc* tribunals, yet it often has failed to fulfill its function due to inadequate training. It is essential that all lawyers before the tribunals understand the importance of cross-examination in undermining a witness's testimony or credibility and perhaps even establishing beneficial evidence.

4. Expert Witnesses

Expert witnesses have always been permitted to testify before the international tribunals. Due to recent changes in the Rules, expert

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[159] TAYLOR, *supra* note 2, at 64.

[160] *See* David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 411 (2002). Also implicated in the right to examine witnesses is defendant's right to confront those who accuse him. *Id.*

[161] ICTY Rules, *supra* note 101, R. 90(H); ICTR Rules, *supra* note 101, R. 90(G).

[162] ICTY Rules, *supra* note 101, R. 90(H); ICTR Rules, *supra* note 101, R. 90(G).

[163] Learning how to cross-examine or being able to have a lawyer familiar with effective cross-examination techniques do so at trial is much more readily available to the prosecution than to the defense. This dichotomy results from the level of financial resources available to each party, coupled with the reality that more defense counsel come from the accused's native country (or a neighboring country) while prosecutors represent a broader international body.

[164] Wald, *supra* note 9, at 104.

testimony in the form of a full formal statement may now be admitted without actually requiring the expert to testify in court.[165] Whether by live testimony or by written statements, expert witnesses provide important background information with which the judges can analyze the testimony of eyewitnesses and victims. There are no precise criteria by which the chambers determine whether a particular witness is indeed an "expert." Experts have been used to establish the historical context of conflicts, the existence of widespread and systematic policies of ethnic cleansing or genocide, the discovery of mass graves and their subsequent exhumation findings, and military structure and movements, among other things.[166]

The experts come from a broad spectrum of professional backgrounds.[167] Some have been official investigators sent from the United Nations, the ICTY's investigative branch, or various independent observers. Others are historians or sociologists.[168] A few experts have been aid workers or human rights advocates.[169]

Experts base their testimony on anything from first-hand research or observations to summaries found in textbooks or reports. In the latter case, the summaries are often compilations of hundreds if not thousands of interviews from eyewitnesses.[170] When one expert was confronted as to the basis of her testimony, the witness replied that the "best source" for her determination was the quote of a single Serbian police officer published in a newspaper one year after the incident had occurred.[171] One party's expert can often be rebutted through the opposing party's own expert.[172]

As may be expected, the use of experts has come under considerable criticism.[173] In many instances, experts provide the only method of

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[165] ICTY Rules, *supra* note 101, R. 94*bis*; ICTR Rules, *supra* note 101, R. 94*bis*. The rule requires the proponent of the evidence to prepare the statement and disclose it to the opposing party as soon as possible; a separate copy must be submitted to the chamber at least twenty-one days prior to the expert's anticipated testimony. The opposing party then has fourteen days to accept the testimony or request permission to cross-examine the witness. Once it is accepted by the opposing counsel, the evidence is admitted absent any live testimony. ICTY Rules, *supra* note 101, R. 94*bis*; ICTR Rules, *supra* note 101, R. 94*bis*.

[166] SCHARF, *supra* note 16, at 120; Fabian, *supra* note 15, at 1021; Wald, *supra* note 9, at 101.

[167] *See, e.g.*, Fabian, *supra* note 15, at 1024, 1028; SCHARF, *supra* note 16, at 120.

[168] *See, e.g.*, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INTL'L L. 102, 138 (2000) [hereinafter *Study of Bosnian Judges and Prosecutors*].

[169] *See, e.g.*, Fabian, *supra* note 15, at 1029.

[170] *See id.* at 1024-29.

[171] *Id.* at 1026.

[172] *See* SCHARF, *supra* note 16, at 178.

[173] *See, e.g.*, *Study of Bosnian Judges and Prosecutors*, *supra* note 168, at 138-39. When questioned, a Bosnian legal professional complained about the number of witnesses

effectively putting a particular event in context—the sheer number of reports or eyewitnesses is too great for a single trial to handle. As with many forms of evidence with minimal probative value or obvious hearsay content, the tribunal tends to allow the testimony with the proviso that it can always exclude the evidence at a later time.[174]

The plethora of relevant background information and the contextual insight that expert witnesses can bring to a proceeding are also balanced by the length of time required to present this evidence. For example, the first five weeks of the *Tadic* trial consisted solely of expert testimony; the defendant's crimes were never even referenced.[175] A desire to increase efficiency and eliminate undue waste of time was the primary impetus behind the recent changes allowing unchallenged expert testimony to be solely in written form.[176]

5. Lay Witnesses

The nature of lay witnesses varies: most are victims, but some are journalists[177] or human rights activists.[178] All have some form of personal knowledge relating to the allegations against the accused. Both parties rely heavily on the testimony of eyewitnesses,[179] a fact that has led to intense debate over how much protection they should be granted. Many witnesses for either party refuse to testify unless protected from the threat of retaliation at home;[180] others fear having to appear before the

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who testified and yet had no personal knowledge of the accused's conduct. As he put it, "There were two or three hundred witnesses there . . . who really didn't have anything to do with it, no connection . . . ." *Id.*

[174] Fabian, *supra* note 15, at 1024.

[175] SCHARF, *supra* note 16, at 137.

[176] ICTY Rules, *supra* note 101, R. 96; ICTR Rules, *supra* note 101, R. 96.

[177] For example, in *Tadic*, the first journalist who entered the Omarska [concentration] camp testified for the prosecution. SCHARF, *supra* note 16, at 136.

[178] Fabian, *supra* note 15, at 1029.

[179] Between 1996 and early 2001, for example, the ICTY brought approximately 1,000 victim witnesses to the Hague to testify in on-going proceedings. Wald, *supra* note 9, at 108. The difficulty in obtaining victim-witnesses to testify is great. Most have never testified in court before and face certain logistical problems since they do not possess passports or other necessary travel documentation. Adama Dieng, *Other Preparations for the Establishment of the Court: International Criminal Justice: From Paper to Practice—A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court*, 25 FORDHAM INT'L L.J. 688, 701 (2002). Even if the appropriate documentation is acquired, the witnesses are still often afraid to travel. For example, estimates indicated that 90% of the lay witnesses before the ICTR are refugees—a status that could impede their ability to safe travel to and from the tribunals. *Id.* at 703.

[180] *See generally* SCHARF, *supra* note 16, at 103; Fabian, *supra* note 15, at 1011. This fear is not without merit. In *Tadic*, a witness later came forward and admitted to giving perjured testimony due to pressure exerted by local authorities. SCHARF, *supra* note 16, at 199-200. Investigations indicate that over 300 survivors of the 1994 conflict that were scheduled to testify in criminal proceedings have been murdered. Van Lierop, *supra* note

accused, and still more simply do not want to relive the horror of their experiences.[181]

These concerns have led the tribunal to allow a variety of measures to protect witnesses while simultaneously guarding the accused's right to a fair trial.[182] First, in some cases, testimony has been admitted in the form of depositions or affidavits relating to the crime, thereby eliminating the need for live testimony.[183] Second, the identity of witnesses can be withheld from public knowledge. Screens are erected to shield the witness from public view (and sometimes outside the view of the accused as well), and his or her name is not released.[184] In other cases, the tribunal has permitted testimony via video link, thus allowing the witness to testify from a safe or local location rather than in the courtroom.[185] The ICTY and ICTR have each established a "Victims and Witnesses Unit" that acts as a witness protection program, not only in ensuring safe travel to the proceedings, but also in the possible relocation of witnesses to friendly countries.[186]

Lastly, in *Tadic*, the chamber allowed some witnesses to appear anonymously not only to the public, but to the defense as well. Despite a strictly enforced five-prong test to determine whether this protection was

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47, at 220. In addition, suspects had themselves been gaining confidential information from victims by disguising themselves and actually working for the ICTR. Victor Peskin, *Rwandan Ghosts*, LEGAL AFFAIRS, Sept.-Oct. 2002, *available at* http://www.legalaffairs.org/issues/September-October-2002/feature_peskin_sepoct2002.html (last visited Oct. 28, 2003).

[181] *See, e.g.*, Fabian, *supra* note 15, at 1004. Not only must the victim "relive" the crime as she testifies, but she may be forced to face the very individual who inflicted such gruesome crimes on herself and thousands of others around her. *See generally* Landesman, *supra* note 49. In addition, cultural beliefs classifying sexuality as an intimate subject not to be discussed publicly has discouraged many victims from testifying. *Id.*

[182] The ICTR, for example, estimates that 85-90% of all witnesses have benefited from some form of protective measure. Dieng, *supra* note 179, at 701. The success with which the tribunals have achieved this balance is contested. The heart of the problem appears to begin with the ambiguities latent in the statutes of the tribunals themselves. The rule states that each right is "subject to article 21 [or 22]"—protection of victims and witnesses. ICTY Statute, *supra* note 69, arts. 21, 22; ICTR Statute, *supra* note 69, arts. 20, 22. Yet the rules delineating protective measures require that they "are consistent with the rights of the accused." Both are contingent on one another and the chambers have articulated different lines to be drawn in accordance therewith.

[183] *See, e.g.*, SCHARF, *supra* note 16, at 68. But a whole new host of problems arise by admitting documents in lieu of live testimony. *See infra* Part V.G.

[184] *See, e.g., id.* at 179; Fabian, *supra* note 15, at 1016.

[185] *See, e.g.*, Dieng, *supra* note 179, at 701. This testimony, however, is subject to imperfections in the transmission, and the demeanor of the witness is not always readily apparent. *See* SCHARF, *supra* note 16, at 191. Taking these factors into consideration, at least one chamber announced that "the evidentiary value of testimony of a witness who is physically present [is] weightier than testimony given by video-link." *Id.* at 114.

[186] ICTY Rules, *supra* note 101, R. 34; ICTR Rules, *supra* note 101, R. 34.

warranted,[187] anonymous testimony has been by far the most controversial action taken by a chamber.[188] In an effort to deflect this criticism, subsequent ICTY decisions have moved away from allowing anonymous witnesses, opting instead for less drastic protective measures. And the ICTR has, thus far, rejected the use of anonymous witnesses, opting instead for allowing late disclosure of witness identity to opposing counsel.[189] It does not appear that future cases will allow a witness's identity to be completely sheltered from the defense.

a. Witness protection

Much of the debate surrounding witness protection falls outside the purview of evidentiary considerations. Once a witness agrees to testify and the tribunal determines the appropriate level of protection to afford that witness, his or her testimony is admissible. Witnesses who have not testified are not to be present during other individuals' testimony; if this rule is broken, chambers may still allow the witness to testify.[190]

Witnesses are subject to cross-examination. Defense counsel have generally found it difficult or impossible to impeach victim witnesses even if they have no personal knowledge of the case and are merely giving hearsay testimony to establish the accused's culpability for what they witnessed and experienced.[191] The prosecution, on the other hand, may attempt to overcome individual credibility or reliability issues by calling a vast number of witnesses to corroborate an allegation.[192] Of course, inconsistent statements made to aid workers, journalists, or other individuals can also be used to impeach a witness. In the case of victim witnesses, the problem of coercion, post-traumatic stress disorder, or any number of other factors play into the reliability of any previous statement just as much as it could influence the current testimony.[193]

b. Sexual assault cases

Witnesses who were victims of sexual assault and rape enjoy certain rights reserved solely to them. First, although most children's testimony must be corroborated,[194] this requirement is waived for testimony by

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[187] Momeni, *supra* note 100, at 165.

[188] *See, e.g.*, SCHARF, *supra* note 16, at 108; Momeni, *supra* note 100.

[189] DeFrancia, *supra* note 104, at 1421-22.

[190] ICTY Rules, *supra* note 101, R. 90(C); ICTR Rules, *supra* note 101, R. 90(D).

[191] *See* SCHARF, *supra* note 16, at 139; Fabian, *supra* note 15, at 1031.

[192] *See* SCHARF, *supra* note 16, at 213.

[193] *See, e.g., id.* at 143, 170-71, 190.

[194] ICTY Rules, *supra* note 101, R. 90(B); ICTR Rules, *supra* note 101, 90(C).

children who are victims of sexual assault. In fact, the testimony of *any* victim of sexual assault does not require corroboration.[195]

Additionally, defendants are prevented from alleging the victim's consent if the victim was either "subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression" or "reasonably believed that if the victim did not submit, another might be so subjected, threatened, or put in fear."[196] An *in camera* hearing must take place before such testimony is allowed in order to determine the relevance and credibility of such a defense. Although the hearing may prevent public knowledge of the victim's sexual conduct and preclude it from being formally admitted into evidence, the rule does not keep the triers-of-fact from hearing it. There is still the possibility that this awareness may subtly affect the chamber's ability to accurately weigh the victim's testimony.[197]

Lastly, the victim's sexual history cannot be admitted to corroborate an accused's defense.[198] This provision is particularly important given the context of the Yugoslavian and Rwandan conflicts. In both situations, the victims and their alleged assailants lived in close, and relatively harmonious, proximity prior to the conflict. The very real possibility exists that defendants could attempt to exploit their knowledge of or prior relationship with the victims.[199]

F. Rules Relating to the Accused

Protecting the rights of the accused for the duration of the entire proceeding, pre-trial to sentencing, remains one of the primary purposes of the rules of procedure and evidence. Consequently, all of the rules can be understood at some level in terms of the accused's rights. Notwithstanding this more theoretical analysis, many of the rules of evidence specifically implicate the accused's participation in the trial.

1. Rights as a Potential Witness

The accused has several rights associated with his status as a witness to the alleged events. First, he has the right to testify in his own defense.[200] Second, he has the right not to testify at all—to remain

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[195] ICTY Rules, *supra* note 101, R. 96(i); ICTR Rules, *supra* note 101, R. 96(i).

[196] ICTY Rules, *supra* note 101, R. 96(ii); ICTR Rules, *supra* note 101, R. 96(ii).

[197] *See, e.g.*, Fionnuala Ni Aolain, *Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*, 60 ALB. L. REV. 883, 903 (1997).

[198] ICTY Rules, *supra* note 101, R. 96(iii); ICTR Rules, *supra* note 101, R. 96(iii).

[199] *See, e.g.*, Aolain, *supra* note 197, at 902.

[200] ICTY Rules, *supra* note 101, R. 85(C); ICTR Rules, *supra* note 101, R. 85(C).

silent—and not have his silence used against him.[201] Third, in the ICTY, he may make an unsworn statement at the beginning of the trial.[202] The first point is uncontroversial in most legal systems, including the international forum; indeed, even the Nuremberg and Tokyo Tribunals allowed the accused to testify.

The "right to silence" is relatively new within the international forum. While it has long existed in many common law traditions, the right is not generally recognized within the civil system. Defendants are expected to freely divulge their side of the story and a defendant's silence can usually be used against him in the court's analysis of the facts presented.[203] In the international community, the right to silence is incorporated into the tribunals' statutes: the accused cannot "be compelled to testify against himself or to confess guilt."[204]

This right to silence has been interpreted as not extending to statements made by the accused, only to his right not to add to that evidence during the proceeding. But within the trial setting chambers have generally interpreted this right to extend not simply to self-incrimination, but to an unqualified right not to testify in any manner. One chamber, for example, held that this right precluded the prosecution from compelling the accused to disclose a handwriting sample in order to authenticate documents allegedly written by him.[205]

The right of a defendant to make a statement while not under oath was first recognized in the international forum by the Nuremberg and Tokyo Tribunals. The right was deliberately included because of the civil law's—and in particular, Germany's—adherence to this guarantee.[206] In

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[201] The accused's "right to remain silent" is a foundational principle of American criminal procedure. *See* U.S. CONST. amend. V; *see also* Mitchell v. United States, 526 U.S. 314, 327-30 (1999) (detailing the Supreme Court's rulings on permissible inferences from testimony). In criminal cases, "no negative inference from the defendant's failure to testify is permitted"; no similar protection exists in American civil cases, where adverse inferences are permitted when a party refuses to testify. *Mitchell*, *supra*, at 327-28. Other legal systems have a different approach to the accused's role in the trial. England, for example, allows juries to "draw an adverse inference" from defendant's failure to explain his side. Civil systems similarly allow various degrees of negative inference to be drawn from an accused's decision not to make a statement. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 186-88 (2d ed. 1994).

[202] ICTY Rules, *supra* note 101, R. 84*bis*.

[203] *See generally* CRIMINAL PROCEDURE, *supra* note 85; SAFFERLING, *supra* note 28, at 304-05 (explaining Germany's policy regarding the accused's silence).

[204] ICTY Statute, *supra* note 69, art. 21(4)(g); ICTR Statute, *supra* note 69, art. 20(4)(g).

[205] Handwriting Sample Decision, *supra* note 108. *See* May & Wierda, *supra* note 2, at 763; DeFrancia, *supra* note 104, at 1432-34.

[206] Wald, *supra* note 9, at 98. In most civil law systems, the accused's testimony is never under oath; in common law systems, on the other hand, the accused's testimony is inadmissible unless it is under oath. SCHABAS, *supra* note 53, at 128.

the ICTY, then, the accused has the decision whether to testify under oath and be subject to cross-examination, or simply to make an unsworn statement that cannot be cross-examined.

2. Confessions

Confessions are presumed to have been freely and voluntarily given.[207] As an protective measure, the prosecution must disclose statements by the accused, including confessions, to the defense before the trial begins, allowing the defense the opportunity to challenge the admissibility of all statements. Thus, the burden is on the defendant to prove inadmissibility for any reason, including any potential abuse of the accused's rights when obtaining a confession. The appropriateness of shifting the burden of persuasion for evidence as explosive as a confession has been subject to much discussion.[208]

3. Evidence of Consistent Pattern of Conduct

Rule 93 states, "Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice."[209] Such acts must be disclosed to the defense prior to trial.[210] This rule is especially important given the nature of the offenses over which the tribunals have jurisdiction. While national criminal proceedings focus on individual culpability for each act alleged, proof of systematic and widespread patterns of behavior are often required elements of the prosecution's case. In these cases, "where the actions of an individual clearly point to a pattern of transgressive behavior, unless a legal device exists to disclose associated information, the focus on individual responsibility may eschew an expanded picture of liability."[211] This principle does not violate the need to prove individual action in connection with each charge; rather, it allows the prosecution to prove those very charges. The prosecution must be afforded the opportunity to prove not only specific conduct on a particular occasion, but also to include evidence of the accused's general behavioral pattern consistent with alleged violations. This opportunity aids the tribunal in more accurately assessing the accused's comprehensive liability.

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[207] ICTY Rules, *supra* note 101, R. 92; ICTR Rules, *supra* note 101, R. 92. *Cf.* ICTY Rules, *supra* note 101, R. 63; ICTR Rules, *supra* note 101, R. 63.

[208] *See, e.g.*, SCHABAS, *supra* note 53, at 297-301.

[209] ICTY Rules, *supra* note 101, R. 93(A); ICTR Rules, *supra* note 101, R. 93(A).

[210] ICTY Rules, *supra* note 101, R. 93(B); ICTR Rules, *supra* note 101, R. 93(B). *Cf.* ICTY Rules, *supra* note 101, R. 66; ICTR Rules, *supra* note 101, R. 66.

[211] Aolain, *supra* note 197, at 898.

G. Admissibility of Documents

The Nuremberg trials relied substantially on Nazi documents to implicate almost single-handedly the defendants' complicity in various crimes. Likewise, the tribunals had discretionary authority to admit affidavits or depositions in addition to or in lieu of live testimony.[212] Both parties entered into evidence thousands of affidavits and interrogatories containing the statements of eyewitnesses.[213] The primary reason for allowing means of entering evidence other than by live testimony was, and continues to be, expediting the proceedings.

Documents and other records continue to play an important function in international criminal proceedings. For most of their history, the *ad hoc* tribunals favored live testimony to written testimony. Not only did the rules expressly state that depositions were to be allowed in lieu of testimony only in "exceptional circumstances," but the Appeals Chambers narrowly construed the meaning of this requirement.[214] As criticism of the tribunals' efficacy heightened, new rules were adopted to acquire the same thoroughness at a quicker rate. The preference for live testimony was eliminated such that the current rules allow admission of evidence in oral or written form, so long as the "interests of justice" permit.[215] As such, depositions complying with the procedural requirements detailed in the Rules are admissible with the chamber's permission.

Rule 92*bis* governs admissibility of affidavits and other written statements. As a general rule, the document must include a declaration by the author attesting to the accuracy of the statement. In addition, a third party must also verify the declarant's identity, attestation, the declarant's awareness of the consequences of perjured testimony, and the date and place of the declaration itself.[216] An exception to the attestation requirement is permitted, at the chamber's discretion in light of the testimony's reliability and other relevant circumstances, if the declarant is dead, no longer traceable, or physically or mentally unable

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[212] *See, e.g.*, May & Wierda, *supra* note 2, at 748-52.

[213] They were submitted much more frequently by the defense counsel, but both parties made liberal use of the admissibility of affidavits and interrogatories. In one of the Nuremberg trials, for example, the defense submitted 2,394 affidavits, while the prosecution submitted 419. *Id.* at 750-51. In the *ad hoc* tribunals, defense counsel submitted affidavits 10:1 over the prosecution. Howard S. Levie, *Prosecuting War Crimes Before an International Tribunal*, 28 AKRON L. REV. 429, 434 (1995).

[214] DeFrancia, *supra* note 104, at 1426-30.

[215] ICTY Rules, *supra* note 101, R. 89(F); ICTR Rules, *supra* note 101, R. 92*bis*.

[216] ICTY Rules, *supra* note 101, R. 92*bis*(B); ICTR Rules, *supra* note 101, R. 92*bis*(B).

to testify.[217] Transcripts of a witness's testimony given at a prior proceeding may also be admitted.[218]

Three limitations restrict the admissibility of affidavits and other written statements. First, none of these can be admitted to prove the "acts and conduct of the accused."[219] The use of affidavits is reserved to corroborating other witnesses who have already testified or to expounding a witness's own testimony.[220] Second, the proponent of such evidence must give two weeks notice to opposing counsel.[221] The opposing counsel then has seven days to respond, accepting the affidavit's admission, challenging its admission, or requesting that the witness be required to appear for cross-examination.[222] Chambers that have attempted to circumvent the procedural requirements of this rule have been overruled by the Appeals Chamber.[223]

The final limitation is perhaps the most important—admission of affidavits is always discretionary. Chambers are charged with balancing relevant factors to determine whether to admit the statement. Factors favoring admission include: the cumulative nature of the statement's content, statements detailing precursory or background factual information, statements relating the impact of crimes on the victims, or statements detailing the accused's character.[224] Factors weighing against admissibility include: public interest in oral testimony, prejudicial effect on the accused, and evidence showing the unreliability of the statement.[225] Though there are many obstacles to the admissibility of affidavits, they are not insurmountable, and chambers in both tribunals routinely admit affidavits that comport with these requirements. Their use is likely to increase in coming years because the tribunals seem to be loosening restrictions in the use of affidavits and depositions. As time passes, counsel are finding it harder to persuade witnesses to disrupt

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[217] ICTY Rules, *supra* note 101, R. 92*bis*(C); ICTR Rules, *supra* note 101, R. 92*bis*(C).

[218] ICTY Rules, *supra* note 101, R. 92*bis*(D); ICTR Rules, *supra* note 101, R. 92*bis*(D).

[219] ICTY Rules, *supra* note 101, R. 92*bis*(A); ICTR Rules, *supra* note 101, R. 92*bis*(A).

[220] *See, e.g.*, DeFrancia, *supra* note 104, at 1399.

[221] ICTY Rules, *supra* note 101, R. 92*bis*(E); ICTR Rules, *supra* note 101, R. 92*bis*(E).

[222] ICTY Rules, *supra* note 101, R. 92*bis*(E); ICTR Rules, *supra* note 101, R. 92*bis*(E).

[223] *See, e.g.*, Prosecutor v. Kordic, ICTY Case No. IT-95-14/2, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement (Sept. 18, 2000).

[224] ICTY Rules, *supra* note 101, R. 92*bis*(A)(i); ICTR Rules, *supra* note 101, R. 92*bis*(A)(i).

[225] ICTY Rules, *supra* note 101, R. 92*bis*(A)(ii); ICTR Rules, *supra* note 101, R. 92*bis*(A)(ii).

their lives and to put themselves at risk by testifying at the proceedings.[226] Witnesses on both sides may find giving a statement at home more desirable than appearing before the chamber; thus, chambers may increasingly admit this testimony since the underlying evidence would otherwise be unavailable.

V. LESSONS LEARNED—RULES OF EVIDENCE FOR THE INTERNATIONAL CRIMINAL COURT

During the various preparatory commission meetings for the International Criminal Court, the experience of the *ad hoc* tribunals proved invaluable. In many ways, the tribunals were "trial runs" for the ICC, not only fueling a renewed interest in establishing such a permanent court, but also providing insight as to what successful provisions to incorporate and previously unforeseen problems to avoid.[227] The as yet untested ICC Rules of Procedure and Evidence provide key insights into the court's initial approach toward both the past and future of evidentiary standards in international criminal proceedings.

Most of the rules are uncontroversial and vary little from the rules adopted by the *ad hoc* tribunals. The general standard of admissibility continues to be relevance and probative value. The Court has discretion in admitting evidence and is to consider, *inter alia*, "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness."[228] Hearsay is not prohibited, but must meet the general requirements of admissibility.[229]

Recognizing the criticism faced by the *ad hoc* tribunals because of the slowness of their proceedings, the ICC Rules encourage increased judicial control in the proceeding. While the method of presentation remains dominantly adversarial, there is a framework for a sliding-scale of increased judicial activism when time or other factors warrant intervention. The Court may take judicial notice of facts of "common knowledge."[230] Likewise, the parties may stipulate to certain facts, but the Court still must exercise discretion as to whether the information should be presented in greater detail, as the "interests of justice" compel.[231]

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[226] *See, e.g.*, Wald, *supra* note 9, at 109.

[227] *See* SCHABAS, *supra* note 53, at 12-13.

[228] Rome Statute, *supra* note 73, art. 69(4).

[229] *See generally* Fabian, *supra* note 15, at 1038-39 (discussing the impact of the international tribunals on the use of hearsay evidence in the ICC).

[230] Rome Statute, *supra* note 73, art. 69(6).

[231] Rules of Procedure and Evidence, International Criminal Court, ICC-ASP/1/3, R. 69 (2002) [hereinafter ICC Rules], *available at* http://www.icc-cpi.int/library/basicdocuments/rules(e).pdf (last visited Oct. 29, 2003).

Measures to protect and to control witness testimony are also in place. Witnesses are required to take a "solemn undertaking" before their testimony is allowed in court.[232] Guidelines regarding privilege are more detailed than in the *ad hoc* tribunals.[233] The Rules protect both witnesses and the accused from self-incrimination.[234] The spouse, children, and parents of the accused also cannot be compelled to testify against the accused.[235] The Rules adopt privileges for "communications made in the context of a class of professional or other confidential relationships."[236] In determining what other protections to accept, the Rules specifically instruct the Court to integrate traditional privileges such as doctor (psychologist or counselor) and patient, attorney and client, and clergy and parishioners.[237] The clergy-parishioner privilege survived a substantial challenge led by France, which sought expressly to reject this category.[238] The Rules also incorporated the *ad hoc* tribunal's extension of privilege to International Red Cross and Red Crescent employees.[239] Given the Rules' general provisions, the Court has the flexibility to recognize additional privileges that it determines necessary.

The testimony of lay and especially victim witnesses was also the source of much debate. The Rules establish a Victims and Witnesses Unit to provide assistance and protection to those who need additional support.[240] Various mechanisms for protecting the witness during testimony—including the use of screens and testimony via video-link—are expressly permitted.[241] The Court also included provisions allowing the testimony of a witness to be pre-recorded: both counsel must be present at the recording, allowing for both direct and cross-examination to take place.[242] This measure should allow for additional protection not only for a witness who fears face-to-face contact with the accused, but also for those who are unable to travel to The Hague to testify in person. A proposal to allow witnesses to testify anonymously was rejected after

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[232] ICC Rules, *supra* note 231, R. 66. The declaration is the same as for the *ad hoc* tribunals, stating, "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth." *Id.*

[233] ICC Rules, *supra* note 231, R. 73.

[234] ICC Rules, *supra* note 231, R. 74.

[235] ICC Rules, *supra* note 231, R. 75.

[236] ICC Rules, *supra* note 231, R. 73(2).

[237] ICC Rules, *supra* note 231, R. 73(3).

[238] *See generally* James Bone & Ruth Gledhill, *War Confessions Remain Sacrosanct*, TIMES (London), Aug. 17, 1999 (discussing an attempt by France to get the clergy privilege excluded).

[239] ICC Rules, *supra* note 231, R. 73(4)-(6).

[240] ICC Rules, *supra* note 231, R. 16-19.

[241] ICC Rules, *supra* note 231, R. 67.

[242] ICC Rules, *supra* note 231, R. 68.

substantial debate on the defendant's right versus the need to protect witnesses.[243] Making its decisions, the committee "agreed that in certain cases it would be appropriate for the Prosecutor to withhold evidence until the commencement of the trial . . . [but] upon the commencement of the trial it would [no longer] be appropriate."[244]

The ICC Rules also afford special protection to victims of "sexual violence."[245] Defense counsel must prove at an *in camera* hearing why the defense of consent should be allowed; as a general rule, it cannot be raised or inferred by the victim's conduct.[246] Nor can evidence of the victim's sexual conduct be used to infer his or her "credibility, character or predisposition to sexual availability."[247]

Most assuredly, the Rules do not address many of the evidentiary problems that the Court will face during its first few years. Nonetheless, they do provide a framework in which the Court can analyze future disputes. They also highlight certain areas in which the ICTY's and ICTR's decisions—either positively or negatively—have already influenced the ICC's development.

VI. CONCLUSION

The debates during the International Criminal Court preparatory commissions indicate a continued dichotomy between not only common law and civil systems, but also between nations within each of those systems. As Chief Prosecutor Telford Taylor stated in his reflections on the Nuremberg trials, "Mankind is supposed to learn from experience, but individuals often 'learn' quite different things from much the same experience."[248] Within the context of the ICC and the *ad hoc* tribunals, the international community has a unique opportunity to adopt rules of evidence and procedure that best reflect modern human rights standards.

As the international community seeks an increased role in prosecuting some of the more egregious violations of law, the multi-national milieu of this approach will necessarily inform the development of evidentiary standards. In addition, the lessons of the *ad hoc* tribunals have served and will continue to serve as tutorials not only for the nascent ICC, but also for individual nations inexperienced in how to prosecute individuals responsible for mass atrocities. In the final analysis, the most important point is that individuals are now being

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[243] Mundis, *supra* note 98, at 784.

[244] Lusty, *supra* note 160, at 421-22.

[245] ICC Rules, *supra* note 231, R. 70.

[246] ICC Rules, *supra* note 231, R. 70(a)-(c).

[247] ICC Rules, *supra* note 231, R. 70(d), 71.

[248] TAYLOR, *supra* note 2, at 33.

prosecuted for crimes that for too long went unaddressed by *any* judicial body. And whether those crimes are repudiated by an international or a domestic court, recognizing and protecting the rights of all of the parties—especially within the context of effective evidentiary standards—will ensure that cases are "spoiled" only for those individuals not on the side of justice.

Kristina D. Rutledge