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4. Written and oral evidence

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I. INTRODUCTION

This chapter mainly focuses on the system of rules regulating the admission of evidence into the trial record in international criminal proceedings.[1] Particular reference will be made to the practices of the main international criminal courts and tribunals – the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the International Criminal Court (ICC) – as well as certain unique facets of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL).

As mentioned in the Introductory chapter of this volume, legal systems based on the common law tradition (adversarial systems) developed strict sets of exclusionary rules for the admission of evidence, for instance limiting the admission of written statements and hearsay in criminal proceedings. These rules were premised, inter alia, on the assumption that, in the courtroom, juries should generally be exposed only to first-hand knowledge of the events in question. This allows a sort of "duel" of the parties who, through strictly regulated examination and cross-examination procedures, are able to present evidence which will lead to a conviction only if guilt is demonstrated beyond reasonable doubt.[2] In essence, according to

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[1] International criminal procedure, as this volume shows, is generally understood as including the law of evidence which in some domestic systems (mainly common law ones) would instead be considered as a separate area.

[2] In common law, the many exclusionary evidence rules have the practical result of leading to a significant use of oral testimony. It is often contended that the principle of "immediacy" in civil law systems has a similar effect. Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A*

the pure common law tradition, nothing really counts as "evidence" until and unless it is heard orally at trial.[3]

Systems of criminal procedure stemming from the civil law tradition vary widely. For the purposes of this chapter, however, these systems have been historically premised on the assumption that judges – and not jurors – are called to be the fact-finders, and that they will generally be guided by the "intimate conviction" (from the French expression "*conviction intime*"), their inner belief that guilt has been established by the prosecuting authorities. In practical terms, of course, the standard of proof "beyond reasonable doubt" has come to be seen as essential in the civil law tradition, too.[4] Nonetheless, in their quest for the truth, judges in these systems have traditionally been afforded greater latitude in admitting and assessing both oral and written evidence than in common law systems,[5] although this has been changing in recent times.[6] Civil law judges (even lay judges, who are required in some systems to decide on allegations of the most serious crimes) have historically been the adjudicators of both procedure and substance. This means that they will see all of the evidence, even that against which a party raises admissibility issues. Common law judges, on the other hand, routinely exercise their duty of "screening" the

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Comparative Study, 121 U. Pa. L. Rev. 506, 517 (1973) (tracing the historical origins of such approach).

[3] John R. Spencer, *Introduction*, *in* European Criminal Procedures 21 (Mireille Delmas-Marty & John R. Spencer eds., 2002).

[4] See, for instance: Cour de cassation [Cass.] [Supreme Court for Judicial Matters] crim., Jan. 24, 2007, judgment n. 06-82.769 (Fr.) (rejecting the arguments that the appellate court had convicted despite reasonable doubt); Cassazione Sezione Penale, Nov. 24, 2003, n. 45276 (*Andreotti et al.*) (It.).

[5] See Section 244 of the German Code of Criminal Procedure, which reads, in part: "In its search for the truth, the Court shall extend the taking of evidence to any fact or means of proof relevant to the decision." Section 258 of the Austrian Code of Criminal procedure provides in part: "The court shall examine the evidence carefully and conscientiously with regard to its trustworthiness and conclusiveness separately and as a whole. Judges shall not decide upon the question of whether or not a particular fact has been proven according to formal [or statutory] rules of evidence, but only according to their own conclusions drawn on the basis of their careful examination of all of the evidence on the record." All translations of non-English case law and legislation are the author's own.

[6] John R. Spencer, *Evidence*, *in* European Criminal Procedures, *supra* note 3, at 600–602. An extreme exception to the regime of free evidence is provided by the Dutch Code of Criminal Procedure, which requires that a conviction be based only on a list of enumerated "legal means of gathering evidence" (Articles 338 and 339). A brief account of the evolution of the systems in the civil law tradition is John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition 125–33 (2007).

evidence in order for jurors – the fact-finders – not to come in contact with evidence deemed unreliable or of unjust origin.[7]

Contemporary international criminal tribunals have witnessed an evolution of at least part of the law applicable to the presentation, admission, and evaluation of evidence.[8] Two issues are here essential to understand: (i) the general rules on the admission of evidence, and (ii) the dichotomy between oral and written evidence.

As regards the first issue, from their inception the ad hoc tribunals have relied on the traditional civil law approach of not burdening fact-finders with strict rules of evidence, doing without most of the complexities of the exclusionary rules so essential to common lawyers and, progressively, to most contemporary civil law systems. However (and this is the second issue), regarding the admission of evidence, the ICTY and the ICTR originally tended to follow a typical common law approach in clearly favoring oral evidence over written documents or statements.[9] While the former assumption has essentially remained unchanged, the latter has undergone significant developments since the time the Rules of Procedure and Evidence (RPE) were first drafted.[10] The ICTY Appeals Chamber has aptly observed that "while the system under which the Tribunal's rules of evidence operates is predominantly adversarial, the jurisprudence – and the Rules themselves – have recognized from the beginning the necessity, and desirability, of certain features which do not accord with a strictly adversarial criminal procedure."[11] Paramount amongst these features is

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[7] When a jury trial is waived and a bench trial is conducted, the judge becomes the trier of fact and will also have the task of determining whether the evidence is both relevant and admissible. This is premised on the assumption that, unlike jurors, professional judges are conceptually able to distinguish the two tasks. The same assumption forms the basis of international criminal trials, where no juries exist.

[8] As discussed in the *Introduction* to this volume, ICTY and ICTR Rules of Procedure and Evidence (RPE) are adopted and amended by judges themselves; it is therefore common (especially in the field of evidence) that a solution is first suggested as a jurisprudential development and then is refined and adopted as a full-fledged rule by the Plenary of judges. This process is more complicated at the ICC, where the RPE are adopted by the Assembly of State Parties.

[9] The original Rule 90(A) of the ICTY RPE read: "Witnesses shall, in principle, be heard directly by the Chambers." The ICTR never modified this rule, which is therefore formally still valid.

[10] Rule 89(F) of the ICTY RPE now reads: "A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form." Various specific rules added over the years detail how this can be done.

[11] Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, ¶ 40 (ICTY Nov. 23, 2007) [hereinafter *Prlić* Decision].

that of admitting written evidence, including previous statements of witnesses, with the aim of expediting trials by shortening the presentation of evidence in the courtroom.

One final overarching note is in order. International criminal tribunals consider it axiomatic that they should, and indeed are bound to, respect international human rights standards.[12] In interpreting this body of law, international criminal tribunals have often made recourse to the decisions of the European Court of Human Rights (ECtHR), especially in the field of evidence. This is not, of course, because ECtHR rulings are per se binding on these jurisdictions, but rather because they deal with cases from different jurisdictions applying a variety of different procedural rules through the prism of a provision (Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms) which is very similar to the catalogue of fair trial rights enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR) and in these tribunals' founding instruments.[13]

The following sections describe the main characteristics of the regime for the admission of evidence before international criminal tribunals (Section II). Without attempting to be exhaustive, this chapter then proceeds to outline how witnesses are heard before these judicial institutions (Section III), and further how other types of information are submitted into the trial record (Sections IV, V and VI).

II. GENERAL RULES AND PRINCIPLES ON ADMISSION OF EVIDENCE

A. Historical Precedents

For the purpose of international criminal proceedings, evidence can be defined as all information that is admitted by a Chamber as tending to prove or disprove – in a broad sense – allegations contained in the document setting out the charges against the accused (usually referred to as an "indictment"). Importantly, as hinted earlier, international criminal tribu-

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[12] Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993), ¶ 106. See also Article 23(3) of the ICC Statute. On the consequences for breach of human rights by international tribunals, see Guido Acquaviva, *Human Rights Violations Before International Tribunals: Reflections on the Responsibility of International Organizations*, 20 Leiden J. Int'l L. 613 (2007).

[13] *Prlić* Decision, *supra* note 11, ¶ 51.

nals are not endowed with juries, and thus judges are called to assess the admissibility of evidence as well as its significance for the ultimate findings.

The post-WWII international military tribunals (the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE)) had extremely lax rules of evidence, which allowed judges to exercise a very broad discretion in admitting evidence, oral or written.[14] During the Nuremberg trial, various judges modified their own attitudes towards the admission and testing of evidence – something made possible by the flexible and somewhat vague nature of the rules in question. Justice Robert H. Jackson, U.S. Chief Counsel for the Prosecution at Nuremberg, wrote after the trial:

> On the Continent, as you know, cross-examination is very little used by members of the bar. […] In fact, there was no Russian equivalent for the term 'cross-examination.' The French made little attempt to use cross-examination. Most of the cross-examining was done by the British, who are adept at it, or by the Americans. The Soviets at first hesitated – and then apparently they found it to be great fun, and cross-examined everybody.[15]

However, despite witness evidence and various examples of masterful examination and cross-examination, there is no denying that at Nuremberg most of the pivotal evidence relied upon was *written* evidence, and specifically documents prepared by the German themselves to record their campaigns and operations.[16] It is against the backdrop of these precedents that one should understand contemporary international practice.

B. Contemporary Rules and Practice

The ICTY, ICTR and STL RPE provide that "[a] Chamber may admit any relevant evidence which it deems to have probative value,"[17] subject

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[14] Article 19 of the IMT Charter provided that "[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to be of probative value." Article 13 of the IMTFE added that "[a]ll purported admissions or statements of the accused are admissible."

[15] Robert Jackson, *Nuremberg Trial of the Major Nazi Leaders*, 70 N.Y. St. B.A. Rep. 147, 157 (1947).

[16] "There is no count in the Indictment that cannot be proved by books and records. The Germans were always meticulous record keepers, and these defendants had their share of the Teutonic passion for thoroughness in putting things on paper." (2 Trial of the Major War Criminals Before the International Military Tribunals 102 (1947)).

[17] Rule 89(C) of the ICTY RPE; Rule 89(C) of the ICTR RPE; Rule 149(C) of the STL RPE.

to a number of constraints and restrictions.[18] Similarly, the ICC Statute provides that the parties may submit evidence relevant to the case, and that the Court may rule on the relevance or admissibility of any evidence, taking into account its probative value.[19] The corresponding provision in the Internal Rules of the ECCC (the hybrid court that most closely follows the civil law approach) is even more explicit in providing that "[u]nless otherwise provided . . . all evidence is admissible. The Trial judges shall weigh all such evidence independently in deciding whether guilt has been proven beyond a reasonable doubt."[20]

The inescapable conclusion is that contemporary international criminal tribunals have followed the example set by the post-World War II tribunals – and traditional civil law codes – in avoiding complex technical rules of evidence. To the common law trained reader, such a situation poses a number of questions: is there no barrier to admitting evidence before international criminal tribunals? How do the judges – and parties themselves – manage to sift through the huge amount of material that could be admitted to the record? How can fact finders be satisfied of the reliability of the evidence presented by the parties?

At the outset, it is important to clarify that the absence of a detailed regime of evidence (such as comprehensive exclusionary rules) does not necessarily signify that there are no rules at all in this area. As the provisions quoted above demonstrate, and as will be seen in the next pages, international criminal tribunals work with a very limited set of explicit technical rules regulating the admission of evidence, but they do possess a functioning system in this respect, albeit framed in rather general terms. The aim of this Section is to cover the main aspects of this system.

C. Admission of Evidence and Exclusionary Rules

The first substantive rule of evidence guiding judges of international criminal tribunals is, as hinted above, that a Chamber may admit *any relevant information* as evidence, taking into account its probative value.[21]

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[18] Rules 89–98 of the ICTY and ICTR RPE.

[19] ICC Statute, Article 69(3) and (4). *See also* ICC Rule 63(2).

[20] Rule 87(1) of the ECCC Internal Rules. On the peculiar nature of these Internal Rules, see Guido Acquaviva, *New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers*, 6 J. Int'l Crim. Justice 129 (2008).

[21] Articles 19 and 20 of the IMT Charter, Article 13(a) and (b) of the IMTFE Charter, Rule 89(C) of the ICTY RPE, Rule 89(C) of the ICTR RPE, Article 69(4) of the ICC Statute, Article 21(2) of the STL Statute, Rule 149(C) of the STL RPE.

This essentially means that a Trial Chamber, when ruling on the admission of evidence (oral or otherwise) will make a preliminary assessment of the likely probative value of the evidence in question vis-à-vis the charges contained in the indictment – while, of course, a final assessment of the probative value of each piece will only be made at the end of the trial, upon a full record. A rule of this type clearly affords judges enormous discretion, which is nonetheless tempered by exceptions and limitations (further discussed below).

Despite these restrictions, however, the general principle stands: international criminal judges are generally allowed great flexibility with respect to the admission of evidence, and their evaluation of what is relevant and what has probative value is largely left unchecked until the judgment is rendered. In this respect, they are in a position similar to German judges, who are required by Section 244 of their Code to search for the truth through any relevant means of proof – of course within the boundaries of carefully crafted principles.

As a corollary of this discretion, *international criminal tribunals are not bound by any national rules of evidence*, including the various exclusionary rules developed by most contemporary systems of criminal law and procedure.[22] This means that, in theory, each international criminal tribunal has its own self-contained system for the admission of evidence. In practice, however, the various courts and tribunals follow some shared rules and general principles, which form the kernel of what is developing as a body of international criminal procedure,[23] including the law dealing with evidence admission and evaluation.

The exclusion of domestic rules of evidence also means that documents

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These articles generally refer to "evidence" rather than information – while technically information becomes evidence only after being admitted into the record.

[22] Rule 89(A) of the ICTY RPE, Rule 89(A) of the ICTR RPE, Rule 89(A) of the SCSL RPE, Rule 63(5) of the ICC RPE. The STL is an exception in this respect, since it provides that, in case of a lacuna, judges may apply provisions of the Lebanese Code of Criminal Procedure "consistent with the highest standards of international criminal procedure." (Rule 149(A) of the STL RPE).

[23] This international criminal procedural law appears to be developing a common set of basic due process guarantees that each international judicial body called to examine individual criminal responsibility is required to follow. In a similar vein, see Stefania Negri, *The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure*, 5 Int'l Crim. L. Rev. 513 (2005) and works cited therein. On the meaning of "general rules and principles" in this field, see *inter alia* Sergey Vasiliev, *General Rules and Principles of International Criminal Procedure: Definition, Legal Nature, and Identification*, *in* International Criminal Procedure: Towards a Coherent Body of Law 19 (Göran Sluiter et al. eds., 2009).

or other exhibits that would formally have been inadmissible in certain national legal systems might nonetheless be legitimately considered by international judges in order to assess the guilt or innocence of an accused. For instance, phone communications intercepted in contravention of the domestic legislation of various states of the former Yugoslavia have been admitted into the trial record of ICTY proceedings.[24] Similarly, the ICC has held that search and seizure operations undertaken in violation of domestic procedures do not per se render the evidence gathered inadmissible.[25]

This liberal approach to the admission of evidence essentially leads international criminal tribunals to postpone the moment when evidence is scrutinized. Such a careful analysis is carried out not at the time the evidence is tendered (as in common law jurisdictions), but rather when the evidence as a whole is evaluated in its context, i.e., at the time of the final judgment, when the full record of the case is available. Various authors have suggested that the use of some exclusionary rules of evidence from the common law tradition would make international criminal trials fairer, shorter and more efficient[26] – but to date such critiques have not been heeded.[27]

The only general exclusionary rule requires that judges in all contemporary courts and tribunals exclude evidence obtained by methods which cast substantial doubt on its reliability or if its admission is contrary to, and would seriously damage, the integrity of the proceedings, e.g., by being contrary to the basic legal instruments of these courts and/or in violation of established human rights.[28] This appears to be a sort of "baseline" rule, which focuses on the results which judges of international criminal tribunals are required to ensure (integrity of the proceedings; fairness and protection of the rights of the accused), rather than providing specific

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[24] *See, e.g.*, Prosecutor v. Brđanin, Case No. IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence" (ICTY Oct. 3, 2003); Prosecutor v. Haraqija & Morina, Case No. IT-04-84-R77.4, Decision on Astrit Haraqija and Bajrush Morina's Joint Request for Reconsideration of the Trial Chamber's Decision of 4 September 2008 (ICTY Sept. 24, 2008).

[25] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶¶ 74–8 (Jan. 29, 2007).

[26] *See, e.g.*, Peter Murphy, *No Free Lunch, No Free Proof – The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials*, 8 J. Int'l Crim. Justice 539 (2010).

[27] For a defense of the main features of the present system, see among others Christine Schuon, International Criminal Procedure: A Clash of Legal Cultures 136 et seq. (2010).

[28] Rules 89(D) and 95 of the ICTY RPE, Rule 95 of the ICTR RPE, Article 69(4) and (7) of the ICC Statute. *See also* Rule 149(D) of the STL RPE.

instructions on the type of evidence that should be excluded from the trial record. To this general principle, one should add that international criminal tribunals have excluded evidence gathered in *serious* violation of their own procedures, such as those rules requiring counsel to be present during suspect interviews.[29]

In essence, these provisions mitigate the consequences of not adhering to strict exclusionary rules that have evolved – often due to constitutional and due process requirements – in various common law traditions.[30] For example, intercepted communications gathered illegally under the national laws of a country or evidence collected during a (domestically) unlawful search and seizure operation which are likely to be inadmissible in a common law system would still be inadmissible if such procedural violations had substantial detrimental effects on the rights of the accused. Thus, international judges are called to appraise carefully on a case-by-case basis the effects of the methods used to gather evidence upon the internationally recognized rights of the defendant and, through such appraisal, rule on the exclusion of exhibits. As hinted above, this is how several civil law systems operated decades ago, even though it should be recognized that these systems – at least in countries subject to the ECtHR – are now trending towards enforcing stricter exclusionary rules.

The final check in relation to the admission of potentially unreliable evidence before international criminal tribunals is provided by yet another feature derived from civil law systems: the requirement that the verdict of innocence or guilt be contained in a reasoned judgment.[31] Unlike the simple finding by common law juries that an accused is "guilty" or "not guilty," international criminal judgments tend to be rather lengthy, because trial judges must duly explain their assessment of the relevance and probative value of the (main) evidence, as well as their own reasoning in reaching the verdict.[32] Even though judges are not required to articulate

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[29] *See, e.g.*, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C), ¶ 21 (Oct. 14, 2004).

[30] The traditional common law view has actually historically been that courts should not be concerned with *how* the evidence was obtained, and that evidence is admissible if relevant. *See* Kuruma Son of Kaniu v. The Queen [1955] AC 197, 203 (PC). As is well-known, this is not the position in the U.S. (*see* Mapp v. Ohio, 367 U.S. 643 (1961)).

[31] A reasoned judgment is however often required in common law systems when no jury trial takes place. *See, e.g.*, Taito v. R, [2002] UKPC 15, ¶ 18.

[32] Problems however abound. This is for instance what the Trial Chamber stated in the *Milutinović* judgment (a 1,700-page long ruling, still under appeal): "The Prosecution chose to present a case founded upon a multitude of alleged

every step of their reasoning for each specific finding,[33] what triers of fact are encouraged to do, for instance, is to discuss *why* they rely on certain parts of a witness' testimony, while they reject other parts as not credible.[34] The same applies to documents, in particular those bearing directly on the guilt or innocence of the accused. This is not dissimilar to what civil law systems provide, and actually human rights bodies tend to require, when mandating judges to give reasons for their decisions.[35]

Keeping in mind these basic overarching principles and rules, let us now consider how evidence – starting with oral testimony – is actually admitted during proceedings before international criminal tribunals.

III. ORAL EVIDENCE

International tribunals have undoubtedly heeded the European Court of Human Rights' prescription that "all the evidence must normally be produced at a public hearing, in the presence of the Accused, with a view to adversarial argument,"[36] something aimed at ensuring that the defense is able to effectively challenge the case against the accused. This is in line with the requirement of the ICCPR (Article 14(e)), and enshrined in all of the international courts' founding instruments, that an accused must be able to "examine, or have examined, the witnesses against him or her." Importantly, Article 14 has been interpreted as requiring not only equality between prosecution and defense in obtaining, leading and challenging evidence, but also that each accused "must have the right to act diligently and fearlessly in pursuing all available defences."[37] As discussed above,

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events in [13] separate municipalities . . . . The Prosecution led evidence from a small number of people in relation to each of the municipalities, but invited the Chamber to make wide-ranging findings about the perpetration of crimes and the movement of hundreds of thousands of people and the murders of many hundreds of people . . . . The net effect is that the Chamber had the very onerous task of carefully considering whether the witnesses presented were sufficiently reliable to enable such wide-ranging conclusions to be based on their evidence." Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgement (Volume 1 of 4), ¶ 45 (ICTY Feb. 26, 2009) [hereinafter *Milutinović*, Trial Judgement].

[33] *See* Prosecutor v. Musema, Case No. ICTR-96-13-A, Appeal Judgement, ¶ 18 (Nov. 16, 2001).

[34] *See, e.g.*, Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeal Judgement, ¶150 (ICTY Mar. 17, 2009).

[35] Garcia Ruiz v. Spain [GC], no. 30544/96, ¶ 26, ECtHR 1999-I (Jan. 21, 1999).

[36] *See, e.g.*, A.M. v. Italy, no. 37019/97, ¶ 25, ECtHR 1999-IX (Mar. 14, 2000).

[37] *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*, ¶ 11.

such considerations must necessarily inform the interpretation and application of the evidence rules of international criminal tribunals.

For these and other reasons – in both common law and civil law criminal trials, as well as in proceedings before international criminal tribunals – preference is currently given to *oral* evidence presented through examination and cross-examination of witnesses before the fact-finders.[38] This is despite the fact that in recent years the scientific basis for preferring eyewitness testimony as the most reliable form of evidence in criminal proceedings has been strongly criticized, and largely proven wrong.[39]

Nonetheless, by and large the presentation of oral evidence before international criminal tribunals has undoubtedly taken the form that is typical in adversarial proceedings – namely, the examination and subsequent cross-examination of witnesses, called first by the prosecution and then by the defense.[40] This procedure appears to be best suited to ensuring equality of arms between the parties since it requires, for instance, the prosecution to present the results of its investigation in a public courtroom and it allows the accused to challenge before an impartial fact-finder the charges leveled against him.[41] Under this model, leading questions by the party calling the witness are banned, though this prohibition does not apply during cross-examination[42] or when questions are posed by the judges

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[38] While the traditional English view enshrined in Myers v. Director of Public Prosecution [1965] AC 1001 (HL), requiring oral evidence in all cases, has been gradually replaced by statutes allowing hearsay and records created in the course of business, it is still true that the most important evidence is presented at an oral hearing. Thus, it is interesting that countries traditionally identified with the civil law tradition have been increasingly embracing the adversarial system of evidence presentation. See Article 111 of the Italian Constitution, amended in 1999, now stating: "In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings. The guilt of the defendant cannot be established on the basis of statements by persons who, out of their own free choice, have always voluntarily avoided undergoing cross-examination by the defendant or the defence counsel."

[39] This point has been convincingly made in Nancy A. Combs, Fact-finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions 14–20 (2011) (but see also 63–105 for problems specifically affecting international criminal tribunals).

[40] This section does not deal with *expert* testimony, which follows somewhat different rules. In general on the topic, see Avi Singh, *Expert Evidence*, *in* Principles of Evidence in International Criminal Justice 599 (Karim A. A. Khan et al. eds., 2010).

[41] *See* Michele Caianiello, *First Decisions on the Admission of Evidence at ICC Trials*, 9 J. Int'l Crim. J. 385, 389 (2011).

[42] *Id.* at 394. The main modification of this model in respect to the one adopted by the ad hoc tribunals is that legal representatives of victims are participants and therefore are given time to question witnesses themselves.

themselves.[43] While, theoretically, Article 64(8)(b) of the ICC Statute gives the Presiding Judge of the Trial Chamber ample discretion over the procedure to be followed in the presentation of evidence, practice thus far has overwhelmingly followed the adversarial model – even if, in order to avoid the appearance of favoring one legal culture over another, certain terms (such as "cross-examination") do not even appear in the ICC Statute or Rules.[44] Moreover, all international criminal tribunals foresee the possibility of live testimony through video-link from another location,[45] despite the fact that this might make it harder for the participants in the courtroom and the judges to assess the demeanor of the witness testifying.[46]

The fact that the regime of oral testimony before international criminal tribunals is grounded in the common law tradition more than in others is also borne out by the fact that ICTY, ICTR, SCSL and STL allow the accused to testify at his own trial.[47] This is generally not allowed in civil law systems, where the accused may of course make statements, but never as a witness proper (i.e., under solemn declaration). Civil law systems in fact prefer not putting defendants to the choice of testifying as witnesses, with the perceived consequent risk of creating an incentive to lie.[48]

The features described thus far would suggest that, in evidence-related matters, contemporary international tribunals follow the main facets of adversarial common law. Nonetheless, a few variations make the system

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[43] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Judicial Questioning (Mar. 18, 2010).

[44] K. Ambos, *International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?*, 3 Int'l Crim. L. Rev. 1, 20 (2003). On the application of the adversarial model at the ICC, see for instance, Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140 (Nov. 20, 2009).

[45] *See, e.g.*, Rule 81*bis* of the ICTY RPE; Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Decision on Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures (Sept. 14, 2001). As for the ICC, see Rule 67(1).

[46] The U.K. House of Lords has however stated that "[i]mprovements in technology enable . . . evidence to be tested as adequately if given by [video conferencing] as it could be if given in court." Polanski v. Condé Nast Publications Ltd. [2005] UKHL 10.

[47] *See* STL Rule 144(D). The other tribunals, including the ICC, do not have specific provisions on this – but the right to testify has been considered inherent in the general system of evidence.

[48] On the relationship between this issue and the right to silence before international criminal tribunals, see William Schabas, The International Criminal Court: A Commentary on the Rome Statute 813–14 (2010).

of international criminal procedure somewhat different from those stemming out of the pure common law tradition.

First, when following international criminal proceedings one cannot fail to note that *judges are generally more active* in intervening and posing questions to the witnesses, and even calling witnesses.[49] This naturally changes depending on the composition of the bench, and the personal inclination of each judge, but it undoubtedly creates the impression that the fact-finders are much more involved than in ordinary jury trials (and, of course, there is no jury to "impress"). At the ICC, for instance, Rule 140 of the Rules of Procedure and Evidence explicitly provides that the prosecution and the defense have the right to question witnesses about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters, but then adds that the Chamber also has the right to question a witness both before or after the witness is questioned by those participants. This occurs frequently. Only two of the hybrid tribunals (the ECCC and STL) foresee a somewhat more civil law-oriented approach to questioning witnesses, with the possibility of judges taking the lead in the examination. At the ECCC, the Trial Chamber shall hear the witnesses and the civil parties in the order it considers useful.[50] Article 20(2) of the Statute of the STL provides that "[u]nless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence."

Second, in contrast to traditional common law systems, *hearsay evidence* is admissible before international criminal tribunals. ICTY case law has defined hearsay as a statement (oral or written) made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of the matter asserted.[51] The ICTY Appeals Chamber has clarified that establishing the reliability of hearsay evidence is of paramount importance, exactly because of the fact that hearsay evidence is admitted as substantive

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[49] ICTY and ICTR Rule 98; ICC Regulations of the Court, Regulation 44(4).

[50] Rule 91 of the ECCC Internal Rules.

[51] A few variations of this definition exist. *See, e.g.*, Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶ 14 (ICTY Feb. 16, 1999) [hereinafter *Aleksovski* Decision]; *Milutinović*, Trial Judgement, *supra* note 32, ¶ 38. Various common law systems have recently also changed attitude towards hearsay. *See, e.g.*, Dushkar Kanchan Singh v. the Queen [2010] NZSC 161, ¶ 23 (referring to the New Zealand Evidence Act of 2006, which, inter alia, allows prior out of court statements by witnesses).

evidence in order to prove the truth of its contents.[52] In order to be admissible, hearsay evidence must be reliable for the purpose of proving the truth of its contents, in the sense of being voluntary, truthful and trustworthy.[53] More generally, international criminal tribunals have adhered to the human rights principle according to which unacceptable infringements of the rights of the defense occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.[54] This principle has become essential to understanding the admission and evaluation of evidence even beyond the area of hearsay *stricto sensu*, as will become clearer in the next pages.

Third, international criminal procedure has at times allowed – or at least not explicitly banned – the use of *anonymous witnesses*, i.e., witnesses who testify without having to disclose their identity or other identifying personal information to the accused. This is clearly a major exception to the basic tenets of adversarial procedures and, it should be noted, this type of heightened protection has so far been granted *only in one case* before the ICTY. In the *Tadić* case, a majority of a Trial Chamber granted some witnesses anonymity based on Rule 75 of the ICTY RPE. As anonymity strongly affects the accused person's ability to defend himself or herself, the Trial Chamber identified a number of criteria that must be fulfilled before it can be granted: (i) there must be real fear for the safety of the witness or his family; (ii) the testimony of the particular witness must be important to the case; (iii) the Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy; (iv) any relevant witness protection program must be ineffective or non-existent; and (v) the anonymity is strictly necessary.[55] Despite these stringent criteria, the *Tadić* decision has been much criticized[56] and it has not been followed in later

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[52] *Aleksovski* Decision, *supra* note 51, ¶ 15.

[53] Prosecutor v. Kordić, Case No. IT-95-14-2, Appeal Judgement, ¶ 283 (ICTY Dec. 17, 2004) (restating the principle).

[54] In addition to the *A.M.* case cited *supra* note 36, the principle was espoused in Saïdi v. France, no. 14647/89, ¶¶ 43–4, ECtHR (Sept. 20, 1993) and Unterpertinger v. Austria, no. 9120/80, ¶¶ 31–3, ECtHR (Nov. 24, 1986). On the application of this principle by the ICTY, see for instance *Prlić* Decision, *supra* note 11, ¶ 53.

[55] Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶¶ 62–6 (ICTY Aug. 10, 1995).

[56] *See e.g.,* Natasha A. Affolder, Tadić*, The Anonymous Witness and the Sources of International Procedural Law,* 19 Mich. J. Int'l L. 445 (1997); Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*, 91 Am. J. Int'l L. 80 (1997).

case law of the ad hoc tribunals. When the ICC Statute was negotiated, no agreement could be reached on the question of allowing anonymous witness testimonies; thus, the ICC Statute and the Rules do not contain any specific provisions either barring or admitting such practice.

The STL Rules do grant the possibility for the Pre-Trial Judge to question anonymous witnesses. In the STL President's explanatory memorandum, Rule 93 has been justified by the extraordinary nature of terrorist criminality.[57] More concretely, STL Rule 93 establishes that where, at any stage of the proceedings, there is a serious risk that a witness or a person close to the witness would lose his life or suffer grave physical or mental harm as a result of his identity being revealed, and ordinary measures for the protection of witnesses would be insufficient to prevent such danger,[58] the Pre-Trial Judge may question the witness in the absence of the parties (including legal representatives of victims). In questioning such a witness, participants are given the opportunity to convey questions to the witness through the Pre-Trial Judge, and a provisional transcript of the witness's answers is given to them in order to allow the posing of additional questions. STL Rule 159 explicitly underlines that a Chamber may exclude statements of anonymous witnesses if their probative value is substantially outweighed by the need to ensure a fair trial, and that a conviction may never be based solely, or to a decisive extent, on such statements.

The use of anonymous witnesses, and in general of *ex parte* evidence, at trial does not really follow the common law *vs.* civil law divide. For instance, the United Kingdom has introduced legislation related to its fight against terrorism that allows detention of foreign nationals on the basis of witness statement and other evidence not disclosed to the individual detained.[59] Other countries have introduced similar provisions, for instance in cases of sexual violence trials; others allow statements given to the police or investigating magistrates to be read into the trial record, without confrontation, when circumstances so require. In this respect, the

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[57] STL RPE Explanatory Memorandum, Nov. 10, 2009, ¶ 35, *available at* www.stl-tsl.org.

[58] Virtually all contemporary international criminal tribunals provide for a non-exhaustive list of measures available to protect witnesses and ensure they are allowed to provide evidence in a secure environment. These include: (i) expunging names and identifying information from the tribunal's public records, (ii) non-disclosure to the public of any records identifying the victim or witness, (iii) the giving of testimony through image- or voice-altering devices or closed circuit television, (iv) assignment of a pseudonym, and (v) closed sessions. An extreme form of protection is relocation of a witness, coupled with in-court protective measures.

[59] See the facts of the case in A. and Others v. UK, no. 3455/05, ECtHR (Feb. 19, 2009).

ECtHR has forcefully stated that where full disclosure of the evidence against a person is not possible (due to national security interest or serious witness intimidation), such restriction on the rights of the accused are nonetheless to be "counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him."[60] The STL Rule in this respect is certainly an exception to the general trend of disallowing anonymous witnesses; it remains to be seen how judges of that Tribunal will be able to apply it in practice abiding by the overarching obligation to ensure a fair trial.

This principle, as seen above, is now at the basis of the procedural system developed by international criminal tribunals, where normally the accused are able to confront witnesses testifying about their alleged criminal conduct[61] – but providing that, if exceptions are established, the evidence thus presented must be corroborated and cannot form the sole basis for conviction. Understanding this principle essential to both common law and civil law countries, *i.e.*, that no one can be convicted solely on the basis of evidence which he had no opportunity to test, allows us also to move into the regime used by international criminal tribunals to admit written evidence into the trial record.

IV. WRITTEN STATEMENTS

While oral evidence was – and to a large extent still is – an extremely important type of evidence before international criminal tribunals, as time has progressed and cases have become more complex, the disadvantages of unnecessarily time-consuming live testimony (often recounting events that have been already discussed in other cases before the same tribunal) have become apparent. In particular, oral evidence has been deemed increasingly unnecessary in interrelated international criminal cases, which deal with the same (or extremely similar) factual bases.

The ICTY and ICTR have therefore introduced over the years a series of provisions to facilitate the admission of written statements of witnesses,[62]

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[60] *Id.* ¶ 218. See also the UK House of Lords ruling in R v. Davis, [2008] UKHL 36, ¶ 25 (Lord Bingham of Cornhill) endorsing the ECtHR approach that "no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses. The reason is that such a conviction results from a trial which cannot be regarded as fair."

[61] This is similar to a long-held position of the U.S. Supreme Court. *See* Turner v. Louisiana, 379 U.S. 466 (1965).

[62] These are non-contemporaneous statements generally produced by a party

while at the same time striving to maintain the adversarial nature of the system and ensuring the fairness of the proceedings. This section discusses the mechanisms for admitting such statements before the ad hoc tribunals (including the SCSL and the STL), and the safeguards embedded in them.

Overall, it must be pointed out that on various occasions tribunals have clarified that less weight is attributed to written statements than to oral evidence presented in court.[63] More importantly, no conviction can be based solely on uncorroborated written statements (or other written evidence, for that matter) if the accused had no opportunity to cross-examine the witness in question.[64] This is an essential principle intended to guarantee that an accused will always be able to challenge the evidence on which a conviction against him might be based.[65] The first of these new Rules (ICTY and ICTR Rules 92*bis*) provides that witness statements (gathered pursuant to certain formal requirements meant to ensure their reliability) or transcripts of previous testimony can be admitted at trial. The Chamber *may*, however, require the witness in question to be present for cross-examination (or questioning by the judges), and *must* do so if the statement or transcript relates to the acts and conduct of the accused as charged in the indictment.[66] Evidence of an accused's "acts and conduct" may, for example, establish (a) that the accused physically perpetrated any of the crimes charged; or (b) that he planned, instigated or ordered the crimes charged; or (c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, perpetration or execution of those crimes; or (d) that he was a superior to those who actually did commit the crimes and (i) he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, and (ii) he

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for submission at trial; their regime, though formally somewhat different at the ICTY and ICTR, is in practice applied very similarly. *See* Chris Gosnell, *Admissibility of Evidence*, *in* Principles of Evidence, *supra* note 40, at 403–04.

[63] *See, e.g.*, Prosecutor v. Naletilić, Case No. IT-98-34-T, Judgement, ¶ 12 (ICTY March 31, 2003).

[64] Prosecutor v. Martić, Case No. IT-95-11-A, Appeal Judgement, fn. 486 (ICTY Oct. 8, 2008).

[65] See also the application of the principle in Prosecutor v. Galić, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), ¶¶ 13–15 (ICTY June 7, 2002) and *Prlić* Decision, *supra* note 11, ¶¶ 53, 59 (ICTY, Nov. 23, 2007).

[66] This of course creates problems if the statement is from the accused himself or from a co-accused who elects not to testify at trial. On this issue, see Sara Luzzati, *On the Admissibility of Statements Made by the Defendant Prior to Trial: Remarks on the ICTY Appeals Chamber's Decisions in* Halilović *and* Prlić et al., 8 J. Int'l Crim. Justice 221 (2010).

failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.[67] Under normal circumstances, witness statements will be admitted without requiring an opportunity for cross-examination if they repeat the evidence of "live" witnesses or if they provide background information that is not pivotal to the prosecution case.

At the ICTY, if a witness is present in court, his previous statements can be admitted even for matters relating to the acts and conduct of the accused, provided that he is *available* for cross-examination and any questioning by the judges, and he *attests* that the statement accurately reflects his other declaration and what he would say if examined.[68] For common law lawyers used to the "show" of witnesses in court, this ICTY rule, adopted in 2006, provides one of the most vivid illustrations of the shift in approach in evidence presentation.[69] On the basis of this provision, examination-in-chief is now of much less significance at the ICTY (because it is usually superseded by mere attestation that a previous statement is accurate), while cross-examination and re-examination are the source of the bulk of the evidence presented before the court. The effect of this is often that the spectators to the proceedings cannot really follow the cross-examination because – unlike the judges – they have not had the chance of perusing the previous statements of the witness in question prior to the hearing. More importantly, the party calling the witness will try to

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[67] The language "acts and conduct of the accused" – though by now established as a fundamental feature of the procedures at the ICTY, ICTR, SCSL, and STL – is unsatisfactory. What the provision in question is meant to ensure, as discussed earlier, is that no conviction be based on untested evidence. Thus, what appears critical is that, under the circumstances of each case, judges are prevented from considering statements containing information essential to the prosecution case – whether or not these relate to the acts and conduct of the accused. Statements regarding the accused's conduct might, for instance, be favorable to the accused and against the prosecution case theory. Moreover, facts unrelated to the acts and conduct of the accused per se can be pivotal to the prosecution case.

[68] ICTY Rule 92*ter*, codified from the case law previously developed (mainly through Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements (ICTY Sept. 30, 2003)).

[69] Several common law jurisdictions nowadays allow a past (or prior) recollection recorded exception to the hearsay rule (*see, e.g.*, U.S. Federal Rules of Evidence 803(5)). A written statement of a witness is admissible under this exception if the witness is present in court, testifies that the statement was accurate when made, and also that he or she has insufficient recollection to testify "fully and accurately" about the matter recorded. The main difference in this case appears to be that before the ICTY (and the STL) there is no need to show that the statement must be used due to memory loss.

have him recount the most important portions of the evidence during re-examination, thus making this part of the evidence longer than one would otherwise expect – and undermining the very essence of cross-examination as the testing ground for examination-in-chief. In a sense, the procedure ensuing after the adoption of Rule 92*ter* is more similar to what occurs in many traditional civil law systems, where the judge already has an understanding of the evidence to be provided by witnesses (through a case file provided by the investigating judge) and the questioning in court merely serves the purposes of testing this information.

Two additional rules provide for the exceptional admission of previous statements. One is ICTY Rule 92*quater* (similar to Rule92*bis*(C) of the ICTR Rules) which deals with a statement (or transcript) of a witness who has died, can no longer be traced, or who is unable to testify orally owing to a bodily or mental condition after providing a statement for the trial, but before appearing in court.[70] Such statements may be admitted even if they relate to the acts and conduct of the accused, but – under the general rule discussed above – it would appear that they could never form the sole basis for a conviction. Sufficient independent corroboration would be required in order to ensure that the accused's right to test the evidence against him is safeguarded.

ICTY Rule 92*quinquies* provides that, in the interests of justice, a Chamber may admit a written statement or a transcript if the witness (i) has failed to give evidence; (ii) the failure to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion; and (iii) reasonable efforts have been made to secure from the witness all material facts known to the witness, by ensuring the necessary protective measures or by other means. This Rule addition was prompted by cases in which trial proceedings were marred by suspicions that witnesses were modifying their testimony or refusing to provide evidence due to improper influence or outright intimidation. In such cases, previous statements are allowed into the record not just to impeach the witness, but for their content. Nonetheless, it would seem that – just like in the case of statements of deceased witnesses – this type of evidence could never form the sole basis for a conviction, because they can never be adequately tested by the accused.

At the ICC, the opportunities for introducing written statements are

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[70] Similarly, see also Rule 158 of the STL RPE, which provides that "[e]vidence in the form of a written statement, any other reliable record of what a person has said, written or otherwise expressed, or transcript of a statement by a person who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally may be admitted . . . ."

somewhat reduced, and the presumption is still that witnesses will give evidence by way of in-court testimony.[71] If the witness is not present in court, a recording or a transcript of the witness's evidence may be admitted if both the prosecution and defense had an opportunity to examine the witness during the recording[72] – even if the statement goes to prove the acts and conduct of the accused.[73] Otherwise, the witness must be present in court in order to be available for questioning.

Another (somewhat marginal) case is when the ICC Prosecutor identifies a "unique opportunity to take testimony or a statement from a witness." In certain instances, under the control of the Chamber, such a statement could be admissible, even if the opposing party was not present when it was taken.[74] The rationale of this approach is clearly that of ensuring the preservation of evidence which could otherwise be lost. However, the ICC regime does not appear to allow the admission of statements that were gathered in situations when the defense was not present or where the witness is not available for questioning in court. Since the ICC does not possess a specific provision for statements of deceased witnesses, it would seem that the general rules on non-admission would apply to such circumstances, too.

In sum, both the ad hoc tribunals and the ICC foresee the possibility, typical of traditional civil law systems, of introducing previous statements of witnesses into the trial record, providing exceptions to the orality principle discussed above. The ICC regime is, contrary to what one might expect, more adversarial than that of the ICTY, the STL and even the ICTR, in that it drastically limits the use of written evidence when the opposing party had no opportunity to test it. Of course, there is no strict requirement that this testing needs to occur during the trial proper, since it can be done in the pre-trial stages of the proceedings (during which ICC defense teams are already active), as long as accused and counsel have a real opportunity to challenge the evidence in question during its gathering.

The other contemporary international criminal tribunals have added a number of exceptions in order to expedite proceedings, and allow written statements or previous transcripts in various circumstances. Instead of

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71 See, for instance, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1140, Decision on Various Issues Related to Witnesses' Testimony During Trial, ¶ 41 (Jan. 29, 2008) (related to video-link testimony but expressing a general principle).

72 Rule 68(a) and (b) of the ICC RPE.

73 Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Decision on Prosecutor's Request to Allow the Introduction into Evidence of the Prior Recorded Testimony of P-166 and P-219, ¶ 19 (Sept. 3, 2010).

74 Article 56 of the ICC Statute.

restricting the type of evidence that is in principle admissible, they impose a heavier burden on the judges at the stage when they will be evaluating the value and relevance of this evidence to the case as a whole, since at that moment the rules on reliability and corroboration will have to be carefully applied.

V. OTHER DOCUMENTARY EVIDENCE

While witness statements and transcripts of previous proceedings are generally gathered and prepared in view of future litigation, a variety of *other documents* may be relevant in criminal trials, such as minutes of meetings, military orders, newspaper articles, forensic and medical reports, personal diaries, photographs and so on.[75] Such material often amounts to tens of thousands of pages tendered into evidence, especially at the ICTY. Indeed, the trend has been that of an exponential increase in the submission of documents before the judges, such that the ICTY is now inundated with this type of evidence.[76] Parties have made somewhat less use of exhibits at the ICTR and ICC, probably owing to the smaller number of documents generated during the conflicts in question and the more limited temporal scope of each case there. In any event, lengthy documents, such as books or other compilations of material, are not usually admitted in full, but rather a selection is usually made of the passages relevant for the given trial.[77]

The general rule at the ad hoc tribunals is that a party may only request the admission of exhibits that have been included on its list of exhibits, filed before the beginning of each phase of trial proceedings proper (although exceptions can be made upon a showing of good cause). This ensures that appropriate notice is given to the opposing party.

As to the modalities of presenting exhibits before contemporary international criminal tribunals, generally speaking the preference is that, as

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[75] On this topic generally, see Marc Nerenberg & Wibke Timmermann, *Documentary Evidence*, *in* PRINCIPLES OF EVIDENCE, *supra* note 40, at 443.

[76] While in the first ICTY case, *Tadić*, a total of 386 exhibits were admitted, the number had already risen to 1,268 in the 2001–2003 trial of *Galić* and then to more than 3,800 in the *Krajišnik* case (2004–2006). *See* the table in Chris Gosnell, *The Changing Context of Evidentiary Rules*, *in* PRINCIPLES OF EVIDENCE, *supra* note 40, at 221.

[77] Prosecutor v. Krajišnik, Case No. IT-00- 39-T, Decision on Admission of Material Sought by the Chamber and Other Exhibits, ¶13 (ICTY July 14, 2006); Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Order on Procedure and Evidence, ¶ 6 (ICTY July 11, 2006).

in traditional common law practice, the party tendering evidence must do so through a witness who is either the author of that piece of evidence, or who can otherwise speak to its origins or content. However, due to what is considered a necessity for the efficient management of complex trials at international criminal tribunals, documentary evidence that is shown to be relevant can be admitted directly from the "bar table."[78]

In both cases, it is of course necessary to allow the opposing party an opportunity to challenge the content of the document and its origin – whether by cross-examination of a relevant witness, or by oral or written arguments.[79] However, it is clear that challenging evidence is more difficult when documents are simply tendered from the bar table. The safeguard in this respect is that judges should exercise exceptional caution when assessing, at the moment of the judgment, the probative value of exhibits submitted in this fashion.

The appropriate way to admit and evaluate documentary evidence was spelled out by the ICTY Trial Chamber in the *Milutinović* case, where thousands of documents were tendered. The Chamber stated that it:

> considered the source of the documents, to the extent known, and did not admit a document if there were substantial doubts as to its authenticity. The Chamber carefully scrutinized the thousands of documents that were tendered, some of which were adduced through a witness, some from the bar table, and others by agreement of the parties. However, the Chamber did not automatically accept the statements contained in admitted documents to be an accurate portrayal of the facts. The Chamber evaluated each and every document admitted into evidence within the context of the trial record as a whole.[80]

VI. JUDICIAL NOTICE

An additional way employed by several international criminal tribunals to shorten the presentation of evidence in the courtroom is to allow

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[78] Prosecutor v. Prlić et al., Case No. IT-04-74-T, Decision Adopting Guidelines for the Presentation of Defence Evidence, ¶ 35 (ICTY Apr. 24, 2008); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on the Prosecution's First Bar Table Motion (ICTY Apr. 13, 2010); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1981, Decision on the Admission from the "Bar Table" (June 24, 2009); Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions (Dec. 17, 2010).

[79] Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Prosecution Motion for Admission of Witness Statement of Investigator Bernard O'Donnell (ICTY Feb. 12, 2004).

[80] *Milutinović*, Trial Judgement, *supra* note 32, ¶ 56 (internal citations omitted).

Chambers to take judicial notice not just of facts of common knowledge,[81] but also of "adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."[82] The procedure has the advantage of dispensing not only with the need of calling additional witnesses or admitting documents to prove a certain fact, but also of assessing the probative value (and in certain instances, even of the relevance) of this evidence. This outcome is premised on the consideration that the fact already adjudicated was thoroughly discussed by another Chamber in another case.

The problematic feature of this procedure – which is generally absent in domestic systems, whatever their tradition – should be evident: the defendant might be faced with a finding made in another case, before different judges and regarding another accused, over which he or she had no control. The case law of the ICTY and of the ICTR has therefore carefully detailed the conditions for this type of judicial notice. Thus, the findings in question must (i) be factual (as opposed to legal characterizations); (ii) be distinct, concrete and identifiable; (iii) have been made during a contested trial (not a plea agreement) and thus form part of a final judgment; (iv) be without any direct bearing on the criminal responsibility of the accused in the case where they are submitted; (v) not be the subject of (reasonable) dispute between the parties in the present case; and (vi) not negatively affect the right of the accused to a fair trial.[83] This last condition allows a Chamber wide discretion in not admitting, for instance, a large amount of adjudicated facts proposed by the prosecution should such an approach endanger the fairness of the proceedings. It is moreover clear that no judicial notice can be taken of facts related to the acts, conduct and mental state of the accused.[84] Moreover, and more

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[81] ICTY Rule 94(A); ICTR Rule 94(A); SCSL Rule 94(A); ICC Rule 69(6); STL Rule 160(A).

[82] ICTY Rule 94(B); ICTR Rule 94(B); SCSL Rule 94(B); STL Rule 160(B) ("adjudicated facts from other proceedings of the Tribunal or from proceedings of national and international jurisdictions relating to matters at issue in the current proceedings, to the extent that they do not relate to acts and conduct of the accused that is being tried"). The ICC does not possess a similar provision.

[83] *See* Prosecutor v. Krajišnik, Case No. IT-00-39-PT, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis* (ICTY Feb. 28, 2003); Prosecutor v. Hadžihasanović, Case IT-01-47-T, Final Decision on Judicial Notice of Adjudicated Facts (ICTY Apr. 20, 2004).

[84] *See, e.g.*, Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision on

importantly, the general understanding is that an adjudicated fact admitted does not constitute definite proof in later proceedings, but is rather a mere *presumption* that the fact in question is proven. The opposing party is therefore free to challenge it during its case through arguments and evidence.

Controversially, through this mechanism, the ICTR has taken judicial notice of the existence of the genocide in Rwanda.[85] However, most instances of judicial notice are rather less problematic, and relate to background facts and/or patterns of criminal behavior that are not directly relevant to the individual criminal responsibility of the accused in question.[86]

VII. CONCLUSION

In the presentation of evidence, international criminal courts and tribunals follow an adversarial approach, tempered by certain principles of civil law origin. It has been remarked that no single national system could by itself provide for how international trials should be conducted due to the "peculiarities and difficulties of unearthing and assembling material for war crimes prosecutions," which call for judicial flexibility.[87] Indeed, despite the fact that most civil law systems today are adding

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Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, ¶ 16 (ICTY June 26, 2007) (and cited references).

[85] Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 35 (June 16, 2006) ("The fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a 'fact of common knowledge.'").

[86] *See, e.g.*, Prosecutor v. Željko Mejakić, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice pursuant to Rule 94(B) (ICTY Apr. 1, 2004) (admitting, inter alia, adjudicated facts related to the "historical, geographical and political background to the conflict in Yugoslavia up to the disintegration of the federation in the 1990s" and the takeover of various towns by Bosnian-Serb formations, "eventually resulting in the displacement of thousands of non-Serbs"); Prosecutor v. Prlić et al., Case No. IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B) (ICTY Mar. 12, 2006) (admitting, inter alia, adjudicated facts related to the background to the conflict but also to the humanitarian conditions in various towns and municipalities in Bosnia-Herzegovina during the indictment period and the relationship between the Croatian army and Bosnian Croat forces fighting there).

[87] Prosecutor v. Kovačević, Case No. IT-97-24-AR73, Separate Opinion of Judge Shahabuddeen, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, pp. 4–5 (ICTY July 2, 1998).

strict sets of exclusionary rules and other rules on the admission and evaluation of evidence typical of common law adversarial approaches, international criminal trials still follow the somewhat older tradition of a flexible and "liberal" approach to the admission of evidence typical of inquisitorial systems, an approach essentially unhindered by specific and technical rules. The need to "shield" a jury from possibly tainted evidence, which created the impetus for devising and refining traditional exclusionary rules at common law, simply does not exist at the international level. The ad hoc tribunals (ICTY and STL in particular, and to a lesser extent ICTR and SCSL) further witnessed a shift away from the original preference for oral evidence in order to expedite proceedings and secure otherwise unavailable evidence through the admission of written statements. Moreover, the judges' role in conducting the examination of witnesses, at times limiting the autonomy of the parties in how evidence is presented, increases the perception that international criminal trials are not fully "adversarial." Such an approach is probably due to the institutional objectives of striving to find the "truth" and of safeguarding the victims' interests[88] by avoiding oppression through unnecessarily harsh cross-examination techniques, similarly to several domestic systems where victims of rape or other serious crimes are granted enhanced protection status.

The main safeguards developed for the lack of detailed exclusionary rules and the admissibility of written evidence consist in the requirements that (i) judges issue their verdicts through reasoned opinions and that (ii) in entering a conviction beyond reasonable doubt, they are banned from relying solely or decisively on evidence which the accused has had no opportunity to test. However, problematic features persist. Notwithstanding the protections developed by international criminal tribunals to ensure that only relevant and reliable evidence is tendered and that a suitable degree of publicity is guaranteed during trial, international judges tend to be flooded with irrelevant and unreliable evidence. This may in turn lead to lengthy delays[89] and, at times, unfair treatment of the accused facing an uphill struggle in understanding the contours of the case

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[88] Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 Chi.-Kent L. Rev. 329 (2008).

[89] In this sense, it is noteworthy that Articles 21 and 28 of the STL Statute require this Tribunal to "confine the trial, appellate and review proceedings strictly to an *expeditious hearing* of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take *strict measures to prevent any action that may cause unreasonable delay*" and to adopt Rules of Procedure and Evidence "with a view to ensuring a fair and *expeditious* trial." *Id.* (emphasis added).

mounted against them. These are challenges international judges must face in order to guarantee lasting legitimacy of the proceedings before them and, ultimately, of the process of international criminal justice as a whole.