INTERNATIONAL CRIMINAL EVIDENCE: NEW DIRECTIONS

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The evidentiary challenges faced by international criminal courts do not resemble those faced by ordinary criminal courts. Some of these were captured in the words of Telford Taylor:

"[The Charter recognizes] the necessity for liberal rules of evidence concerning events transpiring in the Third Reich where the lips of many potential witnesses were sealed by violence and many records have disappeared either by intention or by the fortunes of war. Rules of evidence permitting a full inquiry under such circumstances are often as necessary for the defence as they are for a full presentation of all the surrounding circumstances by the prosecution."\(^1\)

International criminal trials often confront scarcity of probative evidence linking the particular accused to the crimes, but must at the same time adjudicate mass or "system" crimes, which are by definition crimes perpetrated over years and in a wide variety of locations.

It is as a result of these challenges that the practice of international criminal courts in relation to evidence has formed. Although the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) formed their practice without explicit reliance on the experience of the Nuremberg and Tokyo International Military Tribunals, the results were often similar.

In relation to the scarcity of evidence, the Tribunals have responded by formulating flexible rules of admissibility, which allow for evidence of probative value to be admitted regardless of its format, unless the rights of the accused are deemed to be prejudiced. Early decisions of the Tribunals therefore allowed for admissibility of hearsay evidence.\(^2\)

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2 See, for instance, Tadić, Decision on Defence Motion on Hearsay, 5 August 1996. Hearsay evidence was also readily admissible at Nuremberg and Tokyo. A
In relation to the volume of evidence, the practice of the ad hoc Tribunals shows a steady evolution of the search for tools to cope. Here a distinction must be made between the treatment of “crime base” evidence, and evidence relating to the accused’s place in the structure that enabled the perpetration of mass crime. “Crime base” evidence seeks to establish the mass crimes that have occurred. It is in respect of this evidence in particular that the Tribunals have sought the means of expediting the admission of large volumes of evidence laid out below. (Throughout, differences in approach between the ICTY and ICTR will be emphasized.)

A. Departure from Principle of Orality

The modern trials before the ICTY and ICTR differ significantly from the historical trials in their reliance on live testimony. Originally the Rules of both Tribunals expressed a preference for live evidence in Rule 90 (A): “witnesses shall, in principle, be heard directly by the Chambers.” However, there can be no doubt that hearing large numbers of live witnesses has contributed to the length of trials. This led the ICTY, some years into its existence, to delete Rule 90 (A) in favour of a new rule (Rule 89 (F): “[a] Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.” This rule facilitated the passage of other rules allowing for the admission of evidence in written form. The ICTR, on the other hand, maintains the reference to the principle of orality in Rule 90 (A) but has also adopted new rules allowing for the admission of evidence in the form of written statements.

B. Limiting the Number of Witnesses or Imposition of Time Limits

One way the Trial Chambers have sought to curb the number of live witnesses in any given case is by (1) imposing a time limit on the prosecution to present its case; or (2) imposing a limit on the number of witnesses, or calling on the parties to reduce time spent on examination-in-chief. These measures are usually a matter of controversy and in Mladić, the prosecution appealed a Trial Chamber ruling to impose a 14-month time limit on the presentation of its case, arguing that this

similar approach will be taken by the International Criminal Court, the Trial Chambers of which have powers to rule on relevance or admissibility of evidence, taking account of its probative value and any prejudice it may cause to a fair trial or to a fair evaluation of the testimony of a witness: ICC Statute, Article 69 (4).

ICTY/R Rules 73 bis and ter (D) grant Trial Chambers powers to call upon the prosecution or defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called upon to prove the same facts.

ICTY/R Rules 73 bis and ter (C).