Excluding justice or facilitating justice? International criminal law would benefit from rules of evidence

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Abstract This article argues that some rules of evidence would enhance trials before international criminal courts and tribunals. Beginning with the Nuremberg Tribunal, the assumption has been made that rules of evidence are useful only in the context of common law jury trials, and can have no function in international trials before a bench of judges from diverse jurisdictions. But actual experience at the ICTY suggests that rules of evidence would shorten and simplify international trials, would offer protection against the inherent dangers of perjury and fabrication, and would enhance the truth-seeking function.

‘Evidence is the basis of justice; to exclude evidence is to exclude justice.’
Jeremy Bentham, Rationale of Judicial Evidence, Book VIII, Chapter III

The challenge of international criminal trials

The explosion of activity in the field of international criminal law in the space of little more than a decade has changed the face of criminal trials. No criminal practitioner, whatever his or her length of experience, can participate in a trial in an international criminal court or tribunal confident in the knowledge that past experience will be a reliable guide in this new crucible of...
trial practice. 1 The purpose of this article is to examine attitudes to rules of evidence (in the common law sense) in this new paradigm; and to question the assumption that has apparently been made, namely that exclusionary rules of evidence can play little, if any, useful role in international criminal law. 2 I suggest that that belief, though widely held, is inconsistent with the actual experience of international criminal practice. The indiscriminate admission of any and all material claimed to be evidence, far from being the only means of promoting a successful search for the truth, tends to bury the genuinely probative evidence in a vast accumulation of evidential debris, resulting in long and inefficient trials, and frustrating rather than facilitating the task of judges trying to establish the truth. For the purpose of this article, I will focus on the jurisprudence and practice of the ICTY, which has so far been the most important source of decisions in this area. 3 I will begin by outlining the development of international criminal law, and the particular challenges posed in terms of evidence by trials in international courts and tribunals.

The first international criminal trials, in the sense of trials conducted by an internationally created court staffed by judges from different countries, and with the accused charged with crimes defined and developed by the international community, were the trials of the Axis war criminals after the Second World War. 4 The International Military Tribunal at Nuremberg (IMT) was established by charter, which came into force on 8 August 1945 as a result of the London Agreement of the four Allied Powers (the United States, the United Kingdom, France, and the Soviet Union). The IMT itself tried only a small number of those in the highest leadership positions on charges of conspiracy, crimes against the peace, war crimes and crimes against humanity. 5 Subsequently, subsidiary Allied

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1 An American colleague adopted as his maxim during his first ICTY trial the immortal line from the Wizard of Oz, ‘Toto, I don’t think we’re in Kansas any more’. It sums up the experience quite well.
3 Access to the ICTY cases referred to in this article, including indictments, judgments, interlocutory decisions and other public proceedings, is readily available via the ICTY website: http://www.un.org/icty, accessed 24 October 2007. From the home page, go to 'ICTY Cases and Judgements'.
4 Previous proposals to conduct trials of war crimes in an international, as opposed to a domestic, forum had been frustrated by political considerations, the best known example being the unsuccessful efforts to prosecute the Kaiser after the First World War. For a brief overview of the historical development of international criminal jurisdiction, see May and Wierda, above n. 2 at 1.09 et seq. See also C. M. Bassiouni, Crimes against Humanity in International Criminal Law (Kluwer Law International: Amsterdam, 1999) 528 et seq.; Telford Taylor, Anatomy of the Nuremberg Trials (Little Brown: Boston, 1992).
5 The model of the IMT was followed, with far less satisfactory results, in the International Military Tribunal for the Far East (IMTFE), which sat to try the highest-ranking offenders of the Japanese Empire commencing in May 1946.
military tribunals, established by the Allied Powers individually, tried a much larger number of lower-ranking offenders for a variety of offences pursuant to Control Council Law No. 10. The most notable feature of the IMT for present purposes was that the judges were drawn from each of the Allied Powers, with the result that, for the first time in history, a court sat with a bench comprised of judges who not only spoke different languages, but came from diverse legal systems and held different sets of jurisprudential assumptions, specifically assumptions about the nature and uses of evidence.6 This clash of jurisprudential cultures has influenced the treatment of evidence in international criminal law ever since. After Nuremberg, despite a great deal of progress in the development of international humanitarian law,7 and despite ongoing discussion of the creation of a permanent international criminal court,8 no other international criminal tribunal sat until the ICTY. The ICTY was established as an ad hoc tribunal by the UN Security Council to try ‘persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991’.9 The Statute of the Tribunal confers on it jurisdiction, within those temporal and territorial limits, to try grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, genocide (including related inchoate crimes) and crimes against humanity. The judges of the ICTY are elected by the General Assembly from candidates nominated by Member States of the UN and selected by the Security Council.10 So, as in the case of the IMT, they come from a variety of national, cultural, and jurisprudential backgrounds. The ICTY was quickly followed, in 1994, by a sister Tribunal, the ICTR, to try the perpetrators of the genocide committed in Rwanda earlier that year.11 The creation of the two UN ad hoc tribunals and the end of the Cold War gave renewed impetus to the movement to establish a permanent international criminal court. In July 1998, some 120 States became parties to the Rome Treaty, which created the

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6 Evidence was not the only point of conflict in this cross-cultural judicial encounter. Theories of individual criminal responsibility in the context of the crimes charged also gave rise to many problems. The common law concept of conspiracy, though incorporated into Article 6 of the Charter, caused particular anxiety to the French Judge Donnedieu de Vabres: see on this topic E. van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (TMC Asser Press: The Hague, 2003) 17 et seq.

7 As witness the adoption of the Genocide Convention of 1948, the Universal Declaration of Human Rights 1948, the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights 1966, the Convention against Torture 1984, etc.

8 The idea of such a court was revived after the Second World War, but political considerations, including Cold War politics, held it back for many years. On assignment by the UN General Assembly, the International Law Commission drafted both a code of offences and a statute for a permanent court, but neither was adopted.


10 ICTY Statute, Article 13 bis.

International Criminal Court (ICC). The ICC formally came into existence with effect from 1 July 2002, when a sufficient number of the States Parties had ratified the Treaty. The ICC has jurisdiction over offences of genocide, crimes against humanity, war crimes, and the crime of aggression, committed after 1 July 2002. The judges of the ICC are elected by the Assembly of States Parties from candidates nominated by the States Parties, resulting, once again, in a clash of jurisprudential cultures, not least in the field of evidence.\textsuperscript{12}

Trials of charges of genocide, war crimes, crimes against humanity, and other crimes subject to the jurisdiction of international courts and tribunals present difficult challenges with respect to obtaining, managing, and presenting evidence. The temporal and territorial scale of the offences, the number of victims and witnesses, the immense quantities of documents retrieved by investigators, and the detailed background of political, social, and military matters often relevant to these charges create a level of complexity which dwarfs any domestic criminal proceedings, even the most complicated fraud cases. The universe of arguably relevant evidence, including the almost limitless galaxies of background evidence the admissibility of which could be justified on a \textit{res gestae} theory,\textsuperscript{13} often defies all conventional notions of where evidential boundaries should be placed in a criminal trial. There is no precedent for such an expansive approach to prosecutions in domestic proceedings. In certain cases before the ICTY, for example, the Prosecution has alleged that the motivation for the widespread ‘ethnic cleansing’ committed by Bosnian Serb and Bosnian Croat perpetrators in various parts of Bosnia and Herzegovina was the creation of a ‘Greater Serbia’ or ‘Greater Croatia’.\textsuperscript{14} The proof of this desire for territorial aggrandisement has been made to depend on extremely detailed evidence about such matters as the historical rivalry between the three constituent nations recognised by the law of the Former Yugoslavia (the Serbs, Croats and Muslims); the historic borders of the constituent Republics of the Former Yugoslavia; and political machinations over many years, not only in Bosnia and Herzegovina itself, but also in Belgrade and Zagreb. This elaborate set must be assembled and constructed before the many actors in the drama itself take the stage to talk about the many and widespread crimes which

\textsuperscript{12} The growing acceptance of international criminal trials as a means of dealing with the most serious offenders in the field of international humanitarian law has spawned a number of special courts which, while not wholly international in character, have been established in a particular State with an international judicial presence. These include the Special Court for Sierra Leone, the Special Crimes Panels in East Timor, and the War Crimes Chamber of the Constitutional Court of Bosnia and Herzegovina.

\textsuperscript{13} For the admissibility of evidence as background evidence under the \textit{res gestae} principle in English law, see \textit{Murphy on Evidence}, 10th edn (Oxford University Press: Oxford, 2007) 2.7.

\textsuperscript{14} See e.g. the indictments in \textit{Plavšić and Krajnišnik} (Case No. IT-00-398-0) (Bosnian Serbs); and \textit{Prlić et al} (Case No. IT-04-74) (Bosnian Croats).
can be committed in the course of even a modest military or paramilitary campaign.

To this unparalleled level of complexity must be added the difficulties of trying to reconstruct past events when many of the victims are dead, many others hugely traumatised, and yet others too fearful to come forward; when many relevant documents have been destroyed or hidden away; when the sheer mechanics of prosecution result in trials taking place at least a decade after the events in question; and when the Prosecution and the Tribunal itself may regard one of the objects of the trial as the compilation of a complete record of everything that happened during the conflict, as opposed to simply securing the conviction or acquittal of individuals accused of offences.\textsuperscript{15} These factors demand a new and more sophisticated approach to the management and admissibility of evidence, the precise details of which remain to be determined.

**Rules of evidence in international criminal law**

As a starting point, it is instructive to examine the process by which rules of evidence have been adopted for use in international courts and tribunals. One thing that strikes the common law observer immediately is the absence of a separate body of rules of evidence. Such rules of evidence as there are form part of an integrated set of rules of procedure and evidence, suggesting the civil law attitude that evidence is essentially a matter of procedural concern rather than a subject in its own right.\textsuperscript{16} The rules are concerned with the production, form, and management of evidence rather than its admissibility. Overall, it seems fair to say that very little attention has been paid to the possibility of adopting rules of evidence in the common law tradition dealing with admissibility. The Charter of the IMT, which has served as a model for later provisions, reflects this position.

\textsuperscript{15} There has been a certain ambivalence at the ICTY about the goal of making a record of the conflict. While it has featured in public statements by the Prosecutor, and while concerns about the record-making function of the Tribunal delayed the introduction of a procedure for plea-bargaining for several years, the Chambers have generally confined themselves to deciding whether the accused before them are guilty of the offences charged: a point sometimes made clear in express terms: ‘... [T]he primary task of this Trial Chamber was not to construct a historical record of modern human horrors in Bosnia and Herzegovina. The principal duty of the Trial Chamber was simply to decide whether the six defendants standing trial were guilty of partaking in this persecutory violence or whether they were ... not guilty’ (Kupreškić (Case No. IT-95-16-T), Trial Judgment, 14 January 2000, para. 756). But the novel provision of the Rome Statute of the ICC permitting input at trial from victims (Article 68) may result in a very different approach in trial proceedings before the court.

\textsuperscript{16} For more detailed discussion of whether the law of evidence should be interpreted within particular procedural contexts, see P. Roberts and A. Zuckerman, *Criminal Evidence* (Oxford University Press: Oxford, 2004) ch. 2.
exactly. No rules were adopted in the course of preparatory work. Instead, the Charter left the drafting and adoption of the necessary rules to the prosecutors and the judges respectively. Article 13 of the Charter provided:

The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this charter.

Article 14(e) delegated the drafting exercise to a committee composed of the four chief prosecutors. The draft rules were to be submitted to the judges for adoption, and the judges were empowered to accept the prosecutors’ draft with or without amendments, or to reject them. But Article 19 of the Charter could have left the prosecutors in no doubt as to the general contours of the rules they were expected to produce:

The 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 have probative value.\(^{17}\)

The rules drafted by the prosecutors and adopted by the judges on 29 October 1945 were true to the dictates of Article 19. The IMT’s rules of procedure consisted of a total of 11 rules. Specifically evidential provisions were restricted to those dealing with prosecution disclosure (Rule 2); the production of evidence by the defence (Rule 4); testimonial oaths (Rule 6); and constituting the trial record and admitting exhibits (Rules 9 and 10).

This concise but seminal set of rules has several notable features. One is the delegation of the essentially legislative function of making the rules to the very judges who were to apply them, a practice that was to be repeated with some modification at the ICTY. The theoretical objections to this way of doing things (as opposed to having the rules prepared independently of the judges by a

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\(^{17}\) The Charter contained two other specific provisions dealing with evidence. Article 20 provided that the Tribunal might require to be informed of evidence before it was offered, so that it could rule on its relevance. Article 21 provided that judicial notice was to be taken of ‘facts of common knowledge’, and of official government documents, reports of the United Nations, acts and documents of national committees for the investigation of war crimes, and the records of military or other tribunals. Article 13(a) of the Charter of the IMTFE had the same provision as Article 19 of the IMT Charter, with the addition that ‘all purported admissions or statements of the accused’ should be admissible. Article 13(c) provided a list of specific items of documentary evidence which were to be admissible, including signed statements and depositions. For more detail on this and provisions of other military courts and tribunals, see May and Wierda, above n. 2 at 94 et seq.
preparatory commission and adopted by the founding parties, as happened at the ICC) are fairly obvious. Morris and Scharf identify four advantages of the IMT model, though it must be noted that not all of these apply to the ICTY. First, only a limited time was available within which to establish the Tribunal and put it to work. It was seen as vital for the Tribunal to begin its work without delay. This was true also of the ICTY: the war in the Former Yugoslavia was continuing as the Tribunal was set up in May 1993, and there was a real urgency in drawing the attention of the combatants to the fact that the Tribunal had been created and was starting work. Secondly, at the IMT, there was a very limited input on the subject from States and other concerned parties to provide a starting point for the rules. This was not true at the ICTY, which received various drafting proposals both from States and NGOs, several of which were detailed and comprehensive. Thirdly, procedural rules vary greatly as between national jurisdictions, and are technical in nature, making discussion and agreement difficult. This would probably have been a serious problem at the IMT, but at the ICTY, probably not: the judges had access to a great deal of expert assistance, in addition to the input mentioned above. Fourthly, the judges could be relied on to have a special expertise in the area of procedure, and delegating the adoption of the rules to them was the most efficient way to resolve foreseeable difficulties.

Two of the four States represented on the committee of chief prosecutors and among the judges, the United Kingdom and the United States, were common law jurisdictions with highly developed systems of exclusionary rules of evidence. It seems surprising on the face of it that some rules of evidence in the common law tradition were not adopted, or at least considered for adoption. The most common explanation for the absence of exclusionary rules of evidence at the ICTY and the ICC, as well as before the IMT, is that juries were not to be employed. Judges and lawyers from civil law jurisdictions are fond of linking the need for rules of evidence to the use of juries. But that is not the most compelling reason. The common law rules of evidence were never confined to jury trials. Many rules were linked to the rules of special pleading, or were attributable to the contemporary judicial paranoia over perjury and forgery, and had nothing to do with juries. The major rules of criminal evidence were of particular relevance to jury trials, but their rationale was the broader issue of fairness to the accused. These rules were fashioned by 18th and 19th century judges, who were determined to offer some measure of protection to the accused within a draconian system of criminal justice, in which the odds were, procedurally speaking, stacked against

him. The adoption of English rules of evidence in America reflected similar concerns. In the context of the post-World War Two war crimes trials, however, the need to try a large number of accused quickly and efficiently predominated over concerns for the rights of the accused. It should not be overlooked that in the eyes of many, the accused were fortunate to be given a trial at all, as opposed to being summarily executed. There is no reason to doubt that the judges were confident in their own ability to be fair within the confines of the new system of trial they were called on to implement. But there is no indication of any contemporary consciousness of the possible role of rules of evidence in protecting the rights of the accused at the IMT. Indeed, it seems clear that no one, not even the common lawyers, seriously advocated the adoption of exclusionary rules of evidence along common law lines for that purpose. Even if they had, they would probably have concluded that the task of selling the idea to their colleagues from France and the Soviet Union was too daunting. A less technical approach had to be adopted. Procedural rules could be relied on to offer some protection to the accused, and procedural rules transgressed fewer cultural boundaries.

Naturally enough, the precedent of Nuremberg loomed large in the creation of the ICTY, when once again, time was of the essence, and when the Security Council had to confront the likelihood that a large number of accused would have to stand trial for wide-ranging and complex offences. Nuremberg has influenced every aspect of the ICTY’s jurisprudence, and the rules of procedure and evidence are no exception. Article 15 of the ICTY’s Statute follows the basic Nuremberg model of allowing the judges to adopt their own rules:

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

The Statute was adopted by virtue of Security Council Resolution 827 (1993) on 25 May 1993. Draft rules were prepared under the auspices of the Secretariat and working groups. It was not a lengthy process. The draft rules were debated and finalised during the first and second plenary sessions, between November 1993

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19 Space precludes detailed discussion of this topic here. But it may be noted that in an age when most, and during certain periods all, felonies were capital crimes, the accused suffered from huge procedural disadvantages. He was not allowed representation by counsel in felony cases until 1836, and was incompetent to testify in his own defence until 1898. See generally Murphy, above n. 13 at 1.5 et seq.

20 Not surprisingly, the judges also assumed continuing responsibility for amendments to the Rules: see Rule 6.
and February 1994, and were adopted by the judges on 11 February 1994. But despite tight time constraints, the judges received a considerable amount of input from States and NGOs, including, most notably, comprehensive draft rules from the United States and (separately) from the American Bar Association (ABA). The submission of the United States was based on the view that the ICTY Statute had established a ‘modified adversarial system’, and that it was necessary to achieve a balance between the common law and civil law approaches. Its draft rule 25, the wording of which clearly owed much to the Federal Rules of Evidence, dealt with proposed rules of evidence. The proposal included a rule of limited admissibility in joint trials of more than one accused; a rule dealing with judicial notice; a general principle that all relevant evidence should be admissible subject to an exclusionary discretion for good cause, if admitting the evidence would be cumulative or would cause delay; a general principle in favour of primary documentary evidence (a modified best evidence rule); and a general rule that hearsay should be admissible subject to sufficient indicia of reliability, and provided that the interests of justice and the accused’s right to a fair trial would not be undermined. Argentina advocated that evidence should not be excluded on the ground of the manner in which it was obtained, unless obtained by a serious violation of human rights, including torture. Canada proposed that in cases of sexual assault, no corroboration of the victim’s evidence should be required, and advocated the development of standards for the admissibility of hearsay and similar fact evidence. Helsinki Watch strongly recommended that no ‘ex parte affidavits’ should be admitted in substitution for live testimony by a witness because of the effect on the right of confrontation; and advocated the adoption of a rape-shield provision.

21 IT/14, 17 November 1993.
23 The ABA’s proposal would have added to this a specific rule limiting the admissibility of confessions as evidence against the maker only (IT/INF 6, Rev 2, para. 25).
24 This principle seems to have been almost the only area of general agreement (cf. submission of the Lawyers Committee for Human Rights, IT/INF 4, 19 November 1993). The ABA would have added, following the traditional common law exclusionary discretion, the discretion to exclude where the probative value of the evidence was outweighed by the danger of unfair prejudice (above n. 22 at para. 31).
25 Other proposals by the United States included a rule of optional completeness; and rules dealing with expert witnesses; prior sexual conduct of the victim in sexual assault cases; legal professional privilege; and confessions.
26 IT/4, 6 November 1993.
27 IT/15, 29 November 1993.
Evidence at the ICTY

Proceedings of plenary meetings are confidential, and to my knowledge, no record of the judges’ discussions of the draft rules is publicly available. This is rather frustrating, particularly as the statement made by the President of the Tribunal, Judge Antonio Cassese, on the occasion of the adoption of the rules is, to say the least, enigmatic. It certainly sheds little light on the judges’ discussions. But it seems to be a safe inference that the adoption of a detailed system of rules of evidence was never a serious possibility. Judge Cassese begins with a general assertion that the judges had tried to: ‘capture the international character of the Tribunal by adopting only measures on which there is a broad consensus of agreement, thus, we hope, reflecting concepts which are truly recognised as being fair and just in the international arena’. He adds that the judges have also attempted to: ‘strike a balance between the positivist and innovative approaches to the interpretation of our founding Statute and the customary international law it reflects’. After a brief acknowledgement that the judges had found little in the way of precedent to guide them in the ‘rudimentary’ rules of Nuremberg and Tokyo, Judge Cassese then moves to the question of the adversarial versus the inquisitorial approach. His words on that subject are quite remarkable and worth quoting at a little length:

Based on the limited precedent of the Nuremberg and Tokyo trials, and in order for us, as judges, to remain as impartial as possible, we have adopted a largely adversarial approach to our procedures, rather than the inquisitorial approach found in continental Europe and elsewhere ...

However, there are two important adaptations to that general adversarial system. The first is that, as at Nuremberg and Tokyo, we have not laid down technical rules for the admissibility of evidence. I have been told that the common law rule of thumb is: ‘all relevant evidence is admissible unless it is inadmissible’. When I remarked that that was somewhat unclear to me and not very helpful, I was told that was the point! Be that as it may, this Tribunal does not need to

29 Statement by the President at a Briefing to Members of Diplomatic Missions concerning the Adoption of the Rules of Procedure and Evidence of the ICTY (IT/29, 11 February 1994).

30 I was fortunate enough, for the purposes of this article, to be granted an interview with Judge Gabrielle Kirk McDonald, the first American Judge at the ICTY (and later its President), who took part in the discussions at the first plenary meeting. Though she could not divulge details of the judges’ discussions, Judge McDonald confirmed her own view that detailed rules of evidence were unnecessary at the ICTY, given the system of non-jury trial.
shackle itself to restrictive rules which have developed out of the ancient trial by jury system. There will be no jury sitting at the Tribunal, needing to be shielded from irrelevancies or given guidance as to the weight of the evidence they have heard. We, as judges, will be solely responsible for weighing the probative value of the evidence before us. All relevant evidence may be admitted at this Tribunal unless its probative value is substantially outweighed by the need to ensure a fair and expeditious trial. An example of this would be where the evidence was obtained by a serious violation of human rights. [original emphasis]

Secondly, the Tribunal may order the production of additional or new evidence *proprio motu*. This will enable us to ensure that we are fully satisfied with the evidence on which we base our final decisions and to ensure that the charge has been proved beyond reasonable doubt. It will also minimize the possibility of a charge being dismissed *on technical grounds for lack of evidence*. We feel that, in the international sphere, the interests of justice are best served by such a provision and that the diminution, if any, of the accused’s rights is minimal by comparison. [emphasis supplied]

It is difficult as a common lawyer not to find these words profoundly disturbing. There are four reasons for concern. First, Judge Cassese’s dismissive attitude to the common law mode of trial, including his assumption that rules of evidence have no useful role outside the ‘ancient’ (the implication being antiquated and obsolete) system of jury trial. Secondly, his assumption that the rights of the accused are diminished only minimally, if at all, by permitting the Tribunal to take the initiative in producing new or additional evidence without reference to the parties. Thirdly, his failure to realise that this is not an ‘adaptation’ of the adversarial system, but its replacement by an essentially inquisitorial system. Lastly, his characterisation of a lack of evidence as a ground for dismissing a charge as ‘technical’. Indeed, it is tempting for a common lawyer to cite Judge Cassese’s words as strong evidence of the continuing need for juries. Be that as it may, there can be no doubt that the spirit of his statement has dominated both the drafting and the application of the ICTY’s evidential rules.

The ICTY’s rules of evidence are contained in Part Six, Section 3, of the Rules of Procedure and Evidence. As one would expect, based on the preceding potted history, they are (by common law standards) concise and rudimentary, although
not quite so minimalist as those. These Rules have very little to say on the subject of admissibility. The general principles are stated in Rule 89:

(A) A Chamber shall apply the rules of evidence set forth in this Section and shall not be bound by national rules of evidence.
(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the [ICTY] Statute and the general principles of law.
(C) A Chamber may admit any relevant evidence which it deems to have probative value.
(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
(E) A Chamber may request verification of the authenticity of evidence obtained out of court.
(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

The most important of the remaining rules of evidence may be briefly summarised. Rules 90, 90 bis, and 91 are concerned with the mechanics of testimony. Rule 90 governs the conduct of the examination of witnesses, which will be familiar to any common law practitioner, particularly in England. It deals with the solemn declaration to be made by witnesses before testifying, the scope of cross-examination and re-examination, and the exclusion from the courtroom of witnesses prior to testifying. Rule 92 provides that a confession given by the accused during questioning by the Prosecutor shall be presumed to be free and

31 The same is true of the Rules of Procedure and Evidence of the ICC. I regret that space does not permit me to say more about the ICC, particularly as the rules came into being under what I would see as more auspicious circumstances, i.e. they were drafted by a preparatory commission and adopted by the Assembly of States Parties rather than the judges. The rules were adopted in September 2002. Nonetheless, it does not appear that there was ever any realistic possibility of significant rules of evidence in the common law sense being adopted. For details of the Rules, see the court’s website, http://www.icc-cpi.int; and for the work of the preparatory commission, see http://www.un.org/law/icc/asp/asfpra.htm; http://www.un.org/law/icc/asp/asprecs/asp_1stsession.html; http://www.un.org/law/icc/asp/asp_1stsession/report, all accessed 24 October 2007.
32 Articles 20(1) and 21(2) of the Statute enshrine the right to a fair trial.
33 This is a variant of a familiar discretionary exclusionary rule found in England in s. 78 of the Police and Criminal Evidence Act 1984, and in the United States in Federal Rule of Evidence 403 and comparable state rules. Rule 89(D) is supplemented by Rule 95, which permits the exclusion of evidence, ‘if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to and would seriously damage the integrity of the proceedings’.
34 This summary is of the rules, not as originally drafted, but as in force with amendments up to and including those adopted at the plenary meeting of 13 September 2006.
voluntary provided that the provisions of Rule 63, guaranteeing the accused’s right to counsel and a tape-recorded interview, were strictly complied with. Rule 92 bis, ter, and quater, read in conjunction with Rule 89(F), provide for the admission of the evidence of witnesses, in some cases in the form of written statements or transcripts of testimony given in other proceedings. Rule 93 provides that evidence of a ‘consistent pattern of conduct relevant to serious violations of international humanitarian law’ may be admitted in the interests of justice.® Rule 94 provides for judicial notice of ‘facts of common knowledge’, and of adjudicated facts and documentary evidence from other proceedings in the Tribunal which relate to matters currently in issue. Rule 94 bis deals with expert witnesses and the disclosure of expert evidence. Rule 96 makes provision for evidence in cases of sexual assault.® Rule 97 preserves the attorney–client, or legal professional privilege.

The ICTY’s jurisprudence on evidence fully reflects the spirit of Judge Cassese’s statement of 11 February 1994, in the sense that, though paying lip service to the adversarial nature of the Tribunal’s proceedings, it treats evidence much more in accordance with the civil law tradition of free proof. Without purporting to make a comprehensive survey of all the ways in which the treatment of evidence by the ICTY differs from the common law adversarial model, two particularly revealing aspects of ICTY practice merit extended critical commentary, for two reasons. First, these two examples do indeed depart from the common law model. Secondly, in my view, far from furthering the search for truth through free proof, they actually frustrate their objective by making trials longer, more complex, and less efficient, and by tending to bury the truly important evidence in the midst of an enormous accumulation of evidential debris. My two illustrations are: (1) the unquestioned admission of hearsay of any degree without any requirement of indicia of reliability; and (2) the indiscriminate admission of documentary evidence without any threshold evaluation of authenticity.®

® The intended application of this rule is unclear. I am not aware of a case in which it has been used. It may be intended to be similar in effect to US Federal Rule of Evidence 406, which provides for evidence of ‘habit or routine practice’ to prove a particular event in issue by reference to relevant past habitual conduct.

® The most important provisions of this rule are that there is to be no requirement for corroboration of the victim’s testimony; that consent may not be offered as a defence if the consent was obtained by violence, duress, etc. or the threat thereof; and that evidence of the victim’s prior sexual conduct is inadmissible.

® Space does not permit analysis of an important subset of hearsay evidence at the ICTY, namely the routine admission of the evidence of witnesses in the form of written statements or transcripts of testimony given in other cases, under Rule 89(F), Rule 92 bis, and the recently enacted Rule 92 ter and quater. This is a subject of manifest importance, but to do it justice would require another article.
Admission of hearsay without indicia of reliability

There is no mention of hearsay in the ICTY’s Rules of Procedure and Evidence, and the suggestion that any special legal rule should apply to hearsay was peremptorily dismissed at an early stage in the life of the Tribunal. The position has been made abundantly clear in a number of decisions. The Tribunal is not bound by national rules of evidence, including the rule against hearsay. The indicia of reliability of a particular piece of evidence may affect its probative value, but the practice is to admit the evidence and allow the members of the Trial Chamber, as professional judges, to give it such weight as the judges think it merits. This may be done *a posteriori* in the light of other evidence admitted, and in the context of the case as a whole. It may be proper to accord hearsay less weight than other evidence, depending on the provenance and characteristics of a particular piece of evidence. Much the same view had previously been taken at the IMT and the IMTFE. Although the rule against hearsay is often seen as one of the distinguishing characteristics of the common law tradition most radically different from the civil law tradition, the need for a general exclusionary rule against hearsay has been powerfully questioned even in the common law context. In England, the rule against hearsay has undergone radical reform in recent times. It has been relaxed considerably in criminal cases, and in civil cases, it is now dealt with, using the continental approach, as an issue of weight rather than admissibility. In the United States, although the rule nominally remains in full force, it has been diluted by so many exceptions that it is doubtful whether the rule itself or its exceptions now represent the

38 *Tadić (Case No. IT-94-1), Decision on Defence Motion on Hearsay*, 5 August 1996.
39 Ibid.; and see the separate opinion of Judge Stephen in that case; *Aleksovski (Case No. IT-95-14)*, *Appeals Chamber Decision on Admissibility of Evidence*, 16 February 1999; *Blasčić (Case No. IT-95-14), Decision on Standing Objection of Defence to Admission of Hearsay with No Inquiry as to Reliability*, 21 January 1998; for the analogous position at the ICTR see *Musema*, Judgment and Sentence, 27 January 2000, para. 51.
40 *Trial of Major War Criminals (IMT) vol. VII at 14; Judgment of the IMTFE, dissenting opinion of Judge Pal*, 630.
41 ‘Juries are credited with the ability to follow the most technical directions in dismissing evidence from consideration, while at the same time they are of such low-grade intelligence that they cannot, even with the assistance of the judge’s observations, attach the proper degree of importance to hearsay’: Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd edn (1963) 207. A number of American studies of actual and ‘mock’ juries suggest that juries can in fact do this quite well, and that they may even tend to accord less weight to hearsay than lawyers: S. Landsman and R. F. Rakos, ‘A Preliminary Empirical Inquiry concerning the Prohibition of Hearsay Evidence in American Courts’, 15 Law & Psychol Rev 65; M. Bull Kovera, R. C. Park and S. Penrod, ‘Jurors’ Perceptions of Hearsay Evidence’ (1992) 76 Minn LR 683.
42 *Criminal Justice Act 2003, Part 11, Chap. 2; Civil Evidence Act 1995*. For a concise account of the history of these reforms, see generally, Murphy, above n. 13 at 3 et seq.
general principle. Consequently, it may be doubted whether the two approaches are as far apart today as is often assumed. Certainly, jurors, just as much as professional judges, are accustomed to evaluating hearsay in many situations in their everyday lives, and it is not difficult to explain to them that hearsay must often be treated with a degree of caution. On the face of it, therefore, it might seem that the approach taken by the ICTY cases has much to commend it, being not too far removed from the emerging approach in the contemporary common law world. But this view ignores a very important consideration.

In the context of trials for crimes arising from armed conflict, there is a particularly acute danger of perjury and fabricated evidence. Victims and other witnesses associated with one party to the conflict often have a considerable interest, political or emotional, in the conviction of an accused associated with another party. A tribunal such as the ICTY may be seen by one party as a vehicle for continuing the conflict, both substantively and as a form of propaganda; by another as an instrument of oppression in the hands of an opponent; and by a third as evidence that the international community has taken sides against it in the conflict. Revenge and personal animosity are motivations for testifying at least as common as the desire for justice. These and other considerations make the ICTY a fertile breeding ground for false and exaggerated evidence.

Throughout its life, the ICTY has been dogged by suspicions, not only of individual cases of perjury and fabrication, but of the institutional manufacturing of evidence, subornation of perjury, concocting of ‘coordinated’ accounts of relevant events, and ‘coaching’ of witnesses. These suspicions have not progressed to any level approaching proof, but their persistence should be enough to make any judge uneasy. Even if they are ill-founded, it is unquestionably true that the Bosnian Serbs, Croats, and Muslims each have their own collective versions of the history of the conflict and the facts of individual cases. These versions assume, within these groups, the mantle of truth. They are not negotiable, and have been propagated and rehearsed for years. It must be difficult even for the most honest and well-intentioned witness to remain unaffected by them. Individual accounts

43 For example, Rules 803 and 804 of the Federal Rules of Evidence currently contain a total of 28 exceptions to the rule against hearsay. In addition, Rule 807 provides a ‘residual exception’ for evidence which is not specifically covered by any of those 28 exceptions, but which has ‘equivalent circumstantial guarantees of trustworthiness’ (albeit subject to a number of other stringent conditions).

44 For example, suspicion has attached to the now defunct ‘Office of Legal Aid’ in Mostar, and even to the former government of the Republic of Croatia: see Blaškić, Prosecution Request for Review and Reconsideration, Public Redacted Version, 10 July 2006, para. 78 and Annex 10.
of events are inevitably coloured by these nationalistic histories. Yet even in this environment, the judges are extraordinarily tolerant of the most attenuated hearsay. It is common to hear a witness, in reply to a question about what happened to his friend in the detention camp, say something like: ‘Well, I don’t know myself. I never saw my friend again after he was arrested. But another friend told me that he heard from his brother that a man who was detained with my friend told him that my friend was regularly beaten’.

I have to say that if I were a judge under these circumstances, I might actually welcome some form of more structured protection against the risk of exposure to perjured or fabricated evidence. But when advocates raise objections to such tenuous ‘evidence’, the judicial response is immediate and invariable: ‘We are professional judges. We are quite capable of determining the proper weight to give to the evidence.’ I have no doubt whatsoever that the judges say this with absolute conviction and in the utmost good faith, and that they do their best to evaluate the evidence fairly and objectively. Moreover, I am conscious of appearing to plant my adversarial boots on one of the sacred sites of the inquisitorial system of justice. This is not my intention. I acknowledge the existence of the professional judicial faculty of evaluating evidence. I think I possess it myself. And I do not believe that there is any infallible protection, in any system of justice, against deliberate perjury or fabrication. But having myself had many years’ experience of dealing professionally with evidence, albeit only very recently as a judge, I cannot prevent myself from questioning whether the mystical powers apparently bestowed on a man or woman at the first moment of assuming the judicial robe are fully up to the task of sifting through hundreds of speculative hearsay statements and, if necessary, putting them out of one’s mind when forming a judgment about the facts. I cannot help but wonder whether, in some cases, the maxim ‘no smoke without fire’ comes into play. And I would question

45 The ‘we are professional judges’ mantra is not infrequently a source of frustration for the professional advocates who appear at the ICTY, when it emanates from judges who have never served in any judicial capacity, and may rarely, if ever, have appeared in a court in any professional capacity, before being elected judges of the Tribunal. The only requirement of professional experience for the election of judges is that they ‘possess the qualifications required in their respective countries for appointment to the highest judicial offices’ (ICTY Statute, Article 13). Experience in criminal law and international law is to be taken into account ‘in the overall composition of the chambers and sections of trial chambers’ (ibid.). Even though the judges are distinguished individuals with impressive credentials, the nomination and election of a judge does not necessarily imply any courtroom experience as a judge or advocate. Many judges have never seen, let alone participated in, an adversarial trial before their election, and courtroom exchanges sometimes suggest that their expectations of the trial process have been informed mainly by depictions of trials in popular films and television shows. The expression ‘professional judge’. I would submit, must be viewed in that light. The same is true of the ICC. The CVs of the judges of the ICTY and the ICC are accessible on the websites of their respective institutions.
my own ability as a professional judge to guide me through this evidential
minefield without some form of protection, including the protection afforded by
elementary rules of evidence.

(2) Admission of documentary evidence without evidence of authenticity
Dangerous though the uncritical admission of hearsay may be, however, the
general principle that documentary evidence may be admitted without any
foundational evidence of authenticity is even more alarming. This practice leaves
the Trial Chamber defenceless against the infiltration of evidence which is wholly
lacking in reliability, and which may be forged or fabricated. In a context in which
the likelihood of perjury and fabrication of evidence must be assumed and antici-
pated, rather than ignored or downplayed, the greatest danger of dispensing with
the requirement of authenticating documents is not that the Trial Chamber may
not know much, if anything, about the provenance of the document it is asked to
admit; it lies in the fact that the Trial Chamber does not, and cannot, know
whether there exists positive evidence indicating a lack of authenticity, evidence
to which the Trial Chamber has no access. The point of insisting on some founda-
tional evidence of authenticity is that it tends to negate the possible existence
of positive evidence of fabrication: evidence that is unavailable. Against this danger,
the mantra that professional judges are capable of evaluating the weight of the
evidence offers no protection whatsoever. Judges can assess the weight of evidence
to which they have access, but they cannot evaluate evidence to which they do not
have access. To require some evidence of authentication would not impose any
great burden on the party who tenders it. The standard required by common law
jurisdictions is not a high one. For example, US Federal Rule of Evidence 901(a)
provides:

The requirement of authentication or identification as a condition
precedent to admissibility is satisfied by evidence sufficient to
support a finding that the matter in question is what its proponent
claims.

Thus, a party seeking to admit a document or other exhibit is required only to
establish a prima facie case of authenticity or identification. While ICTY Rule
89(A) provides that a Chamber is not to be bound by national rules of evidence, it
does not say that the Chamber cannot derive guidance from them. Moreover, the

46 The position in England is not as clearly stated as it should be because of a certain confusion
between admissibility and authenticity, but it is submitted that the standard in the case of authen-
ticity is accurately stated here: see generally Murphy, above n 13 at 4.10, 4.14, 19.22; Robson [1972] 1
International Criminal Law and Rules of Evidence

Trial Chamber is explicitly empowered, though not required, to require evidence of authenticity, by Rule 89(E). Without such a foundation, the Trial Chamber arguably cannot be satisfied that the evidence tendered is relevant or has any probative value, which would mean that, technically speaking, unauthenticated evidence should be inadmissible as failing to satisfy the threshold requirements of Rule 89(C)—a point which presumably passed unnoticed when Rule 89 was drafted and adopted.47

Yet the ICTY case law is quite clear that evidence may be admitted indiscriminately without any such requirement, in the faith that the judges can and will evaluate its weight at a later time. The various statements emanating from the Chambers on this subject display a sometimes alarming failure to comprehend the basic principles of reliability and safety. It has been held, for example, that the ‘admissibility’ of unauthenticated documents is a question to be kept distinct from that of their weight (ignoring the point that a document that is not authentic has no weight, at least in the sense of tending towards the proof of the issue on which it is tendered);48 that the threshold standard should not be set ‘too high’ because documentary evidence is often admitted, not directly on the issue of guilt or innocence, but as evidence of background or context (as if that should make a difference);49 and that there is no prohibition on the admission of a document simply on the ground that no witness has been called to identify it.50 The Blaškić Trial Chamber summarised the position as follows:

[ ]It is appropriate to point out that the Trial Chamber authorized the presentation of evidence without its being submitted to a witness. The Trial Chamber relied on various criteria for this. At the outset, it is appropriate to observe that the proceedings were conducted by professional judges with the necessary ability for first hearing a piece of evidence and then evaluating it so as to determine its due weight

47 The Trial Chamber in Delalić (‘Čelebići’) (Case No. IT-96-21) (Decision on Prosecution Motion for Admission of Evidence, 19 January 1998, para. 18) and the majority of the Trial Chamber in Tadić (Decision on Defence Motion on Hearsay, 5 August 1996, Judges McDonald and Vorah) recognised this difficulty, holding that the Rules implicitly required that reliability be a component of admissibility. But the Delalić Chamber nonetheless insisted that it was unnecessary to make a determination of reliability as a prerequisite to admitting the evidence because ultimately the question was simply one of weight (ibid. at para. 20): a seemingly inconsistent conclusion.


49 Brđanin (Case No. IT-99-36) Order on the Standards governing the Admission of Evidence, 15 February 2002, para. 18.

50 Ibid. See also Hadžhasanović (Case No. IT-01-47) Decision on Admissibility of Documents of the Defence of Enver Hadžhasanović, 22 June 2005.
with regard to the circumstances in which it was obtained, its actual contents and its credibility in light of all the evidence tendered. Secondly, the Trial Chamber could thus obtain much material of which it might otherwise have been deprived. Lastly, the proceedings restricted the compulsory resort to a witness serving only to present documents. In summary, this approach allowed the proceedings to be expedited while respecting the fairness of the trial and contributing to the ascertainment of the truth.51

I contend that this approach, while seductive in terms of promoting the ‘free proof’ principle, is ultimately indefensible in the light of the reality of practice at the ICTY. Not only does it expose the Trial Chamber to pronounced and uncontrolable risks of admitting forged or fabricated exhibits, but it also complicates and prolongs the trial unnecessarily by compelling the Trial Chamber to accept, and in due course to wade through, vast accumulations of evidential debris—thousands of documents which, even if in fact authentic, cannot be accorded any or any tangible probative value. Far from aiding in the search for the truth, this practice in fact obscures the real issues and distracts the focus of the judges from the evidence that really matters. There is no better example, certainly of the risks involved in the ICTY practice, than the case of the exhibit popularly known as the ‘Variant A&B Document’, whose full title is *Instructions for the Organization and Activity of the Organs of the Serbian People in Bosnia and Herzegovina in Extraordinary Circumstances*.

It is doubtful whether any common law court would give this document the time of day. It is typed, exists only in the form of photocopies, and has no indications of origin, seal,52 or signature. The document purports to be a kind of blueprint issued by the Main Board of the SDS (the principal Bosnian Serb political party) on or about 19 December 1991 and addressed to local SDS municipal boards, providing them with instructions for seizing power in the various municipalities in Bosnia and Herzegovina. Two variants of the instructions, A and B, are provided to deal with alternative scenarios in which the Serbs constituted the majority, or a minority, of the population in a particular municipality. The case for the authenticity of the document rests entirely on the fact that copies of it were found in many locations throughout Bosnia and Herzegovina; that a copy of it was

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51 Blaškić, Judgment of the Trial Chamber, 3 March 2000, paras 34–36 (emphasis supplied). See also Kordić (Case No. IT-95-14/2), Judgment of the Trial Chamber, 26 February 2001, para. 27; Delalić, Decision on Motion of Prosecution for Admissibility of Evidence, 19 January 1998, para. 20.

52 The absence of a seal would be almost conclusive in the former Yugoslavia against a finding that it was any kind of official document: the affixing of seals to official documents of all kinds there approaches the obsessive.
published in the magazine *Slobodna Bosna*; and that according to at least one expert witness, the Bosnian Serbs generally followed the instructions in the course of implementing the alleged ‘Greater Serbia’ conspiracy.\(^\text{53}\) There is no other evidence of authenticity at all. In *B. Simić*, the Defence objected to the admissibility of the document on the ground that the Prosecution had failed to establish its authenticity. In the course of giving its reasons for admitting the document over this objection,\(^\text{54}\) the Trial Chamber held that ICTY case law ‘demonstrates that a determination as to reliability should not be seen as a separate first step in the assessment of the evidence proposed for admission’.\(^\text{55}\) Having found that there were ‘enough indicia of reliability ... to warrant its admissibility’, the Chamber continued:

> However, how much weight should be accorded to Variant A&B is a matter that can only be determined at the conclusion of the proceedings when the Trial Chamber has heard all the evidence upon this issue. It is open to the Defence during the conduct of their case to adduce evidence to show that Variant A&B is of such a nature that the Trial Chamber should place no weight upon it.\(^\text{56}\)

But it was not possible for the Defence to do any such thing, because no further evidence on the subject was available. The Variant A&B Document has become a cornerstone of the Prosecution’s ‘Greater Serbia’ conspiracy theory in a number of cases. Yet every fact relied on as authenticating the document is equally, and perhaps even more naturally, consistent with its having been fabricated by some person or organisation with a grudge against the Bosnian Serbs (a populous

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\(^\text{53}\) Dr Robert Donia testified that he ‘was seeing the rather sizeable and deep footprints of its implementation’ (*B. Simić*, trial transcript, 1083). Another witness, Bernard O’Donnell, testified that other documents corroborated the implementation of the Variant A&B instructions (ibid. at 5631).

\(^\text{54}\) *Reasons for Decision on Admission of ‘Variant A&B Document’*, 22 May 2002. The Trial Chamber noted that the document had previously been admitted in *Tadić, Delalić, Stakić* (Case No. IT-97-24), *Jelisić* (Case No. IT-95-10), and *Brđanin*. The Trial Chamber added that in *Delalić* and *Jelisić*, the document had been admitted ‘without extended discussion in relation to its authenticity’, and in *Tadić*, without objection by the Defence: *Reasons*, para. 14. This may, however, well have been simply because the Defence in those cases did not depend on the existence of an overall Serb conspiracy. In *Simić*, that issue was of considerable importance.

\(^\text{55}\) *Reasons*, para. 15.

\(^\text{56}\) Ibid. at para. 16. The Trial Chamber in its Judgment later duly found as a fact that the Variant A&B Document had indeed been issued on 19 December 1991 by the Main Board of the SDS to all municipal SDS Boards (Judgment, 17 October 2003, para. 169). But the Chamber also found (contradicting one of the arguments advanced in support of authenticity) that the local board in question in the case had not in fact acted on the instructions: ibid. at 985.
category of potential suspects). The implications of this possibility, at this late stage of the ICTY’s work, are almost too awful to contemplate.

**Rules of evidence: excluding justice or facilitating justice?**

The contention that adopting some exclusionary rules of evidence would benefit international criminal trials compels us to examine two assumptions commonly held in civil law jurisdictions about common law doctrine. These assumptions, though fundamental in nature and generally taken as axiomatic, are in my view fallacious. The first is that the existence of exclusionary rules of evidence in common law systems is attributable solely to the practice of trial by jury.57 The second is that such exclusionary rules are opposed to the goal of truth-seeking.

The first assumption is understandable, but nonetheless incorrect. It can be demonstrated that, while the historical evolution of the rules of evidence owes much to the peculiar exigencies of jury trial, the rules were never confined to cases tried with juries.58 In England, the rules of evidence have always applied generally, not only to jury trials for indictable offences, but also to summary trials in magistrates’ courts, in which either a bench of lay magistrates or a district judge may be the finder of fact; and to civil cases.59 Similarly, in the United States, the Federal Rules of Evidence govern all cases tried in the federal courts, and in general make no distinction between jury and non-jury trials, though there are

57 This assumption appears to have played an important role in ICTY decisions on evidence: see e.g. Brđanin, Order on the Standards governing the Admission of Evidence, 15 February 2002, para. 14; Delalić, Decision on Motion of the Prosecution for Admissibility of Evidence, 19 January 1998, para. 20.

58 The development of the law of evidence in England is summarised in Murphy, above n. 13 at 1.5 et seq. See also E. Morgan, *Some Problems of Proof under the Anglo-Saxon System of Litigation* (Columbia University Press: New York, 1956) 117: ‘While distrust of the jury had nothing to do with the origin of the hearsay rule, it has exerted a strong influence in preventing or delaying its liberalization’. The common law rules on the competence or incompetence of witnesses are perhaps the most striking examples of rules of evidence which had nothing whatsoever to do with distinctions between jury and non-jury trial. But the best evidence rule and, as indicated by Morgan, the rule against hearsay, are also major rules of evidence which do not depend in any way on the form of trial or the nature of the case. On the other hand, the rules of evidence are clearly very much the product of the adversarial system of trial: see J. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press: Oxford, 2002) 178; Roberts and Zuckerman, above n. 16 at ch. 2.

59 Of course, individual statutory or common law rules of evidence may be expressed to be applicable only in criminal or civil cases, or may be restricted procedurally to certain kinds of proceedings. For example, evidence of the good or bad character of a party is admissible almost exclusively in criminal cases, unless it is a fact in issue in an action for defamation (see generally, Murphy, above n. 13 at 5.3 et seq.).
discrete variations that apply to particular kinds of case.\textsuperscript{60} One must immediately concede, of course, that there are significant differences in the way in which the rules are applied as between jury and non-jury trials. The exclusionary rules of evidence have far more relevance to jury trials, for two obvious reasons. First, while there may be a need to protect juries from evidence that might be unduly prejudicial or difficult to evaluate objectively, the same is less true of professional judges. Secondly, the mechanics of jury trial conveniently allow for the separation of the tribunals of law and fact, so that the judge can rule on questions of admissibility without exposing the jury to the challenged evidence. In trial by a judge sitting alone, by contrast, the judge must scrutinise the challenged evidence in order to decide whether it is admissible. This calls into question whether there is any point in requiring the judge to adjudicate on admissibility in addition to weight.\textsuperscript{61} In common law jurisdictions, just as in their civil law counterparts, trust is reposed in the ability of professional judges to evaluate the weight of evidence, and to exclude from their consideration irrelevant or unreliable material. The rules of evidence in English civil cases (which are now almost always heard by a judge sitting alone) have been relaxed, not quite to the point of disappearing altogether, but certainly to the point where there is a distinct resemblance to Rule 89 of the ICTY Rules.\textsuperscript{62} Nonetheless, the common law world continues to recognise the value of rules of evidence, even in the context of non-jury trials, as protecting fact-finders against misleading evidence and promoting efficient trials. This brings us to the continental jurists’ second dubious assumption. Are rules of evidence truly opposed to the fundamental goal of a trial to seek the truth?

The debate over whether rules of evidence obstruct or promote the process of truth-finding has exercised common law jurisdictions as well as civil. Jeremy Bentham, writing about English law in the late 18th and early 19th centuries,

\textsuperscript{60} Rule 101 provides that the Federal Rules of Evidence apply to proceedings in ‘the Courts of the United States’, i.e. all federal courts, including those presided over by magistrates and bankruptcy judges, except as provided in Rule 1101. Rule 1101(b) provides that the Rules apply: ‘… generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the Court may act summarily …’. Rule 1101(d) exempts from the Rules the determination of facts preliminary to the determination of the admissibility of evidence, proceedings before grand juries (i.e. hearings to determine whether an indictment should be presented against an accused), and a few miscellaneous cases such as applications for warrants, and extradition proceedings. Evidence rules applicable in state courts generally contain analogous provisions.

\textsuperscript{61} One reason for doing so in a system which operates subject to rules of evidence is that precise findings on admissibility are necessary for the purposes of appeal.

\textsuperscript{62} As we have already noted, the rule against hearsay was abrogated in civil cases in England by the Civil Evidence Act 1995, and the hearsay quality of evidence now affects only its weight, not its admissibility. Moreover, Rule 32.1 of the Civil Procedure Rules 1998 gives the court broad powers to control the admissibility and presentation of evidence generally.
argued that exclusionary rules of evidence were contrary to justice and should be abolished.63 Bentham preferred the principle of free proof adopted in civil law jurisdictions,64 and was uncompromising in his opposition to virtually all rules of evidence, essentially on three grounds. First, exclusionary rules of evidence were obstructions to the discovery of the truth, because they deprived the fact-finder of relevant evidence without any justification.65 Secondly, the rules of evidence were inconsistent, both in their content and in their practical application.66 Thirdly, the use of rules of evidence was a form of organised crime indulged in by judges and lawyers (‘Judge & Co.’) for the purpose of maintaining the need for endless technical arguments, and so increasing their fees.67 It is the first of Bentham’s arguments that resonates widely today. In a sense, the only remarkable thing about his analysis is that it was written for a common law readership. To any judge or lawyer brought up in a continental civil law system, it would have been instantly familiar. The common law’s exclusionary rules of evidence have become an exemplar of procedural idiosyncrasy. To a civilian, it is axiomatic that the judge should have access to all available evidence and then assess its weight. Writing for those accustomed to jury trials, Bentham proposed a series of directions on weight to be given to the jury by the judge to enable jurors to evaluate the evidence. Here,

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63 The contemporary locus classicus on Bentham’s contribution to evidence theory is W. Twining, *Theories of Evidence: Bentham and Wigmore* (Weidenfeld & Nicolson: London, 1985), an invaluable guide to Bentham’s labyrinthine writings on the subject. Bentham developed his ideas at bewildering length throughout his monumental and repetitive *Rationale of Judicial Evidence* (Hunt & Clarke: London, 1827). He was successful in advocating the abolition of some of the most extravagant rules of evidence, especially some of those relating to the competence of witnesses. He might well have had further successes but for the opposition he provoked by his reckless excoriation of the judiciary and the legal profession.

64 But admirers of Bentham’s position would do well to remember that his opposition to rules of evidence extended to those rules which are now held to constitute the basic rights of the accused, and which are today enshrined in Article 21 of the ICTY Statute, Article 6 of the European Convention on Human Rights, and other seminal documents; as witness his celebrated comparison of a criminal trial to a fox hunt, the object being not so much to kill the fox as to allow it a sporting chance of escaping.

65 ‘Evidence is the basis of justice: to exclude evidence is to exclude justice’: *Rationale of Judicial Evidence*, Book VIII, ch. III. Bentham would have permitted the exclusion of evidence only in a narrow range of circumstances, essentially if it was irrelevant, or if obtaining or presenting the evidence would involve greater delay, expense, or other mischief than excluding it (in essence, the discretion to exclude in the interests of fairness or expediency); Ibid. at Part II, ch. 1.

66 Ibid. Book I. It would not have been difficult to sympathise with this in Bentham’s time, and might not be so hard today. But of course, it is an argument mainly for reforming the rules rather than abolishing them.

67 Ibid. Book VIII, Section II (‘Alliance between the sinister interest of judges and that of professional lawyers’). In Bentham’s day, judges were paid on a fee basis like lawyers, and so earned more with every motion filed and adjudicated. Needless to say, this argument, which probably contained a kernel of truth, but was wildly exaggerated and expressed in the most intemperate language, made Bentham many enemies and limited his effectiveness as a reformer.
Bentham’s argument becomes unconvincing. He was not a lawyer, and his views on the weight of evidence are, to say the least, naïve. His proposed directions would probably confuse rather than assist a jury. But in civil systems, in which trials are conducted by one or more professional judges sitting without juries, his argument demands refutation. Why should relevant evidence be excluded, when a professional judge can decide simply to assign no weight to evidence that is deemed unreliable?

One answer to that question was provided by Sir James Fitzjames Stephen, a distinguished advocate and judge, who replied to Bentham from the point of view of the practicalities of managing a trial. Stephen in essence rejected the idea, so sacred to Bentham, that the logical relevance of evidence necessarily guaranteed that it would make a positive contribution to the goal of seeking the truth. To Stephen, a trial, being an exercise conducted by human beings, achieved its highest potential for revealing the truth when managed efficiently with a view to keeping it within reasonable bounds. If permitted to drift into too many collateral inquiries, a degree of confusion was inevitable, and with confusion came an increased risk of error. One of Stephen’s most cogent defences of the rules of evidence was given in his address to the Council of the Governor-General of India on 31 March 1871. Stephen had been tasked with drafting the Indian Evidence Act 1872, which was to apply throughout British India, and was intended for use, it should be noted, by professional judges sitting without juries. Noting that some had called for the law to contain no exclusionary rules of evidence, Stephen used the occasion to explain his draft, which was generally based on the rules of evidence then in force in England. He answered his critics in practical terms:

Legislation thus being necessary, in what direction is legislation to proceed? A gentleman, for whose opinion upon all subjects connected with Indian law and legislation, I, in common with most other people, have a profound respect, said to me the other day in discussing this subject: ‘My Evidence Bill would be a very short one. It would consist of one rule to this effect: rules of evidence are hereby abolished’. I believe that the opinion thus vigorously expressed is really held by a large number of persons who would not avow it so plainly. There is, in short, in the lay world, including in the expression the majority of

68 Ibid. Book I, ch. V. Thus, at one point, he proposes a system of ‘points’ to assess the credibility of witnesses, adding or deducting points for certain positive or negative qualities in a mechanistic fashion. In his defence, it should be said that civil law systems at that time did depend somewhat on a not dissimilar arithmetical procedure for assessing the weight of evidence.

Indian civilians, an impression that rules of evidence are technical
ities invented by lawyers principally for what Bentham called
fee-fathering purposes, and of no real value in the investigation of
truth. I cannot admit that this impression is in any degree correct. I
believe that rules of evidence are of very great value in all enquiries
into matters of fact, and in particular in enquiries for judicial
purposes; and that it is practically impossible to investigate difficult
subjects without regard to them.

Stephen then referred to a comparison he had made of a number of English and
French trials, with specific reference to the presence and absence of rules of
evidence respectively, and continued:

I think anyone who took the trouble to compare those trials together
carefully would agree with me in the conclusion that the practical
effect of the English rules of evidence in those cases was to shorten the
proceedings enormously, and at the same time to consolidate and
strengthen them, keeping out nothing that a reasonable person would have
wished to have before him as material for his judgment ... Again, compare
the proceedings of an ordinary court of criminal justice with the
proceedings of a court-martial, in which the rules of evidence are far
less strictly enforced and less clearly understood. An ordinary
criminal court never gets very far from the point, but a court-martial
continually wanders into questions far remote from those which it
was assembled to try ... No judge can possibly be expected, by the mere
light of nature, to know how to set limits to the inquiries in which he
is engaged, yet if he does not, an incalculable waste of time and
energy, and a great weakening of the authority of his court, is sure to
follow. Active and zealous advocates, who have no rules of evidence to
restrain them, would have it in their power to prevent the adminis-
tration of justice to the basest purposes ... and the main question
would frequently be lost sight of in a cloud of irritating and useless
collateral issues. [emphasis supplied]

In summary, Stephen stands the second assumption on its head: far from
obstructing the search for truth, the judicious use of certain rules of evidence
contributes positively to the goal of seeking the truth by excluding purported
evidence which misleads or diverts attention away from the truth; by shortening
and consolidating the trial; and by keeping the focus on the real issues. It is here
that the relevance of Stephen’s argument to the case of international criminal law
becomes immediately apparent. ICTY trials have in common that they are long
and complicated. The simplest of trials is likely to last at least six months, and the length of most trials is measured in years.\(^{70}\) But it is the sheer volume of evidence, rather than the length of the trials \textit{per se}, that causes the most intractable problems. The Prosecution has routinely announced its intention of calling hundreds of witnesses and adducing thousands of documentary exhibits.\(^{71}\) And it should be understood that a single ‘exhibit’ in the context of ICTY cases may be a document, or series of documents, running to hundreds of pages.\(^{72}\)

The case which proves the point is that of Slobodan Milošević (Case No. IT-02-54). The trial of the former President of Yugoslavia, the alleged architect and prime mover of the Greater Serbia conspiracy, should have been the ICTY’s crowning achievement. Instead it proved to be a catastrophe. The case was, inevitably, massive in scope. There were three separate indictments, relating respectively to Croatia, Bosnia and Herzegovina, and Kosovo. The accused was charged on the basis of the highest political responsibility for almost every crime committed by the Bosnian Serbs during the conflict. The trial began on 12 February 2002. The Prosecution tendered 969 exhibits. Despite draconian time limits imposed by the Trial Chamber on every phase of the trial, the proceedings were discontinued part-heard on 11 March 2006 following Milošević’s sudden death. It would be simplistic to try to pin the whole blame for the Milošević debacle on any single factor. The many inevitable delays and the intransigence of both parties in resisting the efforts of the Trial Chamber to bring the case within manageable proportions must be taken into account.\(^{73}\) But if the Milošević case had been tried in accordance with a few basic common law rules of evidence, its length and complexity could have been considerably reduced. The Trial Chamber would have

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\(^{70}\) In fairness, it should be said that there are a number of other factors that affect the length of ICTY trials. There is a shortage of courtroom space, which requires trials to share courtrooms and limits the available sitting time for each trial. For logistical reasons, frequent breaks are necessary. The proceedings are slowed down by the demands of simultaneous interpretation: the entire proceedings must be interpreted as between the language of the accused and many witnesses (Bosnian/Croatian/Serbian, Albanian, or Macedonian) and one or both of the working languages of the Tribunal (English and French).

\(^{71}\) The earlier cases were smaller in scope. In Tadić, the Prosecution tendered only 362 exhibits; in Delalić, 266. But in Blaškić, the number of Prosecution exhibits rose to 787; in Kordić, it was 2,721; and in Brđanin, it was 2,736: see the ICTY’s Case Information Sheets published on its website. In addition, of course, the Defence tenders substantial numbers of exhibits.

\(^{72}\) In the case of Plavšić and Krajisnik (IT-00-398-40) one single Prosecution ‘exhibit’ comprised some 42 files of separate documents.

\(^{73}\) By the time of the accused’s death, the Prosecution had closed its case and the Defence case was in progress. In fairness, it must be pointed out that the trial suffered massive delays because of Milošević’s chronic illness. As he was representing himself, it was not possible to continue in his absence even though counsel were assigned as \textit{amici curiae} to assist the Trial Chamber. But these delays must be balanced against the Trial Chamber’s relentless saving of time by imposing rigid time limits on both parties.
excluded whole classes of exhibits, and would no doubt also have either excluded or limited the evidence of many witnesses. It is quite conceivable that a more disciplined evidentiary regime would have enabled the Trial Chamber to conclude the case successfully during the lifetime of the accused.

Reconciling the common law and civil law: towards a balanced approach

As Stephen suggested in relation to trials in his day, judicious adoption of a limited number of rules of evidence would, in my submission, greatly enhance the efficiency of contemporary trials in international courts and tribunals. This would in turn assist in, rather than hinder, the judicial search for the truth. I hasten to add that ’judicious adoption’ would not entail the wholesale incorporation of an entire system of common law exclusionary rules, but rather the addition of a small number of tailor-made rules appropriate to the mode of trial and to the realities of the cases with which international courts and tribunals deal. I emphasise Stephen’s insistence that rules of evidence should keep out ’nothing that a reasonable person would have wished to have before him as material for his judgment’.

One of the most impressive aspects of Stephen’s work on the Indian Evidence Act 1872 was his fortitude in resisting what must have been the considerable temptation simply to import into India the byzantine constructions of Victorian English evidence law. Not even the most dedicated defender of the rules of evidence can pretend that they represent any deliberate or systematic attempt to construct a consistent body of law. Indeed, the rules of evidence apparently represent the results of ad hoc and piecemeal efforts by trial judges, during a long and jurisprudentially troubled period spanning the mid-18th to mid-19th centuries, to solve practical problems of litigation as and when they arose, and without much thought for the overall coherence of the law they were creating. Even today, but certainly in Stephen’s time, rules of evidence have fully merited C. P. Harvey’s unkind but accurate stigmatisation.74 Instead of burdening the emerging Indian law with such an unpromising legacy, Stephen set out to construct a coherent framework from first principles. This was, as we have already observed, a system in which professional judges would try cases without juries.

74 ’I suppose there never was a more slapdash, disjointed and inconsequent body of rules than that which we call the law of evidence. Founded apparently on the proposition that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builder’s debris’: C. P. Harvey QC, The Advocate’s Devil (1958)

79. Stephen himself made the same point. His words are cited in the quotation from the text of his address to the Council, below.
During the course of his speech to the Council of the Governor-General of India, Stephen succinctly enumerated the deficiencies of the contemporary English law of evidence:

[T]he system which was adopted or rather which grew up by degrees, was of a very mixed and exceedingly singular character. Part of it consisted of rules declaring large classes of witnesses to be incompetent. Part was intimately connected with the English system of special pleading, which was so contrived as to define with extreme precision the facts upon which the parties differed, or were, as the phrase goes, at issue. Parts were the result of the practical experience of the courts, and these were by far the most valuable portion, in my opinion, of the English Law of Evidence. Most of the other rules have indeed been cut away by legislation, and the rules which still remain may fairly be taken to be the net result of English judicial experience in modern times. In the most general terms these rules are:

1. that the evidence must be confined to the issue;
2. that hearsay is no evidence;
3. that the best evidence must be given;
4. rules as to confessions and admissions;
5. rules as to documentary evidence.

I have two general remarks to make upon them. The first is that they are sound in substance and eminently useful in practice, and that when properly understood, they are calculated to afford invaluable assistance to all who have to take part in the administration of justice. The second is that I believe that no body of rules upon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length.

Stephen’s draft of what became the Indian Evidence Act 1872 was a model of selectivity and precision unencumbered by the looseness, intricacy, and prolixity of English common law and statute. It is a remarkable tribute to Stephen’s draftsmanship and vision that, almost 60 years after India became an independent nation, the Indian Evidence Act 1872, drafted by a representative of the former colonial power, still remains in force today with relatively few amendments. It is noteworthy that Stephen’s list of the main rules of evidence is not easy to trace through the text of the Act. The ‘best evidence rule’, as Stephen well knew, had already been superseded by relevance as the general organising principle of evidence, to which Stephen alluded in terms of confining the evidence to the issue.
Even in his day, the vestigial best evidence principle was limited to requiring production of primary evidence to prove the contents of a document, and in this guise underpinned the ‘rules as to documentary evidence’. The Indian Evidence Act’s treatment of hearsay marked a further departure from English law. Stephen, in short, propounded the spirit rather than the letter of the English law of evidence.

In that same spirit, I do not propose a whole palette of rules of evidence for international courts and tribunals. Nor do I offer detailed drafting solutions. There are many workable texts to choose from, including existing domestic rules and the comprehensive drafts offered to the ICTY by the United States and the American Bar Association, previously mentioned. My objective is only to advance two basic suggestions, which I believe would streamline the complex trials now in vogue in international criminal law; lessen the risks of forged and fabricated evidence; and reduce the accumulation of evidential detritus which currently distracts the focus of the judges from the search for the truth. The overriding objective, as Stephen so graphically put it, is to ensure that the main question is not lost sight of in ‘a cloud of irritating and useless collateral issues’. Without falling prey to the assumptions deftly skewered by Harvey, there are certain practical realities that must be faced.

My first suggestion would be to place reasonable requirements of indicia of reliability on hearsay, whether tendered in the form of written or verbal statements. Manifestly reliable documentary hearsay, such as statements contained in most official and governmental records, commercial documents and the like, would be admitted without further question. Hearsay lacking manifest reliability would be admissible to the extent that the party tendering the evidence can demonstrate that there are acceptable indicia of reliability, or that other reliable and independent evidence clearly corroborates the statements for which the evidence is offered. Hearsay would be excluded only if it lacks any indicia of reliability and is not corroborated by reliable independent evidence; or if it appears that there is a well-founded danger of fabrication, particularly where the maker of the statement had a motive to incriminate the accused, or was biased against him for reasons associated with the conflict or its underlying causes.

My second suggestion would be to require the party tendering any documentary or tangible exhibit to present sufficient evidence of authenticity to the Trial Chamber to establish a prima facie case that the exhibit is genuine; and that it has not been tampered with or altered in any material way since being created or discovered. The merits of such a rule have already been conceded by at least one

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75 See generally Murphy, above n. 13 at 1.5, 19.3.
ICTY Trial Chamber. In the trial of Prlić et al., which is ongoing at the time of writing, the Trial Chamber adopted a number of guidelines for the admission of evidence. As a general rule, the party seeking to tender evidence shall do so through a witness who can attest to its reliability, relevance, and probative value. The evidence must be put to the witness at trial.

The Trial Chamber’s Guideline 6 states that the Prosecution may file to admit evidence not put to a witness in this way, but only under stringent conditions. The Prosecutor must satisfy the Trial Chamber as to why the evidence was not put to a witness in the first instance, the reasons why it could not be adduced through another witness, and the reasons why ‘the party considers the document essential for the determination of the case’. This decision is remarkable on several fronts. The Trial Chamber consists of judges from continental civil law jurisdictions, who announced in their preamble to the decision:

[Th]e admission of several thousand documents without prior discussions over them in court may unduly delay the proceedings, to the extent that the Chamber would not have the benefit of explanations from a witness who could help to put these documents in their context and establish their relevance and probative value ... [T]he Chamber would therefore be required to spend much of its resources examining and assessing thousands of documents, which could take several months and would delay the pronouncement of the judgment ... [T]he Prosecution therefore has a duty to make a choice and identify those documents which are strictly necessary to the determination of points in issue, and present those documents to a witness who is able to provide the Chamber information in court about the authenticity, relevance, and probative value of such documents ...

I harbour no illusions that such rules of evidence will be routinely adopted in international trials. The Rules of the ICC are set for the moment, and the tragic self-exclusion from the court by the United States has greatly weakened the common law’s influence in every area. But it is realistic to hope that the experience of practice at the ICTY will be digested and assimilated in due course,

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76 Decision on Admission of Evidence, 13 July 2006. In the interests of transparency, I point out that, before my appointment to the bench I served as co-counsel for one of the accused in this case.

77 Judge Jean Claude Antonetti (France); Judge Árpád Prandler (Hungary); and Judge Stefan Trechsel (Switzerland).

78 Decision on Admission of Evidence, 13 July 2006 (footnote omitted).
and the appropriate conclusions drawn from it. The concept of blending the best of the common law and civil law traditions in international criminal practice is fundamentally sound, even if its detailed practical implementation is a difficult and often frustrating process. Both ‘sides’ have to be prepared to make concessions, and there is always the risk of creating a procedural hybrid with which no one is really satisfied. Yet the ultimate prize remains worth the effort. This article is intended as a constructive contribution to a wide-ranging debate on the best ways of achieving the goal we all share: fair and efficient trials which result, as far as humanly possible, in the discovery of truth.
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