

**HEARSAY AND THE RIGHTS OF THE ACCUSED:
A COMPARISON OF U.S. LAW AND ANTICIPATED PRACTICES OF THE
INTERNATIONAL CRIMINAL COURT**

*Laurence D. Borten
Friedman Kaplan Seiler & Adelman LLP
New York, New York*

Introduction

One of the many criticisms leveled in the U.S. at the International Criminal Court (“ICC”) is the fact that neither its organizing document, the Rome Statute,¹ nor the Rules of Procedure and Evidence,² contains any prohibition on the introduction of hearsay evidence. This concern is typically articulated in terms of potential violations of the rights of defendants, notwithstanding that the hearsay rules, where they exist, apply equally to evidence introduced by either side.

Were hearsay evidence absolutely barred in the courts of common-law jurisdictions like the U.S., and were hearsay to be unquestioningly admitted and given weight in the ICC, there is no question that this procedural difference would have an impact on substantive outcomes. But, as is known by anyone who has watched a few episodes of “Law and Order,” the common-law bar to the admission of hearsay evidence has numerous gaps, some substantial in size, in the form of exceptions and exclusions. Perhaps less familiar to students of common-law procedure is the fact that in the civil law tradition prevalent in Western Europe (and before existing international tribunals such as the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”)), hearsay, though admissible, is routinely evaluated for its reliability and frequently barred or given no weight by the fact-finding judges. Thus, without examining how the two approaches to hearsay are actually applied, it is impossible to know whether this procedural difference between the common-law system and the ICC Rules will actually result in substantively different outcomes.

The critics of the ICC’s lack of a hearsay bar ignore certain other realities as well. First, while hearsay will not generally be barred at ICC trials, certain types of hearsay – largely corresponding to what the U.S. Supreme Court has recently referred to as “testimonial” hearsay – *will* be barred under a provision something like the Confrontation Clause of the U.S. Constitution: the provision of the Bill of Rights that guarantees a criminal defendant “the right to . . . be confronted with the witnesses against him.”³

¹ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/19 (1998), 37 I.L.M. 999.

² ICC doc. ICC-ASP/1/3, 9 September 2002.

³ U.S. CONST. amend. VI.

Second, the fact-finders in ICC trials will be panels of judges, whose decisions must explain what evidence was considered and what weight was given it – not juries whose deliberations are unrecorded and therefore not subject to appellate review. This continues a tradition, in international war-crimes tribunals, of mixing elements of common-law and civil-law criminal practice. In civil-law procedure, an “inquest model” is prevalent, in which, unlike the “adversarial,” contest-like procedure of the common law, professional judges are charged with evaluating all available evidence in order to arrive at factual conclusions.⁴ Hearsay rules and exceptions, and other technical rules of evidence, would “interfere with the duty of judicial inquirers to assess the evidence,” and are unnecessary because that assessment is reported in a written decision and subject to appellate review. Instead, hearsay is admitted and heard, but given weight only to the extent it is found to be reliable.⁵

This paper attempts to discern, from a close reading of the relevant rules and from actual decisions, the extent to which the two approaches to hearsay evidence are actually likely to differ in practice. Since the ICC has not yet issued any decisions, heavy reliance will be placed, where appropriate, on the decisions of the ICTY and ICTR, which have rules similar to the ICC with respect to the admissibility of evidence (and whose procedures have been subject to similar criticisms).⁶ The paper will consider “testimonial hearsay” – statements made by witnesses during an investigation or court proceeding – separately from nontestimonial hearsay, since in both the U.S. and according to the ICC rules, they are treated differently.

Testimonial Hearsay

In both criminal and civil cases, it is rare that a material witness will testify at trial without having earlier made a formal statement in the course of the investigation or prosecution. In civil practice, each side typically takes depositions of all material witnesses during discovery. In U.S. criminal practice, there are various pre-trial proceedings at which witness testimony is recorded – grand jury proceedings and evidentiary hearings, for example – and there are often recorded, videotaped, or transcribed interviews of the defendant and witnesses by police or prosecutors. Transcripts or recordings of these out-of-court statements, if introduced as evidence at trial, may constitute hearsay if they are offered to prove the truth of what was stated.

⁴ Sean Doran, John D. Jackson, & Michael L. Seigel, *Rethinking Adversariness In Nonjury Criminal Trials*, 23 Am. J. Crim. L. 1, 18-21 (Fall 1995).

⁵ Indeed, where the judges are both the triers of law and the triers of fact – that is, where they both evaluate evidence for admissibility and determine whether the evidence is sufficient to support a guilty verdict – the value of excluding hearsay evidence is greatly reduced. “The process of exclusion works much less effectively when the trier of fact is exposed to inadmissible evidence, which can happen frequently when judges are both the triers of fact and the triers of law.” *Id.* at 28.

⁶ Statute of the International Tribunal, Arts. 14 & 21, 32 I.L.M. 1192, 1196, 1198-99, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, Arts. 14 & 20, 33 I.L.M. 1602, 1607, 1609-10, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994); ICTY Rules of Procedure & Evidence 89-98, U.N. Doc. IT/32/REvid.34 (2005); ICTR Rules of Procedure & Evidence 89-98, *available at* <http://www.icttr.org/ENGLISH/rules/240404/240404.pdf>.

Both in the United States and according the Rome Statute and ICC Rules, this “testimonial” hearsay – statements made *in connection with* the criminal investigation or prosecution – are treated differently from other forms of hearsay, such as overheard casual statements and pre-existing documents. In both jurisdictions, the rules are somewhat new: The distinction between testimonial and non-testimonial hearsay was first drawn by the U.S. Supreme Court in 2004. And the ICC Rules on such evidence differ considerably from the rules of the ICTY and ICTR, which more liberally permit the admission of affidavits and deposition transcripts as evidence at trial. Therefore, in this section, a simple comparison of the formal rules will have to suffice.

The United States: *Crawford v. Washington*

In the 1980 case *Ohio v. Roberts*, the United States Supreme Court considered the implications of the Sixth Amendment’s “Confrontation Clause” for the admissibility of hearsay evidence offered by the prosecution.⁷ The clause states that “In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.” The *Roberts* court noted that this language, if taken literally, would appear to require “the exclusion of any statement made by a declarant not present at trial.”⁸ The Court quickly noted that this was “a result long rejected as unintended and too extreme.”⁹ Thus even in the U.S., it is assumed that the Confrontation Clause, and therefore the extent of the constitutional bar against prosecution hearsay evidence, has boundaries.

In *Roberts*, the Court concluded that, if the hearsay declarant cannot be produced at trial, the boundaries of the Confrontation Clause closely coincide with the common-law exceptions to the hearsay rule: any hearsay that “bears adequate ‘indicia of reliability’” – that is, “falls within a firmly rooted hearsay exception” or otherwise possesses “particularized guarantees of trustworthiness” – is admissible against the accused.¹⁰

Twenty-four years later, in *Crawford v. Washington*, the Supreme Court overruled *Roberts*, at least with respect to what it termed “testimonial hearsay.”¹¹ Uncharacteristically, the Court used an “original intent” approach to constitutional interpretation to expand the protections afforded the accused: it concluded, based on historical sources, that the intended “primary object” of the Confrontation Clause was formal statements by witnesses to or before government officers.¹² Having thus narrowed the principal meaning of “witnesses against him,” the Court gave the clause’s command more force than it had in *Roberts*: it declared that with respect to such out-of-court statements, the clause *absolutely* requires that the defense have the opportunity

⁷ 448 U.S. 56 (1980).

⁸ *Id.* at 63.

⁹ *Id.*

¹⁰ *Id.* at 66.

¹¹ 541 U.S. 36 (2004).

¹² *Id.* at 53.

to “confront,” i.e., cross-examine, the witness.¹³ Neither the hearsay exceptions nor any other “indicia of reliability” are relevant in deciding whether to admit such “testimonial” statements: they are admissible *only* if the witness is unavailable to testify at trial *and* the defense had an opportunity to cross-examine the witness at the earlier proceeding. However, with respect to “casual” statements and other “nontestimonial” hearsay, the Court appears to have left the framework of *Roberts* in place, at least for the time being.¹⁴

The ICC

Article 67 of the Rome Statute appears to guarantee the right of a defendant to cross-examine any witness testimony introduced at trial, whether or not the testimony is presented live or is preserved through a recording or transcript. That article, dealing with the “Rights of the Accused,” provides that among the “minimum guarantees” that an accused is entitled to is the right “to be present at the trial” and “[t]o examine, or have examined, the witnesses against him or her.”¹⁵

Unlike the Bill of Rights, the Rome Statute explicitly contemplates, and gives guidance with respect to, the use at trial of testimony from earlier proceedings – *i.e.*, what the Supreme Court referred to as “testimonial” hearsay. Article 69(2) provides that witness testimony “shall be given in person,” but also allows the Court to permit “recorded testimony of a witness by means of video or audio technology, as well as the introduction of . . . written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence.” In permitting this form of testimony, however, the Statute implicitly preserves the defense’s right under Article 67 to “confront” such witnesses through cross-examination, stating without qualification that “These measures shall not be prejudicial to or inconsistent with the rights of the accused.” “Rights of the accused” must certainly be read to include Article 67’s “minimum guarant[y]” of an opportunity to examine witnesses.¹⁶

¹³ *Id.* at 51-54.

¹⁴ *Id.* at 68. The Court expressly declined to decide exactly what the boundaries of “testimonial” hearsay are. It held that, at a minimum, “prior testimony at a preliminary hearing, before a grand jury, or at a former trial” and “police interrogations” are included, leaving “for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.*

¹⁵ Article 21 of the Statute of the Tribunal for the ICTY contains a similar “minimum guaranty.”

¹⁶ It is this limitation on the Tribunal’s power to admit recorded testimony that is missing from the Statute and Rules of the ICTY and ICTR; although Article 21 of the ICTY Statute recites the “minimum guaranty” of the accused’s right to examine witnesses against him, that provision is not referenced in any of the provisions of the Statute or Rules permitting the admission of testimonial hearsay. As others have noted, the right of an accused before the ICTY to confront the witnesses against him has been eroded over time by (1) amendments to the rules expressly permitting testimonial hearsay to be admitted under a broader range of circumstances, and (2) by certain decisions of the Appeals Chamber interpreting those Rules in a manner favorable to the admission of the hearsay. See Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 Cal. W. Int’l L.J. 47; Patricia M. Wald, *Symposium on “The ICTY 10 Years On: The View from Inside”*: (iv) *The Judiciary*, 2 J. Int’l Crim. Just. 466, 473.

The Statute provides for one specific circumstance under which such recorded testimony may be taken and later admitted at trial. In Article 56, the pre-trial chamber is empowered to, among other things, arrange for the appropriate taking of testimony of witnesses during the investigatory phase when it appears that the witness may not be available to testify at a future trial. Article 56(1) vaguely permits the Pre-Trial Chamber to “take such measures as may be necessary to ensure the efficiency and integrity of [such pre-trial] proceedings and, in particular, to protect the rights of the defense.” Article 56(2) further specifies the measures that the Chamber may take, including “Directing that a record be made of the proceedings” and authorizing or appointing counsel to attend proceedings and “represent the interests of the defense.” While none of this appears to *require* that the defense be given an opportunity to cross-examine witnesses whose testimony is taken before trial, Article 56(4) states that the admission at trial of this testimony is governed by Article 69 – which, as already noted, requires that the rights of the defendant, including the right to cross-examine witnesses, be preserved.

Thus, with respect to testimonial hearsay Article 67’s “minimum guarantee” that an accused be permitted to examine prosecution witnesses, combined with the caveat in Article 69 that measures resulting in the admission of recorded testimony “shall not be prejudicial to or inconsistent with the rights of the accused” appear to leave little room for the admission of testimonial hearsay that has not been tested by the defense’s cross-examination.

The Rules of Procedure and Evidence close one potential loophole: Rule 68 states that any previously recorded testimony *not* taken pursuant to Article 56 is admissible only if the defense has been given the opportunity to examine the witness. If the witness is available at trial, the defense must consent to the introduction of the testimony and must (along with the prosecution and the judges) be permitted to cross-examine the witness at trial. If the witness is not available at trial, the defense must have had the opportunity to cross-examine during the recording.¹⁷

The only substantial difference between the rules laid down in *Crawford* and those governing ICC proceedings is that, under *Crawford*, the unavailability of the out-of-court witness at trial is a prerequisite for the admission of recorded testimony, whereas it appears that the ICC Rules contemplate the admission of recorded testimony even when the witness is present at trial. Since under those circumstances, the defense must consent to the admission of the evidence and also be provided the opportunity to cross-examine the witness at trial, this would appear to protect the accused as fully as the *Crawford* rule.

¹⁷ A possible drafting flaw in the Rules is that Rule 68 appears to suggest, read in isolation, that the defense need not have had the opportunity to cross-examine a witness’s recorded testimony collected pursuant to Article 56. As discussed already, however, the terms of Article 56, 67, and 69 taken together *do* guarantee the defendant’s right to cross-examination for *all* recorded testimony.

Non-testimonial Hearsay

It is in the area of non-testimonial hearsay that the ICC, following the civil law tradition and the tradition of other international criminal tribunals, varies most dramatically from the common-law model of barring hearsay and providing for discrete exceptions.

The Common-Law Hearsay Rules

In U.S. criminal trials, non-testimonial hearsay is governed by the same rules that govern civil trials. In Federal courts, the common-law hearsay rules have been codified in Rules 801 through 807 of the Federal Rules of Evidence, which, for convenience, will hereinafter be used for reference.¹⁸ In the Federal Rules, the exclusion of hearsay evidence is subject to some twenty-nine exceptions (Rules 803 and 804), and, confusingly, two additional rules “defining” certain out-of-court statements to be “Not Hearsay” (Rule 801(d)). Of these thirty-one permitted types of hearsay evidence, only one, Rule 804(b)(1), deals specifically with testimonial hearsay. While some of the remaining thirty exclusions are of a very specialized nature or are otherwise unlikely to be offered against a criminal defendant,¹⁹ at least twelve relate to types of evidence that one would expect to be deemed relevant at criminal or war crimes trials with considerable frequency: statements of present sense impressions; excited utterances; statements of mental, emotional or physical condition; recorded recollections; records of regularly conducted activity; authenticated documents more than 20 years old; statements regarding reputation as to character; records of prior criminal convictions; statements under belief of impending death; statements against interest; identifications of a person after perceiving the person; and defendant or co-conspirator admissions. Furthermore, Rule 807 contains a “Residual Exception”: any hearsay statement having “circumstantial guarantees of trustworthiness” may be admitted (upon a hearing in advance of trial) if, among other things, “the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.”²⁰

This final residual provision underscores the unifying theory behind all hearsay exceptions: the need to ensure the *reliability* of the out-of-court statement being offered. The need in the common-law system for the formality of a general bar with delineated exceptions is often attributed to the fact that the fact-finder in common-law systems is, generally, a jury of lay persons without experience in weighing different kinds of evidence.²¹ Under those

¹⁸ Many states have adopted the Federal Rules of Evidence, which are, in any case, largely based on the pre-existing common-law rules.

¹⁹ E.g., the various exceptions relating to documentation of property interests or of family relationships and history.

²⁰ It should be noted that “the exception found in Rule 807 is to be used rarely, in only truly exceptional cases.” *United States v. Phillips*, 219 F.3d 404, 419 n.23 (5th Cir.2000).

²¹ See *Prosecutor v. Limaj, et al.*, IT-03-66-T, *Decision On The Prosecution’s Motions To Admit Prior Statements As Substantive Evidence*, 25 April 2005 (“[The] justification which is often advanced for the traditional common-law [aversion to hearsay] is that typically the factual determination of a case will be made by a jury. The difficulty of evaluating and weighting hearsay evidence, as against inconsistent oral testimony given in the presence of the jury, has been perceived traditionally to be too complex for a

circumstances, it is argued, it is particularly important to altogether “shield” the fact-finder from potentially unreliable hearsay evidence. The exceptions to the hearsay rule, arrived at over hundreds of years of experience, are designed for judicial efficiency: certain forms of hearsay have been found to be so generally reliable that a case-by-case determination of reliability is unnecessary.

ICC: “Probative Value”

In contrast to the numerous detailed rules regarding the admissibility of evidence, including hearsay evidence, that are typical of common-law jurisdictions, there are few rules regarding the admissibility of evidence in the Rome Statute and the Rules of Procedure. Article 69(4) of the Rome Statute permits the court to “rule on the . . . admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.” As a baseline for admissibility, this neutral directive appears to establish, if anything, a higher standard for admissibility of evidence than the general rule in U.S. Federal courts, which tilts the scales towards admitting evidence when balancing prejudice and probative value: “Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury”²²

However, unlike the Federal and other common-law evidentiary rules, the ICC has no further rules on admissibility, save for rules (1) prohibiting the admission of evidence regarding “the prior or subsequent sexual conduct of a victim or witness” (Rule 71); (2) establishing principles and a formal procedure for determining the admissibility of evidence relating to a victim’s consent to crimes of sexual violence (Rules 70 and 72); (3) protecting attorney-client communications; and (4) relating to self-incrimination and incrimination by family members (Rules 74 and 75).

The highly discretionary regime of the Rome Statute and ICC rules does not exist in a vacuum, however. The ICTY and ICTR Rules also do not prohibit hearsay, and, except as already noted with respect to testimonial hearsay, contain virtually identical language regarding the general admissibility of evidence.²³ Nevertheless, those Tribunals have consistently

jury. This objection is of limited force in this Tribunal where the factual determination is to be made by a bench of three judges.”).

²² Fed. R. Evid. 403 (emphasis added).

²³ Rule 90 of the ICTY Rules of Procedure and Evidence states that:

(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.

Rule 89 of the ICTR Rules of Procedure and Evidence states that:

discerned, in the requirement that evidence be “probative,” a limitation on the use of, and weight to be given to, hearsay evidence. In *Prosecutor v. Tadic*, the first ICTY case to deal with a motion to exclude hearsay evidence, the Appeals Chamber ruled that the reliability of hearsay *must* be evaluated when considering its probative value:

[I]n deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability . . . The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognized by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. . . .²⁴

The *Tadic* rule has been widely cited and applied when ruling on the admissibility of hearsay in ICTY cases. The ICTR tribunals uniformly purport to apply a similar test when evaluating hearsay evidence: virtually every ICTR Trial Chamber Judgment recites something like the following at the outset:

[T]he Chamber notes that hearsay evidence is not inadmissible per se, even when it is not corroborated by direct evidence. Rather, the Chamber has considered such hearsay evidence with caution, in accordance with Rule 89. When relied upon, such evidence has, as all other evidence, been subject to the tests of relevance, probative value and reliability.²⁵

Experience of The ICTY and ICTR

In light of the judicial gloss on “probative value” as applied to hearsay evidence, it is necessary to examine the actual treatment of hearsay evidence by the ICTY and ICTR in order to make an accurate comparison with common-law practice. The descriptions below represent a significant portion of the written determinations made by the Tribunals as to the admissibility and weight to be given to hearsay evidence offered by the prosecution or the defense. However, it is imperative to recognize that an examination of ICTY and ICTR trial transcripts would likely unearth many additional examples of hearsay evidence, since hearsay evidence which elicits no objection from counsel may well be admitted and given weight by the Trial Chamber, without any comment being made as to its hearsay nature. Of course, this is also the case in common-law jurisdictions, where evidence can only be excluded upon an objection by counsel, and the weight given to evidence heard by a jury is never disclosed or even documented.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

²⁴ Case No. IT-94-01-T, *Decision on Defence Motion on Hearsay*, 5 Aug. 1996 (quoted in *Prosecutor v. Delalic*, Case No. IT-96-21, *Transcript* 2502 (7 May 1997)).

²⁵ *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, *Judgment*, 7 June 2001.

Accordingly, the extent to which hearsay ends up “infecting” a trial record without *any* determination being made by the court as to its admissibility or reliability is, in both systems, entirely dependent upon how assiduously counsel make objections at the appropriate stage of the proceedings.

1. Examples of Excluded Hearsay

In ICTY cases, defense counsel have on a number of occasions brought pre-trial motions seeking to prevent the admission of specific items of documentary hearsay evidence. The *Tadic* decision cited above was one such case. This does not seem to have been the practice at the ICTR, and all objections to hearsay before that tribunal appear to take place after trial and before judgment, or on appeal of judgment. This may be because of the relative paucity of documentary evidence offered before the ICTR; this survey of judicial opinions came upon only one reference to a document containing hearsay. Thus the two examples of excluded hearsay that follow are both from the ICTY.

In *Prosecutor v. Kordic and Cerkez*, the Trial Chamber rejected the prosecution’s application to admit an investigator’s report summarizing various evidence (maps, video footage, witness statements, court transcripts from prior ICTY trials, photographs, and other documents) regarding atrocities committed by the Croatian Defence Council (“HVO,” based on the Serbo-Croatian name) in the village of Tulica in central Bosnia on June 12, 1993.²⁶ The prosecution also sought to admit the underlying direct evidence on which the report was based, but hoped to expedite the proceedings by placing its summary in evidence as well. The Chamber rejected the application because the report was not a contemporaneous record of the events, but rather was the product of “recently collected statements and other materials,” and therefore “of little or no probative value.” In a later decision, the Chamber also excluded a collection of documents called collectively the “Zagreb Material,” in part because some of the material consisted of “hearsay statements that are incapable of now being tested by cross-examination.”²⁷

In *Prosecutor v. Strugar*, the prosecution sought to prove the extent of damage caused to the Old Town of Dubrovnik, Croatia, during a particular attack on December 6, 1991. In addition to witness testimony, it proposed to admit into evidence a document “cataloguing damage to the Old Town of Dubrovnik [Croatia] in October, November and December 1991,” along with two other documents providing evidence of damage occurring before December 6, 1991.²⁸ The former document contained 450 entries authored by seventeen individuals, two of whom testified at trial and identified the entries that were made based on their personal observations of damage. However, the authors relied on statements by “neighbors and tenants” of the damaged buildings in determining the reported date of the damage. Furthermore, the catalog was titled a “preliminary” report and many of the authors “had no previous experience in

²⁶ Case No. IT-95-14/2, *Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence*, 29 July 1999, (“Tulica Decision”).

²⁷ Case No. IT-95-14/2, *Decision on Prosecutor’s Submissions Concerning “Zagreb Exhibits” and Presidential Transcripts*, 1 December 2000 (“Zagreb Exhibits Decision”) ¶ 39.

²⁸ Case No. IT-01-42, *Decision on the Admissibility of Certain Documents*, 26 May 2004 ¶¶ 27, 36.

documenting war damage.”²⁹ The Trial Chamber decided to admit only the entries made by the two testifying authors, which they had confirmed in court; the remainder of the entries were deemed inadmissible “as they do not bear sufficient indicia of reliability to be of assistance to the Chamber.”³⁰ The Chamber noted that, even with respect to the admitted entries, the statements regarding dates of damage were hearsay and therefore “subject to questions of reliability.”³¹ The Chamber excluded the two earlier reports entirely because “the Prosecution has not led [sic] any evidence as to the way in which [they] were prepared.”³²

2. Hearsay admitted but not given weight.

Far more frequently, hearsay is simply presented at trial without any prior ruling being made as to its admissibility. Whether or not an objection is raised at the time the testimony is uttered or the document placed in evidence, the parties have the opportunity to make arguments regarding the probative value of the evidence in post-trial briefing, and the Judgments issued by the Trial Chambers typically address these arguments and expressly determine what weight will be placed on the evidence and what factual findings are warranted by it.

(a) ICTY cases

In *Prosecutor v. Kupreskic et al.*, a prosecution witness testifying about the defendants’ involvement in war crimes stated that an order had been issued by HVO to kill all male civilians in the town of Ahmici between 12 and 70 years old and to capture everyone else.³³ The testimony regarding this order was double hearsay: one of the defendants announced the order as he returned to a HVO base, a 14-year-old soldier overheard it, and later reported the order when questioned as a prisoner of war. The witness at trial had overheard this questioning. In its Judgment, the Trial Chamber stated that it was “unable to accept the evidence [because it] is double hearsay and lacks any features which could confirm its reliability.”³⁴

In *Prosecutor v. Kordic and Cerkez*, a witness testified regarding a broadcast of a press conference at which Kordic threatened to destroy a village that had put up a barricade along the main road to block the approach of HVO troops.³⁵ No recording of the press conference had been produced. The Trial Chamber decided that it could “place no reliance on the hearsay evidence of the witness.”³⁶

²⁹ *Id.* ¶¶ 31, 33.

³⁰ *Id.* ¶ 35.

³¹ *Id.* ¶ 34.

³² *Id.* ¶ 36.

³³ Case No. IT-95-16-T, *Judgment*, 14 January 2000 ¶ 489(a).

³⁴ *Id.* ¶ 507.

³⁵ Case No. IT-95-14/2, *Judgment*, 26 February 2001 ¶ 534

³⁶ *Id.*

In *Prosecutor v. Naletilic and Martinovic*, the Trial Chamber found insufficient evidence to conclude that prisoners held at the Primary School of Dobrkovic were mistreated by defendants, since the only evidence of mistreatment was the testimony of two witnesses who had heard of the abuse from prisoners held at the School.³⁷

In *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, the Trial Chamber had admitted, but at judgment refused to consider, a letter introduced by the defense describing an incident at the “Kravica Warehouse” where a massacre of Muslim prisoners had taken place. The Chamber explained that it was hearsay “not . . . examined through examination-in-chief and cross-examination.”³⁸

In *Prosecutor v. Krnojelac*, the Trial Chamber refused to give any weight to the following hearsay testimony of a witness: “I later heard from others, now to what extent you can believe this or not is different, that [Miso Koprivica] beat them.”³⁹ It also refused to credit the testimony of one witness who said he had been told, by the victim of a serious beating, that the accused witnessed the beating; the accused’s own denial of his presence “cause[d] the Trial Chamber to have sufficient doubt as to its accuracy as to reject the evidence, which was hearsay only.”⁴⁰

(b) ICTR cases.

In ICTR cases, the Trial Chamber has with great frequency heard, but expressly chosen not to credit, oral hearsay testimony that is uncorroborated.⁴¹

In *Prosecutor v. Niyitegeka*, the Trial Chamber “declined to rely” on one witness’s uncorroborated hearsay testimony regarding the accused’s distribution of a pile of guns

³⁷ Case No. IT-98-34, *Judgment*, 31 March 2003 ¶¶ 414, 416 & n.1101. It is worth noting that the trial chamber also refused to give weight to the testimony of another witness who saw a body being carried out from the School and heard that “they had killed a man there,” since the Counts of the indictment relating to the School “do not charge the accused with murder or willful killing.” *Id.* ¶ 414 n.1101.

³⁸ Case No. IT-02-60, *Judgment*, 17 January 2005 ¶ 300 n.1079.

³⁹ Case No. IT-97-25, *Judgment*, 15 March 2002 ¶ 301.

⁴⁰ *Id.* ¶ 255.

⁴¹ At other times, a witness’s hearsay testimony is mentioned along with his or her direct testimony, but the hearsay is simply not referred to when making the relevant findings of fact. For example, in *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T, “Witness OO” testified regarding the movements of the accused the day prior to, and the morning of, an attack at the Mugonero medical complex on April 16, 2004. Along with his direct testimony, he provided hearsay evidence that the accused had been present at, and participated in, the attack. *Judgment and Sentence*, 21 February 2003 ¶ 179. However, in making its finding regarding the accused’s participation, the Chamber does not refer to this testimony, instead relying on the testimony of a number of direct witnesses who said they had seen the accused at the attack. *Id.* ¶¶ 311-430.

to attackers, and on another witness's uncorroborated hearsay account of a grenade attack on Tutsi refugees hiding in Mugaba Church on April 16, 1994.⁴²

In *Prosecutor v. Musema*, the Trial Chamber found that the prosecutor failed to prove beyond a reasonable doubt the presence of the accused at the wheel of a truck "transporting individuals armed with spears and machetes," when the only evidence was oral hearsay testimony.⁴³

In *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, the Trial Chamber (1) found that the allegation that Gérard Ntakirutimana cut water and telephone connections to a medical complex was "not supported by sufficient evidence," where the evidence consisted entirely of hearsay; and (2) refused to rely on a witness's testimony that he "heard attackers nearby saying that Ntakirutimana had said that God had ordered that the Tutsi should be killed and exterminated."⁴⁴ On appeal, the defense pointed to another example of hearsay evidence admitted at trial, the testimony of a witness regarding a conversation he had with a third person, who stated that Ntakirutimana participated in a massacre at the medical complex on April 16, 1994. The Appeal Chamber found, based on the transcript and the Trial Chamber's Judgment, that the Trial Chamber had not, in fact, relied on this hearsay at all in finding that the accused had participated, but had referred only to the direct testimony of other witnesses.⁴⁵

In *Prosecutor v. Nahimana et al.*, the Trial Chamber found the hearsay evidence from two witnesses proffered by the Prosecution was insufficient to sustain a finding that the newspaper *Kangura* was government financed.⁴⁶

In *Prosecutor v. Sylvestre Gacumbtsi*, the Trial Chamber found "no evidence establishing a link" between the rape of one witness and the "utterances of the Accused" allegedly instigating others to perpetrate the rapes, as the instigation was reported via hearsay evidence. Thus the accused could not be held responsible for the rape.⁴⁷ With respect to other such rapes, where there was direct testimony regarding the accused's instigation, he was held responsible.

In *Prosecutor v. Ntagerura et al.*, the Trial Chamber did not credit the hearsay evidence of "Witness LC"⁴⁸ that the accused had ordered another to kill three Hutu boys.⁴⁹

⁴² Case No. ICTR-96-14-T, *Judgment and Sentence*, 16 May 2003 ¶¶ 54, 68, 70, 83.

⁴³ Case No. ICTR-96-13-A, *Judgment and Sentence*, 27 Jan. 2000 ¶¶ 650-651.

⁴⁴ Case Nos. ICTR-96-10 & ICTR-96-17-T, *Judgment and Sentence*, 21 February 2003 ¶¶ 156-159, 575, 578.

⁴⁵ Cases Nos. ICTR-96-10-A & ICTR-96-17-A, *Judgment of the Appeals Chamber, Prosecutor v. Elizaphan and Gerard Ntakirutimana*, 13 December 2004 ¶ 211.

⁴⁶ Case No. ICTR-99-52-T, *Judgment and Sentence*, 3 December 2003 ¶ 134.

⁴⁷ Case No. ICTR-2001-64-T, *Judgment*, 17 June 2004 ¶¶ 327, 329.

⁴⁸ Witnesses in ICTY and ICTR trials are often not identified in transcripts and decisions in order to protect them; the identity of the witness, however, is known to the defense.

In *Prosecutor v. Kajelijeli*, the Trial Chamber found “insufficient evidence that the Accused distributed weapons to the Interahamwe prior to 6 April 1994,” when the only evidence was uncorroborated hearsay.⁵⁰

In *Prosecutor v. Kamuhanda*, the Trial Chamber refused to rely upon hearsay testimony regarding the distribution of weapons by the accused.⁵¹ In a later portion of the opinion, the Chamber appears to confuse “relevance” and “credibility” in deciding not to rely on another piece of hearsay testimony relating to distribution of weapons used in a massacre: “The Chamber has considered the evidence of Witness GET and finds it credible. However, the Chamber considers that the nature of his evidence based exclusively on hearsay is not relevant because he did not Witness [sic] any of the events at stake in the Indictment.”⁵² The Chamber also declined to make a finding that the accused had perpetrated certain rapes, citing the hearsay nature of the two witnesses’ testimony.⁵³

In *Prosecutor v. Ndindabahizi*, the Chamber found that “the hearsay evidence of Witness TAS is insufficient, failing corroboration, to establish that the Accused ordered the murder of Marie and Béatrice.”⁵⁴

In *Prosecutor v. Semanza*, the Trial Chamber found that the prosecution had failed to prove the allegations of one count of the indictment relating to the accused’s role in a massacre at a church housing refugees in Ruhanga. One witness’s testimony provided only circumstantial evidence that the accused was present at the church during the attack, and the other witness’s testimony regarding his presence was hearsay.⁵⁵

3. Hearsay admitted and given weight at judgment.

(a) ICTY

In *Prosecutor v. Kordic and Cerkez*, testimony regarding the presence of defendant Dario Kordic at key planning meetings of the HVO on April 15, 2003 – the day before the town of Ahmici was “attacked and destroyed” by the HVO – was given by “Witness AT,” himself a “senior member” of the HVO Military Police.⁵⁶ Some of AT’s testimony was hearsay: he was told of Kordic’s presence at one meeting by another member of the HVO Police (who had direct knowledge) “while it was going on.”⁵⁷ The trial chamber did not expressly address

⁴⁹ Case No. ICTR-99-46-T, *Judgment and Sentence*, 25 February 2004 ¶¶ 401, 403.

⁵⁰ Case No. ICTR-98-44A-T401, *Judgment and Sentence*, 1 December 2003 ¶ 401.

⁵¹ Case No. ICTR-95-54A-T, *Judgment*, 22 January 2004 ¶¶ 290-291

⁵² *Id.* ¶ 494.

⁵³ *Id.* ¶¶ 495-497

⁵⁴ Case No. ICTR-2001-71-I, *Judgment and Sentence*, 15 July 2004 ¶ 196.

⁵⁵ Case No. ICTR-97-20-T, *Judgment in the Appeals Chamber*, 20 May 2005 ¶¶ 152, 159, 161.

⁵⁶ Case No. IT-95-14/2, *Judgment*, 26 February 2001 ¶ 610.

⁵⁷ *Id.*

the hearsay nature of this evidence, but it noted the defense argument that “Witness AT admitted that he did not see Kordic at any time on 15 April 1993.” In addressing this and other defense challenges to the reliability of AT’s testimony, the Chamber relied on both extensive circumstantial evidence generally confirming AT’s testimony (though not specifically Kordic’s attendance at the April 15 meeting) and the fact that AT testified “in the manner of a person recalling incidents rather than one making them up.”⁵⁸ On appeal, the hearsay nature of AT’s testimony was explicitly raised by the defense and addressed by the Appeals Chamber, which noted that the corroboration of hearsay evidence “is not a legal requirement, but rather concerns the weight to be attached.”⁵⁹ It stated, however, that “establishing the reliability of hearsay evidence is of paramount importance” and found that the Trial Chamber appropriately analyzed the probative value of AT’s hearsay testimony.⁶⁰ It should be noted that AT’s hearsay testimony would likely be admissible in a common-law jurisdiction as a present sense impression or as an admission by a party-opponent’s agent or coconspirator.

Also in *Kordic and Cerkez*, the Trial Chamber admitted into evidence a document found in the HVO archives entitled “Book of Observations of the Officer on Duty in the Central Bosnia Operative Zone,” referred to as the “War Diary.”⁶¹ The defense argued, among other things, that the War Diary was “based on multiple levels of hearsay.”⁶² The Chamber found that the document was authentic and “contemporaneously made.”⁶³ It admitted the document because “The Trial Chamber is under a duty to try and ascertain the truth and to deprive itself of this document would put that duty at risk.”⁶⁴ Provided a suitable foundation were laid, the portions of this diary that recorded direct observations – that is, that were not themselves based on hearsay – are statements of the type that might be considered admissible in U.S. jurisdictions as a “Record of Regularly Conducted Activity.”

In *Prosecutor v. Kvočka et al.*, two witnesses testified regarding an incident at the Omarska detention camp in Bosnia-Herzegovina in which a detainee, Muhamed Cehajic, was called out of a building by guards, beaten, and forced to collect money from the other detainees in the building or else be killed.⁶⁵ The two witnesses had direct knowledge of the beating and the fact that the detainee was sent back to collect money. However, the only evidence that defendant Milojica Kos was among the guards was the hearsay report of a statement made by

⁵⁸ *Id.* ¶ 630.

⁵⁹ Case No. IT-95-14/2, *Judgment in the Appeals Chamber*, 17 December 2004 ¶ 274

⁶⁰ *Id.* ¶¶ 283-84.

⁶¹ Zagreb Exhibits Decision, *supra* note 27 ¶ 26.

⁶² *Id.* ¶ 27.

⁶³ *Id.* ¶ 44.

⁶⁴ *Id.* The admission of the “War Diary” was raised as an issue on appeal from the Trial Chamber’s final judgment. *Judgment in the Appeals Chamber* ¶¶ 230-232. The appeals chamber affirmed the decision on the basis that “a reasonable trier of fact could have reached the conclusion of the Trial Chamber as to the admissibility” of the document. *Id.* at ¶ 232.

⁶⁵ Case No. IT-98-30/1, *Judgment*, 2 November 2001 ¶ 493

Cehajic to one of the two trial witnesses immediately upon re-entering the building after the beating. The Trial Chamber accepted this testimony, finding the witness “credible,” noting that the testimony of the two trial witnesses was “in no way contradictory,” and characterizing the hearsay declaration as additional consistent information.⁶⁶ In a common-law jurisdiction, the statement by Cehajic would likely be found admissible as a present sense impression or excited utterance.⁶⁷

In *Prosecutor v. Krnojelac*, the Trial Chamber noted numerous instances in which notes prepared by various witnesses who had spent time in detention camps were admitted into evidence. In many cases, the notes included both the witness’s own recollections and the recollections of others.⁶⁸ The Chamber stated that it “has been careful to scrutinize that evidence with care before determining to rely upon it, taking into account that such material is not capable of being tested by cross-examination, its source is not the subject of a solemn declaration, and its reliability may be affected by a potential compounding of errors of perception and memory.”⁶⁹ These notes are perhaps of the sort that could be permissibly used by the prosecution in U.S. courts to refresh a witness’s memory while testifying. However, the fact that the recollection of parties not testifying at trial was included in the notes might be problematic, particularly if the witness could not recall which entries were not based on their own personal knowledge.

In *Prosecutor v. Naletilic and Martinovic*, substantial amounts of hearsay evidence, both in documentary and oral form, were considered and given weight by the Trial Chamber. The diary of an HVO soldier was given weight, without its hearsay nature being explicitly referred to, because it turned out to be “very reliable in describing the events since other evidence corroborates the content.”⁷⁰ The Chamber gave weight to two reports prepared by international observers regarding the leadership of the HVO forces at the time of certain attacks, stating only that they had “probative value in connection with the other documents.” These documents are of the sort that might, depending on their contents and the circumstances under which they were created, be admissible in common-law courts as recorded recollections or as “Records of Regularly Conducted Activity,” upon a suitable foundation being laid.

The chamber walked a finer line in considering certain oral hearsay relating to the killing of Nenad Harmandzic and defendant Vinko Martinovic’s role in it. Martinovic was a commander of the “Convicts Battalion.” Harmandi was last seen alive, but in “very bad physical shape” from beatings inflicted by and/or on the orders of Martinovic, at Martinovic’s base.⁷¹ His

⁶⁶ *Id.* ¶ 494.

⁶⁷ According to the Federal Rules, this exception permits the admission of hearsay statements “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” Fed. R. Evid. 803(1). “Immediately thereafter” can encompass, under appropriate circumstances, time periods considerably longer than the period apparently involved in *Kvocka*. See, e.g., *U.S. v. Blakey*, 607 F.2d 779, 785-86 (7th Cir. 1979) (twenty-three minutes).

⁶⁸ Case No. IT-97-25, *Judgment*, 15 March 2002 ¶ 70 n.219.

⁶⁹ *Id.* ¶ 70.

⁷⁰ Case No. IT-98-34, *Judgment*, 31 March 2003 ¶ 28 & n. 54 (detailing corroborating evidence).

⁷¹ *Id.* ¶ 466.

body was exhumed and positively identified, and examination revealed that he had been killed by a gunshot through his cheek. But there was no evidence establishing the place of his death or who shot him.⁷² “Witness AE” testified that he overheard a conversation among Martinovic, three of his soldiers, and the owner of the house where AE was hiding. One of the four Convicts Battalion members said that they had killed Hermandzic; AE did not know which.⁷³ Under the common-law rules, this would be admissible as an admission or an adoptive admission, since either Martinovic made the statement himself, or he “manifested an adoption or belief in [the] truth” of the statement⁷⁴ by not remonstrating upon hearing it from his soldier. Witness AE and another witness also recounted conversations they had with two other individuals from Martinovic’s base, who told them that Hermandzic had been killed there.⁷⁵ Those statements would appear not to fall within any common-law exception to the hearsay rule. The Chamber found that these hearsay statements collectively “provide[d] strong links in a chain of circumstantial evidence,” which, combined with other circumstantial evidence regarding events leading up to Hermandzic’s death and burial, and evidence of Martinovic’s animosity towards Hermandzic, was sufficient to convict Martinovic of “at least” participating in Hermandzic’s murder.⁷⁶

In *Prosecutor v. Stakic*, the testimony of two witnesses who “heard” that women were raped in the camp at Trnopolje was admitted, as well as the testimony of two doctors at a medical clinic where several women saying they had been raped sought help.⁷⁷ This testimony was generally corroborated by more direct evidence of rapes of other women and girls at the camp. The chamber thus was “satisfied that rapes did occur” in the camp. Of these hearsay statements, only the testimony of the doctors would likely be admissible in common law courts, as they were reporting statements made to them for purposes of medical treatment.

As discussed above, the Trial Chamber had admitted, in *Prosecutor v. Strugar*, only certain portions of a report cataloging damage sustained by the Old Town of Dubrovnik during the period from October to December 1991. At issue was how much of this damage was attributable to an attack that took place on December 6, 1991; the dates given in the report were hearsay, having been reported to the authors by tenants and neighbors of the damaged buildings. After trial, the Chamber found that, with respect to 64 buildings, there was insufficient evidentiary support that the damage occurred on December 6, as the *only* evidence respecting the date was the hearsay contained in the report. Since the two witnesses who made the entries did not have experience inspecting war damage or expertise in ballistic or criminal investigation, and since cross-examination of one of the authors “revealed many inaccuracies and material

⁷² *Id.* ¶¶ 497-499.

⁷³ *Id.* ¶ 468.

⁷⁴ Fed. R. Evid. 801(d)(2)(B).

⁷⁵ *Judgment* ¶ 469.

⁷⁶ *Id.* ¶ 500.

⁷⁷ Case No. 97-24, *Judgment*, 31 July 2003 ¶ 244. These witness statements were really double hearsay, since the testimony was in the form of statements or trial transcripts admitted under Rule 92 *bis*. *Id.* ¶ 244 n.586.

typographical errors,” the Chamber concluded that the report “can be relied upon only to the extent it is confirmed by other evidence presented in this case.”⁷⁸ The information regarding dates contained in the catalog would likely be deemed inadmissible hearsay by common-law courts.

(b) ICTR

In *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, the Trial Chamber described as “credible” the testimony of “Witness XX” relating to events during April 1994 at the Mugonero medical complex, which was serving as a refugee camp for Tutsi civilians and as a treatment center for the wounded. The chamber acknowledged that the witness’s testimony that the accused Gerard Ntakirutimana had announced, prior to an April 16 attack on the complex, that all Hutu and foreigners should leave the hospital, was based on hearsay, but noted that this had been “corroborated by other witnesses.”⁷⁹

In *Prosecutor v. Sylvestre Gacumbtsi*, the Trial Chamber found credible the hearsay testimony of “Witness TAO” regarding his wife’s repeated rape by Isaïe Karamage over a period of two or three days; his wife told him about the rapes but was killed a few days later.⁸⁰

In *Prosecutor v. Ndindabahizi*, the Trial Chamber credited the hearsay testimony of two witnesses regarding the good relationship between the accused and an individual whose killing the accused was alleged to have incited. This evidence was deemed to be of “secondary importance,” and simply “fortified” the Chamber’s conclusion that the accused was angry at the killing.⁸¹ On this same point, the Chamber cites, without comment as to its hearsay nature, a contemporaneous and authenticated letter written by another witness stating that the accused had “complained about the death[.]”⁸²

In *Prosecutor v. Semanza*, the Trial Chamber credited the testimony of prosecution rebuttal witness “XXK” on the issue of when the accused left the town of Gahengeri, finding that the accused was there until a mass exodus on April 18 or 19, 1994.⁸³ The defense claimed that the accused left about ten days earlier.⁸⁴ The Chamber noted that the witness did not herself see the accused leave, but only reported that another individual, Bizuru (later killed), had told her he would be leaving with the accused and the accused’s family. Nevertheless, the Chamber found her “detailed testimony . . . concerning Bizuru’s actions . . . to be reliable and credible, particularly because of her first-hand knowledge.”⁸⁵ XXK’s testimony regarding a

⁷⁸ Case No. IT-01-42, *Judgment*, 31 January 2005 ¶¶ 321-324

⁷⁹ Case No. ICTR-96-10 & ICTR-96-17-T, *Judgment and Sentence*, 21 February 2003 ¶¶ 131-132.

⁸⁰ Case No. ICTR-2001-64-T, *Judgment*, 17 June 2004 ¶¶ 205-206, 216-217.

⁸¹ Case No. ICTR-2001-71-I, *Judgment and Sentence*, 15 July 2004 ¶ 437.

⁸² *Id.* ¶ 436.

⁸³ Case No. ICTR-97-20-T, *Judgment and Sentence*, 15 May 2003 ¶ 105.

⁸⁴ *Id.* ¶¶ 105, 111.

⁸⁵ *Id.* ¶ 111.

general exodus on April 18 or 19 was corroborated by another direct witness.⁸⁶ It is important to note that the testimony of defense witnesses giving contrary evidence was not credited because of clear bias and the inconsistent, exaggerated, and/or hearsay nature of the testimony.⁸⁷ A prosecution expert's testimony on these facts was also not relied upon because of its hearsay nature.⁸⁸ On appeal, the Appeals Chamber recognized the hearsay nature of XXK's testimony regarding the accused's departure, but noted that hearsay was admissible if it had probative value.

In *Prosecutor v. Rutaganda*, in connection with the charge that the accused had participated in attacks on Tutsis who had taken refuge at the École Technique Officielle ("ETO"), the Appeals Chamber found that the Trial Chamber had committed no legal error in admitting or giving weight to two items of hearsay testimony.⁸⁹

The first item consisted of trial testimony by "Witness A" that two Hutus had told him that Colonel Leonidas Rusatira had sought to separate Hutus from the refugees at the ETO. In fact, nothing in the Trial Chamber's judgment indicates that Witness A's testimony was hearsay; the judgment states simply that "According to Witness A, . . . Rusatira arrived and asked the Hutus to separate themselves from the group."⁹⁰ Thus the Appeals Chamber's conclusion that "it has not been established that the Trial Chamber acted without caution, or that it exceeded its discretion" appears to reflect a view that on appeal, it is the appellant's burden to prove that the Trial Chamber disregarded the absence of indicia of reliability. The Appeals Chamber also noted that Witness A had heard the remarks first-hand and was himself subject to cross-examination – factors that would not be considered relevant in common-law jurisdictions, as it is the reliability of the out-of-court statement that is at issue in determining what forms of hearsay are admissible. The most persuasive reason the Appeals Chamber gives for not finding error in the Trial Chamber's consideration of the hearsay testimony is that the evidence was "not directly relevant in respect of the Appellant himself" – *i.e.*, the error, if any, was harmless. Erroneously admitted hearsay is treated similarly by appellate courts in the U.S.⁹¹

The second item was the testimony of "Witness H" that, upon observing the arrival of a certain vehicle, he asked others about the identity of those on board, and was told that the occupants included the accused. In this instance the Trial Chamber's discussion made clear the hearsay nature of the testimony.⁹² The Appeals Chamber notes this, as well as its view that

⁸⁶ *Id.* ¶ 108.

⁸⁷ *Id.* ¶¶ 107-109.

⁸⁸ *Id.* ¶ 110.

⁸⁹ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, *Judgment in the Appeals Chamber*, 26 May 2003 ¶¶ 154-156.

⁹⁰ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, *Judgment and Sentence*, 6 December 1999 ¶ 268.

⁹¹ *See, e.g., U.S. v. Dukagjini*, 326 F.3d 45, 59-60 (2d Cir. 2003) ("We evaluate the erroneous admission of hearsay evidence for harmless error.").

⁹² *Rutaganda, Judgment and Sentence* ¶ 275.

the Trial Chamber was in a position to “assess the reliability of the information in question.” It found that “it does not appear that the Trial Chamber acted without caution[] or exceeded its discretion.”⁹³ Its reasoning here was based partly on the fact that the trial witness was physically “close to the original source of the reported statements.” Thus, the Appeals Chamber appears to be relying on something akin to the exception to the hearsay rule for present sense impressions, in that the physical and temporal proximity of the event and the hearsay declaration imply that the declaration was based on a contemporaneous and direct observation.

4. Generalizations

Given the discretion trial chambers have to admit hearsay and the lack of bright-line rules such as those embodied in the Federal Rules of Evidence, it is not surprising that the cases cited above vary in the manner in which hearsay is evaluated and in the degree of explanation accompanying its admission and consideration. On the other hand, there is no indication that the ICTY or ICTR trial chambers take a cavalier approach to admitting hearsay. Notwithstanding that hearsay is generally admissible and that nothing in the tribunals’ respective statutes or rules requires that special attention be paid to hearsay evidence, evidence explicitly or implicitly identified as hearsay by one of the parties appears to be scrutinized for reliability. In many cases, where the hearsay is admitted, it corresponds at least roughly to one of the hearsay exceptions recognized in common-law courts – although the Tribunals do not appear to rely on the common-law exceptions in their determinations.

The lesson here is that, before the Tribunals, as much as before common-law courts, both the defense and the prosecution must be vigilant in identifying hearsay evidence and, when appropriate, seeking to have it excluded or discounted by the Trial Chamber. Indeed, the fact that the arguments regarding the *weight* to be given to hearsay must be made *after* the trial is over makes the job of appropriately objecting to it easier than in common-law systems, where an evidentiary objection must be identified and articulated at the time it is admitted or uttered, or else waived.

The other striking feature about the way hearsay is evaluated by the Tribunals is their reliance on the existence of corroborating evidence, of whatever nature, as an indicator of reliability. There is no “corroboration” exception to the hearsay rule in common-law countries, and indeed, such considerations were specifically rejected by the *Crawford* court.⁹⁴ The importance of corroboration may explain the unwillingness of the Tribunals to exclude hearsay evidence before or during trial, since whether hearsay is corroborated is a determination that can only be made after all of the evidence has been presented. This may be why the ICTR Appeals Chamber stated, in upholding the admission of certain hearsay evidence, that “it is unlikely *at that stage in the trial*, and particularly in the absence of an objection, that a Trial Chamber would decide that the indicia of reliability of a witness [sic] testimony that the Chamber has heard live would be so lacking as to negate its probative value and render it inadmissible.”⁹⁵

⁹³ *Rutaganda, Judgment in the Appeals Chamber* ¶ 156.

⁹⁴ *Crawford*, 541 U.S. at 58-59.

⁹⁵ *Rutaganda, Judgment in the Appeal Chamber* ¶ 150 (emphasis added).

Conclusions

The suggestion by some authors that the admissibility of hearsay under the Rome Statute and ICC rules will lead to violations of the right of the accused “to . . . be confronted with the witnesses against him,” as recognized by the U.S. Constitution, is unfounded. The “core concern[]” of the Confrontation Clause is *testimony*, according to *Crawford v. Washington*,⁹⁶ and testimonial hearsay appears also to be prohibited by the Rome Statute and ICC Rules of Procedure and Evidence. The experience of the ICTY and ICTR to the contrary is not relevant, as the Rules governing those tribunals were drafted more loosely with respect to “testimonial” hearsay, and have been loosened further in order to speed the slow progress those *ad hoc* Tribunals have made in completing their work.⁹⁷

Thus the absence of a hearsay rule is relevant only to “nontestimonial” hearsay and does not implicate any fundamental procedural rights recognized in U.S. criminal law. It does raise questions as to the ability of the Tribunals to substantively determine the truth when the evidence proffered is potentially unreliable hearsay. The fact that the hearsay rule in the U.S. and other common-law jurisdictions is used to “shield” the fact-finder from some evidence may reflect more the common law’s concerns about lay jurors’ ability to gauge reliability than any particular view about the inherent unreliability of hearsay evidence. The above examination of outcomes in Tribunal proceedings illustrates that the Tribunal judges, many of them unschooled in the common law and its hearsay rules, take seriously their responsibility to give hearsay evidence effect only to the extent that they find it to be reliable and trustworthy – the very result that the common-law hearsay rules are designed to achieve. The fact that common-law systems do not permit lay jurors to make those evaluations, particularly in light of the fact that jury deliberations are unrecorded and unreviewable, is of uncertain impact given the volume of hearsay that falls into one or more of the hearsay exceptions and exclusions.

Thus the most striking distinction between the tribunals and the common-law systems is procedural: In the tribunals, the fact-finders – judges – are given the opportunity to individually evaluate the reliability of each item of hearsay, rather than acting as gatekeepers preventing a separate fact-finder from hearing or seeing non-exceptioned hearsay. Whether judges are really any good at making this evaluation, and honoring it when passing judgment – and whether lay jurors, given the chance, would be bad at it – is a question that defies an easy answer and that touches on many other aspects of criminal procedure besides the admissibility of hearsay evidence.

The striking substantive distinction between the Tribunals and common-law systems, particularly as seen in the ICTR, is the heavy reliance placed on corroboration in deciding what weight to give to hearsay evidence. The ICTY Appeals Chamber applies this rule broadly, finding hearsay to have probative value when the corroborating evidence is, as a whole, consistent with the hearsay testimony – even if the particular fact supported by the hearsay

⁹⁶ 541 U.S. at 60.

⁹⁷ See Fairlie, *supra* note 16, at 50-79.

testimony is not mentioned in the corroborating direct testimony.⁹⁸ The ICTR cases, on the other hand, often appear to require corroboration of the *particular fact* sought to be proved by the hearsay testimony, and thus reject hearsay with greater frequency.⁹⁹

These distinctions suggest that the apparent absence of a “prohibition” of hearsay in the tribunals is a red herring. The real questions raised by the absence of a formal hearsay rule are more complicated, and more basic: Who is the best fact-finder, a jury of lay persons, or a panel of experienced judges? And how can we best ensure that the innocent are not punished, and the guilty do not go free, when the only available evidence relating to crucial facts often carries with it questions of reliability?

* * *

Maintaining the fairness of ICC trials, and the public perception of their fairness, is a responsibility shared by trial judges and trial counsel. Notwithstanding the attention paid to the reliability of hearsay testimony in written decisions, it is unclear to what extent portions of ICTY and ICTR judgments have been supported, in whole or in part, by hearsay evidence not flagged by counsel through pre-trial motions, trial objections, or post-trial briefing. It is imperative that counsel assert objections to unreliable hearsay, not simply on the grounds that it is hearsay, but on the grounds that the particular example being offered is unreliable or untrustworthy. Although “national laws governing evidence” are not applicable before the ICC,¹⁰⁰ the common law’s hearsay exceptions might be a useful guide for counsel seeking to articulate objections to the reliability of individual examples of hearsay testimony.

ICC judges have the power to rule evidence inadmissible even in the absence of any motion by counsel,¹⁰¹ and must base their judgment upon an evaluation of the evidence submitted.¹⁰² The written decision of the Trial Chamber must include a “full and reasoned statement of [its] findings on the evidence.”¹⁰³ Thus ICC judges, like judges in the ICTR and ICTY, must take a hard look at hearsay evidence, particularly when it is offered in support of facts critical to the prosecutor’s case.¹⁰⁴ The legitimacy of the ICC’s decisions will be further enhanced if, upon overruling an objection to hearsay testimony, judges remind the parties (and the public) that the reliability and trustworthiness of the hearsay declaration will be evaluated in

⁹⁸ See discussions of *Prosecutor v. Kordic and Cerkez*, *supra* pp. 13-14; *Prosecutor v. Kvočka et al.*, *supra* p. 15; *Prosecutor v. Stakic*, *supra* p. 16.

⁹⁹ See discussion of *Prosecutor v. Sylvestre Gacumbtsi*, *supra* p. 12.

¹⁰⁰ Rules of Procedure and Evidence 63(5).

¹⁰¹ Rome Statute, art. 64(9)(a).

¹⁰² *Id.* art. 74(2).

¹⁰³ *Id.* art. 74(5).

¹⁰⁴ However, defense counsel cannot rely on the Appeals Chamber to correct erroneous admission or consideration of hearsay evidence by a Trial Chamber. As is the case in the U.S., where “harmless error” in criminal proceedings is not grounds for vacating a conviction, evidentiary rulings by the Tribunals’ Trial Chambers have rarely been overruled on appeal.

deciding whether and how much weight is to be accorded the evidence. When weight is accorded to hearsay evidence, judges should discuss why they credited the hearsay declaration so as to create a record on appeal, and to assist in developing a body of persuasive authority concerning the reliability of out-of-court statements.

Finally, the ICC should strenuously resist any urge to loosen the rules regarding testimonial hearsay, as has been done in the ICTY, since the right of a defendant to cross-examine witnesses who make statements to investigators, prosecutors, or tribunals is widely recognized to be a fundamental one.