

Note from the Field

Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal

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Convictions, if they are to be legitimate, must be based on credible evidence presented in a public trial. The conflict between the right of an accused to a public trial and the exceptional pressures on victim witnesses of war crimes is omnipresent in ICTY trials. Recently, the ICTY has begun to favor witness protection. These overly liberal grants of witness protection measures, including heavy reliance on affidavits over live testimony, closed sessions, face and voice distortion, and even pseudonyms, threaten the goals of the Tribunal – to provide accurate historical records of terrible events and fair treatment of accused war criminals.

I. THE IMPORTANCE OF WITNESSES IN WAR CRIME TRIALS

Unlike the Nuremberg and Tokyo war crime trials following World War II, the International Criminal Tribunal for the Former Yugoslavia (ICTY), established in 1993, makes lavish use of witness testimony. Telford Taylor, Chief Prosecutor of the Nuremberg prosecution team, commented that his team members “began to realize that the Teutonic penchant for meticulous record keeping would greatly ease our task of proving the criminal charges”¹ soon after embarking on their task of trying Nazi war criminals. Some team members thought the prosecution’s case could be

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1. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 57 (1992).

proved largely through “document books” accompanied by explanatory briefs presented to the court;² even Justice Robert Jackson, the first Chief Prosecutor, had decided “to put on no witnesses we could reasonably avoid,” further suggesting that the defense follow a similar pattern.³ Ultimately, the prosecution called some—but not many—witnesses, and the defense called more than expected, including the defendants themselves.⁴ In fact, in trials against all twenty-four first-tier defendants,⁵ there were only thirty-three witnesses called for the prosecution and sixty-one for the defendants.⁶ This is not surprising given that by the time the Nuremberg trial began, the Allied Military Command had full access to the German archives, as well as the reports of several national commissions that had heard approximately 55,000 live witnesses to war crimes and atrocities.⁷

The ICTY began its tenure in a much colder climate. The Bosnian war was not over, and some of the worst atrocities of the five-year conflict (1991-95), including the genocide at Srebrenica, had not yet occurred. Furthermore, the various “sides” (i.e., Bosnian-Muslims, Bosnian-Serbs and Bosnian-Croats)—aided in many instances by outside forces from remnants of the disintegrated Yugoslavia—were still skirmishing for territory that would eventually provide bargaining leverage at the Dayton Peace Accords negotiations in late 1995. The creation of the ICTY in 1993⁸ was thus as much a diplomatic as a humanitarian gesture to show the horrified world that the international community would do “something”—even if governments would not intervene militarily to stop the bloodshed. In large part, it was courageous reporters who, by exposing the seemingly continuous stream of unbelievable tales of brutalities committed on innocent civilians, helped make the ICTY a reality.

Ironically, the ICTY was an empty vessel for its first few years. The first trial (of a relatively low-profile offender whose transfer was negotiated with Germany, where he was already in custody) did not take place until 1996.⁹ This was partly a result of the fact that the former Yugoslavia was restructured under the Dayton Accords in late 1995 with no clear winners or losers. Certain areas, such as Serbia, Croatia, and Republika Srpska in Bosnia-Herzegovina, thus became practically inaccessible to the ICTY investigators, who could not obtain critical

2. *Id.* at 136.

3. *Id.* at 134, 148.

4. *Id.* at 322.

5. The list of defendants included Goering, Hess, Ribbentrop, Speer, Bormann and other high-ranking military and German political leaders. *Id.* at 89-90.

6. *Id.* at 574.

7. *Id.* at 313-15.

8. The ICTY was created by the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704, Annex 1, available at www.un.org/icty/basic/statut/stat2000.htm (last visited Feb. 2, 2002) [hereinafter ICTY Statute], adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (May 23, 1993), amended by S.C. Res. 1166, U.N. Doc. S/RES/1166 (May 13, 1998).

9. See *Prosecution v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 27 (May 7, 1997).

documents (if they even existed) held by entities unsympathetic to the Tribunal's existence or goals. With time, political transformations in these countries resulted in greater cooperation with the ICTY in securing documents, defendants, and witnesses; the final decisions about their availability, however, still sat in the hands of governmental authorities, which were often less forthcoming than hoped. In all, as the workload of the ICTY rapidly escalated from 1997 onward, prosecutors soon learned they could not depend nearly as heavily on "paper trails" to prove war crimes as their Nuremberg counterparts had. In fact, in most cases they needed substantial numbers of eyewitnesses to prove crimes had occurred, as well as expert witnesses to justify or impugn the defendants' acts. As a case in point, eyewitness testimony from a former member of the Bosnian Serb Army who had personally participated in the execution of thousands of Bosnian Muslim men following the fall of Srebrenica in 1995 was a key part of the prosecutor's case in one trial in which I participated.¹⁰ Witnesses thus became the lifeblood of ICTY trials.

Statistics support the crucial nature of witness testimony at ICTY trials. From January 1, 1998 to July 1, 2001, 971 victim-witnesses came to The Hague to testify—137 in the period between January and May 2001 alone (at an approximate cost of \$1,600 per witness).¹¹ Furthermore, the use of witnesses increased as work intensified: from July 31, 2000 to July 31, 2001, the Victims and Witnesses Section of the ICTY handled 550 witnesses from thirty different countries, a thirty percent increase over the same period from the previous years.¹² All of these witnesses testified in only eight trials conducted during that year,¹³ with the Srebrenica genocide case—in which there was only one defendant—alone involving 103 prosecution witnesses, twelve defense witnesses, and two Chamber witnesses over a ninety-eight day trial.¹⁴

Based on my personal experiences as an ICTY judge, it is clear that witnesses have been vital in establishing the occurrence of the crimes committed. Indeed, in some cases there have not been enough witnesses. For instance, in the trial of General Radislav Krstić for crimes following the fall of Srebrenica in 1995, the massacres were so effective that only one or two victims survived. Sometimes, despite extensive rumors of executions, there were no survivors at all and therefore no witnesses. In one example,

10. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 234, 239-40 (Aug. 2, 2001).

11. Report of Deputy-Registrar, ICTY to Plenary Session, July 11, 2001 (on file with author).

12. 8 ICTY ANN. REP. 4 (2001) (hereinafter ANNUAL REPORT).

13. *Id.* at 16. During the same period nine other cases were in pre-trial proceedings, and fourteen cases were involved in appeals from the final judgment or interlocutory decisions. Witnesses, of course, do not ordinarily participate in pre-trial proceedings or appeals, although they may be summoned for pre-trial depositions and, under Rule 115, additional evidence may be heard on appeal if "in the interests of justice." ICTY R.P. & EVID. 115, U.N. Doc. IT/32/rev.21 (2001). See, e.g., Prosecutor v. Kupreskić, Case No. IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001 (Apr. 11, 2001) (allowing, *inter alia*, the testimony of four new witnesses and associated exhibits to be adduced by a defendant by way of an evidentiary hearing on appeal).

14. ANNUAL REPORT, *supra* note 12, at 17.

it was reported that hundreds of bodies of executed Muslims were dumped into bodies of water and washed away down river, but with no survivors the episode could not be corroborated sufficiently to be included in the prosecutor's case.¹⁵ Ultimately, the Balkan offenders—again unlike their Nuremberg predecessors—did not engage in “meticulous record keeping.” They left few paper trails behind, and thus witnesses had to be relied upon for most of the evidence at trial.

Recent developments in the Tribunal's procedural rules have allowed for increased use of affidavits and other alternatives to live witness testimony. The following sections detail the tensions that exist in a judicial proceeding that must balance the promise of a public trial, a full and fair examination of witnesses, and justice for the victims. This paper examines how the ICTY obtains the testimony of witnesses, what the drawbacks of affidavits as compared to live witness testimony are, and how witnesses' credibility is assessed both when they come to court and when they do not appear at the proceedings. Given that the goal of all international criminal proceedings is to bring perpetrators of war crimes to justice in as fair a manner as possible, it is essential that serious consideration be given to the problem of witness testimony in war crimes trials. The difficulties surrounding witness testimony that have emerged at the ICTY should be examined for their applicability to future permanent tribunals.

II. SECURING WITNESSES

The bulk of ICTY witnesses are victims of war crimes. They are either refugees who have not been able (or do not wish) to return to their home villages and towns, or survivors who have continued to stay on after the Dayton Accords—often in a perpetual state of fear of retaliation if they talk publicly about their experiences. Intimidation, anonymous phone calls, and word-of-mouth threats relayed by third party intermediaries occur with some frequency when the word gets out that someone is coming to testify at The Hague. Unfortunately, the Tribunal has no enforceable subpoena power to compel witnesses to come; we have summons and “binding orders,” but they are binding only so far as the witnesses' native countries choose to enforce them. As a result, timid witnesses can simply refuse to come, and indeed they do so, sometimes at the last minute. This aura of fear and apprehension is just as prevalent among defense witnesses as prosecution witnesses. Many potential witnesses simply want to get on with their lives and avoid stirring old antagonisms. Both prosecution and defense lawyers report that, as time passes, witnesses seem more reluctant to come to The Hague to testify. The routine broadcast of Tribunal proceedings into the Balkans and Western Europe probably serves to intensify this trend.

The Tribunal seeks to counter witnesses' apprehensions in several ways, some of which contend with other human rights guarantees the

15. See *Krstić*, Case No. IT-98-33-T, ¶¶ 201-08, 221, 228, 249.

Tribunal is bound to observe. As a result, there is a decided tension between getting witnesses to testify and preserving the traditional rights of criminal defendants, as reiterated in the Tribunal's Statute and in the European Convention on Human Rights.¹⁶ This section aims to identify the due process costs entailed in witness protection efforts and suggests means for minimizing them.

A. The Arsenal of Witness Protection Measures

The Tribunal has a very active Victims and Witnesses Section (VWS) in its Registry (the administrative arm), created to support and protect all witnesses, whether called by the prosecution, the defense, or the Court. It provides counseling, makes travel and lodging arrangements for witnesses coming to The Hague, supervises their visits (neither prosecution nor defense lawyers are allowed to contact witnesses once they have taken the stand),¹⁷ and does its best to ensure witnesses' health, safety, and security. In extreme cases, VWS personnel will go to the witnesses' homes and personally escort them to and from The Hague. There is also a witness relocation program for the few cases where testifying may endanger a witness's safety back home. Even at the present level, the VWS is understaffed and depends in part on donations from individual countries and the European Commission.¹⁸

Pursuant to its Statute, the Tribunal is tasked with certain responsibilities for the protection of witnesses, including, but not limited to, *in camera* proceedings and non-disclosure of the witness's identity.¹⁹ The Tribunal's approach has been to adopt a variety of witness protection measures designed to limit the audience that is privy to the witness's true identity. These measures are not automatic, and the party seeking safeguards for its witnesses must obtain leave of court. Rule 75 of the ICTY Rules of Procedure and Evidence allows the court to order:

- (a) expunging names and identifying information from the Tribunal's public records;
- (b) non-disclosure to the public of any records identifying the victim;
- (c) giving of testimony through image—or voice—altering devices or closed-circuit television; and

16. ICTY Statute, *supra* note 8, art. 21; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221.

17. This prophylactic measure sometimes makes for increased discomfort of the witness who has had all his prior contacts with the lawyers or investigators for the prosecution or defense and finds himself in a strange city not allowed to contact them. It probably increases the likelihood the witnesses will talk to each other in the waiting rooms or in their lodgings, thereby risking the "collective testimony" syndrome discussed elsewhere.

18. ANNUAL REPORT, *supra* note 12, at 33-34.

19. ICTY Statute, *supra* note 8, art. 22.

(d) assignment of a pseudonym.²⁰

Rule 79 provides for closed sessions in which the court may bar the press or public from watching or listening to testimony. Before making such an order, the court must publicly state reasons for its actions.²¹ The guarantee of "safe passage," which shields witnesses testifying in The Hague from arrest on the basis of war crimes, has become another protection particularly useful to the defense.

Rule 96, which governs the testimony of victims of rape and sexual assault, owes its existence, in substantial part, to non-governmental organization (NGO) efforts focused on women's war crimes issues. This rule requires no corroboration of the victim's testimony; consent is not a defense if the victim has been subjected to or threatened with violence, duress, detention or psychological oppression, or if the victim reasonably believed another would be so subjected if she did not submit. No evidence of consent at all can be submitted unless the court *in camera* has ruled it is relevant and credible, and a victim's prior sexual conduct cannot be admitted into evidence.²²

B. The Drawbacks of Witness Protection

What practical consequence does this emphasis on witness protection import for the trial itself? Invariably, in my experience, the prosecution will request protective measures for a substantial number of its witnesses. Typically, the defense will not be allowed to approach these witnesses before trial without informing the prosecutor, who then ascertains if the witness wants to talk to the defense. In cases where pseudonyms have been ascribed to a witness, counsel for the opposition must invariably keep a log of individuals to whom the real identity of the witness will be

20. ICTY R.P. & EVID. 75, *supra* note 13.

21. *Id.* at R. 79.

22. ICTY R.P. & EVID. 96 does not, of course, take care of problems like the special cultural stigma that attaches to rape victims in Muslim communities. The United Nations has reported that 5,000 women and girls worldwide, but predominantly from Muslim countries, were killed in 2000 by family members for "dishonoring" their clan, many of them the victims of rape. See Molly Moore, *In Turkey, 'Honor Killing' Follows Families to Cities*, WASH. POST, Aug. 8, 2001, at A1, A14. Another problem that has arisen in sexual violence prosecutions is whether the defense should have access to counseling or treatment records where the victim has sought help in handling the traumatic aftermath of the sexual violence. In some ICTY cases, such reports are handed over to the defense; in others *in camera* hearings are held to see if the contents are truly relevant to the witness's credibility or to the weight to be accorded her testimony. Rule 68 is a counterpart to the U.S. *Brady* rule that requires that the prosecution turn over any material "which in any way . . . may affect the credibility of prosecution evidence." ICTY R.P. & EVID. 68, *supra* note 13; *Brady v. Maryland*, 373 U.S. 83 (1963). In at least one case with which I am familiar, however, the Trial Chamber ruled *ex parte* and *in camera* that the counseling report did not have any such effect and need not be disclosed. I am informed however that one human rights group warns women victims in the field that any counseling reports may have to be turned over to the court if they become witnesses—an additional incentive not to testify.

disclosed – this list is usually limited to the trial team.

In the first ICTY case ever tried, the prosecution obtained leave to keep some witnesses' identities anonymous to even the defense team. But, perhaps because of a vigorous dissent by one of the judges²³ and the subsequent furor ignited in the American Bar Association, no other ICTY Chamber has since invoked such stringent safeguards. In my opinion, it is extremely unlikely that one ever will, absent an exceptionally strong showing of the defense's untrustworthiness. The non-disclosure rule, as it presently operates, however, still complicates pre-trial preparations and trial proceedings. Under liberal discovery rules, the prosecution must disclose all prior statements in its possession for witnesses it intends to call, as well as all materials submitted to the judge who confirmed the indictment.²⁴ Where witness protection measures have been imposed, much of this material must be restricted as to dissemination, or even redacted to avoid undue disclosure of witness identities. Throughout the proceedings and even the final judgments, protected witnesses are known by pseudonyms such as Witness A or Witness B. Often the Chamber goes in and out of closed sessions, at some annoyance to the viewing public and press, in order not to publicly identify the witness. Onlookers see only colored cubes on the screen, in place of witnesses' faces, and hear the uniform drone of distorted voices instead of the witnesses' own. If these deviations were limited to one or two witnesses per trial, it might not raise any serious question as to whether the ICTY Statute's guarantee of a public trial is being honored. But this is not how the use of protective measures has worked in practice.

Visitors from the United States are often surprised at how much of a typical ICTY trial is not public, in the sense that visitors to the gallery and viewers on TV can see and hear the witnesses. It is not difficult to envision a point at which so much of the testimony comes from secret or disguised witnesses that the trial as a whole cannot accurately be considered a public one.²⁵ Pseudonyms and closed sessions also complicate the reading of ICTY judgments, which are supposed to be a record of history but are often so peppered with concealed identities of key witnesses that their historical usefulness may be questionable. For instance, out of the 118 witnesses in

23. See *Prosecutor v. Tadić*, Case No. IT-94-I-T, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (Aug. 10, 1995) (Separate Opinion of Judge Stephen); Monroe Leigh, *Witness Anonymity Is Inconsistent With Due Process*, 91 AM. J. INT'L L. 80, 81 (1995).

24. See ICTY R.P. & EVID. 66(A), *supra* note 13.

25. Once a Trial Chamber has imposed protective conditions on a witness's testimony, only that Chamber may lift them. Thus, if the parties to a trial wish to have recourse to the closed session transcript of a witness's testimony from another trial they must seek permission from the Trial Chamber that originally granted the protective measures. This is a cumbersome procedure since, often, the original trial panel no longer exists (one or more of the judges may have ended his tenure or left the court) and the President of the Tribunal must authorize the release of the protected material. See *id.* at R. 75(D). A large number of these motions for lifting protective conditions are filed so that the testimony of one relevant witness can be used in another trial dealing with the same facts. The same protective conditions usually are carried forward in the new trial.

the Krstić Srebrenica trial, fifty-eight testified under pseudonym or face or voice distortion, and nine gave their evidence in closed session.²⁶ Thus, over fifty percent of the witnesses did not testify publicly in the usual sense of the word. The conflict between the right of an accused to a public trial and the exceptional pressures on victim witnesses of war crimes is omnipresent in ICTY trials.²⁷

C. One Avenue for Reconciliation

The solution is not pat. Perhaps some Trial Chambers are too eager to agree to protective measures, either because of a presumed general hostility of the witness's home country or in hopes of avoiding a no-show. My experience suggests that the need for protective measures often depends on the personality and attitude of the witness; some from the same locale and background ask for protection while others are willing to speak openly. Most judges and lawyers, and the VWS—who can itself ask for protective measures for witnesses—are justifiably super-solicitous of the witnesses' fears and apprehensions. Yet there is something lost in the utility of historical trials that are meant to send messages to future war criminals when the witnesses stay hidden and are not identified in the judgment. This practice also fuels the critics of international criminal courts, who say that international due process is less than what most Western Europe countries and the United States expect for their own citizens. In my view, prosecutors, who generally have more witnesses than the defense, should consider whether a witness will testify in person when soliciting testimony for a case. There is a general notion among Tribunal judges that prosecutors overload their witness lists, and recently the Tribunal has passed new rules permitting judges to limit the number of witnesses that either side can call at trial.²⁸ Given a choice between a witness who will testify openly and one who requires protection, the former should have an edge. Both prosecutors and judges should exercise more discretion when they set up their witness lists in order to maximize live witness testimony. And it has been suggested that judges should insist on advance written motions for protective conditions rather than granting them orally during trial, as some do.²⁹ In general, more thought needs to be given to the endemic conflict between witness protection and the rights of the accused. It is bound to arise again in the new International Criminal Court, as well as in other *ad hoc* war crimes trials.

26. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, at xvi (Aug. 2, 2001).

27. A chart prepared by the Victims and Witnesses Section (on file with the author) shows some form of protective measures employed on forty-three percent of all witnesses appearing at the ICTY since January 1, 1998.

28. ICTY R.P. & EVID. 73 *bis* (C), *supra* note 13.

29. The VWS has suggested that witnesses who had not formally asked for protective measures find out when they come to The Hague from other witnesses with whom they dine and lodge that they are available and belatedly request the same treatment for themselves.

III. ARE THERE VALID SUBSTITUTES FOR LIVE WITNESS TESTIMONY?

The ICTY's hybrid approach to live witness testimony reflects a larger tension between American and civil law. In the American system of justice, live witness testimony is the preferred and often the only way to present evidence on what, when, where, and even why critical events occurred. In criminal proceedings, depositions are allowed only in exceptional circumstances by order of the court or by agreement of the parties. The exceptions to the live testimony rule allowed by American hearsay rules are quite circumscribed.³⁰ This mode presupposes the superiority of live testimony to written accounts prepared by witnesses themselves or third party accounts of what someone else said to the witness, neither of which can be subjected to cross-examination. In civil law systems, however, there is a far wider use of written witness statements and of hearsay, especially during the initial period presided over by an investigative judge who produces the "dossier" on which the actual trial is based. While adopting the civil law's more liberal approach to the kinds of testimony that will be admitted, the ICTY in its beginning years nevertheless gave live witnesses a premium role in its proceedings.

The infallibility of live witness testimony may itself be open to doubt. There is a large body of expert criticism that stresses many sources of its fallibility.³¹ The criticisms go like this: assuming an intention to "tell the truth" in the first place and no conscious intent to deceive, the witness testifying in the courtroom will necessarily be processing information he has received from his sensory organs (eyes, ears, touch) through the lens of his unconscious judgments about what that information means, principally comparing the new information to past knowledge and memories. His testimony is almost always a product of both his observations and his prior thought processes. If a witness says a house is "rundown" or "luxurious" he is telling us not just what he saw but what his entire background leads him to think about what he saw. Experiments have shown that a majority of witnesses overestimate or underestimate objective facts like length, width, or height of objects. In one experiment, eighty-eight percent of the subjects' estimates of the dimensions of an object were wide of the mark. As the time between the witness's observations and his testimony grows longer, the likelihood of the witness's non-observational judgments

30. See, e.g., FED. R. CIV. P. 15 (e)(g), 26; FED. R. EVID. 801, 804.

31. The following critique of live testimony draws on the expert witness report of Professor Zivojin Aleksic, *The Probative Value of Testimony in Criminal Proceedings*, submitted by Defense Counsel for Zoran Zigić in *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-T (Mar. 29, 2001) (on file with author). It is used here primarily to illustrate a civil law evaluation of the fallibility of witness testimony. Similar criticisms have been echoed in Anglo-American writings. See, e.g., ELIZABETH LOFTUS, *WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS AND THE EXPERT WHO PUTS MEMORY ON TRIAL* (1992); ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* (1996); Wayne Westling, *The Case for Expert Witness Assistance to the Jury in Identification Evidence Cases*, 71 OR. L. REV. 93 (1992); 2A WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 414.1 (3d ed. 2000) (noting that "[t]here is extensive empirical evidence that eyewitness identifications are not reliable").

entering into his or her conclusions increases. In assessing live testimony that comes years after the event, the fact-finder must thus allow for the effects of time in distorting the events witnessed.

Distortion may also arise from important changes in perception. The perceptions of eyewitnesses as to what they saw may be altered by whether they realized at the time that they were witnessing a criminal act. Perceptions can also be affected radically by whether the eyewitness was a passive observer, the victim of the crime or an active participant in the crime. While studies reveal that a majority of injured party witnesses give basically truthful testimony, there are indications that, on occasion, their feelings of outrage may cause them to aggravate accounts of damage or injury inflicted. Thus, some European courts require an injured eyewitness to give testimony at the beginning of the proceeding in order not to be affected by accounts from other witnesses he may encounter inside or outside the courtroom. A change in perception even on the eve of trial may produce a change in testimony.

The specific sensory organs involved in the act of perception may also affect the reliability of testimony. Most experts say a witness who did not see, but only "heard" about something is far less reliable than an eyewitness. That tenet, of course, is the foundation for our hearsay rules. But even among these "indirect" witnesses there are gradations. Did the original eyewitnesses actually say something to the witness on the stand or did the live witness hear about it from a third party who talked to the eyewitness? It may be important if the original eyewitness transmitted her statement to several second-hand witnesses at the same time so that a "group testimony" syndrome may be set in motion in which the members of the receptor group discuss what they heard and arrive at a kind of consensus as to what was said rather than relying on their original memories of what they actually heard the eyewitness say. Stress may also intensify the likelihood of distortion of what second-hand witnesses heard from the original eyewitness. Although, in general, most civil law countries are more liberal in allowing hearsay evidence, some European countries require corroboration of hearsay statements. The likelihood of distortion from the sources may therefore warrant skepticism about some aspects of live witness testimony if the testimony invokes what the witness "heard" not "saw."

Basically, all live testimony carries with it the possibility of distortion as to what really occurred. Even an on-the-scene witness who heard something rather than saw it is more prone to put her own background experience into the conclusions she draws as to what she heard than one who views it with both eyes and ears; cries of pain or ecstasy or intense laughter can thus be interpreted very differently by different hearers. People also tend to remember only those words in a conversation that attracted their attention in the first place. Live testimony must therefore be evaluated in light of witnesses' unavoidable subjectivity.

This brief summary of the commonly-cited fallibilities of live testimony provides a necessary backdrop for an evaluation of the substitutes the

ICTY has permitted when live witnesses cannot be made to come to The Hague to testify.

The ICTY employs a hybrid admissibility standard for witness testimony. Originally there was an expressed preference for live testimony in Rule 90(A), along with a residual power in Rule 89(C) to admit any relevant evidence the judges deem "probative." There was also a complicated procedure for allowing witness statements if sworn under oath to an appropriate official in the witness's country of residence and so long as the written testimony went only to corroborate the testimony of a live witness as to a disputed fact. Even then, the other party could request and the court could require cross-examination of the person who made the statement. This rather cumbersome procedure was replaced last year by a new rule that allows a witness's written statement in lieu of oral testimony so long as it helps prove "a matter other than the acts and conduct of the accused as charged in the indictment." (The Rule sets out factors in favor of and against the use of written statements as a guide to judges.) The statement must be verified by the witness's declaration of its truthfulness and witnessed by an authorized person in the country where it is taken or an officer of the Tribunal.³² Transcripts of testimony in other Tribunal proceedings can also be admitted, again, so long as they do not go to prove acts and conduct of the accused.³³ Parties planning to use written statements must give notice so that the opposing party can object. The Court will decide for or against admission and whether to require cross-examination.³⁴ Thus, although live testimony continues to play a defining role in ICTY proceedings, the role of written testimony has steadily grown.

This new mixed oral/written witness regime in ICTY criminal trials entails important tradeoffs. Most witness statements are taken by the Office of the Prosecutor (OTP) in the field during the investigative phase of the cases, often several years before the case comes to trial. The OTP often has little or no contact with the witness afterwards until it comes time for the witness to testify. Then because of the distances involved—some witnesses have since migrated to third countries or reside in not-so-friendly countries—the Prosecutor may not see the witnesses to talk to until the day they arrive in The Hague. As a result, the story a witness tells on the stand very frequently differs in major or minor details from the one in the witness statement given years before. Of course, in the interval, the

32. ICTY R.P. & EVID. 92 *bis* (A), *supra* note 13. The new Rule sets out a number of factors that the Chamber shall consider in exercising that discretion. The factors militating towards admission of a written statement are that it: (a) is cumulative in that other witnesses will give similar oral testimony; (b) relates to historical, political, or military background; (c) consists of a statistical analysis of the ethnic composition of the population; (d) deals with the impact of crime upon victims; (e) relates to the character of the accused; or (f) relates to an issue of sentencing. Factors that militate against written testimony include: (a) the presence of an overriding public interest in the evidence being presented orally; (b) demonstration by either party that its nature or source render the statement unreliable or that its prejudicial effect outweighs its probative value; or (c) other factors suggesting cross-examination would be appropriate.

33. *Id.* at R. 92 *bis* (D).

34. *Id.* at R. 92 *bis* (E).

witness may have read about or seen on TV some of the defendants in the dock and may even have had contact with other witnesses involved in the same episode who have already testified before the Tribunal. The witness may also have had counseling or group therapy to deal with the post-traumatic effects of the episode. Sometimes she has herself spoken about the events in other forums—judicial, political, social, educational or media—or even testified in other cases before the ICTY. This time sequence has significant potential effects on her testimony. Her own story may have evolved in its details, even sometimes in the individuals she identifies as criminally involved in the original episode. Since the defense must be given all prior “statements” by witnesses the prosecution intends to call, cross-examination of these witnesses often exposes serious differences between original statements in the field, interim statements to other persons, official or unofficial, and the witness testimony on the stand. If witness statements alone can be admitted, the opportunity to probe and expose these changes in the witness’s recollection will be lost.³⁵ Cross-examination of a live witness serves to sort out the accuracy of a written record of eyewitness testimony compiled years before trial as compared to current recollection of the same event.

Cross-examination may also guard against an excessive reliance on a witness’s uncontested version of events. In reading newspaper accounts of a United States civil case tried *in absentia* against a Serbian official on the basis of some of the same episodes which are the subject of Hague criminal proceedings with which I am familiar, I was surprised by the high degree of credibility on all details the press (I do not know about the judge) accorded a single witness from one of the prison camps. I had seen the same witness in ICTY proceedings subjected to intense cross-examination on the basis of prior statements and grilled on inconsistencies between her past and present accounts. I must conclude that hearing the isolated story of a single or a few witnesses about war crimes in an *absentia*-type proceeding is a very different experience than hearing a parade of witnesses about the same event—both prosecution and defense—and seeing them subjected to intense cross-examination about their earlier accounts. Whatever the inherent difficulties of live witness testimony, additional inaccuracies brought about by the passage of time and confrontation with other sources are far more likely to be ferreted out in

35. The reaction of live witnesses confronted with differences between their present testimony and earlier accounts is interesting. In my experience, most do not back down from their present testimony, even if—as has happened in a few cases—they cannot correctly identify the defendant in the dock. They often say that they did not understand what they were signing in the earlier statement or that they did not say what the statements say. This is not an altogether implausible scenario, since the usual procedure is to have the witness (a) give the statement in his own native language, Bosnian/Croatian/Serbian (BCS), (b) then have an interpreter write it down in English, (c) then read the English version back to the witness in BCS, who (d) then signs the English version. Obviously there is much room for error, as the ICTY Appeals Chamber has noted. See *Prosecutor v. Kordić and Cerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, ¶ 27 (July 21, 2000). Sometimes the witness even denies altogether that anyone read him the statement in the first place or that it bears his signature.

live cross-examined testimony than by a judge reading a written statement. Cross-examination, unavailable in the absence of live witness testimony, may be the most effective method of determining the value of that testimony.

Cross-examination, considered alongside lifeless affidavits, counsels a prudent skepticism of written testimony. Having heard several witnesses repudiate in whole or in part earlier statements, one cannot but have doubts about the weight to be given witness statements standing alone. Perhaps for this reason the new ICTY rule³⁶ limits their scope to evidence not involving acts or conduct of the accused charged in the indictment, although what is or is not conduct of the accused can itself be a litigious matter. Take the case of a superior officer in a prison camp charged under a common purpose theory with contributing to the operation of the camp as an inhumane place of confinement. Acts committed by other officials in the camp can theoretically be charged to him under the common practice theory. Do those other persons' acts or conduct constitute prohibited acts or conduct of the accused for purposes of deciding whether witness statements can be admitted in lieu of live testimony about them? Attempts to enlarge the admissibility of written testimony are sure to encounter continued challenges on where the line will be drawn in each case.

There are of course other substitutes for live testimony in the Tribunal apart from written witness statements. A limitation in an original rule allowing the use of depositions only "in exceptional cases" has been removed, although some Chambers still impose limits that depositions be restricted to occasions where the witness cannot physically come to testify or that they be confined to testimony about surrounding events, not core allegations, against the accused or to situations where there is some live testimony to the same effect.³⁷ Testimony by video-link under Rule 71 *bis*³⁸ is also available in some cases; it more closely parallels the actual courtroom experience since the judges can see the witness testify and ask him questions on the spot. Video-links are expensive and require the presence of an ICTY official at the site where the witness is giving testimony. Still, many witnesses, for obvious reasons, prefer to give testimony by deposition or video-link than to make the trip to The Hague, so use of these techniques is becoming increasingly frequent. These standards have replaced live testimony in an increasing number of cases.

The overall trend is clear. The ICTY has gradually moved from a predominantly live testimony mode to a mixed one.³⁹ The primary reason for this movement is a focus on shorter and less costly trials entailing less

36. ICTY R.P. & EVID. 92 *bis*, *supra* note 13.

37. *Id.* at R. 71. See Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-PT, Decision on Prosecutor's Motion to take Depositions for Use at Trial (Rule 71) (Nov. 10, 2000); Prosecutor v Naletilić and Martinović, Case No. IT-98-34-PT, Decision on Prosecutor's Motion to take Additional Depositions for use at Trial (June 5, 2001).

38. ICTY R.P. & EVID. 71 *bis*, *supra* note 13.

39. See generally, Patricia M. Wald, To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 HARV. INT'L L.J. 535 (2001).

delay for the accused in detention and more credibility for the Tribunal's ability to get its work done. Live testimony has its own set of problems, as I have indicated, but the engine of cross-examination is still a powerful tool to uncover critical errors of perception or memory on the part of witnesses. Witness statements—even verified ones— have no such built-in screening mechanisms. While I have supported the use of those statements for background historical or jurisdictional matters, I retain serious concerns about their use to prove acts or conduct that implicate the accused, acknowledging that the line is often a tenuous one. From my observations at ICTY trials, it is a bit too tempting for a victim witness simply to verify an earlier statement given to a field investigator; it is grueling and may sometimes seem cruel to make the same witness undergo cross-examination from a hostile defense attorney or even intense questioning from the judges on the details of horrifying experiences.⁴⁰ But despite all the fallibilities of live testimony, it still provides decision-makers with the best weapon at our disposal for truth-seeking, far superior to a written statement when the core of guilt is in doubt. The ICTY's willingness to admit substitutes for live testimony may come at the expense of truth. Insofar as witnesses may be intimidated or deterred from testifying because of the pitiless grilling they receive from opposing counsel or the constant stream of objections interrupting their narratives, competent and forceful judges can use their ample powers to control the proceedings to ensure the witnesses' rights to tell their stories coherently and to be treated with dignity and respect.

Live testimony has a checkered history at the ICTY. Early on, ICTY legal purists lost their battle over whether the ICTY statutory right "to examine, or have examined, the witness against him" guaranteed live witness testimony confined to what that witness saw or heard. Rule 89 has, from the beginning, provided that a Chamber may admit "any relevant evidence which it deems to have probative value," and, even before the liberalizing changes in the Rules, many decisions had reiterated the proposition that there is no prohibition against the use of hearsay per se in ICTY trials.⁴¹ Hopefully, the entire battle will not be lost. Paper trails are one thing, paper *trials* another. Overly liberal use of written statements and affidavits poses a potential threat to the integrity of ICTY trials. This threat is greater than in ordinary domestic trials due to the peculiar circumstances that surround the testimony of war crimes victims. Live witness testimony may be the most effective guarantor of the ICTY's integrity and legacy to international humanitarian law.

40. Judges may question witnesses under ICTY R.P. & EVID. 85(B), *supra* note 13.

41. *See, e.g.*, Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶ 15 (Feb. 16, 1999).

IV. JUDICIAL ASSESSMENT OF WAR CRIME WITNESSES AT THE ICTY

A. Courtroom Handling of War Crime Witness Testimony

I was not a trial judge in my U.S. career, so the ICTY has been my first experience in the judicial trenches. The same is true for a substantial number of ICTY judges, many of whom were never judges at all but rather professors or government officials before their current appointment. After hearing several hundred witnesses testify at ICTY trials, however, I have come away with several distinct impressions. In particular, the handling of witnesses and their testimony in the ICTY differs significantly from that in U.S. courts in terms of the role of judges, the nature and extent of cross-examination permitted and the admission of hearsay. These differences can be traced to two main factors: first, the way that the ICTY rules and practice combine civil and common law traditions and involve practitioners and judges from both systems, and second, the fact that war crime witnesses inevitably tend to be accorded great deference and sympathy during court proceedings.

1. Blending of Civil and Common Law

The civil law tradition, as opposed to our common law, favors letting into criminal trials a wider range of evidence, hearsay and otherwise, not only through the testimony of live witnesses but in written form. It assumes that the judge has the professional know-how to sort the wheat from the chaff, as opposed to a lay jury. (I am skeptical of the merit of this assumption.) In contrast, the Anglo-American tradition puts up stronger thresholds for what evidence can be admitted into a criminal trial, imposing bars not only on hearsay but opinion evidence by the lay witness not based on her own perceptions.⁴² As I mentioned above, the ICTY Rules allow any evidence the court deems relevant and probative but authorize the judges to exclude evidence whose probative value is outweighed by the need to ensure a fair trial.⁴³

The ICTY Rules provide for cross-examination of live witnesses in the common law style, though many Balkan and other civil law defense counsel have scant experience or skills with this mechanism. Thus, an experienced ICTY defense counsel from the United Kingdom recently wrote:

There have been instances where civil judges have so limited cross-examination as to reduce its effectiveness to a wholly unfair degree, but allowed even third or fourth-hand hearsay concerning

42. FED. R. EVID. 601, 701.

43. ICTY R.P. & EVID. 89(C), (D), *supra* note 13.

critical events going to the heart of the indictment. Likewise common law judges, unused to the freedom of judicial intervention that is second nature to their civil judicial brethren, have on occasion stayed unhelpfully out of the area when civil law practitioners with no proper understanding or experience of cross-examination have allowed damning testimony to go unchallenged.⁴⁴

In my estimation, repeat performances by some, though not all, defense lawyers from civil law jurisdiction have shown marked improvement in the art of cross-examination, but the quotation is indeed accurate in that ICTY judges vary widely in the scope of cross-examination they allow. In one Chamber, housing a majority of civil law-trained judges, the attitude is pretty much "let it in" and "we'll sort it out later." Other chambers dominated by common law-trained judges are stricter in not letting cross-examination stray from the witness's direct testimony.

The ICTY Rule itself is somewhat ambiguous as to the scope of cross-examination. It says that cross-examination shall be "limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness." The Rule also adds, however, "and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of the case."⁴⁵ Some judges emphasize the first clause over the second, ruling frugally as to how far cross may go beyond direct, while others see the second clause as an open door to any hostile or leading questions that are arguably relevant to the case.

Additionally, there have been recurrent complaints by counsel that defense witnesses are treated less courteously than the prosecution victim-witnesses by the judges⁴⁶ and that defense witnesses' versions of events are less likely to be believed.⁴⁷ I have not personally seen evidence that the first critique is true, but I do admit that there are defense witnesses whose obvious predisposition to assist the defendant at any cost makes them suspect. Some of their stories simply do not pass muster on any kind of plausibility test.

But, in general, both sides of the aisle would do well to prepare their witnesses more carefully for what they will encounter by way of cross-

44. Howard Morrisson, *The Quest for Justice*, COUNSEL, July 2001, at 14-15.

45. ICTY R.P. & EVID. 90 (H)(i), *supra* note 13. See also *id.* at R. 90 (H)(iii) ("The Trial Chamber may, on the exercise of its discretion, permit enquiring into additional matters").

46. See Appellant's Brief on Appeal against Sentence, redacted version, Prosecutor v. Goran Jelisić, Case No. IT-95-10-A (Mar. 2, 2001).

47. See Appeal Brief of Mirjan Kupreškić, 129 ff. (July 3, 2000), and Appeal Brief of Zoran Kupreškić, ¶ 122, Prosecutor v. Kupreškić et al., Case No. IT-95-16-T; cf. Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, n.589 (Jan. 14, 2000) (where the Trial Chamber states, "It should be noted that the only evidence about the activities of the accused during the conflict on 20 Oct. 1992 was given by defense witnesses. Evidence about that day plays no specific part in the Prosecution case against the accused. The Trial Chamber therefore makes no findings except to comment that the evidence that the accused spent the day in the Depression appears unlikely to be true.")

examination. In many civil law countries, especially the countries of the Balkans, cross-examination is not a regular feature of criminal trials. Counsel should certainly acquaint the witness with prior statements on which he may be quizzed and even try to build the witness's emotional stamina so that he will not blow up or break down on the stand. For whatever reasons—time constraints or unawareness—that kind of minimal witness care does not seem to be a universal prerequisite in trial preparation at present.

2. Sympathetic Treatment of War Crime Witnesses

My impression is that, overall, much more leniency is permitted for ICTY witnesses, particularly victim witnesses, as to testimony not based on their own observations than is allowed in American trials. In part, this may reflect the civil law influences on the Tribunal. Additionally, judges are apt to be sympathetic to these victim-witnesses who have suffered terrible outrages and loathe cutting them off mid-story. Defense counsel suspect they will be overruled if they object even to quite remote hearsay and do not wish to appear unsympathetic to the witnesses who have come to tell their "story" and want to tell it in their own way.

War crime witnesses also seem to see independent storytelling as an important part of their role. According to the VWS, interviews with witnesses reveal a variety of motives for coming forward, including "to tell the truth," "to speak on behalf of dead victims," "to tell the world," "to do justice," and "to make the trial an example to the world to prevent future war crimes." Witnesses tell the VWS personnel afterward that testifying was a "catharsis." Some feel a sense of closure on the horrible events to which they bear witness, while others view their presence as an acknowledgment by the world (in the form of the Tribunal) that they have been wronged. On those occasions when witnesses come to The Hague but end up not testifying for trial-related reasons, they feel rejected and victimized a second time. In general, the witnesses seem anxious for concrete appreciation of their contribution, and they sometimes complain they are not "respected," especially when cross-examined intensively. (In some civil law countries, victims have their own legal representatives in the proceedings.) The witnesses' common complaint is that the court does not give them extra time to say what they want at the end of their final testimony (though in one Chamber where they were given that leave, there were sometimes disconcerting results such as diatribes against defense counsel or extended requests for compensation).

The witness testimony in its graphic and heartrending detail is quite often riveting, and the judges want to hear it, especially when the rules do not prohibit it. A few examples:

(a) A former detainee in one of the Bosnian Serbs' notorious prison camps testifies as to one of the "outsiders" who came into the camps to abuse prisoners at night. X had "impossible powers. Everybody was afraid of him, without exception, Muslims, Croats, Serbs. When there were

no more Muslims and Croats in Prijedor, he began killing Serbs. That is common knowledge."⁴⁸

(b) Another detainee testified to a massacre he did not see from his locked room:

I'll remember it for the rest of my life, the cries of women who were outside or in the first room. I'll never forget their cries and screams. Then I smelt the stench of burning meat. You know when meat begins to burn, it has a specific smell, and this smell of burning flesh was mixed with the smell of the burning rubber from the tyres.

He later "heard" from other detainees that prisoners had been thrown into the fire.⁴⁹

(c) Detainees often supplement what they did see with conjecture:

I saw people lying on the ground, lots of people, and . . . guards would go by and fire a bullet in their heads to finish them off [I] didn't see how they fell to the ground and how they were tortured. . . . Probably they were beaten by various things, fire extinguishers, clubs, poles, and then the killing took place with pistol shots, one bullet each into the head. . . . I remember well when this bullet was fired, the brain would come out as if the bullet had hit milk, and it came out like white dust.⁵⁰

(d) Detainees were incarcerated presumably for interrogations related to their active participation in uprisings against the Bosnian Serbs. Witness J testified:

None of us knew why we were – what we were accused of, and I didn't know either; but from my talk with the interrogators I was able to conclude what – why I was there.

[Question: And were you able to form an opinion as to what they were going to do with that information or what the purpose of these talks were, these interrogations?]

Well, for the possible liquidation of people.⁵¹

Although he does say he formed his opinion from talks with the interrogators, he is never asked what they said that was the basis for his

48. *Prosecutor v. Kvočka et al.*, Case No. IT-98-30-T at Transcript 5961 (Edin Ganić), available at <http://www.un.org/icty/transe30/000928ed.htm> (last visited Feb. 2, 2002).

49. *Id.* ¶¶ 93, 94 (Hasen Ičić).

50. *Id.* ¶ 93; Transcript 3931 (Witness AM).

51. *Id.* ¶ 70 (Witness J).

“liquidation” conclusion.

(e) On the alleged acceleration of killings as the camp neared closing, one witness was allowed to speculate:

They kept taking people out all the time, and I think that during that time, massive killings were committed. It was during that period of time that most of the people were taken out, most of them intellectuals and other prominent citizens of Prijedor, and they never came back.⁵²

(f) In this same case the defendants hotly disputed their positions as deputy commanders or shift leaders with responsibility over other guards. The prosecution relied heavily (though not entirely) on detainees’ testimony that they were “told” by others that those individuals were superior officers.⁵³

These examples – all from the same case – illustrate both the vividness of witness testimony and the quite liberal tolerance for hearsay or opinion evidence from victim witnesses in ICTY cases. Of course, in many judicial systems these attributes are not unusual. Certainly there may be “safety in numbers” where many detainees corroborate each other (though that does not always happen – sometimes there are quite different accounts of the same episode).

During the course of their testimony, victim witnesses frequently display intense emotions – reliving such bad times can be traumatic as well as therapeutic. They break down on the stand, they cry, sometimes they curse the defendants in the dock (and their counsel as well). But, surprisingly, they rarely seem intimidated by the courtroom, often chastising the counsel or even the judges if there is an attempt to hurry them along. In general, they carry themselves proudly and with dignity, but on occasion they also express themselves emotionally with rage and anger.

B. Assessing the Credibility of War Crime Witnesses

My distinct impression is that most witnesses before the ICTY tell the truth as to the core of their experience.⁵⁴ They are not, however, always so reliable on the details of that experience. In particular, war crime witness testimony may be compromised by the speaker’s desire for the trial to have concrete results, by multiple retellings of the same story, or by the passage of time. At the same time, judges’ ability to assess witnesses’ credibility is diminished at the ICTY because the counsel and witnesses are speaking in

52. *Id.* ¶ 89 (Nusret Sivac).

53. *See, e.g., id.* ¶¶ 436 (Witness AU), 437, 481.

54. ICTY R.P. & EVID. 91, *supra* note 13, provides for referring a witness to the prosecutor for perjury investigation when the Chamber has “strong grounds for believing” the witness to have knowingly lied. No witness has thus far been cited.

several languages simultaneously and the trials can go on for months or years. These factors lead me to speculate that a closer appellate review of witness credibility findings may be merited in ICTY trials than in domestic cases.

In part, war crimes witnesses are looking for ultimate justice—some have demanded in Court that “someone must pay.” The decision-maker must be continually alert to the line between the “someone” who must pay and the accused person standing trial. If the defendant was somehow attached to the place of the wrong, it may not be as important to the victim witness whether that defendant was the one who perpetrated a particular wrong. In the witness’s view it is rough justice, but it certainly contrasts starkly with the rigorous assessment of individual responsibility we expect in our criminal trials.

War crime witness testimony is also susceptible to inaccuracy for other reasons. Witnesses who come to The Hague now testify about events that occurred five to ten years ago. In the meantime, they have often communicated with several people: fellow witnesses, journalists, NGOs, or counselors. They have also made statements to OTP field investigators, in-country investigative bodies, journalists, and humanitarian organizations. Their stories have sometimes changed form over the years. Details from one version are different or cannot be recalled at all in other versions. If they have suffered multiple crimes, they may confuse one perpetrator for another or what happened in one place for what happened somewhere else. The phenomenon of “misattribution” of witness memories to the wrong time or place is a familiar event in any trial. In war crimes trials featuring multiple defendants and multiple violations of the same victim, it is an even greater danger. Additionally, where witnesses simply heard about something from someone else, the potential for mistake is enormous, especially in a group setting like a prison camp where rumor was rife and tensions furious between inmates and their captors. I have heard witnesses testifying in radically different manners about such seemingly plain facts as who was the commander of the camp, how long he stayed at the camp and how many bodies were found in a certain spot.

In some cases—especially alibi witnesses or close family members—I have reluctantly concluded that the witnesses are not telling the truth. Many victims believe that, in the final analysis, helping a loved one or someone who was on your side or did you a favor during the chaos of war is more important than the integrity of an international tribunal. My sense is that misleading or downright perjurious testimony is sometimes given in ICTY proceedings. It would be difficult to estimate how much, but I suspect more than in American trials. To their credit, ICTY judges have, for the most part, not accepted wholesale the version of events presented by pitiable victim witnesses. There have been acquittals where victims’ versions of horrible events were simply not taken as credible enough to convict. However, I do have a sense that it is very difficult to draw those lines and that, inevitably, the knowledge that the terrible event did occur and that the witness is indeed a victim of that event can incline a doubtful

fact finder toward the person who is in the witness chair and against the one in the dock. Almost inevitably the accused adopts the defense that: "Yes, it happened but it was someone else—either now dead or not yet apprehended—who is responsible," so that accurate identification evidence is the lynchpin of a conviction. It is true, however, that defendants have been given long sentences in foreign prisons on the identification of a single witness—sometimes a minor—who testifies that she recognized a soldier in blackface at dawn during a surprise raid, but who had given a somewhat different story months previously to a different investigator, or who has misidentified several other soldiers.⁵⁵ Given that a trial judge is entitled to discern, on her own, the credibility of a witness's story—indeed the judge can accept part and reject part of that same witness's story—it is still a huge responsibility and, in my view, a much more difficult one in the ICTY setting than in most domestic courts. It is certainly more difficult at the ICTY than in the United States to ensure that the evidence always rises to the "beyond a reasonable doubt" standard for guilt that the Tribunal has accepted as its canon.⁵⁶

The ICTY judges' job of assessing the demeanor of a witness is also more difficult than in a domestic court because the witness invariably speaks in a foreign language. Although simulcast translations by earphone are available, along with a written transcript on the TV screen, it is still very different from hearing the actual words and voice of a witness. Sometimes when a counsel speaks both Bosnian/Croatian/Serbian and English, he will jump up and object to a "wrong" translation (sometimes he is right). But otherwise the judge is almost completely dependent on the translator for the content as well as the inflections of voice in which the witness's testimony is given. Unless the witness breaks into tears or screams and shouts, the judges do not know what parts of her testimony she may sound hesitant about and which she is confident about. It is difficult to calibrate the sounds we hear from the witness with the words of the translator, and, in fact, one often overtakes the other on the tape. So our demeanor evaluation is based on looks and body language alone. I know from experience in American courts how carefully trial participants—judge, jury, or opposing counsel—will listen to the precise words a witness chooses or avoids when describing an experience as an indication of the straightforwardness of her story and of what inconsistencies it may contain internally or in comparison with other testimony. That kind of scanning is virtually impossible in the context of a trilingual trial. Similarly, cross-examination of a witness when the question and then the answer must be translated back and forth into

55. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment ¶¶ 400-03, 425 (Jan. 14, 2000) (Witness H); *id.* ¶¶ 479-83, 503 (Witness EE).

56. ICTY R.P. & EVID. 87(A), *supra* note 13, stipulates that a defendant may only be convicted when a majority of the three judges find guilt beyond a reasonable doubt. There are indications that this standard is being implemented; it has been the basis for several acquittals at the trial level as well as one reversal of a conviction at the appellate level. See Prosecutor v. Delalić, Case No. IT-96-21 (Feb. 21, 2001); Prosecutor v. Kupreškić, Case No. IT-95-16 (Jan. 14, 2000); Prosecutor v. Kupreškić, Case No. IT-95-16-A (Oct. 28, 2000).

different languages, with inevitable pauses in between, gives more time for the witness to consider her answers; the rapid-fire exchange encountered in the American system is simply not possible. I notice, too, that witnesses at the ICTY often ask for questions to be repeated, giving even more time for thought, though in many cases their requests are clearly justified by the language differences.

Finally, the fact that many trials last more than a year also makes it hard for a judge at the time of verdict to remember the impressions she had of witnesses who testified months before. (Notes made at the time of testimony can serve as memory-jogging devices, but they are not always complete reminders.) Credibility determination is particularly angst-inducing, since a judge must often compare her impressions of a recent witness with her memories of one who testified several months earlier. The much-vaunted power of a trial judge to assess credibility on the basis of demeanor as well as testimony content is surely put to the test in ICTY proceedings.⁵⁷

All of these special aspects of witness testimony in ICTY proceedings have led me to wonder whether an appellate court reviewing a Trial Chamber's findings of witness credibility should be required to accord them as much deference as common law jurisprudence does. ICTY judges have a more limited opportunity to assess demeanor. Perhaps where there are more objective indicators of possible lack of veracity of the testimony—e.g., lack of corroboration, internal inconsistencies, contradictions of prior declarations of the same witness—ICTY judges should be more cautious in relying on demeanor alone when using the witness testimony as a foundation for conviction. I admit to being troubled by some of the fact-finding in the Tribunal decisions with which I am familiar. I suggest that our Appellate Chamber should be reluctant to uphold a conviction on appeal in the face of serious inconsistencies in a live witness's testimony if the trial chamber relied solely or principally on the demeanor of the witness to assess her credibility. If this is heresy, so be it.

V. CONCLUSION

Witness protection measures must be strong enough to encourage victims of war crimes to testify, but they must not be so strong as to make war crime trials secretive affairs hidden from the public eye. Witnesses in war crimes tribunal proceedings are precious commodities. There is no doubt that more of them require special protective measures than in

57. I have not said anything about the Tribunal's power to call its own witnesses under Rule 98. This power is frequently invoked and is, of course, found in most civil law, as well as common law, systems. One hazard, however, is that a witness who the Chamber feels should testify may not have been called by the Prosecution because he is under investigation and due to be indicted. This has actually happened in my experience. One day after the judgment in the *Krstić Srebrenica* case came down, one of the two former Bosnian Muslim military commanders whose testimony the court cited was indicted for alleged war crimes of his own. The second one was indicted a few weeks later. Perhaps it should have been a clue that the Prosecution chose not to question them at all while they were testifying.

ordinary criminal cases because of the hostile surroundings in which they live and the widespread network of people who have a continuing personal or political interest in silencing them. An additional consideration is the Tribunal's lack of power to make them come if they are unwilling. Nonetheless, overly liberal grants of witness protection measures, including closed sessions, face and voice distortion, and even pseudonyms, threaten the goals of the Tribunal—accurate historical records of terrible events and fair treatment of accused war criminals who need to know the identity of witnesses in advance in order to prepare properly for trial. At a certain point, a trial in which witness identities are freely withheld from the public is no longer a public trial.

Similarly, substitutes for live witness testimony must be cautiously utilized. In the peculiar circumstances of witnesses first interviewed years before by field investigators, their statements—even if verified later—will not be as credible as live testimony validated by cross-examination. Live witness testimony has its own inherent defects, most of which are non-remediable, but written statements are a poor substitute when they address critical matters in the trial. The Tribunal's scarce resources and time constraints cannot justify excessive use of written statements in lieu of live testimony. Future tribunals must determine how better to ensure that witnesses feel protected so that they will come to testify personally—and preferably publicly—and that they will give such testimony promptly enough after the events so that their memories are not tainted by years of contacts with the media or others involved in the events.

Finally, Tribunal judges must be ever alert to the seductiveness of the victim witnesses' terrible ordeals when making judgments as to whether those witnesses are providing accurate and reliable testimony about the accused's role in events. In the end, these are criminal trials resulting in years of imprisonment for convicted offenders. Despite the witnesses' ordeals in revisiting past sufferings, the convictions must be based on credible evidence. The ICTY experience captures a number of the difficulties involved in international war crimes trials that rely on victim testimony and seek to be fair. There are lessons to be learned from this experience. Perhaps most importantly, the tensions surrounding witness testimony must be thoughtfully considered so that future tribunals can benefit from the experience in Yugoslavia and stake an undeniable claim to legitimacy. The lessons from the ICTY experience should not go unheeded.

