

## TRENDS IN ADMISSIBILITY OF HEARSAY EVIDENCE IN WAR CRIME TRIALS: IS FAIRNESS REALLY PRESERVED?

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*In the course of war, who determines what is just and fair? Fairness and justice are and should be universal constants; however, the paths to fairness and justice must be malleable and adapt to different circumstances.*

*The Nuremberg trials were marked by a conscious effort to avoid “victor’s justice” and provide a fair trial to the defendants who committed acts of atrocity. This paper examines whether this goal was achieved in the Nuremberg, Tokyo, and International Criminal Tribunal for the former Yugoslavia trials, as well as briefly touching upon the Guantanamo military commission trials, by looking particularly at the use of hearsay evidence. By placing greater weight on evidentiary criteria such as “relevance,” “probative value,” “reliability,” and “credibility” and developing a more uniform application of these terms rather than promoting a black and white dichotomy of the admissibility of hearsay evidence, judges can better perform the delicate balancing act of justice that takes place amidst the chaos and hostility of war.*

*War is not a normal circumstance and war crimes are not normal crimes as contemplated by national laws. The path to justice requires flexibility and attention to the precarious circumstances surrounding a world emerging from complete upheaval. The general admissibility of hearsay evidence, in itself, does not provide a great threat to the rights of the accused*

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*in the course of war crimes trials. Examination of these war crimes trials indicate that, contrary to common law perceptions, it is possible to allow typically inadmissible evidence and still preserve fairness.*

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## I. INTRODUCTION

Is justice, like beauty, only in the eyes of the beholder? The concept of justice is neither completely objective nor concrete. Interpretations vary throughout history, between countries and persons, and with changing circumstances. In war, everything changes. Perceptions of right and wrong become malleable and, arguably, subjective concepts. An action that is considered illegal or immoral in everyday life suddenly becomes just, or at least justifiable, when taken in connection with the surreal circumstances of war. To meet this fluid approach to “justice,” the law of armed conflict purports to provide guidance as to the legality of certain acts, given these new circumstances.

Thus the concept of “victor’s justice” becomes a serious concern in connection with war crime trials where it is easy to conclude that the victor’s actions are justified while those of the defeated are unlawful. How could there possibly be a fair trial at Nuremberg for the Nazi soldiers who had a hand in massacring millions of people, in the Tokyo trials for the Japanese commanders who raped, murdered, and oversaw abuses in internment camps, or in the Trial Chambers for the former Yugoslavia for the Bosnian-Serbs who committed genocide? Yet a guiding principle in setting up these tribunals was fairness and justice to all, even to the accused.

As circumstances change and the concept of justice changes, the justice system itself in the context of war crimes might resemble, but cannot actually be the same, as that applicable to *normal*, everyday life. Consequently, there will necessarily be differences in approach to fundamental ideas of both substance and procedural justice. An example of how this similar-yet-dissimilar system operates at the procedural level can be found in the hearsay rules of evidence. Hearsay is defined similarly across common law jurisdictions, broadly, as out-of-court statements (whether written or oral)

where the person asserting the evidence in court for the purpose of proving truth does not have first-hand knowledge of the facts asserted; it is information about the experiences of another.<sup>1</sup> For example, A testifies that B told him he saw C stab D. However it is presented, hearsay evidence is such that the person ultimately making the assertion at issue, B in the previous example, is not available for any form of cross-examination.

Civil and common law jurisdictions differ widely as to the extent of admissibility of such evidence. In civil law countries, hearsay is *prima facie* admissible, whereas in common law systems, it is only admissible under limited exceptions. This difference stems from the fact that trials in common law jurisdictions often involve layman jurors whom courts try to protect from unreliable or prejudicial information in making their factual determinations. In civil law trials, where the use of juries is not as common, judges are deemed capable of discerning the reliability of such evidence for themselves, therefore, there is less need for caution surrounding the admissibility and evaluation of hearsay evidence.

In civil law systems, commonly referred to as the “inquisitorial model,” judges must evaluate all available evidence to arrive at their conclusion. By contrast, in the common law “adversarial model,” the two sides in a dispute argue before the judge and/or jury in the hopes that the truth will be revealed through the exercise of arguing. In the former model, the judge holds both the legal and fact-finding roles, leaving cumbersome evidentiary rules as only hindering his or her ability to properly adjudicate. As such, “hearsay is admitted and heard, but given weight only to the extent it is found to be reliable.”<sup>2</sup> In the systems that prohibit hearsay evidence, the core reasoning lies with the jury’s role as the fact-finder who does not have the experience to properly evaluate and weigh different pieces of evidence.<sup>3</sup> Where the judges act alone, having to both adduce the admissibility of the evidence as well as its ability to support either argument, the purpose of excluding hearsay evidence is no longer so clear.<sup>4</sup> Ultimately, it appears that the admissibility of hearsay hinges on the concept of evidentiary reliability. Even if one were to accept the common law standard of excluding hearsay evidence for use at war-crimes trials, many exceptions to the inadmissibility

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1. *Hearsay*, CORNELL LEGAL INFO. INST., <http://www.law.cornell.edu/wex/hearsay> (last visited Oct. 1, 2018).

2. Laurence D. Borten, *Hearsay and the Rights of the Accused: A Comparison of U.S. Law and Anticipated Practices of the International Criminal Court 2* (Aug. 2005) (unpublished manuscript), <https://docplayer.net/15142605-Hearsay-and-the-rights-of-the-accused-a-comparison-of-u-s-law-and-anticipated-practices-of-the-international-criminal-court.html>.

3. *Id.* at 6; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on the Prosecution’s Motions to Admit Statements as Substantive Evidence (Int’l Crim. Trib. for the Former Yugoslavia Apr. 25, 2005).

4. Borten, *supra* note 2, at 2 n.5.

of hearsay found in these jurisdictions—present sense impression,<sup>5</sup> excited utterances,<sup>6</sup> death of the original witness, etc.<sup>7</sup>—would apply in this context.

While hearing the evidence from the original witness or seeing it on the original document is always better evidence than hearing or reading it second hand, in the context of war, hearsay may be the best, if not the only, evidence available. The unique circumstances of war require unique trial procedures. Documents, even if not intentionally destroyed, may easily disappear, go missing, be destroyed by bombs or buried beneath rubble. First-hand witnesses may be dead or missing. Meanwhile, time is of the essence, and occasionally these trials take place even while the hostilities are ongoing.

The typical procedures of criminal courts in domestic systems are not sufficient and often do not make sense in this unfamiliar context. As Brigadier General Taylor said in relation to one of the Nuremberg trials, there is a “necessity for liberal rules of evidence” because “lips of many potential witnesses were sealed by violence and many records have disappeared either by intention or by the fortunes of war.”<sup>8</sup> In addition, given the international character of war crimes trials, it might be tempting but is impossible to accommodate all of the various domestic criminal law systems. At the same time, given the grave nature and global scale of the situation, these trials require a flexible and nuanced procedure. If not *sui generis*, the war crimes trial context is different enough that it should freely borrow from an array of rules and procedures to tailor an appropriate procedural model.

Thus, just as perceptions of right and wrong change in light of war, the path to justice and fairness requires flexibility in the unstable context of a world just emerging from, or still in the midst of, upheaval. While the admissibility of hearsay evidence is generally considered to be unfair to the interests of the defendant in most common law jurisdictions, in the context of war crime trials, an approach of flexibility allows for the admission of hearsay evidence without impinging on the defendant’s fundamental right to fairness. The Nuremberg trials, as the first of these war-crime trials, paved the way in setting up these tribunals by showing that no one is above the law and distinguishing best evidence from best *available* evidence. The subsequent Tokyo Trials show the need for qualified adjudicators, the

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5. FED. R. EVID. 803(1) (defining a “present sense impression” as “[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.”).

6. FED. R. EVID. 803(2) (defining an “excited utterance” as “[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”).

7. FED. R. EVID. 803, 804.

8. Richard May and Marieke Wierda, *Trends in International Criminal Evidence*, 37 COLUM. J. TRANSNAT’L L. 725, 732–33 (1999) [hereinafter *Trends*] (citing United States v. Carl Krauch et al., 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 898 (1946-1949)).

meaning of “relevance”, and the residual exception to hearsay evidence. Finally, the International Criminal Tribunal for the former Yugoslavia (ICTY) focused on assessing reliability before determining admissibility through establishing a three-step approach of assessing relevance, probative value, and finally weighing any prejudicial effects. By investigating how the Nuremberg Tribunal, the Tokyo Tribunal, and the ICTY have applied evidentiary standards, particularly the admissibility of hearsay, one sees that flexibility was paramount in these tribunals in order to successfully balance the interests of justice and fairness. So long as the concepts behind the admissibility of the evidence—“relevance,” “probative value,” “reliability,” and “credibility” —are applied in a uniform and coherent way, fairness can still be preserved. From these tribunals we learn that it is possible to allow typically inadmissible evidence, including hearsay, and still maintain fairness so long as the evidence is determined to be otherwise reliable and given the proper weight.

## II. NUREMBERG

From the atrocities committed in World War II sprung the Nuremberg and the Tokyo trials. The “Nuremberg Trials” include the trial held in front of the International Military Tribunal as well as twelve trials of lower ranked Nazis<sup>9</sup> under the auspices of Allied Control Council Law No. 10<sup>10</sup> and governed by United States Zone Military Government Ordinance No. 7<sup>11</sup> as part of the U.S. occupation<sup>12</sup> (“Ordinance No. 7 cases”).<sup>13</sup>

President Truman appointed Supreme Court Justice Robert Jackson as the chief prosecutor for the United States; Jackson was instrumental in the

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9. Including State Secretary of the Foreign Office, von Weizsaecker; cabinet ministers von Krosigk and Lammers; military leaders von Leeb, List, and von Kuechler; SS leaders Ohlendorf, Pohl and Hildebrandt; Flick; Josef Altstoetter; Alfred Krupp; and Gerhard Rose.

10. Recognizing the following crimes: (a) crimes against peace; (b) war crimes; (c) crimes against humanity; and (d) membership in categories of a criminal group or organization declared criminal by the International Military Tribunal. Control Council Law No. 10, art. II, *reprinted in* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 250–51 (U.S. Gov’t Printing Office 1949).

11. United States Zone Military Government, Ordinance No.7 (Oct. 18, 1946), *reprinted in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at xxi (1946-1949).

12. Even though these cases were conducted in the name of the United States and governed by US Military Ordinance, they were considered to be international trials. Benjamin Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 39 J. CRIM. L. & CRIMINOLOGY 144, 144 (1948) (citing Judgment in *U.S. v Alstotter, et al.*, transcript 10621).

13. Telford Taylor, *The Nuremberg War Crime Trials*, 27 INT’L CONCILIATION 243, 256 (1949); STEVEN RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 6 (2009).

organization and set-up of the Nuremberg trials.<sup>14</sup> From the perspective of the Soviet delegate, Major General Ion T. Nikitchenko, the trials were a waste of time as Nazi guilt had already been established, or rather, declared by Allied leaders at the Yalta conference, and thus the only thing left to decide was the “measure of guilt” and the appropriate punishment. However, Justice Jackson insisted that every defendant receive a fair and just trial with due process, based on the theory that, while the leader of a country could accuse, they could not convict.<sup>15</sup> The insistence of Justice Jackson not only to try the defendants, but to try them *fairly*, stems from the U.S. criminal system in which a conviction is not valid without judicial finding.<sup>16</sup> Opponents of such a system advocated that since the Nazis never gave anyone a fair trial, they should not be entitled to one either;<sup>17</sup> such was their retributory view of justice. However, Jackson’s influence was more profound and “for the first time in history, the rulers of a defeated nation would be given the benefit of the rule of law and due process.”<sup>18</sup>

The Tribunal was composed of four active judges (and four alternates) representing the four allied powers: the United States, the United Kingdom, France, and the USSR.<sup>19</sup> Given this international composition of the trial, a mixture of the common and civil law systems was required. The Charter of the International Military Tribunal,<sup>20</sup> “The London Charter,” was the result of “blending and balancing . . . elements of the Continental European inquisitorial system and the Anglo-American adversarial system.”<sup>21</sup> Jackson wanted the trial to be simple and efficient so that the procedure would not allow for obstructive and dilatory tactics that defendants tend to use in common law criminal trials.<sup>22</sup>

The London Charter Articles 18-21 dealt with evidence.<sup>23</sup> Article 18 provided for the efficiency and avoidance of undue delay of the proceedings. An expeditious trial was possible because, without a jury, there was no need

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14. Trial of the Major War Criminals before the International Military Tribunal 3 (Int’l Mil. Trib. in Nuremberg, 14 November 1945-1 October 1946).

15. NORBERT EHRENFREUND, *THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIME TRIALS CHANGED THE COURSE OF HISTORY* 12 (2007) [hereinafter *THE NUREMBERG LEGACY*].

16. *Id.* at 12–13.

17. *See id.* at 13.

18. *Id.*

19. *Id.* at 26–27.

20. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter *London Charter*].

21. Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post World War II War Crimes Trial: Did They Provide An Outline For International Legal Procedure?*, 37 COLUM. J. TRANSNAT’L L. 851, 854 n.8 (1998-99).

22. *Id.* at 856 n.22–23.

23. *London Charter*, *supra* note 20, art. 18–21.

for the Tribunal to consider rules that were put in place to prevent jurors from hearing prejudicial evidence, *e.g.* hearsay evidence. Without the need to engage in special protections for a jury, an international criminal court can be less hindered by technical rules of evidence and may evaluate the evidence in the balancing process in accordance with the civil law principle of “free evaluation of evidence.”<sup>24</sup> Article 20, for example, allows for the Tribunal to require information as to the nature of any evidence, and Article 21 stipulates against the requirement for proof of common knowledge. The most important article for the purposes of this analysis is Article 19, which states: “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to be of probative value.”<sup>25</sup>

Due to the nature of the particular conflict and the Nuremberg trial, documentary evidence was used more than eyewitness and oral testimony. In both the Nuremberg and Tokyo trials (discussed *infra*), the defendants were primarily commanders who did not carry out the crimes themselves but made the plans and transmitted orders. Therefore, the most “compelling witnesses against them were the documents they drafted, signed, initialed, or distributed.”<sup>26</sup> Only ninety-four witnesses gave evidence at Nuremberg against nineteen defendants, but thousands of documents were admitted.<sup>27</sup> Similarly, the Tokyo trial admitted evidence from four hundred and nineteen witnesses but included close to five thousand documents.<sup>28</sup> With such voluminous direct documentary evidence, the question of hearsay was not nearly as important as it might otherwise have been; the documents incriminating the accused were more compelling, and thus the hearsay evidence was not given as much weight.

Despite the vast documentary evidence, hearsay did nevertheless play a role in the trial. It is often argued, in attempting to exclude hearsay evidence, that hearsay is not the “best” evidence. Common law jurisdictions have a “best evidence” rule which requires parties to produce the best evidence available.<sup>29</sup> To avoid giving a common law jury prejudicial and unreliable

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24. RICHARD MAY AND MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 93 (2002); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 75 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000).

25. London Charter, *supra* note 20, art. 19.

26. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 86 (U.S. Gov’t Printing Office 1949).

27. *Trends*, *supra* note 8, at 744.

28. *Id.*

29. GÖRAN SLUITER ET AL., INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 1072 (2013) [hereinafter SLUITER INTERNATIONAL CRIMINAL PROCEDURE] (suggesting JOHN HENRY

evidence, the law and fact-finding functions are separated between the judge and jury respectively.<sup>30</sup> The jury, as fact finder, should receive only the best evidence in making its determination. However, in the context of war crimes trials, the idea that hearsay evidence is not the “best” evidence is not always true. In fact, the Nuremberg tribunal did appear to follow the best evidence rule in determining whether and when to admit hearsay. During the course of the Nuremberg trials, the court did deny the prosecution’s request to enter an affidavit into evidence because the witness was nearby and available, upholding the principle of best and direct evidence.<sup>31</sup> That is, “best” evidence meant “best available” evidence.

In balancing the admissibility decisions, it is clear that the judges believed in maintaining the rights of the accused. For example, in the Ordinance No. 7 case of *IG Farben*, affidavits were held to be inadmissible as a violation of the right of the defendant to interrogate the witness.<sup>32</sup> Nuremberg foreshadowed the International Criminal Court (“ICC”), established in 1998, an approach more akin to the civil law system. Article 69(4) of the ICC Rome Statute<sup>33</sup> allows the Chamber to rule on the relevance and admissibility of any evidence itself. However, the ICC emphasized that the accused has a right to confront his or her accuser,<sup>34</sup> and thus the admissibility of hearsay must be dealt with cautiously.

As discussed above, it is also argued that hearsay evidence is unreliable and can prejudice the court. While this may be a concern in domestic criminal cases that include a jury, if no jury is present, it is at least arguable that it is unnecessary to shield judges from potentially prejudicial evidence because they are not as susceptible to prejudice as a jury.<sup>35</sup> Further, judges must give detailed reasoning for their decisions, including what evidence they considered and what weight they gave it, creating a record that can be reviewed for fairness.<sup>36</sup> On the other hand, jury deliberations are unrecorded, so their findings cannot be examined in this way. In short, with no impressionable and inexperienced jury, if the hearsay evidence is reliable, it

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WIGMORE & ARTHUR BEST, *EVIDENCE IN TRIALS AT COMMON LAW (WIGMORE ON EVIDENCE)* (2005); PHIPSON ON EVIDENCE (Hodge M. Malek et al. eds., 2009); CAROLINE FENNELL, *LAW OF EVIDENCE IN IRELAND* (3d ed. 2009)).

30. *Id.* at 1038.

31. *United States v. Carl Krauch*, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 753 (1946-49); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 241 (1st ed. 1992).

32. *United States v. Carl Krauch*, *supra* note 31, at 880-91.

33. Rome Statute of the International Criminal Court art. 69, July 17, 1998, 2187 U.N.T.S. 3.

34. *Id.* at 93.

35. *See generally* Benjamin B. Frencz, *Nurnberg Trial Procedure and The Rights Of The Accused*, 39 J. CRIM. L. & CRIMINOLOGY 144 (1948).

36. Borten, *supra* note 2, at 2.

is not presumptively unfair to admit such evidence. Due to the absence of a jury in the Nuremberg Trials and the establishment of a reasoned record, there was no longer as strong a need to exclude hearsay evidence. The Nuremberg proceedings appeared to be focused more on the question of reliability of given evidence than upon its technical nature. Again, while clearly attempting to preserve fairness, procedural flexibility replaced rigid doctrine.

### III. TOKYO TRIALS – THE NUREMBERG ACROSS THE SEA

In May 1946, U.S. General Douglas MacArthur brought Hideki Tojo, Prime Minister of Japan, along with twenty-six other defendants to trial in front of the International Military Tribunal for the Far East, commonly known as the “Tokyo Trials.”<sup>37</sup> The Tokyo Charter Article 13 mirrors the London Charter Article 19, stipulating that the Tribunal is not bound by technical rules of evidence and shall admit any evidence it deems probative in value.<sup>38</sup>

For the most part, the Tokyo trials mirrored the Nuremberg trials. In fact, some argue that “Tokyo simply ignored those criticisms [of the Nuremberg trials], made little attempt to profit by Nuremberg’s mistakes and merely followed suit.”<sup>39</sup> However, there were a few differences worth mentioning. While the Nuremberg trial lasted a little over ten months, the Tokyo trial lasted about two and a half years.<sup>40</sup> The Nuremberg tribunal consisted of eight judges (although only four had voting powers) while Tokyo had eleven judges each representing a nation that participated in the defeat of Imperial Japan (Australia, Canada, China, France, the United Kingdom, India, the Netherlands, New Zealand, the Philippines, the USSR, and the United States).<sup>41</sup> One major difference between the two trials was that in Nuremberg, one of Justice Jackson’s praiseworthy principles was that no one was above the law no matter how high their status, so no principal offenders were exempt, whereas at Tokyo, Emperor Hirohito was not one of the men indicted despite direct implications. This Nuremberg principle, that no one is above the law, was an entirely new concept at the time and has

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37. THE NUREMBERG LEGACY, *supra* note 15, at 113.

38. Charter of International Military Tribunal for the Far East art. 13, Jan. 19, 1945, T.I.A.S. No. 1589 [hereinafter Tokyo Charter].

39. THE NUREMBERG LEGACY, *supra* note 15, at 115.

40. *Id.* at 114; Benjamin Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT’L L. REV. 203, 216 (1998).

41. THE NUREMBERG LEGACY, *supra* note 15, at 113.

since brought other heads of state to the realization that they are not *untouchable*.<sup>42</sup>

Similar to Nuremberg's London Charter, the Tokyo Charter allowed the Tribunal not to be bound by technical rules of evidence and to admit any evidence it deemed of probative value. The intention again was to provide a fair trial and not simply to seek vengeance. The defendants were granted rights of due process such as the right to counsel, the right to examine witnesses, the right to apply for production of all prosecution documents and most importantly, the presumption of innocence until proven guilty.<sup>43</sup>

Nevertheless, with flexibility of procedure comes the ability to abuse such procedure. Thus, it has been argued that the Tokyo trials were "poorly conducted and badly organized."<sup>44</sup> The President of the Tokyo Tribunal, William Webb of Australia, noted inconsistency in rulings, particularly in favor of the prosecution, as the determination of the probative value of specific evidence would vary depending on the disposition of the court any given day.<sup>45</sup> Ultimately, eight out of the eleven justices supported the final judgment and three dissented. The strongest dissent came from Justice Pal of India, who felt that the rules of evidence were biased in favor of the prosecution. Justice Pal disapproved of the practice of admitting hearsay "because the possible infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words remain untested."<sup>46</sup> While this is generally a valid reason for the exclusion of hearsay evidence in domestic courts, in an international war crime tribunal, such reasoning is outweighed by unique concerns that favor admissibility.

In the domestic systems that typically prohibit the use of hearsay, the inability of the witness to be present is one of the exceptions to the rule.<sup>47</sup> Thus while domestic common law systems which exclude hearsay evidence have similar situations in which witnesses are traumatized or afraid to testify, post-war tribunals are different. First, the tribunals are not prosecuting one person for committing one, or a few, crimes; these are crimes against

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42. Although in reality this does not occur as often as it perhaps should.

43. Tokyo Charter, *supra* note 38, art. 9; THE NUREMBERG LEGACY, *supra* note 15, at 153; *Trends*, *supra* note 8, at 753; United States v. Flick, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1188 (1946-1949).

44. THE NUREMBERG LEGACY, *supra* note 15, at 119 (citing ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS 225 (1st ed. 1987)).

45. THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 449 (Antonio Cassese ed., 2009) (citing THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (I.M.T.F.E.) 29 APRIL 1946 - 12 NOVEMBER 1948, 551, 654-55 (B.V.A. Röling & C.F. Rüter eds., 1977) [hereinafter JUDGE PAL]).

46. *Id.* at 630.

47. See *e.g.*, FED. R. EVID. 804; Crim. P. (Scot.) §259 (1995).

humanity and genocide. Second, the international scope with witnesses all over the world adds another level of difficulty in interrogating or even finding primary witnesses with the difficulty of travel and communication. Third, as noted previously, the person who uttered the words being offered may no longer be alive, may be too frightened to testify, and may be traumatized from the war, thus rendering his or her testimony unreliable. Finally, procedural efficiency is key in a post-war setting where the ultimate goal is reconciliation.

Thus, the specific circumstances entailed by the war crime context require a flexible approach. This need for flexibility in hearsay rules is even already recognized at a domestic level. Both common and civil law systems have the basic principle that “all relevant evidence that has probative value is admissible unless affected by an exclusionary rule.”<sup>48</sup> Even the U.S. system, which prohibits hearsay subject to limited exceptions,<sup>49</sup> includes a “Residual Exception” that hearsay may be admitted if “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.”<sup>50</sup> Thus, the admission of hearsay evidence rests on reliability and relevance. Even prior to both Nuremberg and Tokyo, in 1942, U.S. President Franklin D. Roosevelt ordered the establishment of a Military Commission to try eight captured German Saboteurs; the Commission’s jurisdiction was upheld by the Supreme Court in *Ex parte Quirin*.<sup>51</sup> President Roosevelt, contemplating the war crimes trials before his death while the war was still ongoing, stated that the commission should admit evidence “as would, in the opinion of the President of the Commission, have probative value to a reasonable man.”<sup>52</sup> There is a relationship between probative value and relevance. Both look to a link between the evidence and proof of the fact in dispute.<sup>53</sup> McCormick on Evidence divides “relevance” into two components: (1) materiality and (2) probative value. “Materiality concerns the fit between the evidence and the case. It looks to the relation between the propositions for which the evidence is offered and the issues in the case. . .the second aspect of relevance is probative value, the tendency of evidence to establish the

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48. SLUITER INTERNATIONAL CRIMINAL PROCEDURE, *supra* note 29, at 1039.

49. FED. R. EVID. 801(d), 803, 804.

50. *Id.* 807.

51. 317 U.S. 1 (1942).

52. PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951*, at 12–13 (1979).

53. Frank Terrier, *The Procedure Before The Trial Chamber*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 1277, 1279 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002).

proposition that it is offered to prove.”<sup>54</sup> Therefore, in deciding the “probative” value of evidence, the judges on these war crimes tribunals cannot judge the evidence simply based on the distance to the original person or document but must consider all aspects of materiality and relevance.

While cross-examination and means of testing credibility are imperative in courts in which juries serve as the vulnerable fact-finders, it is arguable that the judges on these tribunals were capable of making such a determination for themselves. However, the Commission set-up for *Yamashita*,<sup>55</sup> which the Supreme Court reviewed, was composed of military commanders, none of whom were lawyers or had legal experience.<sup>56</sup> There is a serious question as to whether such constituted tribunals are any more qualified than juries to make determinations of weight and admissibility without binding rules. The *Yamashita* decision is extremely controversial in the international community,<sup>57</sup> while the Tokyo Tribunal, composed of legally experienced adjudicators, faced less controversy. In short, it seems clear that future war crime trials, in which judges are given wide latitude as to the admissibility of evidence, should have safeguards to ensure that the judges themselves are qualified for such a task.

It is certainly true that in the *Yamashita* decision, Justices Wiley Rutledge and Frank Murphy “were taking standards of criminal procedure prevalent in a stable society and applying them to judgment of behavior in a chaotic, war-torn environment.”<sup>58</sup> The context in which this commission and the previous Tokyo trials were set-up was one that was so vastly different from that of normal criminal courts that to simply transfer the procedures and standards from one to the other would be severely impracticable. While the war-torn context does not justify serious deprivation of rights and unfair trials, the concepts of “fair” and “just” are not concrete or context-free but rather require flexibility. Therefore, the process of justice—exemplified by differences in balancing analyses—may look different from the national context, yet without sacrificing the underlying values.

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54. MCCORMICK ON EVIDENCE 729 (Kenneth Broun et al. eds., 6th ed. 2006).

55. *In re Yamashita*, 327 U.S. 1 (1946). Though by U.S. Military Commission, like the Ordinance No 7 trials, *Yamashita* is sufficiently connected to the Tokyo trials to merit analysis here.

56. GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 785 (2016); John M. Ferren, *General Yamashita and Justice Rutledge*, 28 J. SUPR. CT. HISTORY 54, 57 (2003) [hereinafter *General Yamashita*].

57. William Parks, *Command Responsibility for War Crimes*, 62 MILITARY L. REV. 1, 22 (1973).

58. Ferren, *supra* note 56, at 72.

#### IV. ICTY – THE NUREMBERG AND TOKYO LESSONS APPLIED DECADES LATER

Nearly fifty years after the Nuremberg and Tokyo Trials, the ICTY appeared to have learned the lessons from Nuremberg but, too, saw justice as achieved by flexibility. Slobodan Milosevic was the president of Serbia in 1989 and Yugoslavia in 2000. In 1998, Milosevic began an ethnic cleansing program.<sup>59</sup> On May 25<sup>th</sup>, 1993, the United Nations established the ICTY through Resolution 827 to try the perpetrators of these war crimes, crimes against humanity, and genocide with a tribunal that differed from Nuremberg.<sup>60</sup> The Nuremberg tribunal was run by the four major powers occupying Germany at the time, and “the tribunals tried only the vanquished.”<sup>61</sup> By contrast, the ICTY consisted of eleven judges, none of whom were from Yugoslavia, in an effort to avoid any potential “victors’ justice” criticism and tried subjects from all conflict parties.<sup>62</sup> Geoffrey Robertson, a noted human rights lawyer appointed as a distinguished jurist of the United Nations Internal Justice Council, notes that the ICTY was the first truly international criminal court.<sup>63</sup> The ICTY made a conscious effort to avoid the criticisms of Nuremberg and thus made four major changes to the procedure: (1) no death penalty, (2) no trials in absentia, (3) better treatment of defense counsel in regard to evidence discovery, and (4) the right of appeal.<sup>64</sup>

As with the Nuremberg and Tokyo trials, the evidentiary procedures for this tribunal to prosecute international war crimes required flexibility. The Tribunal was intended to be able to “mold its Rules and procedures to fit the task at hand” in order “to do justice. . .”<sup>65</sup> The ICTY Rules of Evidence and Procedure (ICTY Rules), in Rule 42, lays down rights of the suspect. This Rule has been criticized as only applying to the Prosecutor, but Rule 37(B) extends the Prosecutor’s duties to staff and other persons under the direction of the Prosecutor. Rules 89-98 then govern the law of evidence.<sup>66</sup> Rule 89(C)

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59. THE NUREMBERG LEGACY, *supra* note 15, at 154.

60. S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

61. STEVEN RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 212 (2009).

62. THE NUREMBERG LEGACY, *supra* note 15, at 155.

63. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 35 (2007).

64. THE NUREMBERG LEGACY, *supra* note 15, at 156.

65. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶ 18, 23 (Int’l Crim. Trib. for the Former Yugoslavia Aug 10, 1995).

66. Rules of Procedure and Evidence, Int’l Crim. Trib. for the Former Yugoslavia, U.N. Doc. IT/32 (Mar. 14, 1994).

says that “any relevant evidence” can be used to prove the guilt or innocence of the accused.<sup>67</sup> However, Rule 89(D) provides a way to balance this openness with the need to uphold fairness and justice by stating that evidence may be excluded if “its probative value is substantially outweighed by the need to ensure a fair trial.”<sup>68</sup> In relation to hearsay evidence, the Chamber must be satisfied that the witness and the context were reliable.<sup>69</sup>

Rule 89(A) of the ICTY Rules, meanwhile, explicitly states that the Chambers will not be bound by national rules of evidence.<sup>70</sup> The Chamber in *Prosecutor v. Blaskic* explicitly interpreted this Rule to include the admissibility of hearsay on the basis that it is for the judge to decide on the final weight attributed to the hearsay evidence. “[T]he admissibility of hearsay evidence may not be subject to any prohibition in principle since the proceedings are conducted before professional Judges who possess the necessary ability to begin by hearing hearsay evidence and then to evaluate it, so that they make a ruling as to its relevance and probative value.”<sup>71</sup> As with the Nuremberg and Tokyo trials, the absence of a jury allowed great flexibility in the admission of evidence without prejudicing the accused; it was assumed that judges are capable of sifting through the evidence for the relevant and probative facts. The Chamber further held that admitting hearsay evidence before determining its reliability does *not* infringe on the accused’s rights nor on the ability to conduct a fair trial.<sup>72</sup>

As opposed to the Nuremberg and the Tokyo Trials, where the defendants were mostly high-ranking officials making the orders and not carrying them out, the defendants in the ICTY cases were mostly those who physically carried out the brutal attacks. Due to this key difference, more eyewitness testimony evidence was available. The subject of the first trial in front of the ICTY, and the first person to be tried for crimes against humanity

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67. *Id.* at r. 89(C).

68. *Id.* at r. 89(D).

69. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, ¶ 15 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 16, 1999) (“It is well settled in the practice of the Tribunal that hearsay evidence is admissible. . . . Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful, and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the *probative value of a hearsay statement will depend upon the context and character of the evidence in question*” (emphasis added)); see also CHRISTOPH SAFFERLING, INTERNATIONAL CRIMINAL PROCEDURE 495 (2012).

70. Rules of Procedure and Evidence, Int’l Crim. Trib. for the Former Yugoslavia, *supra* note 66, at r. 89(A).

71. *Prosecutor v. Blaskic*, Case No. IT-95-14 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 21, 1998).

72. *Id.*

since Nuremberg, was Duško Tadić in 1996.<sup>73</sup> *Tadić* allowed hearsay if it was probative. In determining the probative value of evidence; the court was guided but not bound by traditional common law hearsay exceptions.<sup>74</sup> Subsequently, *Prosecutor v. Delalic*<sup>75</sup> suggested that in allowing hearsay evidence, the Tribunal must first assess the reliability of the evidence and then rule on admissibility.<sup>76</sup> Especially in relation to documentary evidence in the midst of an ongoing conflict, the Chamber advised that the threshold for admission should not be too strict.<sup>77</sup> Even though there is no explicit mention in the Rules of *reliability*, the Chamber has claimed that “it is an implicit requirement. . . that the Trial Chamber give due consideration to indicia of reliability when assessing the relevance and probative value of evidence at the stage of admissibility.”<sup>78</sup> To determine reliability, the court was to look to the truthfulness, voluntariness, and trustworthiness of the evidence.<sup>79</sup> That is, just as in the Nuremberg and Tokyo trials, the admissibility of hearsay evidence hinged on the concept of reliability.

This concept of reliability for the purposes of the ICTY proceedings was defined in *Prosecutor v. Kunarac, et al* by comparing it to credibility: “Reliability assumes that the witness is speaking the truth, but depends upon whether the evidence, if accepted, proves the fact to which it is directed.”<sup>80</sup> Reliability can thus be seen as encompassing credibility as well as other factors such as accuracy and authenticity.<sup>81</sup> Accuracy is as fluid a concept as it is subjective; it depends on the witness’s senses. Authenticity, on the other hand, relates to the objective concepts of authorship and source.<sup>82</sup> It is assumed that these concepts, taken together, give the judge the proper tools to determine whether such evidence is probative. If the evidence is reliable, in that it is given with accuracy and authenticity by a credible witness with a credible original source, it should not matter that the original source is not

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73. THE NUREMBERG LEGACY, *supra* note 15, at 155.

74. Borten, *supra* note 2, at 8 (citing *Tadić*, Decision on the Defense Motion on Hearsay (Int’l Crim. Trib. for the Former Yugoslavia Aug. 5, 1996)).

75. Case No. IT-96-21-T (Int’l Crim. Trib. for the Former Yugoslavia) [hereinafter *Delalic*].

76. *Trends*, *supra* note 8, at 747 (citing *Delalic*, Decision on Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample (Int’l Crim. Trib. for the Former Yugoslavia Jan. 19, 1998)).

77. *Delalic*, Decision on the Prosecution’s Motion for the Redaction of the Public Record, ¶ 41 (Int’l Crim. Trib. for the Former Yugoslavia June 5, 1997); MAY & WIERDA, *supra* note 24, at 93–95.

78. *Trends*, *supra* note 8, at 747 (citing *Delalic*, Decision on Motion of Prosecution for Admissibility of Evidence, ¶ 20 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 19, 1998)).

79. *Id.* at 747. This is also emphasized in *Aleksovski*, *supra* note 69, at ¶ 15.

80. *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, Decision on Motion for Acquittal, ¶ 7 (Int’l Crim. Trib. for the Former Yugoslavia July 3, 2000).

81. SLUITER INTERNATIONAL CRIMINAL PROCEDURE, *supra* note 29, at 1025.

82. *Id.*

available. Given the context of these war crimes trials, the chance for the original source to be readily available is very slim and excluding such evidence could actually be more detrimental to justice.

A typical argument against the inclusion of hearsay evidence is that it deprives the defendant of the basic right to confront his or her accuser.<sup>83</sup> Even the ICC, which attempts to strike a balance between the common and civil law systems, includes the right of the accused to examine witnesses against him or her as one of the “minimum guarantees” in Article 67 of the ICC Rome Statute.<sup>84</sup> However, it should be noted that this safeguard against hearsay is only in relation to testimonial evidence. Under appropriate circumstances, even documentary hearsay may be excluded. Thus, in *Prosecutor v. Kordic and Cerkez*<sup>85</sup> the Chamber excluded documents known as the “Zagreb Material” because it consisted of “hearsay statements that are incapable of now being tested by cross-examination.”<sup>86</sup> Thus the Chamber combats this criticism in an indirect way. Here the Chamber specified the criteria to be taken into account when analyzing hearsay evidence: (a) if the statement was given under oath, (b) if it was subject to cross-examination, (c) if it was corroborated by other evidence, (d) if it was “firsthand” or more removed, and (e) if the statement originated at the time of the events or years later.<sup>87</sup>

The Chamber in *Prosecutor v. Aleksovski* further added that while hearsay is admissible, its value will be lower than that of oral testimony in court.<sup>88</sup> The Chamber emphasized that the purpose of the procedural rules of the ICTY was to promote “a fair and expeditious trial” and therefore there must be great flexibility.<sup>89</sup> In fact, the particular excluded evidence in *Kordic* was a very rare case; it was much more frequent for hearsay to be admitted and then subsequently weighed in relative value. In other words, while the Chamber would admit hearsay evidence (if deemed probative), the hearsay

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83. Codified in the U.S. CONST. amend. VI and expanded upon in *Ohio v. Roberts*, 448 U.S. 56 (1980) & *Crawford v. Washington*, 541 U.S. 36 (2004). For further discussion, see generally John Douglass, *Admissibility as Cause and Effect: Considering Affirmative Rights under the Constitution*, 21 QUINNIPIAC L. REV. 1047 (2003); Michael Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); J Brooks Greer III, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651 (1970).

84. Rome Statute, *supra* note 33, art. 67.

85. Case No. IT-95-14/2 (Int'l Crim. Trib. for the Former Yugoslavia).

86. *Kordic*, Decision on Prosecutor's Submissions Concerning “Zagreb Exhibits” and Presidential Transcripts, ¶ 39 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 1, 2000).

87. *Kordic*, Decision on Appeal Regarding Statement of Deceased Witness, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

88. *Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 16, 1999).

89. *Id.* at ¶ 19.

evidence would not weigh heavily compared to more direct or reliable evidence. Again, it is assumed that while the process of sifting through and deciphering the reliability of evidence is one that would be dangerous in the hands of a jury, a panel of judges in a Tribunal is capable of such a task without presumptively prejudicing the accused.

These cases seem to have provided a three step approach: (1) the Chamber ensured the evidence was *prima facie* relevant; (2) the Chamber assessed the probative value of the evidence; and (3) the Chamber weighed this probative value against any prejudicial effects.<sup>90</sup> Even though the nuances of war crime trial circumstances require flexibility in the admission of evidence, avoidance of unfairness and injustice is always an important consideration in international criminal trials. For example, while there is no requirement for the Chambers to use a best evidence rule, *Prosecutor v. Martić* demonstrates that the Chambers relied on the best evidence available given the circumstances.<sup>91</sup> Any failure to produce the best evidence only played a part in assessing the weight to be attributed to such evidence. The evidence can be admitted and then subsequently deemed probative – or not – based on its relevance as determined by the judges sitting in the trial.

The ICTY proceedings are indeed riddled with examples of hearsay evidence that was admitted but then subsequently deemed unreliable and thus of little weight. In *Kordić*, testimony about a television broadcast was admitted; however, the Chamber deemed it unreliable and accorded it zero weight because the tape itself was not provided to the Chamber.<sup>92</sup> In relation to another piece of hearsay evidence, the Trial Chamber declared that it “is under a duty to try and ascertain the truth and to deprive itself of this document would put that duty at risk.”<sup>93</sup> Thus the Tribunal is emphasizing its duty as an adjudicator. Part of the critique of *In re Yamashita* as discussed above was the fact that the adjudicators were military generals, not experienced legal minds. The role of the judges as fact-finders in these scenarios is to gather all the information they can and sift through such information, weighing each piece of evidence against one another on the basis of its reliability to come to an intelligent conclusion. Excluding hearsay evidence provides no material benefit in these circumstances. Allowing hearsay evidence into the trial merely sheds light on the facts and circumstances and thus should be part of the weighing process. Unless the hearsay evidence in question provides the ultimate proof of guilt, there is no

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90. SLUITER INTERNATIONAL CRIMINAL PROCEDURE, *supra* note 29, at 1023.

91. *Prosecutor v. Martić*, Case No. IT-95-11, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, ¶ 7 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 19, 2006).

92. *Kordić*, Judgment, ¶ 534 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

93. *Kordić*, *supra* note 86, at ¶ 44.

great harm to the rights of the accused so long as the professed standards of reliability are followed and so long as the judges are indeed capable of performing the judicial, inquisitorial, and fact-finding functions.

#### V. A NOTE ON GUANTANAMO – A SPECIAL CIRCUMSTANCE

The context of the Guantanamo trials is very different from the previously discussed war crime trials; thus, it is generally outside the scope of this paper and therefore will not be analyzed in depth here.<sup>94</sup> However, some arguments used in these proceedings in relation to the admission of hearsay evidence shed light on the current discussion and demonstrate certain modern-day views towards such evidence. Specifically, there have been many contentions against the use of hearsay evidence in the context of US military commission proceedings against Guantanamo detainees.

The preliminary draft of the Enemy Combatant Military Commissions Act of 2006 allowed for hearsay evidence unless it was unreliable or not probative.<sup>95</sup> This was criticized by some who argued that defendants would not be able to receive a fair trial unless they were “given the protections of an ordinary court-martial – including the right to exclude hearsay.”<sup>96</sup> Yet the circumstances surrounding these trials of suspected terrorists, while different from the war crimes trials of Nuremberg, Tokyo, and the ICTY, are still so vastly different from the circumstances surrounding normal court proceedings that what constitutes fairness in one circumstance cannot necessarily be fair in the other. The Nuremberg, Tokyo, and ICTY defendants were charged with grave and serious crimes against humanity, in war-connected trials in which time was often of the essence, and these trials often had significant political implications. The Guantanamo military commission trials do not quite fit into this model, yet the terrorist-state context makes them less like the normal criminal trial context and more like the contexts in Nuremberg, Tokyo, and the ICTY, which occurred in the contexts of hostility, significant political implications, and under the pressures of time sensitivity.

In the Nuremberg, Tokyo, and ICTY trials, any evidence, including hearsay, would be deemed admissible if it was probative. As the above

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94. One major difference is that the detainees were tried in US federal courts, some by juries, while others involved military tribunals.

95. Martin A. Hewett, *Hearsay at Guantanamo: A “Fundamental Value Determination”*, 96 GEO. L.J. 1375, n.117 (2008) (citing a preliminary draft of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, § 213(b)).

96. Jeffrey Rosen, *A Terror Trial, With or Without Due Process*, N.Y. TIMES (Sept. 10, 2006), [http://www.nytimes.com/2006/09/10/weekinreview/10rosen.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/09/10/weekinreview/10rosen.html?pagewanted=all&_r=0) [hereinafter *A Terror Trial*].

analysis demonstrates, the determination of probative value rests on reliability. Thus in connection to the Guantanamo detainee trials, many of these courts have justified admitting such hearsay if it is *reliable*.<sup>97</sup> One case even goes so far as to say that “the question a habeas court must ask when presented with hearsay is not whether it is admissible – *it is always admissible* – but what probative weight to ascribe to whatever indicia of reliability it exhibits” (emphasis added).<sup>98</sup> Clearly, reliability is the key to the admissibility of hearsay and is particularly important in the weighing process. And as discussed above, hearsay should be admissible in trials without juries because the judges are presumably capable of deciphering the reliability and weight to attribute to each piece of evidence. However, to say that hearsay is *always* admissible opens the floodgates and seriously dilutes the concept of reliability. The previous war crime tribunals set a very low bar for the admissibility of hearsay but still required such evidence to pass some thresholds (i.e. relevance) before it could be considered admissible.

These conflict-fueled contexts and circumstances historically have been repeating themselves and, unfortunately, will probably continue to do so. Professor Richard Goldstone, the South African chief prosecutor for the ICTY, said in relation to the Saddam Hussein trial before the Iraqi Special Tribunal that “[t]he more procedural rights you give the defendant, the more you allow him to continue the war by other means.”<sup>99</sup> This is an extreme position and inconsistent with the fundamental principle that defendants should have the same basic and fundamental procedural rights and due process allotted to everyone else. One of the legacies of Nuremberg was the acknowledgement that even the most heinous people deserve a fair trial. A more complete way of looking at it may be not about reducing the rights of the defendant but perceiving these rights and the concept of justice at trial in the light of the surrounding circumstances.

## VI. SAFEGUARDS TO ENSURE FAIRNESS

Admitting hearsay evidence (and subsequently weighing it) was a necessity in the circumstances in which these war crimes trials were conducted. However, preserving fairness and justice remained a primary concern throughout. Thus, the accused’s counsel has always had the opportunity to object to the use of the hearsay evidence in the specific circumstance and the tribunals set up safeguards via burden and standard of

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97. *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010); MIL. COMM. R. EVID. 803.

98. *Al-Bihani*, 590 F.3d at 879 (While the detainee trials are not habeas courts, this statement shows the trend of courts towards admitting hearsay evidence).

99. *A Terror Trial*, *supra* note 96.

proof, how the evidence was to be weighed, the rules on disclosure, and ultimately, the use of modern day international human rights laws to fill any gaps.

First, in considering burden of proof, the Nuremberg Tribunal, Tokyo Tribunal, and ICTY all seemed to accept the basic standards of the presumption of innocence and proof beyond a reasonable doubt. “Any impartial study of the Nuremberg trials would, in the light of each record, impress the reviewer with the judicial fairness with which the evidence was treated [and] the rigid adherence to the requirement of ‘proof beyond reasonable doubt.’”<sup>100</sup> In one of the Nuremberg Ordinance No. 7 cases, the Tribunal held “proof beyond a reasonable doubt” to entail moral certainty.<sup>101</sup> In another Ordinance No. 7 case, *United States v. Flick*,<sup>102</sup> the judgment identified five principles in relation to these standards and burden of proof: (1) no conviction without proof of guilt; (2) proved beyond a reasonable doubt; (3) such presumption of innocence is allotted to each defendant; (4) the burden is on the Prosecution at *all* times; and (5) if credible evidence can lead both to a reasonable inference of guilt and of innocence, the court must infer innocence.<sup>103</sup> These principles were demonstrated, for example, in the ICTY *Delalic* judgment.<sup>104</sup>

At times, hearsay evidence has been allowed based on corroborating evidence in common law systems.<sup>105</sup> This is an interesting development because there is no such exception in common-law countries.<sup>106</sup> Yet how could one argue that a piece of evidence is not reliable if there is sufficient corroboration of it? A further protection afforded to the accused is that even if a piece of evidence is admitted, that does not necessarily mean it will be given great weight. However, all the evidence is needed in order to determine if there is sufficient corroborating evidence. That is, corroboration does not exist in a vacuum but only in the context of all the evidence. This is why, in war crime trials, hearsay should be admitted and its weight and value determined later.

If the hearsay evidence is unfair or unreliable, the accused will still be protected; even if the tribunal admits such evidence, it will not afford it great weight: “There is a distinction. . . between a decision to admit evidence and

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100. Paul M. Herbert, *The Nuremberg Subsequent Trials*, 16 *INS. COUNSEL J.* 226, 231 (1949).

101. *United States v. Oswald Pohl*, Case No. 4, 5 *TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10*, at 965 (1946-1949).

102. *United States v. Flick*, 6 *TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10* (1946-1949).

103. *Id.* at 1189.

104. *Delalic*, *supra* note 75, at ¶ 601.

105. *See, e.g., R v. Bradshaw*, [2017] S.C.R. 865 (Can.).

106. Borten, *supra* note 2, at 19; *see, e.g., Crawford v. Washington*, 541 U.S. 36, 58–59 (2004).

a decision as to how much weight to give the evidence once it has been admitted.”<sup>107</sup> Thus in the Ordinance No. 7 *Hostage Case*, the Tribunal expressed the opinion that while it may admit hearsay evidence even without proof of authenticity, it cannot ignore authenticity and the usual rules of evaluating evidence in the weighing process.<sup>108</sup> “Any other interpretation would seriously affect the right of the defendants to a fair and impartial trial.”<sup>109</sup> As far as the ICTY tribunal was concerned, any evidence that had probative value was admissible unless the unfairness that would result outweighed the probative value substantially.<sup>110</sup>

Additionally, as an attempt to ensure due process in typical domestic criminal cases, disclosure of the prosecution’s evidence is usually open to all counsel. But at the Nuremberg Trials, “conditions were decidedly not normal”<sup>111</sup> and this is one of the criticisms of the trials’ fairness<sup>112</sup>: some incriminating documents were not revealed from the outset and were sometimes used with dramatic effect in cross-examination.<sup>113</sup> This was one of the differences within ICTY proceedings: the principle of “equality of arms” was used to provide a safeguard for the accused.<sup>114</sup> Under this principle, the prosecutor must disclose materials within thirty days of its initial appearance, allow the defense to inspect any materials if it so requests (although this opens the defense to reciprocal disclosure obligations), disclose the identity of any witnesses in sufficient time, and disclose any evidence suggesting innocence or implicating the credibility of evidence against the accused.<sup>115</sup> Further, in line with the adversarial common law

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107. *Trends*, *supra* note 8, at 755.

108. *United States v. List*, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 95 (1946-1949).

109. *Id.*

110. Rules of Procedure and Evidence, Int’l Crim. Trib. for the Former Yugoslavia, r.89, U.N. Doc. IT/32/Rev.43 (July 24, 2009).

111. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 627 (1992).

112. The Tribunal was critical of this practice in the Ordinance No 7 case, RuSHA – United States v Ulrich Geifelt, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 670 (1946-1949).

113. *See id.* at 639.

114. *Trends*, *supra* note 8, at 757.

115. Rules of Procedure and Evidence, *supra* note 110, at r. 66(A), 66(B), 67(C), 68, & 70; Prosecutor v. Blaskic, Case No. IT-95-14, Decision on the Production of Discovery Materials (Int’l Crim. Trib. for the Former Yugoslavia Jan. 27, 1997).

model and as decided in *Tadić*<sup>116</sup>, the ICTY did not burden the defense with as many disclosure obligations as the prosecution.<sup>117</sup>

Another safeguard the accused has is the exclusion of evidence obtained by illegitimate means. In the Nuremberg trials, evidence of pretrial interrogations was admitted and in the Ordinance No. 7 cases, the Tribunal even rejected an argument that such pre-trial interrogations violate the accused's rights under the Fifth Amendment of the U.S. Constitution.<sup>118</sup> While this was potentially unfair to the defendant, the Tribunal did regard duress as a disqualifying factor in admitting such affidavits.<sup>119</sup> As with the other potential sources of unfairness criticized in the Nuremberg and Tokyo trials, the ICTY attempted to provide more rules in its procedures that addressed these concerns. ICTY Rule 95, for example, calls for the exclusion of any evidence "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."<sup>120</sup> Again, the concept of reliability permeates the evidentiary analysis, thus demonstrating the commitment to fairness. Thus even though these tribunals admitted hearsay evidence, they used procedural safeguards of reliability to protect the defendants from unfairness.

## VII. CONCLUSION

War is not a *normal* circumstance and war crimes are not *normal* crimes as contemplated by domestic criminal laws. Consequently, war crimes trials cannot be considered under the same procedures as everyday domestic criminal trials. The defendants in these trials are accused of genocide, violations of the laws of war, and grave crimes against humanity. That said, in the end, all human beings should be entitled to a fair system of justice. Fairness and justice are and should be universal constants; however, the paths to fairness and justice must be malleable and adapt to different circumstances. In the context of war crimes trials, the crimes involved are of

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116. Prosecutor v. Tadić, Case No. IT-94-1, Decision on Prosecution Motion for Production of Defense Witness Statements (Int'l Crim. Trib. for the Former Yugoslavia Nov. 27, 1996).

117. *Trends*, *supra* note 8, at 760 (this is based on the principle that the accused is under no duty to assist the prosecution).

118. United States v. Carl Krauch, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 854-70 (1946-1949).

119. *Trends*, *supra* note 8, at 762 (citing United States v Carl Krauch, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 844 (1946-1949)). This was put into practice in *RuSHA – United States v Ulrich Greifelt* 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 846, 879 (1946-1949).

120. Rules of Procedure and Evidence, *supra* note 110, at r. 95.

such a grave and serious nature that the desire to deter the perpetrator and the general public from further crimes while searching for closure for the past and moving toward reconciliation, supports the argument in favor of a very liberal approach to evidence. It is a very difficult balancing process but one that can be achieved within the overall standard of fairness and justice implemented by these tribunals.

A point of controversy in relation to the fairness of the Nuremberg, Tokyo, and ICTY trials was that hearsay was deemed admissible. The presence of an impressionable and inexperienced jury – which leaves no record of its reasoning – caused common law systems to formulate a presumption against the admissibility of hearsay evidence subject to a few sharply delimited exceptions. Of course, if these trials followed the common law approach of excluding hearsay evidence, the exceptions seen in most domestic systems would have been applicable to many of the hearsay situations. However, these war crime trials more closely followed the civilian law tradition, where hearsay is presumed admissible conditioned on probative value because of the absence of a jury.

The general admission of hearsay evidence in these trials did not mean the evidence was admitted arbitrarily. It has been clear from the cases that the judges did seriously examine each piece of evidence, and looked at its reliability, relevance, and trustworthiness. The common key terms in these war crime trials on the admissibility of hearsay evidence are: “relevance,” “probative value,” “reliability,” and “credibility.” The real problem is that these terms do not appear to be used in a uniform and coherent way. While flexibility is generally a good thing, we still need clear standards. If these terms are given internationally accepted set standards or definitions, the proper usage of these thresholds would allow for hearsay evidence to be acceptably admissible in trials, even while upholding due process, fairness, and justice for the accused.

Common law systems essentially have a categorical rule precluding the admissibility of hearsay evidence, coupled with closely defined exceptions. The civil law systems for the most part avoid a “rule” as such and rely on the judge to determine the weight to be given to any evidence, rather than its admissibility. The Nuremberg procedure adopted a flexible approach to the common law rule in that it did determine admissibility, but not on the basis of categorical rules and exceptions. Rather, it did so as to the reliability of the hearsay when it was the best evidence available. This approach is especially appropriate in the context of war crimes trials. Combining a general preference against hearsay with general admissibility centered around a case-by-case judicial determination of reliability seems to be a good way to produce a fair and just result.

The circumstances in which these trials take place require nuanced and flexible rules regarding evidence. The context of war crimes is that people can be killed, whole cities can be burned, documents can disappear in the chaos, and oftentimes, hearsay evidence is thus the best evidence available. The circumstances underlying preclusion of hearsay evidence as unfair to the defendant in some domestic systems simply is not present in the war crime context. As the war crimes trials have demonstrated in practice, if *any* evidence, hearsay or not, is not considered reliable and relevant, it will not be admissible anyway. So long as there are adequate safeguards found in procedures and the tribunal is properly constituted with capable judges who are required to provide detailed reasoning with their judgments, then the general admissibility of hearsay evidence in war crimes trials does not provide a great threat to the rights of the accused and in fact provides for a fairer trial.

War crime trials and especially the idea of treating defeated parties fairly are relatively new phenomena. For this reason, the Nuremberg and Tokyo trials helped pave the way for human rights law. In the end,

“Nuremberg proved that a flawed trial is better than none. In following the positive elements of the Nuremberg precedent, the Tokyo trial was still worthwhile. Even if the process had many defects, it was better to hold the trial, make the record and make the attempt at justice.”<sup>121</sup>

Despite the arguable flaws in the procedures, the success of Nuremberg can be seen from the fact that the word “Nuremberg” has acquired a meaning beyond geography or history but “grew to represent a commitment to justice.”<sup>122</sup> It is certainly very easy and understandable for society to not want to treat fairly someone who has treated others so unfairly. However, one of the legacies of Nuremberg is that allegiance to the concepts of fairness and justice requires that every person, regardless of their alleged crime, deserves a trial bound by the standards of fairness and justice. This goal was at least arguably accomplished, even with the admission of hearsay evidence as representative of procedural methods adapted to the unique circumstances. Indeed, some say that “Nuremberg remains legalism’s greatest moment of glory.”<sup>123</sup> The admissibility of hearsay evidence is part of a delicate balancing act that takes place as judges in war crimes tribunals seek to uphold and preserve justice amidst chaos and hostility.

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121. THE NUREMBERG LEGACY, *supra* note 15, at 120.

122. *Id.* at 153.

123. GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 203 (2002).