

The Effect of Legal Culture on the Development of International Evidentiary Practice: From the ‘Robing Room’ to the ‘Melting Pot’

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Abstract

This paper draws on some of the preliminary findings of a small pilot study which aimed to discover what evidentiary challenges a range of practitioners with experience of different international trials faced in the cases they were involved in, and what practices were developed to deal with these challenges. The findings in this study are based on the data collected from The Hague-based institutions, the ICC, the ICTY, the ICTY and ICTR Appeals Chamber, and the Special Tribunal for the Lebanon (STL). It is argued that professionals moving from institution to institution are engaged in a process of cross-pollination which itself influences the practices that develop, although a common understanding of certain evidentiary issues in international trials remains fragmented and at times elusive.

Key words

evidentiary challenges; international criminal practice; legal culture; professional norms; international courts

I. INTRODUCTION

One of the motivations of the authors in organizing a conference on the socio-legal aspects of how evidence is handled in international criminal tribunals was that although there is now a body of scholarship on how rules of evidence and procedure have developed in the tribunals, there is little scholarship on how practitioners themselves view the processes of investigation, prosecution, and presentation of evidence at trial. The application of rules of evidence, like rules of procedure, is often considered better left for technicians while others can concentrate on the more interesting questions of substance.¹ But it is to these technicians that we entrust the job of making international justice work and nothing is, arguably, more important in this job than their handling of evidence. Whether justice is achieved will ultimately depend upon the quality of the evidence obtained and how it is processed through

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¹ For the tendency to characterize lawyers into law-givers, enlightened policy makers and wise judges, on the one hand, and technicians who make the law work, on the other hand, see W. Twining, ‘Pericles and the Plumber’, in W. Twining, *Law in Context: Enlarging a Discipline* (1997), ch. 4.

the justice system. But while we can debate what kind of idealized systems are most appropriate for international criminal justice, there is little point in projecting our ideals onto those charged with making international justice work unless we first have an understanding of how these ideals are likely to be mediated in practice.²

This paper draws on some of the findings of a small pilot study which aimed to discover what evidentiary challenges a range of practitioners with experience of different trials faced in the cases they were involved in and what practices they developed to deal with these challenges.³ The study took place in two phases, the first focused on practitioners who have worked in The Hague-based institutions: the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Tribunal for the Lebanon (STL). The second phase of the study focused on practitioners at the ICTR based in Arusha. The findings in this study are based on the data collected from the first phase of the research. From the outset, the pool of practitioners selected had a multitude of experience that cut across the range of tribunals on offer. While this was not a prerequisite element of the research protocol, it became evident that many practitioners, especially those working in The Hague, had experience of other tribunals centred elsewhere, e.g. the ICTR, Extraordinary Chambers in the Courts of Cambodia (ECCC), and Special Court for Sierra Leone (SCSL), and we were able to draw on their experiences of these tribunals. Perhaps unsurprisingly, the researchers found that this was beneficial not just in terms of the respondents being able to draw on differences and similarities between the different institutions, but also in terms of shedding light on how practices evolve in international criminal practice. It shall be demonstrated that professionals moving from institution to institution are engaged in a process of cross-pollination which itself influences the practices that develop, although we shall see that a common understanding of certain evidentiary issues in international trials remains fragmented and at times elusive.

2. SHIFTING THE FOCUS TOWARDS INTERNATIONAL EVIDENTIARY PRACTICE

The proliferation of new international criminal tribunals over the last 20 years has enabled a variety of evidentiary regimes to emerge for dealing with the challenges posed by mass atrocity cases. The distinctive and anarchic nature of international criminal processes is often evidenced by the repeated labelling of its nature of

2 For the importance in a different context of the role that intermediaries play in 'vernacularizing' international human rights on to local institutions, see S. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2005); and S. Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle', (2006) 108 *American Anthropologist* 38.

3 The study was funded by the Society of Legal Scholars, the Socio-Legal Studies Association, and the School of Law, University College Dublin. This paper represents an analysis of the work in Phase I of the study. The fieldwork consisted of 27 semi-structured interviews with judges, prosecutors, defence counsel, and court officials from chambers or the registry. All participants were granted anonymity.

operation as *sui generis*.⁴ Nevertheless, there can be little doubt that the cultures of domestic legal systems have played an important role in shaping the procedural and evidentiary foundations of the tribunals. Much attention has focused on the importance of common-law and civil-law legal traditions in influencing the procedural and evidentiary regimes that have emerged.⁵ By their inherent nature, international criminal trials are an amalgamation of different legal traditions, especially the common-law and civil-law legal systems. As Murphy observes, the ‘clash of jurisprudential cultures has influenced the treatment of evidence in international criminal law’.⁶

As the architects of the various rules and procedures were drawn from different legal cultures, it was inevitable that they would not agree, as a matter of a priori principle, on what particular approach should govern the proceedings. The choice of framework that has prevailed has therefore not been the result of a particular ideological preference on the part of those responsible for framing the statutes and rules but has rather been the result of the logic of the situation in which they found themselves. Thus, Cassese has observed that the choice of adversarial framework for the Nuremberg trials was because it was much more pragmatic to have prosecutors from each of the four allied powers collect the evidence against the accused and present it at trial.⁷ The alternative was to establish an investigating judge, which would have led to difficulty in determining how such an imposing and powerful figure should be appointed. When it came to the establishing rules and procedures for the ad hoc tribunals of the ICTY and the ICTR, the judges were similarly under time pressure to draft rules and procedures and were therefore unsurprisingly inclined to draw upon models of procedure that were the most readily available. Apart from the precedent of Nuremberg and Tokyo, the judges received proposals from a number of states and organizations but by far the most comprehensive proposal and the one that proved to be ‘particularly influential’ came from the United States, which drew upon its practice of military commissions.⁸ In contrast, the debates on the procedural rules for the ICC were much more extensive and civil-law influences played a more dominant role although the adversary–accusatorial framework continued to prevail.⁹ Other internationalized tribunals, which have operated under the national

4 R. Haveman, ‘The Context of the Law’, in R. Haveman, O. Kavran, and J. Nicholls (eds.), *Supranational Criminal Law: A System of Sui Generis* (2003), 1 at 33–8.

5 See, e.g., D. A. Mundis, ‘From “Common Law” towards “Civil Law”: The Evolution of the Rules of Procedure and Evidence’, (2001) 14 *LJIL* 287; A. Orié, ‘Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC’, in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1439; K. Ambos, ‘International Criminal Procedure: “Adversarial”, “Inquisitorial” or “Mixed”?’ (2003) 3 *International Criminal Law Review* 1; M. Fairlie, ‘The Marriage of Common Law and Continental Law at the ICTY and Its Progeny, Due Process Deficit’, (2004) 4 *International Criminal Law Review* 243; M. Caianiello, ‘Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models’, (2011) 36 *N. C. J. Int’l & Com Reg* 287; J. D. Jackson and S. Summers, *The Internationalisation of Criminal Evidence* (2012), ch. 5.

6 P. Murphy, ‘Excluding Justice or Facilitating Justice? International Criminal Law Would Benefit from Rules of Evidence’, (2008) 12 *International Journal of Evidence and Proof* 1, 3.

7 A. Cassese, *International Criminal Law* (2003), 377–8.

8 See V. Morris and M. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995), 177.

9 See H. Friman, ‘Inspiration from the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court’, (2003) 3 *Law and Practice of International Courts and Tribunals* 373.

law of the country that has requested international assistance to bring perpetrators of international crimes to justice, have adapted their procedures to the national law of the country involved. Thus, although the Special Panels of East Timor adopted procedures closely resembling those of the ICC, the ECCC adopted non-adversarial procedures from Cambodia's French legal heritage, and the procedures of the STL took into account some French/Lebanese procedures, although its procedures closely resemble those of the ICTY.¹⁰

The understandable tendency to derive procedural norms from what is most accessible to hand at the time, however, does not necessarily provide optimal procedures for collecting and handling evidence in mass atrocity crimes. Combs has made the telling point that although some of the tribunals' provisions on subject-matter jurisdiction were crafted towards the particulars of the relevant conflict, the procedures adopted to prosecute these crimes were chosen seemingly without reference to the nature of the conflict that gave rise to the tribunal or to the particular evidentiary context in which the tribunals would have to operate.¹¹ Combs identifies a number of fact-finding impediments that afflicted eyewitness testimony in all the tribunals she observed – the Special Panels, the ICTR, and the SCSL.¹² However, she also accepts that different clusters of problems predominate in different tribunals.¹³ Thus, language interpretation was not as severe in the SCSL as in the ICTR or the Special Panels. Similarly, although the ICTR has been afflicted by persistent allegations of witness lying, this did not seem nearly so prevalent in the Special Panels.

It seems that the debate as to optimal procedures needs to shift away from common-law–civil-law debates towards what practices have been developed and should be developed to deal with the evidentiary problems faced by the international criminal institutions. Although the tribunals started life with a particular blend of common-law or civil-law architecture, we know that the ad hoc tribunals in particular have resorted to various case-management techniques to expedite the wide-ranging nature of the indictments brought in the ICTY and this in turn has resulted in more evidence being presented in documentary form.¹⁴ We know less, however, about the particular evidentiary strategies and practices that have developed in other tribunals to deal with the evidentiary challenges faced by the various professionals involved. Although there is some valuable literature on the different rules and principles of evidence that have been developed across the tribunals,¹⁵ the application of socio-legal methods is able to reveal a more nuanced understanding of

10 S. Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor', (2001) 25 *Melbourne University Law Review* 123; S. Williams, 'The Cambodian Extraordinary Chamber: A Dangerous Precedent for International Justice', (2004) 53 *International and Comparative Law Quarterly* 227; J. E. Wetzel and Y. Mitri, 'The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country', (2008) 7 *Law and Practice of International Court and Tribunals* 81.

11 N. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Convictions* (2010), 289–90.

12 *Ibid.*, chs. 2–5.

13 *Ibid.*, at 297.

14 M. Langer, 'The Rise of Managerial Judging in International Criminal Law', (2004) 53 *American Journal of Comparative Law* 835.

15 See, e.g., K. Khan, C. Buisman, and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (2010).

the development of evidentiary practice. It is now an accepted axiom of socio-legal literature that there is often a gap between ‘the law in the books’ and ‘the law in action’, although much is contested about the relationship between formal rules and practice.¹⁶ There is also now acceptance across a multiplicity of disciplines of the need to study not only the external aspect of human institutions, but also the meaning that actors within these institutions attach to their own behaviour, what has been described as the ‘internal point of view’,¹⁷ although it has been argued that comparative criminal-procedure analyses have generally overlooked the internal point of view of actors in criminal-justice systems.¹⁸ These actors may not have all the answers to our problems but we will not get far in trying to work out what is ‘best’ practice if we do not do all that we can to find out what they think they are doing and why it makes sense to them.¹⁹

Our study took as its starting point the need to gain an understanding of how practitioners *themselves* viewed their role in the international evidentiary process and the extent to which professional norms have developed to influence this process. Professional norms may be distinguished from the rules of procedure and evidence that are drafted for the operation of a particular tribunal or court. Rather, they are the largely unwritten ideas, attitudes, beliefs, expectations, and opinions that professionals develop in the course of their legal practice and come to adopt as part of their culture.²⁰ Although there has been much debate as to the utility of the notion of ‘legal culture’,²¹ it can be useful as a means of expressing the ways in which legal actors internalize and come to adopt shared working practices.

This article will explore a number of themes that arose from the study. First, we found that practitioners act as agents of cultural and normative change, particularly those who have multi-institutional experience. Acting like ‘honeybees’, they take their experiences from the domestic to the international sphere and from one institution to another. The study exposed a shared view among practitioners that the challenging aspects of evidence are more rooted in the difficulties in obtaining quality evidence in the international environment than in the procedural and evidentiary rules themselves. In short, practitioners are able to adapt to new legal environments quite successfully. Second, the flexibility of practice and the lack of rules governing a number of aspects of international criminal procedure, particularly in the early stages of investigation, gave professionals the scope to create their own

16 See, e.g., C. Grace and P. Wilkinson, *Sociological Inquiry and Legal Phenomena* (1978); and D. McBarnet, ‘False Dichotomies in Criminal Justice Research’, in J. Baldwin and A. Bottomley (eds.), *Criminal Justice: Selected Readings* (1978).

17 See M. Rheinstein, *Introduction to Max Weber on Law in Economy and Society* (1954), 24–30; H. L. A. Hart, *The Concept of Law* (1994), 88–91. C. Geertz, *The Interpretation of Cultures* (1973), 5–10.

18 M. Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure’, (2004) 45 *Harvard International Law Journal* 1, n. 33.

19 D. Nelken, *Comparative Criminal Justice* (2010), 7. Nelken provides an illustration of how efforts to develop international standards must face the challenges of how these are disseminated by professional actors working within different legal cultures in D. Nelken, ‘Can Prosecutors Be Too Independent? An Italian Case Study’, in T. Daems, D. van Zyl Smit, and S. Spracklen (eds.), *European Penology?* (2013), 249.

20 Friedman distinguishes between legal culture and legal substance, which comprises the actual rules or norms used by institutions. See L. Friedman, *Law and Society* (1977), 6–7.

21 See the exchange between R. Cotterrell, ‘The Concept of Legal Culture’ and L. M. Friedman, ‘The Concept of Legal Culture: A Reply’, in D. Nelken, *Contrasting Legal Cultures* (1997), 13, 33.

solutions to evidentiary problems. Finally, however, although professionals might share certain ideals, the more limited scope for forming continuing relationships in the international environment has inhibited the process of developing common understandings as to how evidentiary challenges should be addressed. The ideals that professionals share have not been translated into commonly accepted practices.

3. INTERNATIONAL PRACTITIONERS AS AGENTS OF CULTURAL AND NORMATIVE CHANGE

Respondents in our study admitted that it could be quite a culture shock to encounter unfamiliar practices. Byrne correctly states that '[f]or practitioners, national codes of procedure and evidence reflect, rather than create, deeply rooted conceptions of process. Conceptions of process, in turn, shape the understanding of respective professional roles necessary for the delivery of justice'.²² There have been suggestions in the little empirical research conducted that practitioners have a natural tendency to 'bring their domestic culture with them' when they come to international tribunals. In a survey based on two early trials at the ICTY it was found that one trial presided over by a Continental judge adopted the style of the Continental inquisitorial tradition and another trial presided over by an Anglo-American judge adopted the role of judge as referee resembling the empirical role of a judge in adversarial proceedings.²³

In the pilot study, respondents gave some examples of domestic practices that lawyers would engage in which were not suited to international tribunals. One respondent gave the example of an American counsel who repeatedly referred to his client's name in his opening statement and turned his back to the court. That was theatre but it was the kind of theatre that 'doesn't impress, and has got nothing to do with evidence'.²⁴ Another tendency of lawyers from the common-law tradition was to engage in the kind of cross-examination that was more suited to jury trials. This same respondent gave the example of another counsel who had been asking a number of very detailed questions of a witness who was with a group of persons who had been put on a train.²⁵ The witness was asked questions such as,

'Ok, you did board a train, why did you do that?'

'Well we were told to board a train.'

'But were you forced to do it? Did they push you or ...?'

'No they didn't push us.'

When the judge asked counsel what she was doing, she replied 'I'm closing doors'. This respondent explained:

22 R. Byrne, 'The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice', (2010) 25 *Connecticut Journal of International Law* 243, at 248.

23 F. J. Pakes, 'Styles of Procedure at the International Criminal Tribunal for the Former Yugoslavia', (2003) 17 *Perspectives in Law & Psychology* 309. The two trials compared were *Prosecutor v. Tadić* and *Prosecutor v. Blaškić*.

24 Respondent 5, Judge, The Hague, 21 September 2011.

25 Respondent 5, Judge, The Hague, 21 September 2011.

If you have a jury in front of you, it may be important to say ‘Well you see they were not forced . . . they said they got on the train and that’s what they did. What’s wrong with that?’ What she wanted was to avoid anyone saying they were forced on the train. That’s closing doors. Or to say, for example, if someone gives a statement, ‘Did you say everything that you wanted to say?’ ‘Yes, of course I did.’ ‘Did you forget anything?’ ‘No, at least as far as I am aware, I didn’t forget anything, no.’ ‘Was there any relevant thing that you couldn’t tell?’ ‘No, there was nothing.’ And then of course they find some minor thing, which had not been dealt with in the statement. . . . That’s what they call closing doors’.²⁶

But these kinds of practice were ill-suited to benches consisting of professional judges. In this case, the judge said to counsel: ‘I would rather you opened windows than closed doors here because . . . I mean, we’re here, mostly judges who have been in court for 30–40 years. . . .’

One of the authors of this article has drawn attention to various ‘rubbing points’ between domestic traditions that have been experienced by practitioners operating at the international level.²⁷ But in international practice, lawyers have to adapt quickly to the new environment they find themselves in. In one of the early trials at the ICTY Judge Cassese told one of his fellow Continental lawyers who had been complaining about the one-sided nature of the investigation of the Prosecutor and about the fact that witnesses were either for one side or another, ‘I’m afraid this is the procedure. Of course, as you know better than me, it is the adversarial system . . . but we have to stick to the rules’.²⁸ What came across strongly from the interviews, indeed, was the willingness of practitioners to adapt to international procedures and come to value practices that were formerly alien to them. One respondent confided that:

on the Continent and in my country, cross-examination is a nightmare; it’s regarded as something terrible where the lawyer goes into intimate details that have nothing to do with the case to discredit the witness.²⁹

However, he admitted that he came to find the examination of witnesses by counsel was much to be preferred to examination by the judge:

The judge is like digging when you examine someone, you want the truth, no; you want a certain truth, you have expectations, you want to get that. And if the judge does that, he is in great danger of appearing biased.³⁰

Another respondent who had extensive experience working with a number of judges expressed a similar sentiment. He maintained that judges were able to adapt relatively quickly to the new environment they found themselves in:

We had a judge, . . . from Sweden who was very common law. Initially he had views in terms of coming from a civil-law tradition, but he also moved towards the common law

26 Respondent 5, Judge, The Hague, 21 September 2011.

27 Jackson and Summers, *supra* note 5, 124–31.

28 Cited in V. Tochilovsky, ‘Rules of Procedure for the International Criminal Court: Problems to Address in the Light of the Experience of the Ad Hoc Tribunals’, (1999) *Netherlands International Law Review* 343, at 350. See *Prosecutor v. Kupreškić* Transcript, Case No. IT-95-16-T, 1220-1.

29 Respondent 2, Judge, The Hague, 20 September 2011.

30 Respondent 2, Judge, The Hague, 20 September 2011.

and became a little bit less active in the trial ... whereas he would previously [have] been very directive and here he was more like listening to what was happening.³¹

This respondent himself admitted that after several years of working in the ICTY he:

[C]ould see great benefits in the common-law approach in terms of having party-driven procedure evidence rules that are very different from what we have, it's quite clear that I have changed my viewpoint quite a bit over the years. I wouldn't go so far as to say I've totally changed but I have developed a very deep understanding for the great benefits of the other type of legal systems.³²

Few respondents then took issue with the particular mix of common-law and civil-law procedures that they had to deal with. One respondent who had extensive experience of working in the Special War Crimes Chamber of Kosovo, the ECCC, the ICTY, and the ICTR considered that both common-law and civil-law systems were capable of producing reliable evidence provided the participants worked professionally. This suggests that although rules play a part in producing an effective evidentiary process, the attitudes of professionals towards the rules and towards each other can be just as important. Professionals have to adapt to the 'alien' nature of the international context itself, which has its own peculiarities, as well as a particular blend of common or civil law. A good illustration of this is provided by one respondent from a civil-law background who saw some of the strengths of features of his own system, such as the 'dossier', to the international context, because it would speed up the trial process. However, when it came to the trial he came to prefer the examination of witnesses based on the adversarial model, where questions are directed from the parties and the judge takes a more passive approach. Yet, this respondent commented on his own adaption to the international context which involved letting go of his own domestic working practices:

I will confess that, particularly in the beginning, I had a tendency to intervene too frequently and in a way continued the interrogation and then I met with angry protests of the lawyers ... so I learned judicial self-restraint.³³

The respondent appeared to develop self-awareness that in the process of truth-finding his method had to be adapted to the adversarial model of the trial process, while still maintaining a focus on the progress of the trial.

One respondent working in the ICC observed how well different trial chambers were able to adapt:³⁴

Being a common lawyer here at the beginning and seeing a whole civil chamber, I was happily surprised at how well the chamber adapted to this exercise that is counterintuitive to them of having examination, cross-examination, re-examination, you know, the examination of witnesses in the civil-law system is not done that way at all, and also here one defence team comes from Belgium and the Congo so it's civil law. And Mr X being represented by a common lawyer, so you have this mix of defence and the chamber adapting well to that and also understanding pretty quickly these rules

31 Respondent 3, Court Official, The Hague, 20 September 2011.

32 Ibid.

33 Respondent 2, Judge, The Hague, 20 September 2011.

34 Respondent 10, Prosecutor, The Hague, 22 September 2011.

coming from the common law and, of course, here you have professional judges you're not before a jury, so even these common-law rules that are normally being applied, can be relaxed because these stringent rules are for a jury trial, are jury-driven.

The process of adaptation, therefore, is a dynamic one in which practitioners have to jettison some of the established practices of their own tradition, but this relearning does not mean that they are forced into the straitjacket of accepting an entirely different tradition. Rather it involves an interaction that has to be shared by the practitioners themselves so that the practices that evolve do so in a manner that takes account of the international context and may be different from those associated with a particular domestic tradition.

This process has been aided by the fact that although the procedures in the various tribunals may have been rooted in particular traditions, the rules of procedure and evidence are often flexible enough to allow for a variety of practices to evolve.³⁵ On a number occasions at the ICTY, the rules have been changed to conform to rulings and practices that have already been developed. One respondent provided a salient illustration of cultural co-operation to find the best solution that would ultimately seek to enhance the efficiency of the trial process.³⁶ In the early days, there was no obligation on the prosecutor to disclose copies of all the statements of witnesses whom it was intended to call or for the court to be given advance notification of such statements. This respondent, who was a himself a prosecutor, told us that he joined a group of lawyers from various common-law and civil-law jurisdictions who agreed to ensure that the pre-trial stage incorporated the maximum exposure of what witnesses would say in court to the defence and then later persuaded the court to have much of the witnesses' evidence given in writing. This assisted the expediency of the trial process as it saved witnesses having to go through 'an extremely artificial exercise' of answering questions on matters they had already attested to.³⁷ These practices eventually worked their way into the rules, with the famous Rule 92 *bis* or versions of it now found in no less than four international criminal tribunals and described by one commentator as the 'single most successful rule amendment of the ad hoc tribunals'.³⁸

The scope for creativity on the part of practitioners has been carried through into the procedures within the ICC where one respondent considered that there was no dominant legal culture and no civil- or common-law divide but a 'healthy' hybrid between different traditions.³⁹ Another respondent referred to Rule 140 of the ICC Rules of Procedure and Evidence where the chamber can adopt whatever rules it chooses in terms of the presentation of evidence, provided this is done in a fair and impartial manner. This could lead to disparity between different cases where there

35 G. Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility', (2001) 12 *Criminal Law Forum* 41.

36 Respondent 16, Prosecutor, The Hague, 16 April 2012.

37 Respondent 16, Prosecutor, The Hague, 16 April 2012.

38 C. Gosnell, 'Admissibility of Evidence', in Khan, Buisman, and Gosnell *supra* note 15, at 375, 396.

39 Respondent 8, Prosecutor, The Hague, 22 September 2011.

should be a common thread but the institution needed time to develop the best practices.⁴⁰

Right now, the chambers are trying different things for the very purpose of expeditiousness. One of my colleagues always says there's in French, a saying: Fast is good, but good is better: *vite c'est bien mais bien c'est mieux*. So fast is good but good is what we should be striving for. The chambers are trying to adapt and set some common threads and standards that leap inevitably to what is good, what worked and didn't work.

Perhaps the scope for the development of professional norms that seek to go beyond the rules in order to meet the challenges faced in the international context is best seen at the investigative stage where respondents faced a considerable multiplicity of evidentiary challenges. We turn in the next section to explore two particular types of challenge here – collecting evidence and taking statements.

4. EVIDENTIARY PRACTICE AT THE INVESTIGATIVE STAGE

4.1. Challenges in collecting evidence

Within the evidentiary context a number of respondents made the point that in the international environment the standards for collecting evidence were not as high as in domestic jurisdictions where there had been in some cases centuries of practice handed down as to how to handle evidentiary issues. A constant refrain of many respondents was the extreme difficulty in obtaining quality evidence in the international environment. In order to meet this challenge it was necessary to develop a number of practices that were not authorized or developed in the rules. As one respondent said:

I think first of all you're dealing with the scale of offence which is out of all proportion to what you would find domestically . . . , so you're looking at multiplicity of criminal events, involving a multiplicity of individuals; killing an enormous number of people per event. So, the amount of material that that generates is huge. Your average murder, which is the most serious matter in the criminal calendar domestically, usually is one person, generally speaking, maybe several people, but it's usually one event. There is a limited amount of evidence which is generated as a result of it being one event with a limited number of people.⁴¹

Difficulties vary according to the type of case under examination. In the case of the conflict in the former Yugoslavia, another respondent who had considerable prosecutorial experience told us that it was relatively easy to obtain crime base evidence from the statements from victims.⁴² In contrast to the situation in Rwanda, plenty of resources were put into doing exhumations to identify victims. The problem lay in developing links to the perpetrators particularly where a number of states had relevant documents and information but were reluctant to hand them over.⁴³ Although there was an obligation on states to co-operate with the tribunal, the tribunal had

40 Respondent 10, Prosecutor, The Hague, 21 September 2011.

41 Respondent 7, Prosecutor, The Hague, 21 September 2011.

42 Respondent 16, Prosecutor, The Hague, 16 April 2012.

43 Ibid.

been reluctant in the early days to issue subpoenas compelling testimony. Instead, prosecutors had to develop their own strategies to get witnesses to attend for interviews. Prosecutors also had to develop strategies to get insider witnesses to co-operate and often it was a hard job to obtain any incriminating evidence against them, which might be used as a lever for co-operation. According to one lawyer with experience of the ICTY, the ability to secure plea agreements, which was not something authorized in the tribunal rules, became a critical component in the ICTY's legacy.⁴⁴

Collecting evidence in the context of an ongoing conflict is a difficulty faced in many of the situations before the ICC.⁴⁵ According to one respondent, dealing with states that are either unwilling or unable to investigate crimes themselves basically means they either have an interest in causing harm to witnesses or they are not in a position to offer the necessary guarantees of security for the witnesses.⁴⁶ A number of respondents with prosecutorial experience pointed out that one of the biggest challenges the prosecutors face is locating witnesses who were willing to meet and speak with them.⁴⁷ Before there could be any interaction with witnesses on the ground there had to be a security assessment that it is safe to go into the field, and in some cases there was a deliberate choice not to go into the field because it was too dangerous. As one respondent said:

We are on record saying that in Darfur when we did our first and full investigation, we never went to Darfur because basically the assessment was that there was no way we can put a reasonable witness protection system in Darfur and we would be exposing people who we wouldn't be in a position to protect if it comes out we are starting to interview people. So we investigated the crimes allegedly within Darfur by the government of Sudan and Janjaweed from the outside.⁴⁸

When it was decided to enter the field, secret locations had to be found to interview individuals. International officials, whether white or black people, coming into certain areas were immediately identified as outsiders. Those who were willing to be interviewed were not necessarily the best witnesses. Even those who might be willing to speak at first may later change their mind when they realize who has been charged: People who are outside this institution looking at this say, 'Ok let's charge Gadhafi, it's easy it's obvious'. But who is going to be willing to come and testify against Gadhafi if their car could blow up while coming? That is the issue. We can try to move as fast, quickly as we want and we may be criticized for the length of our investigation but sometimes the prosecution cannot bring the best evidence available because people are simply not willing to co-operate.⁴⁹

Given such difficulties, it is perhaps inevitable that prosecutors instead sought intermediaries for getting information through requests to states either for mutual legal assistance or through confidentiality agreements with state parties or through

44 Respondent 17, Prosecutor, The Hague, 17 April 2012. The ICTY eventually came to recognize a plea agreement procedure: see RPE62. See also V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence', in Khan, Buisman, and Gosnell *supra* note 15, at 174–7.

45 Prosecutors' powers to collect evidence and conduct investigations against the wishes of the state are limited: see Part 9 of the ICC Statute. See A. Alamuddin, 'Collection of Evidence', in Khan, Buisman, and Gosnell *supra* note 15, at 231, 246.

46 Respondent 8, Prosecutor, The Hague 22 September 2011.

47 Respondent 6, Prosecutor; Respondent 8, Prosecutor; Respondent 10, The Hague, 21–2 September 2011.

48 Respondent 8, Prosecutor, The Hague, 22 September 2011.

49 Respondent 8, Prosecutor, The Hague, 22 September 2011.

relying on the evidence of NGOs.⁵⁰ Another practice was to rely on what were described as 'overview' witnesses who could put the evidence that was obtained in a wider context:

[I]n the X trial we have a very reduced number of rape victims but we have health experts and people who were in the field at the time and that conducted surveys and we can basically tell the chamber 'Well look, this is a segment of this wider spectrum of victimization, these are the cases that were documented'.⁵¹

Defence practitioners were understandably critical of such practices. From a defence perspective, there was a view that more should be done by the ICC to obtain direct witness evidence. According to one respondent who spoke to more than 300 people in the Democratic Republic of the Congo for the defence, there were people out there who did not support the story of her client.⁵² Although she accepted that there were security problems in securing their evidence, she was surprised these people who could have been useful for the prosecution had not been approached by the OTP. Prosecutors who were interviewed admitted that the quality of information obtained through intermediaries could be deficient.

The answer is not to throw lots of bodies at it because what happens is that they all end up disconnected as to what they've all done and they all end up applying different types of tests to the material. So, you end up, even though you have lots of people doing the work because of the volume of the work, it doesn't create uniformity of outcome. Um, and it's very difficult to guide individuals, without doing the work for them, and once you're doing the work for them, why have them?⁵³

Others argued that one way of mitigating this problem was for the tribunals to develop stricter rules of reliability governing the admissibility of evidence which would encourage greater consistency in the quality of the evidence obtained. A contrast was made with the strict rules that exist to prevent the abuse of suspects. The ad hoc tribunals have taken a strict approach towards the rules governing the interviewing of a suspect or insider interviews requiring lawyers to be present when they are being interviewed.⁵⁴ At the ICTY, for example, there was the famous

50 According to the Open Society Justice Initiative, 'Intermediaries perform a range of functions which are necessary for the ICC to do its work effectively. This may include, for example, assisting prosecution or defense investigators in identifying evidentiary leads and helping to contact potential witnesses. Intermediaries may help to raise awareness among affected communities about the rights of victims to participate in ICC proceedings, and assist victims in filling out official paperwork, or in securing psychosocial services, security, and legal services. More generally, intermediaries help the Court conduct outreach or provide public information in countries in which ICC investigations are taking place.' Open Society Justice Initiative, Briefing Papers, Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties (December 2011). Available at www.opensocietyfoundations.org/sites/default/files/intermediaries-20111212.pdf.

51 Respondent 8, Prosecutor, The Hague, 22 September 2011.

52 Respondent 1, Defence, The Hague, 19 September 2011.

53 Respondent 7, Prosecutor, The Hague, 21 September 2011.

54 ICTY Statute Art. 18(3); ICTR Statute Art. 17(3); RPE 42(B) of both tribunals provides the questioning of a suspect during investigation shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire for counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or been assigned counsel. See also Art. 55 ICC Statute.

Celebici case where the interviews with Mučić were excluded because counsel was not present during the interviews.⁵⁵

4.2. Taking statements

Once witnesses were identified, a further set of challenges that a number of respondents mentioned lay in taking witness statements from them. First, there was often difficulty in finding experienced investigators to obtain witness statements. Second, even if they could be found, nothing could prepare them for the challenges of obtaining evidence from persons who came from an unfamiliar culture. Since in the Rwanda tribunal eyewitness testimony constituted so much of the evidence, witness interviewing was critical yet problematic as investigators often failed to be culturally sensitive to the situation they were investigating, ‘blundering in’, as one respondent described it, by asking a whole series of inappropriate questions that can upset people.⁵⁶ This respondent gave the example of investigating rape cases in Rwanda where there is no word in Kinyarwanda for rape and the context in which you express yourself to have been raped is where you say, ‘he knew me’:

You can imagine the chaos that arises when an investigator does not appreciate what the sensitivities are here; um ‘what are they talking about?’ The word ‘know’ in the biblical sense is being applied but to the ear of the investigator listening to the translation it’s nonsense; ‘he knew me and I didn’t know him’. . . . What she means is ‘he had sex with me and I didn’t know who he was . . .’⁵⁷

Yet, as another respondent explained:

You cannot just rely on a local investigator because . . . they’re not very familiar with how it works in the court, . . . also how to take statements properly, which is very important. You don’t want to be stuck with statements and they’re all the same, for instance, or . . . are . . . led, you know, maybe he’s leading this . . . I don’t know how these answers came about. [A]nd that’s obviously lack of experience, he’s also not a lawyer . . .⁵⁸

To overcome these deficits this respondent who now worked in the ICC used her own experience from the time she worked in the region for the ICTR. She insisted that the investigator was accompanied by a woman who was native to the country and therefore alive to the sensitivities involved. The woman would then be able to explain in the witness’s own language what the importance of the witness’s statement would be and how she should not feel embarrassed and it was not her fault. This demonstrates how the working practices of one institution are imported into another, in this case from the ICTR to the ICC, through the agency of professionals. This respondent built on what she considered ‘best’ practice developed from the one tribunal and adapted it to the operations of another. This kind of cross-fertilization

55 *Prosecutor v. Delalić*, Decision on Zdravko Mučić’s Motion for the Exclusion of Evidence, Case No. IT-96-21-T, 2 September 1997. Cf. *Prosecutor v. Katanga* (Decision on the Confirmation of Charges), ICC-01/04-01/07, 30 September 2008, paras. 97–99.

56 Respondent 7, Prosecutor, The Hague, 21 September 2011.

57 Respondent 7, Prosecutor, The Hague, 21 September 2011.

58 Respondent 1, Defence, The Hague, 19 September 2011.

of practice which occurs from the ground upwards involves a localized sense of the role and responsibilities that the practitioners see for themselves.

Both prosecutors and defence practitioners stressed the importance of investigators being trained to ask questions properly. One respondent reported that, again in the Rwandan context, a number of witness statements were often very superficial and based on poor investigation.⁵⁹ He gave the example of a witness who claimed to have seen people's heads being cut off. When the prosecutor talked to the witness, she said:

I didn't see that with my own eyes . . . someone told me that and that's why I relayed it to the investigator. In the Rwandan context so much oral history and information was passed on person to person and that they didn't really distinguish 'hearsay'.⁶⁰

This respondent reported on a variety of practices from the ICTR, which would vary from question-and-answer statements in the early days of the work of the tribunal to longer narrative statements. Narrative statements give the witness the opportunity to tell the story in the way he or she wishes, something that can be particularly useful, according to another respondent, in a courtroom where witnesses can often be intimidated by a question-and-answer approach. Nevertheless, at the investigative stage narrative statements had the disadvantage that they could leave out important details:

When a witness is impeached on a question-and-answer statement and the question is, say, why did you not tell the investigator that my client was there, you can say, well, find the question that asked that and you're able to rehabilitate the witness to some extent. Whereas, if you have a narrative statement, it can be said that the witness was able to tell everything that was important immediately.⁶¹

Some respondents referred to a variety of practices that could be taken to improve the taking of witness statements. One referred to the fact that he had seen more audio and video recording of statements being taken at the ICTY in Kosovo cases especially where prosecutors were afraid that their witnesses were going to be subjected to intimidation or threats. An audio recording was much more powerful than a previous inconsistent statement.

You can get a transcript of what is said and you can see what the interpreter has said and you can see any degradation or loss of data that has taken place in the process of interpretation.⁶²

Another respondent also referred to a practice that he said took place in the early days of the ad hoc tribunals whereby a lawyer from Chambers could be required to take depositions from witnesses before trial.⁶³ This proved particularly useful in the case of witnesses who had long ago given a statement which now needed to be updated. The statement could be taken with representatives of the parties

59 Respondent 18, Prosecutor, The Hague, 17 April 2012.

60 Respondent 18, Prosecutor, The Hague, 17 April 2012.

61 Respondent 18, Prosecutor, The Hague, 17 April 2012.

62 Respondent 17, Prosecutor, The Hague, 17 April 2012.

63 Respondent 16, Prosecutor, The Hague, 16 April 2012.

and even an examining magistrate or judge present.⁶⁴ Another respondent referred approvingly to the ‘unique investigative opportunity’ procedure at the ICC whereby under Article 56 of the Rome Statute a statement may be taken in lieu of live testimony, which allows a transcript to be admitted of a witness who may not be available at trial.⁶⁵ This respondent considered this device was a valuable import from the civil, law tradition that could be used more often.⁶⁶

5. WITNESS PROOFING

Although respondents were able to give examples of practices which they had adopted to try to improve the evidentiary process outside the explicit rules and statutes of the tribunals, there was not always agreement between them as to whether such practices should be adopted as professional norms. The practice of witness proofing serves as a good illustration of this. ‘Proofing’ has been defined as a process whereby lawyers go through the written statement of a witness and clarify what the witness meant in that statement shortly prior to their appearance at trial for the purposes of preparing and familiarizing the witness with the procedures of the courtroom and reviewing the evidence of the witness.⁶⁷ Although the practice is well developed as a professional norm in certain domestic jurisdictions,⁶⁸ it has provoked considerable controversy in the international arena.⁶⁹ It has been widely adopted within the practice of the ad hoc tribunals, although outside their rules and statutes, and its acceptability in this context has been affirmed by jurisprudence.⁷⁰ Yet it was proscribed by the Pre-Trial Chamber and the Trial Chamber in *The Prosecutor v. Thomas Lubanga Dyilo* on the grounds that it could lead to a distortion of the truth and come close to constituting a rehearsal of in-court testimony.⁷¹

One respondent explained the importance of ‘proofing’ as follows:

Early investigation statements never enquired as to what were first-hand perceptions and what wasn’t ... So I’d start every sentence with I saw, I heard, someone told me

64 See ICTY RPE 71.

65 Respondent 17, Prosecutor, The Hague, 17 April 2012. Art. 56 Rome Statute governs the role of the pre-trial chamber in relation to a unique investigative opportunity.

66 Respondent 17, Prosecutor, The Hague, 17 April 2012.

67 *Prosecutor v. Haradinaj*, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, Case No. IT-04-84-T, 23 May 2007, para. 8.

68 See S. Vasiliev, ‘Liberal Extremity to Safe Mainstream? The Comparative Controversies of Witness Preparation in the United States’, (2011) 9 (1) *International Commentary on Evidence*.

69 See R. Karemaker, B. D. Taylor III, and T. W. Pittman, ‘Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence’, (2008) 21 LJIL 683; K. Ambos, ‘“Witness Proofing” before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman’, (2008) 21 LJIL 911; R. Karemaker, B. D. Taylor III, and T.W. Pittman, ‘A Response to Ambos’, (2008) 97, W. Jordash, ‘The Practice of “Witness Proofing” in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice’, (2009) 22 LJIL 501; S. Vasiliev, ‘Proofing the Ban on “Witness Proofing”: Did the ICC Get it Right?’, (2009) 20 *Criminal Law Forum* 41; R. Skilbeck, ‘Frankenstein’s Monster: Creating a New International Procedure’, (2010) 8 JICJ 451; Jackson and Summers, *supra* note 5, 141–2.

70 *Prosecutor v. Milutinović*, Decision on Ojdanić Motion to Prohibit Witness Proofing, Case No. IT-05-87-T, 12 December 2006; *Prosecutor v. Karemera*, Decision on Interlocutory Appeal Regarding Witness Proofing, ICTR-98-44-AR72.8, 11 May 2007.

71 *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarization and Witness Proofing, ICC-01/04-01/06-679, 8 November 2006; *Prosecutor v. Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, ICC-01/04-01/06, 30 November 2007.

helps them put it into context of a tool to let them distinguish between hearsay and what they saw . . . And so my experience was for every three witnesses I met two were not useful for trial and so 67% of my pre-trial preparation was meeting witnesses that weren't really helping to advance my case.⁷²

As well as filtering out witnesses who would not be useful, proofing also had the advantage of allowing what are called 'will-say' statements to be disclosed when the witness reveals new facts that were not in the original statement. This is not a formal statement but it is a document prepared by a lawyer in the presence of others so that the other side gets disclosure. In the ICTY context, prosecutors also said it was useful to match up the witness's statement against documents and lists of names of suspects whom the witness might be able to identify.⁷³ It could take up considerable court time to go through this process in the courtroom.

Another reason for proofing in the international context mentioned by respondents was that it was necessary to give assurance to witnesses who have come all the way to institutions in The Hague or Arusha from their home village. As one lawyer with extensive trial experience noted,

The point is that you often find you have to talk to the witnesses to work out what they're going to say in the courtroom. [W]hen you ask questions in the courtroom, they are suddenly in an environment, which is not a personal relationship . . . ; they are in this weird spaceship, where there are judges up there, and there are people on either side of them, and they are kind of naked, metaphorically, before this enquiry. And they don't get that connection.⁷⁴

The Victims and Witness Unit at the ICC has developed ways of familiarizing witnesses with the court and prosecutors are allowed a brief 10-minute courtesy meeting but, according to some respondents, witnesses were often disorientated when they could not meet their lawyers.⁷⁵ When, on the other hand, lawyers had time to develop a rapport with witnesses and proofing was permitted, witnesses could be stopped from recanting on the evidence reflected in their original statements.

If I cannot proof a witness then I don't know if a witness has been threatened . . . You need to take time with the witness and ask, 'What the hell is going on? You're changing your story to the one you told previously, you're saying this but you're not saying that.'⁷⁶

Of course, it may be possible to put these matters directly to the witnesses at trial but adversarial justice has traditionally put severe constraints on the extent to which a party is able to cross-examine or impeach the credibility of his own witness.⁷⁷ In

72 Respondent 18, Prosecutor, The Hague, 17 April 2012.

73 Respondents 6, 8, 12, 16, 17, The Hague, 21–2 September 2011; 16–17 April 2012.

74 Respondent 16, Prosecutor, The Hague, 16 April 2012.

75 On 18 November 2010, TC III adopted a protocol submitted by the Victims and Witnesses Unit (VWU) on witness familiarization aimed at assisting witnesses prior to and during the trial. See Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/05-01/08-1016, 18 November 2010, at www.icc-cpi.int/iccdocs/doc/doc969083.pdf. See also 'Victims and Witnesses Unit's Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial', 22 October 2010, ICC-01/05-01/08-972, at www.icc-pi.int/iccdocs/doc/doc957501.pdf.

76 Respondent 12, Prosecutor, The Hague, 23 September 2011.

77 See generally P. Roberts and A. Zuckerman, *Criminal Evidence* (2010), 338.

certain situations a witness may be declared 'hostile', in which case a previous statement inconsistent with his or her present testimony may be admitted.⁷⁸ Although trial chambers have displayed a certain degree of flexibility on whether witnesses must be declared hostile before they may be questioned on prior inconsistent statements, the decision whether a party will be allowed to put a previous statement to its own witness is one for the trial chamber and not for the calling party.⁷⁹

One lawyer argued that a place could be carved out for witness proofing subject to certain limitations. His common-law background provided him with sufficient familiarity with the practice of witness proofing. Although this respondent acknowledged that avoiding proofing would prevent errors of incompetence, nonetheless, the trade-off would be the efficiency of the trial process. In essence, this respondent warned that without proofing there would be an 'open-ended timescale' for international trials.

One respondent was critical of the stance taken by the ICC to completely reject the use of witness proofing out of hand. Speaking in the context of the ICC, he stated that:

I would actually want proofing to be allowed ... from a human point of view you've been the person who's been in contact with these people, and we're talking about people from villages, though not always, ... particularly our witnesses, they have never left their little home, let alone the country ... they really don't know what is going on and what is happening and then they come here and they don't see any familiar face.⁸⁰

Given the highly controversial decision of the ICC Trial Chamber in *Lubanga*,⁸¹ this respondent felt that the ICC should reconsider its stance, look to the best practice of the other institutions such as the ad hoc tribunals or the Special Court of Sierra Leone as some guidance on the matter, and see what fits.

However, this view was not universally shared by all respondents. One respondent considered that the ICC had taken the correct move in this decision. Short of inducing the witness to lie, he felt that proofing was:

... rather a nuisance, because whatever they say, they train the witness to say what the party wants him to say.⁸²

Some practitioners also considered that, while proofing could be useful for them, the practice took away from the spontaneity of evidence.⁸³ When the information comes in first-hand, you can judge the truthfulness and the demeanour of the witness better. The argument for spontaneity insists that when the information comes in first-hand in the courtroom, the finder of fact, a panel of three judges in the case of

78 See *Prosecutor v. Limaj*, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, Case No. IT-03-66-T, T. Ch., 25 April 2006. These rules derive from Section 3 of the English Criminal Procedure Act 1865.

79 See *Prosecutor v. Popović*, Decision on Appeals against Decision on Impeachment of a Party's Own Witness, Case No. IT-05-88-AR73.3, A.C., 1 February 2008.

80 Respondent 1, Defence, The Hague, 19 September 2011.

81 See K. Ambos, "'Witness Proofing' before the ICC: Neither Legally Admissible nor Necessary', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 599.

82 Respondent 2, Judge, The Hague, 20 September 2011.

83 Respondent 6, Prosecutor, The Hague, 21 September 2011; Respondent 18, Prosecutor, The Hague, 17 April 2012.

international tribunals, would be in a better position to assess the truthfulness and the demeanour of the witness.

Although the STL has not yet clearly pronounced on the practice of witness proofing, it would seem that there is a tendency to follow the practice of the ICTY and the ICTR. One respondent pointed out that the STL practitioners are aware of the challenges faced ensuring that ethical standards are adhered to and maintained. For this respondent, judges needed to be activist in their approach to the matter.⁸⁴ He stated that:

I think that, in this tribunal, we have accepted proofing, I do endorse that but I'm not blind to the risks of it.⁸⁵

Another respondent from the STL considered that that it was problematic, philosophically:

... I also think there are good legal reasons to argue against it, but as a prosecutor having done it for a couple of years at the ICTY, I see the huge and significant practical advantages, which are not, in my view, a detriment to the truth-finding exercise... Proofing is not meaning coaching a witness, that's something completely different. ... Proofing sessions, if done properly, and I can assure you, eh, to the extent that I do know they are done properly, ... enable the lawyer who is going to lead the witness in court, to make the witness focus on the crucial matters. So, it adds to judicial economy because you do not need to ask the witness questions, or, you do not need to have to deal with answers that are irrelevant, so you save time, you definitely save time.⁸⁶

Another respondent took a more nuanced view as follows:

If done properly, by professionals and with a code of ethics – I'm not against witness proofing per se. But I think it just has to be done well – within certain rules. Actually witness proofing ... has its merits within our situation, where the witnesses have given their statement so long ago. Things may have changed. Otherwise, you end up in a trial where it's just a succession of developments. And you are not in control ... But you may not want such proofing to occur with witnesses who are vulnerable. It's never one rule fitting everything.⁸⁷

There was an acceptance amongst most of the respondents, however, that proofing can be abused; lawyers have an ethical obligation to do it properly. According to one respondent, the ICC's refusal to allow this was a slap in the face of the professionalism of the lawyers:

Moreover, the lawyers who are doing the proofing are officers of court; we have an ethical obligation to do it properly. We can't suborn perjury, we can't tell witnesses to exaggerate or we can't tell them to do anything, they just tell us their story.⁸⁸

Beyond these shared ethical principles, more safeguards could be introduced to prevent coaching, such as taping the proofing interview and disclosing the product of the tape to the other side, and more guidance could be introduced on when it is

84 Respondent 5, Judge, The Hague, 21 September 2011.

85 Respondent 6, Prosecutor, The Hague, 21 September 2011.

86 Respondent 6, Prosecutor, The Hague, 21 September 2011.

87 Respondent 14, Court Official, The Hague, 23 September 2011.

88 Respondent 18, Prosecutor, The Hague, 17 April 2012.

appropriate and where the line should be drawn between witness preparation and witness coaching. When there is no universal consensus about the practice in the first place, however, there is little likelihood of a detailed code of practice emerging.

6. REACHING A CONSENSUS ON THE MANAGEMENT OF EVIDENCE IN INTERNATIONAL TRIALS

We have seen that there are many evidentiary practices that are open for international practitioners to adopt outside the rules of procedure and evidence of the tribunals. The case of witness proofing illustrates, however, that it is difficult to translate these into professional norms in the absence of a shared consensus. Consensus can be reached on certain ideals and ethical principles. Practitioners can agree, for example, that witness coaching should be disallowed but a dialogue cannot be furthered on how exactly witness-proofing practices which fall short of this should be conducted if there is not a consensus for its use in the first place. A similar difficulty besets attempts to develop professional norms within the trials themselves. International tribunals have been structured to allow for considerable variation in the manner in which cases are conducted at trial. If we return to the different approaches detected on the part of the presiding judges in the first two trials at the ICTY, we saw that it was open for one to approach the case like a neutral referee and the other more like an investigating judge. There was a view among all of the respondents we spoke to, however, that in the international arena where there is no jury, where there are lengthy indictments and multiple defendants, it is much more appropriate for judges not only to take a managerial approach towards the progress of the case but also to intervene during the trial so that the parties are given some indication of what the Chamber is thinking of the evidence as the trial proceeds. It was also suggested by one respondent that it would help if counsel were able to make submissions about the evidence as the trial proceeds. As one prosecution respondent put it:

The judges should be far more engaged in the process, eh, they should be asking more questions, they should be saying to the prosecution, 'What the hell were you asking the witness this about for? We've heard plenty of evidence on that, we don't need any more, we want to hear your next point.' I think they should do that much more.⁸⁹

There was a consensus shared by respondents who have worked across a number of international tribunals that judges should adopt a managerial approach. This would seem to confirm Langer's argument that there has been a movement since the early days of the ad hoc tribunals that judges should adopt a managerial approach to judging.⁹⁰ As one respondent stated:

[I]deally, the most effective method by which these cases could be dealt with, is by a strong interventionist bench; so that the lawyers are told 'sit down, shut up', so that decisions are taken, 'That evidence is irrelevant, it's not helping me, stop'. . . . I would

⁸⁹ Respondent 12, Prosecutor, The Hague, 23 September 2011.

⁹⁰ Langer, *supra* note 14.

like somebody to come in and grab this thing by the neck and say, 'Right, let's get through this now; we're all sitting from eight in the morning until ten at night and we're just not going to stop until it's finished', that sort of thing.⁹¹

There were differences, however, as to how this ideal should be manifesting itself in the reality of the operations of the international criminal bench. In order for judges to play a meaningful role in questioning witnesses, there was a consensus that judges needed to know about the case before it started.⁹² One respondent thought there was a great benefit in the civil-law approach of having a dossier that the judges know already when they go into court on the first day.⁹³ Another drew an analogy with the role of the pre-trial judge at the STL before the indictment is confirmed.⁹⁴ The pre-trial judge can play a proactive role in investigations. In a similar manner, it was suggested that the trial judges should get to read the dossier before the trial starts.⁹⁵

But there were differing views as to whether such a dossier should be immediately admitted into evidence or whether admissibility rules should still prevail requiring items to be tendered for admission according to how reliable and relevant they were. Some respondents were unhappy about the general approach that the ICTY had taken towards admitting written evidence and documents.⁹⁶ Bar table motions had done much to speed up the process of admissibility so that now there was very little screening of documents. But the result, in their view, was that everything ends up coming in and the judges have:

[A] buffet that they can pick at when they write their judgments, you know some of it is reliable and some of it isn't. But if they had a better gatekeeping function and just admitted those things that were really reliable, it would be to the benefit of the parties. . . . It would help to ensure that parties were much more selective about what they submitted and it would be fairer because at present they have too much discretion to decide the case on.⁹⁷

There were also concerns that the Rule 92 *bis* and adjudicated fact procedures had gone too far and there was an opportunity at the ICC to rein back on some of this written evidence in favour of oral testimony.⁹⁸ A contrary view, however, was that it would be much simpler if all the exhibits were admitted subject to objections being raised by the opposing party.⁹⁹ One respondent referred to the approach of the trial chamber in *Prosecutor v. Bemba Gombo* at the ICC where, after the prosecution had presented its list of evidence, the Chamber took the view that:

91 Respondent 7, Prosecutor, The Hague, 21 September 2011.

92 Respondent 2, Judge, The Hague, 20 September 2011; Respondent 5, Judge, The Hague, 21 September 2011. In the first case before the Rwandan tribunal, the Trial Chamber ordered all available prosecution written statements to be submitted to the tribunal (*Prosecutor v. Alayesu*, Decision by the Tribunal on Its Request to the Prosecutor to Submit the Written Witness Statements, Case No. ICTR 96-4-T, 28 January 1997) and in the later case of *Prosecutor v. Dokmanović*, Order of 28 November 1997, Case No. IT-95-13a-PT, TCH, 28 November 1997 the ICTY followed suit.

93 Respondent 2, Judge, The Hague, 20 September 2011.

94 Respondent 6, Prosecutor, The Hague, 21 September 2011.

95 Respondent 2, Judge, The Hague, 20 September 2011.

96 For instance Respondent 5, Judge, The Hague, 21 September 2011.

97 Respondent 20, Defence, The Hague, 18 April 2012.

98 Respondent 20, Defence, The Hague, 18 April 2012.

99 Respondent 3, Court Official, The Hague, 20 September 2011.

Well, everything is admitted into evidence provisionally, so prima facie if the parties have a problem with some of the evidence they can seek exclusion but until an objection is made everything goes in.¹⁰⁰

The Appeals Chamber ruled that the trial chamber had abused its direction.¹⁰¹ However, according to another respondent, this was a positive development which would save a lot of time.¹⁰² The trial could then be used for examining and cross-examining the witnesses whom the prosecution thinks are helpful to illuminate its case.

7. INTERNATIONAL LEGAL CULTURE

This difference of view reflects a general difficulty within the international tribunals on reaching consensus on professional norms beyond the level of certain shared ideals and ethical principles. We have seen that professionals have been able to adapt to the international environment and through working with fellow professionals from very different legal cultures have exercised considerable skill in making trials work. On occasions this has led to professional norms emerging on how trials ought to work, which have resulted in changes to the rules. Too often, however, there is a disjunction between following working practices and internalizing them as practices that ought to be followed. Adaptation to the international environment does not always translate into a common understanding of how evidentiary processes should be conducted. Of course, it has taken in some cases hundreds of years for such norms to develop in domestic systems and it may be too much to expect this to happen within the international tribunals over a much shorter space of time. It may be that the very fact that international trials have been able to work at all is in itself a triumph.

The difficulty is that there are features of the international legal culture that seem to positively militate against the internationalization of professional norms. McEvoy has argued that certain legal cultures may be more or less receptive to innovation, styles of reasoning, passive or dynamic notions of the law, and notions of what professionalism amongst lawyers actually means.¹⁰³ Writing within the context of the legal culture in Northern Ireland, he has demonstrated how the smallness of that jurisdiction and the closely knit ties where 'everyone knows everyone' by virtue of the nature of the work, status, reputation, and formal and informal social networks contributed to a culture of conservatism and quietism towards the Northern Ireland conflict.¹⁰⁴ The legal culture within the international criminal tribunals stretching beyond one single institution to many institutions across the globe is very different.

¹⁰⁰ Respondent 8, Prosecutor, The Hague, 22 September 2011.

¹⁰¹ *Prosecutor v. Bemba Gongo*, Judgment on the Appeals of Mr Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III Entitled 'Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence', ICC-01/080A5OA6, A. Ch., 3 May 2011.

¹⁰² Respondent 10, Prosecutor, The Hague, 21 September 2011.

¹⁰³ K. McEvoy, 'What Did the Lawyers Do during the War? Neutrality, Conflict and the Culture of Quietism', (2011) 74 MLR 350.

¹⁰⁴ *Ibid.*, 379.

Here, as one respondent put it, 'there are many examples of people moving around from different organisations and coming in from different countries having worked in the other tribunals'.¹⁰⁵ This means that 'there isn't the sense of the robing room interaction, which, I think, is so important for the development of a common culture of understanding as to how to approach things'.¹⁰⁶

There are a number of features of this international culture that would appear to militate against the development of shared professional norms. Many actors come in to do one case, which can last three or four years. The relationships between practitioners can be very intense during this period but the focus on a single case can very easily instil a belief, as one respondent put it, that:

The most important part of the exercise is your commitment to the case. The defendant whom you're defending, prosecution, if you're prosecuting and that everything else is less significant. In this environment, there is a danger that people do not mix because they get terribly partisan and it's almost as if as the interns arrive through the door, they say, 'Which side am I on?' and then they're extremely zealous in the pursuit of that side.¹⁰⁷

Sometimes this could lead to a lapse in ethical standards, which were not, according to one respondent, enforced, as they should be in the international courts.¹⁰⁸ In national systems, there are bar associations and members can be disbarred. However, the consequences in an international case are less drastic. Practitioners can be removed from the case but that is the height of the sanction. In this respondent's view, practitioners had a responsibility to uphold the truth-seeking mission of the chamber, which is damaged when the best possible evidence is not coming out or if witnesses are being intimidated by the family of the accused.¹⁰⁹

Apart from leading to a tendency to cut ethical corners, partisanship can also induce actors to take every conceivable measure to win. Another respondent illustrated this by referring to the endless motions for disclosure at the ICTY, which was used to 'bludgeon' the prosecution:¹¹⁰

They will fight a specific strategy of finding failures, finding errors in the prosecution's review and litigating those errors on the basis that the trial is now unfair because the prosecution has not discharged its Rule 68 obligations; so instead of fighting the trial on the merits, they're turning it into a disclosure dispute.

On another view, of course, this is exactly what the defence should be doing in an adversarial trial, but as this respondent argued, in the domestic culture, even in a long white-collar case, there are more constraints on the parties to work together. In domestic legal culture, cases move on rather quickly so that there are different judges, different counsel, and different clients, and there is a continuing relationship between professionals, which lends itself to an atmosphere of trust, and a similar

105 Respondent 7, Prosecutor, The Hague, 21 September 2011.

106 Respondent 7, Prosecutor, The Hague, 21 September 2011.

107 Respondent 7, Prosecutor, The Hague, 21 September 2011.

108 Respondent 17, Prosecutor, The Hague, 17 September 2012.

109 Respondent 17, Prosecutor, The Hague, 17 September 2012.

110 Respondent 12, Prosecutor, The Hague, 23 September 2011.

outlook on how to do things. As one lawyer with extensive experience of the ICTY, the ICTR, and the STL put it:

When I do a case as a member of the bar in the UK, my agenda is to win the approval of the judge, which means getting the case done efficiently, and to win approval of my opposite number because we're likely to encounter each other again. ... But in this environment, it's very easy to slip into thinking that the only rule is to win.¹¹¹

This respondent did not want to minimize the achievements of the tribunals. They had come from nowhere and were producing results, although arguably at too great a cost. Practitioners had been drawn from all over the world and gradually the different approaches had narrowed. Nevertheless, in his view what would make the institutions the better would be if a 'robing room' culture developed where people trust each other in a working environment, trust the bench, and see the object of the exercise in greater terms than simply winning.

8. CONCLUSION

One of most important impressions from our survey was how fragmented so many international evidentiary practices are, with different tribunals, and different chambers within the ICC developing their own particular approaches. This can be very useful as it allows a pragmatic stance to be utilized. Our study also illustrated that there is now a corps of international practitioners with plenty of domestic and international trial and pre-trial experience who think reflectively about their practices. With a clear commitment to making the tribunals work, they can bring their experience to play on others who are less experienced. But for practices to evolve into accepted professional norms, there need to be opportunities for professionals to share their experiences and develop relationships of trust with each other. The process of developing professional norms will not take root unless more conscious efforts are made to facilitate greater communication. Professional organizations have begun to articulate ethical standards such as The Hague Principles on Ethical Standards promulgated by the International Law Association Study Group on International Courts and Tribunals.¹¹² But it has been argued that important issues remain unresolved.¹¹³ This suggests that there should be opportunities for joint training between prosecutors, defence, and chambers' lawyers, and that perhaps consideration should be given to the establishment of an international bar association which would be open to all lawyers to join.

The international community and the various tribunals and chambers, of course, have an important responsibility to help in this direction. Clearly it is important that the recruitment process emphasizes the importance of practitioners and judges having a sufficient grounding in practice in the first place. One respondent expressed

¹¹¹ Respondent 16, Prosecutor, The Hague, 16 April 2012.

¹¹² International Law Association Study Group, 'Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals', (2011) 10 *Law and Practice of International Courts and Tribunals* 1.

¹¹³ See A. Sarvarian, 'Ethical Standards for Prosecution and Defence Counsel before International Courts: The Legacy of Nuremberg', (2012) 10 *JICJ* 423.

a concern about the quality of those recruited into the system and the imperative to have people with more experience, rather than the tribunals becoming 'a training school' for practitioners. This included the judges. As she put it:¹¹⁴

[W]hen we come to trial, it's very important to have a good judge who has a sense of what's happening and ... of course, there's a huge distinction between people from common-law countries and civil-law countries, because it's an adversarial trial and civil-law judges are not familiar with it. [U]ltimately, the quality of justice depends on the quality of the people, doesn't it?

This raises questions about the appointment of practitioners and judges and about how best to promote and enforce ethical standards.¹¹⁵ The institutions also have a responsibility to identify best practice within the tribunals and to ensure that it is openly evaluated. The effort of the ICTY to produce a Manual on Developed Practices is a step in this direction.¹¹⁶ The International Prosecutors Project, which has charted the challenges that have faced prosecutors across 10 different institutions, is a further toolkit of help to international prosecutors.¹¹⁷ But to return to where we began, whatever practice is identified as 'best' needs to be the product of discussion with those who understand how the practice would be translated on the ground in different contexts and needs to be constantly reviewed accordingly. Damaška has remarked upon how international criminal courts play an important socio-pedagogical role in strengthening a sense of accountability for international crime by exposure of the most extreme forms of inhumanity.¹¹⁸ As well as being 'moral teachers', international judges and other legal actors arguably have a pedagogical role in developing best practices for investigating, prosecuting, and trying international crimes. Perhaps that will be their greatest legacy.

114 Respondent 1, Defence, The Hague, 19 September 2011.

115 On the appointment of judges see R. McKenzie et al., *Selecting International Judges* (2010). For discussion of the evolving regime on the professional conduct of lawyers acting before the International Criminal Court, see T. Gut, *Counsel Misconduct before the International Criminal Court* (2012).

116 UNICRI, *ICTY Manual on Developed Practices* (2009).

117 L. Reydans, J. Wouters, and C. Ryngaert (eds.), *International Prosecutors* (2012). Cf. the recent study of prosecution systems across the European Union: K. Ligeti (ed.), *Towards a Prosecutor for the European Union*, Vol. 1, *A Comparative Analysis* (2013).

118 M. Damaška, 'What Is the Point of International Criminal Justice', (2008) 83 *Chicago-Kent Law Review* 329.