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Blending Criminal Procedure at the *Ad Hoc* Tribunals

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BLENDING CRIMINAL PROCEDURE AT THE *AD HOC* TRIBUNALS

RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE. Ardsley, New York: Transnational Publishers, 2002. xxiv + 369.

*Reviewed by William A. Schabas**

One of the great frustrations of both researchers and practitioners working in the dynamic, new discipline of international criminal law is the paucity of reference works on the subject. It is all a bit of a paradox. Thanks to the Internet, the decisions and judgments of the two *ad hoc* tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), are available more or less in real time on the respective websites.[1] Compared to even a decade ago, we are utterly spoiled in terms of our access to information. Generous academics and NGOs are also posting early, obscure material, such as the Eichmann trials and the various Nuremberg judgments, in electronic form. Yet, in contrast with national justice systems, where detailed and rigorous textbooks signpost the way to relevant precedents, international criminal law seems starved for the textbooks and law reports that most jurists were weaned on in law schools.

How welcome, then, is a true "textbook" on evidence before international criminal tribunals. The authors are Judge Richard May, now a judge on the ICTY, but an old hand at writing classic "textbooks" in the English common law system from which he originates, and Marieke Wierda, a Dutch lawyer who worked with Judge May at the *ad hoc* tribunal for the Former Yugoslavia and who is now employed by the New York-based International Centre for Transitional Justice. *International Criminal Evidence* fills a gaping void in the literature, and its publication will be welcomed by lawyers, scholars, and students alike.

Professor M. Cherif Bassiouni, who edits the Transnational Publishers series in international and comparative criminal law to which the book belongs, introduces the volume. He notes that fairness remains central,[2] and indeed it is an overarching concern of the authors. An

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1. *See* International Criminal Tribunal for the Former Yugoslavia, http://www.un.org/icty; International Criminal Tribunal for Rwanda, http://www.ictr.org.

2. M. Cherif Bassiouni, *Foreword* to JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE, at xiii (2002).

important chapter in this volume is entitled "Fair Trial Rights."[3] The book even strays a bit from the precise parameters of evidentiary issues to talk about more strictly procedural questions such as delay.[4] But it is all part of an editorial philosophy, and a rather remarkable evolution from the post-World War II proceedings where fairness and "equality of arms" were not so close to the core of the international agenda. As the authors note, it is the development of international human rights standards, and their interpretation in the case law of such bodies as the European Court of Human Rights, that account for the evolution.[5]

The discussion of fair trial issues begins with a helpful nod to the *Justice Case*, at which Nazi judges and prosecutors were convicted of crimes against humanity for the offense of, essentially, administering justice.[6] Dutiful positivists, they had argued in defense that they were there to apply the law, and not to rule on its wisdom or fairness. They even pledged to do the same in post-war Germany, and aside from those who were indicted at Nuremberg, many of them managed to do precisely that. As May and Wierda recall, the Nazi jurists were found guilty because they had denied the right of the defense to introduce evidence, as well as being responsible for a range of procedural abuses.[7]

One of the first rulings of the ICTY concerned evidentiary matters and fundamental rights. In *Tadic*, the Trial Chamber rejected defense arguments based upon a precedent of the European Court of Human Rights, noting that the ICTY was "in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence."[8] May and Wierda do not take issue with this troublesome statement, but they do quarrel with the *ratio* of the judgment, and take sides with dissenting judge Ninian Stephen, who found the majority to be too prosecution-friendly.[9]

The discussion by the authors of evidentiary issues adheres to a pattern, beginning with what are called the "historical trials" (Nuremberg, Tokyo, and related proceedings), and then the "modern trials" (the *ad hoc* tribunals) followed by a discussion of the law of the International

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3. RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 259-98 (2002).

4. *Id.* at 273-75, 278-80.

5. *Id.* at 265-66.

6. *Id.* at 259.

7. *Id.*; *see* United States v. Alstötter, 3 TRIALS OF WAR CRIMINALS, 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS (1948) (Justice Case). This case is publicly known as the factual underpinnings of the film JUDGMENT AT NUREMBERG (United Artists 1961).

8. Prosecutor v. Tadic, ICTY Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, para. 28 (Aug. 10, 1995), *available at* http://www.un.org/icty.

9. MAY & WIERDA, *supra* note 3, at 283.

Criminal Court. Considerable reliance is placed on the case law of the ICTR, an important body of law that specialists and commentators too often overlook. There is also much insight into the teachings and experience of the early cases, like the *Justice Case*,[10] the *High Command Case*[11] and *Eichmann*.[12] The evidentiary issues that were developed by these pioneering decisions are not well known, and the volume helpfully brings them to our attention.

The authors are both alive to and intrigued by the cultural dimension of the law of evidence, noting how two of the world's principal legal traditions—the English common law and what is sometimes called the "civil law," derived from Napoleon's codifications—have intermarried.[13] They might even have pushed this a bit further, speculating on how the tribunals have diverged from this in some respects. There is a brief discussion about why the evidentiary file, prepared by the prosecutor, is not admissible at trial. In the "civil law" system, an investigating judge's dossier of evidence comprises the starting point for judges at the trial stage, whereas under the common law, there is essentially nothing on the record when the hearing actually begins. May and Wierda state simply that "the Trial Chambers have not adopted a civil law approach."[14] Yet the ICTR, in *Akayesu*, tried to do precisely this, ordering production of the material that had earlier been presented to the defense as part of the disclosure procedure.[15]

A final chapter entitled "Trends in International Criminal Evidence" peers into the future, inevitably with an eye to the International Criminal Court, whose establishment essentially coincides with the publication of this important volume. The authors conclude that international criminal evidence, and probably international criminal law generally, is characterized by an adversarial framework. In other words, the common law has triumphed over the "civil law" in this respect. Yet May and Wierda also set this alongside a philosophy of liberal admissibility standards that is unquestionably derived from *la liberté de la preuve* of the "civil law" tradition.[16]

There are some mysteries that remain to be unravelled, although this book certainly provides elements of a solution. For example, although the issue of privilege has been addressed by the *ad hoc* tribunals (with

10. *Alstötter*, 3 TRIALS OF WAR CRIMINALS.

11. United States v. von Leeb, 10 & 11 TRIALS OF WAR CRIMINALS (1949).

12. A.G. Israel v. Eichmann, 36 I.L.R. 277 (S. Ct. Isr. 1962), A.G. Israel v. Eichmann, 36 I.L.R. 18 (Dist. Ct. Jm. 1961).

13. MAY & WIERDA, *supra* note 3, at 18.

14. *Id.*

15. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, para. 41 (Sept. 2, 1998), *available at* http://www.ictr.org.

16. MAY & WIERDA, *supra* note 3, at 335.

respect to workers in humanitarian organizations and war correspondents), a general framework of analysis has yet to be fleshed out by either tribunal. The Rules of the International Criminal Court provide judges with guidelines, indicating that to be privileged, communication must be made in the course of a confidential relationship producing a reasonable expectation of privacy and nondisclosure, be essential to the nature and type of relationship between the person and the confidant, and be in furtherance of the objectives of the Statute and the Rules.[17] This obviously applies to doctors and probably to priests, but might it not also fit with confidential testimony given to a truth and reconciliation commission? Future judges will furnish us with the answers, but almost surely not without first consulting May and Wierda for guidance.

Another evidentiary enigma in the Statute of the International Criminal Court concerns so-called national security information. May and Wierda are right to note that the last word on whether or not such evidence will be produced falls to the State, in contrast with the situation before the new International Criminal Court. Indeed, it was in reaction to a bold ruling of the ICTY Appeals Chamber setting out the terms and conditions under which States might be compelled to produce materials that they considered to affect national security[18] that the delegations assembled at the Rome Conference sought out a more State-friendly norm. The result is a provision by which a Trial Chamber of the International Criminal Court can "make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances."[19] In other words, a person can be acquitted or convicted on the basis of "evidence" that does not actually exist!

Evidentiary rulings are made by trial judges, generally as interlocutory decisions, and rarely get appealed. This was the case with the ICTY's first evidentiary judgment, in *Tadic*, on anonymous witnesses. A judgment rendered the same day on the question of jurisdiction went on to become one of the defining precedents in international criminal law,[20]

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17. Rules of Procedure and Evidence of the International Criminal Court, R. 73, U.N. Doc. ICC-ASP/1/3, *available at* http://www.icc-cpi.int/docs/rules(e).pdf.

18. Prosecutor v. Blaskic, ICTY Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), *available at* http://www.un.org/icty. On the drafting of article 72 of the Rome Statute, see Donald K. Piragoff, *Protection of National Security Information*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 270, 274 (Roy Lee ed., 1999).

19. Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, arts. 72(7)(a)(iii), 72(7)(b)(ii), U.N. Doc. A/CONF.183/9.

20. Prosecutor v. Tadic, ICTY Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), *available at* http://www.un.org/icty.

while the Trial Chamber's upsetting pronouncement about military tribunals remained unchallenged, like a hair floating on a bowl of soup. Thankfully, the authors note that the ruling has not been followed subsequently,[21] either by the Prosecutor or the Trial Chambers, an important fact that is unfortunately not known widely enough among scholars. Too many students of ICTY case law still look upon that early decision as a statement of good law.

One of the rare judgments of the Appeals Chamber dealing with evidence involved alleged prosecutorial misconduct, and resulted in a ruling granting a stay of proceedings and discharge of the accused, against whom there were serious and credible accusations of participation in genocide.[22] Ultimately, the Appeals Chamber agreed to revise its controversial decision, but in order to justify this it agreed to admit new evidence that was almost surely available to the Prosecutor much earlier, had she shown the requisite diligence. A troubling precedent was created, full of potential for mischief by attorneys on either side of the divide.[23] May and Wierda sagely discredit the Appeals Chamber precedent as the product of "wholly exceptional circumstances,"[24] rather than attempting to fit it within a coherent framework of principles to guide the admissibility of new evidence.

Obviously this is not a book for relaxed bedside reading, and will generally be treated by its professional and academic audience more as a reference work than as a monograph. Good indexes are essential to unlocking the rich material in a volume of this sort, and more effort might have been invested in this respect. This may be more the responsibility of the publishers than of the authors. The table of cases is a bit odd, as it proceeds by name of defendant, such as Tadic, Barayagwiza, and so on, although there may be more than one relevant decision on evidentiary matters for any given individual. Some cases are listed differently: *Eichmann* is placed under "Attorney-General" and *Finta* under *R.* (for "Regina" or "The Queen"). I had trouble finding certain topics in the index. There is nothing under "sexual crimes" (although there is an entry for "rape"), nor any entry for "DNA evidence" or "child witnesses." There is no bibliography or table of legislation.

International Criminal Evidence becomes immediately the standard work on this subject. Carefully researched, thorough and methodical, it responds to a genuine need. Thankfully, it is much more than a catalogue

21. MAY & WIERDA, *supra* note 3, at 283.

22. Barayagwiza v. Prosecutor, Case No. ICTR-97-19, Decision (Nov. 3, 1999), *available at* http://www.ictr.org.

23. *See* Barayagwiza v. Prosecutor, ICTR Case No. ICTR-97-19, Prosecutor's Request for Review or Reconsideration (Mar. 31, 2000), *available at* http://www.ictr.org.

24. MAY & WIERDA, *supra* note 3, at 317.

of relevant cases. There is much thought and insight in this volume about the principles that underpin the rules, the philosophy they express, and the many important matters that remain unresolved. There is much to guide the judges of the International Criminal Court, who in turn will develop the law. Their work will inexorably dictate that May and Wierda begin work on a second edition in this fast changing field.