Caught in a Web of Lies: Use of Prior Inconsistent Statements to Impeach Witnesses Before the ICTY

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CAUGHT IN A WEB OF LIES: USE OF PRIOR INCONSISTENT STATEMENTS TO IMPEACH WITNESSES BEFORE THE ICTY

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Abstract: Trial attorneys around the world face the problem of how to confront a witness whose live testimony contradicts his prior statements. U.S. prosecutors take refuge under Federal Rule of Evidence 613 and the Harris doctrine, which permit inadmissible hearsay and illegally obtained statements to be used to impeach a witness’s live testimony. No similar rule aids prosecutors at the International Criminal Tribunal for the Former Yugoslavia (ICTY). Recent divergent decisions regarding the use of inconsistent statements for impeachment purposes have left ICTY prosecutors struggling to prove cases against the most heinous criminals in history. This Note argues that the ICTY should adopt a new evidentiary rule akin to the United States’ Rule 613 and the Harris doctrine. Adoption of a new rule would more efficiently balance the prosecutor’s duty to prove the case against the accused’s right not to be convicted by otherwise inadmissible evidence.

The question is whether you were lying then or are you lying now . . . or whether in fact you are a habitual and compulsive liar!

—Agatha Christie’s Witness for the Prosecution

Introduction

With the dramatic flair that only movies can muster, Agatha Christie’s character Sir Wilfrid Robarts highlights a classic problem facing trial attorneys: how does an attorney confront a witness whose live testimony contradicts his prior statements?¹

U.S. prosecutors take for granted the evidentiary proposition that inadmissible hearsay and illegally obtained statements are always available to impeach a witness’s live testimony should he weave a web of lies

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¹ Witness for the Prosecution (MGM 1957).
on the stand. In stark contrast, the use of prior inconsistent statements for impeachment purposes before the International Criminal Tribunal for the Former Yugoslavia (ICTY) varies from case to case. In an international criminal system, where there are few evidentiary rules and little precedent to draw on, these divergent decisions leave ICTY prosecutors struggling to prove cases against the most heinous criminals in history.

Part I of this Note focuses on both the development of the ICTY’s *Rules of Procedure and Evidence* and the particular rules governing the admission of evidence at trial. Part II examines particular examples of the admission of prior inconsistent statements before the ICTY, common law courts, and civil law courts. Part III argues that the ICTY should adopt the logic of U.S. courts and codify a rule allowing otherwise inadmissible evidence to be used for impeachment purposes.

I. Background

A. Establishment of the ICTY’s Rules of Evidence and Procedure

The ICTY opened its doors in 1993 as an ad-hoc court and body of the United Nations (U.N.) designed to try crimes committed in the territory of the former Yugoslavia. The ICTY exercises jurisdiction over

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2 See generally Fed. R. Evid. 613 (authorizing impeachment by prior inconsistent statements, even if statement is otherwise inadmissible hearsay); Harris v. New York, 401 U.S. 222 (1971) (allowing impeachment by prior inconsistent statements, even if statement was obtained in violation of witness’s constitutional rights).

3 Compare Prosecutor v. Mrkić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33 (Oct. 9, 2006) (allowing use of prior inconsistent statements for impeachment), with Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003) (refusing to admit prior inconsistent statements for impeachment).


There is an echo in this Chamber today, ... We have preserved the long-neglected compact made by the community of civilized nations [forty-eight] years ago in San Francisco to create the United Nations and enforce the Nuremberg Principles. The lesson that we are all accountable to international law may have finally taken hold in our collective memory. This will be no victor’s tribunal. The only victor that will prevail in this endeavor is the truth.
individuals responsible for violations of the 1949 Geneva Conventions, violations of the law of war or genocide, and other crimes against humanity. To achieve this task, the U.N. Security Council left the arrangement of all practical details to the U.N. Secretary-General. Recognizing that little precedent existed regarding the day-to-day operation of an international criminal tribunal, the Secretary-General concluded that “the judges of the International Tribunal as a whole should draft and adopt rules of procedure and evidence.” Two months of drafting gave rise to the Rules of Procedure and Evidence (Rules). This document, in just 125 rules, outlined the procedural framework including investigatory procedures; pre-trial, trial, and appellate proceedings; sentencing; and all rules of evidence.

The simplicity of the Rules is rooted in the historical purpose and development of the ICTY. The ICTY embraces the straightforward goal of “ensur[ing] that a trial is fair and expeditious . . . with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” Flexible procedures give the Trial Chamber discretion to decide what is in the best interest of the accused on a case-by-case basis. The ICTY also represents an attempt to integrate the civil


7 S.C. Res. 827, supra note 5, ¶ 8.


10 Int’l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, Rules of Procedure and Evidence, ICTY Doc. IT/32/Rev.3 (Feb. 6, 1995), reprinted in ABA, Report on the Proposed Rules of Procedure and Evidence of the International Tribunal to Adjudicate War Crimes in the Former Yugoslavia 4–54 (Karen Tucker ed., 1995); see also Scharf, supra note 9, at 70 (noting that despite brevity of Rules, they represent a marked improvement over Nuremberg Tribunal’s operating rules, which allowed for trials in absentia, denied defense counsel access to evidentiary archives, often compelled defendants into making incriminating statements against themselves, and prohibited appeals of adverse decisions).


12 ICTY Statute, supra note 6, art. 20(1).

13 See Prosecutor v. Tadic, Case No. IT-94-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶ 23 (Aug. 10, 1995) (“A final indication of the uniqueness of the International Tribunal is that, as an ad hoc institution, the International Tribunal was able to mold its Rules and procedures to fit the task at hand.”).
and common law heritages of all U.N. members. The *Rules*, therefore, embody only those principles espoused by all member states.

The judges drafting the *Rules* cleverly left the power to amend any and all procedural rules in their own hands. The drafters were aware that, because the *Rules* were the first international code of criminal procedure, they would need to be adjusted to meet the practical needs of international criminal prosecution. Amendment of a rule occurs when a judge, prosecutor, or registrar proposes a change, which garners support from ten of the sixteen permanent judges at the annual plenary meeting or obtains unanimous support of the permanent judges at any time. The judges of the ICTY have embraced this power wholeheartedly as the *Rules* have been amended, on average, twice per year since their adoption in 1994.

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14 See Prosecutor v. Delalić, Case No. IT-96–21-T, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, ¶ 15 (May 1, 1997) (“[I]n formulating the rules, elements of both the civil and the common law systems capable of promoting justice were considered and adopted. . . . A Rule may have a common law or civilian origin but the final product may be an amalgam of both common law and civilian elements, so as to render it sui generis.”).


19 See Boas, supra note 16, at 5 (explaining the remarkable number of amendments that have been made to *Rules* since their initial adoption).
that, between 2000 and 2001, ninety-one rules were amended, seven new rules were adopted, and one rule was deleted.\textsuperscript{20}

B. Admission of Evidence Under the ICTY’s Rules

Only two broad principles guide a judge’s hand when admitting evidence before the ICTY: (1) Trial Chambers “may admit any relevant evidence which it deems to have probative value,”\textsuperscript{21} and (2) “may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”\textsuperscript{22} The simplicity of these provisions reflects that the common law’s restrictive evidentiary rules stem from the need to control information presented to a lay jury.\textsuperscript{23} As ICTY judges serve as the factfinder at trial, these skilled jurists can weigh the probative value of evidence without being “shielded from irrelevancies or given guidance as to the weight of the evidence they have heard.”\textsuperscript{24} The admission of evidence before the ICTY thus mirrors the inquisitorial model of civil law nations.\textsuperscript{25}

Inherent in the determination of whether evidence is probative is the reliability of the evidence.\textsuperscript{26} Although the Trial Chambers have refused to read an absolute requirement of reliability as a condition for admissibility, reliability is “the golden thread which runs through all components of admissibility.”\textsuperscript{27}

\textsuperscript{20} Id.

\textsuperscript{21} R. P. & Evid., supra note 16, at 89(C) (General Provisions).

\textsuperscript{22} Id. at 89(D) (General Provisions).

\textsuperscript{23} See First Annual Report, supra note 15, ¶ 72 (remarking that there are no technical evidentiary rules because “[t]his Tribunal does not need to shackle itself to restrictive rules which have developed out of the ancient trial-by-jury system”).

\textsuperscript{24} See id.; see also Fed. Judicial Ctr., Manual For Complex Litigation (Fourth) § 11.431 (2004) (stating that judges are “accustomed to reviewing matters that may not be admissible”).

\textsuperscript{25} See Boas, supra note 4, at 48 (comparing ICTY’s flexible approach to admission of evidence to principle of la liberté de la preuve present in French criminal law system, which allows a court to rule any form of evidence admissible).

\textsuperscript{26} See, e.g., Prosecutor v. Kordic, Case No. IT-95–14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, ¶¶ 23, 24, & 29 (July 21, 2000) (concluding that decedent’s unsworn statement that had not been subject to cross-examination was unreliable and, therefore, inadmissible); Prosecutor v. Alexsovski, Case No. IT-95–14/1-AR73, Decision on the Prosecutor’s Appeal on Admissibility of Evidence, ¶ 15 (Feb. 16, 1999) (“Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose in the sense of being voluntary, truthful and trustworthy.”).

\textsuperscript{27} Prosecutor v. Delalić, Case No. IT-98–21-T, Decision on the Prosecution’s Oral Request for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, ¶ 32 (Jan. 19, 1998); see Wi-
1. Admission of Hearsay Evidence

The ICTY defines hearsay as “the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what the person says.”28 Hearsay statements are admissible against both parties if the statements are relevant and have probative value.29 The Rules not only allow for the admission of hearsay evidence, but specifically call for the use of written statements in lieu of live testimony to expedite trials.30

Only when the need to ensure a fair trial outweighs the probative value will Rule 89(D) filter out hearsay statements.31 The “golden thread” of reliability, therefore, weaves into this analysis because determinations regarding probative value require Trial Chambers to pay particular attention to the reliability of a statement including whether it was voluntary, truthful, and trustworthy.32

The adoption of this flexible approach to hearsay evidence reflects that, in legal systems around the world, “[t]he exclusion . . . of hearsay evidence is not grounded upon its intrinsic lack of probative value. It is ordinarily excluded because of the possible infirmities with respect to the observation, memory, narration, and veracity of him who utters the offered words.”33

2. Admission of Evidence Obtained in Violation of the Rules

Evidence obtained in violation of the Rules’ procedural safeguards is not automatically excluded because of the ICTY’s flexible approach to the admission of evidence.34 In Prosecutor v. Brdjanin, the Trial

28 Alexsovski, Case No. IT-95–14/1-AR73, Decision on the Prosecutor’s Appeal on Admissibility of Evidence, ¶ 14.
29 See id. ¶ 15.
31 Boas, supra note 16, at 29 (explaining reasons why hearsay evidence will be excluded in trials before ICTY).
34 See R. P. & Evid., supra note 16, at 5(A) (Non-compliance with the Rules) (“When an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief if it finds that the alleged non-compliance has caused material prejudice to that party.”); Prosecutor v.
Chamber noted that “drafters of the Rules specifically chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained.”

Instead, relevant and probative evidence is generally admissible unless it was “obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”

The defense successfully invoked this exclusionary principle in Prosecutor v. Delalić. There, the Trial Chamber excluded a confession that Austrian police obtained after hours of continuous interrogation, by five different officers, and repeated assertions that the accused’s confession would mitigate the severity of the charges. In making its determination, the Trial Chamber noted that any statements obtained by oppressive conduct undermined the integrity of the proceedings. In Prosecutor v. Kordić, however, evidence obtained by eavesdropping on an enemy’s telephone calls in a time of war did not damage the integrity of the proceedings and was thus admissible at trial.

3. Cross-Examination of Witnesses

The Rules expressly guarantee litigants the right to cross-examine witnesses. The sequence of witness examinations in ICTY proceedings parallels the system used in common law courts: the prosecution presents its witnesses and engages in direct examination, after which the defense counsel may cross-examine the witnesses. Notably, the subject matter on cross-examination is limited to the evidence-in-chief and matters substantially affecting the credibility of witnesses.


37 See Case No. IT-96–21, Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence (Sept. 2, 1997).

38 Id. ¶¶ 13–15.

39 See id. ¶ 41.


41 R. P. & Evid., supra note 16, at 90(H) (i) (Testimony of Witnesses).

42 See First Annual Report, supra note 15, ¶ 65; see also Scharf, supra note 9, at 69 (explaining the procedure followed by the ICTY during trials).

The right to cross-examination is traditionally linked to preserving the right of an accused to confront witnesses testifying against him.\textsuperscript{44} Recent decisions by the Trial Chambers, however, note that both the prosecution and the defense must have the right to engage in effective cross-examination to ensure a fair trial.\textsuperscript{45} For example, in \textit{Prosecutor v. Blaskic}, the defense provided the prosecution with only pseudonyms representing two key witnesses and refused to provide any additional information until the moment the witnesses appeared to testify.\textsuperscript{46} The defense counsel sought to insulate these witnesses from outside pressure.\textsuperscript{47} In finding for the prosecution, the Trial Chamber concluded that this withholding of information interfered with the prosecution’s right to effective cross-examination of defense witnesses.\textsuperscript{48} The Trial Chamber, therefore, ordered defense counsel to provide the prosecution with the witnesses’ full names and summaries of the facts to which each would testify two days before the scheduled testimony.\textsuperscript{49}

\section*{II. Discussion}

The right to cross-examine a witness regarding his or her credibility must include the right to present prior inconsistent statements to a witness if, during live testimony, the witness changes his or her story.\textsuperscript{50} The prosecutor’s ability to introduce this form of impeachment evidence, however, is not explicitly guaranteed in the \textit{Rules} and, therefore, is left entirely to the discretion of each Trial Chamber.\textsuperscript{51}

\textsuperscript{44} See generally Stefano Maffei, \textit{The European Right to Confrontation in Criminal Proceedings} (2006) (concluding that confrontation of adverse witnesses is a fundamental right of accused after tracing development of right in English, Italian, and French criminal procedure).

\textsuperscript{45} \textit{Prosecutor v. Blaskic}, Case No. IT-95–14, Decision on the Defence Motion for Protective Measures for Witnesses D/H and D/I, ¶ 10 (Sept. 25, 1998) (“CONSIDERING that, in view of establishing the truth, this principle requires that there be no excessive infringement on the rights of the Prosecution, \textit{inter alia} the right to conduct an effective cross-examination of the Defence witnesses.”).

\textsuperscript{46} Id. ¶ 8.

\textsuperscript{47} Id.

\textsuperscript{48} See id. ¶¶ 10, 14.

\textsuperscript{49} Id. ¶ 14.

\textsuperscript{50} See R. P. \& Evid., \textit{supra} note 16, at 90(H)(i) (Testimony of Witnesses) (granting litigants the right to cross-examine on matters affecting the credibility of witnesses).

\textsuperscript{51} \textit{Compare} \textit{Prosecutor v. Mrkšić}, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33 (Oct. 9, 2006) (allowing impeachment by prior inconsistent statements), \textit{with} \textit{Prosecutor v. Simić}, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003) (refusing to allow impeachment by prior inconsistent statements).
A. Use of Impeachment Evidence Before the ICTY

1. Impeachment Evidence in Prosecutor v. Simić

For more than three years, Blagoje Simić, Miroslav Tadić, and Simo Zarić, together with the Serbian military, wreaked havoc on the municipality of Bosanski Samac. Under their “campaign of terror,” Bosnian Muslims and Croats were required to work at forced labor projects; expelled, through force and intimidation, from their homes; or sent to detention camps where prisoners were killed, beaten, and sexually assaulted. By the end of the conflict, the Muslim and Croat populations had dwindled from 17,000 in 1991 to less than 300 in 1995. These actions constituted crimes against humanity and contravened the 1949 Geneva Conventions, leading the ICTY Office of the Prosecutor to indict all three men in 1995.

At trial, a novel issue of international evidentiary law emerged regarding the use of a witness’s prior inconsistent statements to impeach his testimony. The prosecutor had conducted three telephone interviews with Tadić in 1996. When Tadić’s live testimony conflicted with his interview statements, the prosecution sought to cross-examine him regarding these inconsistencies. To prevent the admission of these statements, the defense argued that, at the time of the interviews, the accused was not fully aware of the nature and cause of the charges against him. These statements were therefore obtained in violation of the accused’s rights under the Rules. The prosecution urged the Trial Chamber to adopt the logic of Harris v. New York, a seminal U.S. deci-

52 See Prosecutor v. Simić, Case No. IT-95–9, Fifth Amended Indictment, ¶¶ 11–33 (May 30, 2002) [hereinafter Simić Fifth Amended Indictment].
53 Id. ¶ 1.
54 Id. ¶ 34.
55 See Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 2.
56 See R. P. & Evid., supra note 16, at 42 (Rights of Suspect During Investigation) (“(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands: (i) the right to be assisted by counsel of the suspect’s choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it; (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.”).
sion, which allows evidence obtained in violation of a defendant’s constitutional rights to be used for impeachment purposes.\(^{61}\)

Trial Chamber II refused to admit these statements because admission would impede the ICTY’s mission to afford the accused a fair trial.\(^{62}\) First, the Trial Chamber feared that impeaching the accused’s credibility would affect issues of criminal responsibility.\(^{63}\) Second, the Rules’ procedural safeguards were designed to preserve the accused’s privilege against self-incrimination.\(^{64}\) When Tadić consented to these telephone interviews, the prosecutor had not yet served the indictment against him and, therefore, he was not aware of his privilege against self-incrimination.\(^{65}\) The Trial Chamber also feared that the use of these statements—even for impeachment purposes—would condone the prosecutor’s misconduct.\(^{66}\) The Rules also confer the right to appear as a witness in one’s own defense.\(^{67}\) The Trial Chamber reasoned that, if these statements undermined the accused’s credibility at trial, the accused could no longer assist in his own defense.\(^{68}\)

The Trial Chamber refused to adopt the U.S. approach to impeachment evidence because of a factual difference between *Harris* and *Simić*.\(^{69}\) To the Trial Chamber, a crucial difference was that the defendant in *Harris* gave his statement before being indicted, whereas Tadić made a statement without fully being informed of the charges against him.\(^{70}\)

\(^{61}\) *Simić*, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 1.

\(^{62}\) See id. ¶ 8 (concluding that “it is improper to allow the use of such evidence even for the purposes of impeaching the credibility of the accused, doing so would not be in accordance with principles of fundamental justice”); *see also* ICTY Statute, *supra* note 6, art. 20(1) (ensuring defendants the right to fair and expeditious trial).

\(^{63}\) *Simić*, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8.

\(^{64}\) *Id.* ¶ 6; *see also* ICTY Statute, *supra* note 6, art. 21(4)(g) (stating that accused shall “not to be compelled to testify against himself or to confess guilt”).

\(^{65}\) *See Simić*, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8.

\(^{66}\) *See id.*

\(^{67}\) R. P. & Evid., *supra* note 16, at 85(C) (Presentation of Evidence).

\(^{68}\) *Simić*, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 7.

\(^{69}\) *Id.* ¶ 4.

\(^{70}\) *Id.*
2. Impeachment Evidence in *Prosecutor v. Mrkšić*

Mile Mrkšić, a former Colonel in the Yugoslav People’s Army (JNA), along with his subordinates Miroslav Radić and Veselin Šljicančanin, were indicted for orchestrating the Vukovar massacre. On November 19, 1991, JNA soldiers transferred approximately 400 non-Serbs from the Vukovar Hospital to a farm in Ovcara. These ill patients were beaten for several hours before being led to a field to be executed and buried in a mass grave.

Just as in *Simić*, Trial Chamber II faced the question as to whether the prosecution, during cross-examination, should be allowed to introduce the accuseds’ prior inconsistent statements in order to challenge their credibility and the credibility of other defense witnesses. Mrkšić and the other defendants had been questioned by the authorities of the former Yugoslavia in Belgrade in 1998. Defense counsel passionately argued that these statements were inadmissible because this questioning was done in violation of the procedural safeguards laid out in Rule 37(B). Under the *Rules*, investigatory power may be wielded only by the Office of the Prosecutor and those acting under its discretion. The statements at issue were taken by the Serbian military security organ or the Military Investigating Judge at the instigation of the Military Prosecutor in Belgrade—an entity distinct from the ICTY.

Over the defense’s objections, the Trial Chamber admitted the defendants’ 1998 statements solely for the purpose of cross-examination and testing the credibility of the witnesses’ testimony. This decision rested on several considerations including: the statements were obtained in accordance with Serbian domestic law; there was no

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71 Prosecutor v. Mrkšić, Case No. IT-95–13/1, Second Amended Indictment, ¶¶ 18–29 (Aug. 28, 2002).
72 Id. ¶ 22.
74 Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 30 (Oct. 9, 2006).
75 Id. ¶ 15.
76 Id. ¶¶ 11–13.
77 See R. P. & Evid., * supra* note 16, at 37(B) (Functions of the Prosecutor) (“The Prosecutor’s powers and duties under the Rules may be exercised by staff members of the Office of the Prosecutor authorised by the Prosecutor, or by any person acting under the Prosecutor’s discretion.”).
78 Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 15.
79 Id. ¶ 33.
80 Id. ¶ 17.
suggestion that the accused’s wills were overborne or influenced by coercion, inducement, or other impropriety; and the 1998 statements were obtained much closer in time to the actual events than the statements given at trial in 2006. Judge Parker, moreover, concluded that the integrity of the proceedings could be open to greater threat if an Accused was not tested in cross-examination about an earlier account he had given which was materially inconsistent with his evidence given in the trial. That is so whether, for example, the inconsistency is explicable by confusion or lapse of memory given the years since the events, or to deliberate falsity of the evidence given at trial. . . . In the latter case, the Trial Chamber may be misled by perjury concerning a material matter.

Judge Parker also noted that allowing impeachment of a witness would unearth evidence of substantial probative value regarding the credibility of all evidence given by the witness. Discovery of additional probative information furthers the ICTY’s mission to ensure a fair trial.

Although the Trial Chamber admitted these 1998 statements to impeach the declarant, the Trial Chamber refused to admit these statements to challenge the testimony of other defense witnesses. To impeach a witness with another’s prior statements would not yield evidence of significant probative value because no one, except the declarant, would be in a position to explain the inconsistencies.

B. Use of Impeachment Evidence in the United States

In U.S. courts, a defendant’s credibility may be challenged by prior inconsistent statements, even when the statements are inadmissible as evidence in the prosecution’s case-in-chief because of a procedural or

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81 Id. ¶ 28.
82 Id.
83 Mrkić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 31.
84 Id.
85 See ICTY Statute, supra note 6, art. 20(1).
86 Mrkić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 37.
87 Id.
constitutional defect. The *Federal Rules of Evidence* govern when the original statement is considered hearsay. The impeachment exception to the exclusionary rule applies when the original statements were obtained in violation of constitutional rights.

1. Impeachment by Hearsay Evidence

Hearsay, including prior inconsistent statements, is generally inadmissible for substantive use in U.S. courts. Rule 801(d)(1)(A) allows for prior inconsistent statements to be used as substantive evidence only when the original statement was given under oath at a prior proceeding or deposition.

The overriding importance of assessing a witness’s credibility, however, allows for impeachment by prior inconsistent statements even when the original statement is hearsay. When live testimony contradicts a witness’s prior statements, counsel on cross-examination has two options: (1) directly question the testifying witness as to the prior inconsistent statement; or (2) introduce extrinsic evidence, such as written records or another witness, to prove that the testifying witness is lying on the stand. As impeachment evidence may only be used by the factfinder to assess the credibility of a witness, these prior inconsistent statements are admitted with a limiting instruction directing the jury as to the acceptable uses of these statements.

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89 See Fed. R. Evid. 613 & 801(d)(1)(A); see also id. 801(c) (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”).
91 See Fed. R. Evid. 802.
92 Id. 801(d)(1)(A).
93 Id. 613.
94 Id. 613(a).
95 Id. 613(b).
96 See United States v. Michelson, 335 U.S. 469, 484–85 (1948). For example, the Third Circuit’s model jury instruction states:

You have heard the testimony of certain witnesses (if only one witness was impeached with a prior inconsistent statement, include name of witness). You have also heard that before this trial (they)(he)(she) made (statements)(a statement) that may be different from (their)(his)(her) testimony in this trial. It is up to you to determine whether (these statements were)(this statement was) made and whether (they were)(it was) different from the witness(es)’ testimony in this trial. (These earlier statements were)(This earlier statement was) brought to your attention only
In a seminal impeachment case, *United States v. Barrett*, the defendant was tried for the theft of a valuable stamp collection from the Cardinal Spellman Museum. At trial, Buzzy Adams, a prosecution witness, testified that the defendant had previously admitted to the theft. Concerned that Adams was lying to cover his own involvement in the robbery, the defense sought to introduce a second witness, a waitress, who overheard Adams state that the defendant had nothing to do with the theft. The trial judge excluded these inconsistent statements, reasoning that the waitress’s testimony was nothing more than a hearsay opinion that the defendant was innocent. The First Circuit reversed the conviction for failure to admit these inconsistent statements. As the jury is the “principal judge of the credibility of witnesses,” the purpose of prior inconsistent statements is to highlight the “clear incompatibility” between the statements to the factfinder; thus, it is irrelevant whether the testimony is a hearsay opinion.

2. Impeachment by Illegally Obtained Evidence

At the center of U.S. criminal procedure lies the exclusionary rule, which requires the suppression of evidence obtained in violation of a defendant’s constitutional rights. Despite the importance of the exclusionary rule, it is a well-established exception—the *Harris* exception—that illegally obtained evidence may still be used to impeach a defendant’s live testimony. This exception reflects a balancing of the

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97 539 F.2d 244, 245 (1st Cir. 1976).
98 Id. at 254 n.9.
99 Id. at 253–54.
100 Id. at 247.
101 Id. at 254.
102 Barrett, 539 F.2d at 254.
103 See Weeks v. United States, 232 U.S. 883, 889 (1914) (finding that a warrantless confiscation of Week’s private letters violated his constitutional rights under Fourth Amendment and, therefore, letters were inadmissible at trial).
104 See Harris v. New York, 401 U.S. 222, 224–26 (1971) (“The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent statements.”); Walder v. United States, 347 U.S. 62, 65 (1954) (proclaiming, for the first time, that it would be a perversion of *Weeks* doctrine to allow defendant to “turn the illegal method by which evidence in the Govern-
need to deter unlawful police conduct with both the law’s interest in
preventing perjury and the jury’s need to accurately assess a defen-
dant’s credibility.105

_Harris v. New York_ held that statements obtained in violation of
_Miranda_, although inadmissible in the prosecution’s case-in-chief, were
admissible to impeach the defendant’s live testimony.106 Viven Harris
was tried for twice selling narcotics to an undercover agent.107 Before
being read his _Miranda_ rights, Harris admitted to police that he made
both sales and that the second transaction involved heroin.108 At trial,
Harris changed his story, denying that he made the first sale and stating
that the second sale was only baking powder.109 The trial court allowed
the prosecutor to cross-examine Harris by presenting these otherwise
inadmissible statements.110

The Court implicitly reasoned that the “speculative possibility” that
police misconduct would continue if evidence is used for impeachment
purposes was vastly outweighed by both the need to prevent perjury and
the jury’s need to properly assess the defendant’s credibility.111 Police
would continue to avoid blatant violations of constitutional rights be-
cause this evidence would be banned from the prosecution’s case-in-
chief.112 For these reasons, the Court noted that “there is hardly justifi-
cation for letting the defendant affirmatively resort to perjurious testi-
mony in reliance on the Government’s disability to challenge his credi-
bility.”113 In _United States v. Haven_, the Court slightly expanded the _Harris_
exception to allow illegally obtained evidence to impeach a defendant’s
answers to the prosecutor’s questions during cross-examination.114

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105 Stone v. Powell, 428 U.S. 465, 493–94 (1976); _Harris_, 401 U.S. at 225; see Mary Jo
White, _The Impeachment Exception to the Constitutional Exclusionary Rule_, 73 COLUM. L. REV.
1476, 1482 (1973).
106 _See_ 401 U.S. at 226.
107 _Id._ at 222–23.
108 _See_ White, _supra_ note 105, at 1481–82 n.43.
109 _Id._
111 _See id._ at 225.
112 _Id._
113 _Id._ (quoting Walder v. United States, 347 U.S. 62, 65 (1954)); _see also_ United States
v. Haven, 446 U.S. 620, 627 (1980) (“The incremental furthering of those ends [deter-
rence of illegal police conduct] by forbidding impeachment of the defendant who testifies
was deemed insufficient to permit or require that false testimony go unchallenged, with
the resulting impairment of the integrity of the factfinding goals of the criminal trial.”).
Although the *Harris* exception allows defendants to be impeached by illegally obtained evidence, *James v. Illinois* held that this evidence could not be used to impeach the testimony of all defense witnesses.115 In *James*, the prosecution needed to connect the defendant to eyewitness descriptions of a red-headed shooter who left a young boy dead and another seriously injured.116 Darryl James, once arrested, admitted to dying his hair black and wearing it in its “natural” style, but previously had red hair worn in a slicked-back “butter” style.117 At trial, a friend of the defendant’s family testified that on the day of the shooting the defendant’s hair was black and curly.118 The prosecutor unsuccessfully sought to use James’s statement to impeach this friend.119

The balance, in this case, tipped against the expansion of the *Harris* exception because allowing the impeachment of all witnesses with illegally obtained evidence would encourage the illicit collection of evidence and decrease the accuracy of the factfinding process.120 As witnesses are not substantially invested in a trial, a defendant’s fate should not be jeopardized due to a witness’s inattentiveness.121 This extension could lead to defense counsel not calling witnesses—who potentially may offer probative evidence—for fear that their inattentiveness would open the door to illegally obtained evidence.122

C. Use of Impeachment Evidence in Civil Law Systems

In civil law systems, the admissibility of evidence is determined by the trial judge, thus obviating the need to codify many rules of evidence.123 Yet the importance of using prior inconsistent statements for impeachment purposes has crept into the codes of criminal procedure in several nations, including Germany and Poland.124

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116 Id. at 309–10.
117 See id. (noting that James’s original statements were suppressed as fruit of an unlawful arrest because police lacked probable cause for a warrantless arrest).
118 Id. at 310.
119 Id. at 320.
121 *James*, 493 U.S. at 315.
122 Id. at 315–16.
123 See Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 36 (Oct. 9, 2006).
German evidentiary law allows for judicial records of the accused’s previous statements to be read to the court if the accused’s live testimony is contradictory. Furthermore, it is the practice of German courts to allow a witness’s prior depositions to be read to the court in order to highlight inconsistencies.

The Polish Code of Criminal Procedure permits the accused’s prior statements given during an investigation or other proceeding to be read in court if, at trial, the accused refuses to testify, states that he does not remember certain facts, or offers contradictory testimony. Once read to the court, the presiding judge will request that the accused explain these inconsistencies.

III. Analysis

To resolve the contradictory results of Mrkšić and Simić, this Note argues that the ICTY should adopt an international equivalent of the United States’ Rule 613 and the Harris exception to the exclusionary rule. The U.S. approach is clearly compatible with the civil law approach to admission of evidence, as Germany and Poland already possess rules allowing impeachment by prior inconsistent statements. Adoption of the U.S. approach would also allow the ICTY to adhere to its fundamental evidentiary rules.

According to the Rules, evidence is admissible so long as its probative value is not outweighed by the need to ensure a fair trial. Impeachment by prior inconsistent statements unearths evidence of substantial probative value regarding the credibility of a witness’s live
testimony. Allowing impeachment would also further the ICTY’s commitment to conducting fair trials because fair trials occur only when a balance is struck between the need to find the truth and the need to preserve the rights of the accused.

A. Uncovering the Truth Through the U.S. Approach

Impeachment of a witness’s credibility by presentation of prior inconsistent statements is a vital tool for the factfinder in evaluating the evidence presented at trial. The value of testimonial evidence depends on a witness’s “opportunity to observe and his capacity to observe accurately, to remember, and to communicate in such a way that triers of fact may know what actually happened.” If factfinders are to base life-altering decisions on the information communicated by witnesses, it is imperative that they discover whether a witness is worthy of their trust.

By presenting the prior inconsistent statements to a witness, the prosecutor successfully highlights the “clear incompatibility” between the statements to the factfinder. Questioning during cross-examination also affords a witness an opportunity to explain the inconsistencies, proving that the live testimony is truthful and reliable. With both sides of the story, the factfinder may choose to trust a witness, discredit a witness who is so unreliable as to contradict himself, or infer that if a witness is mistaken as to one fact, perhaps he is mistaken as to other crucial facts.

133 See Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 31 (Oct. 9, 2006).
134 See id. ¶ 26 (noting that question is whether probative value of impeachment evidence substantially outweighs need to ensure fair trial); see also Harris v. New York, 401 U.S. 222, 225 (1971) (concluding that the need to prevent perjury and allow jurors to assess credibility outweighed any threat of police misconduct).
137 See FED. R. EVID. 613 advisory committee’s note; Ladd, supra note 136, at 240.
138 See United States v. Barrett, 539 F.2d 244, 254 (1st Cir. 1976).
139 See Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 32.
140 WEINSTEIN & BERGER, supra note 88, § 12.01[5].
141 Id. § 12.01[4]. The maxim falsus in uno, falsus in omnibus, meaning false in one thing, false in everything, is a notion deeply rooted in common law jurisprudence. See United States
The Simić Trial Chamber failed in its role as the principal judge of a witness’s credibility when it refused to allow the prosecution to present Tadić’s telephone interviews. In retrospect, no one will ever know whether Tadić’s telephone interviews or live testimony recounted an accurate version of the atrocities that occurred in Bosanski Samac. Denying the prosecution the ability to present his prior inconsistent statements, however, withheld valuable information regarding Tadić’s character and veracity from the Trial Chamber. In Mrkić, on the other hand, the admission of the 1998 statements gave the Trial Chamber the opportunity to evaluate the accused’s credibility and independently decide whether to credit the live testimony.

B. Preserving the Rights of the Accused Through the U.S. Approach

Experience under the U.S. approach demonstrates that using prior inconsistent statements for impeachment purposes does not tread on the rights of the accused. First, restricting the use of prior inconsistent statements to impeachment purposes ensures that an accused will never be convicted based solely on hearsay or illegally obtained evidence. Courts fear that questionable evidence will affect determinations of criminal responsibility by being used to meet the prosecution’s burden of proof. For example, the Harris Court cautioned that a defendant cannot be convicted based on statements obtained without Miranda warnings because the defendant would be unaware of his right to remain silent.

142 See Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003); see also Barrett, 539 F.2d at 254 (finding trial court erred in excluding impeachment evidence because of importance of assessing witness’s credibility).

143 See Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 2.

144 See id. ¶ 8.

145 See Mrkić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33.

146 Id. ¶ 34.

147 See Walder v. United States, 347 U.S. 62, 65 (1954) (“[T]he Government cannot make an affirmative use of evidence unlawfully obtained.”); Mrkić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 29 (“[T]he Chamber would not have allowed the admission of any of these Statements as substantive evidence, had the prosecution sought to rely on it.”).

148 See Simić, Case No. IT-95–9–T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8; Kainen, supra note 120, at 1352.
to counsel or privilege against self-incrimination.\textsuperscript{149} The Mrkšić Trial Chamber similarly warned that the accused should not risk conviction based on questioning that failed to observe the procedural requirements of the Rules.\textsuperscript{150}

This proposed international evidence rule leaves the Rules’ procedural safeguards intact while simultaneously allowing prosecutors to draw the accused’s inconsistencies to the attention of the Trial Chamber.\textsuperscript{151} The Harris exception was originally “fashioned to prevent defendants from using unfair trial tactics—lying for their own benefit while the Government stood by helplessly, unable to use unconstitutionally obtained probative evidence that could expose the lies.”\textsuperscript{152} Under U.S. law, the Constitution cannot shield a defendant from his own prior statements; similarly, the Rules should no longer be allowed to shield the accused as in Simić.\textsuperscript{153}

ICTY judges, through careful drafting, could form a rule that incorporates the James limitation, thus adhering to the Rules’ exclusion of evidence when its probative value is outweighed by the need to ensure a fair trial.\textsuperscript{154} Rule 613 concludes that any witness may be impeached by their own prior statements.\textsuperscript{155} The James limitation recognizes that a defendant’s statements can only impeach the declarant defendant, not other witnesses.\textsuperscript{156} The normative basis of these two propositions is that a witness should always be aware of his or her own prior statements.\textsuperscript{157} As recognized by the James Court, cross-examination of a witness by ref-

\textsuperscript{149} See Harris v. New York, 401 U.S. 222, 224 (1971) (“Miranda barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from Miranda that evidence inadmissible against an accused in the prosecution’s case in chief is barred for all purposes.”).

\textsuperscript{150} See Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 29.

\textsuperscript{151} See Mrkšić Brief for the Prosecution, supra note 34, ¶ 10.

\textsuperscript{152} White, supra note 105, at 1497.

\textsuperscript{153} See Harris, 401 U.S. at 226.

\textsuperscript{154} See James v. Illinois, 493 U.S. 307, 315–16 (1990); see also R. P. & Evid., supra note 16, at 89(D) (General Provisions) (guiding Trial Chambers to exclude evidence if necessary to hold fair trial).

\textsuperscript{155} Fed. R. Evid. 613.

\textsuperscript{156} 493 U.S. at 315–16.

\textsuperscript{157} See Fed. R. Evid. 613 advisory committee’s note. The common law rule regarding impeachment by prior inconsistent statements, derived from The Queen’s Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), required a witness to be shown a written account of the alleged prior inconsistent statement before counsel could cross-examine regarding the inconsistencies. In Rule 613, the drafters did away with this requirement, implicitly reasoning that witnesses should be aware of their own prior statements and need not be shown the statement in advance. See id.
ference to another person’s statements is unlikely to reveal information of significant probative value.\textsuperscript{158} This type of cross-examination, therefore, would be excluded not just under \textit{James}, but under the ICTY’s current Rules.\textsuperscript{159}

Additionally, trial before a professional factfinder ensures that the accused will not be convicted due to overvaluation of impeachment evidence.\textsuperscript{160} Because of the overriding importance of discovering the truth, U.S. courts allow for impeachment by prior inconsistent statements despite the potential overvaluing of this information by lay juries.\textsuperscript{161} Jurors’ ability to confine evidence to its proper scope, even with a limiting instruction, has been called an “unmitigated fiction”\textsuperscript{162} and an impossible feat of “mental gymnastics.”\textsuperscript{163} Empirical studies confirm that jurors are often unable to follow instructions limiting the use of evidence to a particular purpose.\textsuperscript{164}

The ICTY has a stronger incentive to adopt a rule permitting impeachment of witnesses by prior inconsistent statements because professional judges possess the requisite knowledge to afford only the proper weight to hearsay or illegally obtained evidence.\textsuperscript{165} Scholars

\textsuperscript{158} See \textit{James}, 493 U.S. at 320.

\textsuperscript{159} See \textit{R. P. & Evid.}, supra note 16, at 89(C)–(D) (General Provisions).

\textsuperscript{160} See \textit{Boas}, supra note 4, at 55.

\textsuperscript{161} See \textit{White}, supra note 105, at 1476–77.


\textsuperscript{163} \textit{Nash v. United States}, 54 F.2d 1006, 1007 (2d Cir. 1932); see also \textit{Kainen}, supra note 120, at 1352 (noting that courts expect jurors not to “consider any of the affirmative inferences from the perjury that would relieve the prosecution from establishing its burden of proving guilt with lawful evidence”).

\textsuperscript{164} See \textit{Jonakait}, supra note 135, at 202–05. A preeminent study looked at whether jurors obeyed instructions limiting the use of prior conviction evidence to impeachment purposes as required by Rule 609. When jurors did not receive information regarding prior convictions, 42.5% voted to convict. Jurors were then presented with evidence of prior convictions for similar offenses, prior convictions for dissimilar offenses, and prior perjury convictions. Even though jurors were given a limiting instruction, conviction rates skyrocketed to 75.0%, 52.5%, and 60.0% respectively. Researchers concluded that presentation of prior convictions “increase[s] the likelihood of conviction, and that the judge’s limiting instructions do not appear to correct that error.” See Roselle L. Wissler & Michael Saks, \textit{On the Inefficacy of Limiting Instruction: When Jurors Use Prior Conviction Evidence to Decide on Guilt}, 9 L. & Hum. Behav. 37, 43, & 47 (1985).

\textsuperscript{165} See Andrew J. Wistrich et al., \textit{Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding}, 153 U. Pa. L. Rev. 1251, 1319–21 (2005). One study found that judges in bench trials were able to disregard coerced confessions obtained in violation of \textit{Miranda}’s guarantee of a right to counsel. When judges were not told about the defendant’s coerced confession, 17.7% convicted the defendant. When judges were told about the defendant’s coerced confession, just 20.7% chose to convict the defendant. Researchers concluded that “judges were able to uphold the policies underlying the \textit{Miranda} doctrine and ignore incriminating but inadmissible evidence.” \textit{Id.}
have noted that the presence of professional factfinders is precisely the reason why hearsay and other troublesome evidence are admissible before the ICTY.\textsuperscript{166} Quite simply, ICTY trials are “unencumbered by the usual concern of unduly prejudicing non-judicial minds in the trying of criminal cases.”\textsuperscript{167} Admission of impeachment evidence, therefore, is warranted at the ICTY because it would give the judge a better understanding of the witness’s credibility without the risk of the evidence being used substantively.\textsuperscript{168}

Third, the explicit exclusion of illegally obtained statements from the prosecution’s case-in-chief ensures that prosecutors respect the procedural guidelines of the \textit{Rules}.\textsuperscript{169} The Simi\v{c} Trial Chamber’s fear that admission of prior statements would “condone” violation of the rules was allayed by the U.S. Supreme Court in \textit{Harris}.\textsuperscript{170} There, the Court noted sufficient deterrence of police misconduct stems from the exclusion of these illegally obtained statements from substantive use.\textsuperscript{171} Essentially, there is no incentive to violate procedural and constitutional guidelines if the evidence cannot be used at trial.\textsuperscript{172} Even less incentive exists in ICTY cases because investigations are directed entirely by prosecutors because the ICTY has no law enforcement branch.\textsuperscript{173} Prosecutors, therefore, will have an even greater appreciation for the risks of violating the \textit{Rules} because of the detrimental effect on their own cases.\textsuperscript{174}

Finally, potential impeachment by prior inconsistent statements does not interfere with the free exercise of the accused’s right to testify in his own defense—a fear of the Simi\v{c} Trial Chamber.\textsuperscript{175} This right is guaranteed under both the \textit{Rules} and U.S. law.\textsuperscript{176} Impeachment simply

\textsuperscript{166} See Boas, \textit{supra} note 4, at 55; see also May & Wierda, \textit{supra} note 17, at 747 (explaining that ICTY judges are able to hear hearsay and other controversial evidence in context in which it was obtained and afford it proper weight).

\textsuperscript{167} Boas, \textit{supra} note 4, at 55.

\textsuperscript{168} See \textit{id}.


\textsuperscript{170} See \textit{id}.; Prosecutor v. Simi\v{c}, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003).

\textsuperscript{171} See \textit{Harris}, 401 U.S. at 225.

\textsuperscript{172} See \textit{id}. (explicitly reasoning that “sufficient deterrence follows when the evidence in question is made unavailable to the prosecution in its case in chief”).


\textsuperscript{174} See \textit{Harris}, 401 U.S. at 225.

\textsuperscript{175} See Simi\v{c}, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 7.

\textsuperscript{176} R. P. \& EVID., \textit{supra} note 16, at 85(C) (General Provisions); \textit{In re Oliver}, 333 U.S. 257, 273 (1948) (expounding that “[a] person’s right to reasonable notice of a charge
ensures that when the accused elects to testify, he or she speaks truthfully.\textsuperscript{177} Essentially, this right to testify “cannot be construed to include the right to commit perjury.”\textsuperscript{178}

\textbf{C. Practical Benefits of the U.S. Approach}

In ICTY trials, the lack of contemporaneous evidence presents a tactical problem for prosecutors.\textsuperscript{179} Contemporaneous evidence carries more weight at trial because it was obtained or recorded while the criminal events were transpiring.\textsuperscript{180} Adoption of the U.S. approach to prior inconsistent statements would take prosecutors one step closer to overcoming this evidentiary hurdle.\textsuperscript{181}

Most crimes being tried before the ICTY occurred before the ICTY was even established; therefore, prosecutors are faced with piecing together evidence years after the crimes occurred.\textsuperscript{182} Wiretapping and surveillance—which are two of the most common investigatory tools—are unavailable to ICTY prosecutors.\textsuperscript{183} Documentary evidence is also scarce because, as one former ICTY prosecutor noted, “Senior leaders orchestrating large-scale crimes rarely document the overall criminal purpose or detail each criminal step of its implementation.”\textsuperscript{184}

In the absence of these fact-gathering tools, live testimony is the primary tool for presenting facts to the Trial Chamber.\textsuperscript{185} As the value of testimonial evidence depends on a witness’s ability to remember and relate certain events, the prosecutor should be able to check the accu-

\begin{itemize}
  \item \textsuperscript{177} See R. P. & Evid., supra note 16, at 90(A) (Testimony of Witnesses) (requiring that all witnesses abide by the oath and solemn declaration: “I solemnly declare that I will speak the truth, the whole truth and nothing but the truth”).
  \item \textsuperscript{178} Harris, 401 U.S. at 225.
  \item \textsuperscript{179} Del Ponte, supra note 173, at 553–55.
  \item \textsuperscript{180} Cf. Hagen v. Utah, 510 U.S. 399, 420 (1994) (discussing value of contemporaneous evidence in questions of statutory interpretation).
  \item \textsuperscript{181} See Fed. R. Evid. 613; Harris, 401 U.S. at 226.
  \item \textsuperscript{182} Del Ponte, supra note 173, at 551–52.
  \item \textsuperscript{183} See id. at 552; see also Admin. Office of the U.S. Courts, Report of the Director of the Administrative Office of United States Courts on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications 5 (2006), available at http://www.uscourts.gov/wiretap05/WTText.pdf (noting that in 2005, 1773 wiretap applications were authorized in the United States).
  \item \textsuperscript{184} Del Ponte, supra note 173, at 553.
  \item \textsuperscript{185} See id. at 551–53 (implicitly recognizing that, in the absence of wiretapping, surveillance, and documentary evidence, the primary source of information remaining is live witnesses).
\end{itemize}
racy of trial testimony against statements given closer in time to the underlying event. For example, the Simić case involved alleged crimes occurring between September 1991 and December 1993. The telephone interviews at issue were conducted in 1996. Tadić’s trial testimony, however, did not take place until 2003. Because of the frailty of human memory, statements given two years after an event are more credible than statements given ten years after an event. Even though prior statements may not be used substantively, assessment of a witness’s credibility is crucial in the factfinder’s evaluation of testimonial evidence.

The absence of detailed evidentiary rules, moreover, leaves prosecutors guessing as to which pieces of their limited evidentiary arsenal can be used at trial. Each Trial Chamber is allowed to independently “apply the procedure according to its own understanding of the purpose and underlying principles of the procedure.” As previously discussed, the U.S. approach is consistent with the ICTY’s principles governing the admissibility of evidence, namely that evidence is admissible so long as its probative value is not outweighed by the need to ensure a fair trial. Codification of a clear rule regarding prior inconsistent statements would prevent conflicting interpretations of policy and provide concrete guidelines for prosecutors.

As the ICTY seeks to provide expeditious trials, adoption of the U.S. approach would obviate the need for case-by-case evidentiary deci-

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186 See Ladd, supra note 136, at 240; see also Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 28 (Oct. 9, 2006) (noting extensive time delay between challenged statements and trial testimony of accused can extend up to fifteen years).
187 Simić Fifth Amended Indictment, supra note 52, ¶ 11.
188 Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 2 (Mar. 11, 2003).
189 Id.
190 See generally Yaacov Trope & Nira Liberman, Temporal Construal, 110 PSYCHOL. R. 403, 418 (2003) (finding that memories of events change over time and, as time passes, individuals will likely perceive events in abstract features, not concrete details).
191 Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33.
193 Id. at 1057.
194 See supra notes 132–34 and accompanying text.
195 Compare Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33 (allowing prior inconsistent statements to be used for impeachment), with Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003) (disallowing prior inconsistent statements to be used for impeachment).
sions and speed up the pace of war crimes trials. In Mrkšić, for example, the trial was delayed for a month because the Trial Chamber needed to decide whether the 1998 statements were admissible.

**Conclusion**

International criminal tribunals are bound to play an increasingly important role in the future. The need to establish clear functional rules of evidence is paramount to ensuring that these criminal trials remain fair proceedings for both the prosecution and defense. Currently, the ICTY’s *Rules*, with all their virtues and flaws, have been virtually duplicated by the International Criminal Tribunal for Rwanda and the International Criminal Court. As a result, the debate regarding the use of prior inconsistent statements for impeachment purposes will remain part of the international legal landscape until one tribunal ends the debate by establishing a clear evidentiary rule allowing the admission of these statements.

The ICTY, as the original international criminal tribunal, stands in a position to remedy this problem, once and for all, by adopting an international equivalent to Rule 613 and the *Harris* exception. The Trial Chambers have already accepted the logic underlying the U.S. evidentiary rule. Now it is time for the ICTY to explicitly adopt a similar rule and prevent future witnesses from weaving a web of lies on the stand.

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196 See, e.g., Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33.

197 *Id.* The defense filed a motion requesting the exclusion of the 1998 statements on September 7, 2006. The Trial Chamber did not resolve the issue until October 9, 2006. *Id.*