SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Judge Teresa Doherty, Presiding Judge
Judge Richard Lussick
Judge Julia Sebutinde

Registrar: Mr. Robin Vincent

Date filed: 6 April 2005

THE PROSECUTOR **Against** **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu

Case No. SCSL – 2004 – 16 – T

PROSECUTION RESPONSE TO JOINT DEFENCE MOTION TO EXCLUDE ALL EVIDENCE FROM WITNESS TF1-277 PURSUANT TO RULE 89(C) AND/OR RULE 95

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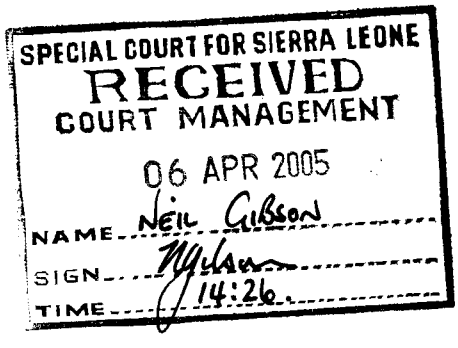

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I. PROCEDURAL BACKGROUND

1. On 8 and 9 March 2005 witness TF1-277 gave evidence before Trial Chamber II. During examination in chief, the witness testified to being present when one Saj Alieu told the witness's uncle that "5'5", the alleged alias for the Third Accused, Santigie Borbor Kanu, shot and killed a woman by the name of Zainab.[1]

2. Counsel for the Third Accused objected to the evidence based upon the fact that it was hearsay, that it was said to someone other than the witness and that it was inconsistent with a previous statement made by the witness.[2] The objection was overruled as premature and Counsel was invited to challenge the evidence during cross-examination, following which an evaluation of the evidence could be made.[3]

3. Witness TF1-277 was cross-examined by all three Defence Counsel. In particular the witness was cross-examined about the inconsistency between his statement dated 4 September 2003 and the evidence given before the Trial Chamber.[4] The

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[1] Transcript 8 March 2005, p. 50 (line 25) to p. 52 (line 15), especially at p. 52 (lines 7-12).
[2] Transcript 8 March 2005, p. 52 (line 18) to p. 53 (line 16) and p. 54 (line 15) to p. 55 (line 5).
[3] Transcript 8 March 2005, p. 55 (lines 9-25).
[4] See particularly Transcript 8 March 2005, p. 110 (line 27) to p. 119 (line 11) and Transcript 9 March 2005, p. 4 (line 27) to p. 15 (line 3).

witness said that he could not remember having had the statement read back to him in Krio and that when he reviewed the statement he found out that there were errors.[5] The witness was not re-examined. At the conclusion of the evidence Counsel for the Second Accused sought the tender of the witness statement dated 4 September 2003.[6] Counsel for the Prosecution argued that a further statement dated 17 February 2005 should be tendered as part of the bundle.[7] The two documents became Defence exhibits, D1 and D1A respectively.

4. On 11 March 2005 Defence Counsel for all three Accused filed a "Confidential and Under Seal – Joint Defence Motion to Exclude All Evidence From Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95" ("the Joint Defence Motion"). In the Joint Defence Motion it is argued:

   a) That the said evidence[8] is "indirect hearsay", which arose under circumstances that renders it presently unreliable;

   b) That the testimony of witness TF1-277 was inconsistent with the statement dated 4 September 2005;

   c) In light of a) and b), the testimony of witness TF1-277 and exhibits D1 and D1A should be excluded in their entirety or, in the alternative, the evidence that the witness heard Saj Alieu say that 5'5 had shot and killed a woman named Zainab should be excluded.

5. The Prosecution submits that the assertions made and relief sought by the Joint Defence Motion are ill founded and contrary to the well-established jurisprudence of the international ad hoc criminal tribunals and of the Special Court for Sierra Leone. The Prosecution submits that the Joint Defence Motion should be rejected in its entirety.

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[5] Transcript 9 March 2005, p 13 (line 27) to p 14 (line 3).
[6] Transcript 9 March 2005, p. 23 (line 23) to p. 24 (line 5).
[7] Transcript 9 March 2005 p. 24 (lines 13-22).
[8] As detailed in paragraph 1 above.

II. ARGUMENT

A. Hearsay evidence is admissible and evaluated according to its probative value

6. The Prosecution submits that the jurisprudence of the international ad hoc criminal tribunals establishes clearly that the correct approach is for the Court to admit hearsay evidence.[9] It is the role of the fact-finder to admit and evaluate the evidence based on its relevance and probative value and, in this process, accord hearsay evidence its proper weight.[10] The evaluation of hearsay evidence should only be made at the close of all the evidence when it can be properly evaluated in light of everything previously produced.[11]

7. This principled approach is based upon a recognition that hearsay evidence is not intrinsically lacking in probative value and is therefore admissible as relevant evidence under Rule 89 of the Rules of Procedure and Evidence. As was established by the International Criminal Tribunal for Yugoslavia (ICTY) in the *Tadic* Decision, "hearsay evidence is not automatically excluded", and objections thereto "were not usually sustained and the testimony in question was admitted into evidence and assessed in the usual way for its probative value pursuant to Rule 89."[12]

8. The ICTY Appeals Chamber recently confirmed in the *Blaskic* Judgement that:

> "hearsay evidence is admissible as long as it is of probative value under Rule 89(C), and that "the weight or probative value to be afforded that evidence will

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[9] See *Prosecutor v. Aleksovski*, Appeals Chamber "Decision on Prosecution's Appeal on Admissibility of Evidence", IT-95-14/1-AR73, 16 February 1999, which held at para. 15 "[i]t is well settled in the practice of the Tribunal that hearsay evidence is admissible". See also *Prosecutor v. Tihomir Blaskic*, IT-95-14-A, "Judgement – Appeals Chamber", 29 July 2004, ("It is settled jurisprudence that hearsay evidence is admissible"). See also *Tadic*, "Decision on the Defence Motion on Hearsay" (Separate Opinion of Judge Stephen) (5 August 1996).

[10] See *Prosecutor Against Sesay et al*, SCSL-04-15-T, Transcript 14 July 2004, Pages 12 (lines 15 – 22), 14 (lines 25 – 32), and in particular: Page 13 (lines 17 – 23) where Judge Boutet stated: "[Y]ou know that this kind of evidence, hearsay evidence, is generally admissible and admitted subject to the court assessing the probative value to be given to that kind of evidence for the very reason that has been provided – and I underline provided – the evidence is relevant and has some kind of probative value. Those are the criteria essentially being – governing the admissibility of this kind of evidence."

[11] *Prosecutor v Blaskic*, "Decision on Standing and Objection of the Defence to the Admission of Hearsay with No Inquiry as to Reliability", IT-95-14-A, 21 January 1998, at paras. 13 and 14, referred to in *Prosecutor v Blaskic*, "Judgement – Trial Chamber", IT-95-14-/1, 3 March 2000, at para. 36, footnote 76.

[12] *Prosecutor v. Tadic*, "Opinion and Judgement", IT-94-1-T, 7 May 1997. at para. 556.

usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined".[13]

9. The Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) held in the *Kamuhanda* Judgement that:

> "this Rule [89(C)] makes provision for the admission of hearsay evidence even when it cannot be examined at its source and when it is not corroborated by direct evidence. The Chamber, however, notes that though evidence may be admissible, the Chamber has discretion to determine the weight afforded to this evidence. The Chamber makes its decision as to the weight to be given to testimony based on tests of "relevance, probative value and reliability." *Accordingly, the Chamber notes that evidence, which appears to be "second-hand", is not, in and of itself, inadmissible; rather it is assessed, like all other evidence, on the basis of its credibility and its relevance.*"[14]

B. Reliability is *not* a separate requirement for admissibility

10. The assertion made in the Joint Defence Motion that the hearsay evidence of witness TF1-277 is unreliable and therefore inadmissible, is mistaken and should be rejected.

11. Such a categorical approach to determining probative value cannot be supported by the prevailing jurisprudence. Affirming the position established by the ICTY Trial Chambers in *Tadic*[15] and *Delalić*[16], the ICTR Appeals Chamber in *Musema* specifically held that reliability:

> "does not constitute a separate condition of admissibility; rather, it provides the basis for the finding of relevance and probative value required under Rule 89(C) for evidence to be admitted. ... The reliability of evidence does not constitute a separate condition of admissibility; rather, it provides the basis for the findings of relevance and probative value required under Rule 89(C) for evidence to be admitted."[17]

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[13] *Prosecutor v.Blaskic*, *supra* note 8 at footnote 1374, citing *Prosecutor v. Alekovski*, *supra* note 8, paras. 15 et seq.
[14] *Prosecutor v Kamuhanda*, "Judgement", ICTR-95-54A, 22 January 2004, para. 42 (emphasis added).
[15] *Prosecutor v. Tadic.* "Decision on Defence Motion on Hearsay", IT-94-1-T, 5 August 1996, cited at *Prosecutor v. Tadic ,supra* note 11 at para. 555 and footnote 41.
[16] *Prosecutor v. Zejnil Delalić*, "Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Muci, to Provide a Handwriting Sample", IT-96-21-T, 21 January 1998, (RP D5395-D5419).
17 *Prosecutor v. Musema*, Judgement and Sentence, ICTR-96-13-A, 27 January 2000, at para. 35 and 38.

12. Thus, it is submitted that an overall determination of admissibility necessarily includes some consideration of whether satisfactory indicia of reliability are present, but not as a separate pre-condition.[18]

13. Rule 89(C) in the Rules of Procedure and Evidence before this Court requires only that the evidence be relevant to be admissible. This is in contradistinction to the equivalent provision in the Rules of the ICTY and ICTR which require that evidence be both relevant and probative. In the "Fofana – Appeal Against Decision Refusing Bail", the Appeals Chamber of this Court said:

> "Rule 89(C) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for jury trial, which prevent judges from having access to information which is relevant. Judges sitting alone can be trusted to give second hand evidence appropriate weight, in the context of the evidence as a whole and according to well-understood forensic standards. The Rule is designed to avoid sterile legal debate over admissibility ..."[19]

C. The hearsay evidence of TF1-277 is both probative and reliable

14. The Prosecution submits that ample indicia of relevance, reliability and probative value are present in the instant case. First, the hearsay evidence provided by TF1-277 is probative as it is material to the direct commission of crimes by one of the accused as pleaded in the Further Amended Consolidated Indictment (paragraph 49).

15. Further indicia of probative value are present through the following details that arose out of witness TF1-277's testimony, which establish the reliability and trustworthiness of the impugned hearsay evidence:

    a) Witness TF1-277 was present and heard the entire report that was given by Saj Alieu to the witness's uncle.[20]

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[18] *Prosecutor v. Delalić*, "Decision on Motion of Prosecution for Admissibility of Evidence", IT-96-21-T, 19 January 1998, at para. 20: "(I)t is an implicit requirement of the Rules that the Trial Chamber give due consideration to indicia of reliability when assessing the relevance and probative values of evidence at the stage of admissibility.", earlier at para. 18: "It is clear that if evidence offered is unreliable it cannot be relevant or of probative value."

[19] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-AR65, 11 March 2005, para. 26.

[20] Transcript 8 March 2005, pp. 50 to 52 and 9 March 2005, p. 23.

b) Less than ten minutes prior to hearing the report given by Saj Alieu, TF1-277 heard a gun shot. This was the only gun shot heard by the witness that day. The gun shot came from across the street. The house where Saj Alieu stayed was across the street from the uncle's house, where the witness also stayed.[21]

c) Five minutes after TF1-277 heard the report by Saj Alieu, the alleged victim of the shooting, a woman named Zainab, was brought to his uncle's house, where the witness was present. The witness saw and heard the uncle inquire of the victim and confirm that her identity was indeed Zainab. The witness also testified that the condition Zainab was in was "bad", and that she died shortly after speaking with the witness's uncle.[22]

d) Finally, the witness described seeing 5'5 leaving the house of Saj Alieu five minutes after hearing a gun shot. The witness observed 5'5 dressed in green, military combat, uniform and carrying a silver object in his hand, which 5'5 was turning around with his finger.[23]

16. This hearsay evidence is not a particular subspecies of hearsay called "indirect" hearsay evidence. It matters not that the witness was not the addressee of the report of the shooting incident.[24] The witness consistently maintained that he was present and heard the report by Saj Alieu.

17. The reliability of the said hearsay evidence is buttressed by the fact that TF1-277 testified under oath and was subjected to rigorous cross examination by Defence Counsel for the three Accused.[25]

18. The Prosecution respectfully submits that by evaluating the hearsay evidence at issue according to the afore-mentioned circumstances, it is clear that such

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[21] Transcript 8 March 2005, pp. 52 and 56.
[22] Transcript 8 March 2005,pp 57, 58 and 59.
[23] Transcript 8 March 2005, p. 57.
[24] Paragraph 11 of the Joint Defence Motion.
[25] See *Prosecutor v. Musema, supra* note 16, at para. 86: "In light of these factors, it is the Chamber's opinion that the probative value of such prior witness statements is, generally, lower than the probative value of positive oral testimony before a Court of law, *where such testimony has been subjected to the test of cross-examination."*

evidence indeed possesses probative value and ought to be admissible pursuant to Rule 89(C).

D. Allegation of prior inconsistency is without merit

19. The Joint Defence Motion also argues that an alleged inconsistency between an earlier written statement by TF1-277 with the witness's oral testimony further demonstrates alleged unreliability and therefore the inadmissibility of the hearsay evidence.

20. Specifically, the Defence suggest that a written statement taken on 4 September 2003[26] is a "substantial prior inconsistent statement" with the oral testimony of this witness. The Joint Defence Motion points to inconsistencies between this statement and what the witness said in evidence on 8 and 9 March 2005, in particular that in the statement the witness said that he saw the shooting, whereas in evidence he said he was told about it.[27] In this context the Joint Defence Motion makes no mention of the Interview Note dated 17 February 2005 in which the witness corrected – prior to giving evidence – the earlier statement by saying that he did not witness the shooting but was told about it by Saj Alieu.

21. The Prosecution submits that any inconsistency that arises is not between the oral evidence and the first written statement, but as between the statement dated 4 September 2003 and the Interview Note dated 17 February 2005. As noted in paragraph 3 above, the witness explained while giving evidence that he could not remember having had the original statement read back to him in Krio and that when he reviewed the statement he found out that there were errors.[28] The Defence assertion that the witness was unable to clarify the alleged inconsistency during cross examination is incorrect.

22. The Prosecution submits that while proof of prior inconsistent statements may in extreme circumstances be relevant to an evaluation of the reliability of oral

[26] Exhibit D1A, RP 6298-6302.
[27] Paragraph 12(a) of the Joint Defence Motion.
[28] Transcript 9 March 2005, p. 13 (line 27) to p. 14 (line 3).

testimony[29], it is correct to treat such inconsistencies as going to the credibility of the said witness. As was held by the ICTY Trial Chamber in *Tadic*:

> "Prior inconsistent statements of the witness used in cross-examination are helpful to reveal any inconsistencies that may affect the Trial Chamber's assessment of the credibility of the witness."[30]

23. Furthermore, as was held by the ICTY Trial Chamber II in *Vasiljevic*:

> "In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness had nevertheless recounted the essence of the incident charged in acceptable detail. For these reasons, the Trial Chamber has not treated minor discrepancies between previous statements and oral testimony as discrediting the evidence of the witness as a whole, provided that the witness has been able to recount the essence of their previous evidence in reasonable detail."[31]

24. The Joint Defence Motion refers to the two unsigned "will-say" statements dated 25 November 2003[32] and 17 February 2005 and asserts that they cannot amount to relevant evidence within the meaning of Rule 89(C). The Prosecution submits that these documents fall within the meaning of "witness statement" and do amount to clarification or correction of the first written statement.

25. In the "Decision on Disclosure of Witness Statements and Cross Examination" in *Prosecutor v Norman, Fofana and Kondewa*, Trial Chamber I considered the meaning of "witness statement".[33] That Chamber found that the absence of a signature and matters of format do not detract from the substantive validity of the

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[29] See *Prosecutor v. Bagilishema*, Judgement, ICTR-95-1A-T, 7 June 2001, para. 24:
The Chamber's point of departure when assessing the account given by a witness is his or her testimony in court. Of course, differences between earlier written statements and later testimony in court may be explained by many factors, such as the lapse of time, the language used, the questions put to the witness and the accuracy of interpretation and transcription, and the impact of trauma on the witnesses. However, where the inconsistencies cannot be so explained to the satisfaction of the Chamber, the reliability of witness' testimony may be questioned.

[30] *Prosecutor v. Tadic*, "Decision on Prosecutor's Motion for Production of Defence Witness Statements" (Dissenting Opinion of Judge McDonald), IT-94-1-T, 27 November 1996, at para. 46, as cited in Richard May and Marieka Wierda, International Criminal Evidence (Transnational Publishers, Inc, Ardsley, New York, 2002) at p. 170.

[31] *Prosecutor v. Vasiljevic*, Judgement, IT-98-32-T, 29 November 2002, at para. 21, citing *Prosecutor v Krnojelac* , Judgment, IT-97-25-T, 15 March 2002, at para. 69 ("*Krnojelac* Trial Judgment") at footnote 10.

[32] This statement is not an exhibit before the Trial Chamber.

[33] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T, "Decision on Disclosure of Witness Statements and Cross Examination", 16 July 2004, at paragraphs 22 to 24 inclusive.

statement within the meaning of Rule 66A(i). This is especially so given the language ability and educational literacy of potential prosecution witnesses and that witnesses often relied upon investigators to record all information disclosed during an interrogation.

26. The Prosecution notes the request made in the Joint Defence Motion to exclude the 4 September 2003 statement (Exhibit D1). As noted above, this document was tendered by the Defence.

E. No prejudice identified

27. The Joint Defence Motion argues that the admission of the evidence of witness TF1-277 "may have substantial prejudicial effect" on the accused persons.[34] This statement is made without any identification of what that prejudice might be. The Prosecution submits that there is none. The evidence is relevant and probative and will be accorded its proper weight. Accordingly, not only is the evidence admissible pursuant to Rule 89(C), but the Defence have failed to discharge the onus of showing that the admission of the evidence would bring the administration of justice into serious disrepute pursuant to Rule 95.

CONCLUSIONS

28. Based upon the foregoing, the Prosecution respectfully requests that the Joint Defence Motion be dismissed in its entirety.

Filed in Freetown,

4 April 2005

For the Prosecution,

Luc Côté
Chief of Prosecutions

Lesley Taylor
Senior Trial Counsel

[34] Paragraph 17 of the Joint Defence Motion.

PROSECUTION INDEX OF AUTHORITIES

Prosecutor v Norman, Fofana and Kondewa, SCSL-04-14-AR65, "Fofana – Appeal Against Decision Refusing Bail", 11 March 2005,

Prosecutor v. Alekovski, IT-95-14/1-AR73, "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999, (http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm).

Prosecutor v. Blaskic, IT-95-14-A, "Judgement – Appeals Chamber", 29 July 2004, (http://www.un.org/icty/blaskic/appeal/judgement/index.htm).

Prosecutor v. Tadic, IT-94-1, T. Ch. II, "Decision on Defence Motion on Hearsay – Separate Opinion of Judge Stephen", 5 August 1996 (Attached).

Prosecutor v Blaskic, IT-95-14-A, "Decision on Standing and Objection of the Defence to the Admission of Hearsay with No Inquiry as to Reliability", 21 January 1998, referred to in *Prosecutor v Blaskic*, IT-95-14-/1, "Judgement – Trial Chamber", 3 March 2000 (http://www.worldlii.org/cgi-worldlii/disp.pl/int/cases/ICTY/2000/4.html?query=%5e+hearsay).

Prosecutor v. Tadic, IT-94-1-T, "Opinion and Judgement", 7 May 1997 (http://www.un.org/icty/tadic/trialc2/judgement/index.htm).

Prosecutor v Kamuhanda, "Judgement", ICTR-95-54-A, 22 January 2004 (http://www.ictr.org/ENGLISH/cases/Kamuhanda/judgement/220104.htm).

Prosecutor v. Tadic, IT-94-1, T. Ch. II, "Decision on Defence Motion on Hearsay", 5 August 1996 (Attached), referred to in *Prosecutor v. Tadic*, IT-94-1-T, "Judgement", 7 May 1997 (http://www.un.org/icty/tadic/trialc2/judgement/index.htm).

Prosecutor v. Delalić, IT-96-21-T, "Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Muci, to Provide a Handwriting Sample", 21 January 1998 (http://www.un.org/icty/celebici/trialc2/decision-e/80119EV2.htm).

Prosecutor v. Musema, ICTR-96-13-A, "Judgement and Sentence", 27 January 2000 (http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm).

Prosecutor v. Delalić, IT-96-21-T, "Decision on Motion of Prosecution for Admissibility of Evidence", 19 January 1998 (http://www.un.org/icty/celebici/trialc2/decision-e/80119EV21.htm).

Prosecutor v. Bagilishema, ICTR-95-1A-T, "Judgement", 7 June 2001 (http://www.ictr.org/ENGLISH/cases/Bagilishema/judgement/2.htm#2.2).

Prosecutor v. Tadic, IT-94-1-T, "Decision on Prosecutor's Motion for Production of Defence Witness Statements" (Dissenting Opinion of Judge McDonald), 27 November 1996, as cited in Richard May and Marieka Wierda, International Criminal Evidence (Transnational Publishers, Inc, Ardsley, New York, 2002).

Prosecutor v. Vasiljevic, IT-98-32-T, "Judgement", 29 November 2002 (http://www.un.org/icty/vasiljevic/trialc/judgement/index.htm).

ATTACHMENT ONE

Prosecutor v. Tadic, IT-94-1, T. Ch. II, "Decision on Defence Motion on Hearsay – Separate Opinion of Judge Stephen", 5 August 1996.

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NATIONS

International Tribunal for the

Case No.

IT-94-1-T

Prosecution of Persons

Responsible for Serious Violations

of International Humanitarian Law

Committed in the Territory of

Date:

Original:

5 August 1996 English and French

Former Yugoslavia since 1991

iN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding

Judge Ninian Stephen

Judge Lal Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 5 August 1996

THE PROSECUTOR

V.

DU TADIC a/k/a/ "DULE"

SEPARATE OPINION OF JUDGE STEPHEN ON

THE DEFENCE MOTION ON HEARSAY

The Office of the Prosecutor

Mr. Grant Niemann Ms. Brenda Hollis

Mr. Alan Tieger Mr. Michael Keegan

Counsel for the Accused

Mr. Michael Wiadimiroff

Mr. Aiphons One

Mr. Steven Kay

Ms. Sylvia de Bertodano

I concur in the conclusion reached by my fellow Judges and state my reasons for that conclusion.

The present motion is concerned with what is known in the common law world as hearsay evidence and with the circumstances in which it may be received in evidence by the Trial Chamber in the course of this present trial. It is not directed to any particular testimony but is intended to result in a general ruling regarding all hearsay evidence relating to the guilt of the accused. It seeks orders having the effect of excluding the reception into evidence of hearsay testimony if it relates to the guilt of the accused unless probative value substantially outweighs prejudicial effect.

The rules of evidence that guide the conduct of trials before this International Tribunal are set out in Rules 89 to 98 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

The general provisions relating to the reception of evidence and the only ones relevant to the determination of this motion are contained in Rule 89. Sub-rule(A) provides:

The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

Then Sub-rule (C) lays down a very general provision as to reception of evidence. It provides:

"A Chamber may admit any relevant evidence which it deems to have probative value."

It thus calls for the admission of evidence if it is both relevant and is deemed to have probative value. The fact that evidence is hearsay does not, of course, affect its relevance nor will it necessarily deprive it of probative value; the fact that in common law systems there exist many exceptions to the exclusion of hearsay evidence is in itself testimony to this. Accordingly, there

is nothing in Sub-rule (C), nor for that matter elsewhere in the Rules, which would exclude the admission into evidence of testimony merely because it is hearsay in character.

The two tests of admissibility laid down by Sub-rule (C) are straightforward enough, although they may not, merely for that reason, always be easy to apply in particular instances; in particular will this be so in the case of probative value, a quality of necessarily very variable content and much will depend upon the context and character of the evidence in question. Hearsay evidence tends usually to be of lesser probative value than will be the first-hand evidence of a witness but very much depends upon the infinitely variable circumstances surrounding hearsay evidence and affecting its weight.

In this International Tribunal we Judges are the judges of fact as well as of law and it is for us as judges of fact to determine in each instance the weight to be accorded to particular evidence, including hearsay evidence, just as it is for us to determine relevance and probative value. Indeed, the degree of weight to

be given to particular evidence will be a reflection of the extent to which that evidence has probative value.

Sub-rule (D) of Rule 89 provides:

"A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."

This Sub-rule empowers a Chamber to exclude evidence where, on balance, its probative value is substantially less than is the always pressing need to ensure a fair trial. When any question of the applicability of Sub-rule (D) arises, and this will usually be because of less than absolutely compelling probative value combined with highly prejudicial character, it will be for the Chamber to weigh up the position and determine whether probative value is substantially outweighed as required by this Sub-rule. If it is the Chamber may, and no doubt should, exclude the evidence in question.

This, too, then is a straightforward enough provision, although the task of weighing against each other two such different qualities as probative value and the need to ensure a fair trial will obviously on occasion prove no easy task.

It is to be noted that Sub-rule (D), while it may be applicable to some instances of hearsay evidence, is by no means confmed to such evidence. It will obviously also have a role to play where, for example, highly prejudicial first-hand testimony is, for any of a multitude of reasons, to be accorded very little weight because of low probative value and should therefore be excluded from evidence.

It can only be on the basis of these two Sub-rules that the Defence can rely in seeking the form of order it does; no other provision is applicable. However, no interpretation of these two Sub- rules would support a view that relevant testimony having probative value should only be admitted if it be shown that probative value substantially outweighs prejudicial effect. Yet this would be the effect of granting the relief sought in this motion and it would, in effect, reverse the position expressly provided for in Sub-rule (D). Instead of probative value being the dominant consideration as that Sub-rule requires, it would be subordinated to that of prejudicial effect. This would be a clear departure from the rules of evidence of this International Tribunal and must be rejected.

Accordingly, the relief sought in this motion is denied.

Done in English and French, the English text being authoritative.

— Judge Ninian

Dated this fifth day of August 1996

At The Hague

The Netherlands

[of the Tribunal]

ATTACHMENT TWO

Prosecutor v. Tadic, IT-94-1, T. Ch. II, "Decision on Defence Motion on Hearsay", 5 August 1996.

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International Tribunal for the
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Counsel for the Accused
Mr. Michail Wladiniiroff Mr. Steven Kay
Mr. Aiphons One Ms. Sylvia De Bertodano
Case No. LT-94-1-T 5 August 1996
1 /15q,

I. INTRODUCTION

Pending before the Trial Chamber is the Motion on Hearsay ("Motion") filed by the Defence on 26 June 1996 pursuant to Rule 54 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Prosecution filed its response on 10 July 1996. Oral argument was heard on 16 July 1996.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

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II. DISCUSSION

A. The Pleadings

1. This Motion raises the issue of the admissibility of hearsay evidence during trial before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Tenitory of the Former Yugoslavia since 1991 ("International Tribunal"). In bringing this Motion, the Defence contends that the admission of hearsay evidence would violate the right of the accused to examine the witnesses against him provided by in Article 21(4)(e) of the Statute of the International Tribunal ("Statute"). On this basis, the Defence avers that the International Tribunal should refuse to admit evidence directly implicating the accused in the crimes charged unless it first fmds that the probative value of this evidence substantially outweighs its prejudicial effect. Further, the Defence asserts that the Trial Chamber should rule on the admissibility of such statements without hearing its content. Instead, the Defence requests that the Trial Chamber make such a ruling only after a review of the circumstances under which the evidence was received.

2. While acknowledging that the International Tribunal is not bound by any national rules of evidence, the Defence asserts that the Rules are more akin to the adversarial common law system and that most such systems contain a general exclusionary rule against hearsay. Even accepting that there are exceptions to this general rule because some types of hearsay may have sufficient probative value to be admissible - for example, instances of excited utterances and dying declarations - the Defence argues that the Trial Chamber should not admit any hearsay evidence unless the Prosecution first demonstrates that the evidence has substantial probative value that outweighs any prejudicial effect on the accused.

3. In opposition to the Defence, the Prosecution argues that the International Tribunal's omission of a Rule excluding hearsay evidence was clearly deliberate and is consistent with both the International Tribunal's procedure of trials in which judges are the fmders of fact, and with the civil law system in which the basic rule is that all relevant evidence is admitted. The Prosecution contends that the Judges of the International Tribunal are fuily capable of determining the weight that should be afforded to such evidence. In the Prosecution's view, the

position of the Defence extends beyond even most common law systems in that these systems allow the admission of hearsay evidence that meets certain exceptions without requiring a further showing. Finally, the Prosecution maintains that the Defence's arguments run contrary to the spirit and intent of the Rules and that adoption of its requests would necessitate a formal amendment requiring approval of the Judges of the International Tribunal.

B. Analysis

4. The power of the Trial Chamber to regulate the conduct of the parties and the presentation of evidence during trial arises from the provisions of the Statute and the Rules. Relevant to the Motion under review is Article 21 of the Statute, which provides for the rights of the accused. The relevant portion states:

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

5. The International Tribunal's Rules, originally adopted in February 1994, govern the admission of evidence. See generally Rules 89-98. Despite the adoption of several amendments to the Rules since their creation, there is no Rule that calls for the exclusion of out- of-court, or hearsay, statements.

6. Rule 89, entitled General Provisions, reads as follows:

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

Rule 95 provides additional guidance regarding the admissibility of evidence. This Rule, entitled Evidence Obtained by Means Contrary to Internationally Protected Human Rights, declares:

No evidence shall be admissible if 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.

7. It is clear from these provisions that there is no blanket prohibition on the admission of hearsay evidence. Under our Rules, specifically Sub-rule 89(C), out-of-court statements that are relevant and found to have probative value are admissible. Although Sub-rule 89(A) clearly provides that the Trial Chamber is not bound by national rules of evidence, in determining the validity of the Defence Motion, it is instructive to review the practice regarding admissibility of evidence in civil and common law systems.

8. In common law systems, evidence that has probative value is generally defined as "evidence that tends to prove an issue." Henry C. Black, Black's Law Dictionary 1203 (6th ed. 1991). Relevancy is often said to require implicitly some component of probative value. For example, the Supreme Court of Canada, in R. v. Cloutier, relied on the following statement of Sir Rupert Cross:

"For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter."

K v. Cloutier, 2 S.C.R. 709, 731 (Canada Sup. Ct. 1979) (quoting Sir Rupert Cross, Cross on Evidence 16 (4th ed. 1974)). Another commentator, in a discussion of United States law, expressed a similar opinion:

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There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. . . . The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove.

Charles T. McCormick, McCormick on Evidence 339-40 (4th ed. 1992).

9. Thus, it appears that relevant evidence "tending to prove an issue", must have some component of reliability. In some common law systems, the general exclusion of hearsay evidence is based upon its presumed lack of reliability. However, this is not an absolute rule. For example, the United States Federal Rules of Evidence provides for twenty-seven specific situations in which hearsay evidence is admissible. See U.S. FED. R. EVID. 803-04. In addition to the circumstances explicitly provided for, the United States rules allow for the admission of statements

not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

U.S. FED. R. EyED. 803(24); see also U.S. FED. R. EvID. 804(b)(5). The Evidence Act of the Laws of Malaysia, while not explicitly defining hearsay, also stipulates the circumstances in which statements by persons who are

unavailable to be called as witnesses are declared relevant and thus admissible. See Malay. EVID. ACT, 1950 § 32 (rev. 1971).

10. Despite these relatively strict limitations on the admission of hearsay, judges in non-jury common law cases often take a slightly different approach:

Where the admissibility of evidence is . . . debatable, the contrasting attitudes of the appellate courts towards errors in receiving and those excluding evidence seem to support the wisdom of the practice adopted by many experienced trial judges in non-

jury cases of provisionally admitting debatably admissible evidence if objected to with the announcement that all questions of admissibility will be reserved until the evidence is all in.

McCormick on Evidence 86-87.

11. In civil law systems, however, there exists no general rule against the admissibility of hearsay evidence. Out-of-court statements are included in a case file of all evidence, prepared by the investigating magistrate, which is considered fully by the judges during the trial proceeding. This difference in criminal procedure between the civil and common law systems is explained primarily by the inquisitorial nature of the civil system, especially in the pre-trial phase, and the absence of a jury. Procedure in these systems, as one commentator noted when discussing the French legal system, is guided by the principle that " forms of evidence are admissible as long as they do not conflict with the ethics of [system of criminal procedure." Criminal Procedure Systems in the European Community 118 (Christine Van Den Wyngaert et al., eds. 1993). Similarly, in criminal matters in Belgium, "the facts may be proven by all possible means" and the trial judge need only rely on his "intimate conviction" regarding whether a fact has been proven after assessing the weight of the evidence presented. Id. at 20-

22.

12. Article 6(3)(d) of the European Convention on Human Rights provides for the right of the accused to examine witnesses against him. In interpreting this provision, the European Court of Human Rights has held that while the use of witness statements made out of court does not, in and of itself, violate this provision, " a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him." Delta v. France, 191-A Eur. Ct. H.R. (ser. A) 15 (1990). However, the European Court of Human Rights has not directly addressed hearsay as such, and indeed, has clearly stated that the admissibility of evidence is primarily a matter of regulation under national law. Schenk v. Switzerland, 145 Eur. Ct. H.R. (ser. A) 29 (1988).

13. In sum, the prohibition on the admissibility of hearsay that fails to meet a recognised exception is a feature of criminal procedure primarily limited to common law systems. In the

civil law system, the judge is responsible for determining the evidence that may be presented during the trial, guided primarily by its relevance and its revelation of the truth.

14. The International Tribunal, with its unique amalgam of civil and common law features, does not strictly follow the procedure of civil law or common law jurisdictions. In view of this, the Trial Chamber recognizes the value to the parties of knowing the standards it will apply in determining whether hearsay evidence is admissible. Moreover, in this first trial before the International Tribunal, an analysis of the Rules will further the ever-present goal of transparency of the proceedings.

15. The Trial Chamber is bound by the Rules, which implicitly require that reliability be a component of admissibility. That is, if evidence offered is unreliable, it certainly would not have probative value and would be excluded under Sub-rule 89(C). Therefore, even without a specific Rule precluding the admission of hearsay, the Trial Chamber may exclude evidence that lacks probative value because it is unreliable. Thus, the focus in determining whether evidence is probative within the meaning of Sub-rule 89(C) should be at a minimum that the evidence is reliable'.

16. In evaluating the probative value of hearsay evidence, the Trial Chamber is compelled to pay special attention to indicia of its reliability. In reaching this determination, the Trial Chamber may consider whether the statement is voluntary, truthful, and trustworthy, as appropriate.

17. The Defence, however, argues that the Trial Chamber should exclude hearsay evidence implicating the accused in one of the crimes charged unless it finds that its probative value substantially outweighs its prejudicial effect. The Trial Chamber is asked to balance hearsay evidence with the possible prejudicial effect on the Defence before ruling on its admissibility. Further, the Defence would require that the Trial Chamber rule on the admission of such evidence without actually hearing its content. This procedure, while possibly appropriate if trials before the International Tribunal were conducted before a jury, is not warranted for the

Rule 95, while concerned with the methods by which evidence is obtained, also allows for its exclusion if it is unreliable.

trials are conducted by Judges tho are able, by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight. Thereafter, they may make a determination as to the relevancy and the probative value of the evidence.

18. Moreover, Sub-rule 8 9(D) provides further protection against prejudice to the Defence, for if evidence has been admitted as relevant and having probative value, it may later be excluded. Pursuant to this Sub-rule, the trial Judges have the opportunity to consider the evidence, place it in the context of the trial, and then exclude it if it is substantially outweighed by the need to ensure a fair trial.

19. Accordingly, in deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability. In doing so, the Trial Chamber will hear both the circumstances under which the evidence arose as well as the content of the statement. The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognised by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. In bench trials before the International Tribunal, this is the most efficient and fair method to determine the admissibility of out-of-court statements.

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III. DISPOSITION

For the foregoing reasons, THE TRIAL CHAMBER, being seized of the Motion filed by the Defence and

PURSUANT TO RULE 54, BY MAJORITY DECISION HEREBY DENIES THE MOTION.

Done in English and French, the English text being authoritative.

Kirk McDonald

Presiding Judge

Judge Stephen appends a Separate Opinion to this Decision.

Dated this fifth of August 1996

At The Hague

The Netherlands

[of the Tribunal]

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