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SPECIAL COURT FOR SIERRA LEONE

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☐ **Prosecution Counsel:**

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**CMS1 FORM**

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SCSL-04-14-T
(13206-13227)

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**SPECIAL COURT FOR SIERRA LEONE**

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Hon. Justice Pierre Boutet, Presiding Judge
Hon. Justice Benjamin Mutanga Itoe
Hon. Justice Bankole Thompson

Registrar: Robin Vincent

Date filed: 4th July 2005

**THE PROSECUTOR**

**Against**

**SAMUEL HINGA NORMAN**

**MOININA FOFANA**

**ALLIEU KONDEWA**

(Case No. SCSL-2004-14-T)

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# PROSECUTION'S REPLY TO JOINT DEFENCE OBJECTIONS TO CONSEQUENTIAL REQUEST TO ADMIT INTO EVIDENCE CERTAIN DOCUMENTS PURSUANT TO RULE 92 BIS AND 89 (C)

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## I. PROCEDURAL BACKGROUND

1. On 24 June 2005 the Prosecution filed a Consequential Request to Admit into Evidence Certain Documents Pursuant to Rule 92 *bis* and 89(C) ("**Prosecution's Request**"). The Defence filed a joint response on 29 June 2005 (the "**Defence Response**"). The Prosecution files this reply in response to the general objections raised by the Defence.

## II. INTRODUCTION

2. The Defence objects to nearly all the proposed document being tendered under Rule 92 *bis*. The Prosecution submits that the purpose of 92 *bis* is to provide, as the heading indicates, "an alternative proof of facts."
3. This tribunal has its own particular set of Rules of Procedure and Evidence (the "**Rules**"), the purpose of which is to ensure that the tribunal receives before it the optimum amount of evidence from which to draw its considered judgments. Although the proceedings are generally adversarial in nature that does not mean the rules of evidence are to be applied in a restrictive manner. Such an approach would be contrary to the spirit of the Rules and indeed, the approach adopted by this court. The court should, in accordance with Sub-rule 89(B), apply rules "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".[1]

## II ARGUMENT

4. The Prosecution does not seek to dispense with the traditional preference for oral testimony, as suggested in the Defence Response. The Prosecution seeks to apply Rule 92 *bis* for the purpose that it was intended, and in accordance with the general principle of admissibility of Rule 89 (C), by which any relevant form of

[1] In accordance with SCSL Rule 89(B), the judges must apply, the rules of evidence which best favour a fair determination of the matters before it and which are consonant with the spirit of the Statute and the general principles of law, where such have not been expressly provided for in the Tribunal's Rules of Procedure and Evidence. See See *Kamuhanda*, ICTR-99-54A-T, Judgment, 22 January 2004 ("*Kamuhanda* Trial Judgement, 22 January 2004"), para. 33. Also see *Blaškić* Hearsay Decision, 26 January 1998, para. 5.

evidence is admissible and subject to evaluation by the tribunal. It is worth repeating the Appeals Chamber's position that "Our Rule 92 *bis* is different to the equivalent Rule in the ICTY and ICTR and deliberately so".[2] The Defence submission is predicated on making Rule 92 *bis* an instrument of exclusion and to limit the discretion of the tribunal to accept and assess evidentiary material.

5. The Defence submission disregards the Appeals Chamber when it stated, in respect of 92(A) *bis,* that it was deliberately construed "to permit the reception of "information"- assertions of fact (but not opinion) made in documents or electronic communications - if such facts are relevant and their reliability is "susceptible of confirmation". [...] [P]roof of reliability is not a condition of admission; all that is required is that information should be *capable* of corroboration in due course."[3]
6. "Susceptible of confirmation in due course" or "capable of corroboration in due course" means at the end of the trial, upon a review of all the evidence[4] and not at the end of Prosecution's case as the Defence submission incorrectly contends[5]. It may well be that during the Defence case, in either examination or cross-examination, further material is elicited by which the reliability of the documents is confirmed. In any event a significant amount of the material raised in the documents has been the subject of oral testimony; for example, the military conduct of the Kamajors, the attacks on Police officer and civilians, the command structure of the CDF.
7. In the *Sesay et al* case, Trial Chamber I cited an appeals decision which stated, "[...]while the 'probative value of particular items in isolation may be minimal, the very fact that they have some relevance means they must be available' for the consideration of the Chamber'. In other words, individual pieces of evidence that

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[2] *Prosecutor v. Norman et al*, SCSL-04-14-T, Appeals Chamber, "Fofana-Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" (hereinafter "**Fofana-Appeal Decision on Judicial Notice**"), 16 May 2005 (Majority Decision ) para. 26 and (Separate Opinion of Justice Robertson) para. 13.

[3] Fofana-Appeal Decision on Judicial Notice, 16 May 2005 (Majority Decision ) paras. 26, 27 and (Separate Opinion of Justice Robertson) paras. 13, 14.

[4] Fofana-Appeal Decision on Judicial Notice, 16 May 2005, Majority Decision ) para. 27 (Separate Opinion of Justice Robertson) para. 14.

[5] Defence Response para. 10.

at first appear to have little probative value may later be of greater probative value when assessed in conjunction with all of the other evidence before the Court".[6] The tribunal will be called upon to make that final determination after all the evidence in the trial has been submitted.

8. The Defence suggests that Rule 92 *bis*, despite acknowledging that the Rule is intended to streamline procedures[7], is only to be used for "information of a testimonial nature which can be linked to a particular source".[8] In support of this proposition the Defence stated that "no trial chamber has accepted any evidence other than witness statements, trial transcripts, and exhibits *previously admitted* – in other words, evidence whose reliability was subject to corroboration."[9] [emphasis added]

9. First, the Prosecution submits that such an assertion is in itself contradictory, since documents "previously admitted" would not require a second admission into evidence via Rule 92 *bis*. Secondly, the Prosecution submits that such an assertion is erroneous and draws the Court's attention to the *Kordic* case, for example, where a large number of exhibits were received into evidence at the end of Prosecution's case. As stated in that case, under the heading 'Evidentiary issues - Exhibits generally':

> [...] at the close of the presentation of its case-in-chief, the Prosecution submitted to the Trial Chamber a large volume of exhibits (15 binders, with approximately 50 documents in each) that had not been tendered through witnesses but which the Prosecution still sought to have admitted ("the outstanding exhibits'). The Trial Chamber examined the documents tendered and, after hearing the parties, admitted most but not all of them (9 binders), subject to an evaluation of the weight to be attributed to such material. A similar procedure was followed at the end of the Defence cases. The Prosecution also submitted five binders of exhibits relating to the issue of international armed conflict in the region, of which approximately half were admitted.[10]

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[6] *Prosecution v Sesay et al*, "Ruling on Gbao Application to Exclude the Evidence of Prosecution Witness Mr Koker", 23 May 2005, para. 9.
[7] Defence Response para. 18.
[8] Defence Response para 17.
[9] *Id.*
[10] *Prosecutor v Kordic*, Judgement, (Annex IV: Procedural History) 26 February 2001 para 27.

10. It can be observed from the above quotation that the procedure requested by the Prosecution is not unusual, nor should it artificially be confined to 'testamentary evidence'. The tendering of such exhibits can be done at any time, including the close of the prosecution case-in-chief. Such an approach is consistent with the extensive admissibility of evidence and, indeed, the practice in the *ad hoc* tribunals.
11. Material can be adduced outside the scope of the indictment, for example the CDF calendar for the year 2001, if it assists the Court in arriving at a better understanding of the circumstances in which the alleged offences were committed. The calendar, for example, indicates the positions various persons held in the CDF; that issue has already been the subject of oral testimony.
12. The defence stated that 'to the extent the proposed evidence is not of a testimonial nature with an identifiable source, it is inadmissible under Rule 92bis'[11]. In support of that proposition the Defence cited a decision in the *Muvunyi* case, which dealt with the admission of a transcript of an expert witness's testimony, subject to cross-examination of the expert witness. Clearly, the approach to expert witnesses is different from the matter under consideration and it is wrong to suggest that the process in regards to experts is the same as to be adopted under Rule 92 bis.
13. Indeed, the Defence acknowledges that the Appeals Chamber anticipated the tendering of documents which did not fall under the category of evidence of a testimonial nature[12]. The Prosecution submits that the Defence proposal of almost total rejection of the subject documents, including for example UN Security Council documents, would defeat the purpose of Rule 92 *bis*, and deny the court useful information. An international criminal tribunal is in a different position from a national court and needs to inform itself with background information.
14. Contrary to the Defence proposition, "Rule 92 *bis* permits facts that are not beyond dispute to be presented to the court in a written or visual form that will

[11] Defence Response, para 20.
[12] Defence Response, footnote 32.

require evaluation in due course"[13]. Reliance is placed upon the tribunal to be able to deal with the information before it; the process is not one by which evidence presented to the Court is artificially filtered by restrictive procedures.

15. The defence places reliance on Rule 92 *bis* as it relates to the ICTY/ICTR. The rules of those tribunals can be distinguished from our Rules as they enumerate a long list of conditions for admissibility. Those conditions have been expressly and intentionally removed from our Rule 92 *bis*. The Defence suggestion that evidence that goes to the acts of the accused, or that is related to command responsibility or joint criminal enterprise, should not be admitted as it creates a danger of prejudice to the defendants has no foundation. That consideration was not maintained under Rule 92 *bis* of our Rules. Further, "[A]s this Chamber has already emphasized, evidence is not prejudicial merely because it is incriminating."[14]

16. The Defence opposes, amongst other reasons, the admission of the third bundle of documents headed "Rule 92bis and 89(C) submission of certain documents for admission from exhibits list not otherwise tendered at trial", alleging that the Prosecution has failed to comply with Rule 66. In putting forward their submissions, the Defence is confusing disclosure with notice. Under Rule 66 the Prosecution is required to disclose, but it is not required to flag what evidence it is disclosing for the purposes of use pursuant to Rule 92 *bis*. Notice is only required at a latter stage, pursuant to Rule 92*bis* (C), and it is a notice of only 10 days to the opposing party. The Prosecution highlights that the documents subject to the application have all been disclosed in April 2004[15], more than a year ago. The

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[13] Fofana-Appeal Decision on Judicial Notice, (Majority Decision) para 27. For example "A party which fails in an application to have a fact judicially noticed under 94(A) may nonetheless be able to introduce into evidence under Rule 92 *bis* the sources upon which it has relied under 92 *bis* and at the end of the trial; the court may well conclude that the fact has been proved beyond reasonable doubt. The weight and reliability of such 'information' admitted under Rule 92 *bis* will have to be assessed in the light of all the evidence in the case."

[14] *Prosecution v Sesay et al*, "Ruling on Gbao Application to Exclude the Evidence of Prosecution Witness Mr Koker", 23 May 2005, para. 8.

[15] Prosecutor v. Norman et al, "Materials Filed Pursuant to Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial of 1 April 2004", 26 April 2004.

Defence has certainly been in a position to read the documents and respond in a comprehensive manner to the Prosecution's application.

## IV CONCLUSION

17. The Prosecution submission is that the subject material is relevant and will assist the Court in its deliberation; Rule 92*bis* facilitates the work of the Court by promoting an inclusionary approach to evidence.
18. The Prosecution position is encapsulated by the words of Geoffrey Nice QC and Philippe Vallieres-Roland, "In many modern conflicts, there is plenty of material available to be assessed in conjunction with the evidence of a chosen sample of live witnesses. Such material may include reports from respected NGO's, other UN agencies, international monitors, respected television broadcasters etc. When judges decline to rely on such material, preferring to depend *only* on live evidence from 'crime base' witnesses giving evidence in the courtroom, this may drive them to draw wide-ranging conclusions from insufficient evidence. This may threaten to defeat their mandate to establish the truth about the particular crimes and 'to establish incredible events with credible evidence', in the words of Justice Jackson." [16]
19. The Prosecution seeks that its Request be granted and the Defence objections rejected.

Done in Freetown this 4th July 2005.

Luc Côté

James C. Johnson

Kevin Tavener

[16] Geoffrey Nice and Philippe Vallieres-Roland Procedural Innovations in War Crimes Trials, Journal if International Criminal Justice, 3 (2005) 354-380, at page 359.

# PROSECUTION'S INDEX OF AUTHORITHIES

1. *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, Judgment, 22 January 2004. http://www.ictr.org/ENGLISH/cases/Kamuhanda/judgement/220104.htm

2. *Prosecutor v Kordic*, IT-95-14-2, Judgement, (Annex IV: Procedural History) 26 February 2001. http://www.un.org/icty/kordic/trialc/judgement/index.htm

3. *Prosecution v Sesay et al*, "Ruling on Gbao Application to Exclude the Evidence of Prosecution Witness Mr Koker", 23 May 2005.

4. Nice, Geoffrey and Vallieres-Roland, Philippe, Procedural Innovations in War Crimes Trials, Journal if International Criminal Justice, 3 (2005) 354-380.

IN THE TRIAL CHAMBER

**Before:**
**Judge Richard May, Presiding**
**Judge Mohamed Bennouna**
**Judge Patrick Robinson**

**Registrar:**
**Mr. Hans Holthuis**

**Date: 26 February 2001**

**PROSECUTOR**

**v.**

**DARIO KORDIC**

**&**

**MARIO CERKEZ**

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# JUDGEMENT

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The Office of the Prosecutor:

**Mr. Geoffrey Nice, Q.C.**
**Mr. Patrick Lopez-Terres**
**Mr. Kenneth R. Scott**
**Ms. Susan Somers**
**Mr. Fabricio Guariglia**

Counsel for the Accused:

**Mr. Mitko Naumovski, Mr. Turner T. Smith, Jr., Mr. Stephen M. Sayers, Mr. Robert Stein and Mr. Christopher G. Browning, Jr., for Dario Kordic**
**Mr. Bozidar Kovacic and Mr. Goran Mikulicic, for Mario Cerkez**

## PART ONE: INTRODUCTION

# ANNEX IV: PROCEDURAL HISTORY

## D. Evidentiary Issues

### 1. Exhibits generally

27. Numerous evidentiary and procedural issues arose during the trial and the Trial Chamber dealt with more than 150 applications of various types and issued more than 30 decisions on matters of substance. The magnitude of the evidence in this case gave rise to repeated challenges and complaints as to late production of material . More than 4,500 exhibits were admitted into evidence and many others excluded , for a variety of reasons. In addition to submitting two binders of key exhibits at the commencement of the case ("core documents"), many of which were agreed by the Defence (subject to translation, legibility etc.), at the close of the presentation of its case-in-chief, the Prosecution submitted to the Trial Chamber a large volume of exhibits (15 binders, with approximately 50 documents in each) that had not been tendered through witnesses but which the Prosecution still sought to have admitted ("the outstanding exhibits"). The Trial Chamber examined the documents tendered and, after hearing the parties, admitted most but not all of them (9 binders), subject to an evaluation of the weight to be attributed to such material. A similar procedure was followed at the close of the Defence cases. The Prosecution also submitted five binders of exhibits relating to the issue of an international armed conflict in the region, of which approximately half were admitted.


International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

**Before:**
Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

**Registrar:** Adama Dieng

**Date:** 22 January 2004

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**The PROSECUTOR**
**v.**
**Jean de Dieu KAMUHANDA**

***Case No. ICTR-95-54A-T***

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PART I - INTRODUCTION

A. The Tribunal and its Jurisdiction

1. This Judgment in the case of The Prosecutor v. Jean de Dieu Kamuhanda is rendered by Trial Chamber II ("Trial Chamber" or "Chamber") of the International Criminal Tribunal for Rwanda ("Tribunal"), composed of Judge William H. Sekule, presiding, Judge Winston C. Matanzima Maqutu, and Judge Arlette Ramaroson.

2. The Tribunal was established by the United Nations Security Council after the Council considered official United Nations reports indicating that genocide and widespread, systematic, and flagrant violations of international humanitarian law had been committed in Rwanda. The Security Council determined that this situation constituted a threat to international peace and security; determined to put an end to such crimes and to bring to justice the persons responsible for them; and expressed the conviction that the prosecution of such persons would contribute to the process of national reconciliation and to the restoration and maintenance of peace. Consequently, on 8 November 1994, the Security Council, acting under Chapter VII of the United Nations Charter, adopted Resolution 955 establishing the Tribunal.

3. The Tribunal is governed by the Statute, annexed to Resolution 955 ("Statute"), and by its Rules of Procedure and Evidence ("Rules").

4. Pursuant to the Statute, the Tribunal has the authority to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states. Under Article 1 of the Statute, the Tribunal's temporal jurisdiction is limited to acts committed between 1 January 1994 and 31 December 1994. Articles 2, 3, and 4 of the Statute provide the Tribunal with subject-matter jurisdiction over genocide, crimes against humanity, and war crimes arising from serious violations of Article 3 Common to the Geneva Conventions ("Common Article 3") and Additional Protocol II thereto. The provisions of Articles 2, 3, and 4 are set out below in Part IV.

The Accused

5. The Indictment alleges that Jean de Dieu Kamuhanda (the "Accused") was born on 3 March 1953 in Gikomero commune, Kigali-Rural préfecture, in Rwanda.

6. The Defence admitted the following facts:

Jean de Dieu Kamuhanda was born on 3 March 1953 in Gikomero commune, Kigali-Rural préfecture, Rwanda.

In late May 1994, Jean de Dieu Kamuhanda held the office of Minister of Higher Education and Scientific Research in the Interim Government, replacing Dr. Daniel Nbangura.

Jean de Dieu Kamuhanda held the office until mid-July 1994.

In his capacity as Minister of Higher Education, Jean de Dieu Kamuhanda was responsible for the articulation and the implementation of the government policy concerning post-secondary school education and scientific research in Rwanda for the Interim Government.

B. Procedural Background

1. Pre-Trial Phase

7. On 1 October 1999, Judge N. Pillay reviewed and confirmed an Indictment dated 27 September 1999 against Jean de Dieu Kamuhanda and Augustin Ngirabatware and issued an Order for Non-Disclosure of the Indictment. On the same date the Tribunal issued a Request for Arrest and Transfer as well as a Warrant of Arrest and Order for Transfer and Detention of the Accused pursuant to the Prosecutor's request.

8. The Accused was arrested on 26 November 1999 in France and was transferred from France to the seat of the Tribunal in Arusha on 7 March 2000.

9. At his Initial Appearance, on 10 March 2000, the Chamber found that the Accused was unprepared to enter a plea, considering an issue he raised about a manner in which the Indictment had been redacted. Consequently, the Tribunal granted his request for another copy of the Indictment redacted differently. Accordingly, the Accused's initial appearance was re-scheduled to 24 March 2000, before Judge Y.

Ostrovsky, at which time the Accused pleaded not guilty to all nine counts alleged in the Indictment.
10. On 7 November 2000, Trial Chamber II, composed of Judge L. Kama, presiding, Judge W. H. Sekule and Judge M. Güney, granted the Defence's motion for severance and separate trial and ordered the Prosecutor to file a separate Indictment pertaining exclusively to Jean De Dieu Kamuhanda, bearing the Case Number 99-54A. The separate Indictment was filed on 15 November 2000. The Trial Chamber, did not consider this separate Indictment to be an amendment of the original Indictment; therefore no new initial appearance of the Accused was required.
11. On 28 December 2000, the Defence notified the Prosecution of its intention to provide alibi evidence with respect to allegations against the Accused. Pursuant to Rule 67(A)(ii)(a), the Defence filed notice of alibi on 31 August 2001. On 8 April 2002 the Trial Chamber granted a Defence Motion to Correct a Material Error in the Notice of Alibi.
2. The Indictment of 15 November 2000
12. There are nine counts in the Indictment, charging Jean De Dieu Kamuhanda with genocide, crimes against humanity, and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II. The Indictment alleges that these crimes were committed between 1 January and 31 December 1994 in Rwanda where the Tutsi, the Hutu and the Twa were identified as racial or ethnic groups. The Indictment asserts that during this period, widespread or systematic attacks were directed against the civilian population on political, ethnic or racial grounds, and that a state of non-international armed conflict existed in Rwanda.
13. The Indictment alleges that before the events of 1994, the Accused was the Director of Higher Education and Scientific Research, and then Counsellor to President Sindikubwabo until late May 1994.
14. The Indictment alleges that in late May 1994, the Accused held the office of Minister of Higher Education and Scientific Research in the Interim Government. The Indictment further asserts that in his capacity as Minister, the Accused attended Cabinet meetings and participated in formulating the policies adopted by the Interim Government, and that he neither publicly disavowed these policies nor did he resign. The Indictment also asserts that in his capacity as Minister, the Accused exercised authority and control over all the institutions and staff members under his ministry and that he failed in his duty to ensure the security of Rwandan citizens.
15. The Indictment alleges that from late 1990 until July 1994, the Accused conspired with others to work out a plan with the intent to exterminate the civilian Tutsi population and to eliminate members of the opposition, by, amongst others things, recourse to hatred and ethnic violence, the training of and the distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated. The Indictment further alleges that in executing this plan, the Accused and others, organized, ordered and participated in the massacres perpetrated against the Tutsi population and moderate Hutu.
16. The Indictment alleges that from 7 April 1994, massacres of the Tutsi population and murders of numerous political opponents were perpetrated throughout the territory of Rwanda and that these crimes were carried out by militiamen, military personnel, and gendarmes on the orders and directives or with the knowledge of authorities, including the Accused.
17. The Indictment alleges that the Accused and others knew or had reason to know that their subordinates had committed or were preparing to commit crimes, and failed to prevent those crimes from being committed or to punish the perpetrators thereof.
18. The Indictment alleges that the Accused was an influential member of the MRND in Kigali-Rural. It is also stated that the Accused supervised killings during the month of April 1994 in the area of Gikomero commune, Kigali-Rural préfecture, where he had family ties. The Indictment further asserts that the Accused personally led attacks of soldiers and Interahamwe against Tutsi refugees in Kigali-Rural préfecture, notably on or about 12 April 1994, at the Parish Church and adjoining school in Gikomero, where several thousand persons were killed. During the attack on the school in Gikomero the militia also selected women from among the refugees, carried them away and raped them before killing them.
19. The Indictment alleges that on several occasions the Accused personally distributed firearms, grenades, and machetes to civilian militia in Kigali-Rural for the purpose of "killing all the Tutsi and

fighting the [RPF]".
20. For his alleged involvement in the acts described in the Indictment, the Accused is charged with conspiracy to commit genocide (Count 1); genocide (Count 2) or, alternatively, complicity in genocide (Count 3); murder as a crime against humanity (Count 4), extermination as a crime against humanity (Count 5), rape as a crime against humanity (Count 6), and other inhumane acts of crime against humanity (Count 7). The Accused is also charged with the war crimes of serious violations of Common Article 3 and Additional Protocol II: for outrages upon personal dignity (Count 8) and killing and causing violence (Count 9). For all the Counts, the Accused is charged cumulatively with all forms of personal responsibility pursuant to Article 6(1) and with superior responsibility pursuant to Article 6(3) of the Statute.
21. On 20 August 2002, following the end of the case for the Prosecution, the Trial Chamber partly granted a Defence motion, under Rule 98, for partial acquittal, and entered a Judgment of Acquittal in respect of Count 1 of the Indictment: conspiracy to commit genocide. The Chamber denied the Motion to enter a Judgment of Acquittal with respect to Count 6: crimes against humanity—rape.
3. Trial Phase

22. The Trial Chamber ordered protective measures for both Defence and Prosecution Witnesses. These included the use of pseudonyms, the non-disclosure of the identity of Witnesses, and the disclosure to the opposing party of identifying information before 21 days of a Witness' testimony at trial. Following a Defence Motion, the Trial Chamber requested the cooperation of certain States and the United Nations High Commissioner for Refugees in order to facilitate the execution and enforcement of the Chamber's order for protective measures for Defence Witnesses.
23. On 22 March 2001, a Pre-Trial Conference was held, and the trial was scheduled to start on 17 April 2001. The Prosecution filed its Pre-Trial Brief on 30 March 2001.
24. On 17 April 2001, the trial began before Trial Chamber II, then composed of Judge L. Kama, presiding, Judge W. H. Sekule and Judge M. Güney. The Prosecution presented its opening statement, and the first Prosecution Witness was heard. On 18 April 2001, the trial was suspended until 3 September 2001.
25. On 3 September 2001, following the death of Judge Kama and the assignment of Judge M. Güney to the Appeals Chamber, the President's Order pursuant to Rule 15bis(C) dated 20 August 2001 was read out in court, inviting the Trial Chamber to make a determination as to the rehearing or the continuation of this part-heard case. The Defence requested a trial de novo, pursuant to Rule15(E), and the Prosecution did not object. The Trial Chamber, composed of Judge W. H. Sekule, presiding, Judge W. C. M. Maqutu and Judge Ramaroson, granted the Defence request, and the trial re-started with a hearing of the Parties' opening statements and the testimonies of three Prosecution Witnesses. This trial session was adjourned on 25 September 2001, ending the first session of the Prosecution case. The Prosecution case was heard during two further trial sessions, from 28 January 2002 until 19 February 2002, and from 6 May 2002 until 14 May 2002. The Prosecution closed its case after having called 28 Witnesses and introduced 53 exhibits.
26. A Pre-Defence Conference and a Status-Conference were held on 15 May 2002. The Defence filed its Pre-trial brief on 25 July 2002.
27. The Defence case was heard during three sessions: from 19 August 2002 until 12 September 2002, from 13 January 2003 until 30 April 2003 and from 5 May 2003 until 15 May 2003. A total of 36 Witnesses were called by the Defence, including the Accused, who testified first, and 88 exhibits were introduced. On 15 May 2003 the Trial Chamber adjourned the proceedings.
28. On 13 May 2003, the Trial Chamber denied a Motion for Leave to Call Rebuttal Evidence filed by the Prosecution on 14 April 2003, pursuant to Rule 85(A)(ii) of the Rules. On 15 May 2003, the Chamber issued a Scheduling Order for the filing of the Closing Briefs and the Closing Arguments of the Parties.
29. On 22 May 2003, the Chamber granted a Defence motion and admitted into evidence two written statement of a deceased Witness.

30. The Prosecution and the Defence submitted their Closing Briefs on 2 July 2003 and 13 August 2003, respectively. Closing Statements were heard on 27 and 28 August 2003, and thereafter Judge W. H. Sekule, the Presiding Judge, declared the trial hearing closed, pursuant to Rule 87(A).

C. Evidentiary Matters

31. The Chamber will, in this Part of the Judgment, address general evidentiary matters of concern that arose during the course of the trial, Witness protection issues, and some general principles of evidence evaluation, including the impact of trauma on the testimony of Witnesses, false testimony, the use of prior Witness statements, and problems of interpretation from Kinyarwanda into French and English.

32. The Chamber has considered the charges against Jean de Dieu Kamuhanda on the basis of testimonies and exhibits introduced by the Parties to prove or disprove allegations made in the Indictment.

1. General Principles of the Assessment of Evidence

33. The Chamber notes that, under Rule 89(A) of the Rules, it is not bound by any national rules of evidence. The Chamber in this case has therefore applied, in accordance with Rule 89(B), the rules of evidence, which in its view, best favour a fair determination of the matters before it and which are consonant with the spirit of the Statute and the general principles of law, where such have not been expressly provided for in the Tribunal's Rules of Procedure and Evidence.

2. Credibility

34. The Chamber notes that many of the Witnesses who have testified before it have seen and experienced atrocities. They, their relatives, or their friends have, in many instances, been the victims of such atrocities. The Chamber notes that recounting and revisiting such painful experiences may affect the Witness's ability to recount the relevant events fully or precisely in a judicial context. The Chamber also notes that some of the Witnesses who testified before it may have suffered, and may continue to suffer stress-related disorders.

35. The Chamber recognises, in addition, the time that had elapsed between the time of the events in question and the testimonies of the Witnesses.

36. In assessing the credibility of the Witnesses, the Chamber is mindful of the considerations which motivated the following judicial pronouncements. We begin with the observations of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the Kupreskic case saying:

[...] It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence. The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the Witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.

37. In that pronouncement, the ICTY Appeals Chamber was reiterating its opinion in its earlier judgment in the Delalic Case. There, it had said as follows:

As is clear from the above discussion, the other matters raised by Delic as undermining the credibility of the Witnesses are not, in the view of the Appeals Chamber, of such a character as would require a reasonable Trial Chamber to reject their evidence. The Appeals Chamber is satisfied that on the evidence before the Trial Chamber it was open to accept what it described as the "fundamental features" of the testimony.

[...]

Delic also refers to certain inconsistencies in the victim's testimony, which he states illustrate that it was unreliable. The Appeals Chamber notes that as an introduction to its consideration of the factual and legal findings, the Trial Chamber specifically discussed the nature of the evidence before it. It found that often the testimony of Witnesses who appear before it, consists of a "recounting of horrific acts" and that often "recollection and articulation of such traumatic events is likely to invoke strong psychological

and emotional reactions [...]. This may impair the ability of such Witnesses to express themselves clearly or present a full account of their experiences in a judicial context". In addition, it recognised the time which had lapsed since the events in question took place and the "difficulties in recollecting precise details several years after the fact, and the near impossibility of being able to recount them in exactly the same detail and manner on every occasion [...]." The Trial Chamber further noted that inconsistency is a relevant factor "in judging weight but need not be, of [itself], a basis to find the whole of a Witness' testimony unreliable".

Accordingly, it acknowledged, as it was entitled to do, that the fact that a Witness may forget or mix up small details is often as a result of trauma suffered and does not necessarily impugn his or her evidence given in relation to the central facts relating to the crime. With regard to these counts, the Trial Chamber, after seeing the victim, hearing her testimony (and that of the other Witnesses) and observing her under cross-examination chose to accept her testimony as reliable. Clearly it did so bearing in mind its overall evaluation of the nature of the testimony being heard. Although the Trial Chamber made no reference in its findings to the alleged inconsistencies in the victim's testimony, which had been pointed out by Delic, it may nevertheless be assumed that it regarded them as immaterial to determining the primary question of Delic's perpetration of the rapes. The Appeals Chamber can see no reason to find that in doing so it erred.

The Trial Chamber is not obliged in its Judgment to recount and justify its findings in relation to every submission made during trial. It was within its discretion to evaluate the inconsistencies highlighted and to consider whether the Witness, when the testimony is taken as a whole, was reliable and whether the evidence was credible. Small inconsistencies cannot suffice to render the whole testimony unreliable. Delic has failed to show that the Trial Chamber erred in disregarding the alleged inconsistencies in its overall evaluation of the evidence as being compelling and credible, and in accepting the totality of the evidence as being sufficient to enter a finding of guilt beyond a reasonable doubt on these grounds.

3. Corroboration

38. As a general principle, the Trial Chamber has weighed all the evidence presented in this case and, accordingly, has attached—or declined to attach—probative value to the testimony of each Witness and exhibit, according to its relevance and credibility. The Trial Chamber recalls that it is not bound by any national rules of evidence and, has been guided by the foregoing principles recalled above , with a view to a fair determination of the issues before it. In particular, the Trial Chamber notes the finding in the Tadic Appeals Judgment that corroboration of evidence is not a customary rule of international law and as such should not be ordinarily required by the International Tribunal.

39. The Chamber notes further the decision in the Aleksovski Appeal Judgment that whether a Trial Chamber will rely on single Witness testimony as proof of a material fact, will depend on various factors that have to be assessed in the circumstances of each case. It may be that a Trial Chamber would require the testimony of a Witness to be corroborated, but according to the established practice of this Tribunal and the ICTY, that is clearly not a requirement.

40. In the Musema case, the Trial Chamber affirmed that it may rule on the basis of a single testimony, if in its opinion the testimony is relevant and credible. It further stated that:

(...) it is proper to infer that the ability of the Chamber to rule on the basis of testimonies and other evidence is not bound by any rule of corroboration, but rather on the Chamber's own assessment of the probative value of the evidence before it.

The Chamber may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which are corroborated: the corroboration of testimonies, even by many Witnesses, does not establish absolutely the credibility of those testimonies.

41. The Appeals Chamber in the Musema case held that these statements correctly reflect the position of the law regarding the trial Chamber's discretion in assessing testimonies and evidence before it.

4. Hearsay Evidence

42. The Chamber observes that Rule 89(c) of the Rules provides that "a Chamber may admit any relevant evidence which it deems to have probative value". The Chamber notes that this Rule 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.

D. Witness Protection Issues

43. In analysing evidence received during closed sessions, the Chamber has been mindful of the need to avoid unveiling identifying particulars of protected Witnesses so as to prevent disclosure of their identities to the press or the public. At the same time, the Chamber wishes to provide in the judgment significant detail to assist in an understanding of its reasoning. In view of these concerns, when referring to evidence received in closed sessions in this Judgment, the Chamber has used language designed not to reveal protected information yet specific enough to convey its reasoning.

# Procedural Innovations in War Crimes Trials

Geoffrey Nice QC and Philippe Vallières-Roland*

## Abstract

*International Criminal Tribunals created by the UN Security Council have been criticized because trials have been too slow. This article examines a number of procedural innovations attempted during the* Kordić *and* Milošević *trials, which were intended to remedy this defect. It is argued in this paper that common law is imperfect generally, and probably ill-suited for war crimes trials. The new hybrid tribunals and the International Criminal Court will no doubt draw from the jurisprudence and practice of the International Tribunals. The authors suggest that they will have to, up to a degree, depart from the overly conservative procedural approaches adopted by the International Criminal Tribunal for the Former Yugoslavia if they are to remain credible in the eyes of the international community.*

## 1. Introduction

The achievements of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have contributed to paving the way to the creation of the International Criminal Court (ICC) and of hybrid[1] courts, such as the Special Court for

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1 In hybrid courts, local judges and prosecutors cooperate with international judges and prosecutors to try cases based on statute and rules of procedure and evidence broadly similar to those of the ICTR and the ICTY.

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This article will examine the following procedural innovations used in the *Kordić* and *Milošević* trials, all created with the aim of presenting evidence fairly and efficiently: (1) the dossier approach; (2) cross-examination by a party of its own witness; (3) proof of fact other than by oral evidence; (4) the use of electronic tools for the management of evidence; (5) increased reliance on a civil law interpretation of the Statute and the Rules; (6) judicial notice of adjudicated facts; (7) joint hearings; (8) selection of relevant material and efficient ways to proceed at the pre-trial stage.

## 4. Procedural Innovations in *Kordić* and *Milošević*

### *A. The Dossier Approach*[8]

To prove a charge under Art. 5 of the ICTY Statute (on crimes against humanity), the prosecution has to prove not only that crimes took place, but also that those crimes were committed as part of a 'widespread or systematic' attack. It is usually impossible to prove incidents which took place throughout a particular region with a single witness or even a few witnesses. And it is also arguably inappropriate for evidence relating to crimes at a *given* location, where perhaps hundreds of people have been transferred or killed, to be entirely dependent on the performance of a single witness in court. Realizing these difficulties, the prosecution in the *Kordić* trial put forward the idea of the Trial Chamber accepting 'dossiers' of witness statements and other material related to villages named in the indictment.

The problem is how to create a dossier that accurately represents what has happened in a particular incident or geographical area without calling dozens of 'crime-base' witnesses. Arguably, a dossier should contain: (a) autopsy reports; (b) reports by OSCE, UN or other similar international agencies; (c) transcripts of relevant witness testimonies given live in other cases; (d) maps; (e) independent non-governmental organization (NGO) reports (Human Rights Watch, Amnesty International, etc.); (f) photographs; (g) videos taken by reliable news agencies; and possibly (h) witness statements. Such a dossier could be given to the parties at the beginning of the case or a new section of the prosecution's case. The dossier would then be the primary means of establishing the background to a particular incident or geographical area, and give the Judges the means to ask relevant questions to the witnesses and take a more proactive role in the proceedings. Identification of witnesses

8 Trial Chambers have a broad discretion under Rule 89(C). The Rule provides that: 'A Chamber may admit any relevant evidence which it deems to have probative value.' See also Decision on Prosecutor's Appeal on Admissibility of Evidence, *Aleksovski* (IT-95–14/2-AR73.5), 16 February 1995, § 15.

to be called could then be made by the Trial Chamber, pursuant to their powers under Rule 98, following arguments by the defence.[9]

In many modern conflicts, there is plenty of material available to be assessed in conjunction with the evidence of a chosen sample of live witnesses. Such material may include reports from respected international NGOs, other UN agencies, international monitors, respected television broadcasters, etc. When Judges decline to rely on such material, preferring to depend *only* on live evidence from 'crime-base' witnesses giving evidence in the courtroom, this may drive them to draw wide-ranging conclusions from insufficient evidence. This may threaten to defeat their mandate to establish the truth about particular crimes and to 'establish incredible events with credible evidence', in the words of Justice Jackson.[10]

The prosecution argued in *Kordić* and *Milošević* that if the Trial Chamber had a dossier in its possession, it could make better use of the provisions already present in the ICTY Rules, notably the Chamber's ability to ask questions of the witness under Rule 85(B) and its authority to call witnesses as court's evidence under Rule 98.

In *Kordić*, the '*Tulića* dossier' approach was initially received positively by the Trial Chamber.[11] Despite these early encouraging indications, the Trial Chamber in *Kordić*[12] rejected the dossier approach (at least in the way that the prosecution envisaged it). The Appeals Chamber in *Milošević* rejected a similar approach relating to a dossier about the Račak killings incident,

9 This later came to be known as the 'Tulića dossier' approach (hereinafter the 'dossier approach') after the name of the first village for which such a dossier was prepared. The dossier approach was proposed with the aim of grounding allegations on a solid base of facts, mostly proved in writing, which would help the Chamber to set its more specific findings in the proper context.

10 Robert H. Jackson (Chief of Counsel for the USA in the Prosecution of Axis War Criminals), 'Report to the President', 7 June 1945, reprinted in 39 *American Journal of International Law* (Supp. 1945) 178, at 184.

11 Judge Bennouna stated: 'Both the Presiding Judge and myself do not have to wait until the plenary in order to decide, so it is in that specific setting, anything dealing with attacks on villages. This is a procedural proposal which would tend to relate to a number of evidence as to the general background of the indictment, the context, the general context of the indictment. . . . For instance, to have the statements, witness statements, and after hearing the Defence and the prosecution, we would be in a position to decide among ourselves, taking into account the statements and within the frameworks set by those statements, to decide which is the relevant testimony to be heard by the Court, taking as a starting point the statements, but also the investigator's testimony itself. . . . this would make it possible for us to better specify the foundation of this discussion, and we could then move ahead and leave it to you to present the rest of the argument', Procedural discussion, *Kordić & Čerkez* (IT-95–14/2-T), 3 June 1999, transcript page (hereinafter 'T') 3193.

12 Decision on the Prosecution Application to Admit the Tulića Report and Dossier into Evidence, *Kordić & Čerkez* (IT-95–14/2-T), 29 July 1999.

intended as an essential supplement to witnesses who would testify live about the incident.[13]

While the Chambers seem opposed to the summarizing of statements by staff of the Office of the Prosecutor (OTP), they are inclined to admit collections of statements and other evidence prepared by reputable independent international organizations (governmental and non-governmental), such as the OSCE and Human Rights Watch (HRW) that have *not* been prepared for the express purpose of legal proceedings. The Trial Chamber in *Milošević*, for instance, admitted an OSCE report entitled 'Kosovo: As Seen as Told' and a report by HRW on Kosovo entitled 'Under Orders'.[14] The Trial Chamber accepted the OSCE report on the basis that 'it had not been prepared for the purposes of this particular trial, and it had been prepared by a body independent of the parties and thus had a quality of independence'.[15]

However, Judges have proposed various ways in which the idea of a 'dossier' could be acceptable. For instance, Judge Shahabuddeen stated that a 'Trial Chamber could admit only the summary (from the OTP investigator) and exclude the conclusions'.[16] The OTP investigator's conclusions on his summary of the written statements of the absent witnesses had been held

13 In *Milošević*, the prosecution again raised the idea of a dossier for the infamous Račak killings incident (a massacre of Kosovo Albanian civilians in Kosovo in 1999) that would contain, inter alia, a summary of all the statements taken by the OTP during the course of its investigations into the incident. That statement was to be prepared by an OTP investigator. See Decision on Admissibility of Prosecution Investigator's Evidence, *Milošević* (IT-02–54-AR73.2), 30 September 2002. The Račak killings incident is an important but complicated component of the *Milošević* prosecution case. It involves multiple crime scenes and the recognition that combat operations between KLA and Serb forces occurred on the day of the massacre. It was estimated by OTP investigator Barney Kelly, the investigator who specialized in the Račak investigation, that 60 witnesses would be necessary to give a complete picture of what happened in that village on 15 October 1999. That figure was reduced to 30 witnesses following a careful selection allowing minimum evidence for the presentation of an accurate picture of events. The Trial Chamber then effectively compelled us to reduce the number of live witnesses to testify about this incident to five. When asked in the course of evidence in the trial whether he thought this number could be sufficient, Mr Kelly plainly responded that it certainly would not. Thus, the Trial Chamber will make a determination on limited evidence where it could have read a more extensive dossier, requiring *viva voce* evidence from a selected number of witnesses, as they deemed appropriate.

14 The HRW report was published in October 2001 and was the result of interviews with 600 Albanians who had fled Kosovo between 28 March 1999 and December 1999. Fred Abrahams, one of the co-authors of the report, was a witness in the *Milošević* case. Abrahams produced as exhibits 16 reports prepared by HRW on Kosovo since 1990.

15 Procedural Discussion on the Admission of Written Evidence, *Milošević* (IT-02–54-T), 30 May 2002, T5943. We have always argued that the fact that a witness is a member of the prosecution team, or is associated with it, should be going to the weight of the evidence rather than its admissibility.

16 Partial Dissenting Opinion of Judge Shahabuddeen to the Decision on Admissibility of Prosecution Investigator's Evidence, *Milošević*, *supra* note 3, § 8.