395) SCSL-03-01-T
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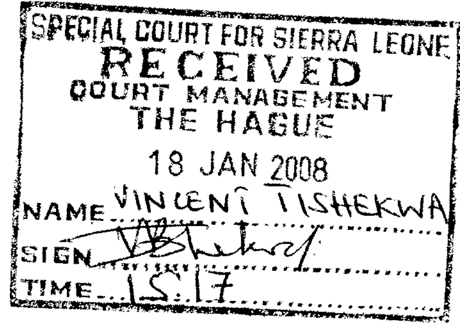
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before:	Justice Teresa Doherty, Presiding Justice Richard Lussick Justice Julia Sebutinde Justice El Hadji Malick Sow, Alternate Judge
Registrar:	Mr. Herman von Hebel
Date filed:	18 January 2008



THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC
REPLY TO DEFENCE RESPONSE TO PROSECUTION MOTION FOR ADMISSION OF PART OF THE PRIOR EVIDENCE OF TF1-362 & TF1-371 PURSUANT TO RULE 92*ter*

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Defence Counsel for Charles Taylor:
Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. On 14 December 2007, the Prosecution filed its "Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92*ter*".[1]

2. The Defence failed to file a timely response to the Motion. However, in the Defence's "Motion for Extension of Time Pursuant to Rule 7*bis* in respect of Two Prosecution Motions: SCSL-03-01-T-372 and SCSL-03-01-T-375",[2] the Defence requested until 14 January 2008 to file a response to the Motion. Notwithstanding this pending request, the Defence filed its response to the Motion on 14 January 2008.[3] On 16 January 2008, the Trial Chamber granted the Defence request and ordered that any reply to the Response be filed within 5 days.[4]

3. The Prosecution, therefore, files this reply pursuant to the aforementioned order and Rule 7(C) of the Rules of Procedures and Evidence ("**Rules**").

4. In the Response, the Defence argue that:

   (i) they are under no obligation to agree to the admission of evidence against its client under Rule 92*ter*;[5]

   (ii) the Prosecution reliance on Rule 92*ter* is excessive;[6] and

   (iii) the limitations on cross-examination are not proper.[7]

II. ARGUMENTS

Agreement of both Parties

5. The plain language of Rule 92*ter* is evident to all parties. However, the point of disagreement between the Prosecution and Defence interpretation of the Rule lies in whether a party needs to show good cause for its objection. A teleological interpretation of the Rule requires such a showing to be made and

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-375, "Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92*ter*", 14 December 2007 ("**Motion**").
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-382, "Motion for Extension of Time Pursuant to Rule 7*bis* in Respect of Two Prosecution Motions: SCSL-03-01-T-372 and SCSL-03-01-T-375", 8 January 2008.
[3] *Prosecutor v. Taylor*, SCSL-03-01-T-391, "Public Defence Response to Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92*ter*", 14 January 2008 ("**Response**").
[4] *Prosecutor v. Taylor*, SCSL-03-01-T-392, "Decision on Motion for Extension of Time Pursuant to Rule 7*bis* in Respect of Two Prosecution Motions: SCSL-03-01-T-372 and SCSL-03-01-T-375", 16 January 2007 *(sic)*.
[5] Response, paras. 8-10.
[6] Response, paras. 11-12.
[7] Response, paras. 13-17.

also prevents a Trial Chamber's discretion from being circumscribed without warrant. Further, contrary to the Defence's argument, requiring a party to show good cause does not oblige the Defence to agree to the admission of evidence but rather simply to justify the failure to agree in order to ensure that proceedings are not unilaterally obstructed.[8]

Excessive reliance in Rule 92ter

6. The concerns regarding the Prosecution's use of Rule 92*bis* and Rule 92*ter* and the Defence claim that the Prosecution is attempting to make the case against the Accused a paper case are unwarranted and overstated. The majority of the Prosecution's linkage witnesses will be called viva voce. The term "excessive" makes the untenable presupposition that there exists some required figure as to how many witnesses must have their evidence–in-chief led *viva voce*.[9]

7. Rules 92*bis* and 92*ter* do not prevent the Defence from confronting the evidence against the Accused through cross-examination of the witness. Rather, Rules 92*bis* and 92*ter* affect the way in which the Prosecution may present its evidence. There is, therefore, no foundation to the claim that the Prosecution are threatening the fair trial rights of the Accused or his right to a public hearing. Such a claim ignores the use made by Rule 92*bis* in other proceedings before the Special Court for Sierra Leone.[10]

8. The Trial Chamber is required under Rule 26*bis* to "ensure that a trial is fair and expeditious". The Prosecution can assist by seeking to make judicious use of the mechanisms in the Rules regarding the various ways in which evidence may be presented. The Defence's assertion that the Prosecution is in some way seeking without due cause to make the trial move faster are, therefore,

[8] Of note is that the equivalent rule at the ICTY (ICTY Rule 92*ter*) does not require the agreement of the parties.

[9] The Prosecution does not believe that drawing comparisons between cases regarding the number of witnesses whose evidence is, at least in part, admitted through rules such as Rules 92*bis* and 92*ter* is appropriate. However, in terms of perspective, it should be noted that at the ICTY in *Prosecutor v. Krajišnik* (IT-00-39 & 40), "the evidence of 105 prosecution witnesses was admitted pursuant to Rule 92*bis*, 16 of whom were required to attend trial for cross-examination" (see "The Pre-trial Process at the ICTY", M. Harmon, *Journal of International Criminal Justice* (May 2007), at p. 379).

[10] See for example *Prosecutor v. Sesay et al.*, SCSL-04-15-T-559, "Decision on the Prosecution Notice under Rule 92*bis* to Admit the Transcripts of Testimony of TF1-334", 23 May 2006 in which the Trial Chamber admitted the prior transcripts and exhibits of TF1-334 which were given in the AFRC trial and allowed the Defence to cross-examine the witness. The Defence did so cross-examine TF1-334 on 5, 6, 7 & 10 July 2006.

ignoring valid prosecutorial considerations such as the most judicially efficient means to present its evidence.[11]

Limitations on cross-examination

9. Limitations on both examination-in-chief and cross-examination are not novel. Such limitations are made in order to ensure the smooth and efficient conduct of proceedings and may, for example, take the form of placing limits on the length of time a party may take to conduct their respect examinations.[12]

10. Restricting the Defence in their cross-examination to relevant questions which are not unduly cumulative to the prior cross examination is simply another mechanism by which judicial efficiency may be achieved. Further, contrary to the Defence's claim, such limitations do not prevent them from cross-examining a witness on a previously examined issue where they wish to use new material borne of their own investigations or to pursue their theory of the case, as by dint of use of such material or theory of this case, the cross-examination would not be unduly cumulative.

III. CONCLUSION

11. For the reasons set out above, the arguments raised by the Defence in the Response are without merit. Accordingly, the Motion should be granted.

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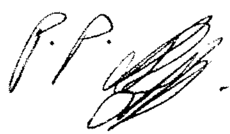
18 January 2008
For the Prosecution



Brenda J. Hollis
Senior Trial Attorney

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[11] See, for example, the direction given by the Trial Chamber in *Prosecutor v. Popović et al.*, IT-05-88-T, "Confidential Order Regarding Prosecution's Estimation as to Length of its Case-In-Chief", 19 January 2007 for the Prosecution to bear in mind the possibility of converting *viva voce* witnesses into Rule 92*ter* witnesses.

[12] See for example *Prosecutor v. Milošović*, IT-98-29/1-T, "Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92*ter*", 22 February 2007, page 4, orders 2 and 3.

List of Authorities

SCSL Cases

Prosecutor v. Taylor, SCSL-03-01-T

Prosecutor v. Taylor, SCSL-03-01-T-375, "Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92*ter*", 14 December 2007

Prosecutor v. Taylor, SCSL-03-01-T-382, "Motion for Extension of Time Pursuant to Rule 7*bis* in Respect of Two Prosecution Motions: SCSL-03-01-T-372 and SCSL-03-01-T-375", 8 January 2008

Prosecutor v. Taylor, SCSL-03-01-T-391, "Public Defence Response to Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92*ter*", 14 January 2008

Prosecutor v. Taylor, SCSL-03-01-T-392, "Decision on Motion for Extension of Time Pursuant to Rule 7*bis* in Respect of Two Prosecution Motions: SCSL-03-01-T-372 and SCSL-03-01-T-375", 16 January 2007 *(sic)*

Prosecutor v. Sesay et al., SCSL-04-15-T

Prosecutor v. Sesay et al., SCSL-04-15-T-559, "Decision on the Prosecution Notice under Rule 92*bis* to Admit the Transcripts of Testimony of TF1-334", 23 May 2006

ICTY Cases

Prosecutor v. Popović et al., IT-05-88-T, "Confidential Order Regarding Prosecution's Estimation as to Length of its Case-In-Chief", 19 January 2007
http://www.un.org/icty/popovic88/trialc/order-e/070119.pdf

Prosecutor v. Milošović, IT-98-29/1-T, "Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92*ter*", 22 February 2007
http://www.un.org/icty/milosevic-d/trialc/decision-e/060209.htm

Journal Articles

"The Pre-trial Process at the ICTY as a Means of Ensuring Expeditious Trials", M. Harmon, *Journal of International Criminal Justice* (May 2007) (copy attached)

List of Authorities

Journal Article:

"The Pre-trial Process at the ICTY as a Means of Ensuring Expeditious Trials", M. Harmon, *Journal of International Criminal Justice* (May 2007)

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and/or crime sites or incidents'.[42] This should not be necessary. The prosecution should take the initiative to concentrate its cases on a handful of representative crime bases.

There is also a core duty incumbent on all us judges to continue to think 'internationally'. We come from diverse domestic jurisdictions with many different methods of running criminal trials, and somehow we have managed to blend these methods together to successfully adjudicate crimes on a scale never attempted or even fathomed in domestic jurisdictions. This is a testament to our vision, our cooperativeness and our empathy. The continued evolution and expansion of international criminal justice demands that we always maintain these three virtues.

42 Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, *Šešelj* (IT-03-67-PT), Trial Chamber, 31 August 2006, at 2. There have been several developments at the Tribunal in relation to Rule 73*bis* since the September 2006 Beijing conference at which I delivered the speech that resulted in this article. In *Šešelj*, for example, the prosecution emphatically declined the Chamber's invitation to reduce the scope of the indictment, contending that the diversity of Šešelj's alleged conduct justified keeping the full indictment. Prosecution's Response to Trial Chamber's 'Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment', *Šešelj* (IT-03-67-PT), 12 September 2006, §§ 3, 28. In response, the Trial Chamber insisted that the scope of the indictment be reduced. The prosecution reluctantly proposed to drop certain counts and not to present evidence on certain crime sites; the Chamber accepted this proposal, and also ordered that evidence relating to a further series of crime sites not be presented. See Decision on the Application of Rule 73*bis*, *Šešelj* (IT-03-67-PT), 8 November 2006. Furthermore, in both the *Perišić* and *Dragomir Milošević* cases, the Trial Chamber also invited the prosecution — again under the newly amended part of Rule 73*bis* — to reduce the scope of the indictment. See Invitation to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, *Perišić* (IT-04-81-PT), 20 November 2006, at 2; Scheduling Order Varying Time-Limits with Regard to the Commencement of Trial and Request to Prosecution to Reduce the Scope of Its Case, *Dragomir Milošević* (IT-98-29/1-PT), 23 November 2006, at 3. The prosecution declined the Invitation, citing policy reasons and invoking the independence of the Prosecutor; but it also noted that, if ordered to reduce the indictment, it would eliminate certain counts, and it suggested which counts could be eliminated. See Prosecution's Response to the Trial Chamber's Invitation to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, *Perišić* (IT-04-81-PT), 4 December 2006; Prosecution's Response to Pre-Trial Chamber's 'Invitation to Prosecution to Reduce the Scope of Its Case', *Dragomir Milošević* (IT-98-29/1-PT), 5 December 2006.

The Pre-trial Process at the ICTY as a Means of Ensuring Expeditious Trials

A Potential Unrealized

Mark B. Harmon*

Abstract

Whilst clarifying that given their complexity international criminal trials cannot be considered unreasonably long, the author maintains that the procedural framework in place at the International Criminal Tribunal for the former Yugoslavia is suitable for ensuring fair and effective proceedings. However, for expediency to be achieved, it is imperative that judges be more actively involved in the pre-trial phase. In particular, the author suggests that pre-trial judges appointed in each case should personally preside over all (or most) preliminary hearings and should then be members of the Trial Chamber that will hear the case.

1. Introduction

Trials of high-level political, military and police accused that are presently ongoing before the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY or 'Tribunal') or trials waiting to commence are cases that allege the commission of significant crimes, committed over considerable periods of time and vast expanses of territory, by members of armies, police forces and paramilitary forces under the direction and control of individuals who held positions of power within state bodies. They are extremely complex cases and are the types of prosecutions (persons and crimes) envisioned by the Security Council when it created the ICTY. They require adequate time to litigate properly.

However, at a time when the Tribunal is most able to realize the aspirations of those who created it, frustration about the length of its trials and impatience with its progress has resulted in efforts to finish the Tribunal's trial work by

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2008 and appellate work by 2010. The consequence of this frustration, 'the completion strategy', is a mixed blessing. On one hand, it causes the Judges and the parties to focus their attention on issues that genuinely will be disputed at trial and it has generated a spate of new rules of procedure and evidence designed to streamline trial proceedings, but on the other hand, application of these new rules, if made on an uninformed and arbitrary basis and in order to meet the deadlines of the completion strategy, risks corroding the positive legacy of the ICTY by making trial proceedings unfair to the parties.

The purpose of this article is to identify and comment upon the provisions of the Tribunal's Rules of Procedure and Evidence (RPE) that can be utilized to streamline trials and to suggest how the current pre-trial process can be made more effective.

2. New Rules Adopted to Make Trials More Expeditious

A number of innovative rules have been adopted by the judges of the Tribunal that provide Trial Chambers with the means by which to shorten the length of trials. It is important to recognize that while the sensible application of many of these Rules will result in less court time being consumed, the efforts required by the parties to perfect admission of evidence under some of the Rules require the expenditure of considerable out of court time and resources. For example, securing a 'declaration', a condition precedent to the admission of a written statement of a witness pursuant to Rule 92*bis*,[1] may involve travelling

1 Rule 92*bis* Admission of Written Statements and Transcripts in Lieu of Oral Testimony (Adopted 1 Dec 2000 and 13 Dec 2000, amended 13 Sep 2006)
(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
(i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:
(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
(b) relates to relevant historical, political or military background;
(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
(d) concerns the impact of crimes upon victims;
(e) relates to issues of the character of the accused or
(f) relates to factors to be taken into account in determining sentence.
(ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:
(a) there is an overriding public interest in the evidence in question being presented orally;
(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

to the former Yugoslavia, along with a Presiding Officer appointed by the Registrar, to meet with the witness. Likewise, reviewing multiple lengthy transcripts of a witness' previous testimonies in order to select relevant portions of them for admission under Rules 92*bis* and 92*ter*[2] requires a substantial investment of time and effort.

A. *Rule 92*bis *(Admission of Written Statements and Transcripts in Lieu of Oral Testimony)*

Rule 92*bis*, particularly with reference to crime base evidence, is a useful Rule that permits the admission of the written statement or transcript of a previous testimony of a witness into evidence in lieu of compelling the witness to attend the trial and present his/her evidence orally, albeit written evidence that goes to the acts and conduct of the accused as charged in the indictment is inadmissible. Upon written application by a party, and after hearing from the other party, a Trial Chamber may admit into evidence the written statement of a witness or the transcript of the previous testimony of a witness and it may require the witness to attend the trial in order to be cross-examined by the opposing party. In the *Krajišnik*[3] case the evidence of 105 Prosecution witnesses was admitted pursuant to Rule 92*bis*, 16 of whom were required to attend trial for cross-examination.

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.
(B) If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and
(i) the declaration is witnessed by:
(a) a person authorized to witness such a declaration in accordance with the law and procedure of a State; or
(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and
(ii) the person witnessing the declaration verifies in writing:
(a) that the person making the statement is the person identified in the said statement;
(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
(d) the date and place of the declaration.
The declaration shall be attached to the written statement presented to the Trial Chamber.
(C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it does so decide, the provisions of Rule 92*ter* shall apply.

2 Likewise, considerable time is required to be expended by a Trial Chamber in reviewing lengthy transcript references for possible admission into evidence.

3 The author was Prosecution counsel in the *Krajišnik* case. The presentation of evidence in this case started on 4 February 2004 and ended on 14 July 2006.

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An interesting interplay between Rule 92*bis* and Rule 94*bis* (Testimony of Expert Witnesses)[4] permitted the Prosecution, in the *Krajišnik* case, to introduce the written evidence of 15 expert witnesses.

However, as mentioned earlier, while Rule 92*bis* is an important provision that can be utilized in reducing the length of court time, compliance with the formal requirement that a declaration be attached to the written statement of a witness before it can be admitted into evidence has proven both costly and time-consuming to implement. As a result, use of this part of the Rule may fall into desuetude.

B. *Rule 92*ter *(Other Admission of Written Statements and Transcripts)*

Rule 92*ter* is a less complicated but more potent variation of the principle of admitting written evidence of a witness because it dispenses with the requirement of formal declaration, required under Rule 92*bis*, and it allows the written evidence to include proof that goes to the acts and conduct of the accused as charged in the indictment.[5] It does so because a condition for the admission of such evidence is that the witness is required to be present in court and is subject to cross-examination by the opposing party and to questions by the Judges. Given its positive features, Rule 92*ter* may be utilized by practitioners with greater frequency in the future. It is interesting to note that even before the adoption of Rule 92*ter*, on 13 September 2006, written evidence under the terms of this new Rule was admitted under the purview of Rule 89(F). In the *Krajišnik* case, the Prosecution introduced the evidence of 38 witnesses pursuant to Rule 89(F). It is worth noting that the provisions of Rule 92*ter* would allow for the admission of an expert's evidence in written form.

C. *Evidence of Unavailable Persons*

Rule 92*quater* is a newly promulgated Rule which allows the admission of written evidence of a person who has subsequently died or can no longer be traced or is incapacitated to the point that his/her evidence cannot be received orally. This Rule may be of particular utility as the passage of time makes such occurrences inevitable.[6]

3. Existing Rules Applied to Speed up Proceedings

A. *Rule 94 (Judicial Notice)*

In efforts to streamline trials, Rule 94, adopted on 11 February 1994 and amended on 10 July 1998, has been resurrected from obscurity and is one of increasing importance.[7] There are two distinct parts of the judicial notice Rule, each of which has different legal consequences. Sub-part (A) of this Rule focuses on judicial notice of 'facts of common knowledge'. What is a fact of 'common knowledge' is a legal question. If the Trial Chamber determines that the fact sought to be admitted under this sub-part of the Rule is a fact of 'common knowledge', the Trial Chamber must take judicial notice of it and, for purposes of trial, the fact is conclusively established. An interesting

4 Rule 94*bis* Testimony of Expert Witnesses (Adopted 10 July 1998)
(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge. (Amended 14 July 2000, amended 1 Dec 2000 and 13 Dec 2000, amended 13 Dec 2001, amended 13 Sept 2006)
(B) Within 30 days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:
(i) it accepts the expert witness statement and/or report; or (Amended 13 Sep 2006)
(ii) it wishes to cross-examine the expert witness and
(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.
(Amended 12 Dec 2002, amended 13 Sept 2006)
(Amended 13 Dec 2001, amended 13 Sept 2006)
(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person. (Amended 13 Dec 2001, amended 13 Sept 2006)

5 Rule 92*ter* Other Admission of Written Statements and Transcripts (Adopted 13 Sept 2006)
(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:
(i) the witness is present in court;
(ii) the witness is available for cross-examination and any questioning by the Judges; and
(iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.
(B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

6 Rule 92*quater* Unavailable Persons (Adopted 13 Sept 2006)
(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92*bis*, if the Trial Chamber:
(i) is satisfied of the person's unavailability as set out above; and
(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.
(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

7 Rule 94 Judicial Notice (Adopted 11 Feb 1994)
(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings. (Amended 10 July 1998).

recent ICTR Appeals Chamber, in *Karemera, Ngirumpatse, and Nzirorera*,[8] took judicial notice of the fact that genocide occurred against the Tutsis in Rwanda in 1994. Although not yet litigated before the ICTY, it would appear that this decision would have relevance to other large scale and notorious events such as the massacre of Bosnian Muslims by Bosnian Serbs in Srebrenica in 1995.

The second part of the Rule deals with judicial notice of facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings. An adjudicated fact is defined as a fact that has been finally adjudicated in proceedings before the Tribunal and not one that is based upon an agreement between the parties in previous proceedings. Facts in a judgment from which no appeal has been taken or facts from proceedings where the appellate proceedings have concluded are considered final for purposes of Rule 94(B). A fact or document that is judicially noticed under this sub-part of the Rule creates a presumption that the fact or document is accurate unless rebutted by the other party at trial. Rule 94(B) is particularly useful in dealing with crime base evidence and in the *Krajišnik* case the Trial Chamber took judicial notice of 620 adjudicated facts.

In terms of streamlining cases for trial, motions under this Rule should be filed and decisions made on them well before the Pre-Trial Conference in order to permit the parties and the pre-trial Judge to determine the scale of the case and to allow the parties to take appropriate witness-related decisions such as whether or not to summon a witness to appear at trial.[9] For example, in the *Krajišnik* case the Trial Chamber took judicial notice of certain events and conditions in the notorious Omarska camp in Bosnia and Herzegovina on the basis that they had been adjudicated in other proceedings. Thus the Prosecution was able to eliminate a considerable number of witnesses who otherwise would have been required to attend the trial and to testify about those events and conditions.

B. *Rule 71 (Depositions)*

A pre-trial Judge, acting on behalf of the Trial Chamber, '. . .shall take any measure necessary to prepare the case for a fair and expeditious trial'.[10] The taking of a deposition,[11] particularly in cases not scheduled to commence for

8 Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, *Karemera, Ngirumpatse, and Nzirorera* (ICTR-98-44-AR73(C)), Appeals Chamber, 16 June 2006.

9 In one recent case, a decision on an adjudicated facts motion was rendered approximately 1 week before the commencement of a trial. Due to the timing of the decision, the Prosecutor was compelled to select witnesses to testify at trial in order to establish facts that were later deemed to have been adjudicated.

10 Rule 65*ter* (B), *infra* note 15.

11 Rule 71 Depositions (Adopted 11 Feb 1994, amended 10 July 1998)

(A) Where it is in the interests of justice to do so, a Trial Chamber may order, *proprio motu* or at the request of a party, that a deposition be taken for use at trial, whether or not the person

months or years, has the potential to expedite later trial proceedings. Although no pre-trial Judge or Trial Chamber has utilized this Rule to expedite trial proceedings, given the potential that a deposition of an important witness has to interrupt other pre-trial preparations, application of this Rule should occur only after consultations with the parties.

4. The Real Length of Trials at the ICTY

The length of trials at the ICTY has been the subject of considerable frustration and discussion and has served as the impetus for many of the judicial reforms outlined above. It is important to address this matter squarely. The actual trial time spent in court in ICTY trials is considerably shorter than the time spent in equally complex trials in many national jurisdictions. At the ICTY, some trials proceed only 3 days a week, one trial proceeds four days a week, and other trials proceed 5 days a week. Adjournments in trials, many of which are lengthy, are not infrequent. The actual time available per day in a trial at the ICTY is only 4 hours at most.[12] If the measure of how long trials last is the number of calendar days between the start of a trial and the end of a trial, then ICTY trials are breathtakingly long. However, if court time were allocated as it is in domestic systems, what may be a 3-year trial at the Tribunal may be the equivalent of a trial lasting 10 months or less in a national jurisdiction. Given the actual amount of trial time available to the parties to present their respective cases, which is becoming increasingly restricted by Trial

whose deposition is sought is able physically to appear before the Tribunal to give evidence. The Trial Chamber shall appoint a Presiding Officer for that purpose. (Amended 17 Nov 1999)

(B) The motion for the taking of a deposition shall indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the circumstances justifying the taking of the deposition. (Amended 17 Nov 1999)

(C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken.

(D) Deposition evidence may be taken either at or away from the seat of the Tribunal, and it may also be given by means of a video-conference. (Amended 17 Nov 1999)

(E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decision by the Trial Chamber. The Presiding Officer shall transmit the record to the Trial Chamber.

12 Because of limited available courtroom space at the Tribunal, two separate trials occupy a single courtroom per day, each sitting in separate sessions. The first session is from 0900 hours to 1345 hours and the second session is from 1415 hours to 1900 hours. Two recesses are taken per session, each of which lasts at least 20 minutes. Thus, for example, only 12 hours of actual trial time, at most, are available for the presentation of evidence if a Trial Chamber convenes 3 days a week, 20 hours per week if a Trial Chamber convenes 5 days a week.

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Chamber decisions,[13] it is imperative that pre-trial proceedings focus intensely on efforts to narrow the cases to those issues that are genuinely in dispute. This fundamental step is the key to reducing the overall length of trials at the Tribunal.

5. The Pre-trial Process

The pre-trial Judge is responsible for the pre-trial proceedings[14] with his principal functions being to '...co-ordinate communication between the parties during the pre-trial phase', to '...ensure that the proceedings are not unduly delayed', and to '...take any measure necessary to prepare the case for a fair and expeditious trial'.[15] Thus the pre-trial Judge's role can be quite crucial in determining the ultimate shape of the case later to be tried. The RPE allow that the pre-trial Judge may be assisted in the performance of his or her duties by one of the Senior Legal Officers (SLO) assigned to Chambers.[16]

Throughout the pre-trial proceedings, obligations are imposed on both the parties and the Judges. The parties, acting under the supervision of the pre-trial Judge or SLO, are required to meet deadlines of a work plan created by the pre-trial Judge. Not less than 6 weeks before the Pre-Trial Conference, the Prosecution is required to file a pre-trial brief setting forth a summary of the evidence for each count of the indictment and the form of responsibility incurred by the accused as well as any admissions by the parties and a statement of matters that are not in dispute as well as a statement of contested matters of fact and law.[17] The Prosecution pre-trial brief must also include detailed information in respect of each of the witnesses it intends to call at trial.[18] Thereafter, and not less than 3 weeks before the Pre-Trial Conference,

13 In the *Prlić* case, a complex multi-defendant case against members of the Bosnian Croat leadership that alleges the commission of significant crimes in Herzegovina and in central Bosnia from 1992 to 1994, the Trial Chamber, well after the commencement of Prosecution case, severely restricted the amount of time available to the Prosecution despite the fact that the Prosecutor averaged only 74 minutes per day for its direct examination of witnesses. The remaining daily trial time had been spent in the cross-examination of witnesses, in Judge's interventions, and in addressing procedural matters. See Prosecution Appeal Concerning the Trial Chamber's Ruling Dated 13 Nov 2006 Reducing the Time for the Prosecution Case, *Prlić and others* (IT-04-74-AR 73.4).

14 Rule 65*ter*

(A) The Presiding Judge of the Trial Chamber shall, no later than 7 days after the initial appearance of the accused, designate from among its members a Judge responsible for the pre-trial proceedings (hereinafter 'pre-trial Judge'). (Amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

15 Rule 65*ter*

(B) The pre-trial Judge shall, under the authority and supervision of the Trial Chamber seized of the case, coordinate communication between the parties during the pre-trial phase. The pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial.

16 Rule 65*ter*

(D) (i) The pre-trial Judge may be assisted in the performance of his or her duties by one of the Senior Legal Officers assigned to Chambers.

(ii) The pre-trial Judge shall establish a work plan indicating, in general terms, the obligations that the parties are required to meet pursuant to this Rule and the dates by which these obligations must be fulfilled.

(iii) Acting under the supervision of the pre-trial Judge, the Senior Legal Officer shall oversee the implementation of the work plan and shall keep the pre-trial Judge informed of the progress of the discussions between and with the parties and, in particular, of any potential difficulty. He or she shall present the pre-trial Judge with reports as appropriate and shall communicate to the parties, without delay, any observations and decisions made by the pre-trial Judge.

(iv) The pre-trial Judge shall order the parties to meet to discuss issues related to the preparation of the case, in particular, so that the Prosecutor can meet his or her obligations pursuant to paragraphs (E) (i)–(iii) of this Rule and for the defence to meet its obligations pursuant to paragraph (G) of this Rule and of Rule 73*ter*.

(v) Such meetings are held inter partes or, at his or her request, with the Senior Legal Officer and one or more of the parties. The Senior Legal Officer ensures that the obligations set out in paragraphs (E) (i)–(iii) of this Rule and, at the appropriate time, that the obligations in paragraph (G) and Rule 73*ter*, are satisfied in accordance with the work plan set by the pre-trial Judge.

(vi) The presence of the accused is not necessary for meetings convened by the Senior Legal Officer.

(vii) The Senior Legal Officer may be assisted by a representative of the Registry in the performance of his or her duties pursuant to this Rule and may require a transcript to be made. (Amended 12 Apr 2001)

17 Rule 65*ter*

(E) Once any existing preliminary motions filed within the time-limit provided by Rule 72 are disposed of, the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73*bis*, to file the following:

(i) the final version of the Prosecutor's pre-trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law; (Amended 12 Apr 2001)

18 Rule 65*ter* (E)

(ii) the list of witnesses the Prosecutor intends to call with:

(a) the name or pseudonym of each witness;

(b) a summary of the facts on which each witness will testify;

(c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment; (Amended 12 Apr 2001)

(d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count; (Amended 12 Apr 2001)

(e) an indication of whether the witness will testify in person or pursuant to Rule 92*bis* or Rule 92*quater* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and (Amended 12 Apr 2001, amended 13 Sept 2006)

(f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor's case. (Amended 12 Apr 2001)

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the Defence is required to file its pre-trial brief in which it sets forth, in general terms, the nature of the accused's defence, the matters with which it takes issue in the Prosecutor's pre-trial brief and, in the case of each such matter, the reason why the accused takes issue with it.[19]

The elaborate framework in which the pre-trial process takes place consists of three distinct types of pre-trial conferences and is a well-thought out scheme that if implemented more effectively could result in shorter trials. The three types of conferences: (i) 65*ter* conferences, (ii) status conferences[20] and (iii) pre-trial conferences,[21] are the formal meetings within which discussions between the parties and the pre-trial Judge, the SLO, and Trial Chamber occur and where critical decisions affecting the length of trials are made.

19 Rule 65*ter*

(F) After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than 3 weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:

(i) in general terms, the nature of the accused's defence;

(ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief and

(iii) in the case of each such matter, the reason why the accused takes issue with it. (Amended 17 Nov 1999, amended 12 Apr 2001)

20 Rule 65*bis* Status Conferences (Adopted 25 July 1997)

(A) A Trial Chamber or a Trial Chamber Judge shall convene a status conference within 120 days of the initial appearance of the accused and thereafter within 120 days after the last status conference:

(i) to organize exchanges between the parties so as to ensure expeditious preparation for trial;

(ii) to review the status of his or her case and to allow the accused the opportunity to raise issues in relation thereto, including the mental and physical condition of the accused.

(Amended 4 Dec 1998, amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(B) The Appeals Chamber or an Appeals Chamber Judge shall convene a status conference, within 120 days of the filing of a notice of appeal and thereafter within 120 days after the last status conference, to allow any person in custody pending appeal the opportunity to raise issues in relation thereto, including the mental and physical condition of that person. (Amended 17 Nov 1999)

(C) With the written consent of the accused, given after receiving advice from his counsel, a status conference under this Rule may be conducted

(i) in his presence, but with his counsel participating either via tele-conference or video-conference; or

(ii) in Chambers in his absence, but with his participation via tele-conference if he so wishes and/or participation of his counsel via tele-conference or video-conference. (Amended 12 Dec 2002).

21 Rule 73*bis*. See also Rule 73*ter* which provides for a Pre-Defence Conference. This type of conference is not a pre-trial conference and occurs only at the conclusion of the Prosecution's case and prior to the commencement by the Defence case. At such a conference, the Trial Chamber may take decisions to restrict the Defence by shortening the estimated time allowed the Defence to examine-in-chief some of its witnesses; may set the number of witnesses the Defence may call; and may determine the time available to the Defence for presenting evidence. Rule 73*ter* Pre-Defence Conference (Adopted 10 July 1998, amended 17 Nov 1999).

A. *Rule 65*ter *Conferences*

At 65*ter* conferences, which are frequently held shortly before Status Conferences, the parties meet in the presence of an SLO[22] and rarely in the presence of the pre-trial Judge to discuss diverse matters relating to the work plan established by the pre-trial Judge.[23] Rule 65*ter* conferences normally occur in a private conference room and, although the proceedings are recorded, they tend to be less formal affairs where the parties and an SLO are in a position to communicate in a more relaxed atmosphere. It is a milieu where, potentially, considerable progress could be made in reducing the size of a trial but is not. Instead the conferences tend to be remarkably sterile endeavours wherein the parties merely report to the SLO their progress on the state of their trial preparations and their differences on particular matters. In most instances, the filing of a written report by the parties would achieve the same result as convening a 'conference', particularly since there is absolutely no effort made to engage the parties to resolve their differences or to tackle head-on matters that could directly shorten the trial.

The fundamental problem with an SLO presiding over a 65*ter* conference is that an SLO lacks both the authority and the capacity to induce the parties to reach meaningful agreements intended to shorten the length of the trial and merely serves as a conduit of information for the pre-trial Judge.[24] While this observation is not intended to denigrate the fine work and efforts of SLOs, it is the human nature of lawyers and the everyday reality in the adversarial process of litigation that the parties in a case act differently in the presence of a Judge who clearly has more authority and ineluctably is in a better position to assist the parties to identify *bona fide* issues in dispute and to assist them in reaching agreements in respect of trial related matters.

B. *Status Conferences*

Status Conferences are public hearings presided over by a Trial Chamber or a Trial Chamber Judge. These proceedings, regularly set within 120 days of the initial appearance and thereafter within 120 days after the last status conference, tend to be rather *pro forma* affairs that accomplish little to '. . .organise exchanges between the parties so as to ensure expeditious preparation for trial'.[25] While Status Conferences may contribute modestly to the goal of ensuring the expeditious preparation for trial, such as monitoring disclosure deadlines or deadlines for the filing of pre-trial briefs as established in a pre-trial

22 The Judges routinely avail themselves to sub-part (D)(i) of Rule 65*ter* that permits the pre-trial Judge to be assisted in the performance of his or her duties by one of the Senior Legal Officers assigned to Chambers.

23 Rule 65.

24 Rule 65*ter* (D)(iii), (iv), (v) and (vii), *supra* note 16.

25 Rule 65*bis* (A)(i), *supra* note 20.

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Judge's work plan, in terms of contributing meaningfully to the objective of streamlining cases so that only essential issues for trial are identified and non-essential issues, to the extent possible, are resolved. Status Conferences and indeed 65*ter* conferences, fall far short of the mark. Status Conferences are often perfunctory affairs lasting but a few minutes where little is accomplished other than receiving a report from an accused on the conditions of his incarceration at the UN Detention Unit.

C. *Pre-trial Conferences*

Following the filings of both Prosecution and Defence pre-trial briefs, the pre-trial Judge's important role in the pre-trial process concludes and he or she is then required to submit to the Trial Chamber the complete file consisting of all the filings of the parties, transcripts of the status conferences and minutes of meetings held in the performance of his or her functions.[26]

The pre-trial process then moves to a new and critical phase, the Pre-Trial Conference,[27] at which the Trial Chamber, based on the file submitted to it by the pre-trial Judge, and presumably after thorough consultations with the pre-trial Judge about issues identified in the preceding 65*ter* conferences and Status Conferences, may take a number of significant measures to shorten the case. These important decisions are based on information generated during the pre-trial process, information that will allow the Trial Chamber to decide, on an informed basis and not an arbitrary one, how to limit the Prosecutor, and later the Defence, in the presentation of their respective cases. Such measures include calling upon the Prosecutor to shorten the estimated length of examination-in-chief for some witnesses;[28] limiting the number of witnesses the Prosecutor may call;[29] limiting the time available for the Prosecutor for presenting evidence;[30] and possibly and quite extraordinarily (after having heard the parties), directing the Prosecutor to select counts in the indictment on which to proceed and to abandon other counts.[31]

26 Rule 65*ter*
(L) (i) After the filings by the Prosecutor pursuant to paragraph (E), the pre-trial Judge shall submit to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions pursuant to this Rule.
(ii) The pre-trial Judge shall submit a second file to the Trial Chamber after the defence filings pursuant to paragraph (G).
(Amended 17 Nov 1999, amended 12 Apr 2001).

27 Rule 73*bis*, *infra* note 37. See also Rule 73*ter* which provides for a Pre-Defence Conference, *supra* note 21.

28 Rule 73*bis* (B), *infra* note 37.

29 Rule 73*bis* (C)(i), *infra* note 37.

30 Rule 73*bis* (C)(ii), *infra* note 37.

31 Rule 73*bis* (E), *infra* note 37.

6. Recommendations for Improving the Pre-trial Process[32]

At the outset it bears observing that streamlining a trial in order to identify the genuinely contested issues to be litigated requires the goodwill and cooperation of all the parties in the litigation. That is not always possible. Simply put (and properly so), an accused can say, 'I agree to nothing. You, Mr Prosecutor, have the burden of proving everything in your indictment. Prove it.' Under such circumstances, the Judges of the Tribunal are not without the means by which to streamline a case as the RPE, discussed earlier, offer some relief. In the face of such an intractable position, however, the Judges must avoid the temptation of taking a broadsword to the Prosecution's case or unduly restricting the Prosecution in the presentation of its evidence.[33] In the end it is international justice and not the completion strategy that must be served.

President Pocar informed the President of the Security Council that the Judges of the Tribunal had taken considerable effort to expedite trials without sacrificing due process. While President Pocar and the Judges' Working Group on Speeding Up Trials[34] recognized that the absence of pre-trial Judges from 65*ter* conferences enervates the pre-trial process,[35] little has changed since these observations were made and, quite remarkably, the discredited practice continues.

If the pre-trial process is to be more effective, four fundamental changes need to occur: (i) the *pre-trial Judge must be pro-active* in the 65*ter* hearings, not only to ensure that the case is prepared for trial but to take an active role in assisting the parties to identify and to narrow the issues that genuinely will be in dispute at trial; (ii) the *pre-trial Judge must a member of the Trial Chamber* that

32 In preparing this article, I had an opportunity to discuss these proposals with certain members of the Defence who concurred with the positions set forth in this article. Having said that, I wish to make clear that the Defence lawyers with whom I consulted were not speaking on behalf of the Defence Bar Association and, in fact, some of their colleagues may disagree with the views set forth herein.

33 Prosecutor Carla Del Ponte, in her address to the ICTY Diplomatic Seminar that was held in The Hague on 5 December 2006, described efforts taken internally by the Office of the Prosecutor to make trials more efficient including an increased use of the procedural rules identified in this article. She went on to say, 'There are obvious limits to what we can achieve. Everyone will understand that the Prosecution must be allowed to present enough evidence to secure a conviction. Otherwise, the prosecution and the victims would be deprived of their right to a fair trial.'

34 The Working Group of Judges was an internal committee of ICTY Judges designated to study possible ways of speeding up trials.

35 President Pocar, in his letter to the President of the Security Council of 29 May 2006 stated: 'Adopting the recommendations of the Working Group, Judges have reversed the traditional roles of Pre-trial Judge and Senior Legal Officer in the conduct of Rule 65*ter* conferences .... The Working Group considered that the parties might be more likely to respond to proposals and requests made by the Pre-trial Judge than by the Senior Legal Officer.'

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will hear the trial; (iii) the timing of the submission of the *Prosecution and Defence pre-trial briefs* must occur at an earlier stage in the pre-trial proceedings and (iv) following the submission of the Defence pre-trial brief, meetings with the pre-trial Judge and the parties should be convened with the purpose of attempting further to *narrow trial issues*.

Judges who have participated in trials at the Tribunal and who assume the duties and responsibilities of pre-trial Judges know full-well through their experiences in the courtroom that considerable amounts of time are wasted at trial litigating matters that are not genuinely in contest. A meaningful pre-trial process, besides ensuring the 'expeditious preparation for trial',[36] should yield agreements in respect of which parts of an indictment are or are not going to be contested, agreements on evidentiary matters such as which parts of expert reports are contested and which pieces of evidence will or will not be contested on authenticity grounds. Agreements of this nature have the potential to shorten trials considerably. Without the active involvement of a pre-trial Judge at 65*ter* conferences pursuing such types of agreements, the parties, on their own, will rarely achieve them.

How might a 65*ter* hearing proceed with the active participation of a pre-trial Judge? I submit that the pre-trial Judge should summon the parties to a conference, roll up his/her sleeves, lock the door and work with the parties to narrow the issues for trial. Such efforts should include reviewing the indictment and the attached schedules paragraph by paragraph, item by item in order to determine what is and is not contested and why the accused takes issue with a particular paragraph or item. It should also attempt to identify and resolve issues relating to evidence that will be adduced at trial, such as authentication issues. These working sessions with a pre-trial Judge and the parties should occur both before the Defence is required to file its pre-trial brief and certainly after the Defence has filed its pre-trial brief. While these sessions may take time — indeed even days — agreements reached during such a process could save substantial trial time. A further salutary effect of this type of process is that the Trial Chamber that later presides over the trial, having been informed by the pre-trial Judge as to what are the genuine issues in dispute, would be in a better position to manage the trial.

Further impoverishing the effectiveness of the pre-trial process is that frequently the pre-trial Judge is not a member of the Trial Chamber that will later hear the case for trial. As a result, he or she is not fully invested in the case and may, as experience shows, be reluctant to take the very types of decisions that can streamline a case. In actual fact there have been instances where a pre-trial Judge who has not been a member of the Trial Chamber assigned to the case, either deferred or delayed taking decisions on motions designed to shorten the trial of a case.

This needs to change. The pre-trial Judge should be a member of the Trial Chamber that will later hear the trial. Critically, knowledge gained by a pre-trial Judge who is a member of the Trial Chamber that will hear the case will better enable a Trial Chamber to make decisions in respect of a wide range of trial issues, including the application of that extraordinary sub-part of Rule 73*bis*,[37] sub-part (E), that permits a Trial Chamber to '. . .direct the Prosecutor to select the counts in the indictment on which to proceed'.[38] As ICTY Judge O-Gon Kwon stated in a speech delivered in Beijing, China on 7 September 2006, 'the proper use of the Rule requires a comprehensive and intimate understanding of the prosecution's case. Unless one of the judges in the Trial

36 Rule 65*bis* (A)(i), *supra* note 20; see also 65*ter* (B), *supra* note 15.

37 Rule 73*bis* Pre-Trial Conference (Adopted 10 July 1998; amended 17 Nov 1999; amended 17 July 2003):

(A) Prior to the commencement of the trial, the Trial Chamber shall hold a Pre-Trial Conference.

(B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65*ter* (L)(i), the Trial Chamber may call upon the Prosecutor to shorten the estimated length of the examination-in-chief for some witnesses. (Amended 17 Nov 1999, amended 12 Apr 2001)

(C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65*ter* (L)(i), the Trial Chamber, after having heard the Prosecutor, shall determine
(i) the number of witnesses the Prosecutor may call; and
(ii) the time available to the Prosecutor for presenting evidence. (Amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(D) After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged. (Amended 17 July 2003, amended 30 May 2006)

(E) Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65*ter*, the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, may direct the Prosecutor to select the counts in the indictment on which to proceed. Any decision taken under this paragraph may be appealed as of right by a party. (Amended 30 May 2006)

(F) After commencement of the trial, the Prosecutor may file a motion to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that are to be called or for additional time to present evidence and the Trial Chamber may grant the Prosecutor's request if satisfied that this is in the interests of justice. (Amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

38 Directing the Prosecutor to select counts of an indictment on which to proceed and abandon others, a measure designed to speed up trials, risks being interpreted by the persons on whose behalf the Tribunal is working as arbitrary and unnecessary. In criticizing the Prosecutor for not bringing an expanded indictment against a particular accused, one Judge of the Tribunal stated: 'One might say, under the Rules of this Tribunal, that it is for the Prosecutor alone to decide whom, and under which charges, to indict. In principle, this is correct. However, it is also for the Prosecutor to safeguard that justice is seen to be done and to convince, in particular, those people on whose behalf this Tribunal is working that there is no arbitrary selection of persons to be indicted and no arbitrary selection of charges or facts in case of an indictment.' Dissenting Opinion of Judge Wolfgang Schomburg, Sentencing Judgment, *Deronjić* (IT-02-61-S), Trial Chamber II, 30 March 2004, § 10.

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Chamber also served as pre-trial judge in a given case, most Trial Chambers are unlikely to have this understanding by *the time of* the pre-trial conference, when the Rule's possible invocation is anticipated because the judges will only recently been assigned to the case.'[39] Judge Kwon's observation is well founded.

Timing issues in respect of the filing of Prosecution and Defence pre-trial briefs are also quite important if the pre-trial process is to become more effective. Both parties are required to file pre-trial briefs.[40] The Prosecution brief must identify, *inter alia*, a summary of evidence the Prosecutor intends to call at trial and the Defence brief must identify, in general terms, the nature of the accused's defence and the matters in the Prosecutor's pre-trial brief with which it takes issue and why it does so. However, if the pre-trial briefs were to be filed earlier in the pre-trial process, a pre-trial Judge who was fully engaged in the process and working with the parties would be in a better position to understand the issues in the case and would be better able to assist the parties in streamlining the case for trial.

The usual Tribunal practice is that once the Defence pre-trial brief has been filed, a pre-trial conference is set three weeks later. No meeting with the pre-trial Judge and the parties occurs in the gap between the filing of the Defence pre-trial brief and the pre-trial conference. This practice should be abandoned. Instead, the pre-trial Judge, after having read the respective briefs, should meet with the parties to attempt further to narrow trial issues. Once those meetings have exhausted the possibility of further narrowing the scope of the trial, and only then, should the pre-trial conference be held because it is only at that point that the Trial Chamber will be in a position to make well-informed decisions when exercising its authority to limit the number of witnesses the Prosecution may call and limit the time available to the Prosecution to present evidence.[41] Moreover, it will be in a position, if it so chooses, to make sound judgments when exercising the extraordinary power it recently granted itself[42] to limit the Prosecution's evidence against a particular accused, in the interest of a fair and expeditious trial, by directing it to select the counts in the indictment on which to proceed and forcing it to abandon other counts.[43]

7. Conclusion

The perception that trials at the Tribunal have taken too long resulted in dissatisfaction by members of the Security Council. The ensuing pressure spawned the 'completion strategy', a timetable proposed to the UN Security Council by the Tribunal for the completion of its trial and appellate work. In the face of the proposed deadlines, there has been an increasing reliance on older procedural rules to expedite trials and there have been new rules promulgated that vest in the Judges of the Tribunal the authority to restrict the number of witnesses that can be called by a party; the time available to the parties to present evidence; and a remarkable new rule that permits a Trial Chamber to direct the Prosecutor on which counts of an indictment to proceed. While the implementation of these rules, new and old, will surely result in shorter trials, the objective of achieving more expeditious trials would considerably be enhanced if the pre-trial Judge appeared at 65*ter* conferences and engaged the parties in a collaborative effort to identify the genuine issues in dispute.

While measures adopted and implemented at the ICTY to streamline trials require that all the participants in the pre-trial process, Judges, Prosecutors and Defence counsel, engage constructively and transparently in the process if such efforts are to succeed, the success of these efforts can only be measured against a standard of actual and perceived fairness to the litigants and to the victims in the former Yugoslavia who suffered so greatly during the conflict. Anything less will be elevating expedition over fairness and will be damaging to justice and to the legacy of the ICTY.

39 See O-Gon Kwon, 'The Challenge of an International Criminal Trial as Seen from the Bench' in this issue of the *Journal*.

40 Rule 65*ter* (E)(i) and (F), *supra* notes 17 and 19.

41 Rule 73*bis* (C), *supra* note 37.

42 Sub-part (E) of Rule 73*bis* was added by amendment on 30 May 2006, *supra* note 37.

43 Rule 73*bis* (E), *supra* note 37.