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Is there authority for allowing the statement of a dead witness as to the acts and conduct of the accused as charged in the indictment to be admitted in evidence to the ICTR

Jonathan Luis-Lancho Van Balen

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE: IS THERE AUTHORITY FOR ALLOWING THE STATEMENT OF A DEAD WITNESS AS TO THE ACTS AND CONDUCT OF THE ACCUSED AS CHARGED IN THE INDICTMENT TO BE ADMITTED IN EVIDENCE TO THE ICTR

PREPARED BY JONATHAN LUIS-LANCHO VAN BALEN
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28. Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of the Witnesses, Trial Chamber (20 Mar. 1997).

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38. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Decision on the Defence Motion for the Deposition of the Testimony of Dr. Ferdinand Goffioul, Trial Chamber (25 Apr. 2003).

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46. R. v. O'Brien, [1978] 1 S.C.R. 591.

47. R. v. Noël, [2002] 3 S.C.R. 433.

48. R. v. Potvin, [1989] 1 S.C.R. 525.

49. R. v. Sang, [1980] A.C. 402.

50. R. v. Starr, [2000] 2 S.C.R. 144.

51. Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982).

52. Subramaniam v. Public Prosecutor, [1956] 1 W.L.R. 965.

53. United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997).

54. Unterpertinger v. Austria, 110 Eur. Ct. H. R. (ser. A)(1987).

Books

55. JOHN E. ACKERMAN & EUGENE O'SULLIVAN, PRACTICE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2000).

56. JEROME ATRENS, THE CHARTER AND CRIMINAL PROCEDURE: THE APPLICATION OF SECTIONS 7 AND 11 (1989).

57. WILLIAM H. CHARLES, THOMAS A. CROMWELL & KEITH B. JOBSON, EVIDENCE AND THE CHARTER OF RIGHTS AND FREEDOMS (1989).

58. CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley ed., 1999).

59. CRIMINAL PROCEDURE IN CANADA (Vincent M. Del Buono ed., 1982).

60. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997).

61. MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

62. CATHERINE ELLIOTT, FRENCH CRIMINAL LAW (2001).

63. ANDRE HUET, LES CONFLITS DE LOIS EN MATIERE DE PREUVE (1965).

64. MARTIN IMBLEAU & WILLIAM A. SCHABAS, INTRODUCTION AU DROIT RWANDAIS (1999).

65. INTRODUCTION TO GERMAN LAW (Werner F. Ebke & Matthew W. Finkin eds., 1996).

66. INTRODUCTION TO SWISS LAW (François Dessemontet & Tuğrul Ansay eds., 1981).

67. GERT-JAN G.J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW (2001).

68. LAW SOCIETY OF UPPER CANADA, APPLYING THE LAW OF EVIDENCE: TACTICS AND TECHNIQUES FOR THE NINETIES (1991).

69. LE NOUVEAU CODE PENAL (1993).

70. RENÉ J. MARIN, ADMISSIBILITY OF STATEMENTS (7th ed. 1989).

71. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998).

72. PETER MURPHY, MURPHY ON EVIDENCE (6th ed. 1997).

73. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIBUNAL SINCE NUREMBERG (1997).

74. JOHN SOPINKA, SIDNEY N. LEDERMAN & ALAN W. BRYANT, THE LAW OF EVIDENCE IN CANADA (1992).

75. SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND CRIMINAL COURTS (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

76. STUDIES IN CANADIAN CRIMINAL EVIDENCE (Roger E. Salhany & Robert J. Carter eds., 1972).

77. ANDREW WEST ET AL., THE FRENCH LEGAL SYSTEM (2d ed. 1998).

78. PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE?: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA (2002).

79. MICHAEL ZANDER, THE POLICE & CRIMINAL EVIDENCE ACT 1984 (2d ed. 1990).

Law Review Articles

80. Natasha A. Affloder, *Tadić, the Anonymous Witness and the Sources of International Law*, 19 MICH. J. INT'L L. 445 (1998).

81. M. Cherif Bassiouni, *Former Yugoslavia: Investigation Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 FORDHAM INT'L L.J. 1191 (1995).

82. Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163 (2000).

83. Mirjan Damaška, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425 (1992).

84. Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81 (1997).

85. Joanne A. Epps, *Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?*, 77 KY. L.J. 7 (1989).

86. Kitty Felde, Gabrielle Kirk McDonald, Alan Tieger & Michaïl Wladimiroff, *War Crimes Tribunals: The Record and the Prospects: The Prosecutor v. Dusko Tadić*, 13 AM. J. INT'L L. REV. 1441 (1998).

87. Mark Findlay, *Synthesis in Trial Procedures?—The Experience of International Criminal Tribunals*, INT'L & COMP. L.Q. 50.1(26) (2001).

88. Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QUINNIPIAC L. REV. 777 (2003).

89. Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725 (1999).

90. Kingsley Chiedu Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT'L L. REV. 273 (2002).

91. Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*, 41 HOW. L.J. 155 (1997).

92. Kristina D. Rutledge, *"Spoiling Everything"—But for Whom? Rules of Evidence and International Criminal Proceedings*, 16 REGENT U.L. REV. 151 (2003/2004).

93. Antonia Sherman, *Sympathy for the Devil: Examining a Defendant's Right to Confront Before the International War Crimes Tribunal*, 10 EMORY INT'L L. REV. 833 (1996).

94. Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535 (2001).

95. Patricia M. Wald, *Dealing with the Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunals*, 5 YALE H.R. & DEV. L.J. 217 (2002).

I. Introduction[*]

A. Issues

This memorandum addresses the issue whether there is precedent from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to admit the testimony of a dead witness into evidence before the ICTR. Since the ICTY and the ICTR have essentially hybridized the common law and civil law traditions to create functioning tribunals, it is important to explore how the testimony of dead witnesses is treated in different jurisdictions. The memorandum explores how the Tribunals have interpreted the Rules of Procedure and Evidence. It also examines how the testimony of dead witnesses is treated in civil law jurisdictions and falls under the exceptions to the hearsay rule in common law jurisdictions. Finally, the memorandum examines how the jurisprudence of the ICTY and the ICTR establish precedent for allowing the testimony of a dead witness to be admitted in evidence.

B. Summary of Conclusions

i. The ICTR has the authority under the Rules of Evidence and Procedure to Admit into Evidence the Testimony of a Dead Witness as to the Acts and Conduct of the Accused in the Indictment

The Tribunals, under Rule 89(C) "may hear any evidence that is deemed to have probative value."[1] Rule 92*bis* allows for proof of facts other than by oral evidence. Rule 92*bis*(C) deems written statements by a person who has subsequently died to be admissible if the tribunal is satisfied on a balance of probabilities and finds that the statement is reliable.[2] This is

[*] Issue 7: Is there authority for allowing the testimony of a dead witness, as to the acts and conduct of the accused as charged in the indictment, to be admitted in evidence to the ICTR? Consider Rule 89 and Rule 92*bis*, the case law of the ICTY and ICTR, and state practice in common-law and civil-law jurisdictions.

[1] MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 169 (1997). [Reproduced in the accompanying notebooks at Tab 73].

the only mention of a dead witness in the ICTR Rules. Rule 92*bis*(A),[3] however, requires that such statements go to proof of a matter other than the acts and conduct of the accused in the indictment.

The Tribunal has shown great flexibility in interpreting the Rules of Procedure and Evidence, and there is no reason why the Judges may not amend Rule 92*bis* to allow for such statements to go to proof as to the acts and conduct of the accused in the indictment. Under Rule 6, the Judges, the Prosecutor or the Registrar may propose an amendment of the Rules.[4] While Rule 6(C) stipulates that "an amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case,"[5] the Tribunal's main purpose is to facilitate justice. The Tribunal has discretion to determine the admissibility of evidence, and does so if it is relevant and has probative value. Under the unique circumstances which gave rise to the creation of the Tribunal, any testimony which would be in the interest of justice should be admitted.

ii. The Tribunal May be Guided by the Exceptions to the Hearsay Rule Found in the Common Law in Allowing the Testimony of a Dead Witness to be Admitted in Evidence

The testimony of a dead witness is generally regarded to be hearsay evidence. In *Blaškić*[6], the Trial Chamber "interpreted Article 21(4)(e) as applying only to those witnesses

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[2] Rules of Procedure and Evidence for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Persons Responsible for Genocide and other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (adopted 29 June 1995) (amended 12 Jan. 1996, 15 May 1996, 4 July 1996, 5 June 1997, 8 June 1998, 1 July 1999, 21 Feb. 2000, 26 June 2000, 3 Nov. 2000, 31 May 2001, 6 July 2002, and 27 May 2003) [hereinafter ICTR Rules], Rule 92*bis*(C). [Reproduced in the accompanying notebooks at Tab 5].

[3] *Id.* Rule 92*bis*(A).

[4] *Id.* Rule 6.

[5] *Id.* Rule 6(C).

called before the Trial Chamber and not to the statements of witnesses admitted as hearsay."[7] A defense objection to the admission of hearsay evidence was rejected because Rule 89(C) "authorises the Trial Chamber to receive any relevant evidence which it deems to have probative value and that the indirect nature of the testimony depends on the weight which the Judges give to it and not on its admissibility."[8] The Tribunal also stated a statement of a deceased witness given under oath to the Prosecutor's investigators was "clearly one of the exceptions to the principle of oral witness testimony, in particular for cross-examination, accepted in the different national and international legal systems and therefore they admitted the said statement in evidence but reserved the right to give it the appropriate weight when the time came."[9] While there is no Confrontation Clause in the language of the statute, the Tribunal could follow recent U.S. jurisprudence that does not regard hearsay evidence as "testimonial," and therefore is not precluded from being admitted by the Confrontation Clause.

Rule 92*bis*(C) allows for written statements by a person who has subsequently died to be admitted into evidence. This rule, in combination with the Tribunal's ability to admit into evidence testimony it deems to be relevant and to have probative value, should allow for the testimony of a dead witness to be admitted in evidence.

iii. The Admission of the Testimony of a Dead Witness is in the Interests of Justice But May Infringe Upon the Rights of the Accused Before the Tribunal under the Statute

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[6] Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, Trial Chamber (3 Mar. 2000). [Reproduced in the accompanying notebooks at Tab 25].

[7] JOHN E. ACKERMAN & EUGENE O'SULLIVAN, PRACTICE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 128 (2000). [Reproduced in the accompanying notebooks at Tab 55].

[8] *Blaškic*, Judgement (TC), para. 36. [Reproduced in the accompanying notebooks at Tab 25].

[9] *Id.*

The testimony of a dead witness may be highly relevant and have high probative value in a case before the Tribunal. However, evidence that is highly relevant and highly probative may also be highly prejudicial to the accused. In common law jurisdictions, such evidence would be excluded either at the judge's discretion, or because it does not fall within one of the exceptions to the hearsay rule. In the United States, if the probative value is equal to the potential prejudice to the accused, evidence is admitted. If the prejudice outweighs the probative value, then it does not. Rule 89(B)[10] implies that the admission of evidence is at the discretion of the judges, and it is therefore necessary for them to implement a balancing test that ensures that the rights of the accused are being protected.

II. Factual Background

The ICTY and the ICTR are ad hoc tribunals that were created under the Section VII authority of the U.N. Security Council.[11] The Tribunal refuses to be hindered

> by a technical approach to the admission of evidence in their search for the truth. This is best illustrated by their approach to hearsay evidence, but is also reflected in the admission of documents and affidavits. In all these matters the tribunals have adopted a liberal approach, not fettered by common law rules.[12]

Hearsay evidence was accepted at both the Nuremberg and Tokyo Tribunals in the form of oral evidence and affidavits.[13] The Rules of Procedure and Evidence are essentially the same for both the ICTY and the ICTR, and thus, the precedent of the ICTY concerning their application is

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[10] ICTR Rules, *supra* note 2, Rule 89(B). "In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which 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." [Reproduced in the accompanying notebooks at Tab 6].

[11] Kingsley Chiedu Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT'L L. REV. 273, 275 (2002). [Reproduced in the accompanying notebooks at Tab 90].

[12] Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 745 (1999). [Reproduced in the accompanying notebooks at Tab 89].

[13] *Id.*

relevant to the cases that are before the ICTR. The ICTY also looks to jurisprudence of the ICTR when crafting opinions and judgments.

Under Article 14 of the ICTR Statute, the judges are to adopt "the Rules of Procedure and Evidence . . . of the International Tribunal for the former Yugoslavia with such changes as they deem necessary."[14] In interpreting the Rules of Evidence and Procedure the judges of the ICTY have often followed the adversarial approach found in common law jurisdictions, even though the Rules were also influenced by civil law.[15]

The ICTY and the ICTR have addressed the issue of hearsay evidence from their inception. In *Tadić*, the Appeals Chamber held that a prior inconsistent statement, for example, "is admissible for the truth of its contents, but the weight to be given to the prior statement – as hearsay material – will depend upon the infinitely variable circumstances which surround hearsay material."[16] While the Rules of Procedure and Evidence adopted by the ICTY in 1994 "are an amalgamation of the civil and common law traditions,"[17] the interpretation of the rules, regarding witnesses and hearsay, often departs from the common law tradition. The drafters of the Statutes creating the Tribunals also looked to customary international law and international conventions when delineating the rights of the accused, witnesses, and the victims.

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[14] Statute for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Persons Responsible for Genocide and other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by Security Council on 8 Nov. 1994, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute], Article 14. [Reproduced in the accompanying notebooks at Tab 8].

[15] 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 416 (1998). [Reproduced in the accompanying notebooks at Tab 71].

[16] ACKERMAN & O'SULLIVAN, *supra* note 7, at 425. [Reproduced in the accompanying notebooks at Tab 55].

[17] Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*, 41 HOW. L.J. 155, 159 (1997). [Reproduced in the accompanying notebooks at Tab 91].

III. The Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda

A. Rule 89 and 92*bis*

The Tribunals are able to interpret the Rules of Procedure and Evidence as they see fit. "In interpreting the Rules, the Tribunals have applied Rule 89(B). The ICTY has held that Article 31 of the Vienna Convention on the Law of Treaties is applicable to the ICTY Statute, even though it is a *sui generis* instrument.[18] Article 31 of the Vienna Convention, states "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose."[19]

"The ICTY employs a hybrid admissibility standard for witness testimony. Originally there was an expressed preference for live testimony in Rule 90(A), along with a residual power in Rule 89(C) to admit any relevant evidence the judges deem "probative.'"[20] While the Tribunal has the ability to admit hearsay testimony into evidence under Rule 89 and 92*bis*, this ability, which serves to promote justice, seems to go against the rights of the accused to confront his or her accuser. If an out of court statement is offered for its truth, then it is hearsay. The key factor if that the statement has not been made under oath before the Tribunal. This means that the witness has not appeared before the Court, but full weight should be given to their testimony. If the accused cannot cross-examine the witness, then there is no way for him or her to verify the reliability of the witness's testimony.

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[18] May & Wierda, *supra* note 12, at 736. [Reproduced in the accompanying notebooks at Tab 89].

[19] Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980). [Reproduced in the accompanying notebooks at Tab 13].

[20] Patricia M. Wald, *Dealing with the Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunals*, 5 YALE H.R. & DEV. L.J. 217, 227 (2002) [hereinafter Wald (2002)]. [Reproduced in the accompanying notebooks at Tab 95].

Rule 89 seeks to apply rules of evidence that favor a fair determination of matters before the Tribunal. "The only limitations on the admissibility of hearsay are the general requirements of probative value and relevance."[21] In *Tadić*, the ICTY stated "the mere fact that particular testimony was in the nature of hearsay did not operate to exclude it from the category of admissible evidence."[22] Any objections to the acceptance of hearsay evidence in *Tadić* were "not usually sustained and the testimony in question was admitted into evidence and assessed in the usual way for its probative value pursuant to Rule 89."[23]

The ICTY addressed the admission of the written statement of a deceased witness in *Kordić and Čerkez*.[24] The Prosecution attempted to enter into evidence "two unsworn statements of witnesses who had subsequently died."[25] The Prosecution sought to enter the statements under Rule 89(C). The Trial Chamber admitted the first deceased statement noting that it

> had not been (and could not now be) subject to cross-examination and was not given under oath; further, the Trial Chamber noted that consistent with the jurisprudence of the European Court of Human Rights, it would not be possible to convict the accused on the basis of the deceased statement alone, if uncorroborated.[26]

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[21] Kristina D. Rutledge, *"Spoiling Everything"—But for Whom? Rules of Evidence and International Criminal Proceedings*, 16 REGENT U.L. REV. 151, 169-170 (2003/2004). [Reproduced in the accompanying notebooks at Tab 92].

[22] Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgement, Trial Chamber (7 May 1997), para. 555. [Reproduced in the accompanying notebooks at Tab 44].

[23] *Id.* at para. 556.

[24] Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-AR 73.5, Decision on Appeal Regarding Statement of a Deceased Witness, Appeals Chamber (21 July 2000). [Reproduced in the accompanying notebooks at Tab 36].

[25] Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Judgement, Trial Chamber (26 Feb. 2001), Annex IV, para. 30. [Reproduced in the accompanying notebooks at Tab 37].

[26] *Kordić and Čerkez*, Judgement (TC), Annex IV, para. 31.

On 21 July 2000, The Appeals Chamber ruled that this deceased statement was inadmissible, holding that "the Rules express a preference for in-court testimony"[27] "Rule 89(C) must be interpreted so that safeguards are provided to ensure that the Trial Chamber can be satisfied that the evidence is reliable."[28] The Appeals Chamber also held that the deceased statement did not contain any of the required indicia of reliability as it was not given under oath before a judge, subject to cross-examination, corroborated, and was not given at the time or near the time of the events in question.[29]

"Although national rules of evidence are not binding on the Rwanda Tribunal, these rules may provide further guidance in the form of general principles of law."[30] Rule 89(D) of the ICTY Rules states that the "Trial Chamber may exclude relevant evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial."[31] The ICTR did not adopt this text of Rule 89(D). Instead, Rule 89(D) of the ICTR Rules provides that "a Chamber may request

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[27] *Kordić and Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness (AC), para 19. [Reproduced in the accompanying notebooks at Tab 36].

[28] *Id.* at para. 22

[29] *Kordić and Čerkez*, Judgement (TC), Annex IV, para. 33.

[30] Rutledge, *supra* note 21, at 564. [Reproduced in the accompanying notebooks at Tab 92].

[31] Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (adopted 11 Feb. 1994) (amended 5 May 1994, 4 Oct. 1994, 30 Jan. 1995, further amended 3 May 1995, 15 June 1995, 6 Oct. 1995, 18 Jan. 1996, 23 Apr. 1996, 25 June 1996, 5 July 1996, 3 Dec. 1996, 25 July 1997, 20 Oct. 1997, 12 Nov, 1997, 9 July 1998, 10 July 1998, 4 Dec. 1998, 23 Feb. 1999, 2 July 1999, 17 Nov. 1999, 14 July 2000, 1 Dec. 2000, 13 Dec. 2000, 12 Apr. 2001, 12 July 2001, 13 December 2001, 23 Apr. 2002, 11 July 2002, 12 July 2002, 10 Oct. 2002, 12 Dec, 2002, 24 June 2002, and 17 July 2003), U.N. Doc. IT/32/Rev.28 [hereinafter ICTY Rules], Rule 89(D). [Reproduced in the accompanying notebooks at Tab 7].

verification of the authenticity of evidence obtained out of court."[32] The ICTR decided "to allow the judges to evaluate the worth of the evidence after it has been admitted."[33]

Article 14(3)(e) of the International Covenant on Civil and Political Rights (ICCPR) asserts that an accused has the right "to examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him."[34] In the inquisitorial or civil law system, the judge or trier of fact questions witnesses. The provisions of Rule 90,[35] which assets a preference for live testimony and Article 20(4)(e),[36] which delineates a defendant's right to examine witnesses against him, generally seem to "preclude hearsay evidence . . . since the declarant of the statement is not present before the Trial Chamber or a Presiding Officer appointed thereby and the defense has no opportunity to examine the declarant."[37] In *Tadić*, "the Trial Chamber reasoned that . . . a rule against hearsay is not warranted during bench trials, where the judges are able by virtue of their training and experience to hear the evidence in the context in which it was obtained and accord it appropriate weight."[38]

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[32] ICTR Rules, *supra* note 2, Rule 89(D). [Reproduced in the accompanying notebooks at Tab 6].

[33] Rutledge, *supra* note 21, at 565. [Reproduced in the accompanying notebooks at Tab 92].

[34] International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(3)(e), 999 U.N.T.S. 171, 177 (entered into force Nov. 23, 1976). [Reproduced in the accompanying notebooks at Tab 4].

[35] ICTR Rules, *supra* note 2, Rule 90(A). "Witnesses shall, in principle, be heard directly by the Chambers, unless a Chamber has ordered that the witness be heard by means of a deposition as provided for by Rule 71." [Reproduced in the accompanying notebooks at Tab 6].

[36] ICTR Statute, *supra* note 14, Article 20(4)(e). "In determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to examine, have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her." [Reproduced in the accompanying notebooks at Tab 8].

[37] Rutledge, *supra* note 21, at 565. [Reproduced in the accompanying notebooks at Tab 92].

[38] 1 MORRIS & SCHARF, *supra* note 15, at 566. [Reproduced in the accompanying notebooks at Tab 71].

Rule 89(D) states that evidence may be excluded if its probative value is outweighed by the need for a fair trial. Judges at the ICTY and the ICTR "not only pass judgment on the law, but also on the facts. Considered in that light, it would be advisable to see to it that the judges who decide on the admissibility of the evidence are not also members of the chamber…so as to avoid…trial judges being tainted by inadmissible evidence."[39]

Regarding the admissibility of hearsay in *Blaškić*, the judges noted "that neither common law nor civil law rules regarding admissibility standards apply."[40] The judges in *Blaškić* also noted that various exceptions to hearsay exist in common law countries and often overshadow the hearsay rule itself.[41] The ICTY in *Blaškić* allowed for the statement of a dead witness who had died of natural causes to be admitted into evidence pursuant to Article 21(4)(e) and Rule 89. The statement of the witness, Midhat Haškić, "was given under oath to the Prosecutor's investigators and . . . said statement was disclosed by [the Prosecutor] to the Defence on 11 October 1996."[42]

The Trial Chamber in *Tadić* "acknowledged that Article 21 of the Statute provides minimum judicial guarantees to which all defendants are entitled and reflects the internationally

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[39] Michaïl Wladimiroff, "Rights of Suspect and Accused," *in* SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND CRIMINAL COURTS 417-450, 437-438 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000). [Reproduced in the accompanying notebooks at Tab 75].

[40] Gabrielle Kirk McDonald, "Trial Procedures and Practices," *in* SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 548-622, 580. Footnote 161 states: "It is important to note that the admission of hearsay, when applied fairly and equally, does not necessarily operate to the prejudice of the accused, since the accused is also permitted to introduce out-of-court statements made by witnesses. Hence, the admission of hearsay does not necessarily violate the principle of equality of arms." [Reproduced in the accompanying notebooks at Tab 75]

[41] *Id.* at 580 n. 162.

[42] Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Defence Motion to Admit into Evidence the Prior Statement of Deceased Witness Midhat Haškić, Trial Chamber (29 Apr. 1998). [Reproduced in the accompanying notebooks at Tab 22].

recognized standards of due process as set forth in Article 14 of the ICCPR."[43] Rule 89(D) states that the Trial Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

In *Delalić* and *Blaškić*, the ICTY determined that hearsay is admissible evidence, with the judges following Rule 89(C). Gabrielle Kirk McDonald notes that no confrontation clause exists in the Statute of the ICTY.[44] "The confrontation clause is Amendment 6 of the United States Constitution. Our statute says that the accused has the right to examine or cross examine witnesses against him."[45] What McDonald says is true. There is no confrontation clause present in Article 21(4)(e) of the ICTY Statute or Article 20(4)(e) of the ICTR Statute. The confrontation clause guarantees the right of the accused to be confronted by the witnesses against him, but it is only invoked in an instance where a statement is "testimonial." Hearsay statements are arguably not "testimonial," as the declarant is not testifying live before the Tribunal.

B. An Amendment to Rule 92*bis* under Rule 6 of the ICTR Rules

Rule 92*bis* "allows a witness's written statement in lieu of oral testimony so long as it helps prove 'a matter other than the acts and conduct of the accused as charged in the indictment."[46] Rule 92*bis*(C) allows for a "written statement…by a person who has subsequently

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[43] GERT-JAN G.J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 219 (2001). [Reproduced in the accompanying notebooks at Tab 67].

[44] Kitty Felde, Gabrielle Kirk McDonald, Alan Tieger & Michaïl Wladimiroff, *War Crimes Tribunals: The Record and the Prospects: The Prosecutor v. Dusko Tadić*, 13 AM. J. INT'L L. REV. 1441, 1465 (1998). [Reproduced in the accompanying notebooks at Tab 86].

[45] *Id.*

[46] Wald (2002), *supra* note 20, at 227. [Reproduced in the accompanying notebooks at Tab 95].

died" to be admitted if the Trial Chamber is satisfied on a balance of probabilities, and finds from the circumstance under which the statement was made that it is reliable."[47]

By not relying on the written record "it becomes difficult or impossible to obtain competent evidence early on, and to disinter it, when obtained, after long entombment in the file. The disappearance of a single witness can ruin even a carefully prepared case."[48] If a witness dies during trial, it may adversely affect the defendant's case, as he or she may not have had the opportunity to cross-examine them. Rule 92*bis*(A) precludes a written statement from going to proof of the acts and conduct of the accused in the indictment. If a witness is unavailable to testify because they are deceased, then the Tribunal would have to rely on their written statement. While it would be preferable for the statement to have been given under oath for purposes of reliability, it would not be in the interests of justice to prevent the testimony from being admitted because it is a written statement. If the deceased individual was one of the only witnesses who could identify the accused or corroborate the charges listed in the indictment, the Prosecutor, under Rule 92*bis*(A), would not be able to proceed with their case without such key testimony. Rule 6 authorizes an amendment to the Rules as long as they do not infringe upon the rights of the accused under Article 20(4)(e). However, the Tribunal has allowed for evidence to come in under Rule 89 that many would deem to be prejudicial to the accused. The admission of hearsay testimony under Rule 89 has been argued to be prejudicial to the accused in several cases before the Tribunals, but has been allowed by the Judges. Following this reasoning, an amendment to Rule 92*bis* to allow for a written statement to go to proof as to the acts and

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[47] ICTR Rules, *supra* note 2, Rule 92*bis*(C). [Reproduced in the accompanying notebooks at Tab 6].

[48] MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 61 (1986). [Reproduced in the accompanying notebooks at Tab 61].

conduct of the accused would be consistent with the past decisions and judgments of the ICTY and the ICTR.

IV. The Admissibility of Hearsay Evidence in Civil Law and Common Law Jurisdictions

A. Civil Law Jurisdictions

> Although countries outside of the common law's compass are not unaware of hearsay dangers, their reaction to them seldom assumes the form of exclusionary rules. Where it does, as is sporadically the case in criminal procedure, the embrace of the exclusionary option is rooted as much in due process values as it is in the desire to protect the adjudicator from unreliable information.[49]

In continental legal systems, the judge serves as the fact-finder at trial and examines all the evidence that is relevant to the subject matter of the case. "The principle of immediacy" demands "that evidence be presented to the full court, and that witnesses appear personally before the decision maker."[50]

i. The European Court of Human Rights

"Even if precedent were to govern international judicial decision-making in the criminal jurisdiction it would be essentially influenced by the contesting notions of the law which come before the trial chambers from their origin in different traditions."[51] "There is a heavy reliance on the oral testimony of witnesses before international criminal tribunals. This is consistent with the desire, for example, of the ICTY to represent the process of trial as publicly as possible."[52] The ICTY in *Delalić* stated that "*viva voce* testimony is an essential part of the evidence before

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[49] MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 15 (1997). [Reproduced in the accompanying notebooks at Tab 60].

[50] Mirjan R. Damaška, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425, 446-447 (1992). [Reproduced in the accompanying notebooks at Tab 83].

[51] Mark Findlay, *Synthesis in Trial Procedure?—The Experience of International Criminal Tribunals*, INT'L & COMP. L.Q. 50.1(26), 4 (2001). [Reproduced in the accompanying notebooks at Tab 87].

[52] *Id.* at 7.

the Trial Chamber."[53] The principle of equality of arms "encapsulates the rights of access, information, confrontation, and representation, and has been invoked in the ECHR over issues such as failure to furnish documents to a party, failure to give reasons, refusal to admit evidence, and the use of court appointed experts."[54]

"In 1986 the ECHR first held that a criminal conviction based on evidence which an American court would describe as hearsay was a violation of Article 6(3) of the Convention."[55] In *Unterpertinger v. Austria*[56], the Court said "that hearsay could be used if the use complied with the rights of the defendant. This opinion stopped without trying to describe how that might occur."[57] In the *Unterpertinger* case, the defendant was convicted on the basis of testimony that was derived from written statements taken from his wife and stepdaughter. The two women had refused to testify. The Court stated that "the reading out of statements in this way cannot be regarded as being inconsistent with Article 6(1) and (3)(d) of the Convention, but the use of them must nevertheless comply with the rights of the defence,"[58] especially in a criminal trial when the defendant has not had the opportunity to cross-examine the witnesses.

It is understandable how the Court determined that Unterpertinger was not accorded a fair trial as required by the Convention, since the witnesses were available to testify at trial, but

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[53] Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of Witnesses, Trial Chamber (20 Mar. 1997), para. 6. [Reproduced in the accompanying notebooks at Tab 28].

[54] Findlay, *supra* note 51, at 11. [Reproduced in the accompanying notebooks at Tab 87].

[55] Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QUINNIPIAC L. REV. 777, 778 (2003). [Reproduced in the accompanying notebooks at Tab 88].

[56] Unterpertinger v. Austria, 110 Eur. Ct. H. R. (ser. A)(1987), *in* (1991) 13 E.H.R.R. 175. [Reproduced in the accompanying notebooks at Tab 54].

[57] Kirst, *supra* note 55, at 783. [Reproduced in the accompanying notebooks at Tab 88].

[58] *Unterpertinger*, *supra* note 56, (1991) 13 E.H.R.R. at 184. [Reproduced in the accompanying notebooks at Tab 54].

chose not to do so. However, had the witnesses been unavailable to testify, the reading of the written statements would have been permissible under the language of the Convention.

ii. France

Article 6.3.d of the European Convention on Human Rights "grants the accused the right 'to examine or have examined witnessed against him and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him."[59] Article 6.1 grants the accused the right to a fair trial. "The European Court of Human Rights, and the French Court of Cassation, have held that these provisions require the trial court to grant defendant's request to summon and question a witness unless the witness is clearly unavailable…"[60] "Notwithstanding the somewhat expanded right to confront during appellate proceedings, the French system does not need to place a priority on a defendant's right to confront because a judge is the party responsible for the examination of witnesses."[61]

The French Penal Code has a provision that punishes an individual with life imprisonment for the murder of a witness, a victim or a party to a civil suit done to prevent them from providing information, filing suit, or testifying at trial.[62] This provision seems to support the hearsay exception of forfeiture by wrongdoing found in the United States and Canada. By punishing an individual for making a witness unavailable, one can assume that a statement

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[59] Richard S. Frase, "France," *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 143-186, 170 (Craig M. Bradley ed., 1999). [Reproduced in the accompanying notebooks at Tab 58].

[60] *Id.*

[61] Antonia Sherman, *Sympathy for the Devil: Examining a Defendant's Right to Confront Before the International War Crimes Tribunal*, 10 EMORY INT'L L. REV. 833, 864. [Reproduced in the accompanying notebooks at Tab 93].

[62] LE NOUVEAU CODE PENAL 66 (1993), Article 221-4, 5° « Le meurtre est puni de la réclusion criminelle à perpétuité lorsqu'il est commis: Sur un témoin, une victime ou une partie civile, soit pour l'empêcher de dénoncer les faits, de porter plainte ou de déposer en justice, soit en raison de sa dénonciation, de sa plainte ou de sa déposition. » [Reproduced in the accompanying notebooks at Tab 69].

offered against the accused by the unavailable witness would then be allowed into evidence, because the accused should not be rewarded for disposing of a witness against him.

"Under the 1958 Constitution, criminal procedure falls within the legislative domain of article 34, and therefore regulation play only a limited role in this area, primarily applying parliamentary legislation."[63] Article 55 of the Constitution holds that legislation must be in conformity with international treaties, and in the context of criminal procedure, article 6 of the 1950 European Convention for the Safeguard of Human Rights "protects the right to a fair trial in the criminal field."[64] "In practice, the Criminal Division of the *Cour de cassation* generally takes the view that for matters of criminal procedure its principal source is the Code, and the Convention is only of secondary importance."[65] French law recognizes five types of evidence, including written and oral.[66] Article 1 of An Act of 31 May 2000[67] says

> The criminal procedure must be fair and give due hearing to the parties and preserve the balance between the parties' rights. It must guarantee the separation of the authorities responsible for the prosecution and the trial. People finding themselves in similar conditions and prosecuted for the same facts must be judged according to the same rules.[68]

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[63] CATHERINE ELLIOTT, FRENCH CRIMINAL LAW 11 (2001). [Reproduced in the accompanying notebooks at Tab 62].

[64] *Id.*

[65] *Id.*

[66] ANDRE HUET, LES CONFLITS DE LOI EN MATIERE DE PREUVE 167 (1965). « Le droit français a essentiellement prévu et réglementé cinq moyens de preuve, 'la preuve littérale, la preuve testimoniale, les présomptions, l'aveu de la partie et le serment' (art. 1316 C. civ.)». [Reproduced in the accompanying notebooks at Tab 63].

[67] ELLIOTT, *supra* note 63, at 11. *Loi no. 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes*. [Reproduced in the accompanying notebooks at Tab 62].

[68] *Id.* at 12. « La procédure pénale doit être équitable et contradictoire et préserver l'équilibre des droit des parties. Elle doit garantir la séparation des autorités chargées de l'action publique et des autorités de jugement. Les personnes se trouvant dans des conditions semblables et poursuivies pour les mêmes infractions doivent être jugées selon les mêmes règles».

"It should be noted that because of the inquisitorial nature of French criminal procedure, witnesses are permitted to give evidence which to a British lawyer might be regarded as hearsay evidence…"[69] This is true of most civil law jurisdictions, as it left to the trier of fact to determine if evidence is admissible and to accord it the appropriate weight when making the final judgment. "The trial hearing has always mixed elements of the inquisitorial and adversarial system as it usually takes place in public with a limited opportunity for the parties to put their case orally, but the written file on the case prepared during the pre-trial investigations is central to the hearing."[70] In the French system, there is great reliance on the written record, as the Court is trying to find the truth in the matter, and does so by reviewing all relevant evidence, no matter what form it takes. If the Court did not permit written testimony to be admitted into evidence, then it may not be made aware of information necessary to decide a case.

iii. Germany and Switzerland

"The first sentence of section 250 of the German Code of Criminal Procedure, adopted in 1877, but still in force, broadly proclaims: 'If evidence of a fact rests upon a person's observation, this person must be examined at the trial."[71] This sentence pertains to what would be regarded as written hearsay in common law jurisdictions.[72] "Inadmissible evidence is excluded from the trial, but professional judges usually are aware of it from the dossier of the case."[73] The court may "use the record of a prior judicial examination when a witness is

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[69] ANDREW WEST ET AL., THE FRENCH LEGAL SYSTEM 257 (2d ed. 1998). [Reproduced in the accompanying notebooks at Tab 77].

[70] ELLIOTT, supra note 63, at 13. [Reproduced in the accompanying notebooks at Tab 62].

[71] Damaška, *supra* note 50, at 449. [Reproduced in the accompanying notebooks at Tab 83].

[72] *Id* .at 450.

hindered from appearing at trial."[74] Since German judges control fact-finding and are responsible for the comprehensiveness and accuracy of the evidentiary material, the German Code of Criminal Procedure "requires the court to extend the reception of evidence to 'all means of evidence which are important for the decision."[75]

"German criminal procedure combines principles of the inquisitorial process with those of purely accusatorial procedure…Inquisitorial elements only enter the proceedings once charges have been filed. At that point the judge assumes direction of the proceedings."[76] "The most important sources of law for the 'constitution' of the courts and for criminal procedure are the Code of Criminal Procedure (*Reichsstrafprozeßordnung*) and the Judicature Act (*Gerichtsverfassungsgesetz*) of 1877." "In view of the danger that may be posed to fundamental human rights during the course of a criminal trial, Germany's Constitution (*Grundgesetz*—GG) with its catalogue of fundamental human rights is also an important source of law."[77] The courts must interpret the Code of Criminal Procedure in light of the Basic Law of 1949, and due to the "fundamental procedural guarantees" found in the European Convention of Human Rights, the Basic Law must be interpreted in light of the values of the Convention.[78]

In terms of evidentiary principles, the principle of immediacy "requires the court to obtain the most direct and immediate impression of the events charged (§ 261

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[73] Thomas Weigand, "Germany," *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 187-216, 208 (Craig M. Bradley ed., 1999). [Reproduced in the accompanying notebooks at Tab 58].

[74] Damaška, *supra* note 50, at 450. [Reproduced in the accompanying notebooks at Tab 83].

[75] *Id.* at 454.

[76] Gerhard Dannecker & Julian Roberts, "The Law of Criminal Procedure," *in* INTRODUCTION TO GERMAN LAW 413-449, 414 (Werner F. Ebke & Matthew W. Finkin eds., 1996). [Reproduced in the accompanying notebooks at Tab 65].

[77] *Id.* at 416.

[78] *Id.* at 417. Interpretation in conformity with human rights is *menschenrechtskonforme Auslegung*.

Strafprozeßordnung—StPO)."[79] Generally, witnesses must be directly examined at trial, "and this examination may not be replaced by reading out the record of some earlier examination or by a written statement (§ 250 StPO)."[80]

In Switzerland, there is not a consistent view on hearsay evidence, as the federal and cantonal systems are not always in agreement with each other. "It must be borne in mind that…Switzerland is a federative state. When it was founded in 1848, legislation in criminal matters was not attributed to the Confederation but remained with the cantons…Even now cantonal criminal law continues to exist along with federal legislation."[81] The Federal Tribunal has held that the rule of *nullum crimen sine lege* "is incorporated in Article 4 of the Federal Constitution which guarantees to everyone equality before the law without discrimination and is construed as a general protection against arbitrariness including a guarantee to a fair trial."[82] "The Federal Tribunal also often refers to the legal doctrine of neighbouring countries—the most important influence on legal thinking in the field of criminal law comes from the Federal Republic of Germany."[83] The Swiss courts will refer to jurisprudence of the European Court of Human Rights and neighboring countries, and the federal view on the admissibility of hearsay evidence would be one consistent with the European Convention on Human Rights and other civil law jurisdictions.

iv. Rwanda

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[79] Dannecker & Roberts, *supra* note 76, at 428. [Reproduced in the accompanying notebooks at Tab 65].

[80] *Id.* at 429.

[81] S. Trechsel, "Criminal Law," *in* INTRODUCTION TO SWISS LAW 213-236, 213 (François Dessemontet & Tuğrul Ansay eds., 1981). [Reproduced in the accompanying notebooks at Tab 66].

[82] *Id.* at 213-214.

[83] *Id.* at 217.

Like the French, the Rwandan legal system recognizes five types of evidence, including written and oral testimony. The Rwandan system admits all pertinent evidence in accordance with the Franco-Germanic legal tradition.[84] Like other civil law jurisdictions, the Rwandan system allows for any relevant evidence to be admitted. Rwandan law recognizes five types of evidence, including written evidence.[85] A witness is not automatically required to testify in court, as the dossier may be sufficient to establish the necessary evidence.[86] The Rwandan code echoes the ICCPR and the African Charter by recognizing the right of the accused to examine or have examined the witnesses against him.[87]

In regards to the creation of the ICTR, the Rwandan Government has expressed some misgivings, ranging from the jurisdiction of the Tribunal, its location in Arusha, and the penalties for the crimes over which it exercises jurisdiction.[88] Rwandan laws would allow for the death penalty for those convicted of the commission of genocide. The ICTR Statute does not allow for capital punishment, which is consistent with the view of most countries today, particularly the countries of Europe. "Therefore, the individuals who committed the most serious crime could get less than life imprisonment in the ICTR while lower level perpetrators tried in Rwanda could

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[84] MARTIN IMBLEAU & WILLIAM K. SCHABAS, INTRODUCTION AU DROIT RWANDAIS 62-63 (1999). « La preuve peut être établie par tout moyen de fait ou de droit, pourvu qu'elle soumise à un débat contradictoire (art. 17 CPP). Contrairement à la *common law* avec ses règles de preuve très techniques, le système d'inspiration romano-germanique admet en preuve tous les éléments à la condition qu'ils soient pertinents ». [Reproduced in the accompanying notebooks at Tab 64].

[85] *Id.* at 150. « Le droit rwandais reconnaît cinq types de preuves : la preuve écrite, la preuve testimoniale, les présomptions, l'aveu de la partie et le serment. Le code distingue les écrits dont l'authenticité a été vérifiée par un officier public tel un notaire, et les simples écrits (art. 199 à 216 CC III)».

[86] *Id.* at 64. « Les témoins à charge et à décharge peuvent être entendus ; leur présence n'est toutefois pas automatique puisque le dossier préparé par le juge d'instruction peut être suffisant pour faire ressortir les éléments de preuve».

[87] *Id.* at 215.

[88] Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 176 (2000). [Reproduced in the accompanying notebooks at Tab 82].

receive the death penalty."[89] In light of the passage of Security Council Resolutions 1503 and 1534, which are discussed later in further detail, the fact that the Rwandan courts may administer the death penalty, could make it necessary for the testimony of dead witnesses as to the acts and conduct of the accused in the indictment, even if this is inconsistent with Rule 92*bis*. The Rwandan Government has severed relations in the past when it has disagreed with the actions of the Tribunal and may do so in the future. In the event that prosecutions may be turned over to the courts of a nation that has not always agreed with the work of the Tribunal, in the interests of expediting justice, it may be in the best interests of the ICTR to amend Rule 92*bis* to allow for written statements of deceased witnesses to go to proof of the acts and conduct charged in the indictment. There is a shortage of prosecutors and defense attorneys in Rwanda at present, which would inhibit the rights of individuals to a fair and expeditious trial guaranteed under the ICTR Statute.[90]

B. Common Law Jurisdictions

The general rule concerning the admissibility of evidence in the Commonwealth nations was that set out by Lord Goddard, CJ in *Kuruma v. R.*[91]

> In their Lordships' opinion the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, admissible and the court is not concerned with how the evidence was obtained.[92]

In Canada, the Canadian Charter of Rights and Freedoms departed from this rule. Section 24(2) provides that evidence "obtained subsequent to a violation of the *Charter* must be excluded in any case where the admission of evidence in the proceedings would bring the

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[89] Carroll, *supra* note 88, at 177. [Reproduced in the accompanying notebooks at Tab 82

[90] *Id.* at 188-189.

[91] Kuruma v. R., [1955] A.C. 197 (P.C., Eastern Africa). [Reproduced in the accompanying notebooks at Tab 17].

[92] *Id.* at 203.

administration of justice into dispute."[93] In the United Kingdom, the Criminal Justice Act 1988 addresses evidentiary issues before the courts. While the modern legal systems of the United States, Canada, and the United Kingdom all evolved from the common law tradition, they have diverged in their thinking about and application of the hearsay rule.

i. The United Kingdom

In the United Kingdom, "no statutory definition of hearsay existed until the Civil Evidence Act 1995 came into effect on 31 January 1997."[94] The definition in this act defines hearsay as "a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated."[95] The definition does not apply to criminal cases, however, even though other definitions in the act do extend to criminal cases.[96] "Almost as soon as the rule against hearsay had been formulated, the judges recognized the necessity for some exceptions and began to create them."[97] *Myers v. Director of Public Prosecutions*[98] was a landmark case in regards to hearsay. In *Myers*, the majority "held that that era of judicial creation of major exceptions had ended, and that the time had come for Parliament

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[93] David M. Pacciocco, "The Law of Evidence: Recasting Rules to Perform New Roles," *in* LAW SOCIETY OF UPPER CANADA, APPLYING THE LAW OF EVIDENCE: TACTICS AND TECHNIQUES FOR THE NINETIES 1-50, 4 (1991). [Reproduced in the accompanying notebooks at Tab 68].

[94] PETER MURPHY, MURPHY ON EVIDENCE 184 (6th ed. 1997). [Reproduced in the accompanying notebooks at Tab 72].

[95] *Id*.

[96] *Id.* at 185.

[97] *Id.* at 186.

[98] Myers v. Director of Public Prosecutions, [1965] A.C. 1001. [Reproduced in the accompanying notebooks at Tab 18].

to provide a comprehensive legislative basis for the rule and the exceptions to it."[99] Lord Reid stated in *Myers*:

> The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is long overdue. A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature…[100]

"To this day, there has been no comprehensive, systematic legislative treatment of hearsay in criminal cases."[101]

"The rules at common law show that declarations made by persons since deceased are admissible, exceptionally, to prove the facts contained in them, in four kinds of cases…"[102] These are matters of public concern, declarations against interest, declarations in the course of duty, and dying declarations in homicide cases. "Not until the Police and Criminal Evidence Act 1984, was any broad attempt made to introduce documentary hearsay evidence into criminal cases."[103] Section 23 of the Criminal Justice Act allows for firsthand documentary evidence to be admitted if "the maker of the statement is unavailable to give evidence or it would be pointless to call him as a witness."[104]

Section 78 of the Police and Criminal Evidence Act 1984 states,:

> In any proceedings the court may refuse to allow the evidence on which the prosecution proposes to rely to be given if it appears to the court that, having

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[99] MURPHY, *supra* note 94, at 188. [Reproduced in the accompanying notebooks at Tab 72]

[100] *Myers*, *supra* note 98, at 1022. [Reproduced in the accompanying notebooks at Tab 18].

[101] MURPHY, *supra* note 94, at 188. The Criminal Evidence Act 1965 was replaced by the Police and Criminal Evidence Act 1984, which was replaced by the Criminal Evidence Act 1988. [Reproduced in the accompanying notebooks at Tab 72].

[102] *Id.* at 190.

[103] *Id.* at 283.

[104] *Id.*

> regard to all the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[105]

This seems to codify the power that the English judiciary had in the common law prior to the decision of the Privy Council in *Myers*.[106]

ii. Canada

"Normally hearsay evidence is thought of as being evidence by a witness which consists of his relating something which he was told by another person."[107] The Judicial Committee of the Privy Council said "It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made."[108] The Canada Evidence Act makes no mention of hearsay testimony in its language. In regards to the cross-examination of witnesses, the Act states that "On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or that have been recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case…"[109]

The Privy Council in *Subramaniam v. Public Prosecutor*[110], stated:

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[105] MICHAEL ZANDER, THE POLICE AND CRIMINAL EVIDENCE ACT 1984 200, 325 (2d ed. 1990). [Reproduced in the accompanying notebooks at Tab 79].

[106] *Id.* at 200. [Reproduced in the accompanying notebooks at Tab 79].

[107] Robert J. Carter, "The Rule Against Hearsay," *in* STUDIES IN CANADIAN CRIMINAL EVIDENCE 1-5, 1 (Roger E. Salhany & Robert J. Carter eds., 1972). [Reproduced in the accompanying notebooks at Tab 76].

[108] *Id.* at 2. [Reproduced in the accompanying notebooks at Tab 76].

[109] Canada Evidence Act, R.S., 1985, c. C-5, s.10; 1994, c. 44 s. 86. [Reproduced in the accompanying notebooks at Tab 1].

[110] Subramaniam v. Public Prosecutor, [1956] 1 W.L.R. 965. [Reproduced in the accompanying notebooks at Tab 52].

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[111]

"Special attention has been given to hearsay as being particularly fraught with untrustworthiness because its evidential value rests on the credibility of an out-of-court asserter who is not subject to the oath, cross-examination or a charge of perjury."[112]

"The Supreme Court of Canada in *R. v. O'Brien*[113] had occasion to comment on what is and what is not hearsay."[114] In this case, there were two defendants, O'Brien and Jensen. "On appeal, the question arose as to whether Jensen's statement could be admitted through the testimony of O'Brien's lawyer."[115]

> The evidence of Mr. Simon was offered for the purpose of proving the truth of the matter asserted. It was sought, through that evidence, to prove that Jensen, and not O'Brien, had committed the act with which O'Brien stood charged, or at least to raise a reasonable doubt as to O'Brien's guilt. That is the classic touchstone of inadmissible hearsay.[116]

This case provides a good example of how hearsay evidence is examined in Canadian jurisprudence and the justices' desire to prevent hearsay evidence from being admitted if it does not fit within one of the hearsay exceptions.

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[111] *Subramaniam*, *supra* note 110, at 970. [Reproduced in the accompanying notebooks at Tab 52].

[112] JOHN SOPINKA, SIDNEY N. LEDERMAN & ALAN W. BRYANT, THE LAW OF EVIDENCE IN CANADA 157 (1992). [Reproduced in the accompanying notebooks at Tab 74].

[113] R. v. O'Brien, [1978] 1 S.C.R. 591. In this case, O'Brien and Jensen, the defendants, were charged with trafficking narcotics. O'Brien was convicted. Jensen had left the jurisdiction and when he returned, told O'Brien's lawyer he alone had committed the offense and would testify under the protection of subsequent immunity found in the Canada Evidence Act. He died prior to the trial. [Reproduced in the accompanying notebooks at Tab 46].

[114] SOPINKA ET AL., *supra* note 112, at 161. [Reproduced in the accompanying notebooks at Tab 74].

[115] *Id.*

[116] *O'Brien*, *supra* note 113, at 593-594. [Reproduced in the accompanying notebooks at Tab 46].

Section 1 of the Canadian Charter of Rights and Freedoms "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by the law as can be demonstrably justified in a free and democratic society."[117] "Section 1 of the *Charter* performs a dual function in that it constitutionally guarantees the rights and freedoms set out in succeeding section of the *Charter*, and at the same time, establishes the criteria by which those guaranteed rights may be limited."[118] Canadian courts have referred to the wording and judicial interpretation of international documents, with the United Nations Covenant on Social and Political Rights and the European Convention being "frequently referred to in the interpretations of s. 1, 2(*a*), 2(*d*), 7, 8, 9, 11(*b*), 11(*d*) and 12 of the *Charter*."[119] This is consistent with the decisions and judgments of the ICTY and the ICTR in reference to the rights of the accused.

"The appropriateness of judicial reference to international documents as aids to the interpretations of the *Charter* has now been made clear by Chief Justice Dickson of the Supreme Court of Canada in [*Alberta Union of Provincial Employees v. A.G.*]."[120]

> [T]he various sources of international human rights law—declarations, covenants, conventions, judicial and quasi judicial decisions of international tribunals, customary norms must, in my opinion, be relevant and persuasive sources for the interpretation of the *Charter's* provisions.[121]

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[117] Canada Act, 1982 (U.K.), 1982, c. 11, Schedule B of the Canada Act, 1982 is the Constitution Act, 1982, The Canadian Charter of Rights and Freedoms is Part I of the Constitution Act, 1982. [Reproduced in the accompanying notebooks at Tab 2].

[118] WILLIAM H. CHARLES, THOMAS A. CROMWELL & KEITH B. JOBSON, EVIDENCE AND THE CHARTER OF RIGHTS AND FREEDOMS 98 (1989). [Reproduced in the accompanying notebooks at Tab 57].

[119] *Id.* at 73.

[120] *Id.* at 75.

[121] Alberta Union of Provincial Employees v. A.G. (Alta.), [1987] 28 C.R.R. 305 at 328. [Reproduced in the accompanying notebooks at Tab 14].

"Perhaps the best approach would be for courts to analyze all hearsay-by-conduct evidence in the terms of possibility of the dangers of defective perception, insincerity, memory, or communication, and ambiguity of inference raised by such untested evidence."[122] *R. v. Potvin* may serve as a guide. "The Crown tendered as evidence the transcript of the declarant's testimony at the preliminary which satisfied the statutory conditions for admissibility under the provisions of the *Criminal Code* permitting such evidence to be received at trial."[123]

> …the right to confront unavailable witnesses at trial is neither an established nor a basic principle of fundamental justice. To the extent that s. 7 guarantees the accused a fair trial, it cannot be said, in the absence of circumstances which negated or minimized the accused's opportunity to cross-examine the witness when the previous testimony was given, that the admission of the previously obtained testimony under s. 643(1)[124] was unfair to the accused. It is the opportunity to cross-examine and not the fact of cross-examination which is crucial if the accused is to be treated fairly. The same is true of the accused's right to a fair trial guaranteed by s. 11(*d*) of the *Charter*.[125]

LaForest J. cites to *R v. Sang*[126] saying "That case, and others there referred to, make it clear that under English law, a judge in a criminal trial always has a discretion to exclude evidence if, in the judge's opinion, its prejudicial effect outweighs its probative value."[127] The accused "would have a constitutional right to have the evidence of prior testimony obtained in the absence of a full opportunity to cross-examine the witness excluded."[128] As one commentator notes "it seems only a matter of time before the Supreme Court of Canada recognizes that judges have the

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[122] SOPINKA ET AL., *supra* note 112, at 172. [Reproduced in the accompanying notebooks at Tab 74].

[123] *Id.*

[124] Criminal Code, R.S.C. [1970], c. C-34, s. 643(1). This provision is now Criminal Code, R.S. [1985], c. C-46, s. 715 (1). [Reproduced in the accompanying notebooks at Tab 3].

[125] R. v. Potvin, [1989] 1 S.C.R. 525, 527. [Reproduced in the accompanying notebooks at Tab 48].

[126] R. v. Sang, [1980] A.C. 402 [Reproduced in the accompanying notebooks at Tab 49].

[127] *Potvin*, *supra* note 125, at 532. [Reproduced in the accompanying notebooks at Tab 48].

[128] *Id.* at 551.

discretion to exclude technically admissible evidence in criminal cases, whenever its prejudicial impact outweighs its probative value."[129]

The Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights enshrine the rights of Canadians, including the right to justice and a fair trial. The language in these two documents was inspired by international covenants, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention.[130] The Charter replaces the Bill of Rights, but that does not mean that the rights that existed in the Bill of Rights no longer exist simply because the wording has changed or does not exist anymore in the language of the Charter. "The due process clause does not appear in the Charter."[131] "The accused…has the right to compel attendance of witnesses and cross-examine them."[132] Section 7 of the Canadian Charter of Rights and Freedoms "has been interpreted to protect the accused's right to present full answer and defence."[133] The language of section 7 of the Charter states that "Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[134]

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[129] Pacciocco, *supra* note 93, at 18. Pacciocco in the footnotes writes that "The court recognized an exclusionary discretion in these broad terms in the narrow contest of similar fact evidence in the case of *R. v. Morin*, [1988] 2 S.C.R. 345 at 367." [Reproduced in the accompanying notebooks at Tab 68].

[130] JEROME ATRENS, THE CHARTER AND CRIMINAL PROCEDURE: THE APPLICATION OF SECTIONS 7 AND 11 6-2-6-3 (1989). [Reproduced in the accompanying notebooks at Tab 56].

[131] Stanley A. Cohen, "Criminal Procedure and the Canadian Charter of Rights and Freedoms," *in* CRIMINAL PROCEDURE IN CANADA 1-26, 13 (Vincent Del Buono ed., 1982). [Reproduced in the accompanying notebooks at Tab 59].

[132] Kent Roach, "Canada," *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 53-80, 75 (Craig M. Bradley ed., 1999). [Reproduced in the accompanying notebooks at Tab 58].

[133] *Id.*

[134] ATRENS, *supra* note 130, at 6-10. [Reproduced in the accompanying notebooks at Tab 56].

Section 11(d) provides individuals with the right to a fair trial as a principle of fundamental justice.[135]

In *R. v. Hawkins*, Section 715 of the Criminal Code was addressed by the Supreme Court. Section 715 of the Criminal Code

> provides that where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge or on the preliminary inquiry into the charge…is dead…and where it is proved that the evidence was taken in the presence of the accused, it may be read as evidence in the proceedings without further proof.[136]

The Court reiterates the existence of a principled exception to the hearsay rule "which seeks to give effect to the underlying purposes of the rule."[137] "Under this reformed framework, a hearsay statement will be admissible for the truth of its contents if it meets the separate requirements of 'necessity' and 'reliability'."[138]

With regards to hearsay testimony, the Supreme Court of Canada in *R. v. Starr*[139] ordered a new trial in a murder case where a witness's testimony about a victim's statement of intention had been admitted into evidence. *Starr* is one of the most recent cases which continue the "principled approach" to hearsay which states "hearsay evidence may be admissible, notwithstanding the inapplicability of the categorical exceptions on the facts of the case, provided the criteria of necessity and reliability set out in *Khan* are met."[140] This mirrors the

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[135] ATRENS, *supra* note 130, at 6-10. [Reproduced in the accompanying notebooks at Tab 56].

[136] R. v. Hawkins, [1996] 3 S.C.R. 1043, 1059. [Reproduced in the accompanying notebooks at Tab 45].

[137] *Id*. at 1080.

[138] *Id.* at 1080-1081.

[139] R. v. Starr, [2000] 2 S.C.R. 144. [Reproduced in the accompanying notebooks at Tab 50

[140] *Id.* at 225-226.

criteria set out in *Ohio v. Roberts* in the United States, which has since been overturned by *Crawford v. Washington*.

Dying declarations are admitted into evidence in Canada, as they are in the United States. "In trials for murder or manslaughter, a written or oral statement of a deceased person is admissible evidence as to his cause of death provided he made the statement while he was under a settled hopeless expectation of death and provided he would have been a competent witness had he lived."[141]

iii. The United States

In common law jurisdictions, the testimony of a dead witness would be classified as hearsay testimony. In the United States, hearsay is generally inadmissible. Hearsay in United States federal courts is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[142] Rule 802 of the Federal Rules of Evidence states that "hearsay is not admissible except as provided by these rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."[143] Rule 804 outlines the exception the Hearsay Rule when the declarant is unavailable. "Unavailability of a witness" includes a situation in which the declarant "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."[144] The two exceptions to hearsay in Rule 804 that are most relevant to the issue at hand are those dealing with a witness's former testimony and forfeiture by wrongdoing.

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[141] Roger E. Salhany, "Exceptions to the Hearsay Rule," *in* STUDIES IN CANADIAN CRIMINAL EVIDENCE 7-39, 9 (Roger E. Salhany & Robert E. Carter eds., 1972). [Reproduced in the accompanying notebooks at Tab 76].

[142] Fed. R. Evid. 801. [Reproduced in the accompanying notebooks at Tab 5].

[143] Fed. R. Evid. 802. [Reproduced in the accompanying notebooks at Tab 5].

[144] Fed. R. Evid. 804(a)(4). [Reproduced in the accompanying notebooks at Tab 5].

Rule 804(b)(1) allows for past testimony to be entered into evidence if the declarant is unavailable as defined by Rule 804(a)(1) and the past statement was given under oath at a proceeding or deposition and was subject to examination by the party against whom it was offered.[145] Rule 804(b)(6) allows for "a statement offered against a party that has engaged in or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the declarant as a witness."[146]

In *United States v. Houlihan*[147], the First Circuit stated that "a defendant who wrongfully procures a witness's absence for the purpose of denying the government that witness's testimony waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements."[148] The Court also held that the defendants in *Houlihan*, when they waived their confrontation right, "they simultaneously waived their right to object on hearsay grounds to the admission of his out-of-court statements."[149] "English and American courts have consistently relaxed the hearsay rule when the defendant wrongfully causes the witness's unavailability."[150] The relevance to the testimony of a dead witness before the ICTR is if the accused caused the witness's death prior to the indictment or after.

Rule 804(2) allows for dying declarations to be admitted into evidence "in a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing

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[145] Fed. R. Evid. 804(b)(1). [Reproduced in the accompanying notebooks at Tab 5].

[146] Fed. R. Evid. 804(b)(6). [Reproduced in the accompanying notebooks at Tab 5].

[147] United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996), *cert. denied*, 519 U,S, 1118 (1997). [Reproduced in the accompanying notebooks at Tab 53].

[148] *Id.* at 1279.

[149] *Id.* at 1282.

[150] Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982). [Reproduced in the accompanying notebooks at Tab 51].

that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death."[151]

Rule 804(b)(6) is applicable only when the defendant has wrongfully caused a witness to be unavailable to testify. In the instance of a dead witness's testimony before the ICTR, this would be relevant if the defendant wrongfully procures a witness's unavailability, by arranging for their death in some manner.

Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…"[152] As one commentator notes, "where the Court has identified values inherent in certain constitutional provisions, it has defended those values even despite some cost. As is true of specific constitutional provisions, the sixth amendment as a whole has a value. That value is balance."[153]

The Sixth Amendment of the U.S. Constitution asserts that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[154] In *Ohio v. Roberts*[155] the U.S. Supreme Court established a two-part test to apply the Confrontation Clause to the admissibility of hearsay. This test established the rules of necessity and reliability. In 2004, the way the Confrontation Clause is applied to hearsay statements changed in *Crawford v. Washington*.[156] Justice Scalia cited to *Roberts*, which says "an unavailable witness's out-of-

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[151] Fed. R. Evid. 804(2). [Reproduced in the accompanying notebooks at Tab 5].

[152] Fed. R. Evid. 403. [Reproduced in the accompanying notebooks at Tab 5].

[153] Joanne A. Epps, *Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?*, 77 KY. L.J. 7, 57 (1989). [Reproduced in the accompanying notebooks at Tab 85].

[154] U.S. CONST. amend. VI. [Reproduced in the accompanying notebooks at Tab 12].

[155] Ohio v. Roberts, 448 U.S. 56 (1980). [Reproduced in the accompanying notebooks at Tab 19].

[156] Crawford v. Washington, 158 L. Ed. 2d 177 (2004). [Reproduced in the accompanying notebooks at Tab 15].

court statement may be admitted so long as it has adequate indicia of reliability—*i.e.*, falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness."[157]

"The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."[158]

V. The Admissibility of Hearsay Evidence at the ICTR and Evidentiary Principles which are Applicable to the Testimony of Dead Witnesses as to the Acts and Conduct of the Accused

A. Article 20(4)(e)

Article 19(1) of the ICTR Statute states the Trial Chamber "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[159] The principle of *unus testis, nullus testis* has been invoked by the accused in several cases before the ICTY and the ICTR, but as noted in the *Tadić*, the requirement of "testimonial corroboration of a single witness's evidence as to a fact in issue, is in almost all modern legal systems no longer a feature."[160] The ICTR in the *Akayesu* case held that a "Chamber can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible."[161]

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[157] *Crawford v. Washington*, 158 L. Ed. 2d at 187, *citing Ohio v. Roberts*, 448 U.S. at 66. [Reproduced in the accompanying notebooks at Tab 15].

[158] *Id.*

[159] ICTR Statute, *supra* note 14, Article 19(1). [Reproduced in the accompanying notebooks at Tab 8]. *See also*, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. Doc. S/2704 at 36, annex (1993) and S/25704/Add.1 (1993) adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993). [hereinafter ICTY Statute], Article 20(1). [Reproduced in the accompanying notebooks at Tab 9].

[160] *Tadić*, Opinion and Judgement (TC), para. 537. [Reproduced in the accompanying notebooks at Tab 44].

[161] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, Trial Chamber I (2 Sept. 1998), para. 135. [Reproduced in the accompanying notebooks at Tab 21].

In the *Nahimana* case, the defense made a motion to hear the evidence of a witness by deposition. The defense counsel submitted that Witness Y was in ill health and could not travel to Arusha to testify in person, and also feared that he may be targeted upon arriving in Africa.[162] The Trial Chamber determined that it was in the interest of justice to hear the witness and as he could not travel to Arusha, that there were "exceptional circumstances" that are required by Rule 71 .[163] A similar defense motion was granted for the deposition of expert witness for one of Nahimana's co-defendants.[164]

In *Ntagerura*[165] the Trial Chamber observed that "prior written statements of witnesses were not systematically tendered into evidence in their entirety. When the parties used such statements during trial, they read the relevant portions of the statements into the record."[166] In both *Nahimana* and *Ntagerura*, the Tribunal has sought to accommodate both the Defense and the Prosecution when it comes to witness testimony. The instance of the testimony of a dead witness should be no different.

The judges for the ICTY looked to the suggestions of the United States when it came time to draft the Rules of Procedure and Evidence. "As a result of the drafting process, the judges ended up embracing a largely adversarial approach to their Rules of Procedures, rather

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[162] Prosecutor v. Nahimana, Case No. ICTR-99-52-I, Decision on the Defence Request to Hear the Evidence Witness Y by Deposition, Trial Chamber (10 Apr. 2003), para. 2. [Reproduced in the accompanying notebooks at Tab 39].

[163] *Nahimana*, Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition, para. 7 and 8.

[164] Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Decision on the Defence Motion for the Deposition of the Testimony of Dr. Ferdinand Goffioul, Trial Chamber (25 Apr. 2003). [Reproduced in the accompanying notebooks at Tab 38].

[165] Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgement, Trial Chamber III (25 Feb. 2004). [Reproduced in the accompanying notebooks at Tab 42].

[166] *Ntagerura*, Judgement (TC III), para. 26.

than the inquisitorial system prevailing in continental Europe."[167] When the Tribunal admits a hearsay statement, "the author of the statement has never appeared before the tribunal and the statement has never been subject to the scrutiny of cross-examination. At trial, it is important to review the record with an eye for determining which evidence is first hand and which is second hand."[168] "The question of 'the alleged author not appearing as a witness's affects the right of the accused to confrontation pursuant to Article 21(4)(e). As with hearsay evidence, the admissibility of evidence under Rule 89(C) has been found not to violate Article 21(4)(e)."[169]

The Rules "advocate the principle of due process of law and enumerate several guarantees ensuring fundamental fairness and substantial justice. This is also by the implementation of the sub-principle of 'equality of arms,' whereby the accuser and accused are equal in procedural perspective."[170] However, if the testimony of dead witnesses is admitted in evidence at the Tribunal, it may prove difficult to ensure that both sides are equal. If the witness was dead prior to the trial, and the statement was not made under oath, then it is pure hearsay, and the probative value may be outweighed by the prejudice to the defendant. If the witness had been deposed, or testified before the Tribunal and then died, the admissibility of the testimony is at issue if it was not done in the presence of the accused, or if the accused did not have the opportunity to cross-examine the witness.

As mentioned earlier, the ICTY addressed the issue of admitting the statement of a deceased witness in to evidence. "The statement had been taken by the Prosecutor's investigator

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[167] PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE?: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 106 (2002). [Reproduced in the accompanying notebooks at Tab 78].

[168] ACKERMAN & O'SULLIVAN, *supra* note 7, at 421. [Reproduced in the accompanying notebooks at Tab 55].

[169] *Id.*

[170] KNOOPS, *supra* note 43, at 221. [Reproduced in the accompanying notebooks at Tab 67].

in 1995, and the witness had died in the interim. The witness had not sworn to the statement, and had, of course, not been subject to cross-examination."[171] The appellant referred to Article 21(4)(e) to argue against the admission of the statement.[172] The Prosecution noted that an ICTY Trial Chamber "at the defense's request, allowed a prior out-of court statement of this very same dead witness, and the Appeals Chamber upheld it."[173] The reason that the Appeals Chamber rejected the admission of the statement was that it "was the only evidence of the accused's presence in a particular place at a critical time."[174] Had the Appeals Chamber not overturned the Trial Chamber in this instance, then it would have been infringing on the accused's rights that are outlined in Article 21 of the Statute of the ICTY and Article 20 of the Statute of the ICTR. The decision to allow for anonymous witnesses to testify before the tribunal

Rule 94*bis*(C) states "If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person."[175] "Expert witnesses may testify; however, if the opposing party accepts the statement of the expert witness, the statement may be admitted without calling the witness to trial."[176] If the opposing party would accept the statement of a dead witness, the reasoning behind Rule 94*bis*(C) may allow for their statements to be admitted into evidence.

B. The Ruling on Anonymity of Witnesses in the *Tadić* Judgment and the Rule on Expert Testimony

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[171] Patricia M. Wald, *"To Establish Incredible Events By Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunals Proceedings*, 42 HARV. INT'L L.J. 535, 541-542 (2001) [hereinafter Wald (2001)]. [Reproduced in the accompanying notebooks at Tab 94].

[172] *Id.* at 542.

[173] *Id.*

[174] *Id.*

[175] ICTR Rules, *supra* note 2, Rule 94*bis*(C). [Reproduced in the accompanying notebooks at Tab 6].

[176] McDonald, *supra* note 40, at 557. [Reproduced in the accompanying notebooks at Tab 75].

The issue of the anonymity of witnesses arose in *Tadić*, when the Prosecutor sought the protection of three witnesses by granting them anonymity. Article 20(4)(e) of the ICTR Statute and Article 21(4)(e) of the ICTY Statute state the accused has the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[177] "The attention that the Protective Measures Decision in the Tadić case has received is based on its final result of permitting the trial to proceed on the basis of anonymous testimony."[178] The use of anonymous testimony by the Tribunal was widely criticized by the international legal community, as this would not be permitted in most jurisdictions, particularly in common law jurisdictions, where it would be inconsistent with the right to confrontation embodied in the common law and capitalized on in the Confrontation Clause existing in U.S. jurisprudence.

The Tribunal has the ability to grant anonymity to a witness pursuant to Rule 69[179] and Rule 75.[180] The Trial Chamber in *Tadić* "held that anonymity would be permissible if a highly detailed five-prong balancing test could be satisfied."[181] The issue of anonymity seemingly has no relevance to the admissibility of the testimony of a dead witness, especially since it was

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[177] ICTR Statute, *supra* note 2, Article 20(4)(e). [Reproduced in the accompanying notebooks at Tab 8]; ICTY Statute, *supra* note 159, Article 21(4)(e). [Reproduced in the accompanying notebooks at Tab 9].

[178] Natasha A. Affloder, *Tadić, the Anonymous Witness and the Sources of International Law*, 19 MICH. J. INT'L L. 445, 494 (1998). [Reproduced in the accompanying notebooks at Tab 80].

[179] ICTR Rules, *supra* note 2, Rule 69(A). "In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witnesses who may be in danger or at risk, until the Trial Chamber decides otherwise." [Reproduced in the accompanying notebooks at Tab 6].

[180] ICTR Rules, *supra* note 2, Rule 75(A). "A Judge or a Chamber may, *proprio motu*, or at the request of either party, or of the victim or witnesses concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused."

[181] Momeni, *supra* note 17, at 164. [Reproduced in the accompanying notebooks at Tab 91].

widely criticized by the international legal community and has not been done since. The identity of witnesses may be kept anonymous by the Trial Chambers until a time when it is necessary for the Defense to be able to prepare for cross-examination.

However, the second and third prongs of the anonymity balancing test are helpful in illustrating the importance of a witness's testimony to the Prosecutor's case. The Trial Chamber in the second prong "the evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the Prosecutor to proceed without it."[182] The third prong requires a lack of "prima facie evidence that the witness is untrustworthy."[183] "This requirement in effect protects the process against testimony of witnesses with extensive criminal backgrounds and puts the onus on the Prosecutor to perform a thorough background check of the witnesses. The Prosecutor must also file a report on the reliability of the witness with the Court and the Defense."[184]

The Trial Chamber in *Tadić* recognized that the decision regarding anonymity of a witness was controversial and asserted that Article 21(4)(e) would not be violated if the accused had the opportunity to question the witness. With a dead witness, however, the accused does not have the ability to cross-examine the witness which is a right afforded them under Article 21(4)(e). The ICTY developed guidelines to ensure fairness by stating that judges "must be able

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[182] Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Trial Chamber (10 Aug. 1995), para. 63. [Reproduced in the accompanying notebooks at Tab 43].

[183] *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, para. 64. [Reproduced in the accompanying notebooks at Tab 43].

[184] Momeni, *supra* note 17, at 164. [Reproduced in the accompanying notebooks at Tab 91].

to observe the demeanor of a witness in order to ensure the reliability of the testimony."[185] By observing the demeanor of a witness, the judge has the opportunity to gauge their sincerity.

VI. Conclusion

In international law, it is generally accepted that anyone accused of a crime has a right to fair trial. This right is codified in the various legal systems around the world. The Statute for the ICTY and the Statute for the ICTR are no different. Article 21 of the Statute for the ICTY and Article 20 of the Statute for the ICTR codify general international principles concerning the rights of the accused in criminal proceedings.

The Tribunals have permitted hearsay testimony to be admitted into evidence. By allowing depositions to be taken in place of live testimony, the Tribunals have established that live testimony, while preferred under the Rules and precedent of the Tribunals, is not always possible, nor is it always necessary. The testimony of dead witnesses is often relevant and highly probative, and neither the Prosecutor nor the defense should be precluded from entering such testimony into evidence, especially if it is necessary to prove their case. There are hearsay exceptions in both the common law and civil law traditions, and while the common law hearsay rules are seemingly stricter than their civil law counterparts, they still allow for testimony to come in if it is relevant and probative and not prejudicial to the accused.

Both the United States and Canada make hearsay generally inadmissible, unless the testimony of the witness was done under oath. In that case, the testimony may be admissible if it is given before a grand jury or during trial. While the Tribunal takes its adversarial approach from the common law tradition, in terms of the testimony of dead witnesses, if classified as hearsay, it should begin to look at the hearsay exceptions present in the United States and

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[185] Momeni, *supra* note 17, at 167. [Reproduced in the accompanying notebooks at Tab 91].

Canadian legal systems. The main issue with admitting any hearsay evidence is that the declarant may not be the witness at trial, and the accused does not have an adequate opportunity to exercise his or her right to examine a witness or to confront his accuser. The Court in the same article of the Statute is concerned with the rights of witnesses and victims, and if hearsay testimony is the only way that justice will be served, it may be necessary to admit it. Hearsay testimony, for the most part, cannot be corroborated, and the testimony may be distorted by the time the Court hears the testimony. The Tribunal must balance the interests of justice with the rights of the accused as outlined in the Statute. Testimony of dead witnesses should be admitted into evidence on a case-by-case basis, with the judges being mindful of the weighing test that is found in the common law tradition.

The Security Council in Resolution 1503 "calls on the ICTY and ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010."[186] Under this resolution, it is advisable that the Tribunal allow for the testimony of dead witnesses to be admitted into evidence, if the reliability of the testimony can be verified. This follows the precedent of both the ICTY in *Blaškić* and the ICTR. By allowing for such testimony to be admitted into evidence, it may create expediency at the Tribunal, and the Office of the Prosecutor can complete the job it was assigned under the Statute. Resolution 1534 calls on the ICTR Prosecutor "to review the case load . . . in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions."[187] In light of these resolutions and the state of the Rwandan national courts at present, it is advisable that the ICTR allow for the testimony of dead witnesses as to the acts and conduct of the accused as charged in the

[186] U.N. Doc. S/RES/1503 (2003), para. 7. [Reproduced in the accompanying notebooks at Tab 10].

[187] U.N. Doc. S/RES/1504 (2004), para 4. [Reproduced in the accompanying notebooks at Tab 11].

indictment to be admitted under Rule 89 as hearsay testimony has been admitted under the rule in previous judgments. It is also advisable that the Judges, the Prosecutor or the Registrar propose an amendment to Rule 92*bis* to that effect to comply with the aims of the ICTR Statute. Rule 6 provides the Tribunal with the authority to amend the Rules. While Rule 6(C) requires that they be amended with respect to the rights of the accused guaranteed under Article 20(4)(e) of the ICTR Statute, "those rights are subject to the power of the Trial Chamber in [Article 19(1)] to ensure a fair and expeditious trial."[188] The ICTR Statute and ICTR Rules and the jurisprudence of the ICTY and the ICTR provide the necessary authority to allow the statement of a dead witness as to the acts and conduct of the accused as charged in the indictment to be admitted in evidence to the ICTR.

[188] Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, Dated 24 May 1998, Trial Chamber (12 June 1998), para. 32. [Reproduced in the accompanying notebooks at Tab 29].