SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve University
School of Law Scholarly Commons

War Crimes Memoranda | War Crimes

2012

A study of comparative practice of the international tribunals: how do other international tribunals deal with witnesses who have provided a written statement at the pre-trial stage of the proceedings but are unavailable to testify at trial?

Christopher L. Cassaniti

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos

 Part of the Criminal Procedure Commons, and the International Law Commons

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
SPECIAL TRIBUNAL FOR LEBANON

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR

ISSUE: 11

A study of comparative practice of the international tribunals: how do other international tribunals deal with witnesses who have provided a written statement at the pre-trial stage of the proceedings but are unavailable to testify at trial? Please address in particular whether the written statement may be admitted into evidence even if the witness does not appear at trial. For this research, the unavailability of the witness may be due to the following situations:
I) the witness is dead; or
Ii) the witness can no longer be found or traced; or
Iii) the witness fears for his/her security.

PREPARED BY:
CHRISTOPHER L. CASSANITI
SPRING, 2012

TABLE OF CONTENTS

INDEX TO SUPPLEMENTAL DOCUMENTS

STATUTES AND RULES OF PROCEDURE AND EVIDENCE

CASE LAW AND STATEMENTS

ICTY

01. *Prosecutor v. Gotovina and Cermak and Markac*, Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 *Quater*, Case No. IT-06-90-T, 24 July 2008.

02. *Prosecutor v. Kordić and Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR 73.5, Appeals Chamber, 21 July 2000.

03. *Prosecutor v. Milosevic,* Decision on Prosecution Motion for Admission Under Rule 89(C) of Written Evidence Produced by Witness Melika Malesevic, Case No. IT-02-54-T, 21 January 2004.

04. *Prosecutor v. Milosevic*, Trial Chamber Finding in the Matter of Witness K12, Case No. IT-02-54-T, 21 November 2002.

05. *Prosecutor v. Perisic*, Decision on Defense Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, Case No. IT-04-81-T, 21 April 2010.

06. *Prosecutor v. Simic et. al.*, Decision on Prosecution's Interlocutory Appeals on the Use of Statements Not Admitted into Evidence Pursuant to Rule 92 *bis* as a Basis to Challenge Credibility and to Refresh Memory, Case Nos.: IT-95-9-AR73.6 & IT-95-9-AR73.7, 23 May 2003.

07. *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1, 10 August 1995.

08. *Prosecutor v. Tolimir*, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quarter*, Case No. IT-05-88/2-PT, 25 November 2009.

ICTR

01. *Prosecutor v. Bagosora et. al.,* Decision on Prosecutor’s Motion for the Admission of Written Witness Statements Under Rule 92 bis, Case No. ICTR-98-41-T, 9 March 2004.

02. *Prosecutor v. Bagosora et. al.,* Decision on Admission of Statement of Kabiligi Witness Under Rule 89 (C), Case No. ICTR-98-41-T, 14 February 2007.

03. *Prosecutor v. Bagosora et. al.*, Decision on Admissibility of Proposed Testimony of Witness DBY, Case No. ICTR-98-41-T, T. Ch.1, 18 September 2003.

04. *Prosecutor v. Kamuhanda*, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rule 89(C), Case No. ICTR-0054A-T, 20 May 2002.

05. *Prosecutor v. Karemera et. al.,* Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara, Case No. ICTR-98-44-T, 9 July 2008.

06. *Prosecutor v. Muvunyi*, Decision on the Prosecutor's Motion for Admission of Testimony of Expert Witness, Case No. ICTR-2000-55A-T, 24 March 2005.

07. *Prosecutor v. Ndayambaje et. al,* Decisions on the Prosecutor's Motion to Remove from Her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses, Case No. ICTR-98-42-T, 22 January 2003.

08. *Prosecutor v. Ndindiliyimana et. al.*, Decision on the Admission of Written Statements Disclosed by the Prosecutor Pursuant to Rule 68(A) of the Rules of Procedure and Evidence (With Strictly Confidential Annex), Case. No. ICTR-00-56-T, 12 April 2011.

09. *Prosecutor v. Ngirabatware,* Decision on Defence Motion for Reconsideration or Certification to Appeal the Trial Chamber's Rule 92 *bis* Decision of 22 September 2011, Case No. ICTR-99-54-T, 25 November 2011.

10. *Prosecutor v. Nizeyimana,* Decision on Prosecutor's Motion to Rule 92 *bis* (A) and (D) for Witness Marcel Gatsinzi, Case No. ICTR-00-55C-PT, 6 May 2011.

11. *Prosecutor v. Nizeyimana,* Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi, Case No. ICTR-2000-55C-PT, 6 October 2010.

12. *Prosecutor v. Nzirorera*, Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijiro, Case No. ICTR-98-44-T, 20 February 2008.

13. *Prosecutor v. Serugendo*, Decision on Defence Motion for the Admission of Written Witness Statements Under Rule 92 *bis*, Case No. ICTR-2005-84-1, 1 June 2006.

SCSL

01. *Prosecutor v. Fofana et. al.*, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92 bis, Case No. SCSL-04-14-T, 9 October 2006.

02. *Prosecutor v. Fofana et. al.,* Decision on Norman Request to Admit Documents on Lieu of the Testimony of Abdul-One Mohammed Pursuant to Rules 89(C) and 92 *bis*, Case No. SCSL-04-14-T, 15 September 2006.

03. *Prosecutor v. Fofana et. al.,* Decision on Prosecution's Request to Admit into Evidence Certain Documents Pursuant to Rules 92 *bis* and 89(C), Case No. SCSL-04-14-T, 14 July 2005.

04. *Proseuctor v. Taylor,* Decision on Public with Confidential Annexes C to E Prosecution Motion for Admission of the Prior Trial Transcripts of Witnesses TF1-021 and TF1-083 Pursuant to Rule 92 *quarter*, Case No. SCSL-03-1-T, 5 February 2009.

05. *Prosecutor v. Taylor*, Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92 *bis* - Newspaper Article, Case No. SCSL-03-1-T, 5 October 2010.

06. *Prosecutor v. Taylor*, Defence Response to "Prosecution Motion for the Admission of the Prior Trial Transcripts of Witnesses TFI-021 and TFI-083 Pursuant to Rule 92 *quater,*" Case No. SCSL-2003-01-T, 11 September 2008.

07. *Prosecutor v. Taylor*, Decision on Public with Confidential Annexes A to D & F to G Prosecution Notice under Rule 92 *bis* for the Admission of Evidence Related to Inter Alia Freetown & Western Area - TF1-09, TF1-104, and TF1-227, Case No. SCSL-03-1-T, 21 October 2008.

ECCC

01. *Co-Prosecutors v. Chea et. al.*, Co-Prosecutors' Reply to the Responses Regarding the Admission of Written Wittness Statements Before the Trial Chamber, Case No. 002/19-09-2007-ECCC/TC, 10 August 2011.

02. *Co-Prosecutors v. Chea et. al.*, Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, Case No. 002/19-09-2007-ECCC/TC, 15 June 2011.

03. *Co-Prosecutors v. Kaing*, Decision on Admissibility of Material on the Case File as Evidence, Case No. 001/18-07-2007/ECCC/TC, 26 May 2009.

U.N. DOCUMENTS

01. ECCC - Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850 – UN Doc. S/1999/231, (3 March 1999).

02. SCSL - Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, S.C. Res. 246, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/246 (Jan. 16, 2002).

03. SCSL - UN S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

BOOKS

01. International Criminal Justice: Law and Practice from the Rome Statute to its Review (Roberto Bellelli ed., 2010).

02. International and National Prosecution of Crimes Under International Law: Current Developments (Horst Fischer, Claus Kress, Sascha Rolf Lüder eds., 2001).

03. Principles of Evidence in International Criminal Justice (Karim A.A. Khan, Caroline Buisman, Christopher Gosnell eds., 2010).

04. John Mendelson, Trial by Document: The Use of Seized Documents in the Nurnberg Proceedings (1988).

05. Virginia Morris and Michael P. Scharf, An Insider's Guide to The International Criminal Tribunal for the Former Yugoslavia, Vol. 1 (1995).

06. Virginia Morris and Michael P. Scharf, The International Criminal Tribunal for Rwanda, Vol. 1 (1997).

07. Telford Taylor, The Anatomy of the Nuremberg Trials (1992).

08. Vladimir Tochilovsky, Jurisprudence of the International Criminal Courts and the European Court of Human Rights (2008).

JOURNALS AND LAW REVIEW ARTICLES

01. 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).

02. Anna M. Haughton, *The Balancing of the Rights of the Accused Against the Rights of a Witness in Regard to Anonymous Testimony,* Memorandum for the Office of the Prosecutor of the ICTR (2001).

03. 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).

04. Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 Yale Hum. Rts. & Dev. L.J. 217 (2002).

05. George A. Finch, *The Nuremberg Trial and International Law*, 41 Am. J. Int'l L. 20 (1947).

06. Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QLR 777 (2003).

07. Hakan Friman, *Inspiration from the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court*, Vol.2, Issue 3, The Law & Practice of International Courts and Tribunals (2003).

08. Jared Paul Marx, *Intimidation of Defense Witnesses at the International Criminal Tribunals: Commentary and Suggested Legal Remedies*, 7 Chi. J. Int'l L. 675 (2007).

09. Marieke Wierda, *Procedural Developments in International Criminal Courts*, The Law and Practice of International Courts and Tribunals 2 (2003).

10. Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725 (1999).

11. Michele Caianiello, *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, 36 N.C. J. Int'l L. & Com. Reg. 287 (2011).

12. Robert Cryer, *Witness Evidence Before International Criminal Tribunals*, 2 Law & Prac. Int'l Cts. & Tribunals 411 (2003).

13. Quincy Wright, *The Law of the Nuremberg Trial*, 42 Am. J. Int'l L. 38 (1947).

14. Robert W. Miller, *War Crimes Trials at Yokohama*, 15 Brok. L. Rev. 191 (1949).

15. Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 Harv. Int'l L.J. 323 (2009).

16. Mark Wasef, *Procedural Rules in International Litigation Admissibility of Transcript of Interview of Accused Against Co-Accused*. 20 Criminal Law Forum 447 (2009).

17. Michele Caianiello, *First Decisions on the Admission of Evidence at ICC Trials: A Blending of Accusatorial and Inquisitorial Models?*, 9 Journal of International Criminal Justice 385 (2011).

18. Katharina Margetts, *Current Developments at the Ad Hoc International Criminal Tribunals*.

19. Peter Murphy, *Excluding justice or facilitating justice? International criminal law would benefit from rules of evidence,* 12 The Int'l J. of Evidence and Proof 1 (2008).

20. Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. Int'l Criminal Justice 1107 (2007).

21. Eugene O'Sullivan, *The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY*, 8 J. Int'l Criminal Justice 511 (2010).

22. Jérome De Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?,* 5 J of Intl'l Criminal Justice, 402 (2007).

23. Padaric J. Glaspy, *Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 21 Harv. Hum. Rts. J. 143 (2008).

24. Gideon Boas, *Developments In The Law Of Procedure And Evidence At The International Criminal Tribunal For The Former Yugoslavia And The International Criminal Court*, 12 Criminal Law Forum 167 (2001).

OTHER SOURCES

01. *The Rwandan genocide and its aftermath*, The State of the World's Refugees, United Nations High Commissioner for Refugees, Jan. 1, 2000, at 245.

02. *Sierra Leone: Back from the Brink?*, Refugees Magazine, United Nations High Commissioner for Refugees, vol. 1, no. 118, (Mar. 1, 2000), at 9.

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. ISSUE[1]

In a comparative study of the international tribunals, this research memorandum will attempt to address whether a written statement made by a witness during pre-trial stages is admissible into evidence if the witness does not appear at trial. Organzied by tribunal, this paper will examine each tribunal's rules of procedure and evidence and evaluate the admissibility of such witnesses' written pre-trial statement under several circumstances - in particular, where: (1) the witness is dead, (2) the witness can no longer be found, or (3) the witness can be located, but refuses to testify for a variety of reasons. The admission of such statements would conflict with Anglo-American notions of fairness because it would tend to go against a basic tenant of adversarial-trial systems: that the accused has a right to face and confront his accuser.[2] However, due in part to the influence of both common law and civil law on the tribunals' foundations, and in part to the complexities and the difficulties of the crimes the tribunals are tasked with resolving - there are situations where these statements may be admitted. This memorandum will attempt to identify and define such situations.

B. SUMMARY OF CONCLUSIONS

[1] **Topic 11**. A study of comparative practice of the international tribunals: How do other international tribunals deal with witnesses who have provided a written statement at the pre-trial stage of the proceedings but are unavailable to testify at trial? Please address in particular whether the written statement may be admitted into evidence even if the witness does not appear at trial. For this research, the unavailability of the witness may be due to the following situations:

i) the witness is dead; or
ii) the witness can no longer be found or traced; or
iii) the witness fears for his/her security.

[2] U.S. Const. amend. VI

Each of the Tribunals has its own unique approach in managing pre-trial written witness statements, but all of them share a common theme that guides their jurisprudence: the Accused has a right to a fair trial. Generally, all of the Tribunals have suggested that this includes the Accused having the right to face his accuser. However, there are certain circumstances where the Tribunals have limited this right, namely due to the need to expedite monumentally complex and sluggish war crimes trials.

In each of the four Tribunals discussed in this paper, the admission of written witness statements involves a process of fairly complex rules found in the Tribunals' Rules of Procedures of Evidence. Generally, each of these processes starts with a mandate that all evidence must be relevant. At this stage, some of the Tribunals also require that the evidence be probative. After a piece of written evidence clears these hurdles, the Trial Chamber will then proceed to analyze the admissibility of the written statement. Generally, it is at this stage where the Chamber will then look to the status of the witness who authored the written statement as well as the circumstances surrounding the creation of the statement. From here, the Tribunals start to vary on how they deal with the written statements.

Alive and Located Witnesses

Generally, if a witness is alive and his or her location is known, the only way for his or her written witness statement to be admissible in lieu of oral testimony is if the Trial Chamber finds that it is reliable and that the contents of the statement point to a matter other than the acts and conduct of the accused.[3] Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) have special provisions that allow for the admission of written witness statements that point to the acts and conduct of the accused, but

[3] *See* ICTY, ICTR, SCSL RPE Rule 92 *bis*.

only if the witness is in court and available for cross-examination should the opposing party elect to do so.[4] The ICTY is the only Tribunal that currently has a provision in its Rules that addresses the issue of what to do with written witness statements where the witness refuses to testify due to "interference," namely threats, intimidation, and bribes.[5] Under this provision, written witness statements that point to the acts and conduct of the accused may be admissible in lieu of oral testimony provided that the Chamber finds that there was indeed interference and that the party proffering the statements can demonstrate that it made legitimate attempts to obtain the witness' presence in court.

Unavailable Witnesses

Generally, if the party submitting the written witness statements can demonstrate that the witness who authored the statements is deceased, missing, or incompetent, and that the statement is reliable, the statement will likely be admissible provided that it does not point to the acts and conduct of the accused. The International Criminal Tribunal for Rwanda (ICTR) will only accept written statements from unavailable witnesses that do not point to the acts and conduct of the accused,[6] while the ICTY and SCSL have special provision in their Rules that do permit written witness statements from unavailable witnesses even if they do point to the acts and conduct of the accused.[7] However, the Trial Chambers will generally treat this as a factor against the statements admission, and still have a fairly wide degree of discretion in making this determination.

---

[4] *See* ICTY, SCSL RPE Rule 92 *ter*.

[5] *See* ICTY RPE Rule 92 *quinquies*.

[6] *See ICTR* RPE Rule 92 *bis* (C).

[7] *See* ICTY, SCSL RPE Rule 92 *quater*.

II. FACTUAL BACKGROUND

Although evidence of war crimes, crimes against humanity, and genocide may be plainly evident, the very success and effectiveness of international criminal tribunals relies on the international community's acceptance of and faith in the integrity of the courts.[8] An essential part of maintaining that integrity is the notion that everyone, even those accused of committing heinous war crimes deserves the right to a fair trial. However, what constitutes a fair trial depends on the legal system in which you ask: some countries follow adversarial trial models while others follow inquisitorial models.

In order to uphold that principle and appease members from both trial systems, the international tribunals have developed a comprehensive body of rules and procedures combining elements of the trial systems in both common law and civil law nations. The international tribunals have typically held bench trials with judges acting as triers of both fact and law. Typically, "the presentation of evidence has followed the “adversarial” model [usually associated with common law systems][9], whereas the rules governing the admissibility of evidence may be seen as more akin to the “inquisitorial” model [seen more commonly in civil law countries, which] leave wide discretion to the judges."[10] As in many domestic courts, war crimes prosecutors must present evidence of the accused's involvement.

Unfortunately, in the chaos that typically accompanies during the commission of such crimes a cloud of confusion often develops over who actually did what. Often this may leave

[8] Cristian Defrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 Va. L. Rev. 1381, 1382 (2001).

[9] *See, e.g.,* Archibold's Criminal Pleadings, Evidence and Practice chs. 9-16 (S. Mitchell & P. Richardsons eds., 55th ed. 1998).

[10] Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 727 (1999).

prosecutors with little clear evidence of a defendant's actual involvement. In that case prosecutors have with little choice but to rely on the accounts of people who were there to hear the commands, witness the atrocities, or suffer from the acts of the perpetrators themselves. Collecting this kind of evidence presents hazards for both investigators and witnesses, as, more often than not, accomplices or even the perpetrators of the atrocities may still be at large. Investigators and prosecutors are not usually welcome in many areas where such atrocities have allegedly been committed. For example, during several of the prosecutions of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), investigators of the Office of the Prosecution ("OTP") required armed escorts from international peacekeepers in order to conduct their interviews.[11] Unfortunately, many witnesses are not afforded the same protections and, without any sort of established or properly-funded witness protection program,[12] they are usually left to fend for themselves and their families.

As stated by a Former ICTY Judge: the majority of "witnesses are victims of war crimes…" who often live in "a perpetual state of fear of retaliation if they talk publically about their experiences."[13] Typically, the Tribunals lack an enforceable subpoena power.[14] They may issue "summons and 'binding orders,' but they are binding only so far as the witnesses' native countries choose to enforce them. As a result, timid witnesses can simply refuse to come."[15] Regardless of what may be keeping the witnesses away from the court, the tribunals are left with

---

[11] International Criminal Justice: Law and Practice from the Rome Statute to Its Review 127 (Roberto Bellelli ed., 2010).

[12] Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, Prosecutor v. Tadic, U.N. Doc. IT-94-1-T, 10 (McDonald judgment).

[13] Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 Yale Hum. Rts. & Dev. L.J. 217, 220 (2002).

[14] *Id.*

[15] *Id.*

their pre-trial statements, some of which may be key pieces of evidence in a party's case; statements that may decide whether the accused is convicted or goes free. When a key witness disappears it almost inevitably will cause traumatic effects on a party's case, often resulting in substantial delays for the trial. Due to the costly nature of the tribunals, the need to accelerate the pre-trial and trial process has led to some evolution in the rules and procedures regarding the admissibility of written evidence at the international tribunals in order to address and help alleviate this time-consuming systemic problem surrounding war crimes trials.[16]

III. THE TRIBUNALS

A. THE NUREMBERG TRIALS.

Established in the wake of the atrocities following the Second World War, the International Military Tribunal at Nuremberg ("IMT"), held in the city of Nuremberg, Germany from 1945-1946, set a precedent for the establishment of international courts and has had an immense influence in setting the course for the progress of international criminal law.[17] Delegates from Allied countries worked together to construct the IMT's charter which clearly defined the Tribunal's powers.[18] Realizing that the Nuremberg Trials would be the first of their kind, the delegates, particularly the Americans, wanted to set an example for future tribunals by emphasizing the importance of fairness in the proceedings.[19] However, in recent years, the

[16] Gideon Boas, *Developments In The Law Of Procedure And Evidence At The International Criminal Tribunal For The Former Yugoslavia And The International Criminal Court*, 12 Criminal Law Forum 167, 168 (2001).

[17] Quincy Wright, *The Law of the Nuremberg Trial*, 42 Am. J. Int'l L. 38 (1947).

[18] George A. Finch, *The Nuremberg Trial and International Law*, 41 Am. J. Int'l L. 20 (1947).

[19] 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, 538 (2001).

Nuremberg Trials have been criticized as merely an example of “victors’ justice,” since the all of the Tribunal's judges came from the victorious nations, while all of the accused were from defeated Germany.[20] Despite the criticism, "[a]ny impartial study of the Nuremberg trials would, in the light of each record, impress the reviewer with the judicial fairness with which the evidence was treated; the rigid adherence to the requirement of 'proof beyond reasonable doubt.'"[21]

The IMT Charter[22]

The Charter of the IMT explicitly discussed evidence in Articles 18-21 as follows:

Art. 18. The Tribunal shall:

(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Art. 19. *The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.* [Emphasis added]

Art. 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

---

[20] Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725 (1999).

[21] *Id*.

[22] IMT Charter.

> **Art. 21.** The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Though the IMT Charter made no direct reference written testimony, it ultimately granted the judges wide discretion in determining the admissibility of evidence.[23] Ultimately, the "technical rules of evidence developed under common law system of jury trials to prevent the jury from being influenced by improper evidence were considered to be unnecessary in the absence of a jury."[24] Relying on Article 19, the IMT Charter allowed for judges to admit any evidence the tribunal deemed to have probative value. Regardless of the type of evidence - live testimony, hearsay, affidavit - if the tribunal felt the evidence had probative significance it was typically free to admit it. "Although the trials were adversarial and the parties alone were responsible for calling the evidence, the judges were sitting without a jury, and the common law rules designed to prevent jurors from hearing prejudicial evidence were discarded in favour of a liberal approach akin to that of civil law systems."[25]

Moreover, following the war, Allied prosecutors had access vast troves of documents the Nazis had scrupulously recorded during the course of the war.[26] Article 21 of the IMT Charter explicitly authorized the tribunal to take judicial notice of both oral and written depositions taken

---

[23] Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 729 (1999).

[24] Virginia Morris and Michael P. Scharf, The International Criminal Tribunal for Rwanda, Vol. 1, 7 (1997).

[25] *Id*.

[26] Telford Taylor, The Anatomy of the Nuremberg Trials 44-45 (1992).

before any U.N. or national commission setup to investigate war crimes, and nearly 55,000 witness depositions were taken before such committees.[27] Thus, the tribunal judges were free to consider these un-tested documents made by absent witnesses with little to no restriction.

As a result of the IMT Charter's broad flexibility with regards to the admissibility of evidence, affidavit evidence played a widespread role during the Nuremberg Trials. "In each of the trials, affidavits were introduced by both parties, although the defense introduced affidavits more extensively than did the prosecution."[28] The status of the witness was for the most part insignificant during the trials. Ultimately, it did not matter if witness had passed away, could not be found, or refused to testify. If their affidavit was deemed probative, the judges had the discretion of admitting it into evidence. It must be noted that Article 17 of the IMT Chart granted the Tribunal the power to compel witnesses at the judges' discretion.[29] For example, in one instance, the judges allowed into evidence a written statement from the American Ambassador to Mexico City due to the impracticality of bringing him from Mexico City to Germany to testify,[30] but refused to admit a written statement "from the former Chancellor of Austria because he was nearby and could come personally without major inconvenience."[31]

By allowing affidavit evidence, the Nuremberg Trials were able to conclude their dealings rather expeditiously; concluding approximately+ 10 months from its founding. "If all available witnesses had been required to testify before the Tribunal rather than to give their

---

[27] *Id*. 313-315.

[28] Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 749 (1999).

[29] IMT Charter, art. 17(a).

[30] Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 749 (1999).

[31] 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, 539 (2001).

evidence through affidavits, the trials would have lasted much longer than they did and fewer trials would have been held."[32]

B. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA.

The Nuremberg Trials pioneered the way for the establishment of international criminal tribunals. The precedent they set "stands for the principle of individual accountability for the commission of the gravest crimes known to mankind which have been committed throughout history."[33] However, they have also been criticized as unfair and even illegitimate; painted as victors' trials.[34] The defendants at Nuremberg were punished for crimes that had not been defined until the creation of the IMT Charter.[35] Further, the unprecedented use of written testimony in lieu of oral testimony shocked advocates of the adversarial trial model. Thus, they have acted as a model for the creation of future international criminal tribunals by exemplifying both the provisions that should be repeated, and those that should not. Accordingly, in an attempt to avoid the downfalls and criticisms of the past, the International Criminal Tribunal for the Former Yugoslavia ("ICTY" or "Yugoslavia Tribunal"), established in May, 1993, adopted the foundations laid by the Nuremberg Trials, but took efforts to eliminate its imperfections.

Unlike in the Nuremberg Trials, the "Yugoslavia Tribunal was created neither by the victors nor by the parties to the conflict, but rather by the United Nations representing the

---

[32] Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 749 (1999).

[33] Virginia Morris and Michael P. Scharf, An Insider's Guide to The International Criminal Tribunal for the Former Yugoslavia, vol. 1, 9 (1995).

[34] Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 749 (1999).

[35] Virginia Morris and Michael P. Scharf, An Insider's Guide to The International Criminal Tribunal for the Former Yugoslavia, vol. 1, 9 (1995).

international community of States. Whereas the Nuremberg Tribunal judges were appointed by the victors, the Yugoslavia Tribunal judges were elected by the General Assembly, the most representative body of the international community."[36] Thus, the many of the issues of impartiality and unfairness were avoided in its creation. The ICTY also took steps to rein in the wide discretion the Nuremberg judges had with regards to the admissibility of evidence. "The Nuremberg Tribunal was governed by limited procedural and evidentiary rules,"[37] and granted its judges extremely wide discretion in admitting evidence. In contrast, "the Yugoslavia Tribunal is governed by the far more detailed Rules of Procedure and Evidence which represent a major advancement over the scant set of rules fashioned for its predecessor."[38]

However, the original Rules of Procedure and Evidence, adopted by the ICTY in 1994, left some issues regarding the admissibility of evidence somewhat vague, primarily because it founders envisioned that the Tribunal proceedings would primarily rely on live testimony. Unlike in the Nuremberg Trials, ICTY investigators do not have access to vast troves of incriminating documentary evidence, and as a result, documentary evidence has not played as important of a role in ICTY cases as it did in Nuremberg.[39] For these reasons and in maintaining the interests of fairness, the original Rules of Procedure and Evidence[40] tended to favor live over written witness testimony.

The ICTY Statute and Rules of Procedure and Evidence

---

[36] Virginia Morris and Michael P. Scharf, The International Criminal Tribunal for Rwanda, Vol. 1, 38 (1997).

[37] *Id*.

[38] *Id*.

[39] 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, 539-40 (2001).

[40] ICTY RPE.

In defining the rights of the accused, ICTY Statute Article 21(4)(e) provides that the accused shall be entitled "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." [41]

The original Rules of Procedure and Evidence further emphasized the use of live witnesses in Rule 90, which required live testimony and allowed witness depositions only under "exceptional" circumstances and with the limitations imposed by Rule 71:

Rule 90. Testimony of Witnesses[42]

(A) Witnesses shall, in principle, be heard directly by the Chambers. In cases, however, where it is not possible to secure the presence of a witness, a Chamber may order that the witness be heard by means of a deposition as provided for in Rule 71.

Rule 71. Depositions[43]

(A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

Although these rules combined with the ICTY Statute suggest that written testimony may be admitted only under exceptional circumstances (which included situations "where all three judges were unable to be present or the witness was not able for physical reasons to come to The

[41] ICTY Statute, art. 21, para. (4)(e).

[42] ICTY Rules of Procedure and Evidence, Rule 90, U.N. Doc. IT/32 (1994).

[43] ICTY Rules of Procedure and Evidence, Rule 71, U.N. Doc. IT/32 (1994).

Hague, and the testimony was important to the fairness of the trial"),[44] there were breaks in the live witness requirement.

In the original rules, Rule 89 simultaneously granted the Tribunal the powers to admit any relevant evidence it deems probative and to exclude any evidence it believes may unfairly prejudice a party:

> **Rule 89. General Provisions[45]**
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will be favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
>
> (C) A Chamber may admit any relevant evidence which it deems to have probative value.
>
> (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

Thus, under Rule 89, if the Chamber decides a piece of evidence is extremely probative, it can conceivably allow it into evidence. In the *Milosevic* case, however, the Trial Chamber noted that Rule 89 is not meant for parties to introduce written evidence "*in lieu of oral testimony*" but rather to serve as a general guide for the admissibility of evidence.[46] The Trial Chamber here allowed the written testimony into evidence, but only under the condition that the

---

[44] 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, 540 (2001).

[45] ICTY Rules of Procedure and Evidence, Rule 71, U.N. Doc. IT/32 (1994).

[46] *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Prosecution Motion for Admission Under Rule 89(C) of Written Evidence Produced by Witness Melika Malesevic (Formal Statements) 21 January 2004.

witness appear at trial for further cross-examination.[47] In another instance, the Appeals Chamber reversed a Trial Chamber order admitting the written statement of a deceased witness under the broad authority of Rule 89(C).[48] The Appeals Chamber here noted that not only must a written statement in lieu of oral testimony be probative for admissibility, but that it must also be reliable. The Appeals Chamber further stated Rule 89(C) must be used in a way that is congruent with the rest of the Rules and Statute; which provided very few exceptions from the live testimony standard.[49]

Although the ICTY Chambers were initially hesitant to weaken the rules requiring live testimony, the need to expedite lagging trials has led to several modifications and additions over the course of 46 revisions and amendments to the Rules of Procedure and Evidence. First, in December, 2000 the Tribunal amended Rule 89 by adding Rule 89 (F), which states: "A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form."[50] Rule 89 (F) formally acknowledges the Tribunal's acceptance of written statements in general. Second, Rule 90 (A) (discussed above) was struck from the rules and replaced with Rule 92 *bis*:

---

[47] *Id.*

[48] *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).

[49] 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, 542 (2001).

[50] ICTY RPE, Rule 89 (F).

Rule 92 *bis.* Admission of Written Statements and Transcripts in Lieu of Oral Testimony[51](Adopted 1 Dec 2000, amended 13 Dec 2000, amended 13 Sept 2006)

> (A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony *which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment*.[emphasis added].

Rule 92 *bis* allows for the admission of a written statement in lieu of oral testimony as long as it helps prove "*matter other than the acts and conduct of the accused as charged in the indictment*."[52] The rule then lists multiple factors, both those in favor of admission and those against its admission, which a Trial Chamber may consider in determining whether to admit a written statement.[53] Rule 92 *bis* also sets a list of requirements regarding the reliability to of the written statement. According to part (B), the statement must be accompanied by the witness's declaration of its truthfulness which must have been made in front of an authorized person in the country where it is taken or in front of an officer of the Tribunal.

If the above requirements are met, the Trial Chamber will then decide for or against admission and whether to require cross-examination.[54] If the Trial Chamber decides to require cross-examination, it will then apply the provisions of Rule 92 *ter* which requires that the witness appear in Court.[55] Note that in *Simic et al.*, the Appeals Chamber held that nothing in Rule 92

---

[51] *Id.* at R. 92 *bis*.

[52] *Id.* at R. 92 bis (A).

[53] *Id.* at R. 92 *bis* (A)(i)(ii).

[54] *Id*. at R. 92 *bis* (C).

[55] *Id.* at R. 92 *ter*.

bis, prevents the use of portions of a written statement not admitted under the Rule in cross-examination as a "prior inconsistent statement."[56,57]

The Appeals Chamber stated in *Galic* that Rule *92 bis* was "primarily intended to be used to establish what has now become known as “crime-base” evidence..."[58] Although Rule 92 *bis* helped streamline the process for admitting some written statements, it did not address what the Chambers were to do with statements concerning the acts and conduct of the accused or what to do in the event that a witness who has provided a written statement turns out to be unavailable for cross-examination - perhaps because he/she had died subsequent to giving the written statement, or could no longer be found. In 2006, the Tribunal addressed both of these issues by adopting Rule 92 *quater*:

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

---

[56] Marieke Wierda, *Procedural Developments in International Criminal Courts*, The Law and Practice of International Courts and Tribunals 2, 347, 351 (2003).

[57] *Simic et al.*, Decision on Prosecution's Interlocutory Appeals on the Use of Statements Not Admitted into Evidence Pursuant to Rule 92 *bis* as a Basis to Challenge Credibility and to Refresh Memory, 23 May 2003.

[58] *Prosecutor v. Galic,* Decision on Interlocutory Appeal Concerning Rule 92*bis* (C), IT-98-29-AR73.2, 7 June 2002.

In a rather strong departure from its original stance requiring live testimony, the ICTY adopted Rule 92 *quater*. Unlike Rule 92 *bis*, which will only allow written testimony into evidence when it points to a *"matter other than the acts and conduct of the accused as charged in the indictment,"*[59] (e.g., factual evidence about the context of a specific event), Rule 92 *quater* allows the admission of any reliable[60] written testimony even if it points to the "*proof of acts and conduct of an accused as charged in the indictment,*"[61] though the Chamber may consider this as a factor against admission.[62] Rule 92 *quater* applies, however, only in situations where the Chamber has been convinced that the witness giving the "written statement or transcript … has subsequently died, … can no longer with reasonable diligence be traced, or … is by reason of bodily or mental condition unable to testify."[63] The Tribunal must also ensure that the written statements meet the requirements of Rule 89 – i.e. that the statement is probative and relevant.[64]

In *Prosecutor v. Gotovina, Cermak, Markac*, the prosecution sought to admit the written statements of four unavailable witnesses: 5, 12, 28, and 14.[65] The Prosecution argued that

---

[59] ICTY RPE, Rule 92 *bis*.

[60] *Id*. at R. 92 *quater* (A)(ii).

[61] *Id*. at R. 92 *quater* (B).

[62] *Id*.

[63] *Id.* at R. 92 *quater* (A).

[64] *Prosecutor v. Milutinovic et al.*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quater, 16 February 2007 ("1st Milutinovic Decision"), para. 4; *Prosecutor v. Milutinovic et al.*, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quater, 5 March 2007, para. 6; *Prosecutor v. Haradinaj et al.*, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quater and 13th Motion for Trial-Related Protective Measures, 7 September 2007 ("1st Haradinaj Decision"), para. 6; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution's Motion to Admit Five Statements of Witness 1 into Evidence Pursuant to Rule 92 quater with Confidential Annex, 28 November 2007 ("2nd Haradinaj Decision"), para. 6.

[65] *Prosecutor v. Gotovina and Cermak and Markac, Case No. IT-06-90-T, Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 Quarter, 2 (Formal Statements) (July 24, 2008).*

Witness 5 had passed away, 12 was missing, 28 unable to testify orally due to a physical condition, and that 14 was too mentally and emotionally disturbed to testify.[66] The statements were signed by the witnesses, but none were administered under oath nor were they subject to any sort of cross-examination.[67] The Chamber found all of the statements to be relative and probative as required by Rule 89 (C).[68] With regards to witnesses 5 and 28, the Chamber found their statements admissible since a copy of Witness 5's death certificate was provided, and Witness 28 was over 80 years old, and unable to leave her house or provide oral testimony by video-link.[69] The Chamber also noted that neither 5 nor 28's statement went to the proof of the acts and conducts of the accused, thus were less pivotal in the case and allowed them into evidence.[70]

With regards to Witness 12, the missing witness, the Prosecution spent over ten months attempting to track down the whereabouts and potential death certificate of the witness to no avail. The Chamber was satisfied with the prosecution's efforts locate Witness 12 and, noting that Witness 12's statement did not point to the acts and conducts of the accused, allowed his statement in evidence.[71]

With regards to Witness 14, the Prosecution submitted that the witness was unavailable testify due to mental and emotional distress. The Chamber, although mindful of the Witness' mental state, noted that many war crimes victims suffer mental distress, but in order "for a

---

[66] *Id*.

[67] *Id.* at para. 7.

[68] *Id.* at para. 8.

[69] *Id*. at para. 9.

[70] *Id.* at para. 10.

[71] *Id*. at para 13-14.

witness to be 'unavailable' within the meaning of Rule 92 *quater*, the witness must be objectively unable to attend a court hearing, either because he or she is deceased or because of a physical or mental impairment."[72] Thus, the Chamber denied the Prosecution's request to enter Witness 14's written statement.[73]

In *Prosecution v. Tolomir*, the Prosecution sought to admit the prior written testimony of three deceased witnesses.[74] The Prosecution provided the Chamber with the death certificates of all three witnesses, thus satisfying the Chamber that the three deceased witnesses were unavailable within Rule 92 *quater's* meaning.[75] However, meeting the unavailability requirement alone is not sufficient for admission. The Chamber must verify the reliability of the written statements. In assessing the reliability of a written statement pursuant to Rule 92 *quater*, the Chamber listed several factors to examine, including:

> (a) the circumstances in which the statement was made and recorded, including
>
> (i) whether the statement was given under oath;
>
> (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection;
>
> (iii) whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination;

---

[72] *Id.* at para. 16 (quoting *Prosecutor v. Prlic et. al.,* Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlic's Questioning into Evidence, 23 November 2007, para.48).

[73] *Id.* at para. 16.

[74] *Prosecutor v. Tolomir*, Case No. IT-05-88/2-PT, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *Quater* (Formal Statements) 25 November 2009.

[75] *Id.* at para. 33.

(c) whether the statement, in particular an unsworn statement never subject to cross-examination, relates to events about which there is other evidence; and

(d) other factors, such as the absence of manifest or obvious inconsistencies in the statements.[76]

The Chamber noted that these factors are not exclusive or determinative. The presence of one does not automatically lead to admission; the absence of another does not automatically bar its admission.[77] The Chamber then proceeded to test the reliability surrounding each written statement, as well as the relevance and probative value as required by Rule 89. The Court was satisfied that all three statements met Rule 92 *quater*'s and Rule 89's requirements and allowed them into evidence. [78]

In another case, *Prosecutor v. Perisic*, the Chamber admitted the written testimony of three deceased witnesses introduced by the Defence.[79] Like in previous cases, the Chamber first examined whether the witnesses were truly unavailable as required by Rule 92 *quater*. The Defence provided the three death certificates of the witnesses, which satisfied the Chamber.[80] The Trial Chamber also found all three statements to be reliable, even though one of the statements was not taken under oath (it was, however, signed by the witness).[81] The Chamber then verified that all statements were relevant and of probative value in accordance with Rule 89.

---

[76] *Id.* at para. 29.

[77] *Id.* at para. 35.

[78] *Id.* at para. 53.

[79] *Prosecutor v. Perisic*, Case No. IT-04-81-T, Decision on Defence Motion for Admission of Evidence Pursuant to Rule 92 *Quater* (Formal Statements) 21 April 2010.

[80] *Id*. at para. 11.

[81] *Id.* at para. 22.

Satisfied that the statements were made by unavailable witnesses, reliable, and relevant and of probative value, the Chamber allowed all three written statements into evidence.[82]

Finally, in 2009 the ICTY adopted another rule weakening the live testimony requirement which specifically addresses situations where a witness fails or refuses to testify due to safety concerns: Rule 92 *quinquies.* [83] This rule allows the admission of any written statement or transcript given by a witness who has, to the Trial Chambers satisfaction, been subjected to interference.

> **Rule 92 *quinquies* Admission of Statements and Transcripts of Persons Subjected to Interference** (Adopted 10 Dec 2009)
>
> **(A)** A Trial Chamber may admit the evidence of a person in the form of a written statement or a transcript of evidence given by the person in proceedings before the Tribunal, where the Trial Chamber is satisfied that:
>
> **(i)** the person has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect;
>
> **(ii)** the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion;
>
> **(iii)** where appropriate, reasonable efforts have been made pursuant to Rules 54 and 75 to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness; and
>
> **(iv)** the interests of justice are best served by doing so.
>
> **(B)** For the purposes of paragraph (A):
>
> **(i)** An improper interference may relate inter alia to the physical, economic, property, or other interests of the person or of another person;
>
> **(ii)** the interests of justice include:

[82] *Id.* at para. 24.

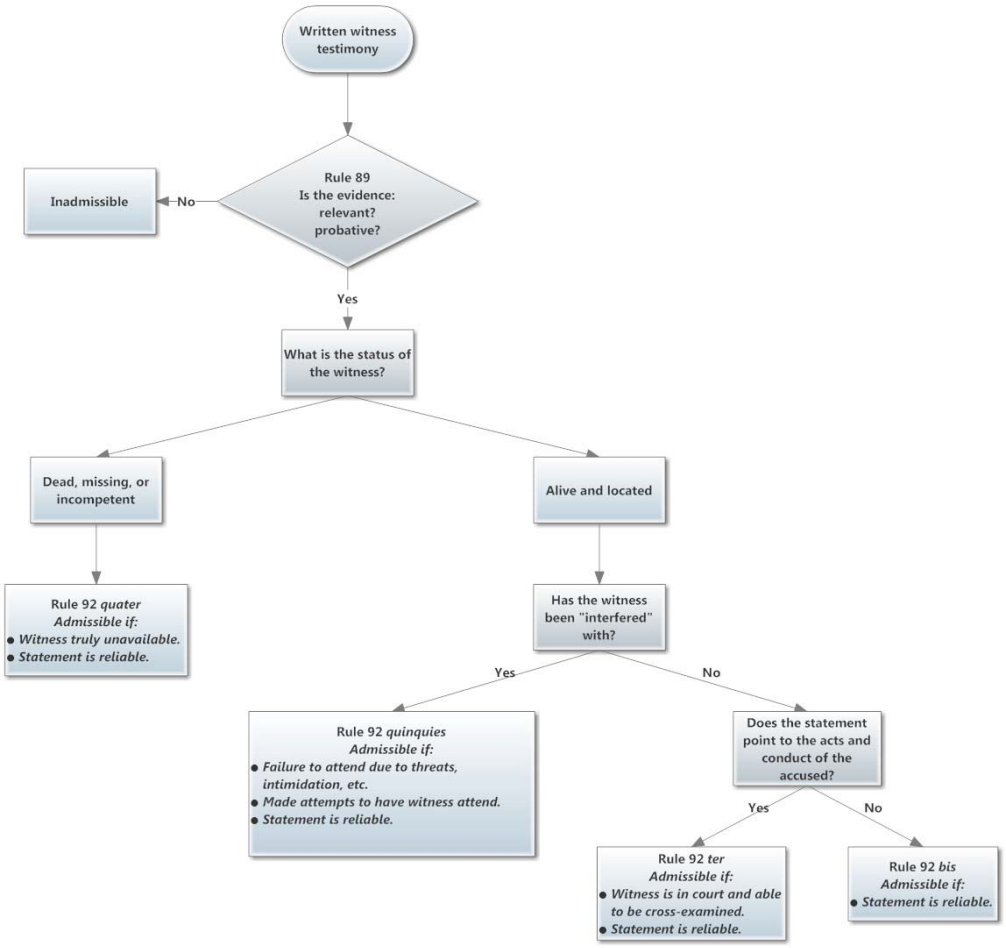
[83] ICTY RPE, Rule 92 *quinquies*.

> **(a)** the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded;
>
> **(b)** the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference; and
>
> **(c)** whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment.
>
> **(iii)** Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.
>
> **(C)** The Trial Chamber may have regard to any relevant evidence, including written evidence, for the purpose of applying this Rule.

Essentially, Rule 92 *quinquies* allows the Chamber to admit into evidence any relevant written evidence in lieu of live testimony if the Chamber is satisfied that the witness giving the statement has been materially and improperly influenced by threats, intimidation, injury, bribery, or coercion.[84] As of yet, there have not been any ICTY cases where Rule 92 *quinquies* has been applied, though it will be interesting to see how it is applied in the future.

[84] *Id*.

ICTY Summary



The ICTY was founded with the notion that live testimony would reign during its proceedings.[85] However, due to the excessive length of the trials - which not only gave rise to serious concerns regarding the generally the recognized right to a speedy trial, but also were draining the Tribunal of its resources - the Tribunal replaced this approach with one that favors the admissibility of written evidence in order to expedite the proceedings. Generally speaking, in order to be admissible the written evidence in lieu of live testimony must be relevant and

[85] Vladimir Tochilovsky, Jurisprudence of the International Criminal Courts and the European Court of Human Rights, 397 (2008).

probative, and not point towards the acts or conduct of the accused.[86] If the evidence points towards the acts or conduct of the accused, the written evidence in lieu of oral testimony will only be admissible if the witness is unavailable in accordance with Rule 92 *quater* or if the witness has been subjected to material improper influence per Rule 92 *quinquies*. The additions of Rules 92 *ter, quater, and quinquies* are essentially Rule 89 (F) codified.

C. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The history of Rwanda in the mid-to-late 20th century has been one of violence and tragedy, consisting of multiple violent conflicts between the Tutsi and Hutu tribes.[87] Ignited by the downing of the plane carrying Rwandan President Juvenal Habyarimana, the 1994 Rwandan Genocide led to a 100-day long rampage resulting in the deaths an estimated 500,000 to one million civilians; constituting over 75% percent of Rwanda's Tutsi population.[88] The genocide and the collapse of the government provoked a mass exodus of over an estimated two million people fleeing from the country.[89]

In response to the genocide, in 1994 the United Nations established the International Criminal Tribunal for Rwanda, which provided jurisdiction over "persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan

[86] ICTY RPE, Rule 92 *bis*.

[87] Virginia Morris and Michael P. Scharf, The International Criminal Tribunal for Rwanda, Vol. 1, 47 (1997).

[88] *Id.*

[89] *The Rwandan genocide and its aftermath*, The State of the World's Refugees, United Nations High Commissioner for Refugees, Jan. 1, 2000, at 245.

citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994."[90]

The ICTR Rules of Procedure and Evidence

Modeled after the precedent set by the Yugoslavia Tribunal, the ICTR adopted a similar Charter and Rules of Procedure and Evidence. Like the ICTY, the ICTR initially started with a strong preference for oral testimony, which has eroded overtime to allow a much wider level of admissibility for written evidence.[91] Like the ICTY, the ICTR's Rules state that the admissibility of all evidence is governed by the broad language in Rule 89, which allows a Chamber to admit any "relevant evidence" that it deems to have "probative value." [92] However, even if both of these elements are met, Rule 89 (C) "does not command, but merely permits, admission of the evidence."[93] Unlike the ICTY, however, the ICTR has refused to adopt any form of the ICTY's Rule 89(F), nor does it have Rule 92 *ter, quater,* or *quinquies*, and, as a result, the admissibility of written statements in lieu of oral testimony is bounded by the restrictions of its version of Rule 92 *bis*, which substantially narrows the scope of admissibility for written testimony in lieu of oral testimony at the ICTR. The Tribunal has repeatedly stated that Rules 89 and 92 *bis* work together in determining the admissibility of written evidence. In *Bagosora,* the Trial Chamber rejected the Defense's argument that the Chamber has discretion to "admit witness statements

[90] ICTR Statute, art. I.

[91] Principles of Evidence in International Criminal Justice, 460 (Karim A.A. Khan, Caroline Buisman, Christopher Gosnell eds., 2010).

[92] ICTR RPE, Rule 89(C).

[93] *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY, Case No. ICTR-98-41-T, T. Ch.1, 18 September 2003, para. 4.

solely on the basis of Rule 89."[94] Citing the ICTY Appeals Chamber in *Galic,* the Chamber here noted:

> A party cannot be permitted to tender a written statement given by a prospective witness to an investigator of the OTP under Rule 89 (C) in order to avoid the stringency of Rule 92 bis. The purpose of Rule 92 bis is to restrict the admissibility of this very special type of hearsay to that which falls within its terms. By analogy, Rule 92 bis is the *lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89 (C), although the general propositions which are implicit in Rule 89 (C) – that evidence is admissible only if it is relevant and that it is relevant only if it has probative value – remain applicable to Rule 92 bis. But Rule 92 bis has no effect upon hearsay material which was not prepared for the purposes of legal proceedings.[95]

The ICTR's Rule 92 *bis* explicitly allows for the admission of some out of court written statements, provided that they meet the rule's reliability requirements:

> **Rule 92 *bis*. Proof of Facts Other than by Oral Evidence[96]**
>
> (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to *proof of a matter other than the acts and conduct of the accused as charged in the indictment*.
>
> (i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question:
>
> (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
>
> (b) relates to relevant historical, political or military background;
>
> (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

[94] *Prosecutor v. Bagosora et. al.,* Decision on Admission of Statement of Kabiligi Witness Under Rule 89 (C), Case. No. ICTR-98-41-T, 14 February 2007, para. 3.

[95] *Id*. at para. 4.

[96] ICTR RPE, Rule 92 *bis*.

(d) concerns the impact of crimes upon victims;

(e) relates to issues of the character of the accused; or

(f) relates to factors to be taken into account in determining sentence.

(ii) Factors against admitting evidence in the form of a written statement include whether:

(a) there is an overriding public interest in the evidence in question being presented orally;

(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

(B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief. …

(C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:

(i) is so satisfied on a balance of probabilities; and

(ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.

(D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.

(E) Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the

> statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

ICTR's Rule 92 *bis* is similar to its ICTY counterpart in that it requires that the written statement sought to be introduced goes to proof of a matter other than the acts and conduct of the accused.[97] Although Rules 92 *ter*, *quater*, and *quinquies* are absent from the ICTR's Rules, the ICTR adopted some elements of Rule 92 *quater* in section (C) of its version of Rule 92 *bis,* which provides for the written statements of deceased and missing witnesses.[98] A Judge in the *Nzirorera* case noted in applying Rule 92 *bis* (C) that:

> "Trial Chambers at the ICTY have applied a similar test for admissibility of the statement of a deceased witness. Under ICTY Rule 92 *quater*, it is required that (1) the person whose statement or transcript is sought to be admitted is unavailable; and (2) the statement is reliable. The proffered evidence must also be relevant, have probative value, and not be unduly prejudicial."[99]

Thus, the Chamber effectively used the same analysis of ICTY Rule 92 *quater* in applying ICTR Rule 92 *bis* (C), but also noted the difference from its ICTY counterpart: "Rule 92 *quater* differs from ICTR Rule 92 *bis* (C) in that the ICTY allows the statement to be admitted even if it goes to the acts and conduct of the accused."[100]

The Rwandan chambers have been fairly consistent in applying Rule 92 *bis*; regularly striking down the admission of written evidence that points to the acts and conduct of the

---

[97] ICTR RPE, Rule 92 *bis* (A). See also, *Prosecutor v. Bagosora et. al.,* Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis (TC) ("Bagosora Decision of 9 March 2004"), 9 March 2004, para. 12.

[98] ICTR RPE, Rule 92 *bis* (C).

[99] *Prosecutor v. Nzirorera*, Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijiro, Case No. ICTR-98-44-T, 20 February 2008, para. 4.

[100] *Id*.

accused and admitting those that do not - provided that they meet the other requirements of 92 *bis* and the general requirements of relevance and probative value imposed by Rule 89.

In one instance of the previously mentioned *Bagosora* case, the Trial Chamber found that the witness statements the defense sought to introduce directly went to the acts and conduct of the accused, and subsequently were inadmissible.[101] In another *Bagosora* instance, the Trial Chamber confirmed that the appropriate determination of the admissibility of written statements in lieu of oral testimony would involve:

> first an enquiry as to whether the statement or transcript sought to be admitted satisfies both Rule 89(C), in that it is relevant and has probative value, and Rule 92bis, in that it goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment, that is, that it does not contain evidence that tends to prove or disprove the Accused's acts or conduct as charged.[102]

In a decision in *Karemera,* the Defense sought to introduce the written testimony of two witnesses.[103] After examining each of the statements individually, the Trial Chamber decided that neither of the statements went to the acts and conduct of the accused and both were reliable, relevant, and probative, and thus, both were admissible.[104]

In an instance of *Muvunyi*, the Prosecution sought to introduce into evidence the written testimony of an expert witness who had previously testified in another case.[105] The Chamber held that the statement in question satisfied the requirements of Rule 89 and did not go to the acts

---

[101] *Prosecutor v. Bagosora et. al.,* Decision on Admission of Statement of Kabiligi Witness Under Rule 89 (C), Case. No. ICTR-98-41-T, 14 February 2007, para. 8.

[102] *Prosecutor v. Bagosora et. al.,* Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *Bis*, Case. No. ICTR-98-41-T, 9 March 2004, para. 16.

[103] *Prosecutor v. Karemera et. al.,* Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara, Case No. ICTR-98-44-T, 9 July 2008, para. 1.

[104] *Id.*

[105] *Prosecutor v. Muvunyi*, Decision on the Prosecutor's Motion for Admission of Testimony of Expert Witness, Case No. ICTR-2000-55A-T, 24 March 2005, para. 1.

and conduct of the accused.[106] However, in this instance the Defense objected as to the credibility of the witness, and requested that it "be allowed to cross-examine the proposed expert witness."[107] Per Rule 92 *bis* (E), and noting the lack of objection from the Prosecution, the Chamber admitted the statement into evidence, but ordered the expert witness appear before the Tribunal for questioning.[108]

In these three case examples, the statuses of the witnesses were not a particularly important factor in the Chambers' decisions over whether to admit the written statements. Instead the Chamber focused their inquiries primarily on the contents of and circumstances surrounding the statements (namely whether they went to the acts and conduct of the accused and whether they were reliable, probative, and relevant).

In an instance of *Ndayambaje*, the statuses of several witnesses were called into question.[109] Here, the Prosecutor sought to introduce the witness statements of four recently deceased witnesses pursuant to Rules 89(C) and 92 *bis* (C). The Prosecution here was able to sufficiently demonstrate that, per Rule 89, the written evidence was relevant, probative, and reliable, and, per Rule 92 *bis* (C), that "on a balance of the probabilities" the witnesses were deceased.[110] However, in response to the Prosecution's attempt to introduce the written statements per Rule 92 *bis* (C), the Chamber noted:

> any statement admitted under the provisions of Rule 92 *bis* must first comply with the threshold requirement of Rule 92 *bis* (A) that the evidence go to proof of a

[106] *Id.* at para. 23-4.

[107] *Id*. at para. 6.

[108] *Id.* at para. 26-7.

[109] *Prosecutor v. Ndayambaje et. al,* Decisions on the Prosecutor's Motion to Remove from Her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses, Case No. ICTR-98-42-T, 22 January 2003.

[110] *Id*. at para. 15.

> matter other than the conduct of the accused as charged in the indictment. Rule 92 *bis* (C) merely grants the Chamber the discretion to admit the written statement of a deceased witness absent the attached declaration required on Rule 92 *bis* (B). It does not 'provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony.'[111]

Here, the Chamber found that the written statements of the deceased went to the acts and conduct of the accused, and subsequently found them inadmissible as a whole.[112]

The Prosecution then filed a separate motion seeking to have portions of the deceased witnesses written statements - those did not point to the acts and conduct of the accused - admitted. The Chamber held that even if such portions did not go to the acts and conduct of the accused as the Prosecution claimed, it would still need to "make a further determination pursuant to Rule 92 *bis* (A)(i) and (ii) as to whether the evidence should be admitted."[113] The Prosecution's submissions did not contain enough information for the Chamber to make a ruling on this matter, and subsequently found all of the statements inadmissible.[114]

Although ICTR Rule 92 *bis* seems quite clear about what kind of written statements may be admitted, the Trial Chambers have shown some flexibility. In an interesting decision in *Kamuhanda*, the Trial Chamber held that it could admit two written statements of a deceased witness even though the statements were deemed to point to the acts and conduct of the accused.[115] Specifically, the statements here directly contradicted the allegations against the accused laid out in the indictment. This was so, even though Rule 92 *bis* (A) only allows for the

---

[111] *Id*. at para. 21.

[112] *Id*. at para. 24.

[113] *Id.* at para. 26.

[114] *Id*.

[115] *Prosecutor v. Kamuhanda*, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rule 89(C), 20 May 2003, para. 29.

admission of such statements where they go to matters other than the acts and conduct of the accused as charged in the indictment. The Trial Chamber held that "at the heart of the matter here is the need to avoid prejudice to the accused person and to ensure within the meaning of Article 19 (l), '[f]ull respect for the rights of the accused'"[116] Thus, even though the written statements here went to the acts and conduct of the accused, the Chamber held that it was in the interests of justice to admit the written statements in this fact specific case.[117]

The Trial Chamber came to a similar conclusion in an instance of *Ndindiliyimana*.[118] Here, noting that:

> …while Rules 92 *bis* and 89(C) provide the formal requirements for the admission of written witness statements in lieu of oral evidence, *the ultimate determination as to whether such statements should be admitted must be made in light of the overarching 'necessity of ensuring a fair trial as provided for in Articles 19 and 20 of the Statute*.'[119] [Emphasis added]

Although the Chamber found that the evidence here went to the acts and conduct of the accused, it found that "a rigid adherence to the limitations of Rule 92 bis in this instance would adversely impinge on the right of the Accused to a fair trial,"[120] and subsequently admitted the written statements into evidence.[121]

Following this idea, in an instance of *Ngirabatware*, the Defense appealed the Trial Chamber's rejection of several written witness statements that directly went to the acts and

---

[116] *Id*. at para. 30.

[117] *Id.* at para. 31.

[118] *Prosecutor v. Ndindiliyimana et. al.,* Decision on the Admission of Written Statements Disclosed by the Prosecutor Pursuant to Rule 68(A) of the Rules of Procedure and Evidence (with strictly confidential annex), Case. No. ICTR-00-56-T, 12 April 2011.

[119] *Id*. at para. 7 (quoting *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements under Rule 92 *bis*, 9 March 2004, para. 16).

[120] *Id*. at para. 10.

[121] *Id.* at para. 11.

conduct of the accused, arguing that by rejecting the written statements, the Trial Chamber "abused its discretion in failing to recall its duty to ensure a fair trial."[122] The Appellate Chamber here ruled that the Defense failed to establish that the non-admission of the written statements involved an issue that would "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,"[123] or that the non-admission of the statements would result in undue prejudice against the accused.[124] As a result, the Appellate Chamber denied the Defense's motion to reverse the Trial Chamber's decision and admit the written statements into evidence.[125]

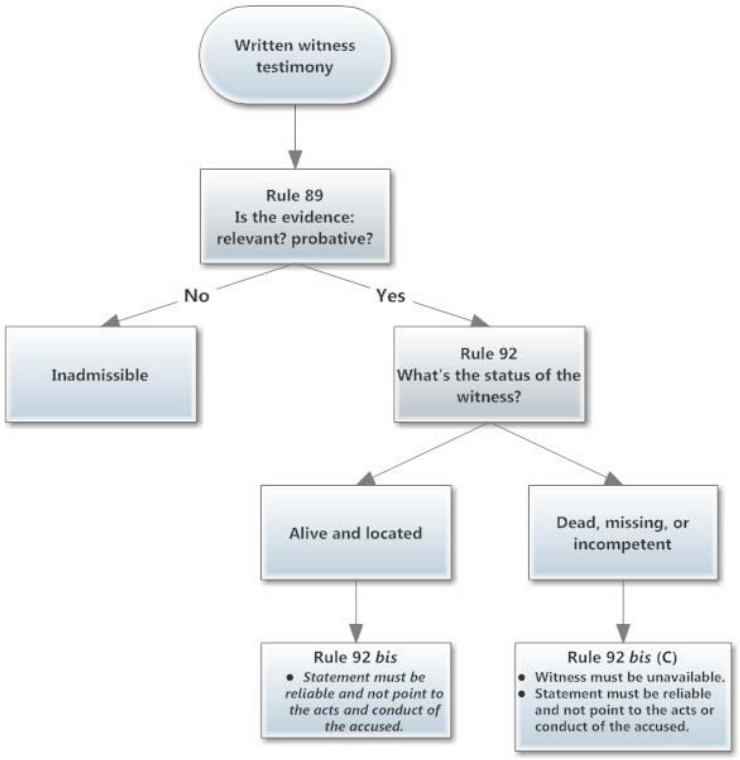
[122] *Prosecutor v. Ngirabatware,* Decision on Defence Motion for Reconsideration or Certification to Appeal the Trial Chamber's Rule 92 *bis* Decision of 22 September 2011, Case No. ICTR-99-54-T, 25 November 2011, para. 5.

[123] *Id*. at para. 31.

[124] *Id*.

[125] *Id*.

ICTR Summary



The admissibility of written witness statements in lieu of oral testimony relies less on the status of the witness than it does with its counterpart at the ICTY. Provided that the statements meet the requirements of Rule 89 (relevance and probative value), the primary question for ICTR Chambers is whether the statements point to the acts and conduct of the accused. Generally speaking, if the statements go to the acts and conduct of the accused, they are inadmissible regardless of the author's status. Only under extreme circumstances where the "interests of justice" or "rights of the accused" would be significantly and negatively affected by the non-admission of such statements, will the Chamber consider their admission.

D. THE SPECIAL COURT FOR SIERRA LEONE

In March of 1991, a former army corporal named Foday Sankoh inspired a group of militants known as the Revolutionary United Front (RUF) to take up arms against the government of Sierra Leone in an attempt to overthrow the presidency of Joseph Momoh. By joining forces with another group known as the National Patriotic Front of Liberia, led by Charles Taylor, the RUF campaign resulted in an armed conflict lasting over a decade, as well as the killing, mutilation, and displacement of over half of the country's civilian population.[126] On August 14, 2000, the United Nations Security Council adopted Resolution 1315, requesting the Security-General and Government of Sierra Leone to work together to establish an independent special court to try those responsible for the atrocities committed during the conflict.[127] On January 16, 2002, an agreement was signed between the United Nations and the Government of Sierra Leone formally establishing the Special Court for Sierra Leone ("SCSL").[128]

The SCSL Statute and Rules of Procedure and Evidence

Like the ICTR, the SCSL structure shares a common foundation set by the Yugoslavia Tribunal. Its Rules of Procedure and Evidence share a similar hybrid approach combining elements of both adversarial and inquisitorial trial systems. The admissibility of evidence is governed by the general provisions set out in Rule 89.[129] However, the SCSL's version of Rule

---

[126] United Nations High Commissioner for Refugees, Refugees Magazine, vol. 1, no. 118, Page 9 (2000).

[127] S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

[128] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, S.C. Res. 246, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/246 (Jan. 16, 2002).

[129] SCSL RPE Rule 89.

89 is considerably shorter and more simplified than its ICTY/ICTY counterparts, and subsequently grants its Chambers wider discretion in the admissibility of evidence.

> **Rule 89: General Provisions (amended 7 March 2003)**
>
> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
>
> (C) A Chamber may admit any relevant evidence.

Recall, that ICTY/R Rules only allow Chambers to admit evidence that is both relevant and probative.[130] The SCSL version states that "[a] Chamber may admit any relevant evidence;"[131] probative value is not addressed in the SCSL Rule.

Also like the ICTY/R, the admission of written witness statements and testimony in lieu of oral testimony is governed by Rule 92 *bis*. And like its adaptation of Rule 89, the SCSL's version of Rule 92 *bis* has been shortened and simplified significantly. In its early form, the SCSL's version simply stated that "[a] Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony,"[132] provided that it determines it to be relevant and sufficiently reliable.[133] Noting this rather dramatic departure from ICTY/R precedent, the SCSL Appeals Chamber explained:

---

[130] *See* ICTY RPE, Rule 89, ICTR RPE Rule 89.

[131] SCSL RPE, Rule 89(C).

[132] Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 92 *bis* (A) (2005).

[133] *Id*. at R. 92 *bis* (B).

> SCSL Rule 92 *bis* is different to the equivalent Rule in the ICTY and ICTR and deliberately so. The judges of this Court, at one of their first plenary meetings, recognised a need to amend ICTR Rule 92 *bis* in order to simplify this provision for a court operating in what was hoped would be a short time-span in the country where the crimes had been committed and where a Truth and Reconciliation Commission and other authoritative bodies were generating testimony and other information about the recently concluded hostilities. The effect of the SCSL Rule is to permit the reception of 'information' - assertions of fact (but not opinion) made in documents or electronic communications - if such facts are relevant and their reliability is 'susceptible of confirmation'. This phraseology was chosen to make clear that proof of reliability is not a condition of admission: all that is required is that the information should be capable of corroboration in due course.[134]

However, in 2007, the Rule 92 *bis* was amended, and its scope was narrowed substantially by limiting its application only to written statements that go to matters other than the acts and conduct of the accused.[135] The current SCSL version is still considerably shorter and less complex than its ICTY/R equivalents: Rather than listing non-exhaustive lists of factors the Chambers should weigh in assessing admissibility, and stating specific guidelines and procedures for determining the reliability of a statement, the SCSL's Rule simply allows a Chamber to admit any evidence relevant "to the purpose for which it is submitted," provided that its reliability is "susceptible of confirmation, "[136] provided it points to a matter other than the acts and conduct of the accused.

> **Rule 92 *bis*. Alternative Proof of Facts** (adopted 14 March 2004 and amended 14 May 2007)[137]

---

[134] *Prosecutor v. Fofana et. al.,* Decision on Joint Defense Application for Leave to Appeal from Decision on Defence Motion to Exclude all Evidence from Witness TF1-277, Case no. SCSL-04-16-T-358, 2 August 2005, para. 6.

[135] SCSL RPE, Rule 92 *bis*.

[136] *Id*. at R. 92 *bis* (B).

[137] *Id*. at R. 92 *bis*.

> (A) In addition to the provisions of Rule 92ter, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, *that do not go to proof of the acts and conduct of the accused.* [Emphasis added]
>
> (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, *it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.* [Emphasis added]
>
> (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.

Like the ICTY/R versions, SCSL Rule 92 *bis* allows for its Chambers to admit written statements in lieu of oral testimony that are relevant, reliable, and that go to proof of a matter other than the acts and conduct of the accused. With regard to statements that go to proof of the acts and conduct of the accused, the SCSL breaks from the ICTR standard of inadmissibility and, instead, follows the ICTY approach, which allows for the admission of such statements under the requirements of Rules 92 *ter* and *quater*.

Rule 92 *ter* allows for the admission of written statements in lieu of oral testimony regardless of whether they point to the acts and conduct of the accused provided that the witness is present in court, available for cross-examination, and can attest to the accuracy of the statement.[138]

Adopted in 2007, Rule 92 *quater* allows for the admission of written witness statements of deceased, missing, or incompetent witnesses, regardless of whether they point to the acts and conduct of the accused, provided that the Chamber is satisfied that the witness is truly unavailable (deceased, missing, or incompetent), and that the statement is reliable.[139] However,

---

[138] SCSL RPE, Rule 92 *ter*.

[139] SCSL RPE, Rule 92 *quater* (A).

the Rule states that if the Chamber finds that the written statement points to the acts and conduct of the accused, then it may be a weighed as a factor against its admission.[140]

Rule 92 *quater*. Unavailable Persons (adopted 14 May 2007)[141]

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92bis, if the Trial Chamber:

(i) is satisfied of the person's unavailability as set out above; and

(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

Although the SCSL Chambers seem to have fairly wide discretion, especially when compared to their ICTY/R counterparts, they are still bound by the limitation set in Rule 95, which provides that "[n]o evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."[142]

In its relatively short existence, the SCSL has had many opportunities to evaluate the admissibility of written witness statements pursuant to Rule 92 *bis*. In one instance of the *Fofana and Kondewa* trial, prior to the 2007-amendments of the Rule, the Defense sought to introduce several documents in lieu of oral testimony pursuant to Rule 92 *bis*. After assessing the relevance of the documents as required by Rule 89, the Chamber then analyzed the documents under Rule

[140] SCSL RPE, Rule 92 *quater* (B).

[141] SCSL RPE, Rule 92 *quater*.

[142] SCSL RPE, Rule 95.

92 *bis*. In assessing whether the documents' reliability were "susceptible to confirmation," the Chamber noted:

> [P]roof of reliability is not a condition for admitting "information" under Rule 92 *bis* and that a requirement under this Rule of such information being capable of corroboration in due course leaves open the possibility for the Chamber to determine the reliability issue at the end of the trial in light of all evidence presented in the case and decide whether the information is indeed corroborated by other evidence presented at trial, and what weight, if any, should the Chamber attach to it.[143]

After finding the documents to be both relevant, sufficiently reliable, and not in violation of the interests of justice, the Court allowed their admission without assessing whether they went to the acts and conduct of the accused.[144]

In another instance from the *Fofana and Kondewa* trial, the defense sought to have admitted into evidence a statement of an Ambassador and a copy of an email communication by another witness, in lieu of their oral testimony.[145] Again, the Chamber here first examined for their relevance as required by Rule 89.[146] It then analyzed the written statements under Rule 92 *bis*, however, unlike in the previous case where the Chamber simply ignored the issue of whether the evidence pointed to the acts and conduct of the accused, the Chamber here expanded on the idea that, "the Accused will be unfairly prejudiced if documents pertaining to their acts and conduct are admitted into evidence without giving the Defence the opportunity of cross-examination…"[147] After finding that the witnesses who authored the written statements would be

---

[143] *Prosecutor v. Fofana et. al.,* Decision on Norman Request to Admit Documents on Lieu of the Testimony of Abdul-One Mohammed Pursuant to Rules 89(C) and 92 *bis*, Case No. SCSL-04-14-T, 15 September 2006, para. 14.

[144] *Id*. at para 22.

[145] *Prosecutor v. Fofana et. al.,* Decision on Fofana Request to Admit Evidence Pursuant to Rule 92 *bis*, Case No. SCSL-04-14-T, 9 October 2006, para. 3.

[146] *Id*. at para. 15.

[147] *Id.* at para. 19 (quoting Decision of the 14th of July 2005, supra note 10, p. 4) (See also *Prosecutor v. Milosevic*, Case No. IT-02-54-T, "Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92

unavailable for cross-examination, the Chamber subsequently allowed into admission the written statements with the exceptions of the portions that were identified to go to the acts and conduct of the accused.[148]

Following the 2007 amendments to SCSL Rule 92 *bis*, the SCSL not only adopted the ICTY's language but also some of the ICTY's interpretations of the rule. In an instance of the Charles Taylor case, the Trial Chamber noted that the SCSL had adopted the ICTY's interpretation of the meaning of "acts and conduct of the accused."[149] Finding that the written statements in question here went to the acts and conduct of the accused, the Chamber rendered statements inadmissible.[150]

Likewise, in another instance of *Taylor*, the Prosecution sought to introduce several documents into evidence in lieu of oral testimony of several witnesses.[151] The Trial Chamber was satisfied that the documents did not go to the acts and conduct of the accused, were relevant to the purpose for which they were submitted, and that their reliability was susceptible to confirmation, and subsequently granted the Prosecution's motion allowing the documents into evidence.[152]

---

bis", 21 March 2002, paras. 24-5; and *Prosecutor v. Galic*, Case No. IT-98-A R73.2, "Decision on Interlocutory Appeal Concerning Rule 92bis(C)", 7 June 2002, para. 13).

[148] *Id*. at para. 24.

[149] *Prosecutor v. Taylor*, Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92 *bis* - Newspaper Article, Case No. SCSL-03-1-T, 5 October 2010, para. 7.

[150] *Id*. at para. 10.

[151] *Prosecutor v. Taylor*, Decision on Public with Confidential Annexes A to D & F to G Proseuction Notice under Rule 92 *bis* for the Admission of Evidence Related to Inter Alia Freetown & Western Area - TF1-09, TF1-104, and TF1-227, Case No. SCSL-03-1-T, 21 October 2008, para. 2.

[152] *Id*. at paras. 13-4.

The SCSL has not, however, had many opportunities to evaluate the admissibility of written statements in lieu of oral testimony pursuant to Rule 92 *quater*; where witnesses are unavailable to appear before the Chamber. SCSL Rule 92 *quater* made its first and only appearance before the Tribunal in the Charles Taylor case.[153] In this instance, the Prosecution sought the admission of several transcripts and exhibits relating to the prior live-testimony of two now deceased witnesses.[154] The Trial Chamber, recognizing that this was the first appearance of Rule 92 *quater,* noted from ICTY jurisprudence that Rule 92 *quater* "requires that two cumulative conditions be satisfied, namely the unavailability of the author of the transcript of evidence and the reliability of the evidence contained therein,"[155] in addition to satisfying the provisions of Rule 89 and Rule 95 - that the evidence be relevant and not bring the "administration of justice into serious dispute."[156] Finding that the written statements satisfied the requirements of Rule 89 and Rule 95, the Chamber then analyzed the statements under Rule 92 *quater*: first addressing the unavailability of the witnesses, then the reliability of the statements.

The Prosecution provided uncontested copies of the death certificates for each of the witnesses, which satisfied the unavailability requirement of the first prong of Rule 92 *quater*.[157] In assessing the reliability of the written statements, the Trial Chamber looked again to the

---

[153] *Prosecutor v. Taylor*, Defence Response to "Prosecution Motion for the Admission of the Prior Trial Transcripts of Witnesses TFI-021 and TFI-083 Pursuant to Rule 92 *quater,*" Case No. SCSL-2003-01-T, 11 September 2008, para. 5.

[154] *Prosecutor v. Taylor,* Decision on Public with Confidential Annexes C to E Prosecution Motion for Admission of the Prior Trial Transcripts of Witnesses TF1-021 and TF1-083 Pursuant to Rule 92 *quarter*, Case No. SCSL-03-1-T, 5 February 2009, para. 1.

[155] *Id*. at para. 17 (citing *Prosecutor v. Prlic et. al*, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, ICTY Case No. IT- 04-74-T, 27 Oct. 2006, para. 8.

[156] *Id*.

[157] *Id*. at para. 19.

guidance of the ICTY and noted the following non-determinative factors as indicia of reliability: "(i) the fact that the statement was made under oath, (ii) that it was subject to cross-examination and (iii) that it has been corroborated by other evidence."[158] The Defense here argued that the cross-examination of the witnesses in the prior proceedings was inadequate and should thus be dismissed. However, the Trial Chamber rejected this argument, stating that "the quality and/or extent of the cross-examination are issues which go to the 'weight to be attributed to the evidence rather than to its admissibility.'"[159] Ultimately, the Trial Chamber found both statements to be sufficiently reliable.[160] Finally, the Chamber addressed the Defense's argument that the written statements should be barred from admission because they point to the acts and conduct of the accused.[161] The Chamber rejected this argument noting that "Rule 92 *quater* does not preclude the admission of evidence which goes to the acts and conduct of an accused; however, this is a factor which can argue against admission in whole or in part…"[162] After examining the documents, neither of them were deemed so pivotal in the case as to bar their admission.[163] Subsequently, the granted the Prosecution's motion and admitted the written statements into evidence.[164]

---

[158] *Id*. at para. 17 (citing *Prosecutor v. Prlic et. al.*, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, ICTY Case No. IT- 04-74-T, 27 Oct. 2006, para. 10).

[159] *Id*. at para. 23 (quoting *Prosecutor v. Popovic*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, Case No. IT-05-88-T, 21 April 2008, para. 51).

[160] *Id*. at para. 27.

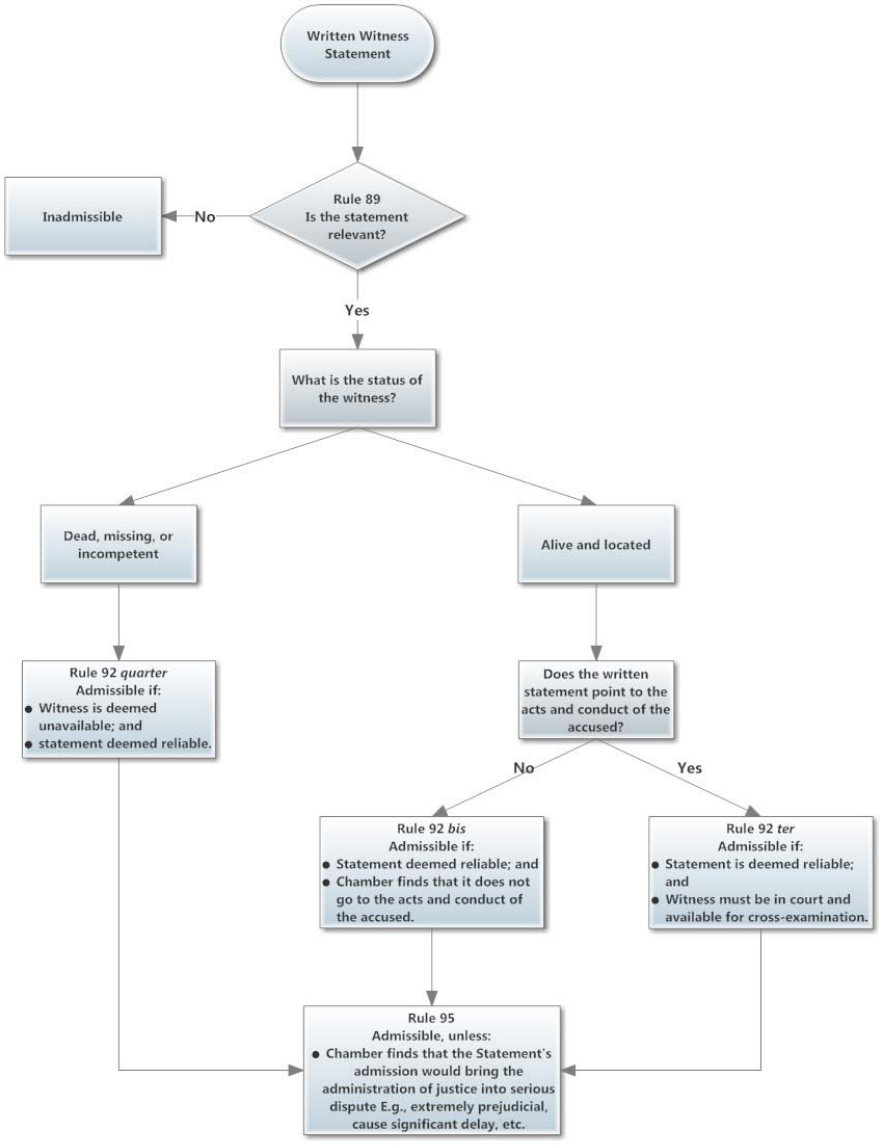
[161] *Id*. at para. 28.

[162] *Id.* at para. 18.

[163] *Id*. at para. 30.

[164] *Id*. at para. 31.

SCSL Summary



The SCSL Rules of Procedure and Evidence regarding the admissibility of written witness statements operate in a fashion very similar to that of its ICTY/R counterparts. The admission of all evidence is bound by the provisions of Rule 89 and Rule 95, which require that the evidence be relevant[165] and not "bring the administration of justice into serious disrepute."[166]

[165] SCSL RPE Rule 89 (C).

[166] SCSL RPE Rule 95.

Written witness statements in lieu of oral testimony may be admitted under Rule 92 *bis* provided they are reliable, do not point to the acts and conduct of the accused, and, where needed, that the author of the statement be available for cross-examination.[167] If a written statement points to the acts of the accused, the statement may still be admissible under Rule 92 *ter,* provided that the witness is present in court, available for cross-examination, and the witness testifies to the accuracy of the written statement.[168] If a witness is unavailable (deceased, missing, or incompetent), his/her written statements may be admissible under Rule 92 *quater,* regardless of whether the statements point to the acts and conduct of the accused, provided that the witness is truly unavailable, and that the Chamber finds that the statement is reliable.[169]

E. THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

On April 17, 1975, a militant group called the Communist Party of Kampuchea, commonly known as the Khmer Rouge, seized power in Cambodia and embarked on a purification campaign of genocide and crimes against humanity lasting three years and nine months that would result in the death of nearly a fifth of country's population.[170] Although the regime was toppled in 1979, many of those responsible for the atrocities escaped justice and remained free; enjoying relative impunity.[171] In order to heal the wounds of the past, in 1997 the

---

[167] SCSL RPE Rule 92 *bis.*

[168] SCSL RPE Rule 92 *ter*.

[169] SCSL RPE Rule 92 *quater.*

[170] Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, at 6, UN Doc. A/53/850 – UN Doc. S/1999/231 (Mar. 3, 1999).

[171] *Id*.

Government of Cambodia wrote to the Secretary-General of the United Nations requesting assistance in creating a court to bring those most responsible for the crimes to justice. After a series of negotiations, the Extraordinary Chambers in the Courts of Cambodia ("ECCC") was established in 2003.

The ECCC Statute and Rules of Procedure and Evidence

Unlike the ICTR and SCSL, which adapted their rules from the ICTY model (the "ad hoc tribunals"), the ECCC has established its own comprehensive body of Rules and Procedures. As a former French colony, the influence of the French civil law trial system is stronger in the Cambodian Tribunal than it is with its ad hoc counterparts, and that influence is reflected in its Rules of Procedure and Evidence.

The admissibility of all evidence is governed by Rule 87, which simply asserts, unless stated otherwise in the Rules, all evidence is admissible.[172] The Rule clarifies the scope of this rather broad statement by adding in Section 2 that only evidence that has been put before the Chamber and subjected to examination will carry weight in making a decision.[173] The Chamber may reject any evidence based on criteria set in Rule 87(3), "namely irrelevance, inability to prove the facts alleged, impossibility of obtaining evidence within a reasonable time, or due to the existence of breaches of fundamental legal standards concerning the rules of evidence."[174]

> **Rule 87. Rules of Evidence** (Amended on 1 February 2008, on 6 March 2009 and on 11 September 2009)

[172] ECCC Rules of Procedure and Evidence, Rule 87(1).

[173] *Id*. at Rule 87(2).

[174] *Co-Prosecutors v. Kaing*, Decision on Admissibility of Material on the Case File as Evidence, Case No. 001/18-07-2007/ECCC/TC, 26 May 2009, para. 6.

> 1. Unless provided otherwise in these IRs, all evidence is admissible. The onus is on the Co-Prosecutors to prove the guilt of the accused. In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt.
>
> 2. Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination.
>
> 3. The Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court. The Chamber may reject a request for evidence where it finds that it is:
>
>   a. irrelevant or repetitious;
>   b. impossible to obtain within a reasonable time;
>   c. unsuitable to prove the facts it purports to prove;
>   d. not allowed under the law; or
>   e. intended to prolong proceedings or is frivolous.
>
> 4. During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.

Though the ECCC's Rule 87 is substantially different from the ad hoc Tribunals' Rule 89, the basic test it creates is similar: in order to be used as evidence, the submitted evidence should be relevant and reliable. If the evidence clears this hurdle, the Chamber will then assess its probative value.[175]

However, although Rule 87 essentially declares that all relevant and reliable evidence is admissible, this simple decree does not apply so amenably to written witness statements offered in lieu of oral testimony. As a general rule, the ECCC takes the stance that an accused has the

[175] *Id*. at para. 7.

right to a fair and expeditious trial, which includes the right face his or her accuser. This principle is expressed in Article 33 new[176] of the ECCC Charter, and codified in Rule 84.

> **Article 33 new**
>
> The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.
>
> The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

> **Rule 84. Appearance of Witnesses and Experts** (Amended on 1 February 2008 and on March 2009)[177]
>
> 1. The Accused shall have the absolute right to summon witnesses against him or her whom the Accused had no opportunity to examine during the pre-trial stage.

Although on its face Rule 84 appears to completely bar the admission of written statements in lieu of oral testimony where the Accused has not had the chance to face the author, this has not been the case entirely. Unlike the ad hoc tribunals' Rule of Procedure and evidence, the ECCC's Rule do not explicitly discuss or present a solution for the use of written statements in lieu of oral testimony. On one hand, Rule 84 explicitly states that the Accused has the *absolute* right to summon witnesses testifying against him or her, on the other Rule 87 states that all

[176] ECCC Charter at Article 33 new.
[177] ECCC RPE at Rule 84.

evidence is admissible. Article 33 new of the Charter states that the Accused has the right to fair trial, but it also says that the Accused has a right to an expeditious trial. In the light of incredibly complex and voluminous war crimes trials, if the Defense is granted the absolute right to summon every witness testifying against him, trials could drag on endlessly. As the ICTY discovered prior to adopting Rule 92 *bis*, the preference for live testimony resulted in "trials [that] develop[ed] into endless contests between the parties, whose main aim [was] to win these battles, not to promote the expeditiousness of the proceedings and judicial economy."[178] Per Article 33 new, the ECCC has taken note of this issue, and has looked to guidance from the international criminal justice community.[179]

In one of the few instances where an ECCC Trial Chamber has addressed this issue, *Co-Prosecutors v. Kiang*, the Prosecution sought to introduce into evidence the written testimony of two deceased witnesses.[180] After noting how the ad hoc tribunals deal with the written statements of deceased witnesses and examining the statements in question, the Chamber rejected the Prosecution's motion and barred the statements from admission.[181] However, in making this decision the Chamber did not reject the statements solely because the Accused did not have an opportunity to cross-examine the author of the statements, but rather treated it as a factor against admitting the statements. When combined with other factors - the witnesses never appeared before the Chamber, the statements were not taken under oath, discrepancies between the English and French versions of the statements, the Defense's objection to their use, and that the

---

[178] Jérome De Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?* 5 J of Intl'l Criminal Justice, 402, 405 (2007).

[179] *Co-Prosecutors v. Kaing*, Decision on Admissibility of Material on the Case File as Evidence, Case No. 001/18-07-2007/ECCC/TC, 26 May 2009, paras. 14-5.

[180] *Id.* at para. 16.

[181] *Id*.

contents of the statements went to the acts and conduct of the accused - the scales tipped in favor of the written statements' non-admission.[182] In making this decision, the Chamber effectively adopted a similar approach to that of the ICTY and SCSL consistent with Rule 89 and Rule 92 *quater*.

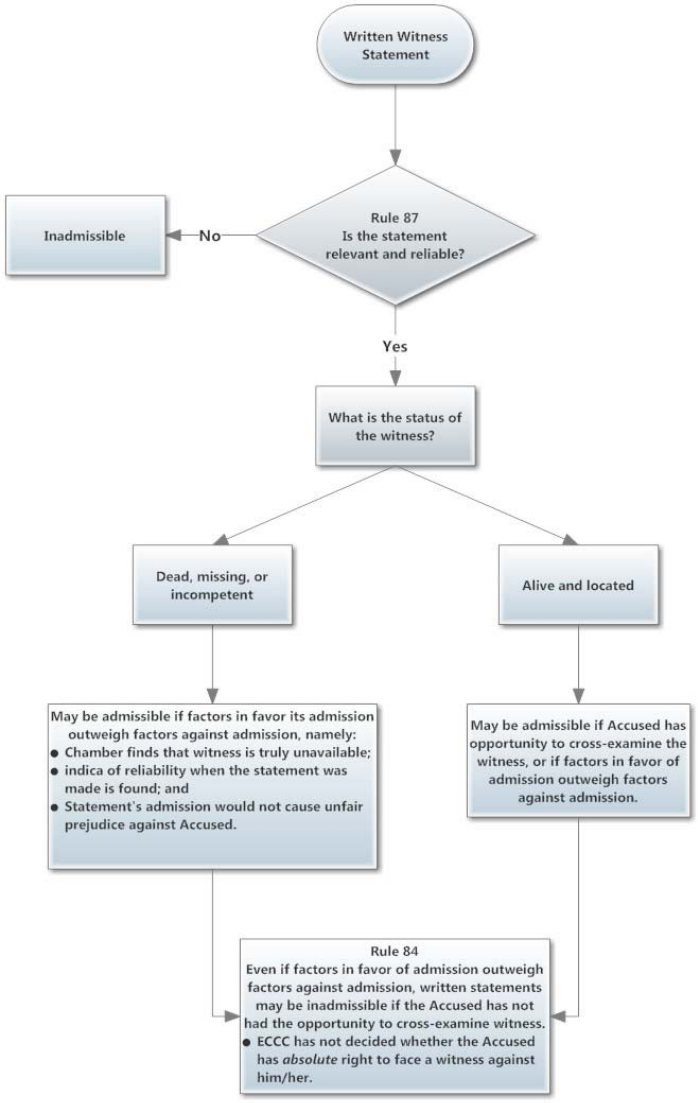
However, none of this jurisprudence has been codified in the ECCC Rules of Procedure and Evidence. How the ECCC Chambers will rule on this issue in the future is in the air. As of the date of this paper, the Trial Chamber has yet to weigh in on this hotly contested issue in the *Chea et. al.* case, where the several defendants have asserted their "rights" to confront all witnesses called against them and to contest the admission of any written statements in lieu of oral testimony.[183] The Prosecution has challenged these assertions in a series of replies, but as of yet, the Trial Chamber has yet to decide on the matter.[184]

[182] *Id*.

[183] *Co-Prosecutors v. Chea et. al.,* Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, Case. No. 002/19-09-2007-ECCC/TC, 15 June 2011, para 1.

[184] See *Co-Prosecutors v. Chea et. al.,* Co-Prosecutors' Reply to the Responses Regarding the Admission of Written Witness Statements Before the Trial Chamber, Case No. 002/19-09-2007-ECCC/TC, 10 August 2011, para. 24.

ECCC Summary



Rule 87 states that all evidence is admissible, except as provided in other rules. Rule 84 states that the Accused has an absolute right summon witnesses against him or her. Seemingly, Rule 84 would bar the admission of all written witness statements in lieu of oral testimony regardless of the witness's status. However, in the interests of ensuring that the Accused receive a fair and expeditious trial, per Article 33 new, the ECCC Chambers have examined the issue. In doing so the Chamber used guidance from the ad hoc tribunals, namely the procedure embodied by ICTY/SCSL Rule 92 *quater*. It is too early to tell how the ECCC will rule on this issue in the

future, but based on what limited jurisprudence the ECCC has on the matter and the sheer difficulty in conducting war crimes tribunals without the use of written testimony, it is likely that the Cambodian Tribunal will adopt a position similar to that of the ad hoc tribunals.

IV. CONCLUSIONS

Each of the Tribunals has adapted and evolved their own approach to dealing with pre-trial written witness statements. All of the Tribunals share a common theme that guides their jurisprudence: the Accused has a right to a fair trial. Generally, the all Tribunals have suggested that this includes the Accused having the right to face his accuser. In the Nuremberg Trials, the admission of written witness statements in lieu or oral testimony was rampant and relatively unchecked, which subsequently resulted in much criticism from around the world. In an effort to avoid this criticism, the ICTY, the first of the ad hoc tribunals, initially was envisioned to be conducted solely from live testimony. However, due to the incredibly complex nature of war crimes trials and the need to provide the Accused with an expeditious trial, the use of written statements has swung, like a pendulum, from one extreme to the other and is now generally heading back to a middle ground, where such statements may be admissible, but under limitations set forth in the Tribunals' Rules of Procedure and Evidence.