

NOTES

“DEAD MEN TELL NO TALES”: RULE 92 BIS—HOW THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS UNNECESSARILY SILENCE THE DEAD

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The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda adopted Rule 92 bis—Proof of Facts Other than by Oral Evidence—as a good faith attempt to hone the rules of evidentiary admissibility and provide a better balance between fairness and efficiency. While Rule 92 bis provides certain benefits, this Note argues that because of the unique nature and purpose of the Tribunals, this Rule is not the optimal framework within which to determine the admissibility of deceased witness statements. Applying Rule 92 bis to prior statements of deceased witnesses needlessly reinforces existing incentives to kill important witnesses before they can testify in person at the Tribunals and unnecessarily limits the admissibility of testimony of classes of victims that survived the initial crimes but did not live long enough to testify in person in front of the Tribunals. This Note presents two ways that the Tribunals could admit written statements of deceased witnesses while maintaining many of the important benefits of Rule 92 bis, and consequently, provide a better balance between fairness and efficiency than is currently achieved under Rule 92 bis.

INTRODUCTION

Over the past sixty years the international community has made extraordinary progress in developing an internationalized system designed to prosecute and document war crimes and crimes against humanity. This trend began with the Nuremberg trials after World

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War II, and it continues today with the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹ and the International Criminal Tribunal for Rwanda (ICTR),² together known as the Ad Hoc International Criminal Tribunals (AHICTs).³

With their distinctive mix of civil and common law traditions, the AHICTs have endeavored to establish rules of procedure and evidence that provide fair and efficient international fora for documenting and prosecuting war crimes, crimes against humanity, and genocide.⁴ This process has proven particularly challenging when trying to create rules regarding the admissibility of written statements. Admitting written affidavits can speed up proceedings considerably and save significant costs associated with the daunting task of documenting and adjudicating mass crimes that often span many months and large geographical areas. However, allowing parties to submit written affidavits into evidence, in lieu of oral testimony, prevents cross-examination, creating concerns about the reliability and credibility of admitted evidence and the perceived fairness and legitimacy of the Tribunals' judgments. As succinctly described by Robert Jackson, Chief Prosecutor of the Nuremberg Military High Criminal Trials, the challenge has been to establish "incredible events by credible evidence."⁵

¹ Acting according to its powers under Chapter VII of the United Nations Charter, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) as the first international criminal court since World War II. S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993); Kristina D. Rutledge, Note, "*Spoiling Everything*"—*But for Whom? Rules of Evidence and International Criminal Proceedings*, 16 REGENT U. L. REV. 151, 157 (2004).

² The United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) in response to the atrocities in Rwanda in early 1994. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

³ No discussion of modern international criminal law is complete without mentioning the new International Criminal Court (ICC); however, this Note does not directly address the ICC because it is in its infancy and has yet to hear a case. The topics discussed in this Note may nevertheless inform the development of the rules of procedure and evidence in the ICC.

This Note also does not examine the Special Court for Sierra Leone, which has a similar mandate to the AHICTs but is a hybrid tribunal combining aspects of domestic Sierra Leonian and international law.

⁴ The governing Statutes of the ICTY and ICTR specify the subject matter jurisdiction of the Tribunals. Statute of the International Tribunal for Rwanda arts. 1–4, Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Statute]; Statute of the International Tribunal arts. 1–5, May 25, 1993, 32 I.L.M. 1163 [hereinafter ICTY Statute]. They also oblige the judges of the Tribunals to create rules of procedure and evidence for, inter alia, "the admission of evidence" and "the protection of victims and witnesses and other appropriate matters." ICTY Statute, *supra*, art. 15; see also ICTR Statute, *supra*, art. 14 (requiring adoption of Rules of Procedure and Evidence of ICTY but allowing changes as judges "deem necessary").

⁵ TELFORD TAYLOR, THE ANATOMY OF THE NUEREMBERG TRIALS 54 (1992).

In response to this difficult task, the AHICTs have experimented with various combinations of rules regarding the admissibility of written affidavits in an effort to find an optimal balance. In their most recent attempt, the AHICTs adopted Rule 92 *bis*—Proof of Facts Other than by Oral Evidence.⁶ Rule 92 *bis* permits parties to submit evidence other than live witness testimony, but a judge may only admit such evidence into the record if it meets certain specified criteria: The evidence must have satisfactory indicia of reliability,⁷ and it must be “proof of a matter *other than* the acts and conduct of the accused as charged in the indictment.”⁸

Compared to past admissibility regimes, Rule 92 *bis* appears to have created a superior balance between fairness and efficiency. However, the Rule could benefit from some fine tuning. Most significantly, under Rule 92 *bis* written affidavits of witnesses who die before they are able to testify in person are no longer admissible if the evidence they offer helps to prove the acts and conduct of the accused as charged in the indictment.⁹ This provision makes Rule 92 *bis* unnecessarily and harmfully overbroad. By preventing the admission of most deceased witness affidavits, Rule 92 *bis* perversely reinforces existing incentives to kill witnesses before they can testify in person at the Tribunals. Furthermore, because of the nature of the crimes perpetrated during these atrocities, many victims live long enough to recount their stories to investigators but do not survive to testify in person.¹⁰ By hampering the admission of deceased witness statements, Rule 92 *bis* needlessly keeps valuable testimony out of the official historical record.

⁶ Int'l Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 92 *bis*, U.N. Doc. IT/32/Rev.37 (Apr. 6, 2006), available at <http://www.un.org/icty/legaldoc-e/index.htm> [hereinafter ICTY Rules]; Int'l Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 92 *bis* (June 7, 2005), available at <http://www.ictr.org/ENGLISH/rules/070605/070605.pdf> [hereinafter ICTR Rules]. For the full text of ICTY and ICTR Rule 92 *bis*, see Appendix. See also ARCHBOLD: INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE & EVIDENCE 449 (Karim A.A. Khan et al. eds., 2d ed. 2005) (discussing adoption and use of Rule 92 *bis* in relation to Chamber's “need[] to strike a balance between ensuring that the trial is both fair and expeditious”); Daryl A. Mundis, *Current Developments at the Ad Hoc International Criminal Tribunals*, 1 J. INT'L CRIM. JUST. 197, 217 (2003) (recounting adoption of Rule 92 *bis*).

⁷ ICTY Rules, *supra* note 6, Rule 92 *bis*(B)–(C); ICTR Rules, *supra* note 6, Rule 92 *bis*(B)–(C).

⁸ ICTY Rules, *supra* note 6, Rule 92 *bis*(A) (emphasis added); ICTR Rules, *supra* note 6, Rule 92 *bis*(A) (emphasis added).

⁹ See *infra* Part II.C.

¹⁰ Many such victims were subjected to severe mutilation, brutal rape, or the more recent phenomenon of intentionally using men infected with HIV to rape women. See *infra* notes 100–03 and accompanying text.

This Note argues that, given the nature and purpose of the AHICTs, Rule 92 *bis* does not provide the optimal framework within which to determine the admissibility of prior written statements made by deceased witnesses. This Note does not criticize the application of Rule 92 *bis* to all out-of-court statements. Rather it maintains that, given the nature of the crimes being tried, the special role that the Tribunals play in establishing an official historical record of atrocities, and the distinctive mix of civil and common law traditions developed to try these crimes, Rule 92 *bis* is overly restrictive with respect to deceased witness statements.

This Note proceeds in four parts. Part I explains the role and purpose of the AHICTs, the nature of the crimes they adjudicate and document, the position of the AHICTs in relation to international law, and their distinctive mix of civil and common law traditions. Part II discusses the history of the admissibility of prior written statements by deceased witnesses at international war crimes tribunals and the emergence of Rule 92 *bis*. It then lays out the various trial and appellate interpretations as to how Rule 92 *bis* applies to the admissibility of prior affidavits made by deceased witnesses. Part III analyzes the benefits and drawbacks of Rule 92 *bis* in relation to the admissibility of prior written statements of deceased witnesses. Part IV presents two ways that the AHICTs could admit written statements of deceased witnesses that—while maintaining many of the important benefits of Rule 92 *bis*—would achieve a better balance between fairness and efficiency than does the present rule.

I

THE UNIQUE NATURE OF THE AHICTS

As institutions created by the U.N. Security Council to prosecute and document mass violations of international humanitarian and criminal law, the ICTY and ICTR are inextricably connected. The Statutes governing the Tribunals and their Rules of Procedure and Evidence significantly parallel and at times even reference one another.¹¹ In fact, the AHICTs are so closely linked that they share

¹¹ Cristian DeFrancia, Note, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 V.A. L. REV. 1381, 1388 (2001); see, e.g., ICTR Statute, *supra* note 4, art. 14 (“The judges of the International Tribunal for Rwanda shall adopt . . . the rules of procedure and evidence . . . of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.”). However, over time the rules of procedure and evidence at each of the Tribunals have changed, and today there are slight but significant differences between the Rules of Procedure and Evidence of the ICTY and the ICTR. See, e.g., *infra* notes 39–43 and accompanying text (noting how ICTR has retained original language of Rule 90(A), which articulates preference for live testimony, whereas ICTY has

the same Appeals Chamber.¹² Nonetheless, they remain distinct from other national and international courts.¹³

The AHICTs are unique judicial institutions in three significant ways. First, they are charged with both adjudicating and documenting violations of international humanitarian and criminal law. Second, they are purely international courts. Third, they operate under a distinctive mix of Anglo-American adversarial common law and continental European inquisitorial civil law traditions.

A. Crimes Adjudicated and Documented

Unlike national courts or various other international adjudicatory bodies, the AHICTs are designed specifically to prosecute and document war crimes, crimes against humanity, and genocide. Because of the grand scale and historically significant nature of these crimes, the purpose of the Tribunals is not only to adjudicate individual criminal liability but also to establish an official historical record of the atrocities.¹⁴ Madeleine Albright, U.S. Ambassador to the United Nations when the ICTY was established, went so far as to declare “that the ICTY’s *primary* purpose was to ‘establish the historical record before the guilty can reinvent the truth.’”¹⁵

Because of this mandate, the AHICTs must deal with distinct evidentiary issues relating to both prosecution and documentation. As

replaced said language with alternative for witnesses to give evidence orally or in writing); *see also* Appendix.

¹² See ICTR Statute, *supra* note 4, art. 12(2) (providing that members of ICTY Appeals Chamber shall also serve as members of ICTR Appeals Chamber).

¹³ The ICC may be the closest equivalent, but for reasons addressed in note 3, *supra*, it will not be discussed in this Note.

¹⁴ See Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT'L & COMP. L. 353, 358 (2001) (“Unless these matters are addressed by the ICTY, there will not be an accurate historical record of the war and the establishment of ‘truth’ will have failed.”); Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT'L CRIM. JUST. 427, 428 (2004) (“A long list of purposes has been ascribed to the ICTY . . . and other similar tribunals . . . [including] provid[ing] a safe forum for victims to tell their stories; . . . [and] creat[ing] an accurate historical record, to forestall those who might later try to deny that wide-scale violations of international law occurred.”); Recent Case, *Prosecutor v. Nahimana, Barayagwiza, & Ngeze (Media Case)*, Case No. ICTR-99-52-T (Dec. 3, 2003), 117 HARV. L. REV. 2769, 2773 (2004) (noting ICTR’s “institutional goals of etching the genocide’s factual history”); *see also* Diane F. Ortenlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2546 n.32 (1991) (discussing Nuremberg trials’ function of creating well-documented history of German atrocities during World War II).

¹⁵ Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 430 (2001) (quoting 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 334 (1995)) (emphasis added).

Patricia Wald, U.S. Court of Appeals for the D.C. Circuit judge and former ICTY justice explains:

Prosecuting war crimes does present unique problems. . . . The definition of a war crime, a crime against humanity, or genocide itself requires proof of predicate conditions such as the existence of an international armed conflict, a nexus between the illegal acts alleged and an armed conflict, the occurrence of a systematic or widespread campaign against civilians of which the alleged acts are a part, or an intent to destroy a religious, ethnic, or racial group, in whole or in part. A trial at the ICTY is usually more akin to documenting an episode or even an era of national or ethnic conflict rather than proving a single discrete incident.¹⁶

The AHICTs are faced with thousands of potential defendants, including government and military leaders, subordinate commanders, and individual actors, all of whom are subject to varying degrees of culpability.¹⁷ Because of the mass nature of the crimes, there are also hundreds of thousands of potential witnesses and victims, presenting an investigative and evidentiary challenge to institutions with limited resources.¹⁸ Unlike the International Military Tribunal at Nuremberg, the ICTY and ICTR have been tasked with adjudicating crimes

¹⁶ 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, 536–37 (2001).

¹⁷ Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851, 881 (1999). Determining who should be tried where—at the AHICTs or in domestic jurisdictions—has sparked significant debate. See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 385–86 (1998) (noting debates about primacy of AHICTs over national courts resulted in adoption of complementarity model for ICC); Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162 (2005) (discussing large amount of discretion given to prosecutors to determine who should be indicted in various international criminal tribunals); Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 363–67 (1997) (arguing that purpose of tribunals is to determine which defendants are prosecuted within it and which are tried in national courts); Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 J. INT'L CRIM. JUST. 124, 135–36 (2005) (noting limits on prosecutorial discretion at tribunals). Because of their mandate to prosecute “persons responsible for serious violations of international humanitarian law,” ICTR Statute, *supra* note 4, art. 1; ICTY Statute, *supra* note 4, art. 1(A), the AHICTs have generally tried only those in leadership positions. Because the national jurisdictions’ punishments are significantly more severe than those of the United Nations, this policy has created a counterintuitive result: Subordinates receive greater punishments for lesser crimes. See Morris, *supra*, at 363–64 (discussing benefits to defendants tried at ICTR in comparison with those tried in Rwandan courts).

¹⁸ Rutledge, *supra* note 1, at 163 (noting evidentiary challenges presented by need to prove ongoing conflict, systematic destruction of towns or people, and direct targeting of entire population groups).

related to conflicts that, to varying degrees, were ongoing even while investigations and prosecutions were being conducted. This instability often made investigations dangerous for U.N. employees and potential witnesses.¹⁹ Because of their distinctive subject matter jurisdiction, the AHICTs are confronted with evidentiary issues not generally applicable to national or other international adjudicatory bodies.

B. Internationality

As subsidiary organs of the United Nations, the AHICTs rely on international will for their authority, legitimacy, and very existence.²⁰ The only crimes within the Tribunals' jurisdictions are those that have been defined by the international community in multilateral treaties, which are mirrored in each Tribunal's Statute.²¹ The Rules of Evidence and Procedure are similarly based on international consensus, as there is no existing standard of international rules of evidence upon which the judges tasked with developing these rules can rely.²²

C. Mix of Civil and Common Law

The AHICTs' distinctive mix of Anglo-American adversarial common law and continental European inquisitorial civil law procedures is largely due to their reliance on consensus when creating governing rules and procedures.²³ The structure of the Trial Chambers

¹⁹ Cf. *infra* Part III.B.1. (describing threats to safety of AHICT witnesses).

²⁰ See Gregory P. Lombardi, *Legitimacy and the Expanding Power of the ICTY*, 37 NEW ENG. L. REV. 887, 887–89 (2003) (discussing Security Council's political goals in creation of Tribunal and resulting legitimacy questions). Lombardi also claims that the ICTY is struggling to be independent of the United Nations to avoid criticism that it lacks legitimacy as a court because it is a political tool. *Id.*

²¹ See ICTR Statute, *supra* note 4, arts. 1–4; ICTY Statute, *supra* note 4, arts. 1–5. Many of these crimes are also defined in other U.N. documents. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (defining grave breaches of Geneva Conventions); Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (defining acts that constitute genocide).

²² Rutledge, *supra* note 1, at 161–62. Other international adjudicatory bodies, such as the International Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights, do not provide the requisite guidance because they only have jurisdiction over states and none is able to impose criminal penalties. *Id.*

²³ Wald, *supra* note 16, at 537. The use of the categories "Anglo-American adversarial" and "continental European inquisitorial" is not meant to imply that all Anglo-American adversarial systems or all continental European inquisitorial systems work the same way or have the same rules. Rather, these categories draw on general characteristics of two discrete systems of criminal procedure. For a more detailed discussion of these categories, see Kai Ambos, *International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1, 4–5 (2003).

shows a compromise between adversarial and inquisitorial systems.²⁴ As in the adversarial model, the judges do not conduct their own factual investigations. The Trial Chamber relies on each party to perform its own investigations and present this information while arguing its case before the Tribunal. However, unlike the Anglo-American criminal system, there is no jury. Three professional international judges preside over the proceedings, acting as finders of both fact and law. These judges, among other things, ask witnesses their own questions,²⁵ as judges regularly do in inquisitorial systems.

The Tribunals have developed rules of procedure and evidence reflecting this hybridization of civil and common law systems.²⁶ The AHICTs’ treatment of hearsay evidence is one clear example.²⁷ While hearsay evidence is generally excluded in common law proceedings, the Trial Chambers at the AHICTs, like continental civil law courts, have historically had the discretion to admit hearsay evidence and decide how much weight to give it during judicial deliberations, as long as its probative value is not outweighed by its prejudicial nature and the Trial Chamber believes it shows indicia of reliability.²⁸

II ADMISSIBILITY OF PRIOR WRITTEN STATEMENTS BY DECEASED WITNESSES

To better understand the rationale behind the AHICTs’ current position on the admissibility of deceased witness statements, this Part

²⁴ See Ambos, *supra* note 23, at 5 (noting that procedure before ICTY is mix of adversarial and inquisitorial traditions); Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT'L L.J. 47, 51, 59–74 (2003) (highlighting that ICTY’s original Rules were dominated by adversarial model and demonstrating how they have moved away from that model).

²⁵ Ambos, *supra* note 23, at 21.

²⁶ See *id.* at 18–34 (discussing conflicts between common and civil law traditions during trials and ways such conflicts are addressed in ICTY and ICTR).

²⁷ See *id.* at 22–23 (discussing “flexibility principle” which generally gives civil law courts wide discretion to admit hearsay evidence).

²⁸ *Id.* at 23–25; see Wald, *supra* note 16, at 550–51 (discussing judges’ discretion regarding admissibility and weight of hearsay evidence under ICTY Rules). France and Germany are examples of civil law countries whose criminal codes contain few restraints on the admissibility of evidence and thus generally allow the admission of hearsay evidence. Section 244.2 of the German Code of Criminal Procedure (*Strafprozessordnung*) obliges the court to take into account all facts and evidence relevant to its search for the truth. RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE ¶ 4.02 (2002). Similarly, hearsay evidence is frequently admitted in French criminal trials because the French system is unconstrained by formal exclusionary rules. *Id.*; see also ANDREW L.-T. CHOO, HEARSAY AND CONFRONTATION IN CRIMINAL TRIALS 34 (1996) (“In Germany . . . written hearsay is, subject to minor exceptions, freely admissible. France, like Germany, does not have a formal hearsay rule.”).

tracks the current Rule's evolution. It begins with the post-World War II Tribunals' permissive regimes and progresses through the early rules of the AHICTs. The AHICTs' early admissibility regime was dominated by the combination of criteria from Rule 89(C) and a declaratory preference for live testimony from Rule 90(A). Admissibility rules developed as the ICTY altered its declaratory preference, passing Rule 89(F), and experimented with Rule 94 *ter*—permitting written statements to corroborate other evidence regarding facts in dispute. The ongoing struggle to balance fairness and efficiency culminated with the AHICTs' latest attempt: Rule 92 *bis* and the seminal cases interpreting its scope and application to deceased witness statements.

A. Post-World War II Tribunals

The scope of the admissibility of written affidavits has been a source of constant friction since the post-World War II Nuremberg and Tokyo Tribunals. At their inception, these Tribunals maintained non-exclusionary rules of evidentiary admissibility to deal with the unique realities of prosecuting war crimes. There were relatively few survivors of these heinous crimes as well as a large number of defendants whom the Tribunals needed to deal with in an expeditious manner.²⁹ As a result, both the prosecution and defense relied heavily on written statements, including written statements made by deceased witnesses,³⁰ in lieu of testimony by live witnesses.³¹ Recognizing the potential problems created by the inability to conduct cross-examinations, the Tribunals decided that the weight of such evidence, as compared to that of live testimony, would be considered by the judges during their deliberations.³²

²⁹ See MAY & WIERDA, *supra* note 28, ¶¶ 4.06–15, 7.05, 7.13 (describing relaxation of rules of evidence by postwar tribunals to deal with unique problems of trying war crimes).

³⁰ See *id.* ¶¶ 7.36–37 (describing history and reasons for use of affidavits in war crimes trials). But see *id.* ¶¶ 7.38–39 (noting *Farben* case, in which International Military Tribunal (IMT) denied admission of written statements made by deceased witnesses, citing defendants' right to cross-examination, but recognizing that this decision was inconsistent with others at IMT).

³¹ See *id.* ¶¶ 7.05–13 (citing cases in which statements of dead witnesses were admitted into evidence).

³² See *id.* ¶ 7.08 (recounting affidavit admitted into evidence with consideration that “[t]he probative value of an affidavit as compared with a witness who has been cross-examined would, of course, be considered by the Tribunal” (quoting 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 352 (1947))).

B. Rules of Evidence and Procedure at the AHICTs Before Rule 92 bis

Following in the footsteps of the post-World War II Tribunals, the modern AHICTs adopted largely permissive rules of evidentiary admissibility.³³ Rule 89(C) and Rule 90(A) initially governed the admissibility of prior written statements made by deceased witnesses.

1. Rule 89(C)

Rule 89(C) allows a Trial Chamber the discretion to admit “any relevant evidence which it deems to have probative value.”³⁴ In determining the probative value of evidence under Rule 89(C), the Trial Chamber must make a determination regarding the reliability and authenticity of the evidence. In *Kordic & Cerkez*, the Appeals Chamber set out the following standard for the admissibility of evidence in the form of prior written statements:

“Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy . . . and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; . . . the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is “first-hand” or more removed, are also relevant to the probative value of the evidence.”³⁵

In addition, the Appeals Chamber held that Article 21(4) of the ICTY Statute—which guarantees the “full equality” of the accused’s right to “examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf

³³ See *id.* ¶ 4.16 (discussing ICTY Rule 89, which adopts permissible stance on admission of evidence).

³⁴ ICTY Rules, *supra* note 6, Rule 89(C); ICTR Rules, *supra* note 6, Rule 89(C); see also Rutledge, *supra* note 1, at 168 (claiming “[t]his rule alone has excluded virtually no evidence” and represents benefit of flexibility in Tribunal structure). For the full text of ICTR and ICTY Rule 89, see Appendix.

³⁵ Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness, ¶ 23 (July 21, 2000) (quoting Prosecutor v. Aleksovski, Case No. IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, ¶ 15 (Feb. 16, 1999)). But see Prosecutor v. Mucic, Delic & Landzo, Case No. IT-96-21, Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, ¶ 32 (Jan. 19, 1998) (“[I]t is neither necessary nor desirable to add to the provisions of Sub-rule 89(C) a condition of admissibility which is not expressly prescribed by that provision.”).

under the same conditions as witnesses against him”³⁶—“does not create a general prohibition on hearsay evidence, and . . . ‘relevant out of court statements which a Trial Chamber considers probative are admissible under Rule 89(C).’”³⁷

In 2000, the ICTR admitted hearsay evidence in the form of three statements made by witnesses who refused to testify in court, declaring that: “[I]n accordance with Rule 89, any relevant evidence having probative value may be admitted into evidence provided that it is . . . in . . . accordance with the requisites of a fair trial. Hearsay evidence is not inadmissible per se, but shall be considered with caution, in accordance with Rule 89.”³⁸

Consequently, before the enactment of Rule 92 *bis*, hearsay evidence—including prior written statements by deceased witnesses—could be admitted into evidence at the AHICTs when it was relevant, probative, and authentic (insofar as it was deemed to be voluntary, truthful, and trustworthy).

2. *Rule 90(A) and Its Progeny*

While Rule 89(C) permitted judges to admit many statements into evidence, it existed alongside Rule 90(A), which declared the AHICTs’ preference for live testimony: “Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.”³⁹ The Rule’s juxtaposition of “shall” with “in principle” suggests that a witness can be heard by the Trial Chamber in other ways and that hearing a witness directly is preferable, not mandatory. In *Kordic & Cerkez*, the Appeals Chamber declared that:

There is a general preference for live, in-court testimony before the International Tribunal . . . There is . . . no absolute right to confront a witness. . . . [H]earsay evidence can be admissible if it satisfies Rule 89(C) and presents sufficient indicia of reliability: . . . “Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence.”⁴⁰

³⁶ ICTY Statute, *supra* note 4, art. 21(4).

³⁷ *Kordic & Cerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, ¶ 23 (quoting *Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, ¶ 14). Note that despite this legal analysis, the Appeals Chamber found the prior written statements submitted by the Prosecutor inadmissible because it did not meet the Chamber’s standards of reliability. *Id.* ¶ 28.

³⁸ Transcript at 135–36, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T (June 8, 2000).

³⁹ ICTR Rules, *supra* note 6, Rule 90(A). For the full text of ICTY and ICTR Rule 90, see Appendix.

⁴⁰ *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, ¶ 24 (Sept.

This declaratory preference for live testimony remains in force in the ICTR Rules, but did not survive in the ICTY Rules. The ICTY replaced Rule 90(A)'s live testimony preference with Rule 89(F) in December 2000.⁴¹ Rule 89(F) declared a "no preference alternative"⁴² in which a "Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form."⁴³

Regardless of this difference in declaratory preference, before the adoption of Rule 92 *bis*, the Trial Chambers of the ICTR and the ICTY, as well as their unified Appeals Chamber, seemed to be moving away from a preference for live testimony, recognizing the admissibility of prior written statements of deceased witnesses under Rules 89(C) and 90(A).⁴⁴ As a result, out-of-court affidavits were admitted under Rule 89(C), and the judges, during their deliberations, determined what weight should be given to the evidence.⁴⁵ Additionally, many statements were admitted into evidence at the ICTY under Rule 94 *ter*, a short-lived rule that permitted "affidavits 'to prove a fact in dispute' where the affidavit was 'in corroboration of' a live witness's testimony."⁴⁶

C. Introduction of Rule 92 bis

Rule 92 *bis*—Proof of Facts Other than by Oral Evidence—was introduced into the Rules of Evidence and Procedure of the ICTY in January 2001.⁴⁷ Its stated purpose was "to facilitate the admission by way of written statement of peripheral or background evidence in

18, 2000) (quoting *Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶ 15).

⁴¹ ICTY Rules, *supra* note 6, Rule 89(F). For the full text of ICTY Rule 89, see Appendix.

⁴² Wald, *supra* note 16, at 548; DeFrancia, *supra* note 11, at 1429.

⁴³ ICTY Rules, *supra* note 6, Rule 89(F).

⁴⁴ DeFrancia, *supra* note 11, at 1425–26; *see supra* note 40 and accompanying text.

⁴⁵ DeFrancia, *supra* note 11, at 1426.

⁴⁶ Wald, *supra* note 16, at 540 (quoting Int'l Criminal Tribunal for the Former Yugoslavia, Amendments to the Rules of Procedure and Evidence, Rule 94 *ter*, U.N. Doc. IT/32/Rev.14 (Dec. 4, 1998) (deleted Dec. 2000), available at www.un.org/icty/legaldoc-e/basic/rpe/IT32_rev14.htm). Rule 94 *ter*, added in December 1998, was "a short lived experiment for the admission of affidavits." MAY & WIERDA, *supra* note 28, ¶ 7.19. Affidavits were admissible if the following procedural requirements were met:

(1) affidavits could only be used to corroborate "facts in dispute" testified to by a live witness; (2) affidavits had to be filed prior to the giving of the testimony of the live witness; (3) the opposing party had the right to object within seven days and indicate that the affiant should be called for cross-examination.

Id. After the requirements were met, the Trial Chamber decided whether the affiant should be called. *Id.* For the full text of ICTY former Rule 94 *ter*, see Appendix.

⁴⁷ Mundis, *supra* note 6, at 217. Rule 92 *bis* was subsequently added to the Rules of Procedure and Evidence at the ICTR in July 2002. ICTR 12th Plenary Session, 5–6 July 2002, <http://69.94.11.53/ENGLISH/rules/050702/amend12.htm> (last visited Aug. 19, 2006).

order to expedite proceedings while protecting the rights of the accused under the Statute.”⁴⁸ Thus, Rule 92 *bis* was passed as an attempt to speed up the trials by sharpening the permissive rules of admissibility under Rule 89(C), thereby leaving less discretion to the individual Trial Chambers.⁴⁹ Substantively, the adoption of Rule 92 *bis* was intended to encourage Trial Chambers to admit background evidence in written form in order to speed up the trial while preventing them from admitting evidence in written form that would go to proving elements of the crime. Thus, Rule 92 *bis* represents an attempt by the AHICTs to find a better balance between fairness and efficiency than the one previously provided by Rules 89(C), 90(A)/89(F), and 94 *ter*, by codifying a safeguard for the important rights of the accused.

Rule 92 *bis* applies broadly to many different types of non-oral evidence, but only subsections A, B, and C are substantively relevant to the admissibility of prior written statements made by deceased witnesses. Rule 92 *bis*(A) states: “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.”⁵⁰ This subsection includes several distinct elements. First, the language—“may”—is permissive rather than mandatory. The Chamber can therefore choose on a case-by-case basis whether it wants to admit the evidence, as long as the evidence meets the Rule’s other criteria. Second, the Chamber appears to have the discretion to admit “part” of the evidence that has been submitted. It does not have to choose between admitting the entirety of the evidence submitted and nothing.⁵¹ Third, for the evidence to be considered for admission under the Rule, it cannot be proof of “the acts and conduct of the

⁴⁸ The President of the International Tribunal, *Eighth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶ 51, delivered to the Security Council and the General Assembly, U.N. Doc. A/56/352-S/2001/865 (Sept. 17, 2001), available at <http://www.un.org/icty/rappannu-e/2001/AR01e.pdf>.

⁴⁹ This purpose was expressed by the Appeals Chamber in *Galic*, which insisted that Rule 92 *bis* be understood as a *lex specialis*, which would not replace the *lex generalis* of Rule 89(C) but rather add additional requirements to it. *Prosecutor v. Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), ¶ 31 (June 7, 2002). *But see Prosecutor v. Milosevic*, Case No. IT-02-54, Decision on Admissibility of Prosecution Investigator’s Evidence, ¶ 32 (Sept. 30, 2002) (Shahabuddeen, J., dissenting in part) (arguing that Rule 89(C) should be seen as alternative to requirements of Rule 92 *bis*).

⁵⁰ ICTY Rules, *supra* note 6, Rule 92 *bis*(A) (emphasis added); ICTR Rules, *supra* note 6, Rule 92 *bis*(A) (emphasis added).

⁵¹ *But see Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Admission of Statements of Deceased Witnesses, ¶ 17 (Jan. 19, 2005) (refusing to admit statements con-

accused as charged in the indictment."⁵² This criterion is the basic substantive limitation of Rule 92 *bis* and is particularly restrictive when read in conjunction with the Rule 89(C) requirements that the evidence be both relevant and probative.⁵³ Reading these two Rules together, the Appeals Chamber has held that evidence presented under Rule 92 *bis* can only present background or very general information about the circumstances surrounding the alleged crimes.⁵⁴

Rule 92 *bis* also addresses concerns about authenticity and reliability.⁵⁵ Under Rule 92 *bis*(B), the witness making the written statement must expressly declare it to be true, and this declaration of truth must be witnessed by a relevant authority who must make a declaration verifying all procedural (as opposed to substantive) aspects of the statement.⁵⁶

Building on the need for reliability, Rule 92 *bis*(C) addresses circumstances where there may be a written statement made without the declarations of subsection (B) or without being witnessed by a relevant authority. Rule 92 *bis*(C) provides that the requirements of subsection (B) are not absolute; they may be overcome if the statement was "made by a person who has subsequently died."⁵⁷ In such a case, the Chamber must be satisfied that other circumstances surrounding the making and recording of the statement make it likely that the written statement is reliable.⁵⁸

There has been some disagreement regarding whether Rule 92 *bis*(C) was meant to be a self-contained method of admitting prior written statements by deceased witnesses into evidence or merely an exception to the reliability requirements in subsection (B). The ICTR Trial Chambers and the unified Appeals Chamber have held that deceased witness statements are not unilaterally admissible under Rule 92 *bis*(C) because:

taining inadmissible portions under Rule 92 *bis* subject to suggestion that such portions could be ignored by judges during deliberation).

⁵² ICTY Rules, *supra* note 6, Rule 92 *bis*(A); ICTR Rules, *supra* note 6, Rule 92 *bis*(A).

⁵³ ICTY Rules, *supra* note 6, Rule 89(C); ICTR Rules, *supra* note 6, Rule 89(C).

⁵⁴ Galic, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), ¶¶ 10-11 (describing systematically what it means for information to go to acts or conduct of accused).

⁵⁵ These concerns were previously dealt with in ICTR Rules, *supra* note 6, Rule 89(D) and ICTY Rules, *supra* note 6, Rule 89(E). For the full text of these Rules, see Appendix.

⁵⁶ ICTY Rules, *supra* note 6, Rule 92 *bis*(B); ICTR Rules, *supra* note 6, Rule 92 *bis*(B). For the full text of ICTY and ICTR Rule 92 *bis*(B), see Appendix.

⁵⁷ ICTY Rules, *supra* note 6, Rule 92 *bis*(C); ICTR Rules, *supra* note 6, Rule 92 *bis*(C). For the full text of ICTY and ICTR Rule 92 *bis*(C), see Appendix.

⁵⁸ ICTY Rules, *supra* note 6, Rule 92 *bis*(C); ICTR Rules, *supra* note 6, Rule 92 *bis*(C).

[Subsection (C)] does “not provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony. . . . [B]oth in form and substance, Rule 92 *bis*(C) merely excuses the necessary absence of the declaration required by Rule 92 *bis*(B) for written statements to become admissible under Rule 92 *bis*(A).”⁵⁹

Despite the Trial and Appeals Chambers’ current interpretation, some who were present at the plenary session when Rule 92 *bis* was created believe that the seminal decision of the *Galic* Court misinterpreted the intent of subsection (C).⁶⁰ They claim that subsection (C) was not intended to be read in conjunction with subsection (A), but rather was intended to provide an independent method of admitting prior statements of deceased witnesses at trial.⁶¹ As a result, they would argue, as does this Note, that despite the Trial and Appeals Chambers’ decisions to the contrary in *Bagosora*, *Muhimana*, *Nyiramasuhiko*, and *Galic*,⁶² deceased witness statements that prove the acts and conduct of the accused should be admissible under Rule 92 *bis*.

⁵⁹ Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Decision on the Prosecution Motion for Admission of Witness Statements (Rules 89(C) and 92 *bis*), ¶ 25 (May 20, 2004) (quoting *Galic*, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), ¶ 24).

⁶⁰ See MAY & WIERDA, *supra* note 28, ¶ 7.44. Judge Richard May, who attended the ICTY plenary session where Rule 92 *bis* was discussed and adopted, is critical of the Appellate Chamber’s readings of Rule 92 *bis*(C) and the admission into evidence of statements made by deceased witnesses. In his book, Judge May states that, according to Rule 92 *bis*(C), deceased witness statements should be “admissible provided the Trial Chamber is satisfied on a balance of probabilities that the witness has died . . . and if it finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.” *Id.*

⁶¹ See *id.*

⁶² Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on Admission of Statements of Deceased Witnesses, ¶¶ 16–19 (Jan. 19, 2005) (declining to admit deceased witness’s statements going to proof of accused’s acts and conduct in whole or in part); *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rules 89(C) and 92 *bis*), ¶ 24 (noting Rule 92 *bis* was clearly not intended to derogate accused’s right to examine witnesses under article 20(4) of the ICTR Statute); Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-T, Decision 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 the Said Witnesses ¶ 23 (Jan. 22, 2003) (concluding Rule 92 *bis* does not allow statements relating to alleged criminal conduct of accused by deceased witnesses, whose statements cannot be challenged for reliability); *Galic*, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), ¶ 25 (rejecting prosecution’s argument that Rule 92 *bis*(C) does not exclude proof of acts and conduct of accused by written statement of deceased person).

III BENEFITS AND DRAWBACKS OF APPLYING RULE 92 *BIS* TO PRIOR WRITTEN STATEMENTS OF DECEASED WITNESSES

As stated above, Rule 92 *bis* was adopted in an attempt to achieve a better balance between fairness and efficiency at the AHICTs. This Part examines the Rule's benefits but also highlights some disturbing unintended consequences of applying this Rule to prior written statements of deceased witnesses. The analysis suggests that applying Rule 92 *bis* to prior written statements of deceased witnesses unnecessarily threatens the security of witnesses and undermines the Tribunals' goal of providing an accurate historical record.

A. Benefits

1. Legitimacy and International Standards of Procedural Fairness

In general, admitting written witness statements into evidence without giving the opposing party the opportunity to cross-examine the declarant could be considered contrary to international norms of due process and fairness to the accused. Such norms are codified in the International Covenant on Civil and Political Rights⁶³ and were adopted by the Statutes of the ICTY and the ICTR. The ICTY Statute reads:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . . (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.⁶⁴

Consequently, under the Statutes of the AHICTs and general international law standards, a person accused of a criminal offense has

⁶³ See International Covenant on Civil and Political Rights art. 14(3), Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (1978) [hereinafter ICCPR], available at <http://www.ohchr.org/english/law/pdf/ccpr.pdf>. Cross-examination is considered by some to be a "core guarantee" within the Tribunals. Wald, *supra* note 16, at 545 (predicting "inevitable challenges" to ICTY rule changes that increase judicial discretion regarding use of substitutes for live witnesses).

⁶⁴ ICTY Statute, *supra* note 4, art. 21(4). The ICTR text differs only in that it includes "or her" after every instance of "him." ICTR Statute, *supra* note 4, art. 20(4). This text comes directly from the almost universally ratified ICCPR, *supra* note 63, art. 14(3)(e). Note, however, that before the adoption of Rule 92 *bis*, admitting hearsay statements was not considered a violation of Articles 21(4) and 20(4) respectively. See *supra* notes 36–37, 40 and accompanying text.

the right to examine or have the court examine witnesses who present evidence against him or her in a court of law.⁶⁵

Procedural fairness to defendants is particularly important to the AHICTs because their judgments are legitimate only insofar as the international community agrees to be bound by them. One way to achieve this legitimacy is to utilize rules of evidence and procedure that all parties consider fair.⁶⁶ Without such rules and safeguards, the Tribunals might be considered nothing more than political show trials that, in the guise of justice, punish those who have fallen into global political disfavor.⁶⁷ Such a conception would only add to existing political distrust of international criminal law and its nascent institutions,⁶⁸ weakening their already limited scope and negatively affecting international criminal law's potential efficacy as a deterrent to some of the world's most horrific crimes.

2. *Cross-examination Tests Credibility and Reliability*

There are strong practical reasons not to admit written statements made by deceased witnesses. Even assuming such statements were made and recorded according to the criteria set out in Rule 92

⁶⁵ See ICCPR, *supra* note 63, art. 14(3)(e). The ICCPR has been ratified by an overwhelming number of countries. See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 12 (2004), available at <http://www.unhchr.ch/pdf/report.pdf> (noting 152 state parties to ICCPR). Once a state ratifies the ICCPR, withdrawal is not permitted. See U.N. Human Rights Comm., *General Comments Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 26(61)*, ¶ 5, U.N. Doc. A/53/40 (Sept. 15, 1998), available at [http://www.unhchr.ch/tbs/doc.nsf/0/119097c7a5d817fc802566ce004fe417/\\$FILE/N9826810.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/119097c7a5d817fc802566ce004fe417/$FILE/N9826810.pdf).

⁶⁶ See Rutledge, *supra* note 1, at 169 (stating that Trial Chambers must balance value of admitting evidence with "the threat that it poses to the legitimacy of the case and to the tribunal as a whole" and that "[t]he importance of admitting only reliable evidence, even if not central to each individual piece of evidence, cannot be overlooked when examining the integrity of the proceeding as a whole"); Wallach, *supra* note 17, at 868 (noting London Conference's emphasis on providing defendants with "fair trial" after World War II). The AHICTs' perceived legitimacy has been challenged on other grounds as well. See Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 196 (2006) (discussing attacks on AHICTs' perceived legitimacy from communities where victims reside).

⁶⁷ See Lombardi, *supra* note 20, at 899–900 (explaining that many have viewed ICTY as "political tool" rather than judicial body and highlighting need to strengthen Tribunals' legitimacy by demonstrating their judicial independence from Security Council).

⁶⁸ See, e.g., Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, The United States and the International Criminal Court*, 29 B.C. INT'L & COMP. L. REV. 1, 15–17 (2006) (chronicling U.S. objections to ICC, primarily fear of politically motivated prosecutions); News Release, U.S. Dep't of Def., Sec'y Rumsfeld Statement on the ICC Treaty (May 6, 2002), http://www.defenselink.mil/releases/2002/b05062002_bt233-02.html (noting fear of "politicized prosecutions of American servicemembers and officials" as one reason for U.S. objections to ICC).

bis(B)–(C), prior written statements of deceased witnesses still present the substantive reliability concerns common to all hearsay statements—possible falsehoods, ambiguity, or failures of perception and memory.⁶⁹

The problems of substantive reliability are exacerbated in the AHICTs because trials are conducted in multiple languages. The judges may speak one language, the attorneys another, and witnesses a third. As a result, every aspect of the proceedings is translated into multiple languages.⁷⁰ This creates a reliability problem: Even in the best circumstances, ambiguities of language result in imperfect translations, often causing significant and occasionally unnoticed miscommunication between the parties, witnesses, and judges.⁷¹

In Anglo-American adversarial common law systems, cross-examination is considered one of the most powerful ways to test the credibility and reliability of witness testimony.⁷² The heightened nature of these concerns stemming from translation ambiguities sug-

⁶⁹ See Fairlie, *supra* note 24, at 54 ("Total reliance on . . . untested depositions by unseen witnesses is certainly not the most reliable road to factual accuracy. . . [N]ot only faulty observation but deliberate exaggeration must have warped many of the reports." (alteration in original) (quoting TELFORD TAYLOR, THE ANATOMY OF THE NUEREMBERG TRIALS: A PERSONAL MEMOIR 315 (1992))); Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 751 (1999) ("[A]llowing affidavit evidence . . . increases the range but decreases the accuracy of the narration." (quoting Judgment of the International Military Tribunal for the Far East (November 4–12, 1948) (Pal, J., dissenting), in 2 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (I.M.T.F.E.) 636 (B.V.A. Röling & C.F. Rüter eds., 1977))).

⁷⁰ At the ICTR, for example, everything is translated into English, French, and Kinyarwanda (the national language of Rwanda).

⁷¹ For example, in Kinyarwanda, the same word can be used for "seeing" and "hearing." This distinction can have a great impact in a court where the difference between seeing and hearing has a large effect on the reliability and credibility given to the evidence. Rutledge, *supra* note 1, at 164; see also Wald, *supra* note 16, at 551 (supporting her concern for "margin for error" created by translations by noting that in AHICTs court-rooms "many witnesses say they were misunderstood or misquoted in [their] earlier [translated] statement[s]").

⁷² See 5 JOHN HENRY Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourn rev. 1974) (stating cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth"); cf. Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (purporting that Sixth Amendment's Confrontation Clause reflects judgment that reliability of evidence is best accomplished through cross-examination); MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (Lawbook Exchange 2000) (1713) (same). Yet there are many ways of calling into doubt the credibility and reliability of the substance of a witness's testimony, *inter alia*: presenting conflicting evidence, finding places where the witness's testimony is internally inconsistent, and questioning the witness's motives based on his or her relationship to the parties. Furthermore, the concept of cross-examination is "a phenomenon" with which most lawyers and judges from a civil law background are entirely unfamiliar. Rutledge, *supra* note 1, at 176.

gests that cross-examination may be of critical importance in the context of the AHICTs.⁷³

In an attempt to mitigate this concern, Rule 92 *bis* recognizes that in situations where substantive reliability is a less significant issue, affidavits—including written statements of deceased witnesses—may be admissible. According to Rule 92 *bis*, when the evidence presented corroborates evidence previously admitted,⁷⁴ or its substance goes to the circumstances surrounding the crime and not the accused's acts or conduct, reliability may not be a crucial concern.⁷⁵ Thus, possible unreliability would be unlikely to have a great effect on the ultimate conviction of the defendant. However, where reliability of the evidence is a more critical consideration—as would be the case with evidence that goes directly to the acts or conduct of the accused⁷⁶—Rule 92 *bis* emphasizes that the defendant should have the ability to question the reliability of the evidence through cross-examination, regardless of whether or not the evidence is corroborative.⁷⁷

3. *Maintaining High Conviction Rates*

Despite fears that Rule 92 *bis* prevents the prosecution from introducing key evidence, the empirical data suggest that the Rule has not had a significant effect on conviction rates. Thus, it appears that Rule 92 *bis* may provide the legitimizing benefits it intended, without negatively affecting the mission of bringing international criminals to justice.

The cases at the AHICTs involve large numbers of witnesses.⁷⁸ For example, in the *Kordic & Cerkez* trial at the ICTY, the Prosecutor alone called 122 witnesses to testify in front of the Trial Chamber.⁷⁹ While it is unclear how many witnesses testify to the acts and conduct

⁷³ See May & Wierda, *supra* note 69, at 749 (asserting that probative value of written statements is “by necessity affected” by fact that they have not been subjected to cross-examination); Wald, *supra* note 16, at 551 (declaring she has “grown suspicious of many out-of-court statements that are the product of a witness speaking one language to an interrogator speaking another who writes it down in the interrogator’s language and has it read back to the witness in the witness’s native tongue by a third party”).

⁷⁴ See ICTY Rules, *supra* note 6, Rule 92 *bis*(A)(i)(a); ICTR Rules, *supra* note 6, Rule 92 *bis*(A)(i)(a).

⁷⁵ See ICTY Rules, *supra* note 6, Rule 92 *bis*(A)(i)(b)–(f); ICTR Rules, *supra* note 6, Rule 92 *bis*(A)(i)(b)–(f).

⁷⁶ See ICTY Rules, *supra* note 6, Rule 92 *bis*(A); ICTR Rules, *supra* note 6, Rule 92 *bis*(A).

⁷⁷ See Wald, *supra* note 16, at 551 (supporting Rule 92 *bis* by asserting that “[i]t is . . . essential . . . that any written statements truly be limited to non-incriminating evidence”).

⁷⁸ *Id.* at 535 (noting some trials have featured over two hundred witnesses).

⁷⁹ Kordic and Cerkez (IT-95-14/2) Case Information Sheet (Feb. 17, 2005), <http://www.un.org/icty/glance/kordic.htm>.

of the accused as charged in the indictment, and by what margin prosecutors meet their burden of persuasion, as of June 2006, 88.6% of defendants brought to trial before the Tribunals were found guilty.⁸⁰ Furthermore, the overall conviction rate fell only slightly from 88.9% to 88.4% since the passage of Rule 92 *bis*.⁸¹ While it is unclear what effect the admission or omission of such statements has had on sentencing,⁸² even if Rule 92 *bis* did not exist and all prior written statements of deceased witnesses were admitted, it seems unlikely that the overall conviction record would significantly increase. Rule 92 *bis* thus appears to provide fairness benefits to the defendants without negatively affecting the prosecutorial goal of convicting international criminals. As a result, the most prominent effect of changing Rule 92

⁸⁰ As of June 2006, of the defendants that did not plead guilty, twenty-one defendants had been convicted and three acquitted by the Trial Chamber at the ICTR. See International Criminal Tribunal for Rwanda, Status of Cases, <http://ictr.org> (follow “English” hyperlink; then follow “Cases” hyperlink; then follow “Status of Cases” hyperlink; then follow individual case hyperlinks to see verdicts) (last visited Sept. 28, 2006). As of June 2006, of the defendants that did not plead guilty, forty-one defendants had been convicted and five acquitted by the Trial Chamber at the ICTY. See International Criminal Tribunal for the Former Yugoslavia, Key Figures of ICTY Cases, <http://www.un.org/icty/glance-e/index.htm> (follow “Key Figures” hyperlink) (last visited Sept. 28, 2006). However, not all defendants have been found guilty on all charges included in their indictments. Status of Cases, *supra*; Key Figures of ICTY Cases, *supra*.

⁸¹ To calculate these percentages, I disregarded defendants who pleaded guilty, and then separated the remaining defendants into two categories: at the ICTR, those with Trial Chamber judgments before Rule 92 *bis* was adopted and those with Trial Chamber judgments after the adoption of Rule 92 *bis* but before June 2006; and at the ICTY, those with trials ending before the adoption of Rule 92 *bis* and those with trials ending after the adoption of Rule 92 *bis* but before June 2006. I then considered a judgment which included at least one guilty verdict as a conviction. At the ICTY, before Rule 92 *bis* was adopted in January 2001, there were two acquittals and eighteen convictions, a 90% conviction rate; after January 2001, there were three acquittals and twenty-three convictions, an 88.5% conviction rate. At the ICTR, before Rule 92 *bis* was adopted in July 2002, there was one acquittal and six convictions, an 85.7% conviction rate; after July 2002, there were two acquittals and fifteen convictions, an 88.2% conviction rate. This analysis did not include judgments by the Appeals Chamber because the Trial Chamber, as the court of first instance, is given the primary responsibility of making factual determinations based on the evidence.

I acknowledge that this is a fairly crude empirical analysis. It does not take into account a myriad of other possible factors that could have been responsible for changes in conviction rates. It does not recognize that many judgments counted as “convictions” included findings of “not guilty” on various counts. This analysis also does not take into account that many trials may have begun before, but ended after the adoption of Rule 92 *bis*. As a consequence, it may be hard to determine what effect Rule 92 *bis* had on the outcome of many trials. Finally, my numbers may be skewed because they do not include cases in which the defendants pleaded guilty to some (but not necessarily all) counts in the indictment.

⁸² An empirical analysis of the effects on sentencing in all cases in which the Prosecutor desired to admit statements of deceased witnesses and such a request was denied under Rule 92 *bis* is beyond the scope of this Note.

bis to admit deceased witness statements—other than potential sentencing increases—would be the erosion of the perceived legitimacy of decisions by the Tribunal. It would not actually alter conviction rates.

B. Problems

Legitimacy and fairness to the accused must be balanced against the Tribunals' ability to effectively pursue their substantive goals of prosecuting international crimes and creating an accurate historical record. As Judge Shahabuddeen posited in his dissenting opinion in *Milosevic*, the fairness of the trial depends on striking a balance between the interest in protecting the rights of the accused and the assurance that crimes are “properly investigated and duly prosecuted.”⁸³ While the number of convictions may not be significantly affected by the admission of affidavits of deceased witnesses,⁸⁴ Rule 92 *bis* does threaten the proper investigation and prosecution of war crimes and has substantial effects on the recorded history of the atrocities.

1. Danger to Witnesses

Since the Rwandan genocide in 1994, over three hundred survivors scheduled to testify against perpetrators of the genocide have been murdered.⁸⁵ In one case, a wife even admitted to conspiring to kill her husband because of his impending testimony at the ICTR.⁸⁶ In fact, the murder and intimidation of potential witnesses in Rwanda has been so widespread that an entire book has been published on the

⁸³ Prosecutor v. Milosevic, Case No. IT-02-54, Decision on Admissibility of Prosecution Investigator's Evidence, ¶ 36 (Sept. 30, 2002) (Shahabuddeen, J., dissenting in part); *see also* Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶¶ 18, 23 (Aug. 10, 1995) (declaring that it is imperative that Tribunal be free to interpret rules so as to “fit the task at hand” and “to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace”).

⁸⁴ See *supra* Part III.A.3.

⁸⁵ Robert F. Van Lierop, *Report on the International Criminal Tribunal for Rwanda*, 3 HOFSTRA L. & POL'Y SYMP. 203, 220 (1999) (noting that of this number, some were scheduled to testify in local Rwandan trials and others at ICTR); *see also* Rory Carroll, *Genocide Witnesses 'Killed to Stop Testimony,'* GUARDIAN (London), Dec. 18, 2003, at 17 (describing killing of witnesses expected to appear before gacaca courts in Rwanda); *Genocide Witnesses 'Being Killed,'* BBC News, Dec. 16, 2003, <http://news.bbc.co.uk/2/hi/africa/3324871.stm> (same).

⁸⁶ *Rwanda—Top Rwandan Prosecutor Urges UN Court to Improve Witness Protection,* HIRONDELLE NEWS AGENCY, Oct. 21, 2004, available at <http://www.hirondelle.org/arusha.nsf/LookupUREnglish/BF92CF460E098DFC43256F390041DZAD>.

topic.⁸⁷ Murders of potential witnesses for trials at the ICTY have also been documented.⁸⁸ For example, in August 2000, Croatian national Milan Levar was murdered after agreeing to serve as a key prosecution witness at the ICTY concerning atrocities committed by Croatian forces against Serbian civilians.⁸⁹

The severity of the crimes and the nature of the defendants being tried at the AHICTs already combine to create a situation where defendants have both the incentive and wherewithal to make sure that witnesses scheduled to testify against them never make it to the courtroom. The Tribunals, as determined by their Statutes, only try those accused of the most heinous crimes.⁹⁰ While, empirically, testimony of these witnesses may not significantly affect conviction rates,⁹¹ defendants are likely to *perceive* that it will affect their chances of being convicted or at least that it will affect the severity of their sentences. As a result, defendants, already threatened with the most severe punishments,⁹² may believe they can only benefit by using nefarious means to prevent the testimony of witnesses against them. Unlike most domestic criminal defendants, the majority of defendants coming before the AHICTs are high-ranking members of government or the military.⁹³ They are generally well-connected individuals with considerable resources and influence. Consequently, not only do they have a heightened incentive to use any means necessary to prevent testimony against them, they are also more likely than most criminals to have the capability to prevent such testimony.

Similarly, defense witnesses are also in danger from parties who have vested interests in the full prosecution and punishment of the

⁸⁷ AFRICAN RIGHTS, RWANDA KILLING THE EVIDENCE: MURDER, ATTACKS, ARRESTS AND INTIMIDATION OF SURVIVORS AND WITNESSES (1996); *see also* Rutledge, *supra* note 1, at 178 (noting that many witnesses for both prosecution and defense have refused to testify for fear of retaliation).

⁸⁸ AMNESTY INT'L, REPORT 2004, at 249 (2004), available at <http://web.amnesty.org/report2004/yug-summary-eng> (recounting murder and intimidation of several important witnesses against well-connected Kosovo Liberation Army members).

⁸⁹ REPORTERS WITHOUT BORDERS & DAMOCLES NETWORK, VICTIMS' GUIDE TO THE INTERNATIONAL CRIMINAL COURT 67 (2003), available at http://www.rsf.org/IMG/pdf/guide_CPI_A4_en.pdf.

⁹⁰ See ICTR Statute, *supra* note 4, arts. 1–6; ICTY Statute, *supra* note 4, arts. 1–7.

⁹¹ *See supra* Part III.A.3.

⁹² *See* ICTY Rules, *supra* note 6, Rule 101(A) (noting maximum term of life in prison); ICTR Rules, *supra* note 6, Rule 101(A) (same).

⁹³ The Tribunals have generally pursued the leaders responsible for these crimes under the command responsibility doctrine. *See* JOHN R.W.D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE 430–44 (3d ed. 2003) (describing use of command responsibility doctrine at AHICTs); GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNALS 53–59 (2003) (same); *supra* note 17 (discussing who is tried at AHICTs).

Tribunals' defendants. In Rwanda, the current President, Paul Kagame, was the Tutsi leader of the Rwandan Patriotic Front (RPF), which defeated the Hutu Power leaders of the genocide. As a result, the strong governmental interest in ensuring the organizing forces behind the genocide are convicted and punished has created a dangerous environment for defense witnesses asked to appear before the ICTR.⁹⁴

The AHICTs have acknowledged this real and substantial danger to witnesses.⁹⁵ Indeed the Tribunals have recognized that "a fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses."⁹⁶ Accordingly, the AHICTs have instituted numerous precautionary measures in an attempt to assure the safety of witnesses.⁹⁷ Problematically, such procedures fall short of denying the accused the ability to view and know the identity of a witness against him⁹⁸ and do not prevent locals from becoming suspicious when members of a community who have rarely, if ever, left their village conspicuously disappear for several days. Thus, despite the Tribunals' awareness of the danger to potential witnesses, their protective measures provide inadequate protection from those with the desire and means to keep such witnesses from testifying.⁹⁹

While the threat to potential witnesses in trials at the AHICTs predates the adoption of Rule 92 bis, it seems incongruous for the

⁹⁴ Defense witnesses have been threatened or murdered to keep them from testifying. For example, defense counsel in *Prosecutor v. Kajelijeli* claimed that potential defense witnesses were "killed mysteriously or beaten to death." Case No. ICTR-98-44A-T, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses, ¶ 3 (Apr. 3, 2001); see DeFrancia, *supra* note 11, at 1422 ("In the case of Rwanda, the desire for vengeance has created an unsafe environment for defense witnesses as well as prosecution witnesses."); see also Press Release, Int'l Criminal Tribunal for Rwanda, Defence in 'Military I' Trial Begins Today (Apr. 11, 2005), available at <http://69.94.11.53/ENGLISH/PRESSREL/2005/427.htm> (noting claims by defense counsel that convincing witnesses to testify at Tribunal is difficult because witnesses are afraid for their safety in Rwanda).

⁹⁵ See May & Wierda, *supra* note 69, at 733 ("Witnesses have more to fear for their own safety and that of their family than in countries where peace and stability prevail.").

⁹⁶ *Prosecutor v. Tadic*, Case No. IT-94-I-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 55 (Aug. 10, 1995).

⁹⁷ See ICTR Statute, *supra* note 4, art. 21 (providing specifically for in camera proceedings and protection of victim identities); ICTY Statute, *supra* note 4, art. 22 (same); ICTY Rules, *supra* note 6, Rules 69, 75 (allowing court officials to conceal witness or victim identities from public under certain circumstances); ICTR Rules, *supra* note 6, Rules 69, 75 (enumerating several specific measures courts may take to prevent public disclosure of victim or witness identity or location); DeFrancia, *supra* note 11, at 1411–12 (explaining rights of accused under article 21(2) of ICTY Statute must be balanced with need to protect victims and witnesses under article 22 of ICTY Statute). For a discussion of witness protection at the AHICTs, see JONES & POWLES, *supra* note 93, at 612–30.

⁹⁸ Rutledge, *supra* note 1, at 179–80.

⁹⁹ See *supra* notes 85–89, 94 and accompanying text.

Tribunals to enhance this danger by embracing an evidentiary rule that creates an incentive to kill potential witnesses. As a result of its broad interpretation, Rule 92 *bis* denies the admissibility of previously recorded affidavits of deceased witnesses that go to the acts or conduct of the defendant as charged in the indictment. By wholly disallowing the admission of sworn, previously recorded testimony of witnesses who died before being able to give live testimony before the Tribunals, Rule 92 *bis* provides an additional benefit to those defendants and parties willing to use whatever means necessary to ensure that witnesses do not live to testify against them or their interests.

2. *Damage to the Official Historical Record*

Another consideration supporting the admissibility of affidavits of deceased witnesses is that the types of crimes committed—systematic rape, mutilation, and the more recent phenomenon of intentionally using men infected with HIV to rape women—often lead to the death of potential witnesses in the longer term. The current President of Rwanda reported that during the genocide, the Hutu government released AIDS patients from hospitals specifically to construct battalions of rapists.¹⁰⁰ AIDS contracted through rape was deliberately used as a way to murder Tutsis and particularly Tutsi women, slowly and agonizingly.¹⁰¹ According to one estimate, approximately seventy percent of women raped during the Rwandan genocide have HIV and will eventually die from it.¹⁰² As a result, many of the potential victim-witnesses who survived the official genocide will eventually die over a more extended period of time due to the direct consequences of the attacks against them.¹⁰³

¹⁰⁰ Peter Landesman, *A Woman's Work*, N.Y. TIMES, Sept. 15, 2002, § 6 (Magazine), at 116.

¹⁰¹ *Id.*

¹⁰² Jennifer M. Hentz, *The Impact of HIV on the Rape Crisis in the African Great Lakes Region*, 12 HUM. RTS. BRIEF, Winter 2005, at 12, 13 (citing 2001 study finding that sixty-seven percent of genocide rape survivors reported being HIV positive).

¹⁰³ Landesman, *supra* note 100, at 116, quotes Charles B. Strozier, a psychoanalyst and professor of history, as saying, "By using a disease, a plague, as an apocalyptic terror, as biological warfare, you're annihilating the procreators, perpetuating the death unto the generations The killing continues and endures." Landesman also quotes Silvana Arbia, ICTR's acting chief of prosecutions as saying, "H.I.V. infection is murder Sexual aggression is as much an act of genocide as murder is." *Id.*; see also Amnesty Int'l, *Rwanda: "Marked for Death," Rape Survivors Living with HIV/AIDS in Rwanda*, 1-3, AI Index AFR 47/007/2004, Apr. 5, 2004, available at <http://web.amnesty.org/library/index/engraf470072004> (stating that due to poverty and lack of life-prolonging anti-retroviral therapy many rape survivors of genocide will die of HIV/AIDS-related causes); Hentz, *supra* note 102, at 12 ("The calculation of one million dead [in the Rwandan Genocide] . . . does not account for the women who were intentionally infected with HIV during those 100 days as part of a systematic rape campaign designed to infect

The long delay between the occurrence of the crimes in question and the AHICTs' availability to hear a witness's testimony in court adds to the likelihood that many victims' stories will not be heard. It takes a long time to set up a tribunal to prosecute these crimes, and each large trial lasts many years.¹⁰⁴ This lag means that many victims who were witnesses to the actions and conduct of the accused may survive long enough after the crime to make statements against their attackers but not long enough to testify at trial. As a result, Rule 92 *bis* denies them any means of providing evidence in the trials of the persons responsible for their pain, suffering, and ultimate deaths, as well as that of their friends and family. The Rule keeps their stories out of the official historical record.

Comparatively more evidence from live witnesses at the AHICTs will therefore have to come from accomplices and collaborators in these crimes, rather than eyewitness victims. Already, victims are underrepresented as witnesses at the AHICTs because of the systematic and mass nature of the crimes. In contrast, those complicit in the crimes have survived, and many have appeared before the Tribunals as eyewitnesses. If there is a disproportionate amount of testimony from assailants as compared to victims, any rule that increases this discrepancy significantly undermines the Tribunals' function of creating an accurate historical record.¹⁰⁵

Rule 92 *bis* also heightens existing concerns about the accuracy of the historical record created by the Tribunals because the reliability of the testimony of complicit witnesses—who themselves were involved in committing the atrocities—is questionable.¹⁰⁶ In addition to poten-

Tutsi women who survived the genocide with the virus."); Stephanie K. Wood, *A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape As a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 COLUM. J. GENDER & L. 274, 295 (2004) ("The intentional and unintentional use of soldiers infected with the AIDS virus as rapists also aided prosecutors in focusing on rape as a genocidal act.").

¹⁰⁴ The ICTY did not start trying cases until 1994, three years after the crimes covered by its initial mandate were committed, and it is still calling witnesses to testify about crimes committed over fifteen years ago. At the ICTR, the Prosecutor is still trying cases and calling witnesses over twelve years after the start of the genocide. For a discussion of the causes of these delays, see Fairlie, *supra* note 24, at 62–63. The problem of long trials also affects the elderly, who will likely pass away of natural causes before they are able to testify.

¹⁰⁵ See *supra* notes 14–15 and accompanying text (discussing Tribunals' role in establishing historical record).

¹⁰⁶ See generally José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 384–85 (1999) (highlighting "naïve internationalism" of international law paradigm where judicial accounts of mass atrocity in international trials avoid dwelling on ethnic difference under guise of impartiality). "Whatever its merits are within liberal states, the appeal to ethnic neutrality has a limited audience within places as

tial concerns about reliability based on the “moral fiber” of witnesses who were complicit in genocide,¹⁰⁷ testimony given by complicit witnesses may be unreliable because of a desire to shift or spread blame or to curry favor with the Prosecutor for their own benefit.¹⁰⁸ Similarly, even though many complicit witnesses are not themselves being tried at the Tribunals,¹⁰⁹ their testimony may prove unreliable because they are subject to trial within their home jurisdictions and, consequently, must be careful what information they divulge to the Tribunals. Rule 92 *bis* exacerbates these reliability problems by eliminating many victim-based sources of information, thus forcing the AHICTs to rely more heavily on accomplice-based information.

IV RECOMMENDATIONS

While the AHICTs may elect to keep Rule 92 *bis*, they should address its negative aspects by either: (1) amending Rule 92 *bis* to allow narrowly for the admission of prior written statements by deceased witnesses—including statements that go to the acts and conduct of the accused—and let the judges decide what weight to give this evidence during their deliberations, or (2) complementing Rule 92 *bis* with a new rule that would permit the admission of statements by deceased witnesses when the Chamber determines that the party they are being offered against bears some responsibility for the unavailability of the declarant. Either of these solutions would create a more appropriate balance between fairness and efficiency at the Tribunals.

ethnically polarized as present day Rwanda . . . [In the context of ongoing combat] a Hutu or Tutsi witness, only temporarily in Arusha for trial, faces enormous pressures to give testimony favorable to his/her ethnic community.” *Id.* at 445.

¹⁰⁷ *Id.* at 443–45. For instance, the judges in *Tadic* faced considerable difficulties when primary sources of conflicting testimony were pro-Serb or pro-Muslim witnesses. “[T]he *Tadic* bench . . . deftly avoided nearly all reference to [witnesses’ ethnic or religious affiliations] when stating reasons for determining credibility of witnesses.” *Id.* at 444. The judges rejected certain defense testimony as self-serving, refusing “in most cases” to accept comparable defense claims that Muslim victims were similarly biased. *Id.* at 445. But importantly, regardless of the judges’ opinions of the credibility of complicit witnesses, their testimony has been entered officially into the record.

¹⁰⁸ *United States v. Vernor*, 902 F.2d 1182, 1187 (5th Cir. 1990) (noting that statement by codefendant is “presumptively unreliable as to the passages detailing the defendant’s conduct or culpability because those passages may well be the product of the codefendant’s desire to shift or spread blame, curry favor, avenge himself or divert attention to another” (quoting *Lee v. Illinois*, 476 U.S. 530, 545 (1986))).

¹⁰⁹ *See supra* note 17 and accompanying text (discussing potential defendants).

A. Option One: Amend Rule 92 bis

Judges at the AHICTs more closely resemble magistrates in the continental civil law tradition than judges in the common law tradition, because they act as experienced finders of both fact and law.¹¹⁰ Unlike common law lay juries, professional judges can more easily be trusted “by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight,”¹¹¹ as they do in various other circumstances.¹¹² As a result, “[g]iving judges sole discretion to admit hearsay and how much weight to afford it does not necessarily violate the accused’s right to a fair trial.”¹¹³ If it did, we would be forced to conclude that many defendants convicted at the AHICTs before the institution of Rule 92 *bis* did not receive a fair trial.¹¹⁴ Moreover, if this were true, criminal defendants would not receive a fair trial in countries, such as France or Italy, where a civil law inquisitorial tradition prevails.¹¹⁵ Permitting judges to admit the evidence and then determine its weight during

¹¹⁰ In contrast, criminal cases in the United States are constitutionally required to have lay juries as factfinders, and thus judges are limited to the role of finder of law.

¹¹¹ Press Release, Int’l Criminal Tribunal for the Former Yugoslavia, Tadic Update 2: Defence Motion on Hearsay Rejected (Aug. 7, 1996), <http://www.un.org/icty/pressreal/p102-e.htm> (quoting Trial Chamber decision, rendered in *Tadic* on August 5, 1996, rejecting defense motion to exclude hearsay evidence during trial as general rule); *see also* MAY & WIERDA, *supra* note 28, ¶ 4.09 (discussing use of bench trials in ad hoc Tribunals as consistent with practice adopted by historical trials based on judges’ professional qualifications).

¹¹² *See id.* ¶ 7.43 (“Excluding [written evidence] at the admissibility stage is . . . contrary to the presumption in international criminal trials that professional judges are able to exclude unreliable evidence from their minds when formulating their judgment.”); May & Wierda, *supra* note 69, at 747 (noting that before Rule 92 *bis* “hearsay evidence [was] not excluded at the admissibility stages, and judges [were] therefore able to hear evidence and the context in which it was obtained, and then accord it its proper weight”); *id.* at 755 (“A second safeguard for the rights of defendants is to be found in the duty of the Tribunal to weigh evidence.”); Wald, *supra* note 16, at 551 (“ICTY judges, of course, may decide how much weight to give a written statement—ordinarily, we would expect it to be less than that of a live credible witness subject to cross-examination.”); Rutledge, *supra* note 1, at 169 (“Because trials in the inquisitorial and international arena do not involve juries, judges are considered to have the skill and knowledge to analyze hearsay; therefore, it is admissible.”). *But see* DeFrancia, *supra* note 11, at 1383 (claiming that American conceptions of due process are appropriate “yardstick” with which to measure “integrity of the trial process”).

¹¹³ Rutledge, *supra* note 1, at 170.

¹¹⁴ *See supra* Part II.B (discussing how admissibility of most hearsay evidence was generally handled at AHICTs before Rule 92 *bis*).

¹¹⁵ *But see* Conor Mulcahy, Note, *Unfair Consequences: How the Reforms to the Rule Against Hearsay in the Criminal Justice Act 2003 Violate a Defendant’s Right to a Fair Trial Under the European Convention on Human Rights*, 28 B.C. INT’L & COMP. L. REV. 405, 416–17 (2005) (discussing cases where European Court of Human Rights held that Austria, Spain, France, and Switzerland violated defendants’ right to fair trial under Convention by not giving them opportunity to cross-examine witnesses presenting evidence against them).

their deliberations also allows them to take into account the differences in the circumstances surrounding the written recording of statements. Some statements are made before only the Prosecutor or defense counsel, while others are made before a neutral questioning magistrate.¹¹⁶ Some statements may include the prompting questions asked by the non-witness and others may omit these questions. The circumstances in which the statement is taken are relevant to its reliability. Nevertheless, as long as these circumstances are clear from the statement itself, the judges would be able to take these considerations into account and weigh them accordingly, as with all the other evidence presented at trial.

This recommendation provides a better balance between the interest in creating a comprehensive historical record of the atrocities and the interest in limiting the use of uncorroborated and untested evidence to convict defendants of a serious crime. Such an amended rule might be challenged as failing to provide the requisite fairness to the defendants, thus intensifying challenges to the legitimacy of the Tribunals' judgments and possibly of international criminal law in general.¹¹⁷ However, this permissive rule for deceased witness statements was the rule regarding the admission of *all* hearsay evidence before Rule 92 *bis*.¹¹⁸ Rule 92 *bis* was not enacted as a response to complaints about the legitimacy of the Tribunals but rather to the desire to speed up the trials.¹¹⁹ Therefore, an amended Rule 92 *bis*, which would still speed up trials, conserve judicial resources,¹²⁰ and be more restrictive than the rules were before the adoption of Rule 92 *bis*, should not cause significant legitimacy concerns.

This recommendation also addresses the concern that Rule 92 *bis* enhances the incentive to kill potential witnesses. If the Rules were amended to allow the admission of affidavits of deceased witnesses, parties may prefer to attack a witness's credibility through cross-examination at trial rather than having a witness killed and her prior written statements admitted without cross-examination, thus forcing

¹¹⁶ See Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 17 (1995) (describing magistrate's role in nonjury trials where contestation is model of proof). "Because these officials are independent and not partial to either party, statements accredited by them are entitled to much greater weight than out-of-court statements related by parties in the course of a contested trial." *Id.* at 21.

¹¹⁷ See *supra* Part III.A.1 (discussing connections among perceptions of fairness, hearsay, and legitimacy).

¹¹⁸ See *supra* notes 112–13 and accompanying text.

¹¹⁹ See *supra* note 48 and accompanying text.

¹²⁰ By eliminating the need for hearings about whether deceased witness statements go to the acts or conduct of the accused, this option will use fewer resources than the current Rule 92 *bis*. For a more in-depth discussion of resource constraints, see *infra* notes 130–32 and accompanying text.

the party to rely on the judge to give the witness's statement the proper weight.¹²¹ Therefore, by keeping Rule 92 *bis* in force to minimize the general use of out-of-court statements, but limiting its scope so it does not apply to statements made by deceased witnesses, the Tribunals could create a better balance between fairness and efficiency.

B. Option Two: Adopt a Forfeiture by Wrongdoing Rule

Alternatively, many of the problems with Rule 92 *bis* could be solved by adding a more limited rule allowing judges to admit written statements only when they find that the party the statements are being offered against bears some responsibility for the unavailability of the declarant. A similar rule was added to the U.S. Federal Rules of Evidence in 1997 as an exception to the hearsay rules and is now codified in Rule 804(b)(6): forfeiture by wrongdoing.¹²² Such a rule would discourage parties from killing or even threatening¹²³ potential witnesses against them; if a party was found complicit in such behavior, previous statements made by such a witness would be admissible without the party having the advantage of being able to cross-examine the witness. Similarly, such a rule could permit admission of statements made by those unable to testify in person before the Tribunals either because they were purposefully infected with HIV through rape, or because they died prematurely of injuries inflicted on them during the atrocities.¹²⁴

¹²¹ One could argue that once evidence is within a judge's subconscious they may not have complete control over how much weight they actually give it. However, under Rule 92 *bis* judges must look at the information when it is submitted by the party in order to determine whether or not to admit it. Because the information is already within their purview, whether or not they choose to admit it, this argument loses much of its weight.

¹²² Federal Rule of Evidence 804(b)(6) provides that “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness” is not excluded from admissibility under the hearsay rule. FED. R. EVID. 804(b)(6). Even before it was codified in 1997, this rule existed for centuries in one form or another in the common law of both the United States and England. See *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878) (discussing English common law origins of American common law rule of forfeiture by wrongdoing); Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)*, 80 NEB. L. REV. 891, 896–903 (2001) (surveying historic forfeiture by wrongdoing cases). Such a rule is only needed in adversarial jurisdictions where the admissibility rather than the weight of hearsay evidence is at issue.

¹²³ This option's possible ability to impede intimidation of potential witnesses may make it more attractive than the first option.

¹²⁴ While U.S. courts are split as to the exact meaning of the intent requirement of Rule 804(b)(6), several have held that this requirement may be met when the substantive crime that the defendant is being charged with is itself the reason for a witness's unavailability. See *United States v. Dhinsa*, 243 F.3d 635, 652–53 (2d Cir. 2001) (stating that “based on the

At the same time, a forfeiture by wrongdoing exception to Rule 92 *bis* would pose a less significant threat to the perceived legitimacy of the AHICTs. As seen above, there is a concern that defendants' right to confrontation be protected.¹²⁵ Without such protection, the perception that the AHICTs are simply political show trials,¹²⁶ rather than legitimate international judicial institutions, is potentially strengthened. Creating a forfeiture by wrongdoing exception allows the AHICTs to provide this procedural protection but places the onus of maintaining this protection on the party seeking to benefit from it. The only way that a party can lose this protection is by its own wrongdoing. By thus shifting the burden of protection, a forfeiture by wrongdoing rule would allow the AHICTs to provide a better balance of interests than that which exists under current rules, without altering the perception of fairness and legitimacy.

Moreover, a forfeiture by wrongdoing rule could provide additional protections to defendants in circumstances where parties in power threaten or kill potential witnesses for the defense to keep them from testifying at the AHICTs.¹²⁷ This has been, and will likely continue to be, a problem for defendants, because by the time defendants stand trial before an international tribunal, their "side" has lost the struggle for power in their home country, and the people in power have a vested interest in their punishment. A forfeiture by wrongdoing rule could be formulated to help ensure that in the event defense witnesses are kept from testifying through intimidation or murder, previous statements made by such witnesses could still be admitted into evidence.

Despite the apparent legitimizing advantages of a more focused forfeiture by wrongdoing exception to the prohibition against admis-

plain language of Rule 804(b)(6) and the strong policy reasons favoring application of the waiver-by-misconduct doctrine to prevent a party from profiting from his wrongdoing," statements of declarant made unavailable at trial by wrongdoing of defendant may be admissible against that defendant at trial for crime that caused witness to be unavailable); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (rejecting contention that Rule 804(b)(6) only applies to statements relevant to "a trial on the underlying crimes about which [the defendant] feared [the witness] would testify, [and] not in a trial for murdering [the witness]," based on belief that "plain meaning" and "manifest object" of Rule 804(b)(6) establish "general proposition that a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness"). As a result, if the AHICTs agreed to adopt a forfeiture exception to Rule 92 *bis*, it would be important to craft any potential intent requirement to make sure that statements by classes of witnesses or potential witnesses would be included. For a further discussion of drafting considerations, see *infra* notes 128–34 and accompanying text.

¹²⁵ See *supra* Part III.A.1.

¹²⁶ See *supra* note 67 and accompanying text.

¹²⁷ See *supra* note 94 and accompanying text (discussing dangers to defense witnesses in Rwanda).

sion of statements by deceased witnesses, such a rule would create difficulties that would not occur under the alternative of generally admitting statements made by deceased witnesses. First, a forfeiture by wrongdoing rule would require the AHICTs to spend additional time and resources—two things already in short supply—on hearings to determine whether or not a party is responsible for the unavailability of a witness. Second, crafting the rule in a way that provides the desired incentives and protections would be a significant challenge. This is in no small part because the model for such a rule, Federal Rule of Evidence 804(b)(6),¹²⁸ was designed (1) to deal with domestic crimes, where the prosecutor is an agent of the ruling government, and (2) to address individual or more focused crimes as opposed to mass crimes.¹²⁹

There is a legitimate concern that a forfeiture by wrongdoing exception would put additional strain on the AHICTs' already taxed resources.¹³⁰ Although the lack of a jury obviates the potential need

¹²⁸ The United Kingdom has similar codification of the forfeiture by wrongdoing exception to the hearsay rule. Criminal Justice Act, 2003, c. 44, § 116(2)(e)–(3) (Eng.) (stating that hearsay evidence is admissible where witness is unavailable under condition “that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence,” and that “‘fear’ is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss”). However, the construction of this subsection and its reliance on “fear” is largely influenced by the fact that under U.K. law, previous statements of deceased witnesses are admissible into evidence regardless of the wrongdoing of either party. *See id.* § 116(2)(a) (declaring that hearsay evidence is admissible in cases where witness is unavailable on condition “that the relevant person is dead”).

¹²⁹ *Reynolds v. United States* provides insight into the English common law origins of the forfeiture by wrongdoing rule. 98 U.S. 145, 158–59 (1878). The seminal English forfeiture cases discussed in *Reynolds* were clearly domestic criminal cases in England, as they refer to a “prisoner.” Moreover, the cases each discuss only one witness who was killed so they were not likely to be mass crime cases like the ones the AHICTs are dealing with. *See id.* The common law rules developed in these domestic criminal cases, where the government/prosecutor was a party, were subsequently taken as the background for the U.S. common law rule, which is what *Reynolds* itself creates. This common law rule, designed for specific types of crimes in a domestic context, was then codified into Federal Rule of Evidence 804(b)(6) in 1997. *See supra* note 122 and accompanying text.

¹³⁰ *See* Alan Tieger & Milbert Shin, *Plea Agreements in the ICTY: Purpose, Effects, and Propriety*, 3 J. INT'L CRIM. JUST. 666, 679 (2005) (“[T]he dominant challenges to the Tribunal's fulfillment of its mandate at this point are time and resources. The Tribunal has a steadily decreasing budget and rapidly waning time within which to prosecute the persons responsible for serious violations of international humanitarian law.”); *see also* The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?: Hearing Before the H. Comm. on Int'l Relations, 107th Cong. 22 (2002) (statement of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State), available at http://www.house.gov/international_relations/107/77896.pdf (“We have and are urging both Tribunals to begin to aggressively focus on the end-game and conclude their work by 2007 or 2008”); Geoffrey Nice QC & Philippe Vallières-Roland, *Procedural*

for a separate evidentiary hearing,¹³¹ a forfeiture by wrongdoing rule would still require the parties to spend time and resources gathering and presenting evidence to prove that a party is responsible for the unavailability of a witness. In order to merely make a determination as to whether or not to admit a piece of evidence in the record, a trial chamber would be required to have what is in effect a miniature trial determining the guilt or innocence of a party with respect to the unavailability of a witness. The time and resources needed for this determination could be mitigated by requiring a party to prove responsibility by only a preponderance of the evidence,¹³² but it would still require more than a rule generally admitting statements made by deceased witnesses. However, given the recognition that one of the Tribunals' primary functions is to provide the official historical record of the atrocities that took place,¹³³ the small additional expenditure of time and resources, when compared to Tribunals' overall budget and timeline, is a negligible price worth paying to ensure that victims' important voices are heard and recorded.

In addition to straining the resources of the AHICTs, adding a forfeiture by wrongdoing exception presents the challenge of crafting a rule that can provide the desired incentives and safeguards. As a model, Rule 804(b)(6) appears to limit the forfeiture exception to actions caused or acquiesced to by a party to the dispute. In a domestic criminal system, this construction evenhandedly protects both defense and prosecution witnesses from interference by the other side. Such a construction would not be as effective in protecting defense witnesses at the AHICTs, where the Prosecutor is an agent of the Tribunal, rather than the defendant's home state. Therefore, to help ensure the protection of defense witnesses as well as prosecution witnesses, the language of the forfeiture rule should include provisions

Innovations in War Crimes Trials, 3 J. INT'L CRIM. JUST. 354, 355 (2005) ("[T]he Tribunals are considered to be too expensive. By the time the ICTY and ICTR close their doors (currently scheduled for the end of 2010), they may well have cost well over US\$1 billion each.").

¹³¹ In the United States, circuits are split over whether it is necessary to hold a separate evidentiary hearing outside the presence of the jury. *Compare* United States v. Dhinsa, 243 F.3d 635, 653–54 (2d Cir. 2001) (holding that district court must conduct evidentiary hearing outside presence of jury) *with* United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (rejecting defendant's claim that trial court should have held hearing outside presence of jury to prove that defendant procured witness's unavailability).

¹³² Since the codification of the forfeiture by wrongdoing rule in the United States, courts have required a preponderance of the evidence standard based on the rule's intent to admit more evidence. The Advisory Committee Notes to Federal Rule of Evidence 804(b)(6) declare that "[t]he usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage." FED. R. EVID. 804(b)(6) advisory committee's note.

¹³³ See *supra* notes 14–15 and accompanying text.

not only for wrongdoing by the prosecution and defense but also for wrongdoing by other interested actors.

Another concern with transplanting language from a domestic forfeiture rule, like Rule 804(b)(6), is that such rules are not designed to deal with certain issues particularly related to mass crimes. U.S. common law has held that the forfeiture actions of a coconspirator can be imputed to a party for purposes of Rule 804(b)(6), only if the state can prove by a preponderance of the evidence that: (1) the party was part of the conspiracy; (2) the action was procured within the scope and in furtherance of the conspiracy; and (3) the action against this victim-witness was reasonably foreseeable to the party.¹³⁴ While the first two requirements may be possible to prove, it would be very difficult—especially in a situation of mass crime encompassing millions of people over an extended period of time—to expect a party to reasonably foresee harm to specific witnesses. As a result, any forfeiture clause at the AHICTs should be sure to explicitly include statutory language related to conspiracy, but should carefully consider whether to include a foreseeability requirement, and if included, how specific the foreseeability requirement should be.

CONCLUSION

The ICTY and ICTR adopted Rule 92 *bis*—Proof of Facts Other than by Oral Evidence—as a good-faith attempt to hone the rules of evidentiary admissibility to provide a better balance between fairness and efficiency. Yet, Rule 92 *bis*—and its interpretation by the Trial and Appeals Chambers—is overbroad in its application to prior written statements made by deceased witnesses. It dangerously incentivizes the killing of important witnesses by interested parties, and unnecessarily impedes the Tribunals’ mission of creating an accurate historical record, by unfairly limiting the testimony of classes of victims that survived the initial crimes but did not live to testify in person in front of the Tribunals. This Note provides two options that address the overbreadth of Rule 92 *bis* and attempt to create a better balance for the AHICTs. Neither option is perfect, but either would improve the current balance between fairness and efficiency at the AHICTs and provide a stronger foundation on which to base the rules of future international criminal trials.

¹³⁴ See *United States v. Cherry*, 217 F.3d 811, 820 (10th Cir. 2000) (holding that “[a] defendant may be deemed to have waived his or her Confrontation Clause rights (and, a fortiori, hearsay objections) if [those conditions are established by] a preponderance of the evidence”).

APPENDIX

ICTR Rules of Procedure and Evidence

(last updated June 7, 2005)

Section 3: Rules of Evidence

Rule 89: General Provisions

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

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

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

(D) A Chamber may request verification of the authenticity of evidence obtained out of court.

Rule 90: Testimony of Witnesses

(A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.

ICTY Rules of Procedure and Evidence

(last updated April 6, 2006)

Section 3: Rules of Evidence

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(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.

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

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

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

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

Rule 90: Testimony of Witnesses

**ICTR Rules of Procedure
and Evidence**

(B) Every witness shall, before giving evidence, make the following solemn declaration:

"I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

(C) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone.

(D) A witness, other than an expert, who has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

(E) A witness may refuse to make any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for

**ICTY Rules of Procedure
and Evidence**

(A) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth".

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(C) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

(D) Notwithstanding paragraph (C), upon order of the Chamber, an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings.

(E) A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness

**ICTR Rules of Procedure
and Evidence**

any offence other than perjury.

(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (i) Make the interrogation and presentation effective for the ascertainment of the truth; and
- (ii) Avoid needless consumption of time.

(G)(i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

Rule 92 bis: Proof of Facts Other than by Oral Evidence

(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

**ICTY Rules of Procedure
and Evidence**

for any offence other than false testimony.

(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to

- (i) make the interrogation and presentation effective for the ascertainment of the truth; and
- (ii) avoid needless consumption of time.

(G) The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73 *bis* (C) and 73 *ter* (C).

(H)(i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

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Rule 92 bis: Proof of Facts Other than by Oral Evidence

(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

**ICTR Rules of Procedure
and Evidence**

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;

(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 and

**ICTY Rules of Procedure
and Evidence**

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;

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(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

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(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 and

ICTR Rules of Procedure and Evidence	ICTY Rules of Procedure and Evidence
(i) the declaration is witnessed by:	(i) the declaration is witnessed by:
(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or	(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and	(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and
(ii) the person witnessing the declaration verifies in writing:	(ii) the person witnessing the declaration verifies in writing:
(a) that the person making the statement is the person identified in the said statement;	(a) that the person making the statement is the person identified in the said statement;
(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;	(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and	(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
(d) the date and place of the declaration.	(d) the date and place of the declaration.
The declaration shall be attached to the written statement presented to the Trial Chamber.	The declaration shall be attached to the written statement presented to the Trial Chamber.
(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:	(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	(i) is so satisfied on a balance of probabilities; and
(ii) finds from the circumstances in which the statement was made and	(ii) finds from the circumstances in which the statement was made and

**ICTR Rules of Procedure
and Evidence**

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.

**ICTY Rules of Procedure
and Evidence**

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 Rule 127 or any order 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.

Deleted Rule**Rule 94 *ter*: Affidavit Evidence**

To prove a fact in dispute, a party may propose to call a witness and to submit in corroboration of his or her testimony on that fact affidavits or formal statements signed by other witnesses in accordance with the law and procedure of the State in which such affidavits or statements are signed. These affidavits or statements are admissible provided they are filed prior to the giving of testimony by the witness to be called and the other party does not object within seven days after completion of the testimony of the witness through whom the affidavits are tendered. If the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination.