Cross-examination and international criminal law

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This tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the completion strategy which the Security Council has endorsed, but by the fairness of the trials. The majority appeals chamber decision and others in which the completion strategy has been given priority over the rights of the accused will leave a spreading stain on this tribunal's reputation.[3]

International criminal law has attempted to reconcile two great legal traditions, the common law and the civil law. It is an uneasy marriage.

This article examines the developing law of the International Criminal Tribunal for the Former Yugoslavia in relation to the admission of written statements, cross-examination and 'crime base' evidence.

Documentary evidence at the tribunal

The rules of evidence at the tribunal are contained in Part 6, section 3 of the *Rules of Procedure and Evidence*. The general principles governing admissibility are embodied in rule 89. This rule allows a trial chamber to admit 'any relevant evidence', including hearsay,[4] which it 'deems to have probative value'. It also gives the chamber a corresponding power to exclude evidence if 'its probative value is substantially outweighed by the need to ensure a fair trial.'

In its early years, the tribunal expressed a preference for oral evidence. Rule 90(A) stated: '... witnesses shall, in principle, be heard directly by the chambers.' As time went on, the rules were amended to allow for the introduction of written evidence. In December 2000, rule 90(A) was removed and rules 89(F) and 92 *bis* were inserted. Rule 89(F) now reads: 'A chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.'

Rule 92 *bis*: Proof of facts other than by oral evidence

Rule 92 *bis* is a special procedure which allows the chamber to admit witness statements and transcripts from previous trials while denying, in certain circumstances, the opposing party's right to cross-examine. 'The purpose of the rule is to facilitate the admission by way of written statement of peripheral or background evidence in order to expedite proceedings while protecting the rights of the accused under the statute.'[5] It is only available:

1. when a document was prepared for use in legal proceedings;
2. where the contents of the document go to 'proof of facts other than the acts and conduct of the accused'; and
3. where the evidence will be tendered in lieu of oral testimony.

It is primarily intended for use in establishing 'crime-base' evidence.[6]

Rule 92 *bis* operates within the framework of principles enshrined in rule 89. In the words of the appeal chamber in *The Prosecutor v Galic*, 'it identifies a particular situation in which, once the provisions of rule 92 bis are satisfied, and where the material has probative value within the meaning of rule 89(C), it is in principle in the interests of justice within the meaning of rule 89(F) to admit the evidence in written form.'7

The test for determining admissibility under rule 92 bis

The admissibility of a document is assessed in two stages.

First, the trial chamber must establish that the document is capable of being admitted. This will depend upon the contents of the statement and, in particular, upon whether it relates to the 'acts or conduct of the accused'. The 'acts and conduct of the accused' include his or her mental state.[8] It might also, in appropriate cases, include the accused's omission to act.[9]

Chrissa gives a demonstration of Australian-style cross-examination.

Rule 92 *bis* therefore excludes evidence which might prove that:

1. the accused actually committed (that is, he or she personally physically perpetrated) any of the crimes charged, or
2. the accused planned, instigated or ordered the crimes charged, or
3. the accused aided or abetted those who did plan, prepare or execute those crimes.

The Office of the Prosecutor has indicted many accused on the basis of command responsibility under article 7(3) of the statute[10] and increasingly, on the basis of co-perpetration in a joint criminal enterprise under article 7(1).[11] In cases based on command responsibility, rule 92 *bis* excludes evidence that:

1. the accused had effective control over the perpetrators, or
2. he knew or had reason to know that those crimes were about to be, or had been, committed by his subordinates, or
3. he failed to take reasonable steps to prevent the illegal acts or punish the perpetrators.[12]

When an accused is charged with joint criminal enterprise, written statements will be excluded if they may be used to establish that:[13]

1. he had participated in the joint criminal enterprise; or
2. he shared the requisite mental state of those did who commit the crimes.

The second stage involves the exercise of the chamber's discretion to admit or exclude the evidence. Factors which may be taken into account include, but are not limited to:

1. the fact that there is an overriding public interest in admitting the evidence orally;[14]
2. the fact that its nature and source render it unreliable or, alternatively, more prejudicial than probative;15 or
3. any other factor,16 such as the 'proximity'17 of the evidence to the accused.

The right to cross-examine under rule 92 *bis*

Under rule 92 *bis*, cross-examination is effectively reduced from the status of a right to a privilege. In this respect, there is, in the words of the trial chamber in *The Prosecutor v Kordic and Cerkez*, 'a marked tension with the guarantee in article 21(4) [of the tribunal's statute] that the accused has the right to examine the witnesses against him.'[18]

The trial chamber is more likely to require a witness to appear for cross-examination if the document tendered relates to a 'critical element of the prosecution's case or a live and important issue between the parties',[19] as opposed to 'a peripheral or marginally relevant issue.'[20]

Conversely, the opportunity to cross-examine will generally be denied if the chamber is satisfied that the witness has been thoroughly cross-examined in an earlier case and that the defence case in both trials shared a 'common interest'.[21]

The right to cross-examination under international law

Under international law, cross-examination is generally considered to be a 'minimum' right or guarantee. The statues of the international criminal tribunals for Rwanda[22] and Yugoslavia,[23] the European Convention on Human Rights,[24] the Inter-American Convention on Human Rights[25] and the International Covenant on Civil and Political Rights[26] enshrine, with only slight variations, the following fundamental guarantee:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... . 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

In practice, this right is not considered absolute.[27] In exceptional circumstances, uncorroborated out-of court statements, which are not subjected to cross-examination, will be admitted provided they do not form the basis of a conviction.[28]

This compromise may not, however, be sufficient to guarantee the rights of the accused at the tribunal. In the first place, judgments, although published with reasons, do not always contain an explanation of the specific evidence upon which the judges have relied in reaching their conclusions. Secondly, there is extensive use of inference in the jurisprudence of the tribunal which somewhat negates the elemental guarantee provided by the 'no conviction without cross-examination' principle. The risks are particularly evident when the accused is indicted under article 7(3). While rule 92 *bis* prohibits the admission of evidence which goes to the acts and conduct of the accused, it does not prevent the prosecution from tendering evidence relating to the defendant's immediate subordinates. The appeal chamber has itself recognized the problem this causes. In *The Prosecutor v Galic*, it stated that, 'there is often but a short step from a finding that the acts constituting the crimes charged were committed by... subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them.'[29]

Individual judges of the court have repeatedly expressed their concern. The Hon Justice David Hunt's dissents were highly principled and passionate.[30] Judge Patrick Robinson also dissented, admitting to feeling 'a long period of disquiet in the application of [the] rule.'[31] His main criticism concerned the use of transcripts from previous trials as evidence in subsequent trials. He stated, inter alia, that 'foisting cross-examination from a previous case on an accused in an ongoing

case interferes with the statutory right of an accused to determine his defence'[32] and that the factors which ostensibly counterbalance the risk of injustice 'are not sufficiently cogent to correct the unfairness to the accused that results from his lack of opportunity to cross-examine the transcript witness.'[33]

At the heart of these dissents lies a deep discomfort with the gradual erosion of rights typically afforded by the common law system of justice. The tribunal's rules are increasingly being influenced by the civil law, in which dossiers of evidence are accepted prior to trial. This has led to an uneasy compromise. While it is admirable to attempt to reconcile the procedures of two great justice systems, it is sometimes difficult to avoid the conclusion that criminal law relies upon the coherence of well-established legal system in order to avoid injustice. As the Hon Justice David Hunt wrote recently in an article addressing the role of judges in the ICC, 'My own experience as a judge of the ICTY has taught me that the most attractive colours do not always make the most appealing picture, and that two legal traditions may simply not mix.'[34]

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3 Judge David Hunt, dissenting opinion, *Prosecutor v Milosevic* IT-02-54-AR73.4, 'Decision on interlocutory appeal on the admissibility of evidence-in-chief in the form of written statements' (30 September 2003) at para 22.

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5 *ICTY annual report 2001*, UN Doc A/56/352 - S/2001/865 para 51.

6 *Prosecutor v Galic* IT-98-29-AR73.2, 'Decision on interlocutory appeal concerning rule *92bis*(c)', (7 June 2002) at para 16.

7 ibid., at para 12.

8 ibid., at para 11.

9 ibid., at para 11.

10 Article 7(3) states: 'The fact that any of the acts referred to in articles 2 to 5 of the present statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.'

11 Joint criminal enterprise is a basis of liability with arises 'where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.' *The Prosecutor v Tadic* IT-94-1-A (15 July 1999) at para 190.

12 *The Prosecutor v Galic*. Above n6 at para 10.

13 *The Prosecutor v Galic*. Above n6 at para 10.

14 Rule 92 *bis* (A)(ii)(a).

15 Rule 92 *bis* (A)(ii)(b).

16 Rule 92 *bis* (A)(ii)(c).

17 Above n6 at para 13.

18 *The Prosecutor v Kordic and Cerkez* IT-95-14/2, 'Decision on appeal regarding statement of a deceased witness' (21 July 2000) at para 23.

19 *The Prosecutor v Milosevic* IT-02-54-T, 'Decision on prosecution motion for the admission of transcripts in lieu of viva voce testimony pursuant to 92 *bis* (D)' (30 June 2003) at para 39.

20 *The Prosecution v Milosevic* IT-02-54-T, 'Decision on prosecutor's request to have written statements admitted under rule 92 *bis*' (21 March 2002) at paras 24-25.

21 Above n19.

22 Article 20(4)(e)

23 Article 21(4)(e)

24 Article 6(3)(d)

25 Article 8(2)(f)

26 Article 14(3)(e)

27 See, for example, the jurisprudence of the tribunal in *The Prosecutor v Kordic and Cerkez* IT-95-14/2, 'Decision on appeal regarding statement of a deceased witness' (21 July 2000). Also, the jurisprudence of the European Court of Human Rights in *Unterpertinger v Austria*, 24 November 1986, Series A, No. 110 at para 33 and *Saidi v France*, 20 September 1993, Series A, No. 261-C at para 44.

28 ibid.

29 Above n6 at para 14.

30 David Hunt retired from the tribunal in 2003 after sitting on the appeals chamber for two years.

31 Judge Patrick Robinson, dissenting opinion, *The Prosecutor v Milosevic* IT-02-54-T, 'Decision on prosecution motion for the admission of transcripts in lieu of viva voce testimony pursuant to 92 bis(D) – foca transcripts' (30 June 2003) at para 2.

32 ibid., at para 44(i).

33 ibid., at para 44(v).

34 The Hon David Hunt, 'The International Criminal Court: High hopes, 'creative ambiguity' and an unfortunate mistrust in international judges', (2004) 2(1) *Journal of International Criminal Justice* 56.

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