
**NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION**

**MEMORANDUM FOR
OFFICE OF THE PROSECUTOR**

**A COMPARATIVE ANALYSIS OF NATIONAL AND INTERNATIONAL
LEGISLATION AND JURISPRUDENCE REGARDING THE USE OF
DEPOSITION EVIDENCE AT TRIAL
Issue #5**

Prepared by Maryellen Ryan
UCWR
December 1999

TABLE OF CONTENTS

INDEX TO SUPPLEMENTAL DOCUMENTS

I.	Introduction	1
II.	Factual Background	1
III.	Legal discussion	3
	A. History of Criminal Procedure Before International Tribunals ... 3	
	1. Nuremberg.....	4
	2. Tokyo.....	6
	3. Former Yugoslavia.....	7
	4. Summary of Conclusions.....	10
	B. Problems With Admitting Depositions at Trial	11
	1. Confrontation.....	11
	2. Hearsay.....	14
	C. Common Law versus Civil Law	16
	1. United States.....	16
	a. Unavailability.....	18
	b. Inconsistent Statements and Impeachment.....	19
	c. Deposition Standards.....	20
	d. Summary of Conclusions.....	21
	2. England and Wales.....	22
	a. Unavailability.....	22
	b. Prior Testimony.....	23
	c. Illness.....	23
	d. Recent Legislation.....	24
	e. Summary of Conclusions.....	25
	3. France.....	25
	a. French Criminal Procedure.....	25
	b. Summary of Conclusions.....	28
	4. Germany.....	28
	a. German Criminal Procedure.....	28
	b. Summary of Conclusions.....	32
	D. Conclusion	32

INDEX

STATUTES

1. Statute of the International Tribunal for Rwanda, annexed to S/RES/955 (1994).
2. International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence, U.N. Doc. ICTR.3 Rev 2 (1996).
3. Charter of the International Military Tribunal For The Far East (Adopted January, 19, 1946).
4. Charter of the International Military Tribunal, 82 U.N.T.S. 280 (August 8, 1945).
5. Council Of Europe, European Treaties ETS No. 5, Convention For The Protection of Human Rights and Fundamental Freedoms (Rome 4.XI.1950).
6. Federal Rules of Criminal Procedure for the United States District Court, United States Code Annotated (1999).
7. Federal Rules of Evidence for United States Courts and Magistrates, 28 U.S.C.A., United States Code Annotated (1999).

ICTY CASES

8. *Prosecutor v. Dusko Tadic: Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, Case No. IT-94-1-T (Dated August 10, 1995).
9. *Prosecutor v. Zlatko Aleksovski: Decision on Prosecutor's Appeal on Admissibility of Evidence*, Case No. IT-95-14/1 (Dated February 16, 1999).

UNITED STATES CASES

10. *California v. Green*, 399 U.S. 149 (1970).
11. *Gladden v. Lonergan*, 269 P. 2d 491 (1954).
12. *Lilly v. Virginia*, 119 S. Ct. 1887 (1999).

13. *Mattox v. United States*, 156 U.S. 237 (1895).
14. *Ohio v. Roberts*, 448 U.S. 56 (1980).
15. *People v. Green*, 3 Cal. 3d 981 (1971).
16. *United States v. Dennis*, 625 F. 2d 782 (8th Cir. 1980).
17. *United States v. Dillman*, 625 F. 2d 782 (5th Cir. 1980).
18. *United States v. Keithan*, 751 F. 2d 9 (1st Cir. 1984).
19. *United States v. Kelley*, 36 F. 3d 1118 (D.C. Cir. 1994).
20. *United States v. Marteau*, 162 F.R.D. 364 (1995).
21. *United States v. Tavares*, 512 F. 2d 872 (9th Cir. 1975).
22. *United States v. Wilson*, 601 F. 2d 95 (3d Cir. 1979).

ENGLAND AND WALES CASES

23. *R. v. Hall*, 57 Cr App Rep 170 (1973).
24. *R v. Thompson*, 74 Cr App Rep 315 (1982).

BOOKS

25. John Huxley Buzzard, *Phipson on Evidence 13th Edition* (1982).
26. Andrew L.-T. Choo, *Hearsay and Confrontation in Criminal Trials* (1996).
27. Phil Fennel, et al., *Criminal Justice in Europe: A Comparative Study* (1995).
28. Nigel Foster, *German Legal System & Laws* (1996).
29. Bryan A. Garner, *Black's Law Dictionary*, (1996).
30. John Hatchard, Barbara Huber & Richard Vogler, *Comparative Criminal Procedure* (1996).

31. John H. Langbein, *Comparative Criminal Procedure: Germany* (1977).
32. 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).
33. 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998).

LAW REVIEWS AND JOURNALS

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

I. Introduction

This research memorandum seeks to examine the following:

A comparative analysis of national and international legislation and jurisprudence regarding the use of deposition evidence at trial.¹

II. Factual Background

The Rules of Procedure and Evidence, based upon principles set forth in the Statute of the International Criminal Tribunal for Rwanda, govern proceedings before the International Criminal Tribunal for Rwanda (hereinafter ICTR). Although the Statute and Rules of Procedure and Evidence address the taking of depositions, they do not specifically address the issue of their use at trial.

According to Rule 71 which provides for the taking of depositions, a deposition may be taken in exceptional circumstances as long as it is in the interest of justice to do so, notice is given and an accurate record is made including documentation of any cross-examination or objections raised.² Assuming a deposition satisfies Rule 71, a determination as to the use of the deposition at trial must be considered in light of Articles 19, 20 and 21 of the Statute.

¹ See United Nations International Criminal Tribunal for Rwanda, Office of the Prosecutor, Legal Research Topics No. Five, Facsimile dated August 20, 1999. The issue is: "Rule 71 of Rules of Procedure and Evidence provides for the taking of depositions, but there are no provisions concerning their use at trial. On the basis of national and international legislation and jurisprudence please analyse the use of depositions before ICTR." *Id* at 2. [Reproduced at Appendix 1].

² 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 548 (1998). [Reproduced at Appendix 3]. According to Rule 71:(A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.
(B) The motion for the taking of a depositions shall be in writing and shall indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the exceptional circumstances justifying

According to Article 19, trial proceedings are to be conducted in accordance with the Rules of Procedure and Evidence and take into account the rights of the accused and the rights of victims and witnesses.³ The accused has a right to confront witnesses against him or her in any trial proceeding before the Tribunal.⁴ Thus, Article 20 subsection (e) requires that witnesses appear in court to provide the accused the right to examine them.⁵

Article 21 specifically leaves determining the extent of protective measures for victims and witnesses to the Rules of Procedure and Evidence.⁶ As a result, Rule 75 allows:

the taking of the deposition.

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

(D) Deposition evidence may also be given by means of a video-conference.

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

³ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 9 (1998). Statute of the International Tribunal for Rwanda, S/RES/955 (1994) * (Annex), 8 November 1994. [Reproduced at Appendix 2]. Article 19 is entitled Commencement and conduct of trial proceedings. According to section 1:

The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protections of victims and witnesses.

⁴ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 9 (1998). Statute of the International Tribunal for Rwanda, S/RES/955 (1994) * (Annex), 8 November 1994. Article 20, section 4(e) states:

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: To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. [Reproduced at Appendix 2].

⁵ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 9 (1998). Statute of the International Tribunal for Rwanda, S/RES/955 (1994) * (Annex), 8 November 1994. [Reproduced at Appendix 2].

⁶ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 10 (1998). Statute of the International Tribunal for Rwanda, S/RES/955 (1994) * (Annex), 8 November 1994. Article 21 provides for the Protection of victims and witnesses:

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection shall include, but shall not be limited to, the conduct of in camera proceedings and

by closed circuit television or through image or voice altering devices, testifying under a pseudonym, and non-disclosure to the public of any identifying information of a witness.⁷ Rule 75 does balance the protection of victims and witnesses with the rights of the accused by providing that any protective measures are “consistent with the rights of the accused.”⁸

Thus, analysis of the use of depositions before the ICTR must first be considered in light of principles enunciated in the Statute and current Rules of Procedure and Evidence. Thereupon, consideration can be given to the history of criminal procedure before International Tribunals, and national and international legislation and jurisprudence.

III. Legal Discussion

A. *History of Criminal Procedure Before International Tribunals*

Criminal Procedure before the ICTR has been shaped by developments in international law. It has also benefited from the lessons learned from the predecessors of the Rwandan Tribunal.⁹ Post World War II tribunals include the International Military Tribunal at Nuremberg (hereinafter the Nuremberg Tribunal), the International Military Tribunal for the Far East (hereinafter the Tokyo Tribunal), and the most recent predecessor, the International Criminal Tribunal for the Former Yugoslavia (hereinafter the ICTY). These Tribunals set the precedent

the protection of the victim’s identity. [Reproduced at Appendix 2].

⁷ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 537 (1998). [Reproduced at Appendix 35].

⁸ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 537 (1998). Rule 75 (A) states: “A judge of a Chamber may...order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.” *Id.* [Reproduced at Appendix 35].

⁹ See generally 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 3-16 and 37-46 (1998). [Reproduced at Appendix 35].

for current standards of criminal procedure under international law. It is important to examine the problems of these Tribunals in order for the ICTR to avoid repeating them in the future.

1. Nuremberg Tribunal

The Nuremberg Tribunal was established following the Second World War to hear cases involving those accused of committing crimes during the war.¹⁰ “As the first international criminal jurisdiction, the Nuremberg Tribunal provides the benchmark for evaluating the establishment, the substantive law and the procedural due process of the subsequent international criminal tribunals.”¹¹

The Charter of the International Military Tribunal (hereinafter the Nuremberg Charter), along with the Rules of Procedure and Evidence, governed the proceedings before the Nuremberg Tribunal. The Nuremberg Tribunal had very limited rules of procedure.¹² The Tribunal had wide discretion in determining admissibility of evidence as indicated by Article 19 which states: “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.”¹³ The rationale for such limited rules was

¹⁰ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 3 (1998). [Reproduced at Appendix 35]. “In 1945, the victorious Allied Governments of the United States, France, the United Kingdom and the Soviet Union concluded the London Agreement providing for the establishment of the International Military Tribunal at Nuremberg (Nuremberg Tribunal) to try the most notorious of the Germans accused of crimes against peace, war crimes and crimes against humanity.” *Id.*

¹¹ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 37 (1998). [Reproduced at Appendix 35].

¹² Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 729 (1999). The Rules of Procedure consisted of eleven rules in all. [Reproduced at Appendix 10].

¹³ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 473-486 (1998). [Reproduced at Appendix 36]. “The result was an expeditious trial of the accused-as required by the Charter-which

that cases were heard solely before judges, therefore, the common law rules designed to keep prejudicial evidence from juries were not needed.¹⁴ Thus, the Nuremberg Tribunal adopted liberal rules of procedure prevalent in civil law jurisdictions.¹⁵

There were three major criticisms of Nuremberg. The first was that Nuremberg was a victor's Tribunal.¹⁶ The second criticism was that the Tribunal applied ex post facto laws by prosecuting for the crime of aggression for the first time.¹⁷ The third criticism, which is significant for this discussion, was that the Rules of Procedure were inadequate to protect the rights of the accused. "In particular, the Nuremberg Tribunal allowed the prosecutors to introduce the ex parte affidavits of persons who were available to testify at trial as evidence against the defendants."¹⁸ Documentary evidence played a major role in post World War II trials. Many documents including depositions, affidavits, diaries and letters were regularly introduced at trial.¹⁹

was completed in ten months and in which issues such as the admissibility of evidence did not take up much time." *Id.*

¹⁴ Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 729-730 (1999). "Although the parties alone were responsible for calling the evidence, the judges were sitting without a jury and the common law rules designed to prevent jurors from hearing prejudicial evidence were discarded in favor of a liberal approach akin to that of civil law systems." *Id.* [Reproduced at Appendix 10].

¹⁵ Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 730 (1999). [Reproduced at Appendix 10].

¹⁶ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 10-16 (1998). This was due to the fact that the victorious States were the ones who created the Tribunal and were responsible for selecting the judges. [Reproduced at Appendix 35].

¹⁷ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 10-16 (1998). Defendants were prosecuted for crimes that were newly established by the victorious States. [Reproduced at Appendix 35].

¹⁸ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 12-13 (1998). [Reproduced at Appendix 35].

¹⁹ Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 748 (1999). "Documents were bound together in books dealing with specific counts, topics or defendants. Most of these documents, which according to the commentary on the

2. Tokyo Tribunal

The Tokyo Tribunal was established to try major Japanese war criminals.²⁰ The Tokyo Tribunal was not as historically significant as Nuremberg because it had major flaws from its inception. First, the Tokyo Tribunal was not part of an international agreement involving intense negotiation, which had been the case at Nuremberg. Second, it was established by order from General MacArthur who also personally selected the judges.²¹

The Tokyo Tribunal also had limited rules of procedure.²² Many of the rules were identical to those used at Nuremberg. For example, Article 13(a) of the Tokyo Charter was identical to Article 19 of the Nuremberg Charter with one exception, Article 13 added the following language: “All purported admissions or statements of the accused are admissible.”²³ A significant addition to the Tokyo Charter was Article 13 subsection (c)(3) which specifically allowed for the admission of “an affidavit, deposition or other signed statement.”²⁴ Thus there could be no mistake, depositions could be admitted before the Tokyo Tribunal.

Nuremberg trial ‘were the principal evidence relied upon by the prosecution in each of the Nuremberg trials’”. *Id.* [Reproduced at Appendix 10].

²⁰ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 8 (1998). [Reproduced at Appendix 35].

²¹ See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 8 (1998). “Whereas the Nuremberg Charter was adopted as part of an international agreement after extensive multilateral negotiations, the Tokyo Charter was promulgated as an executive order by the Supreme Allied Commander for Japan following the war, General Douglas MacArthur, without the prior approval of the other Allied Powers.” *Id.* at 8-9. [Reproduced at Appendix 35].

²² Richard May & Maricke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat’l L. 725, 731 (1999). “The Rules of Procedure were equally brief, nine rules in all.” *Id.* [Reproduced at Appendix 10].

²³ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 488 (1998). [Reproduced at Appendix 35].

²⁴ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 488 (1998). [Reproduced at Appendix 35].

3. Yugoslavia Tribunal

The Yugoslavia Tribunal, which was established to prosecute persons who committed violations of international humanitarian law in the former Yugoslavia, was a significant advancement over Nuremberg and Tokyo. The Statute and Rules of Procedure and Evidence which govern the Yugoslavia Tribunal are much more detailed than those at Nuremberg and Tokyo. In establishing the Yugoslavia Tribunal, the Judges looked to Nuremberg and they were “conscious of the need to avoid some of the flaws noted in the Nuremberg ... proceedings.”²⁵ In an attempt to avoid the type of criticism directed at Nuremberg, the Statutes and Rules governing the ICTY utilize generally accepted principles from both common law and civil law countries.

Although the Statute adopts a largely common law approach to its proceedings, it deviates in several respects from the purely adversarial model. For example, there are no technical rules for the admission of evidence and the Judges are solely responsible for weighing the probative value of evidence. Second, a Chamber may order the production of additional or new evidence proprio motu. Thirdly, there is no plea-bargaining. As such, the International Tribunal constitutes an innovative amalgam of these two systems.²⁶

Several recent decisions rendered by the ICTY relate to procedure and evidence. The first is its decision in *Prosecutor v. Tadic*.²⁷ In *Tadic*, the Trial Chamber found that the Rules of

²⁵ See *Prosecutor v. Dusko Tadic*: Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, Dated August 10, 1995. Specifically Paragraph No. 21. “Although the Judges of the International Tribunal looked to the Nuremberg and Tokyo Tribunals when drafting the Rules, these tribunals provided only limited guidance.... Therefore, the International Tribunal is distinct from its closest precedents.” *Id.* [Reproduced at Appendix 7].

²⁶ See *Prosecutor v. Dusko Tadic*: Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, Dated August 10, 1995. Specifically Paragraph No. 22. “The Chamber found that the Rules, and in particular, Rule 89(C), do not bar the admission of hearsay evidence, where it is relevant and found to have probative value”. *Id.* [Reproduced at Appendix 7].

²⁷ See *Prosecutor v. Tadic*, Case No. IT-94-1-T. [Reproduced at Appendix 7].

Procedure and Evidence do not bar the admission of hearsay evidence.²⁸ The court held hearsay evidence could be admitted as long as it was relevant and had probative value. The Tribunal recognized that it may be guided by hearsay exceptions generally recognized by other national legal systems, but it is not bound to do so.²⁹ “In determining the admissibility of out-of-court statements the Tribunal will look to the voluntariness, truthfulness and trustworthiness of the evidence.”³⁰ In *Tadic*, The Tribunal recognized that it must decide cases “within the context of its own unique legal framework.”³¹ As evidence of this unique legal framework, the Tribunal recognized that it is often compared to a military Tribunal which generally have limited rights of due process and more lenient rules of evidence.³²

In *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, the Appeals Chamber considered the admissibility of evidence in the form of prior testimony by an expert witness. The Appeals Chamber held that prior testimony may be admitted under Rule 89(C) subject to the discretion of the judge.³³ The Chamber held that unavailability did not have to be established prior to

²⁸ See *Prosecutor v. Tadic*, Case No. IT-94-1-T. See also *Tadic Case: The Jurisprudence*, ICTY Bulletin No. 17, Section 5 Decision on Hearsay dated 5 August 1996. [Reproduced at Appendix 8].

²⁹ See *Prosecutor v. Tadic*, Case No. IT-94-1-T. See also *Tadic Case: The Jurisprudence*, ICTY Bulletin No. 17, Section 5 Decision on Hearsay dated 5 August 1996. [Reproduced at Appendix 8].

³⁰ See *Tadic Case: The Jurisprudence*, ICTY Bulletin No. 17, Section 5 Decision on Hearsay dated 5 August 1996. [Reproduced at Appendix 8].

³¹ See *Prosecutor v. Dusko Tadic: Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses*, Case No. IT-94-1-T, Dated August 10, 1995. Specifically point Nos. 19 and 28. “It is the first international criminal tribunal ever to be established by the United Nations. Its only recent predecessors, the International Military Tribunals at Nuremberg and Tokyo, were created in very different circumstances and were based on moral and juridical principles of a fundamentally different nature.” *Id.* [Reproduced at Appendix 7].

³² See *Prosecutor v. Dusko Tadic: Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses*, Case No. IT-94-1-T, Dated August 10, 1995. Specifically point No. 28. “The International Tribunal is adjudicating crimes which are so horrific as to warrant universal jurisdiction.” *Id.* [Reproduced at Appendix 7].

³³ See *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Case No. IT-95-14/1, Dated February 16, 1999. Specifically No.15 and 16. Rule 89(C) provides: A Trial Chamber may admit any relevant evidence which it deems to have probative value. [Reproduced at Appendix 9].

admitting the prior testimony; instead “the Trial Chamber was entitled to take account of the stage of the trial, the length of time the accused had been in custody and its finding that the witness was not immediately available in exercising its discretion to admit the evidence.”³⁴ In the same opinion, the Appeals Chamber held that the transcript of prior testimony of a confidential witness could also be introduced under the equality of arms theory as long it had probative value to rebut the transcript of the expert witness.³⁵

Judge Robinson, one of the presiding judges, dissented in the *Aleksovski* case. He argued that the transcript should not have been admitted because it was not subject to cross-examination and the transcript did not qualify as adjudicated facts under Rule 94(B).³⁶ Alternatively, Judge Robinson argued that the proper procedure for introduction of such evidence was not followed.

Hearsay evidence comes in through a witness; under the Rules that witness may testify in Chamber itself under Rule 90(A), or may give out of Chamber evidence in a deposition or by video-conference link under Rule 90(A), as an expert under Rule 94bis, or in an affidavit under Rule 94(C).³⁷

Therefore, Robinson argued, since the transcript was admitted on its’ own and it was not proffered by any one person who could testify to the validity of it, it should not have been admitted.

³⁴ See *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Case No. IT-95-14/1, Dated February 16, 1999. Specifically paragraph No. 19. [Reproduced at Appendix 9].

³⁵ See *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Case No. IT-95-14/1, Dated February 16, 1999. Specifically paragraph No. 27. [Reproduced at Appendix 9].

³⁶ See *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Case No. IT-95-14/1, Dated February 16, 1999. Specifically No. 28(v) and (vi), subsection (a). [Reproduced at Appendix 9].

³⁷ See *Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Case No. IT-95-14/1, Dated February 16, 1999. Specifically No. 24. [Reproduced at Appendix 9].

The Rules of Procedure and Evidence of the ICTY were amended in December of 1998 to include Rule 94ter. Rule 94ter specifically gives the Tribunal the authority to admit affidavits at trial. According to Rule 94ter:

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 signed by other witnesses in accordance with the law and procedure of the State in which such affidavits are signed. These affidavits are admissible if the other party does not object within five working days after the witness' testimony. 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.

In *Prosecutor v. Blaskic*, the statement of a deceased witness was admitted during trial proceedings.³⁸ “The Trial Chamber had in mind the exceptions relating to the admission of statements of deceased witnesses in national and international legal systems and decided to admit the statement into evidence, while reserving the right to determine its probative value at a later stage.”³⁹ This is a common practice of the ICTY, judges often allow evidence to be admitted and determine the weight to be given to the evidence at a later date.

4. Summary of conclusions

The authority of the Nuremberg and Tokyo Tribunals was challenged and criticized for the admission of ex parte affidavits at trial. Although affidavit evidence has not been predominant before the ICTY, the Tribunal has ruled that affidavits may be admitted under Rule 94ter. In addition, any determination of admissibility of depositions before the ICTR must take into account principles enunciated in recent decisions of the ICTY. Most importantly, hearsay is

³⁸ See *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14.

³⁹ See Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 753-754 (1999). [Reproduced at Appendix 10].

admissible before the ICTY and prior testimony may be admitted under Rule 89(C) subject to the discretion of the judge.

B. Problems With Admitting Depositions at Trial

Regardless of the jurisdiction, there are two main concerns that must be weighed before considering the admissibility of depositions at trial: confrontation and hearsay.

1. Confrontation

Confrontation, in criminal procedure law, is a defendants' right to directly oppose an accusing witness, in person, and to have the opportunity to cross-examine that witness.⁴⁰

The principle that criminal procedure should be carried out in public is of vital importance in any democratic society.⁴¹ This concept, known as the principle of orality, can be divided into two aspects: first, the principle of open justice; and second, the requirement that all evidence be presented in open court before the defendant, where it can be challenged.⁴² Thus, in most jurisdictions, there is a preference for witnesses to give evidence orally in open court.

⁴⁰ Brian Garner, *Black's Law Dictionary* (1996). This definition is taken from the definition of Confrontation Clause in Black's Law Dictionary. Confrontation Clause is defined as "The Sixth Amendment provision guaranteeing a criminal defendant's right to directly confront an accusing witness and to cross-examine that witness." [Reproduced at Appendix 37].

⁴¹ Phil Fennel, et al., *Criminal Justice in Europe: A Comparative Study* 283 (1995). [Reproduced at Appendix 37].

⁴² Phil Fennel, et al., *Criminal Justice in Europe: A Comparative Study* 283 (1995). [Reproduced at Appendix 37].
"By rendering the administration of justice visible, publicity contributes to the aim of Article 6-namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention. But publicity is only one aspect of the principle of open justice. A second element is that all the evidence is to be presented in open court, in the presence of the defendant and the judge, where it is subject to challenge. This means a witness is generally required to give evidence orally in open court where he can be examined." *Id.*
A discussion of Article 6 of the European Convention on Human Rights follows.

The United States specifically addresses this concept of orality in its Constitution. Amendment 6 of the United States Constitution is known as the Confrontation Clause. The Confrontation Clause allows the accused the right to confront witnesses against him or her.⁴³ The primary purpose of the Confrontation Clause is to prevent the use of ex parte affidavits at trial.⁴⁴ The Confrontation Clause is also designed to ensure the reliability of evidence by subjecting it, before the trier of fact, to testing in an adversarial proceeding. Such testing includes cross-examination which has been called the “greatest legal engine ever invented for the discovery of truth.”⁴⁵

The European Union, of which England, Wales and France belong, employs a similar standard articulated in Article 6 of the European Convention on Human Rights. The goal of Article 6 is to ensure a fair trial. Article 6 provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law... Everyone charged with a criminal offence has the following minimum rights: ... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses

⁴³ U.S. CONST. amend. 6. The official text of Amendment VI is:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

⁴⁴ See *California v. Green*, 399 U.S. 149, 156 (1970). [Reproduced at Appendix 13].

It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on evidence which consisted solely of ex parte affidavits or depositions secured by the examining Magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.

⁴⁵ See *Lilly v. Virginia*, 119 S.Ct. 1887, 1894 (1999) [Reproduced at Appendix 15] quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990) and *California v. Green*, 399 U.S. 149, 158 (1970).

on his behalf under the same conditions as witnesses against him.⁴⁶

It is the view of the European Court of Human Rights that all evidence should be produced “in the presence of the accused at a public hearing with a view to adversarial argument.”⁴⁷ But, the European Court does recognize exceptions. First, Article 6 is not violated when counsel for the accused is present in place of the accused.⁴⁸ And second, the Court recognizes that in exceptional circumstances, a trial court may hear evidence from witnesses in the absence of the defendant. For example, the Commission has found fear of reprisal a sufficiently exceptional circumstance.⁴⁹ Although the European Court of Justice does embrace the principle of orality, Article 6 does not guarantee the defendant an unlimited right to confrontation.⁵⁰

Despite the preference for orality, most courts recognize that a public trial may be traumatic for some witnesses, and in some cases testifying in public may pose a danger to the safety of a witness.⁵¹ Problems with in-person testimony may also exist in cases involving the

⁴⁶ See *Convention For The Protection of Human Rights and Fundamental Freedoms*, Council of Europe ETS No. 5. [Reproduced at Appendix 6].

⁴⁷ Phil Fennel, et al., *Criminal Justice in Europe: A Comparative Study* 288 (1995). “The trial courts should be able to observe the witness’ demeanor under questioning and to form their own impression of their reliability.” *Id.* [Reproduced at Appendix 37].

⁴⁸ Phil Fennel, et al., *Criminal Justice in Europe: A Comparative Study* 288 (1995). Also, article 6 is not violated if the defendant does not ask for a hearing of a witness. [Reproduced at Appendix 37].

⁴⁹ Phil Fennel, et al., *Criminal Justice in Europe: A Comparative Study* 288 (1995). “A public trial is often traumatic for all involved and may even endanger the safety, not only of the suspect but also the witnesses, who play a central role in any criminal trial...It has long been recognized that, without the co-operation of witnesses, legal systems would simply cease to function.” *Id.* [Reproduced at Appendix 37].

⁵⁰ Phil Fennel, et al., *Criminal Justice in Europe: A Comparative Study* 288 (1995). [Reproduced at Appendix 37].

⁵¹ Phil Fennel, et al., *Criminal Justice in Europe: A Comparative Study* 283 (1995). A witness who fears the defendant may be reluctant to testify at a public trial. [Reproduced at Appendix 37].

testimony of children or cases involving witnesses who are unreachable by the court.⁵² Thus, the principle of orality is not an absolute right.

2. Hearsay

Hearsay is defined as “a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.”⁵³ A fundamental rule of common law is that hearsay is not admissible at trial. This rule has been modified in many jurisdictions by statutes and exceptions. Most courts are reluctant to allow hearsay because it is not subject to cross-examination and it is often not made under oath.

Historically, International Tribunals have not taken a technical approach to the admission of evidence. “This is best illustrated by their approach to hearsay evidence, but is also reflected in the admission of documents and affidavits.”⁵⁴ Documentary evidence was routinely admitted at Nuremberg and Tokyo. Although hearsay evidence was often admitted in the form of affidavits and depositions, the courts could use their discretion in determining the weight to be given to such evidence.

Hearsay is generally not admissible in United States courts.⁵⁵ As a result, courts usually will not admit depositions, extrajudicial statements or hearsay because the accuracy and

⁵² Phil Fennel, et al., *Criminal Justice in Europe: A Comparative Study* 284 (1995). The frequency of trans-national crimes has raised issues involving witnesses who reside outside of the jurisdiction of the court. [Reproduced at Appendix 37].

⁵³ Bryan A. Garner, *Black's law dictionary* 287(1996). [Reproduced at Appendix 39].

⁵⁴ See Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 745 (1999). “A significant practice of all the International Tribunals is their refusal to be hindered by a technical approach to the admission of evidence in their search for the truth.” *Id.*

⁵⁵ See *Federal Rules of Evidence* Rule 802 which provides: “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” [Reproduced at Appendix 10].

trustworthiness of the information cannot be tested by confrontation and cross-examination.⁵⁶ Although rules of this kind are designed to benefit the system and the accused, they must occasionally give way to considerations of public policy and the necessity of presenting a case. Therefore, the United States does allow exceptions to the rule against hearsay.⁵⁷ Exceptions are divided into two groups: when the declarant is unavailable and when the declarant is available. If the declarant is unavailable, the following examples of hearsay may be admitted: former testimony under oath, statement under belief of impending death, statement against interest and statement of personal or family history.⁵⁸ The following hearsay exceptions do not depend on the availability of the declarant: present sense impressions, excited utterances, recorded recollections, records of regularly conducted activities and statements in ancient documents.⁵⁹

Similarly, in England and Wales the following examples of hearsay may be admitted: prior inconsistent statements, expert witness testimony, prior testimony, evidence of prior identifications or to refresh the memory of a witness.⁶⁰ Also, “declarations, oral or written, made by deceased persons in the ordinary course of duty, as to facts within their personal knowledge, contemporaneously with the facts stated and without motive to misrepresent, are admissible in proof of their contents.”⁶¹

In civil law jurisdictions, common in Continental Europe, there are no strict rules prohibiting the admission of hearsay at trial. In France and Germany, “evaluation of evidence is

⁵⁶ See *United States v. Dennis*, 625 F. 2d 782, 795 (1980). [Reproduced at Appendix 19].

⁵⁷ See *Mattox v. United States*, 156 U.S. 237, 243 (1895). [Reproduced at Appendix 16].

⁵⁸ See Federal Rule of Evidence 804. [Reproduced at Appendix 12].

⁵⁹ For a complete list of exceptions, see Federal Rule of Evidence 803. [Reproduced at Appendix 12].

⁶⁰ See Andrew L.-T. Choo, *Hearsay and Confrontation in Criminal Trials*, 44-73 (1996). [Reproduced at Appendix 38].

⁶¹ John Huxley Buzzard, *Phipson on Evidence 13th edition*, 476 (1982). [Reproduced at Appendix 30].

free and unconstrained by formal exclusionary rules as the courts are concerned more with the weight or value of evidence than its admissibility.”⁶²

C. Common Law v. Civil Law

Analysis of the use of depositions at trial will be examined in light of common law and civil law jurisprudence and legislation. The United States and England and Wales will be the focus of the common law analysis.⁶³ Many of the concepts and rules relating to the use of depositions at trial are similar in the United States and England and Wales. Therefore, the focus will be to present as much information as possible from each jurisdiction without duplication.⁶⁴ Finally, the approach of France and Germany will be examined as representations of civil law. The purpose of studying French and German law is to contrast it with common law. The ICTR is comprised of both common law and civil law aspects; therefore, this discussion would not be complete without an examination of civil law concepts.

1. United States

The rules regulating the use of depositions at trial in the United States are based upon policy considerations enunciated in the United States Constitution. The most important is Amendment 6, the Confrontation Clause, which guarantees the accused the right to confront

⁶² John Hatchard, Barbara Huber and Richard Vogler, *Comparative Criminal Procedure* 29 (1996). [Reproduced at Appendix 31].

⁶³ In conducting research for this paper, I examined the jurisprudence and legislation of Canada also. My research yielded information substantially similar to that of the United States; therefore, I chose to omit Canada from this paper in an effort to provide differing views on the subject.

⁶⁴ Thus, discussion and case law may not represent the entire jurisprudence from each jurisdiction.

witnesses against him or her.⁶⁵ Attendance of witnesses at trial is the favored method of presenting testimony, therefore depositions are not favored in criminal cases.⁶⁶ Although depositions are not favored, it is firmly established through case law that they may be admitted as long as they have been subject to cross-examination.⁶⁷

Federal Rule of Criminal Procedure 15(e) specifically addresses the use of depositions during criminal trials.⁶⁸ Rule 15(e) provides that a deposition may be used as substantive evidence if the witness is unavailable, the witness gives testimony at trial that is inconsistent with that witness's deposition, or for the purpose of contradicting or impeaching the witness.⁶⁹ The courts have clearly stated that the purpose of Rule 15(e) is to preserve testimony for trial, not to "provide a method of pretrial discovery."⁷⁰

⁶⁵ U.S. CONST. amend. VI. See also footnote 43.

⁶⁶ See *United States v. Wilson*, 601 F. 2d 95, 97 (3d. Cir. 1979). [Reproduced at Appendix 25]. "Attendance of witnesses at trial, however, is the favored method of presenting testimony, and primarily for this reason depositions are not favored in criminal cases."

⁶⁷ See *Gladden v. Lonergan*, 269 P.2d 491, 499 (1954). [Reproduced at Appendix 14]. "It is firmly established that depositions and former testimony of witnesses, where the opportunity of cross-examination has been afforded, are, under certain circumstances, admissible in evidence, and such admission is not a violation of the constitutional guaranty." *Id.*

⁶⁸ For discussion of deposition use during civil trials see *Rule 32 of the Federal Rules of Civil Procedure* (FED. R. CIV. P. 32). This rule is similar to Federal Rule of Criminal Procedure Rule 15 with the noted exception that unavailability of a witness can be satisfied if the witness is at a greater distance than 100 miles from the place of trial. [Reproduced at Appendix 12].

⁶⁹ See FED. R. CRIM. P. 15(e) [Reproduced at Appendix 11], which provides
At the trial or upon any hearing, a part of all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.

⁷⁰ See *United States v. Kelley*, 36 F.3d 1118, 1124 (D.C. Cir. 1994). [Reproduced at Appendix 22].

a. Unavailability

According to Rule 15(e), a deposition may be admitted at trial if the declarant is unavailable. Unavailability of a witness is defined in Rule 804(a) of the Federal Rules of Evidence as one who: is privileged from testifying, refuses to testify, testifies to a lack of memory, or is unavailable due to death or a physical or mental illness.⁷¹ Under this exception, United States courts have accepted the following circumstances: “(1) death of the witness; 2) absence from the jurisdiction; 3) disappearance of the witness, and inability, after diligent search, to find him; 4) illness, infirmity, and ages, preventing attendance of the witness; 5) insanity, or other mental incompetency.”⁷²

For a deposition to be admitted at trial on the grounds of unavailability of the witness, many courts require proof of a good faith effort to obtain the presence of the declarant.⁷³ In addition, the party seeking to admit the deposition must show that the deposition has some indicia of reliability or a guarantee of trustworthiness.⁷⁴ The purpose of proving reliability or trustworthiness is to guard against violation of the Confrontation Clause.

⁷¹ See FED. R. EVID 804 [Reproduced at Appendix 12], which states in part:

“Unavailability as a witness” includes situations in which the declarant-

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant’s statement; or
- (4) is unable to be present or to testify at the hearing because of death of then existing physical or mental illness or infirmity;

For a further discussion of this issue topic No. 6.

⁷² See *Gladden v. Lonergan*, 269 P.2d 491, 500 (1954). [Reproduced at Appendix 14].

⁷³ Merely saying that the witness is unavailable is not enough.

⁷⁴ See *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). “Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that there is no material departure from the reason of the general rule.” *Id.* [Reproduced at Appendix 17].

b. Inconsistent Statements and Impeachment

Federal Rule of Criminal Procedure 15(e) provides that depositions may be introduced at trial if the witness gives testimony which is inconsistent with that witness' deposition. Such use does not violate the Confrontation Clause provided that "the statement was made by the declarant in testifying as a witness at the preliminary hearing or the declarant testifies as a witness at the trial."⁷⁵ Thus the defendant has the opportunity to cross-examine the witness regarding the statement⁷⁶ and the trier of fact can observe the witness' demeanor and the nature of his testimony as he or she addresses the inconsistency.⁷⁷ The Supreme Court has taken this position because it concluded that in many cases "the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation."⁷⁸ To admit depositions at trial as a prior inconsistent statement, the court requires that the witness have the opportunity to explain or deny the statement and the opposing party must have the opportunity to interrogate the witness regarding the statement.⁷⁹

In determining admissibility, the trial judge has discretion in determining whether testimony and a written deposition actually are inconsistent. "Inconsistency is not limited to

⁷⁵ See *People v. Green*, 3 Cal. 3d 981, 985 (1971). [Reproduced at Appendix 18].

⁷⁶ See *People v. Green*, 3 Cal. 3d 981, 985 (1971). The defendant's opportunity to cross-examine the witness is considered sufficient to satisfy the Confrontation Clause. [Reproduced at Appendix 18].

⁷⁷ See *United States v. Tavares*, 512 F. 2d 872, 874 (9th Cir. 1975). Thus, the dangers which the hearsay rule is designed to protect do not exist. [Reproduced at Appendix 24].

⁷⁸ See *United States v. Tavares*, 512 F.2d 872, 874 (9th Cir. 1975). [Reproduced at Appendix 24].

⁷⁹ See *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980). This is known as laying the proper foundation. [Reproduced at Appendix 19].

diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes in position.”⁸⁰

Prior inconsistent statements may be admitted as substantive evidence or for the sole purpose of impeachment.⁸¹ If a witness cannot remember a prior inconsistent statement, or denies making any such statement, the inconsistent statement can be read during trial for the purpose of impeaching the credibility of the witness.⁸² On the other hand, if a witness admits making a prior inconsistent statement, that witness is impeached and no further testimony or deposition evidence is necessary.⁸³

c. Deposition Standards

A deposition may be introduced at trial only if it has been taken properly. A deposition may be taken when exceptional circumstances exist such that it is in the interest of justice that the testimony of a potential witness be preserved for use at trial.⁸⁴ U.S. courts have broad discretion in allowing depositions to be taken. Determining exceptional circumstances is done

⁸⁰ See *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980). This gives the judge the opportunity to exercise his discretion on a case-by-case basis. [Reproduced at Appendix 19].

⁸¹ See *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980). “Whether to admit them as substantive evidence or to limit their use to impeachment is within the broad discretion of the trial court.” *Id.* If admitted substantively, the statements are accepted as proof of the matter asserted. [Reproduced at Appendix 19].

⁸² See *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980). The purpose of impeachment is to discredit the witness. But, evidence that is otherwise inadmissible may not be admitted under “the guise of impeachment.” *Id.* [Reproduced at Appendix 19].

⁸³ See *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980). The deposition does not have to be admitted into evidence if the witness admits making a prior inconsistent statement. [Reproduced at Appendix 19].

⁸⁴ See FED. R. CRIM. P. 15. Rule 15(a) [Reproduced at Appendix 11] provides:

Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place.

on a case-by-case basis.⁸⁵ If the court determines that exceptional circumstances do exist; notice must be given, there must be consent of the parties and the conduct of the deposition must be such as would exist at trial.⁸⁶

The party seeking the deposition bears the burden of demonstrating that “exceptional circumstances” exist so as to require the preservation of testimony through a deposition. “Critical factors toward meeting this burden include (1) the materiality of the testimony; and (2) the unavailability of the witness to testify at trial.”⁸⁷ Other factors include: “whether the witness’ testimony is material to the moving party’s case and whether the taking of the deposition would cause injustice to the nonmoving party.”⁸⁸

d. Summary of Conclusions

The United States has strict rules governing the use of depositions at trial. Central to these rules is the presumption that attendance of witnesses at trial is the favored method of presenting testimony. In the United States, “the most important factor to be taken into account in determining whether to allow the use of a deposition at a criminal trial is the defendant’s right of confrontation.”⁸⁹ If circumstances exist such that the defendant’s right of confrontation can be sufficiently satisfied, then, in limited situations, courts may allow depositions to admitted at trial.

⁸⁵ See *United States v. Dillman*, 15 F. 3d 384, 389 (5th Cir. 1994). [Reproduced at Appendix 20].

⁸⁶ See generally FED. R. CRIM P. 15 [Reproduced at Appendix 11]. This means there must be a record of any objections raised or cross-examination performed.

⁸⁷ See *United States v. Kelley*, 36 F.3d 1118, 1125 (D.C. Cir. 1994). [Reproduced at Appendix 22].

⁸⁸ See *United States v. Marteau*, 162 F.R.D. 364, 367 (1995). [Reproduced at Appendix 23].

⁸⁹ See *United States v. Keithan*, 751 F.2d 9, 12 (1st Cir. 1984). [Reproduced at Appendix 21].

2. England and Wales

Similarly, in England and Wales, strict rules of evidence govern the admissibility of depositions at trial. There is a preference for evidence to be given orally in open court.⁹⁰

Despite this preference, evidence may be admitted at trial if it is sufficiently related to the facts at issue and it would assist in resolving such issues.⁹¹

Section 13(3) of the Criminal Justice Act of 1925 provides the basis for using depositions at trial. According to section 13(3), a deposition may be introduced at trial if the deponent was the subject of a conditional witness order, is dead, insane or "so ill as not to be able to travel".⁹² The deposition must have been taken in the presence of the accused and there must have been opportunity for cross-examination.⁹³

a. Unavailability

England follows the common law rule of allowing depositions to be introduced at trial if the deponent is unavailable. A witness may be considered unavailable due to: death, insanity,

⁹⁰ John Hatchard, Barbara Huber and Richard Vogler, *Comparative Criminal Procedure* 184 (1996). "It is a fundamental principle that justice must be administered in open court and for the proceedings to be freely reported, including the names of the accused and victims." *Id.* [Reproduced at Appendix 29].

⁹¹ John Hatchard, Barbara Huber and Richard Vogler, *Comparative Criminal Procedure* 185 (1996). [Reproduced at Appendix 29].

Unlike the position in France and Germany, strict rules of evidence govern the admissibility and exclusion of factual information in legal proceedings. The general rule is that evidence is admissible and required to be admitted if sufficiently relevant to the facts in issue between the parties to be capable of assisting a rational tribunal of fact to determine the issues.

⁹² John Huxley Buzzard, *Phillips on Evidence 13th edition*, 845 (1982). [Reproduced at Appendix 30].

⁹³ Thus the defendant's right of confrontation is satisfied.

serious illness or interference from the opposite side. The most notable example of unavailability is death.

We think it plain that a deposition properly taken before a magistrate on oath in the presence of the accused and where the accused has had the opportunity of cross-examination was always admissible at law in criminal cases if the original deponent was dead, despite the absence of opportunity to observe the demeanor of the witness.⁹⁴

b. Prior Testimony

Transcripts or depositions are admissible in criminal proceedings in a subsequent trial as long as: the issues are the same, the parties or their privies are the same and the witness was previously cross-examined.⁹⁵ “Affidavits in former trials, though not fulfilling the above conditions, are also frequently receivable as admissions, or to contradict the same witness on the second trial, or, after the deponent’s death, to prove public rights or pedigree.”⁹⁶

c. Illness

A deposition may also be introduced at trial if the deponent is too ill to travel to court. The degree of illness is a matter for the judge to determine. The courts draw a distinction between a temporary illness and a permanent one. “If a witness be too ill to attend the trial, but there is a probability that he may recover, his deposition is not admissible.”⁹⁷ If there is a possibility that

⁹⁴ See generally, *R v. Hall*, 57 Cr App Rep 170 (1973). [Reproduced at Appendix 26].

⁹⁵ John Huxley Buzzard, *Phipson on Evidence 13th edition*, 673 (1982). These requirements ensure protection of the defendant’s rights. [Reproduced at Appendix 30].

⁹⁶ John Huxley Buzzard, *Phipson on Evidence 13th edition*, 845 (1982). [Reproduced at Appendix 30].

⁹⁷ See *R. v. Thompson*, 74 Cr App Rep 315. [Reproduced at Appendix 26].

the witness will recover, the court will grant an adjournment for a reasonable period of time and wait for the witness to personally appear in court.⁹⁸

On the other hand, a deposition may be introduced if the witness has an illness that is permanent or there is no way to know when the witness will recover. The following have been held sufficient to allow a deposition to be introduced at trial: if travelling would endanger life, paralysis or if the witness was “so ill and nervous that examination and cross-examination would confuse and nullify his evidence.”⁹⁹ Anxiety, pregnancy and the flu are not acceptable illnesses to allow the admissibility of a deposition at trial.¹⁰⁰

d. Recent Legislation

A new exception to the common law rule of inadmissibility of depositions at trial has been added by recent legislation in England and Wales. The new exception is fear. The Criminal Justice Act of 1988 section 23(3)(b) provides “a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if the person who made it does not give oral evidence through fear.”¹⁰¹

⁹⁸ See John Huxley Buzzard, *Phillips on Evidence 13th edition*, 845 (1982). [Reproduced at Appendix 30].

⁹⁹ See John Huxley Buzzard, *Phillips on Evidence 13th edition*, 848-849 (1982). [Reproduced at Appendix 30].

¹⁰⁰ See John Huxley Buzzard, *Phillips on Evidence 13th edition*, 849 (1982). [Reproduced at Appendix 30].

¹⁰¹ See Criminal Justice Act 1988, s 23 dated 29 July 1988. Cross heading: Part II Documentary Evidence in Criminal Proceedings. [Reproduced at Appendix 28].

e. Summary of Conclusions

Like the United States, England and Wales allows depositions to be admitted at trial under limited circumstances. These limited circumstances include death and illness. Of particular importance to the ICTR may be the recent legislation in England and Wales relating to fear. According to this recent legislation, depositions, or any statement, of a witness may be introduced at trial if the witness does not testify due to fear.

3. France

a. French Criminal Procedure

An examination of criminal procedure in France may be helpful to the ICTR because although France is a civil law jurisdiction, it has both adversarial and inquisitorial aspects.

The major source of criminal procedure law in France is the Criminal Procedure Code (CPP). The rules of criminal procedure in France “are designed to prevent an innocent person from becoming a victim of judicial error and to provide a guilty person with access to sufficient means of defence to ensure that the final penalty imposed is a fair one.”¹⁰² The CPP regulates the mixed system of criminal procedure in France. The trial stage is adversarial, while the pre-trial investigation is inquisitorial in nature.¹⁰³ “It is widely argued that this hybrid model of

¹⁰² John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal* 18 (1996). [Reproduced at Appendix 1]. “The rules of criminal procedure in France are expressed as being intended to ensure the protection of society while at the same time providing safeguards for the liberty of the individual.” *Id.*

¹⁰³ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal* 18- 19 (1996). [Reproduced at Appendix 31].

It is not accurate to characterise the French system of criminal procedure as inquisitorial. At the revolution, a form of procedure based largely on Anglo-American adversarial practice was adopted, complete with a jury trial. This was modified in 1808 by the enactment of the Napoleonic Code d’Instruction Criminelle which retained the adversarial elements of the trial stage but re-instated the inquisitorial pre-trial investigation.

procedure represents a successful fusion of the best elements of both adversarial practice and inquisitorial practice.¹⁰⁴

France has an extensive pre-trial stage. The purpose of the pre-trial stage is to compile a file of written evidence called a dossier. The dossier is inquisitorial in nature. The dossier is compiled by a Magistrate or by the police. Any person whose evidence may be useful may be questioned. Witness depositions taken by the police are not taken under oath, while depositions taken by Magistrates are.¹⁰⁵ The Magistrate usually does not interrogate the witness, although he may ask questions to clarify any points of confusion.¹⁰⁶ Generally, the defendant is not present at any witness deposition. The dossier is then passed to the trial court where a trial is conducted in public.¹⁰⁷ The notion of a public trial is adversarial in nature. In most common law jurisdictions, the defendant cannot be questioned without consent, but in France the defendant is questioned and participates in each stage of the procedure.¹⁰⁸

¹⁰⁴ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 19 (1996). [Reproduced at Appendix 31]. "The balance struck in 1808 remains the basis for the modern mixed system of procedure in France and it is widely argued that this hybrid model of procedure represents a successful fusion of the best elements of both inquisitorial and adversarial practice." *Id.*

¹⁰⁵ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 46 (1996). [Reproduced at Appendix 31].

¹⁰⁶ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 76 (1996). [Reproduced at Appendix 31]. The examining Magistrate will not usually interrogate a witness but merely record the deposition by dictating it to the clerk, asking questions only where it is necessary to clarify any points of confusion. Each page of the proces verbal must be signed by all present after it has been read over to the witness." *Id.*

¹⁰⁷ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 19 (1996). [Reproduced at Appendix 31].

Once the dossier is completed it is passed to the trial court. The trial is in public and has a more familiar adversarial character. The thoroughness of the pre-trial investigation ensures that it is not necessary for all the evidence to be re-heard, and the court may, if it wishes, rely on the depositions previously taken before the judge. As a result, trials are usually more rapid than in England.

¹⁰⁸ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 71 (1996). [Reproduced at Appendix 31]. "Questions are put successively by officers of the judicial police, by the prosecutor, by the examining magistrate and finally by the trial judge. Unlike all other witnesses, the defendant is not asked to give evidence on oath and the administration of such an oath may result in the quashing of the entire proceedings." *Id.*

In France, trials are conducted by the court with very little input from attorneys. There is no distinct examination in chief or cross-examination and no strict rules of evidence apply.¹⁰⁹ The principle of orality is respected but there is no requirement that all evidence be given in person; therefore, substantial sections of uncontroversial material may simply be read from the dossier.¹¹⁰ “The thoroughness of the pre-trial investigation ensures that it is not necessary for all the evidence to be re-heard, and the court may, if it wishes, rely on the depositions previously taken before the judge.”¹¹¹

Despite the mixed approach in France, the process of resolving disputes focuses more on investigation than on cross-examination and confrontation. Due to the inquisitorial nature of proceedings, documentary evidence plays a major role. Therefore, depositions are often introduced at trial. If a witness is unavailable or has died, that witness’ deposition may be read at trial.¹¹² In addition, a witness may consult a deposition to refresh his or her memory.¹¹³

¹⁰⁹ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 52 (1996). [Reproduced at Appendix 31]. “Witnesses are then called and examined in turn by the president and these may be recalled to clarify points. The procedure of evidence-taking in court is considerably less formal and more conversational than in English courts.” *Id.*

¹¹⁰ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 52 (1996). [Reproduced at Appendix 31].

¹¹¹ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 21 (1996). [Reproduced at Appendix 31].

¹¹² John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 76 (1996). [Reproduced at Appendix 31]. “Where a witness has died before the trial or is otherwise unavailable it is possible for the president to read from the proces verbal.” *Id.*

¹¹³ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 76 (1996). [Reproduced at Appendix 31]. “He is not allowed to read from a statement but, with the permission of the president, may consult documents to refresh his memory.” *Id.*

b. Summary of Conclusions

Deposition evidence has a significant role in France. The dossier is a written procedure, thus French trials rely more heavily on written testimony than oral testimony. As a result, “evaluation of evidence is free and unconstrained by formal exclusionary rules as the courts are more concerned with the weight or value of evidence than its admissibility.”¹¹⁴

4. Germany

a. German Criminal Procedure

The major sources of German criminal procedure are the Code of Criminal Procedure and the Courts Act.¹¹⁵ Also, the European Convention of Human Rights (ECHR), which contains basic procedural guarantees, is applicable in German courts. Criminal “procedure as a whole must conform with the right to a fair trial as enshrined in article 6(I)(1) ECHR.”¹¹⁶

¹¹⁴ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 29 (1996). [Reproduced at Appendix 31]. “The standard of proof adopted in all French criminal cases is that of the inner belief of the judge or jury as the case may be....A judge or jury member is entitled to base his belief on any aspect of the evidence produced in court, notwithstanding the weight of the evidence to the contrary.” *Id.*

¹¹⁵ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 99 (1996). [Reproduced at Appendix 32]. “The main sources of German criminal procedure are the (Imperial) Code of Criminal Procedure (Reich-Strafprozeßordnung) of 1877 (StOP) ...and the Courts Act (Gerichtsverfassungsgesetz/GVG) of the same year.” *Id.*

¹¹⁶ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 108 (1996). [Reproduced at Appendix 32]. According to Article 6(I)(I):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Like France, German criminal procedure is also a hybrid system of accusatorial and inquisitorial elements.¹¹⁷ German criminal procedure is composed of the following principles: the principle of orality and public hearing, the principle of investigation, and the principle of free evaluation of evidence.¹¹⁸ Each of these principles plays a major role in shaping German criminal procedure.

First, German courts embrace the principle of orality. Section 250 of the German Criminal Procedure Code states: "If the evidence of a fact is based upon a person's observation, this person shall be examined at the trial. The examination may not be replaced by reading the record of an earlier examination, or by reading written statements."¹¹⁹ Thus, oral examination of a witness generally cannot be substituted by written statements. "A decision must not be based on previous statements made by witnesses at an earlier stage of the investigation and contained in the investigation file."¹²⁰ Although German courts respect the principle of orality, it is not strictly followed. There are certain circumstances in which written statements such as depositions may be introduced at trial. These circumstances will be considered in subsequent discussion.

Under the principle of investigation, "the fundamental duty of the courts is to search for the truth and the participants have no control over the presentation of evidence nor any power to

¹¹⁷ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 100 (1996). [Reproduced at Appendix 32]. "It is misleading to characterise modern German criminal procedure as being purely inquisitorial for it contains several features of an adversarial process and can best be described as a mixed or hybrid system." *Id.*

¹¹⁸ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 107-112 (1996). [Reproduced at Appendix 32].

¹¹⁹ John H. Langbein, *Comparative Criminal Procedure: Germany* 165 (1977). [Reproduced at Appendix 34].

¹²⁰ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 110 (1996). [Reproduced at Appendix 32].

seek a discontinuance of the proceedings.”¹²¹ Under this principle, the Court is obligated to conduct its own investigation, independent from the any pre-trial investigation conducted by state attorneys or the police.¹²²

The most important principle, for the purpose of this discussion, is the principle of free evaluation of evidence. In Germany, judges are not bound by legal rules of evidence. “In order to discover the truth, the court must examine all available evidence irrespective of whether or not one of the participants has asked it to do so. It is neither bound by the evidence called by the participants, nor is it limited by their motions.”¹²³ The presiding Judge questions the defendant and any witnesses; however, the prosecutor, defendant and his lawyer are entitled to question witnesses and make comments.¹²⁴ The Code expressly provides for cross-examination, although it is unusual in practice.¹²⁵ Although the preferred method of presenting evidence is by oral examination in court, there are circumstances in which written statements can be read at trial.

First, judicial and non-judicial depositions or written statements may be read at trial if the witness’ absence is unavoidable. A witness may be unavoidable due to: “intervening death, mental illness, failure to establish whereabouts, illness, frailty or unavailability due to

¹²¹ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 110 (1996). [Reproduced at Appendix 32].

¹²² Nigel Foster, *German Legal System and Laws* 215 (1996). [Reproduced at Appendix 33]. “This obliges the court to conduct its own investigation in the interim proceedings, independent from the state attorney and the police, and not to rely on the information and evidence supplied by the state attorney.” *Id.*

¹²³ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 131 (1996). [Reproduced at Appendix 32].

¹²⁴ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 131 (1996). [Reproduced at Appendix 32].

¹²⁵ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 131 (1996). [Reproduced at Appendix 32]. “The Code provides for cross-examination, if both the state prosecution and the defence lawyer apply for it. In this case, they question the witness while the judge can only put additional questions. However, this method is unusual in practice.” *Id.*

distance.”¹²⁶ Second, if the defendant has legal representation, and the prosecutor, defendant and defendant’s attorney agree, both judicial and non-judicial depositions and written statements may be read at trial.¹²⁷ Third, depositions and written statements may be introduced at trial to refresh the memory of a witness.¹²⁸ And lastly, judicial records of former statements can be read at trial to resolve contradictions between the defendant’s present and former declarations.¹²⁹

In determining the extent to which depositions may be introduced at trial in Germany, consideration must be given to the fact that hearsay evidence may be admitted in German courts. Because “there are no legal rules compelling the judge to consider evidence in any particular

¹²⁶ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 131 (1996). [Reproduced at Appendix 32]. This is enunciated in section 251(I)(1-3) of the Code.

¹²⁷ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 131 (1996). [Reproduced at Appendix 32]. “If the state prosecutor, the defendant and his defence lawyer agree to judicial depositions in respect of the questioning of witnesses, experts or co-defendants being read out as well as non-judicial depositions and written statements of such persons. This can only be done if the defendant is legally represented.” *Id.* This is enunciated in section 251(I)(4) and (II) of the Code. For the text of section 251, See John H. Langbein, *Comparative Criminal Procedure: Germany* 166 (1977). [Reproduced at Appendix 34]. According to 251(I)(4) and (II):

The examination of a witness, expert, or co-accused may be replaced by the reading of the notes of his former examination by a judge, if the prosecutor, defense counsel, and accused agree to the reading. If a witness, expert, or co-accused has died, or if he cannot be examined by a judge within a reasonable time for some other reason, notes of other examinations as well as documents containing written statements originating from him may be read.

¹²⁸ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 131 (1996). [Reproduced at Appendix 32]. This is enunciated in section 253 of the Code. For the text of section 253, See John H. Langbein, *Comparative Criminal Procedure: Germany* 166 (1977). [Reproduced at Appendix 34]. According to 253:

If a witness or an expert states that he no longer remembers a fact, the relevant part of the record of his former examination may be read to aid his recollection. The same may be done if a contradiction arises during the trial examination that cannot be otherwise settled or resolved without interrupting the trial.

¹²⁹ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 131 (1996). [Reproduced at Appendix 32]. This is enunciated in section 254 of the Code. For the text of section 254, See John H. Langbein, *Comparative Criminal Procedure: Germany* 166 (1977). [Reproduced at Appendix 34]. According to 254:

Statements of the accused contained in a record made by a judge may be read for the purpose of evidencing a confession. The same may be done if a contradiction arises during the trial examination that cannot be otherwise settled or resolved without interrupting the trial.

way and stating what emphasis to put on any particular piece of evidence, thus hearsay evidence may be acceptable. This may result from the fact that there is no jury to be influenced.”¹³⁰

b. Summary of Conclusions

Although the principle of orality is respected in Germany, it does not require that all evidence be given orally in open court. Depositions may be introduced at trial if the witness is unavoidably absent, if the parties agree or to refresh the memory of a witness.

D. Conclusion

Whether to admit depositions at trial before the ICTR is a decision the Tribunal must make in light of its current Statute and Rules of Procedure and Evidence. Rule 71 of the Rules of Procedure and Evidence specifically provides for the taking of depositions for their use at trial. Therefore, the Tribunal must determine under what circumstances depositions will be admitted at trial.

The predecessors of the Rwandan Tribunal provide a source of International Law upon which to base a decision. Such predecessors include the Nuremberg Tribunal, the Tokyo Tribunal and the Yugoslavia Tribunal. The most important reason to study these Tribunals is because they furnish a foundation for prosecuting war crimes before International Tribunals. It is upon the principles established by the Nuremberg, Tokyo and Yugoslavia Tribunals that the

¹³⁰ Nigel Foster, *German Legal System and Laws* 222-223 (1996). [Reproduced at Appendix 33].

ICTR may build in an effort to preserve fairness and equality between the parties before the ICTR.

Of particular importance is the fact that Nuremberg and Tokyo were harshly criticized for allowing the admission of ex parte affidavits at trial.¹³¹ The ICTR must be aware of such criticisms to avoid repeating them in the future. The ICTR may also look to decisions rendered by the ICTY for guidance. The ICTY has held that statements of deceased witnesses and prior testimony of a witness may be introduced at trial.¹³²

Lastly, national legislation and jurisprudence may provide additional guidance. Although international legislation and jurisprudence cannot mechanically be imported into international proceedings, they can be of assistance and guidance to the Tribunal in determining questions of procedure and evidence.¹³³

Common law jurisdictions, such as the United States and England and Wales, have strict rules governing the admissibility of depositions at trial, while civil law jurisdictions, such as France and Germany, have more lenient rules.

In the United States, strict rules govern the admissibility of depositions at trial. The defendant's right of confrontation is of utmost importance; therefore, depositions are not favored in criminal cases. Notwithstanding this fact, United States' courts do recognize exceptions when the defendants' right of confrontation is sufficiently satisfied. Thus, depositions may be

¹³¹ For further discussion see section (III)(A)(1) and (2).

¹³² For a complete discussion see section (III)(A)(3) entitled Former Yugoslavia.

¹³³ See generally Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 737 (1999). [Reproduced at Appendix 10].

Legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings. The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules. On the other hand, national rules may be of assistance and guidance to the Chambers in determining questions of procedure and evidence.

introduced at trial only if they were taken properly, the witness is unavailable, the deposition contains an inconsistent statement or for the purpose of impeachment.

Similarly in England and Wales, there is a preference for evidence to be given orally in open court. Thus, depositions may be introduced at trial only in limited circumstances. These circumstances include unavailability of a witness or when the witness does not testify due to fear.

Due to the inquisitorial nature of trial proceedings in civil law jurisdictions, the focus is on discovering the truth and evaluating any available evidence. Therefore, depositions are more frequently introduced at trial in France and Germany. For example, in France, “evaluation of evidence is free and unconstrained by formal exclusionary rules as the courts are more concerned with the weight or value of evidence than its admissibility.”¹³⁴

In Germany, depositions may be introduced at trial if the parties agree to allow deposition evidence to replace oral testimony, the witness is unavoidably absent, or to refresh the memory of a witness.

Therefore, bearing in mind the common law and civil law aspects of the ICTR, the Tribunal may regulate the use of deposition evidence at trial in light of national and international legislation and jurisprudence.

¹³⁴ John Hatchard, Barbara Huber and Richard Vogler. *Comparative Criminal Procedure* 29 (1996). [Reproduced at Appendix 31].