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The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis

YVONNE MCDERMOTT*

Abstract
This article introduces some quantitative and qualitative analysis on the use of written witness statements in lieu of oral testimony at trial to assess in practice the impact of the rules on the admissibility of written witness testimony before the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone. It traces pieces of evidence admitted under the newer, more liberal, rules on written witness testimony from admissibility to judgment, to establish what impact, if any, these rules have had in practice and whether the critique that such rules might jeopardize fair-trial standards has been realized. The analysis illustrates that the newer rules on admissibility are used with relative infrequency in some tribunals, but that the admission of such statements could raise the question of equality of arms in others, given that the more liberal rules on written statements tend to be used more frequently by the prosecution than by the defence. It will be shown that some chambers have continued to emphasize the importance of oral testimony and have taken a very cautious approach when weighing written testimony, whilst others have suggested that written testimony that was not subject to full cross-examination should not, in principle, be given less weight than oral testimony. The 'totality of the evidence' approach in weighing the evidence will be analysed from a practical standpoint, and it will be shown that recent Appeals Chamber jurisprudence suggests that trial chambers may need to take a more particularized approach to pieces of evidence in the future.

Key words
international criminal procedure; evidence; fair trial; orality; witness testimony

1. Introduction

It would be difficult to point to an area of international criminal procedure where the amendments of the relevant Rules of Procedure and Evidence have been more responsive to developments in jurisprudence than that of the use of written witness statements in lieu of oral testimony. The deletion of the preference for orality under Rule 90(A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the introduction of Rule 92 *bis*, which allows for the admission of written witness statements that do not go towards proving the acts and conduct of the accused, were clearly a reaction to two Appeals

* Lecturer in Law, Bangor University, UK [y.mcdermott@bangor.ac.uk]. I would like to thank Michelle Farrell, John Jackson, Joe Powderly, Osian Rees, William A. Schabas, and LJIL's anonymous reviewers for their extremely helpful comments and encouragement on earlier drafts.

Chamber judgements in *Kordić and Čerkez* on the admissibility of a statement of a deceased witness.[1] Rule 92 *bis*, as originally enacted, was less strict than the Rule 94 *ter* on affidavits which it replaced, in that it did not require statements to be formally made in accordance with domestic law if the witness was dead – chambers could still rule such evidence to be admissible, considering other factors like reliability. The requirement that affidavits be introduced solely for corroboratory purposes and that the statements be admitted before the witness whose testimony would be corroborated had testified were also removed.[2] Over time, Rule 92 *bis* has been amended further. The requirement of giving the other party 14 days' notice has now been removed, as has the provision that the Trial Chamber should still be able to order the appearance of the witness for cross-examination, although that option is still open to the chamber.[3] Rule 90(A) of the Special Court for Sierra Leone (SCSL) was amended to remove the preference for orality in 2003,[4] and in 2004, the Court adopted its own Rule 92 *bis*.[5] The International Criminal Tribunal for Rwanda (ICTR) retains a preference for orality in its Rule 90(A) although it too has adopted a Rule 92 *bis* on prior statements not going towards the acts and conduct of the accused.[6]

In a similar trajectory, shortly after the Appeals Chamber in *Milošević* held that if a witness were present in court and available to attest to the veracity of a prior statement, the prior statement could be introduced under the flexible *lex generalis* of Rule 89(F), subject to a right of the parties to cross-examine the witness,[7] the judges of the ICTY introduced Rule 92 *ter* precisely to this effect. The SCSL has an equivalent Rule 92 *ter*, adopted in November 2006.[8]

In *Milutinović* in 2006, the ICTY faced a request for the admission under Rule 92 *bis* of the prior recorded testimony of two deceased witnesses – Ibrahim Rugova, who testified in the *Milošević* trial, and Antonio Russo, who had given a statement to investigators in the field.[9] The former was denied admissibility, as it went towards proving the acts and conduct of the accused, whereas the latter was admitted as it

1 *Prosecutor v. Kordić and Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, IT-95-14/2-AR73.5, A. Ch., 21 July 2000; and *Prosecutor v. Kordić and Čerkez*, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, IT-95-14/2-AR73.5, A. Ch., 18 September 2000. For a more in-depth analysis, see M. Fairlie, 'Due Process Erosion: The Diminution of Live Testimony at the ICTY', (2003) 34 *California Western International Law Journal* 47, 70–4; R. May and M. Wierda, *International Criminal Evidence* (2002), 108, at 210–18; and P. Wald, 'To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings', (2001) 42 *Harvard International Law Journal* 535, at 541–8.

2 Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, 17 November 1999, UN Doc. IT/32/Rev.17.

3 Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.48, 28 November 2012.

4 Rules of Procedure and Evidence of the Special Court for Sierra Leone, 30 October 2003.

5 Rules of Procedure and Evidence of the Special Court for Sierra Leone, 14 March 2004.

6 Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, UN Doc. ITR/3/Rev.12, 6 July 2002.

7 *Prosecutor v. Milošević*, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of a Written Statements, IT-05-54-AR73.4, A. Ch., 30 September 2003. See further, S. Kay, 'The Move from Oral Evidence to Written Evidence: "The Law Is Always Too Short and Too Tight for Growing Humankind"', (2004) 2 JICJ 495, at 500.

8 Rules of Procedure and Evidence of the Special Court for Sierra Leone, 24 November 2006.

9 *Prosecutor v. Milutinović et al.*, Decision on Prosecution's Rule 92 *bis* Motion, IT-05-87-PT, T. Ch. III, 4 July 2006, at para. 4.

related to crime-base evidence.[10] Two months later, the tribunal adopted Rule 92 *quater* relating specifically to the written statements of deceased witnesses, which are no longer precluded from going towards the acts and conduct of the accused.[11] The Rugova transcript was ultimately admitted pursuant to the new Rule 92 *quater*.[12] The SCSL adopted its own Rule 92 *quater* in May 2007,[13] while the ICTR retains Rule 92 *bis*(C) on the statements of deceased witnesses, meaning that, in principle, such testimony should not go towards proving the acts and conduct of the accused.

The most recent addition to the family of rules is 92 *quinquies* of the Rules of Procedure of the ICTY, which was introduced after allegations of witness intimidation in the *Haradinaj*[14] and *Limaj*[15] trials and following the report of a working group on contempt proceedings.[16] The new rule provides that, where a witness fails to attend or appears in court but fails to testify in any substantive sense owing to 'improper interference' with the witness, a written transcript or statement can be introduced in lieu of oral testimony.[17] As with Rule 92 *quater*, such evidence is not precluded from relating to the acts and conduct of the accused, although that may be taken into account as a factor in deciding admissibility. There is no equivalent rule in the SCSL and ICTR Rules of Procedure and Evidence.

We can see, then, that rules on admissibility of evidence have become more liberal over the years and have been closely tied to jurisprudential developments. Most scholarly works on these changes focus almost exclusively on the issue of admissibility, with analyses of weight being limited to perfunctory remarks stating that judges ought to be very cautious in relying on such written testimony to establish individual criminal responsibility.[18] Such caution is warranted, in order to

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10 Ibid., at paras. 18–22.

11 Rules of Procedure and Evidence, UN Doc. IT/32/Rev.39, International Criminal Tribunal for the Former Yugoslavia, 13 September 2006.

12 *Prosecutor v. Milutinović*, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, IT-95-87-T, T. Ch. III, 5 March 2007, at para. 8.

13 Rules of Procedure and Evidence of the Special Court for Sierra Leone, 14 May 2007.

14 The Trial Chamber's 2008 judgement discusses some of the difficulties posed in obtaining witness testimony and measures taken to secure witnesses in *Prosecutor v. Haradinaj et al.*, Judgement, IT-04-84-T, T. Ch. I, 3 April 2008, at paras. 22–28.

15 Beqa Beqaj, a relative of one of the accused individuals, was convicted of wilfully interfering with a witness in the *Limaj et al.* case in 2005: *Prosecutor v. Beqaj*, Judgement on Contempt Allegations, IT-03-66-T-R77, T. Ch. I, 27 May 2005.

16 Report of the International Tribunal for the Former Yugoslavia, UN Docs. A/65/205 and S/2010/413, 30 July 2010, at para. 23.

17 Rule 92 *quinquies*, Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.44, 10 December 2009.

18 For example, Wald, *supra* note 1, at 551–3; Fairlie, *supra* note 1, 70–83; J. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial–Inquisitorial Dichotomy', (2009) 7 JICJ 17, at 30–3; P. Murphy, 'No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials', (2010) 8 JICJ 539, at 551–2 and 567–72; C. DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters', (2001) 87 *Virginia Law Review* 1381, at 1397–9 and 1424–30; E. O'Sullivan and D. Montgomery, 'The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY', (2010) 8 JICJ 511; and C. Rohan, 'Rules Governing the Presentation of Testimonial Evidence', in K. Khan et al. (eds.) *Principles of Evidence in International Criminal Justice* (2010), 499, at 522–4. N. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010), examined evidential inconsistencies before the ICTR, SCSL, and Special Panels (Dili) with great mastery, but her analysis is focused on the content of (primarily oral) testimony, whilst the present article analyses the form of witness testimony and whether the form of written witness testimony does have an impact on its ultimate weight in judgments in practice.

comport with the accused's right to examine the witnesses against him or her and to have a judgment that is not based decisively on untested witness testimony.[19] This article seeks to fill a gap in the literature by establishing whether caution has been observed in practice, by tracing pieces of evidence admitted under the newer, more liberal rules on written witness testimony from admissibility to judgment, to establish what impact, if any, the liberal admissibility rules have had in practice and whether the critique that such rules would lead to a misapplication of the standard of proof has been realized.

Nine judgments will be analysed in detail. These judgments were chosen solely on the basis of their date of issue. Cognizant of the fact that the admissibility rules have become more flexible over time, and wishing to analyse trial judgments where the most flexible admissibility rules were in force, it was decided to analyse trial judgments issued from 1 January 2011 to 1 June 2012 as a representative sample. This provided a total of one judgment from the SCSL,[20] five from the ICTR,[21] and three from the ICTY.[22] This case selection brought the added benefit of providing a cross-section of chambers composed of judges from different legal traditions, which permitted the author to test the hypothesis that judges can be biased towards their own procedural backgrounds.[23] Judgments for contempt offences fall outside the scope of this article, as do appeals judgments, which tend to give deference to the fact-finding activities of the Trial Chamber due to its proximity to the evidence and the fact that it can assess demeanour, credibility, and consistency in a way that the Appeals Chamber cannot.[24] Findings of fact may only be overturned where

19 ECtHR case law includes relevant decisions on this right: *Unterpertinger v. Austria* (1991) 13 EHRR 175, 24 November 1986; *Doorson v. The Netherlands* (1997) 23 EHRR 330, 26 March 1996; *Saïdi v. France* (1994) 17 EHRR 251, 20 September 1993; *Lüdi v. Switzerland*, Appl. No. 12433/86, 15 June 1992; *Luca v. Italy* (2003) 36 EHRR 46; *Kornev and Karpenko v. Ukraine*, Appl. No. 17444/04, 21 October 2010; *Al-Khawaja and Tahery v. UK* (2009) 49 EHRR 1, 20 January 2009; and *Al-Khawaja and Tahery v. UK* (2012) 54 EHRR 23, 15 December 2011.

20 *Prosecutor v. Taylor*, Judgment, SCSL-03-01-T, T. Ch. II, 18 May 2012 ('Taylor Judgment').

21 *Prosecutor v. Ndindiliyimana et al.*, Judgement, ICTR-00-56-T, T. Ch. II, 17 May 2011 ('*Ndindiliyimana et al.* Judgement'); *Prosecutor v. Nyiramasuhuko et al.*, Judgment, ICTR-98-42-T, T. Ch. II, 24 June 2011 ('*Nyiramasuhuko et al.* Judgement'); *Prosecutor v. Ndahimana*, Judgement, ICTR-01-68-T, T. Ch. II, 30 December 2011 ('*Ndahimana* Judgement'); *Prosecutor v. Gatete*, Judgement, ICTR-00-61-T, T. Ch. III, 31 March 2011 ('*Gatete* Judgement') and *Prosecutor v. Karemera and Ngirumpatse*, Judgement, ICTR-98-44-T, T. Ch. III, 2 February 2012 ('*Karemera et al.* Judgement').

22 *Prosecutor v. Đorđević*, Judgement, IT-05-87/1-T, T. Ch. II, 23 February 2011 ('*Đorđević* Judgement'); *Prosecutor v. Gotovina et al.*, Judgement, IT-06-90-T, T. Ch. I, 25 April 2011 ('*Gotovina et al.* Judgement') and *Prosecutor v. Perišić*, Judgement, IT-04-81-T, T. Ch. I, 6 September 2011 ('*Perišić* Judgement').

23 See, e.g., D. Mundis, 'From "Common Law" to "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence', (2001) 14 LJIL 367, 374; and F. J. Pakes, 'Styles of Trial Procedure at the International Criminal Tribunal for the Former Yugoslavia', in P. J. van Koppen and S. D. Penrod (eds.), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2003), at 309 (comparing the judicial approaches of Judges Jorda and McDonald).

24 An unintended consequence of this selection was that, between the time of writing and publication, convictions entered at trial in two of the cases (*Gotovina et al.* and *Perišić*) were overturned on appeal. Despite the fact that hundreds of pages of the *Gotovina et al.* Judgement, *supra* note 22, discussed the commission of crimes by armed units, including those of Gotovina and Markač's subordinates, at length, as well as the proceedings of the Brioni meeting in which the removal of the Serb population of Krajina was planned and anti-Serb laws and policies implemented by the Croatian government at the time, the Appeals Judgement (*Prosecutor v. Gotovina*, Judgement, IT-06-90-A, A. Ch., 16 November 2012 ('*Gotovina* Appeals Judgement')) focuses almost exclusively on the '200 metre standard' imposed by the Trial Chamber in assessing whether artillery strikes were sufficiently targeted on military objectives to be lawful. Although the Appeals Chamber entered into a *de novo* review of the evidence – albeit a rather perfunctory one, as pointed out in the Dissenting Opinion

the Appeals Chamber holds that no reasonable trier of fact would have entered a conviction on the basis of the evidence to hand.[25]

There is an obvious omission in the form of the 2012 judgment in *Lubanga* before the International Criminal Court,[26] as the differences in the structure of that Court's Rules of Procedure and Evidence and statutory framework do not lend themselves methodologically to an accurate comparison in the same way as the broadly similar rule structures of the other three tribunals do. However, the *Lubanga* judgment will be referred to throughout as providing a point of general comparison.

Furthermore, a body of material entered into the record under Rule 89(C) has been excluded from the scope of this article. The reasoning behind this was that Rule 89(C) ought to be, and generally is, the preserve of documentary evidence – that is, material that is contemporaneous to the events in question, and not statements made after the fact by witnesses, whether in court or in the field.[27] The ICTY judgements studied made particular use of this type of documentary evidence, citing military orders, minutes from meetings, hospital records, and other contemporaneous documentation, usually as corroboration to witness testimony. Statements admitted under this rule should only be used to go towards proving the credibility of the witness, and should not be used as proof of their contents.[28] However, that principle has not always been observed in practice.[29]

A number of key points on the operation of the more liberal rules on written witness testimony shall be illustrated. Section 2 will show that the newer rules tend

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of Judge Carmel Agius, paras. 5–12 – on the basis of its findings on the '200 metre standard', the Appeals Chamber judgement largely falls outside the scope of the present article. However, the judgement and the Appeals Chamber's judgement in *Prosecutor v. Perišić*, Judgement, IT-04-81-A, A. Ch., 28 February 2013 ('*Perišić* Appeals Judgement') both raise questions about the Appeals Chamber's appreciation of the 'totality of the evidence' approach, which will be discussed in detail in section 3.2 below. In the *Perišić* Appeals Judgement, the chamber considered that aiding and abetting liability required that 'specific direction' be given towards the commission of crimes. In this light, it conducted a *de novo* review of the evidence and found a lack of evidence that the accused directed assistance to criminal activity in particular. Like the *Gotovina et al.* Appeals Judgement, the Appeals Chamber in *Perišić* pointed to a number of witnesses whose testimony had apparently been disregarded by the Trial Chamber because it had not been specifically cited. However, it is quite possible that these testimonies were taken into account as part of the 'totality of the evidence' assessed by the Trial Chambers, as shall be discussed in greater detail below.

25 *Prosecutor v. Brđanin*, Appeals Judgement, IT-99-36-A, A. Ch., 3 April 2007, at paras. 11–16.

26 *Prosecutor v. Thomas Lubanga Dyilo*, Judgement pursuant to Art. 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012 ('*Lubanga* Judgement').

27 See, e.g., *Prosecutor v. Nizeymana*, Decision on Nizeyimana Defence Motion for Recall of Prosecution Witness AJP or Admission of Documentary Evidence, ICTR-00-55C-T, T. Ch. III, 7 July 2011, at para. 10; *Prosecutor v. Brima et al.*, Decision on Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95, SCSL-04-16-T, T. Ch. II, 24 May 2005, at para. 22; *Prosecutor v. Naletilić and Martinović*, Decision on the Admission of Witness Statements into Evidence, IT-98-34-T, T. Ch., 14 November 2001; *Prosecutor v. Galić*, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), IT–98–29–AR73.2, A. Ch., 7 June 2002, at para. 31.

28 *Prosecutor v. Kanyabashi*, Decision on Kanyabashi's Three Motions to Vary His List of Witnesses and to Admit Written Statements under Rule 92 *bis*, ICTR-96-15-T, T. Ch. II, 24 April 2008; *Gatete* Judgement, *supra* note 21, at para. 80.

29 E.g., *Prosecutor v. Haradinaj et al.*, Decision on Joint Defence Oral Motion Pursuant to Rule 89(D), IT-04-84 *bis*-T, T. Ch. II, 28 September 2011, at para. 11. The evidence of witness Kabashi from the *Limaj* trial was admitted under Rule 89(C) after the witness stated that he could not confirm his testimony from that trial (thereby precluding it from the remit of Rule 92 *ter*). The Trial Chamber confirmed that the testimony went to the acts and conduct of the accused, but stated that it would need to be corroborated by credible evidence if it were to be relied upon in coming to the final verdict (ibid., para. 13). See also, *Prosecutor v. Haradinaj et al.*, Retrial Judgement, IT-04-84bis-T, T. Ch. II, 29 November 2012, at paras. 181–182 and para. 473.

to be utilized far more frequently by the prosecution than by the defence, and will also illustrate that the rules are used far more frequently in some tribunals than in others. Some chambers have taken a rather cautious approach by ordering cross-examination of witnesses where this was technically not required under the Rules. Section 3 illustrates further caution in the Chambers' approach to corroboration of and the weight given to written testimony, but shows that some Chambers are more wary of relying on written testimony than others in this regard. It shall be further argued that the 'totality of the evidence' approach can leave the observer – and even later appellate judicial panels – uncertain as to the precise weight given to a piece of evidence, and calls the suitability of broad admissibility rules in this context into question.

2. Admissibility of written witness statements

Table 1 illustrates the full scope of evidence admitted, whether viva voce or pursuant to one of the rules on written witness testimony, as part of the prosecution (P) or defence (D) case. A number of remarks shall then be made about the utilization of some of the newer rules on the admissibility of evidence.

Table 1. *Forms of Witness Testimony, January 2011–June 2012*

			Viva voce		92 *bis*		92 *ter*		92 *quater*		92 *quinquies*	
Case	Date	Court	P	D	P	D	P	D	P	D	P	D
Đorđević, IT-05-87/1-T	23 Feb. 2011	ICTY	23	0	34	0	48	13	5	1	0	0
Gotovina et al., IT-06-90-T[30]	15 April 2011	ICTY	81	57	10	10	71	51	14	1	0	0
Perišić, IT-04-81-T	6 Sept. 2011	ICTY	35	21	3	3	37	0	11	3	0	0
Taylor, SCSL-03-01-T[31]	18 May 2012	SCSL	94	21	28	1	0	0	2	0	0	0
Ndindiliyimana et al., ICTR-00-56-T	17 May 2011	ICTR	72	144	0	4	0	0	0	0	0	0
Nyiramasuhuko et al., ICTR-98-42-T	24 June 2011	ICTR	59	130	0	0	0	0	0	0	0	0
Ndahimana, ICTR-01-68-T	30 Dec. 2011	ICTR	15	30	0	0	0	0	0	0	0	0
Gatete, ICTR-00-61-T	31 March 2011	ICTR	22	27	0	0	0	0	0	0	0	0
Karemera & Ngirumpatse, ICTR-98-44-T	2 Feb. 2012	ICTR	29	124	16	98	0	0	0	0	0	0

A few preliminary observations may be made on the basis of the figures. The most notable trend is the conspicuous absence of written witness statements in the record of recent cases before the SCSL and the ICTR (with the exception of the *Karemera* trial), in comparison to the ICTY. The structure of the Rules of Procedure

30 Seven additional witnesses were called to testify viva voce by the trial chamber.

31 Other documentary evidence, such as code-cables and other contemporaneous documents which would normally be the purview of Rule 89(C), were admitted under Rule 92 *bis*. As these were not witness statements or prior recorded testimony, they have not been analysed in the course of this article.

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and Evidence accounts for some of this divergence – the ICTR has only adopted Rule 92 *bis* of the more recent rule amendments, and retains a preference for orality in Rule 90(A). However, this cannot be the only factor when one considers the infrequent use of Rule 92 *bis*, and the fact that the SCSL has adopted all but 92 *quinquies* of the newer rules in this area, and has shown a similar degree of conservatism. Indeed, the only request to use Rule 92 *ter* before the SCSL was rejected.[32] Requests to admit evidence under Rule 92 *bis* before the ICTR in *Nyiramasuhuko et al.* and *Gatete* were similarly denied.[33]

We might ask, then, why the *Karemera* trial stands as an outlier amongst contemporaneous ICTR trials in its quite prolific use of Rule 92 *bis* statements. The argument that a chamber's willingness to admit written testimony hinges on the legal background of the judges holds some limited weight in this instance. Trial Chamber III in the case was initially composed of Judges Byron (St Kitts and Nevis), Short (Ghana) and Joensen (Denmark), two of whom are from broadly common legal system backgrounds, while Denmark has a largely inquisitorial model. In an early decision on Rule 92 *bis*, Trial Chamber III, so constituted, denied the prosecution request for the admission of 71 written statements of rape witnesses in lieu of oral testimony,[34] on the basis that this evidence sought to establish the widespread and systematic nature of the rapes allegedly committed by the accused's subordinates or co-perpetrators.[35] These allegations, the chamber held, were 'so pivotal' to the prosecution case that it would be unfair to admit the evidence without the opportunity for cross-examination.[36] This was a rather narrow interpretation of the 'acts and conduct' provision, which generally accepts that the acts and conduct of one's subordinates can be admitted under Rule 92 *bis*.[37]

Later, when Judge Short was replaced by Judge Kam of Burkina Faso (which can be loosely classified as a civil-law system), the chamber did appear to become more open to the admission of written statements; indeed, the December 2006 decision on the admissibility of written statements going towards the charge of rape as a crime against humanity was 'reconsidered' in September 2007 as a result of a number of changes in circumstance. These changes were: that oral witnesses had testified in court on these counts, that the prosecution was now happy to accept cross-examination of these 92 *bis* witnesses if the Chamber so ordered (in contrast to its 2006 'all or nothing' approach), and that the renewed request of the prosecution was significantly narrowed in scope as well as copper-fastened by more evidence on the

32 *Prosecutor v. Taylor*, Decision on Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 and TF1-371 Pursuant to Rule 92 *ter*, SCSL-03-01-T-399, T. Ch. II, 25 January 2008.

33 *Prosecutor v. Kanyabashi*, *supra* note 28, at paras. 42–44; *Prosecutor v. Gatete*, Decision on Defence and Prosecution Motions for Admission of Written Statements and Defence Motion to Postpone Filing of Closing Briefs, ICTR-00-61-T, T. Ch. III, 24 June 2010, at paras. 16–20.

34 *Prosecutor v. Karemera et al.*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *bis* of the Rules; and Order for Reduction of Prosecution Witness List, ICTR-98-44-T, T. Ch. III, 11 December 2006.

35 Ibid., at paras. 9–21.

36 Ibid., at para. 20.

37 See, e.g., *Prosecutor v. Milošević*, Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 *bis*, IT-02-54-T, T. Ch., 21 March 2002, at para. 22; *Prosecutor v. Galić*, Decision on Interlocutory Appeal Concerning Rule 92 *bis*, IT-98-29-AR73.2, A. Ch., 7 June 2002, at para. 15.

trial record than had been contained at the time of its original request.[38] A reverse in position on the 'acts and conduct' standard for the rape witness statements was enacted, with the chamber noting that it did 'not agree with the Defence contention that there are elements of the statements … which are so pivotal to the Prosecution case … that their admission would be unfair'.[39] Sixteen witness statements, all of which were ultimately relied upon in the Trial Judgement,[40] were admitted without being subject to cross-examination, although three had portions redacted, and one witness later testified orally.[41] In all likelihood, the change in the composition of the chamber was but one factor leading to this divergence in interpretation. The fact that corroborating oral testimony had already been produced by the time of the second decision was likely to have been as or more decisive to the Chamber's change of position.[42]

Moreover, the composition of the Chamber cannot account for the preponderance of written statements as a whole in this case. It must be noted that the defence requested the admission of more Rule 92 *bis* statements than in any other case studied. There were issues throughout the trial with the length of the defence witness list, particularly regarding the accused Nzirorera, who had initially proposed calling 180 witnesses viva voce and submitting 47 statements under Rule 92 *bis*.[43] Having been ordered to reduce his list of witnesses to 55,[44] Nzirorera sought to admit 127 witness statements under Rule 92 *bis* in December 2008.[45] Twenty statements were admitted into evidence, and a further 60 were declared admissible, subject to certification.[46] The accused produced certified statements for 44 witnesses.[47] Several statements were denied admissibility because of their limited relevance, probative value, or reliability,[48] while 25 were rendered inadmissible by virtue of the fact that they went towards the acts and conduct of the accused,[49] but as a whole, the

38 *Prosecutor v. Karemera et al.*, Decision on Reconsideration of Admission of Written Statements and Admission of the Testimony of Witness GAY, ICTR-98-44-T, T. Ch. III, 28 September 2007.

39 Ibid., at para. 23.

40 *Karemera et al.* Judgement, *supra* note 21, at paras. 1337–1424.

41 This was Witness GAY: see *Karemera et al.* Judgement, *supra* note 21, at paras. 1355–1360 and para. 1371.

42 *Prosecutor v. Karemera et al.*, Decision on Reconsideration of Admission of Written Statements and Admission of the Testimony of Witness GAY, *supra* note 38.

43 *Prosecutor v. Karemera et al.*, Order to Joseph Nzirorera to Reduce his Witness List, ICTR-98-44-T, T. Ch. III, 24 October 2008, at para. 4.

44 Ibid., at para. 11.

45 *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Testimony, ICTR-98-44-T, T. Ch. III, 15 July 2009, at para. 1 ('*Karemera* Written Statements Decision'). Nzirorera also lodged separate motions for individual statements to be entered under Rule 92 *bis*: see, for example, *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Submission of Rule 92 *bis* Certified Statements of Gratien Kabiligi, ICTR-98-44-T, T. Ch. III, 7 April 2010; *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Benefits to Prosecution Witness ZF, ICTR-98-44-T, T. Ch. III, 21 October 2009; and *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motion to Admit Testimony of Elizaphan Ntakirutimana, ICTR-98-44-T, T. Ch. III, 10 November 2008.

46 *Karemera* Written Statements Decision, *supra* note 45, at para. 115 and *Prosecutor v. Karemera et al.*, Reconsideration of and Corrigendum to the Chamber's Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Testimony, ICTR-98-44-T, T. Ch. III, 31 July 2009.

47 *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Submission of Rule 92 *bis* Certified Statements from Africa and USA, ICTR-98-44-T, T. Ch. III, 29 September 2009; *Prosecutor v. Karemera et al.*, Decision Following Joseph Nzirorera's Submission of Rule 92 *bis* Certified Statements, ICTR-98-44-T, 10 September 2009; and *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Submission of Rule 92 *bis* Certified Statement of Gratien Kabiligi, ICTR-98-44-T, T. Ch. III, 7 April 2010.

48 *Karemera* Written Statements Decision, *supra* note 45, at paras. 10–23.

49 *Karemera* Written Statements Decision, *supra* note 45, at para. 9.

Chamber showed a relatively lenient approach to admissibility, which, combined with the defence's extensive request, led to a greater admission of 92 *bis* statements than observed in other trials. Of the 61 witness statements (excluding transcripts) declared admissible, however, only three – those statements of witnesses Kagaba, Rukerikibaye, and Kahihura – were ultimately referenced in the trial judgement.[50]

The analysis further revealed that the Rules do not always operate as one might expect them to from a literal reading of the Rules of Procedure and Evidence. For instance, Rule 92 *bis* allows for the admission, without cross-examination, of written testimony that does not go towards the acts and conduct of the accused, although Rule 92 *bis*(C) of the ICTY's Rules of Procedure and Evidence and Rule 92 *bis*(E) of the ICTR's Rules permit the Trial Chamber to decide that the witness must appear for cross-examination. There is no equivalent in the SCSL's Rules of Procedure and Evidence. None of the relevant sets of rules indicate what factors might be taken into account in deciding whether to require cross-examination. However, the ICTY and ICTR Rules note factors like the public interest in hearing the evidence orally, fair-trial considerations, and unreliability as reasons why the Trial Chamber might decline to admit evidence under the rule;[51] the same factors could presumably be taken into account in deciding whether to require cross-examination, but this is not explicit. The argument is frequently raised that, given the fact that it does not require cross-examination, Rule 92 *bis* has the potential to open a Pandora's box. As many international criminal convictions are based on extended forms of liability, it has been argued that there is a risk that 'crime-base' evidence that may seem extraneous to the key question of the guilt of the accused may be decisive in the ultimate verdict.[52] However, of the total number of 207 92 *bis* witnesses across the three tribunals listed in the table above, 73 were called for cross-examination.[53] This means that over a third of Rule 92 *bis* testimony was in fact subject to cross-examination by the non-moving party,[54] which makes it more akin to Rule 92 *ter* testimony than to the form originally envisaged for Rule 92 *bis*.[55]

It is clear that Rule 92 *ter*, in turn, has been greatly utilized by the ICTY, where Rule 92 *ter* testimony outweighed the use of viva voce testimony for the prosecution in all trials observed. Indeed, the fact that a high preponderance of testimony under Rules 92 *bis*, 92 *ter*, and 92 *quater* (some 65 per cent) was introduced by the prosecution in the ICTY cases studied may lead to concerns on the principle of equality of arms. In a decision on referrals to Rwanda, the ICTR held that it would be a breach

50 For a critique of the free-proof approach, which allows 'almost limited galaxies' of material to be admitted to the record which is ultimately of limited value at the final determination, see Murphy, *supra* note 18, 540–44.

51 ICTR and ICTY Rules 92 *bis*(A)(ii).

52 See, for example, Jackson, *supra* note 18, 29–30; and P. L. Robinson, 'Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY', (2005) 3 JICJ 1037, at 1043–46.

53 In *Đorđević*, 29 of the 34 prosecution witnesses whose testimony was admitted under Rule 92 *bis* were called for cross-examination. In *Perišić*, one of the three prosecution 92 *bis* witnesses was called for cross-examination. The 28 92 *bis* prosecution witness statements admitted in *Taylor* were admitted subject to the prosecution making the witnesses available for cross-examination by the defence. The defence waived its right to cross-examination for one witness (see *Prosecutor v. Taylor*, Transcript, SCSL-03-01-T, T. Ch. II, 17 October 2008, 18660), but 27 92 *bis* witnesses were cross-examined. Sixteen of the 98 Rule 92 *bis* witnesses admitted for the defence in *Karemera and Ngirumpatse* appeared for cross-examination.

54 See *Taylor* Judgment, *supra* note 20, at para. 201; *Karemera* Written Statements Decision, *supra* note 45, para. 25; *Đorđević* Judgement, *supra* note 22, at para. 2251.

55 Rule 92 *bis*(C) of the ICTY RPE states that the Rule 92 *ter* procedure will apply if the witness is called to testify.

of equality of arms if the majority of prosecution witnesses were heard in person and the majority of defence witnesses testified via video link.[56] This increased utilization of written statements without examination-in-chief may hamper the tribunals' purported goal of setting a historical record,[57] as it removes much of the material that would otherwise be contained in transcripts on the tribunals' websites and renders it inaccessible to victims and other interested parties.

Again, some flexibility in the application of the rules has been observed – in *Đorđević*, for example, the motion to admit the testimony of witness Haxhiu pursuant to Rule 92 *ter* was granted in part, but the witness was ordered to appear for examination-in-chief as regards one contentious meeting discussed in his statement.[58] While in theory, Rule 92 *ter* procedure ought to protect both the expedience of the trial and the rights of the accused, it has not been immune from critique. It has been criticized for limiting the orality of proceedings in the sense that the first time the court hears a witness is in the context of cross-examination, as there is no initial examination, which may in turn render credibility assessments more difficult.[59] Indeed, the Trial Chamber in *Gotovina* noted that while, in principle, Rule 92 *ter* testimony could go towards proving the acts and conduct of the accused, viva voce testimony was still preferable.[60] In *Milutinović*, the Trial Chamber urged caution, given that Rule 92 *ter* statements had been tendered just days before the witness appeared in court to give evidence, and some statements had been altered quite significantly in advance of the witness's appearance, which had the potential of hampering the other side's right of cross-examination.[61] As neither party claimed to have suffered prejudice as a result, the trial chamber did not take any further action on the issue, but it did note that such last-minute amendments to witness statements were 'generally unsatisfactory'.[62] This issue of last-minute amendments to Rule 92 *ter* statements appears to have persisted in the ICTY,[63] but none of the more recent judgements mention it as a problem.

The ICTR does not have a Rule 92 *quater*, but its Rule 92 *bis*(C) allows the admission of the statements of deceased witnesses provided that such testimony does not go

56 *Prosecutor v. Munyakazi*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, ICTR-97-36-R11 *bis*, T. Ch. III, 28 May 2008, at para. 65.

57 See, e.g., Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, UN Docs A/53/219 and S/1998/737, 10 August 1998, at para. 202; and generally R. A. Wilson, *Writing History in International Criminal Trials* (2011).

58 *Prosecutor v. Đorđević*, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter*, IT-05-87/1-T, T. Ch. II, 10 February 2009, at para. 19.

59 Kay, *supra* note 7, at 500.

60 *Gotovina et al.* Judgement, *supra* note 22, at para. 16.

61 *Prosecutor v. Milutinović et al.*, Judgement, IT-05-87-T, T. Ch., 26 February 2009, at paras. 47–48.

62 Ibid.

63 E.g. *Prosecutor v. Gotovina*, Transcript, IT-06-90-T, T. Ch. I, 28 April 2008, 2282–3. In *Đorđević* (*Prosecutor v. Đorđević*, Transcript, IT-05-87/1-T, T. Ch. II, 23 February 2009, 1332–40), the defence objected to last-minute changes made to witness Neraj's testimony days before testifying, and to the introduction of additional materials (namely a transcript of the witness's testimony from *Milutinović*) being entered along with this witness's statement under Rule 92 *ter*, claiming that they had not received notice of this, thereby hampering the possibility of full cross-examination on the transcript. The objection was not upheld; indeed, the *Milutinović* transcript had been explicitly mentioned in the admissibility decision (*Prosecutor v. Đorđević*, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter*, *supra* note 58).

towards the acts and conduct of the accused. Three statements in *Karemera* were admitted under Rule 92 *bis*(C),[64] although they were not ultimately referred to in the final judgement. Rule 92 *quater* saw the admission of two witness statements for the prosecution in the *Taylor* trial before the SCSL. Admissibility under Rule 92 *quater* before the ICTY was an altogether more common occurrence. It is notable that one of the most criticized rules in the ICTY's procedural framework, Rule 92 *quinquies*,[65] was not used in any of the cases observed.

3. Weight given to written witness statements

Having discussed the volume of materials admitted under the various evidential rules, it must be noted that most of the judgments analysed emphasized the principle that admissibility had no bearing on weight; in other words, the fact that a piece of evidence was admitted to the record did not mean that the evidence in question would be relied upon in the final judgment.[66] This section seeks to adduce the ultimate value given to different forms of witness testimony introduced to the evidential record under various rules. This was not a straightforward task, not least because many of the statements are redacted on the court's database and because the witnesses are referred to by one name at one point in proceedings, and by a pseudonym at other junctures. Moreover, it was difficult to measure the precise weight given to particular pieces of testimony, given that the evidential record is assessed 'as a whole',[67] and there is no obligation on the Trial Chamber to address each relevant piece of admitted evidence in its judgment.[68] For the purposes of the present analysis, if a piece of testimony was referenced in the trial judgment, and the judgment did not go on to later disregard that piece of testimony or express doubts as to the credibility of the witness,[69] it was taken that the Chamber had accepted the veracity of the testimony's contents. There is a further difficulty in this endeavour, insofar as it risks prioritizing form over substance. The assumption here is not that oral testimony is inherently more reliable than its written counterpart,[70] rather that viva voce testimony allows the Chamber to assess the credibility of the witness in greater detail than if their witness statement was introduced, even with limited cross-examination under Rule 92 *ter*.

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64 *Karemera* Written Statements Decision, *supra* note 45, at paras. 105–111.

65 See e.g., Rohan, *supra* note 18, at 523–4.

66 E.g. *Taylor* Judgement, *supra* note 20, para. 202; *Đorđević* Judgement, *supra* note 22, para. 12; *Gatete* Judgement, *supra* note 21, para. 18; *Gotovina et al.* Judgement, *supra* note 22, at para. 45.

67 See below, section 3.2.

68 *Prosecutor v. Limaj*, Judgement, IT-03-66-A, A. Ch., 27 September 2007 ('*Limaj* Appeals Judgement'), at para. 86.

69 The Appeals Chamber in *Kvočka* noted that not every inconsistency needed to be addressed; if an inconsistency existed within the witness's testimony or a contrary piece of evidence was presented but not mentioned in the Trial Chamber's judgement, it was to be presumed that the Chamber had evaluated the evidence as a whole in light of this and weighed the evidence accordingly. *Prosecutor v. Kvočka*, Judgement, IT-98-30/1-A, A. Ch., 28 February 2005, at para. 23.

70 On countless occasions, the oral testimony of a witness was discounted as lacking in credibility for reasons outlined by the Trial Chamber. To give but one example, in the *Đorđević* Judgement, *supra* note 22, para. 101, the chamber found it 'incredible' that anti-terrorism strategies ('the single most pressing security issue … at the time') undertaken in Kosovo were never discussed in the Collegium of the Minister, despite several witnesses testifying that this was the case.

In spite of these limitations, there are still a number of important questions that can be answered by the present analysis, such as whether chambers view oral testimony as more valuable than written testimony, whether testimony which has not been subjected to cross-examination can be corroborated by another piece of unexamined testimony as proof of a matter, and whether the freer approach to admissibility adopted by some chambers is an adequate match to the assessment of evidence on the basis of the 'totality of the evidence'. It will be shown that there is a large degree of inconsistency in the answers to these questions, depending on the chamber. It shall also be submitted that a failure to pinpoint the precise weight given to a piece of evidence might lead to misunderstandings at later stages of proceedings, and this is partly illustrated by the *Gotovina* and *Perišić* appeal judgements.

3.1. The continued value of oral testimony

Almost all of the judgements from the ICTR studied reiterated a preference for oral witness testimony and recalled the principle that prior witness statements should not normally be admitted as proof of their contents.[71] This position is of little surprise as the preference for orality remains in the Tribunal's Rules of Procedure and Evidence.[72] The trial chamber in *Nyiramasuhuko* noted that this preference was 'general, though not absolute'.[73] The preference for oral testimony was not alien to the other tribunals which have abolished the preference for orality in their rules. In *Gotovina*, the case which made the most extensive use of Rule 92 *ter*, the Chamber 'expressed a strong preference that … important evidence central and critical to the case be elicited orally from a witness in court'.[74] The *Gotovina* Trial Chamber adopted a meticulous approach to Rule 92 *ter* statements; almost universally, when a statement admitted under Rule 92 *ter* was referred to,[75] the part of the transcript where that witness testified live in court was also referenced, often along with other corroboratory material. When parts of the 92 *ter* statements were not attested to in later live testimony, they were admitted to the record under Rule 89(C) and the inconsistency would be taken into account when deciding the relevance and probative value of the prior inconsistent statement.[76]

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71 *Ndahimana* Judgement, *supra* note 21, para. 45; *Nyiramasuhuko et al.* Judgement, *supra* note 21, at para. 177.

72 Rule 90(A), Rules of Procedure and Evidence, UN Doc. ITR/3/Rev.21, International Criminal Tribunal for Rwanda, 9 February 2010. The principle of orality has been defined as 'a preference for the oral introduction of evidence'. *Prosecutor v. Halilović*, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, IT-01-48-AR73.2, A. Ch., 19 August 2005, at para. 17; *Prosecutor v. Đorđević*, Decision on Prosecution's Motion to Admit Exhibits from the Bar Table, IT-05-87/1-T, T. Ch. II, 28 April 2009, at para. 11.

73 *Nyiramasuhuko et al.* Judgement, *supra* note 21, at para. 181.

74 *Gotovina et al.* Judgement, *supra* note 22, at para. 16. Compare *Prosecutor v. Gotovina et al.*, Transcript, IT-06-90-T, T. Ch. I, 24 April 2008, 2205. 'The Trial Chamber expects the Prosecution … to clarify as necessary portions of the statement, without eliciting the same evidence *viva voce*.'

75 As was the case in over 5,000 of the 8,000 footnotes in the two-volume judgement.

76 *Prosecutor v. Gotovina et al.*, Guidance on the Admissibility into Evidence of Unattested Parts of Rule 92 *ter* Statements as Previous Inconsistent Statements, IT-06-90-T, T. Ch. I, 30 March 2010, at para. 10; *Gotovina et al.* Judgement, *supra* note 22, at para. 19. The 30 March 2010 decision explicitly mentions the allegations made by witness Petar Pašić that his written statements were not an accurate account of what he said at the time. He later acknowledged that the changes made to his statements were either because the statements did not reflect what he said, or were comments that he made at the time without giving them much thought, which is obviously distinct from incorrectly reported statements. However, when pressed, the witness was

By contrast, the *Perišić* Trial Chamber explicitly stated that Rule 92 *ter* testimony was considered in the same manner as viva voce testimony would have been.[77] It is difficult to trace whether this was the case, because the prosecution's motions on the admissibility of evidence under Rule 92 *ter* on the ICTY's court records database lists the witnesses in confidential annexes.[78] The only exception is witness Koster, a DutchBat officer whose account from the *Karadžić and Mladić* transcript of the transfer of civilians from the Potočari compound by Mladić and his army and of attacks on Dutchbat forces by VRS troops was referenced without further corroboration. The witness was cross-examined on 2 and 4 December 2008, but the transcript of this cross-examination is not referred to in the Trial Chamber judgement. In the light of the often inadequate amount of time given to parties to prepare for cross-examination, as discussed above,[79] and given that the cross-examination without examination-in-chief gives the Chamber less time to evaluate the credibility of the witness, one wonders whether the *Gotovina* principle that important evidence should be elicited live in court would be preferable.

When it came to the weight to be attached to Rule 92 *bis* evidence, the *Perišić* Trial Chamber stated that there was no reason to presume as a general rule that Rule 92 *bis* testimony should bear less weight than viva voce testimony.[80] The witness statements admitted under this rule were the only eyewitness testimony of the incident and were thereby crucial to the finding of fact that a modified air bomb exploded at Bunićki Potok Street on 1 July 1995, a finding also supported by contemporaneous documentary evidence and photographs.[81] It is not suggested that the finding in this regard was erroneous or that the Chamber gave undue weight to the Rule 92 *bis* statements, but the Chamber could have been more explicit in stating that evidence that was not subject to cross-examination would be weighed very carefully in the light of other evidence on the record and would need corroboration for proof of its contents.[82] The *Perišić* Trial Chamber also stated that corroboration was not a formal requirement for Rule 92 *quater* testimony,[83] illustrating that the Chamber attached less significance to the principle of orality than did the *Gotovina* Chamber. However, the Chamber did later appear to attach some weight to corroboration through oral

unable to report which of the changes were made because the statement was incorrect and which were made because he had reconsidered his comments: *Prosecutor v. Gotovina et al.*, Transcript, IT-06-90-T, T. Ch. I, 12 October 2009, 22937–40. In any event, the unattested parts of Pašić's testimony do not appear to have been referenced by the Trial Chamber in its judgement.

77 *Perišić* Judgement, *supra* note 22, at para. 42.

78 *Prosecutor v. Perišić*, Report on Rule 92 *ter* Motion, IT-04-81, 10 July 2008; *Prosecutor v. Perišić*, Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Confidential Annex A, IT-04-81, 1 May 2007; *Prosecutor v. Perišić*, Prosecution's Supplement to Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Confidential Annex A, IT-04-81, 12 June 2007.

79 See *Prosecutor v. Munyakazi*, *supra* note 56, and accompanying text. See also *Prosecutor v. Perišić*, Transcript, IT-04-81-T, T. Ch. I, 20 May 2009, 6356, where defence counsel Mr Guy-Smith remarked, 'I think they [the prosecution] changed … [the status of the witness] again. Yesterday's *viva voce* is today's 92*ter*', indicating that the form in which testimony is presented can change sporadically and without much prior notice.

80 *Perišić* Judgement, *supra* note 22, at para. 41.

81 *Perišić* Judgement, *supra* note 22, at paras. 416–435; *Prosecutor v. Perišić*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, IT-04-81-T, T. Ch. I, 2 October 2008.

82 The *Perišić* Judgement, *supra* note 22, at para. 41, does state that the fact that 92 *bis* testimony was not cross-examined was taken into account and that the Chamber awarded 'appropriate weight' to it accordingly.

83 *Perišić* Judgement, *supra* note 26, at para. 44.

testimony as regards Rule 92 *quater* witnesses. Witness Deronjić's account was taken as a credible and reliable account, given that it was corroborated by the testimony of witnesses Nikolić and Vasić, whom the 'Chamber had the benefit of hearing the testimony of' in court.[84]

It could be argued that the *Perišić* Trial Chamber's difference in approach on the weight to be given to Rule 92 *bis* testimony compared to the weight to be given to Rule 92 *quater* testimony is warranted, given that the latter can go towards proving the acts and conduct of the accused, while Rule 92 *bis* evidence cannot. However, it is argued that Rule 92 *bis* is more suitable as corroboration of oral evidence, and this tended to be how Rule 92 *bis* testimony was used in the judgments studied. A notable exception was observed in *Karemera*, however, where the only evidence of rape in the Butare *préfecture* that had been introduced by the prosecution was a single 92 *bis* witness statement.[85] The charges of rape at the other crime bases were supported by a mix of oral testimony, written statements, and adjudicated facts from the *Akayesu*, *Niyitegeka*, and *Musema* trials which the Trial Chamber had taken judicial notice of.[86] The Chamber held that the single statement had been 'corroborated by the pattern of evidence from the other *préfectures*'.[87] The Chamber was further swayed by the fact that the defence had 'not sought to rebut her [the Rule 92 *bis* witness's] evidence'.[88] This appears to be a very dangerous precedent indeed as regards both the standard and burden of proof. It is something of a stretch to suggest that just because a pattern of conduct was proven in regions X and Y, this goes towards proving the same conduct in region Z. Furthermore, the fact that the Chamber was swayed by the defence's failure to rebut a single piece of evidence may be taken as imposing a positive burden on accused persons to counter the evidence against them, which goes beyond the presumption-of-innocence principle that the burden of proof rests with the prosecution.

The *Gotovina* judgement identified a number of factors for assessing the weight of Rule 92 *quater* testimony; these included the circumstances in which the statements were made or recorded, whether they were consistent with other statements, and whether they had been subject to cross-examination.[89] Unfortunately, perhaps, these factors were not explicitly worked through by the *Đorđević* Trial Chamber when it assessed witness Morina's 92 *quater* testimony, taken from the *Milošević* transcript.[90] This led the defence to claim in its appeal brief that the only evidence on the burning of a mosque at Landovica/Landovicë was Morina's 92 *quater* statement.[91] This was not correct, as the testimony was in fact consistent with the inspection carried out by witness Riedlmayer,[92] but perhaps this could have been made even more explicit

84 Ibid., at para. 667.
85 *Karemera et al.* Judgement, *supra* note 21, at paras. 1408–1410.
86 Ibid., at paras. 1337–1424.
87 Ibid., at para. 1411.
88 Ibid.
89 *Gotovina et al.* Judgement, *supra* note 22, at para. 16.
90 *Đorđević* Judgement, *supra* note 22, at paras. 1817–1819.
91 *Prosecutor v. Đorđević*, Vlastimir Đorđević's Appeal Brief, IT-05-87/1-A, 15 August 2011, at para. 347.
92 *Đorđević* Judgement, *supra* note 22, at para. 1818.

by the Trial Chamber, and emphasis could have been drawn to the witness's oral testimony, in order to avoid such a critique of its evidentiary findings.

3.2. The 'totality of the evidence' approach

One of the arguments in favour of a broad admissibility regime is that it allows judges to make an assessment based on the 'big picture' which is sketched through thousands of individual pieces of evidence. The 'totality of the evidence' approach allows judges to come to a judgment based on a holistic assessment of the evidential record as a whole. The other side of the coin, however, is that it is often difficult to assess exactly how much weight is given to a piece of evidence in the absence of an explicit pronouncement on the credibility or reliability of that witness or evidence. In *Đorđević*, for example, following a pronouncement that, on occasion, the chamber accepted evidence that contained inconsistencies or contradictions while rejecting evidence that was apparently consistent with other pieces of evidence, the chamber claimed to have 'acted in light of the other evidence on the issue'.[93] Similar approaches to the evidential record 'as a whole' were identified in *Nyiramashuko*[94] and *Perišić*.[95]

The right to a reasoned verdict does not stretch to a right to know whether and on what basis a trial chamber found one piece of evidence to be more reliable or authentic than another piece,[96] and the Appeals Chamber of the ICTY has explicitly stated that the standard of proof should not be based on a piecemeal approach, but rather on the totality of the evidential record.[97] However, difficulties can arise at the appeals stage of proceedings when the Appeals Chamber expresses the view that a certain piece or pieces of evidence have not been adequately addressed. In the *Perišić* appeals judgement, for example, the Chamber referred to the 'paucity' of evidence supporting the finding on the accused's ability to issue commands,[98] and its belief that the Trial Chamber failed to adequately take the testimony of witnesses Rašeta and Orlić into account.[99] The Trial Chamber judgement had noted the testimony of both witnesses,[100] but had come to a contrary conclusion based on other evidence on file.[101] It will be recalled that:

> A Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, 'as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.' Such disregard is shown 'when evidence which is clearly relevant … is not addressed by the Trial Chamber's reasoning.'[102]

93 Ibid., at para. 18.
94 *Nyiramasuhuko et al.* Judgement, *supra* note 21, at paras. 190, 343, 391, and 569.
95 *Perišić* Judgement, *supra* note 22, at para. 41
96 *Prosecutor v. Brđanin*, Judgement, IT-99-36-A, A. Ch., 3 April 2007, at paras. 39–40.
97 *Prosecutor v. Halilović*, Judgement, IT-01-48-A, A. Ch., 16 October 2007, at para. 128.
98 *Perišić* Appeals Judgement, *supra* note 24, at para. 95.
99 Ibid., at paras. 90–96.
100 *Perišić* Judgement, *supra* note 22, at para. 1720.
101 Ibid., at para. 1784.
102 *Limaj* Appeals Judgement, *supra* note 68, at para. 86.

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By noting the contrary evidence and basing its conclusions on the totality of the evidence, the *Perišić* Trial Chamber had clearly addressed the relevant evidence and had not shown complete disregard for it in a manner that would constitute an error of law. The testimony of Orlić testified that orders were not received from Perišić, but the majority of the Chamber concluded that even if the accused was not in a position to issue orders, this did not discount the existence of other means to control subordinates.[103] Yet, the Appeals Chamber was of the view that the Trial Chamber's 'failure to explicitly discuss and analyse [these witnesses'] evidence' constituted an error of law, and proceeded to conduct a *de novo* review of the evidence on that basis.[104] In a very similar manner, the *Gotovina* Appeals Chamber felt that the Trial Chamber's finding on the occurrence of indiscriminate attacks in Knin, in particular, was not 'adequately supported' by the evidence, in light of its finding that the 200-metre standard was incorrect.[105] But, as Judge Agius pointed out in his dissenting opinion, the Appeals Chamber's approach represented an 'overly compartmentalised and narrow view'[106] that failed to acknowledge many key pieces of evidence,[107] leading to its apparent conclusion that when one finding cannot be upheld on appeal, the rest of the evidential record must collapse beneath it like a house of cards. The approach of the Appeals Chambers in both cases perhaps raises broader questions about the Appeals Chamber's function and standard of review, but for the purposes of the present article, both decisions show dubious interpretations of the 'totality of the evidence' approach. The *Perišić* appeals judgement, in particular, seems to suggest that it is not sufficient to acknowledge contrary evidence on the record and base a finding on other evidence; the Appeals Chamber required an explicit discussion and analysis of contrary evidence, with full elucidation as to why a witness's testimony on one point was not relied upon.[108] The approach of the *Gotovina* and *Perišić* Appeals Chambers would appear to constitute a move away from the well-established position that Trial Chambers are best placed to assess the evidential record as a whole, and by consequence, their findings should not be lightly overturned.[109]

Later Appeals Chambers' interpretations aside, the 'totality of the evidence' approach does raise a number of further questions. The first is whether the admissibility rules really align with this approach. Many of the admissibility rules on written witness testimony in lieu of viva voce evidence were introduced with a view to aiding expedience, but have ironically on occasion added an extra layer of complexity in calling for submissions on whether a statement goes to the acts and conduct of

103 *Perišić* Judgement, *supra* note 22, at para. 1773. Judge Moloto dissented on this point, but agreed with the Majority on the accused's failure to punish.
104 *Perišić* Appeals Judgement, *supra* note 24, at paras. 95–96.
105 *Gotovina* Appeals Judgement, *supra* note 24, at para. 66.
106 Ibid., Dissenting Opinion of Judge Carmel Agius, at para. 3.
107 Ibid., at paras. 19–24.
108 *Perišić* Appeals Judgement, *supra* note 24, at para. 95.
109 See also, *Gotovina* Appeals Judgement, *supra* note 24, Dissenting Opinion of Judge Carmel Agius, at paras. 26–27. ('The Majority, which – unlike the Trial Chamber – did not have the benefit of hearing all of the evidence, simply discards the considerations and assessments of the Trial Chamber in a manner which I consider to be unorthodox and unacceptable.')

the accused, whether cross-examination would be in the interests of justice, and so forth, to such an extent that at times, it would have been more expedient to call the witness to testify in person. In the light of this paradox, we might question the wisdom of a complex admissibility process that has no bearing whatsoever on weight, and that allows pieces of evidence that have had to jump through numerous admissibility hurdles to be completely disregarded in the final judgment. The 'totality of the evidence' approach might be well suited to a legal culture that embraces the free admission of almost all evidence, but it appears to be at odds with a statutory framework that demands that certain criteria be met before a piece of evidence can even come before the judges.

The observer might also question the extent to which a 'totality of the evidence' approach can be implemented in a context where the totality of the evidence comprises tens of thousands of pages of transcript, thousands of pieces of evidence, and a trial period that often stretches into the hundreds of days. For example, as well as the witnesses outlined in Table 1, the *Đorđević* Trial Chamber also received 2,518 pieces of documentary evidence 'from the bar table' and the trial record encompasses 14,534 pages of transcript. The *Lubanga* judgment illustrates the practical difficulties in this regard: there was so much evidence admitted before the chamber that the parties were asked to make explicit which witnesses and pieces of testimony they wanted the Trial Chamber to focus on in making its judgement, and they were warned that if they failed to do so, they ran the risk of having relevant pieces of evidence overlooked.[110] Similarly, the *Gotovina* judgement placed a great degree of reliance on evidence emphasized by the parties in their closing submissions,[111] illustrating that, in spite of more liberal rules on the admissibility of evidence, proceedings continue to be party-driven, as opposed to judge-driven.

This section illustrated that the principle of orality is given varying degrees of importance, depending on the tribunal and the composition of the chamber. Some chambers placed huge emphasis on the preference that testimony should be elicited orally, while others had no objection, in principle, to testimony which had not been subject to cross-examination being given equal weight to viva voce testimony. A greater degree of consistency on this question, and on the requirements for corroboration of untested witness testimony, would assist in clarifying the evidentiary principles of international criminal procedure as the ad hoc tribunals' mandates come to an end and observers seek to assess their legacy. When it comes to the impact of certain pieces of evidence on the final judgment, we see that it becomes difficult to adduce the precise weight given to individual pieces of evidence, given that the evidential record is said to have been assessed as a whole. This 'totality of the evidence' approach can give rise to issues at the appeals stage of proceedings, when the Appeals Chamber feels that a certain piece of evidence has not been duly considered and enters into a *de novo* assessment of the evidential record as a consequence. Furthermore, the compatibility of the 'totality of the evidence' approach with the more

110 *Lubanga* Judgement, *supra* note 26, at paras. 95–97.
111 *Gotovina et al.* Judgement, *supra* note 22, at para. 47; *Prosecutor v. Gotovina*, Transcript, IT-06-90-T, T. Ch. I, 26 March 2010, at 28048.

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liberal admissibility rules may be called into question, given the sheer volume of evidence before the Trial Chambers and the fact that the admissibility regime falls short of a free proof-approach.

4. Conclusion

This article sought to fill a gap in the literature on written witness testimony in lieu of oral testimony at the ICTY, the ICTR, and the SCSL by assessing the broad picture of admissibility decisions on written witness statements, and the ultimate weight given to such statements. The article did not claim to give an overall assessment of the trajectory of the move towards increased use of written testimony over time, but rather a snapshot of the use and impact of new admissibility rules at one point in time. Further research would be needed to assess the overall impact of these new rules.[112]

The statistics produced do show that, perhaps surprisingly, the more flexible rules on written witness testimony that have been introduced in recent years have been used relatively infrequently, particularly at the ICTR and the SCSL. This suggests that some of the criticisms of the newer rules may have been premature. Furthermore, it was shown, evidence introduced under some of the newer rules which do not technically require cross-examination were still subject to cross-examination, illustrating a cautious approach to written witness testimony.

Further caution was observed with regard to the weight given to oral testimony vis-à-vis written testimony, but the chambers' approaches to the principle of orality was at times inconsistent. Some insisted that there was no reason to assume that written testimony should be given less weight than oral testimony, although in most instances, written testimony was corroboratory to other evidence on the record. One worrying incident from *Karemera* was reported, where a single Rule 92 *bis* statement was used as proof of a matter, seemingly influenced by the fact that it was consistent with evidence from other prefectures and the fact that the defence had not rebutted the testimony.

The evidential record is weighed by Trial Chambers as a whole, and Appeals Chambers should be slow to overturn findings of fact, given that the Trial Chamber is in the best position to come to conclusions based on an overall impression from the evidence placed before it. However, recent Appeals Chamber decisions suggest that Trial Chambers may need to be more explicit as to the precise value given to individual pieces of evidence and the reasons for doing so. Given that judgments often run to several thousand pages already, this will be a time-consuming and difficult exercise. The broad admissibility rules studied in this article may not aid expedience of trial proceedings, given the debates that tend to ensue on matters such as whether the evidence goes to the acts and conduct of the accused, whether the witness is truly unavailable, and so on. Furthermore, given the huge volume

112 The author has been granted a British Academy Quantitative Skills Acquisition Award to carry out an in-depth analysis of evidence before the International Criminal Tribunal for the former Yugoslavia, which will hopefully yield more in-depth results.

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of evidence on record, chambers showed a tendency to request that parties point them to the most relevant pieces of evidence in their closing briefs or submissions. This shows the impossibility of an assessment that truly takes the totality of the evidence into account, without some direction from the parties. These and other issues discussed in the present article show that the international criminal tribunals studied have yet to strike the perfect equilibrium between trial efficiency and the most complete presentation of evidence, and may suggest a need to re-evaluate the operation of rules relating to written witness testimony in international criminal trials.

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