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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-98-29-A
		Date:	30 November 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Mr. Mark Ierace
Ms. Michelle Jarvis
Ms. Shelagh Mc Call
Ms. Anna Kotzeva

Counsel for Stanislav Galić:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

of which criminalise terror against the civilian population, and provisions of Yugoslavia's 1988 "FArmed Forcesğ Regulations on the Application of International Laws of War",[304] which incorporated the provisions of Additional Protocol I, following Yugoslavia's ratification of that treaty on 11 March 1977. Those provisions not only amount to further evidence of the customary nature of terror against the civilian population as a crime, but are also relevant to the assessment of the foreseeability and accessibility of that law to Galić.[305]

97. In addition to national legislation, the Appeals Chamber notes the conviction in 1997 by the Split County Court in Croatia for acts that occurred between March 1991 and January 1993, under, *inter alia*, Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, including "a plan of terrorising and mistreating the civilians", "open[ing] fire from infantry arms [...] with only one goal to terrorise and expel the remaining civilians", "open[ing] fire from howitzers, machine guns, automatic rifles, anti-aircraft missiles only to create the atmosphere of fear among the remaining farmers", and "carrying out the orders of their commanders with the goal to terrorise and threaten with the demolishing of the Peruča dam".[306]

98. In light of the foregoing, the Appeals Chamber finds, by majority, Judge Schomburg dissenting, that customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, from at least the period relevant to the Indictment.

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to [...] the application of measures of intimidation and terror [...] shall be punished by imprisonment for not less than five years or by the death penalty".

[304] Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, ex. P5.1. This manual provides *inter alia* that "Serious" violations of the laws of war are considered criminal offences (p. 14), considers as war crimes "attack on civilians F...ğ inhuman treatment Fof civiliansğ inflicting great suffering or injury to bodily integrity or health F...ğ application of measures of intimidation and terror" (p. 18, emphasis added), mentions explicitly under the part dealing with means and methods of combat that "Attacking civilians for the purpose of terrorising them is especially prohibited." (p. 29), and envisages that that the perpetrators of war crimes "may also answer before an international court, if such a court has been established" (p. 15).

[305] *Ojdanić* Appeal Decision on Joint Criminal Enterprise, para. 40. *See also Had`ihasanović et al.* Appeal Decision on Jurisdiction in Relation to Command Responsibility, para. 34.

[306] *Prosecutor v. R. Radulović et al.*, Split Country Court, Republic of Croatia, Case No. K-15/95, Verdict of 26 May 1997. The Appeals Chamber also notes the reference made by the Trial Chamber to the first conviction for terror against the civilian population, delivered in July 1947 by a court martial sitting in the Netherlands East Indies in the *Motomura et al.* case; the court martial convicted 13 of the 15 accused before it of "systematic terrorism practised against civilians" for acts including unlawful mass arrests. *See* Trial Judgement, paras 114-115, referring to *Trial of Shigeki Motomura and 15 Others*, in *Law R. Trials War Crim.*, Vol. 13, p. 138.

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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-94-1-T

Date: 5 August 1996

Original: English & French

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Ninian Stephen
Judge Lal C. Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **5 August 1996**

PROSECUTOR

v.

DUŠKO TADIĆ a/k/a"DULE"

DECISION ON DEFENCE MOTION ON HEARSAY

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Steven Kay
Ms. Sylvia De Bertodano

I. INTRODUCTION

Pending before the Trial Chamber is the Motion on Hearsay ("Motion") filed by the Defence on 26 June 1996 pursuant to Rule 54 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Prosecution filed its response on 10 July 1996. Oral argument was heard on 16 July 1996.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and the oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. The Pleadings

1. This Motion raises the issue of the admissibility of hearsay evidence during trial before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"). In bringing this Motion, the Defence contends that the admission of hearsay evidence would violate the right of the accused to examine the witnesses against him provided by in Article 21(4)(e) of the Statute of the International Tribunal ("Statute"). On this basis, the Defence avers that the International Tribunal should refuse to admit evidence directly implicating the accused in the crimes charged unless it first finds that the probative value of this evidence substantially outweighs its prejudicial effect. Further, the Defence asserts that the Trial Chamber should rule on the admissibility of such statements without hearing its content. Instead, the Defence requests that the Trial Chamber make such a ruling only after a review of the circumstances under which the evidence was received.

2. While acknowledging that the International Tribunal is not bound by any national rules of evidence, the Defence asserts that the Rules are more akin to the adversarial common law system and that most such systems contain a general exclusionary rule against hearsay. Even accepting that there are exceptions to this general rule because some types of hearsay may have sufficient probative value to be admissible - for example, instances of excited utterances and dying declarations - the Defence argues that the Trial Chamber should not admit any hearsay evidence unless the Prosecution first demonstrates that the evidence has substantial probative value that outweighs any prejudicial effect on the accused.

3. In opposition to the Defence, the Prosecution argues that the International Tribunal's omission of a Rule excluding hearsay evidence was clearly deliberate and is consistent with both the International Tribunal's procedure of trials in which judges are the finders of fact, and with the civil law system in which the basic rule is that all relevant evidence is admitted. The Prosecution contends that the Judges of the International Tribunal are fully capable of determining the weight that should be afforded to such evidence. In the Prosecution's view, the

position of the Defence extends beyond even most common law systems in that these systems allow the admission of hearsay evidence that meets certain exceptions without requiring a further showing. Finally, the Prosecution maintains that the Defence's arguments run contrary to the spirit and intent of the Rules and that adoption of its requests would necessitate a formal amendment requiring approval of the Judges of the International Tribunal.

B. Analysis

4. The power of the Trial Chamber to regulate the conduct of the parties and the presentation of evidence during trial arises from the provisions of the Statute and the Rules. Relevant to the Motion under review is Article 21 of the Statute, which provides for the rights of the accused. The relevant portion states:

> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> . . .
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> . . .

5. The International Tribunal's Rules, originally adopted in February 1994, govern the admission of evidence. *See generally* Rules 89-98. Despite the adoption of several amendments to the Rules since their creation, there is no Rule that calls for the exclusion of out-of-court, or hearsay, statements.

6. Rule 89, entitled *General Provisions*, reads as follows:

> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

> (C) A Chamber may admit any relevant evidence which it deems to have probative value.
>
> (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

Rule 95 provides additional guidance regarding the admissibility of evidence. This Rule, entitled *Evidence Obtained by Means Contrary to Internationally Protected Human Rights,* declares:

> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

7. It is clear from these provisions that there is no blanket prohibition on the admission of hearsay evidence. Under our Rules, specifically Sub-rule 89(C), out-of-court statements that are relevant and found to have probative value are admissible. Although Sub-rule 89(A) clearly provides that the Trial Chamber is not bound by national rules of evidence, in determining the validity of the Defence Motion, it is instructive to review the practice regarding admissibility of evidence in civil and common law systems.

8. In common law systems, evidence that has probative value is generally defined as "evidence that tends to prove an issue." Henry C. Black, *Black's Law Dictionary* 1203 (6th ed. 1991). Relevancy is often said to require implicitly some component of probative value. For example, the Supreme Court of Canada, in *R. v. Cloutier,* relied on the following statement of Sir Rupert Cross:

> "For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter."

R. v. Cloutier, 2 S.C.R. 709, 731 (Canada Sup. Ct. 1979) (*quoting* Sir Rupert Cross, *Cross on Evidence* 16 (4th ed. 1974)). Another commentator, in a discussion of United States law, expressed a similar opinion:

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. . . . The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove.

Charles T. McCormick, *McCormick on Evidence* 339-40 (4th ed. 1992).

9. Thus, it appears that relevant evidence "tending to prove an issue", must have some component of reliability. In some common law systems, the general exclusion of hearsay evidence is based upon its presumed lack of reliability. However, this is not an absolute rule. For example, the United States Federal Rules of Evidence provides for twenty-seven specific situations in which hearsay evidence is admissible. *See* U.S. FED. R. EVID. 803-04. In addition to the circumstances explicitly provided for, the United States rules allow for the admission of statements

> not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

U.S. FED. R. EVID. 803(24); *see also* U.S. FED. R. EVID. 804(b)(5). The Evidence Act of the Laws of Malaysia, while not explicitly defining hearsay, also stipulates the circumstances in which statements by persons who are unavailable to be called as witnesses are declared relevant and thus admissible. *See* Malay. EVID. ACT, 1950 § 32 (rev. 1971).

10. Despite these relatively strict limitations on the admission of hearsay, judges in non-jury common law cases often take a slightly different approach:

> Where the admissibility of evidence is . . . debatable, the contrasting attitudes of the appellate courts towards errors in receiving and those excluding evidence seem to support the wisdom of the practice adopted by many experienced trial judges in non-

> jury cases of provisionally admitting debatably admissible evidence if objected to with the announcement that all questions of admissibility will be reserved until the evidence is all in.

McCormick on Evidence 86-87.

11. In civil law systems, however, there exists no general rule against the admissibility of hearsay evidence. Out-of-court statements are included in a case file of all evidence, prepared by the investigating magistrate, which is considered fully by the judges during the trial proceeding. This difference in criminal procedure between the civil and common law systems is explained primarily by the inquisitorial nature of the civil system, especially in the pre-trial phase, and the absence of a jury. Procedure in these systems, as one commentator noted when discussing the French legal system, is guided by the principle that "[a]ll forms of evidence are admissible as long as they do not conflict with the ethics of [the] system of criminal procedure." *Criminal Procedure Systems in the European Community* 118 (Christine Van Den Wyngaert et al., eds. 1993). Similarly, in criminal matters in Belgium, "the facts may be proven by all possible means" and the trial judge need only rely on his "intimate conviction" regarding whether a fact has been proven after assessing the weight of the evidence presented. *Id.* at 20-22.

12. Article 6(3)(d) of the European Convention on Human Rights provides for the right of the accused to examine witnesses against him. In interpreting this provision, the European Court of Human Rights has held that while the use of witness statements made out of court does not, in and of itself, violate this provision, "[a]s a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him." *Delta v. France*, 191-A Eur. Ct. H.R. (ser. A) 15 (1990). However, the European Court of Human Rights has not directly addressed hearsay as such, and indeed, has clearly stated that the admissibility of evidence is primarily a matter of regulation under national law. *Schenk v. Switzerland*, 145 Eur. Ct. H.R. (ser. A) 29 (1988).

13. In sum, the prohibition on the admissibility of hearsay that fails to meet a recognised exception is a feature of criminal procedure primarily limited to common law systems. In the

civil law system, the judge is responsible for determining the evidence that may be presented during the trial, guided primarily by its relevance and its revelation of the truth.

14. The International Tribunal, with its unique amalgam of civil and common law features, does not strictly follow the procedure of civil law or common law jurisdictions. In view of this, the Trial Chamber recognizes the value to the parties of knowing the standards it will apply in determining whether hearsay evidence is admissible. Moreover, in this first trial before the International Tribunal, an analysis of the Rules will further the ever-present goal of transparency of the proceedings.

15. The Trial Chamber is bound by the Rules, which implicitly require that reliability be a component of admissibility. That is, if evidence offered is unreliable, it certainly would not have probative value and would be excluded under Sub-rule 89(C). Therefore, even without a specific Rule precluding the admission of hearsay, the Trial Chamber may exclude evidence that lacks probative value because it is unreliable. Thus, the focus in determining whether evidence is probative within the meaning of Sub-rule 89(C) should be at a minimum that the evidence is reliable[1].

16. In evaluating the probative value of hearsay evidence, the Trial Chamber is compelled to pay special attention to indicia of its reliability. In reaching this determination, the Trial Chamber may consider whether the statement is voluntary, truthful, and trustworthy, as appropriate.

17. The Defence, however, argues that the Trial Chamber should exclude hearsay evidence implicating the accused in one of the crimes charged unless it finds that its probative value substantially outweighs its prejudicial effect. The Trial Chamber is asked to balance hearsay evidence with the possible prejudicial effect on the Defence before ruling on its admissibility. Further, the Defence would require that the Trial Chamber rule on the admission of such evidence without actually hearing its content. This procedure, while possibly appropriate if trials before the International Tribunal were conducted before a jury, is not warranted for the

[1] Rule 95, while concerned with the methods by which evidence is obtained, also allows for its exclusion if it is unreliable.

trials are conducted by Judges who are able, by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight. Thereafter, they may make a determination as to the relevancy and the probative value of the evidence.

18. Moreover, Sub-rule 89(D) provides further protection against prejudice to the Defence, for if evidence has been admitted as relevant and having probative value, it may later be excluded. Pursuant to this Sub-rule, the trial Judges have the opportunity to consider the evidence, place it in the context of the trial, and then exclude it if it is substantially outweighed by the need to ensure a fair trial.

19. Accordingly, in deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability. In doing so, the Trial Chamber will hear both the circumstances under which the evidence arose as well as the content of the statement. The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognised by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. In bench trials before the International Tribunal, this is the most efficient and fair method to determine the admissibility of out-of-court statements.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence and

PURSUANT TO RULE 54,

BY MAJORITY DECISION HEREBY DENIES THE MOTION.

Done in English and French, the English text being authoritative.

Gabrielle Kirk McDonald
Presiding Judge

Judge Stephen appends a Separate Opinion to this Decision.

Dated this fifth of August 1996
At The Hague
The Netherlands

[Seal of the Tribunal]

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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations ofInternational Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

Case No: IT-95-14-T

Date: 21 January 1998
English
Original: French

IN THE TRIAL CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Fouad Riad
Judge Mohamed Shahabuddeen

Registrar: **Mr. Jean-Jacques Heintz, Deputy Registrar**

Decision of: **21 January 1998**

THE PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

DECISION ON THE STANDING OBJECTION OF THE DEFENCE TO THE ADMISSION OF HEARSAY WITH NO INQUIRY AS TO ITS RELIABILITY

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Counsel for the Accused

Mr. Anto Nobilo
Mr. Russell Hayman

1. On 30 September 1997, Defence Counsel for Tihomir Blaškić (hereinafter "the Defence") submitted a Motion objecting in principle to the admission of hearsay evidence with no inquiry as to its reliability (hereinafter "the Motion"). The Prosecutor presented her arguments in her Response of 30 October 1997 (hereinafter "the Response"). On 19 November 1997, the Defence filed a Reply (hereinafter "the Reply"). Lastly, the parties debated the question during a public hearing on 28 November 1997 (hereinafter "the hearing").

The Trial Chamber will first analyse the claims of the parties and then discuss all the disputed points.

I. CLAIMS OF THE PARTIES

2. In its Motion, the Defence raises an objection in principle to the admission of hearsay evidence, with no inquiry as to its reliability, in particular, following the depositions of two witnesses who testified before the Trial Chamber on 26 and 29 September 1997.

The Defence invokes the accused's fundamental right to cross-examine the Prosecution witnesses, as provided in article 21(4)(e) of the Statute of the Tribunal (hereinafter "the Statute"). Basing itself *inter alia* on the case-law of the European Court of Human Rights, the Defence recalled that what is at stake is "a basic tenet of both national and international judicial systems". The Defence, therefore, considers that hearsay evidence should be admissible only if it is based on a proper foundation and only if found to be reliable following a detailed investigation by the Trial Chamber. In support of its Motion, the Defence refers both to the common law legal systems and Sub-rule 89(B) and Rule 95 of the Rules of Procedure and Evidence (hereinafter "the Rules") as well as to the Decision of Trial Chamber II of 5 August 1996 in respect of the Defence Motion on hearsay, *The Prosecutor v. Tadić, IT-94-1-T, CPI 2* (hereinafter "Decision on Hearsay").

3. In her Response, the Prosecutor first maintains that the common law rule against the admissibility of hearsay evidence is not directly applicable to proceedings before the International Tribunal and that the recent developments in common law jurisdiction tend to demonstrate that whether the evidence is direct or hearsay is a matter which is relevant to its weight and not its admissibility. The Prosecutor then asserts that the case-law of the European

Court of Human Rights cited by the Defence is not relevant to the matter at hand. Lastly, the Prosecutor recalls that the admissibility of hearsay evidence before the Tribunal has been well established, pursuant to Rule 89 of the Rules and the Decision on Hearsay.

II. DISCUSSION

4. The Trial Chamber must review the conditions under which hearsay evidence is admissible and *inter alia* concentrate on the question of its reliability and compatibility with a fair trial. In so doing, the Trial Chamber notes that for reasons inherent to the armed conflict which concerns us here, thousands of people were displaced, detained or even killed. Under such conditions, it can be expected that the witnesses will refer to events which others, and not they themselves, experienced. This, however, may be considered only on the basis of parity between the Parties and on respect for the rights of the accused as expressed in internationally recognised standards.

5. The Trial Chamber would first recall the rules most relevant to this case. Firstly, Sub-rule 89(A) of the Rules states explicitly that the "Chambers shall not be bound by national rules of evidence". For that reason, neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system.

A. Hearsay evidence is admissible

6. At the hearing, the Defence specified that it was not contesting the principle of the admissibility of hearsay evidence but the limits to such admissibility. Nevertheless, the contents of the initial Motion largely deal with the principle of the admissibility of hearsay evidence. The Trial Chamber would wish to recall its agreement in principle to the admissibility of such evidence.

7. The Trial Chamber notes that the only provision regarding the admissibility of evidence is to be found in Sub-rule 89(C) of the Rules:

> "A Chamber may admit any relevant evidence which it deems to have probative value".

This provision applies whether the evidence is direct or hearsay. In fact, when interpreted in the light of the other paragraphs of Rule 89, it is sufficiently general to include the admissibility of hearsay evidence. In respect of this point, the Rule offers a correct interpretation of the Statute.

8. Concomitantly, the Trial Chamber would point out that the case-law of the European Court of Human Rights invoked by the Defence in support of its Motion is not appropriate here. In fact, the cases mentioned relate to situations in which, because of other insufficient inculpatory evidence, the accused was convicted essentially on the basis of hearsay evidence, or even anonymous testimony. In the case *Kostovski v. The Netherlands* (ECHR, Series A, no. 166, 1989), the conviction was handed down as a result of the statements of two anonymous witnesses questioned by the police. Likewise, in the case *Windisch v. Austria* (ECHR Series A, no. 186, 1990), the conviction was based mainly on anonymous statements. In the case *Delta v. France* (ECHR Series A, no. 191, 1990), an accused was convicted without the presence of the only two prosecution witnesses and merely on the basis of the testimony of the police officer who had taken their statements. In the case *Unterpertinger v. Austria* (ECHR Series A, no. 110, 1986), the conviction was also based principally on the statements of two witnesses who refused to appear at the hearing.

9. Lastly, the Trial Chamber, as the parties, moreover, have noted, points out that case-law relative to this matter already exists within the Tribunal. Trial Chamber II in the "Decision on Hearsay" in the case *The Prosecutor v. Tadić* has already ruled on the issue. The Judges reached the conclusion that the Statute and the Rules contained no principle barring the admissibility of hearsay testimony and reaffirmed the two conditions governing the admissibility of the evidence : its relevance and its probative value.

In respect of the provisions of the Statute and the Rules, the Judges stated:

> "there is no blanket prohibition on the admission of hearsay evidence. Under our Rules, specifically, Sub-rule 89(C), out of court statements that are relevant and found to have probative value are admissible." (para. 7)

Judge Stephen, in particular, affirmed:

> "The fact that evidence is hearsay does not, of course, affect its relevance nor will it necessarily deprive it of probative value". *(Separate Opinion of Judge Stephen on the Defence Motion on Hearsay,* p.2*).*

10. This Trial Chamber agrees with those conclusions and emphasises that the two criteria for admissibility - relevance and probative value - pursuant to Sub-rule 89(C) of the Rules, apply whether the testimony is direct or hearsay. In fact, direct testimony may also not be relevant or have the required probative value and thus be declared inadmissible. The direct or hearsay nature of the testimony is but one of the many factors which the Trial Chamber will consider when evaluating the relevance and probative value of such testimony. The Trial Chamber therefore considers that the admissibility of hearsay evidence may not be subject to any prohibition in principle since the proceedings are conducted before professional Judges who possess the necessary ability to begin by hearing hearsay evidence and then to evaluate it so that they may make a ruling as to its relevance and probative value. The Trial Chamber notes, finally, that the principle of the inadmissibility of hearsay evidence, as enshrined in the common law countries, has, in those very countries today, become "riddled with judicial and even legal exceptions" (Jean Pradel, *Droit pénal comparé,* Précis Dalloz, 1995, p. 406).

B. The question of the limits to the admissibility of hearsay evidence

11. As regards the limits to the admissibility of hearsay evidence, the Defence is seeking both that a general limit be placed on recourse to hearsay evidence and that the evidence be identified so that the Judges may evaluate its reliability. The principal argument in support of such limits is the absence of any cross-examination of the initial declarant. However, since the principle making hearsay evidence admissible has been accepted, the objection in respect of the absence of cross-examination is not related to admissibility but to the weight given to the evidence.

12. The right to cross-examination guaranteed by Article 21(4)(e) of the Statute applies to the witness testifying before the Trial Chamber and not to the initial declarant whose statement has been transmitted to this Trial Chamber by the witness.

The Trial Chamber does, however, note that the right to cross-examine the witness in court may be used to challenge the importance to be given to the hearsay testimony, for example, by clearly indicating the number of intermediaries who transmitted the testimony and by seeking to learn the identity and other characteristics of the initial declarant as well as the possibilities for that declarant to have learned the relevant elements or even by bringing out the other facts or circumstances which might assist the Trial Chamber in its evaluation of such evidence.

13. In the opinion of the Trial Chamber, the Judges are the ones who will, in due course and in each case, determine the reliability to be accorded to a testimony, according to the circumstances in which it was obtained and to its content. For this purpose, the Judges, if necessary, will not hesitate to ask the witness questions relating to the hearsay evidence. The proceedings of the International Tribunal are not conducted before a jury, but before professional Judges who rule on both fact and law. Thanks to their training and experience, the Judges can give the appropriate weight to testimony declared admissible in light of its reliability. Such an evaluation can logically be made only *a posteriori* once the Parties have presented all their claims.

C. The need to ensure a fair trial

14. The Trial Chamber would recall that testimony initially admitted because it satisfies the two-fold criteria of relevance and probative value may subsequently be rejected, pursuant to Sub-rule 89(D) of the Rules should the Judges deem that, within the context of the trial, such testimony no longer meets the need to ensure a fair trial. Sub-rule 89(D), in fact, states that

> "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a faire trial".

In its Decision on hearsay, Trial Chamber II already considered the real guarantee for the Defence in respect of the unconditional admission of evidence. It noted that

> "Moreover, Sub-rule 89(D) provides further protection against prejudice to the Defence, for if evidence has been admitted as relevant and having probative value, it may later be excluded" (para. 18).

Each of the parties must provide the elements which it considers necessary in order to allow the Trial Chamber to identify clearly what falls within the category of hearsay and in order to convince the Trial Chamber, as a last resort, that the testimony in question satisfies the need to ensure a fair trial. In particular, the Defence is free to demonstrate that a hearsay testimony which was declared admissible must, in the end, be excluded because its probative value is insufficient.

III. DISPOSITION

FOR THE FOREGOING REASONS,

The Trial Chamber

RULING *inter partes* and unanimously,

REJECTS the Defence Motion of 30 September 1997 on the objection in principle to the admission of hearsay evidence with no inquiry as to its reliability.

Done in French and English, the French version being authoritative.

Done this twenty-first day of January 1998
At The Hague
The Netherlands

(signed)

Claude Jorda, Presiding Judge
Trial Chamber I

ANNEX 1: GLOSSARY

GOVERNMENTS OR POLITICAL PARTIES IN SIERRA LEONE MENTIONED IN EVIDENCE

S.L.P.P.:	Sierra Leone Peoples Party
A.P.C.:	All Peoples Congress
N.P.R.C.:	National Provisional Ruling Council
A.F.R.C.:	Armed Forces Revolutionary Council (May 1997-February 1998) Often referred to as the Junta

MAIN RUF LEADERSHIP

Foday Sankoh	Also known as Lion
Sam Bockarie	Also known as Mosquito or Masikita
Issa Sessay	
Denis Mingo	Also known as Superman
Gibril Massaquoi	
Morris Kallon	
Mike Lamin	Referred to as "Commander B" by witness TF1-045
Augustine Gbao	
Komba Gundema	
Eldred Collins	
Issac Mongor	

MAIN COMBATANT GROUPS

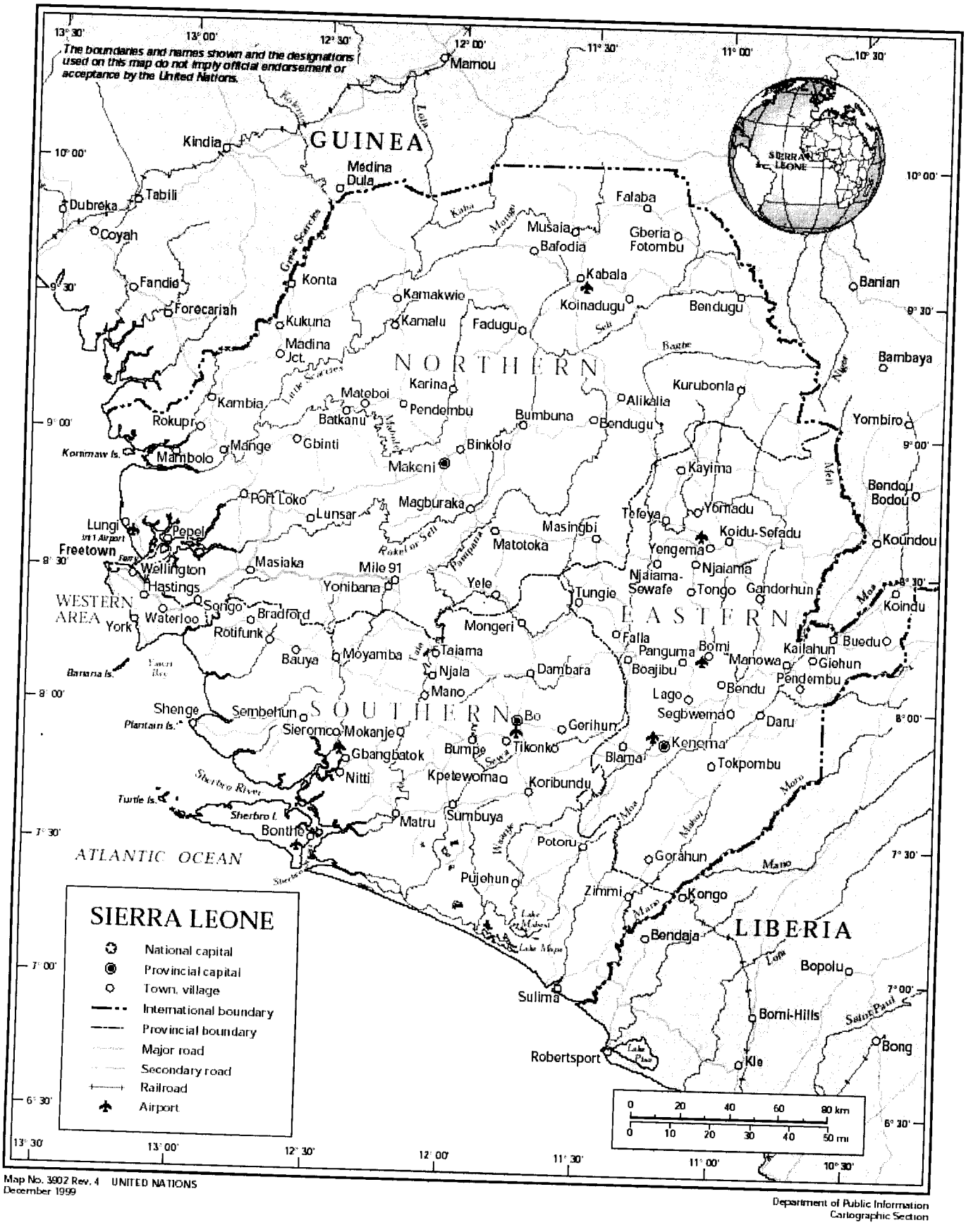
S.L.A.	Sierra Leone Army (Those soldiers that aligned with the A.F.R.C. Government and later the A.F.R.C. Faction after the Intervention)
Loyal S.L.A.	Those members of the Sierra Leone Army that fought alongside E.C.O.M.O.G. to restore the SL.P.P. government
E.C.O.M.O.G.	Economic Community of West African States Monitoring Group
R.U.F.	Revolutionary United Front

C.D.F.	Civil Defence Forces, which included Kamajors
A.F.R.C. Faction	The designation of the A.F.R.C. after being forced from the power after the Intervention and reverting to a military force
S.L.P.	Sierra Leone Police
Peoples Army	The combined group of RUF/SLA
RSLAF	Republic of Sierra Leone Armed Forces
RDF	Rapid Deployment Force
Junta Forces	Mixed SLA/RUF forces

SOME SIGNIFICANT A.F.R.C. / S.L.A. PARTICIPANTS IN ADDITION TO THE ACCUSED

Johnny Paul Koroma	Also known as JPK
Solomon Anthony James Musa	Also known as SAJ Musa. Referred to as "Commander C" by witness TF1-334
Abu Sankoh	Also known as Zagallo
Hassan Papah Bangura	Also known as Bomblast. Referred to as "Commander A" or "Supervisor A" by witness TF1-334.
George Johnson (TF1-167)	Also known as Junior Lion
Alimamy Bobson Sesay (TF1-334)	Also known as Yapo and Bobby
Alie Turay (TF1-184)	Also known as Alabama
Brigadier Mani	
Franklyn Conteh, WOII	Also known as Woyoh
Mohamed Savage	Also known as Mr. Die
Staff Alhaji Bio	Also known as Staff Alhaji
Adama Cut Hand	Also referred to as Adama

ANNEX 2 – Maps of Sierra Leone



Map No. 3802 Rev. 4 UNITED NATIONS
December 1999

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SIERRA LEONE PLANNING MAP