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Evidence in International Criminal Trials: Lessons and Contributions from the Special Court for Sierra Leone

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Abstract

This article aims to contribute to the discourse on the development of a system of international criminal justice. The paper discusses the Special Court for Sierra Leone (SCSL), in particular, certain of its rules of evidence and their role in ensuring just, fair and expeditious trials for breaches of international humanitarian and international human rights law during the Sierra Leone conflict which lasted between 1991 and 2002. In the conclusion, the author considers whether the manner in which the SCSL interpreted and applied specific rules of evidence helped it to meet and contribute to the objectives of a system of international criminal justice. These objectives include holding violators of international norms accountable; guaranteeing procedural propriety; giving legitimacy to the process and bestowing confidence in international criminal justice institutions. Though not without criticism, the author concludes that they did.

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I. Introduction

Trials for violations of international human rights and humanitarian law have proliferated in recent times. Most are taking place before international and hybrid tribunals. The majority, if not all, draw some experience from the International Military Tribunals (IMT) in Nuremberg and Tokyo. Although earlier attempts at enforcing the laws of war and punishing those responsible for heinous atrocities developed haphazardly, they have come to be regarded as a viable option for the international community's response to specific events that caused grave suffering and loss of lives. These attempts contributed towards establishing a court-based system of international criminal justice to address breaches of international human rights (IHR) and international humanitarian law (IHL).¹

The general aim of this article is to contribute to the discourse on the development of a system of international criminal justice. Contemporary international law discourse has witnessed a shift: the question is no longer what is the basis for holding accountable those who breach international criminal law; it is how to ensure that the process through which accused persons are held accountable will be just, fair and expeditious. The focus of this paper is one such institutional mechanism: the ad hoc Special Court for Sierra Leone (SCSL), in particular, its rules of evidence and how they assist in ensuring just, fair and expeditious trials for breaches of IHL and IHR during the Sierra Leone conflict which lasted between 1991 and 2002. In the conclusion, I will attempt to ascertain whether the experience of applying rules of evidence at the SCSL helps to meet the objectives of a system of international criminal justice. These objectives include holding violators of IHR and IHL accountable; guaranteeing procedural propriety; giving legitimacy to the process and bestowing confidence in international criminal justice institutions.

II. Origin of Rules of Evidence in International Criminal Tribunals

The right to fair trial is one of the cardinal features for which the IMT is renowned as having "...constituted a milestone in international criminal justice..."² For others, the IMT also impacted on the development of both substantive and procedural international criminal law.³ The recent international criminal tribunals do not only incorporate the right to fair trial but also place at centre-stage the whole concept of international human rights protection and humanitarian law enforcement in their proceedings. In this context, the role the rules of evidence play in enhancing the integrity of such proceedings will also be discussed. Rules of evidence are discussed in order to contribute to giving prominence to this area of international criminal law, as international criminal tribunals (including ad hoc and hybrid tribunals)

¹ Antonio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Cesare P. R. Romano, Andre Nollkaemper and Jann K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press Inc., New York 2004), 3-13 at 3 & 13.

² Salvatore Zappala, *Human Rights in International Criminal Procedure*, (Oxford University Press, Oxford 2003), 244, footnote 1.

³ Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 1.

become a more permanent fixture of international law. The establishment of the ICC makes a compelling case for rules of evidence relating to international criminal trials to be standardized. The alternative would be continued reliance on the current approach adopted in the ad hoc and tribunals which appears to perpetuate what the International Law Commission refers to as fragmentation of international law.⁴ The case-law that has developed from these tribunals (especially the ICTY and ICTR⁵) relevant to evidence will be discussed.

The earliest available reference to rules of procedure and evidence at international criminal tribunals dates back to the IMT at Nuremberg.⁶ The IMT thus represents an appropriate starting point to discuss rules of evidence in modern international criminal trials. That said, scholars have suggested that the rules of procedure and evidence of the IMT and other World War II trials conducted by the Occupying Powers “are not very instructive”.⁷ As such, it has been argued, those trials should not be relied upon as authoritative precedents for subsequent international criminal tribunals. Part of the rationale for this is that at the time of those trials, “the only recognized principle of international criminal law was the vaguely defined principle of the right to fair trial.” The principle emphasized that the

“...only obligation a sovereign State owes to the violator of one of its laws is to give him a fair trial in a forum where he may have counsel to represent him, where he may produce witnesses in his behalf and where he may speak in his own defence. Similarly, a defendant charged with a violation of International law is in no sense done an injustice if he is accorded the same rights and privileges.”⁸

However, other scholars have noted the relevance of the IMT on issues of substantive law, procedure, evidence and fairness:

“[T]he Nuremberg and Tokyo Trials became widely criticized for having been unfair. Serious substantive and procedural shortcomings in both sets of trials led many to denounce them as ‘victors’ justice’...and enforcement of the death penalty at Nuremberg and Tokyo have to be considered all the more serious together with the fact that no one convicted of a crime by either international military tribunal had a right to appeal against his or her conviction.”⁹

⁴ Robin Geiß, Noémie Bulinckx, ‘International and internationalized criminal tribunals: a synopsis’ (2006) *International Review of the Red Cross*, Vol. 88 Number 861, 49-64 at 49-50, footnote 2

⁵ The SCSL Rules of Procedure and Evidence were adopted *mutatis mutandis* from those of the ICTR. See Art. 14(1), SCSL Statute.

⁶ Daniel D. Ntanda Nsereko, ‘Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia’ in Roger S. Clark and Madeleine Sann (eds), *The Prosecution of International Crimes* (Transaction Publishers, London 1996), 293-341 at 294 & 326.

⁷ Salvatore Zappala, *Human Rights in International Criminal Procedure* (Oxford University Press, Oxford 2003), 244, footnote 1.

⁸ Tribunal ruling in the *German High Command case 1949 Law Reports of Trials of War Criminals* Vol. XII, 62 & 63, cited by Anne-Marie La Rosa, ‘A tremendous challenge for the International Criminal Tribunals: reconciling the requirements of international humanitarian law with those of fair trial’, *International Review of the Red Cross* (1997), 635, 635-650 at 635-636.

⁹ Sang-Hyun Song, ‘The International Criminal Court: Impartial and Efficient International Criminal Justice for Asia and the World’, *International Criminal Court: Choice of China*, Gao

The historic trials have also been criticised for preventing the accused from bringing evidence concerning Allied misdeeds. It has also been argued that the tribunals had “sinister origins; that they were misused for political purposes; and that they were somewhat unfair.”¹⁰ In fact, one scholar has gone so far as to suggest that the “precedential value” of the IMT trials to the ICTY was minimal.¹¹

Further, reliance on the IMT as a precedent on evidentiary matters is also debated in relation to the scope and depth of its rules of evidence. Article 19 of the Nuremberg Charter specified that “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value....”¹² The application of this Article was not always consistent, as noted by B.V.A Rolling: “Accordingly to our Charter, technical rules of evidence would not apply. Consequently the Tribunal had to decide *ad hoc* whether specific evidence had probative value and was relevant. But the tendency was to apply ever more technical rules, fit only for an Anglo-Saxon trial.”¹³

The SCSL Rules of Procedure and Evidence (SCSL-RPE) adopt the inclusionary principle.¹⁴ This principle however contains exceptions that require the application of technical rules which include Rule 90(E) (witness testimony given in court under compulsion); Rule 92 (confessions or other evidence obtained without due regard for substantive and procedural safeguards like those contained in Rules 42 and 43 for suspects and Rule 63 for accused persons (rights of the accused)); Rule 93 (if admission of the evidence is not in the interest of justice); and Rule 95 (if admission would bring the administration of justice into serious disrepute).

III. Rules of evidence and their application at the SCSL

It has been observed that

“Those overseeing accountability face a legal landscape devoid of any uniform rules of evidence and characterized by different approaches across various fora. International law provides no clear evidentiary standards for international tribunals, nor are there many uniform

Ming-xuan, Zhao Bing-zhi and Wang Xiu-mei (eds), (China People’s Public Security University, Beijing 2005) as quoted in Asian Human Rights Commission’s Human Rights Correspondence School Lessons [Series 46]: The ICC - Overview of the ICC and its unique characteristics, 10 available at <<http://www.hrschool.org/modules/46.pdf>> or <<http://www.hrschool.org/doc/mainfile.php/lesson46/178/>> accessed 01/05/07; also B.V.A Rolling and Antonio Casses, *The Tokyo Trial and Beyond*, (Blackwell Publishers, Cambridge 1994), 5.

¹⁰ B.V.A Rolling and Antonio Casses, *The Tokyo Trial and Beyond*, (Blackwell Publishers, Cambridge 1994), 89.

¹¹ Daniel D. Ntanda Nsereko, ‘Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia’ in Roger S. Clark and Madeleine Sann (eds), *The Prosecution of International Crimes* (Transaction Publishers, London 1996), 293-341 at 294.

¹² <<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.htm>> accessed 28 July 2009

¹³ (n 9), 50.

¹⁴ By its very nature, inclusionary principle requires the application of technical rules of evidence to set out the exceptions that apply to it: Terence Anderson, David Schum and William Twining, *Analysis of Evidence*, (Cambridge University Press, Cambridge 2005), 291.

principles across national legal systems. As a result, international tribunals have taken an ad hoc and fairly liberal approach to evidentiary matter...”¹⁵

Therefore until the adoption of the ICTY RPE, there was no single body of law relating to evidence in international criminal trials. Since then, the ICTY RPE have become the model for later tribunals including the ICTR (pursuant to Article 14 of the ICTR Statute) and the SCSL (pursuant to Article 14(1) of the SCSL Statute). It is suggested that this approach makes it relatively easier to adopt the RPE in later tribunals as well as helps to develop a coherent body of RPE in international criminal proceedings.¹⁶

A. Judge-made law

Judges in international criminal tribunals make and implement the RPE that govern proceedings.¹⁷ This type of evidence law has attracted criticism primarily because, when judges set out to make rules of procedure and evidence, they usurp the functions of legislators. It blurs the distinction between judges and lawmakers (an essential requirement for ensuring separation of powers) and makes the process malleable.¹⁸ Other scholars disagree, noting that the flexibility of the rules has been an important asset in dealing with many unprecedented situations confronting the tribunals. Judges of ad hoc tribunals are best placed to know the hurdles and pitfalls and to identify lacunae in the rules that may arise at trials.¹⁹ Judge Richard May and Marieke Wierda also argue that the availability in later tribunals of certain safeguards, like appeals on law and procedure, heralded by development in human rights law, have created a better balance against the powers of judges to make, amend and apply rules of procedure and evidence.²⁰

However, there may be legitimacy, at least in principle, in the argument that flexible rule-making undermines certainty in the rule. The ICC appears to have overcome the above concerns by empowering the Assembly of States Parties to the Court to adopt amendments to the rules upon the proposal of any State Party, judges or the prosecutor.²¹

¹⁵ Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy*, (2nd edn Oxford University Press Inc., New York 2001), 253.

¹⁶ Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing Limited, London: 2003), 288.

¹⁷ Article 14(2) SCSL Statute; Article 14 ICTR Statute; and Article 15 ICTY Statute.

¹⁸ Evan Wallach, ‘The Procedural and Evidentiary Rules of Post World War II War Crimes Trials: Did They Provide An Outline for International Legal Procedure?’ (1999) 37 COLUM. J. TRANSNAT’L L. 851 at 869 as cited in Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (New York: Transnational Publishers, Inc., 2002) 22-23.

¹⁹ Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 23.

²⁰ *ibid* 25.

²¹ Article 51 ICC Statute and Rule 3 of the RPE, adopted by the Assembly of States Parties, First Session, New York, 3-10 September 2002, Official Records ICC-ASP/1/3.

B. Adversarial and inquisitorial systems

Another preliminary matter relating to evidence that is worth mentioning at this juncture is the use of national rules of evidence in international criminal trials. Like the IMT's, the RPE of the ICTY, ICTR and SCSL state that these tribunals shall not be bound by national rules of evidence.²² Perhaps this is the best way to address evidence at international criminal tribunals. As countries practice different legal traditions, they have different preferences and approaches for proving criminal guilty and ensuring fairness. In common law countries, the process of proving criminal guilt is largely adversarial and party-led. The judge presides over proceedings as an umpire and only intervenes to rule on procedure and law. Dissimilarly, in civil law jurisdictions, the process is inquisitorial in nature and provides for early judicial intervention with the judge at times examining, and cross or re-examining witnesses. Accordingly, in common law jurisdictions, the parties have, to a certain extent, a free hand in the choice and presentation of evidence while in civil law jurisdictions, an investigating judge has power to access any evidence without consideration of the parties' evidentiary preferences.

As the experience at the IMT demonstrated, the choice should not be either common law (adversarial) or civil law (inquisitorial) mode of trials, but an amalgamated trial mode, which is workable and expeditious:

“It is important to keep clearly in mind that we are applying international penal law and that we should not, and cannot, approach these questions solely from the standpoint of any single judicial system. International law has made substantial strides in the development of both substantive and adjective law, and in both fields, international law must derive from a variety of legal systems, including both civil and common law.”²³

The well-cited opinion of Judge Antonio Cassese makes the point further that this issue is now settled:

“The point at issue is the extent to which an international criminal court may or should draw upon national law concepts and transpose those concepts into international criminal proceeding. To my mind, notions, legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings. The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules.”²⁴

²² Common Rule 89(A) RPE of the ICTY, ICTR and SCSL.

²³ Brigadier General Telford Taylor, chief prosecutor for the subsequent trials at Nuremberg as cited in Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 25.

²⁴ Separate and Dissenting Opinion of Judge Cassese to the ICTY Appeals Chamber Decision in *Prosecutor v. Erdemovic* as cited by Geert-Jan Alexander Knoops, *The Theory and Practice of International and Internationalised Criminal Proceedings*, (Kluwer Law International, The Netherlands 2005) 94.

These preliminary matters appear to have been settled in current discourse and practice in international criminal trials. Even at the SCSL, which has an article dedicated to domestic Sierra Leonean law offences, has yet to see an indictment brought under Article 5 (which would have activated the application of national evidence rules). This implies that reliance on national rules of evidence will occur only in exceptional circumstances. Moreover, the SCSL exercised its discretion not to rely on domestic Sierra Leonean sentencing practice pursuant to Article 19(1) of its Statute. This is because “none of the Accused was indicted for, nor convicted of, offences under Article 5 of the Statute.”²⁵ In any event, had these been applied, questions would have arisen as to the consistency of the domestic law and practice with international law. For instance, whereas under Sierra Leonean law the death penalty may apply for serious crimes like treason, the SCSL can only give life sentences.

A further preliminary point worth brief mention here relates to the standard of proving guilt, commonly referred to as the burden of proof. Article 17 of the SCSL Statute, like its counterparts in the ICTR and ICTY Statutes, deals with the rights of the accused, but it does not stipulate the standard of proof required.²⁶ The closest it comes to the issue is to re-state with some modification, *inter alia*, the right of the accused to “be presumed innocent until proved guilty according to the provisions of the present Statute.”²⁷ Article 17 of the SCSL Statute appears to have been influenced by Article 14 of the International Covenant on Civil and Political Rights,²⁸ which requires proof of guilt “according to law”.

However, it is the RPE of the tribunals which give us an indication of the standard of proof:

“...A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.”²⁹

Article 17 of the SCSL Statute and Rule 87(A) of the SCSL RPE do not indicate the party with the onus of proving guilt. However, it is a general principle of law that the accuser must prove his allegations beyond reasonable doubt. The ICTY has confirmed that the prosecution carries the burden of proving the case beyond reasonable doubt and that this onus is derived from a general

²⁵ *Prosecutor v Brima, Kamara and Kanu*, (Sentencing Judgment) SCSL-04-16-T (19 July 2007) para. 32.

²⁶ Articles 20 and 21 of the Statutes of the ICTR and ICTY respectively, do not address this issue – see in particular, Article 17(3) SCSL, Article 20(3) ICTR and Article 21(3) ICTY Statutes.

²⁷ Article 17(3) SCSL Statute.

²⁸ ICCPR was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23rd March 1976, in accordance with Article 49.

²⁹ common Rule 87(A) of the RPE of the SCSL, ICTR and ICTY; proof beyond reasonable doubt is regarded as a formula derived from the English case of *Woolmington v. DPP* [1935] AC 462; *Prosecutor v Delalic and Others*, (Judgment) Case No. IT-96-21-T (16 November 1998) para 601.

principle of law.³⁰ Where the allegations include aggravating circumstances, these too must be proved beyond reasonable doubt.³¹

The ICTY has noted that “*proof beyond reasonable doubt*” should be understood as follows:

It need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.³²

For Judge Richard May and Marieke Wierda, “[p]roof beyond a reasonable doubt means that the accused’s guilt must be proven to a moral certainty”.³³

One notable exception to the reasonable doubt test occurs when the defence makes an allegation or when the prosecution’s allegation is not an essential element of the charges in the indictment. In such circumstances, the burden of proof is based on a balance of probabilities.³⁴ Another exception to the reasonable doubt test relates to mitigation. Mitigating circumstances need only be proved on a “balance of probability.”³⁵

IV. General approach to admissibility of evidence at international criminal tribunals

The rules of evidence in international criminal tribunals have been likened to those in civil trials in domestic jurisdictions based on their non-technical nature and mode of application.³⁶ The international criminal tribunals have a wide discretion to admit any relevant evidence (as in the case of the SCSL) or evidence deemed to have probative value (as in the case of both the ICTY and ICTR). This power allows the tribunals to assess freely³⁷ evidence presented to them with a view to ensuring trials are fair, expeditious and serve the interest of justice. Evidence that is relevant and has probative value is admissible

³⁰ *Prosecutor v Delalic and Others* (Judgment) IT-96-21-T (16 November 1998) paras 599 & 601.

³¹ Aggravating circumstances must be proved beyond reasonable doubt - *Prosecutor v Brima, Kamara, Kanu* (Sentencing Judgment) SCSL-04-16-T (19 July 2007) para. 9; also *Prosecutor v Tihomir Blaskic* (Judgment) IT-95-14-A (29 July 2004) para 688.

³² Per Lord Denning in *Miller v. Minister of Pensions* [1947] 1 All ER 372, 373-4 as cited in *Prosecutor v Delalic and Others* (Judgment) IT-96-21-T (16 November 1998) para. 601.

³³ Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 754 .

³⁴ *Prosecutor v Delalic et al.*, (Judgment) IT-96-21-T (16 November 1998) paras. 602-603.

³⁵ *Prosecutor v Brima, Kamara and Kanu* (Sentencing Judgment) SCSL-04-16-T (19 July 2007) para. 9.

³⁶ Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 93.

³⁷ This has been referred to as the “free assessment of evidence” approach: *Prosecutor v. Alfred Musema Case* (Judgment and Sentence) ICTR-96-13-A (27 January 2000) para. 75.

evidence, except if the prejudicial value of admission will outweigh its probative value.

‘Relevance’ and ‘probative value’ are clear requirements for the admissibility of evidence. However, the same cannot be said about ‘reliability’, as will be discussed below. Judge Richard May and Marieke Wierda regard evidence as relevant when it “*tends to prove or disprove a material issue; in other words, evidence is relevant ‘if its effect is to make more or less probable the existence of any fact which is in issue, i.e. upon which guilt or innocent depends’*”.³⁸ In essence, relevance is always a preliminary issue and often considered as the first requirement of admissibility.³⁹

‘Probative value’ is the second test of admissibility and the term is used to describe the assessment of the significance of specific piece(s) of evidence balanced against any improper, illegitimate or disproportionate effect (prejudicial effect) it may have if it were or were not admitted.⁴⁰

When tribunals set out to determine the significance of the evidence of a case in relation to a fact in issue, consequence of a fact, a charge, or some other act to the required standard of proof, they engage in a “weighing” of the evidence. The determination of the weight of any evidence is a process that takes place beyond the admissibility stage. The SCSL has noted that a final determination of the relevance, reliability and probative value of evidence is made “at the appropriate time in light of all the evidence adduced during the trial”.⁴¹ On the face of it, evidence may be admitted, but that fact does not equate to the weight to be given to the propositions or statements contained in the evidence: “weight is still to be examined”.⁴² In other words, admissibility should not be confused with the weight that is attached to evidence. “[T]ribunals will often declare that evidence is admissible, but then declare it is of little weight.”⁴³

Admissibility of evidence has not been concerned with only relevance (in the case of the SCSL) or relevance and probative value (in the case of the ICTY and ICTR), but rather may be concerned also with reliability. Generally, proof of ‘reliability’ is not required for evidence to be admitted. The international tribunals take the view “...that evidence which is both relevant and probative must also enjoy some component of reliability.”⁴⁴ Evidence is reliable if it is relevant, has probative value and if there is a nexus between it and the subject matter. Accordingly, “reliability is the invisible golden thread which runs through all the components of admissibility.” This

³⁸ (n35) 102.

³⁹ Anderson Terence, David Schum and William Twining, *Analysis of Evidence*, (Cambridge University Press, Cambridge 2005), 296; also Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 107.

⁴⁰ Anderson Terence, David Schum and William Twining, *Analysis of Evidence*, (Cambridge University Press, Cambridge 2005), 241 & 385; also Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 107.

⁴¹ *Prosecution v. Issa Hassan Sesay, et al.*, (Ruling On Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker) SCSL-04-15-T (23 May 2005) para 13.

⁴² Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 108 Footnote 62.

⁴³ William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo 2006), 454.

⁴⁴ *Prosecutor v. Alfred Musema* (Judgment and Sentence) ICTR-96-13-A (27 January 2000) para 35.

notwithstanding, the ICTR has maintained that “...reliability of evidence does not constitute a separate condition of admissibility; rather, it provides the basis for the findings of relevance and probative value required under Rule 89(C) for evidence to be admitted.”⁴⁵

Some scholars argue that reliability has been treated as a component of admissibility and refer to the ICTY case of *Kordic* to illustrate this point. The Trial Chamber in *Kordic* had ruled that Rule 89(C) gave broad discretion to admit the unsworn statement of a witness who passed away before he was cross-examined. The Trial Chamber justified admitting and relying on that evidence to convict the accused partly because it was corroborated; the court noted the fact that the statement had not been subjected to cross-examination and was not made under oath were factors that went to the weight of the statement and not its admissibility.⁴⁶ However, the Appeals Chamber’s view in *Kordic* was that the absence of indicia of reliability in the unsworn statement meant it was so lacking in reliability that it should have been excluded as without probative value under Rule 89(C).⁴⁷

A. Admissibility of evidence at the SCSL

The case involving the Subpoena *ad testificandum* to the President of the Republic of Sierra Leone created opportunities and challenges for the SCSL to deal with the requirements of admissibility. For both majorities in the Trial and Appeals Chambers,⁴⁸ this case was primarily about Rule 54, the correct test for issuing subpoenas and the exercise of the Court’s discretion therein.⁴⁹ Having relied on paragraphs 6-7 of the ICTY *Halilovic Appeal Decision*⁵⁰ and paragraphs 10-11 of the ICTY *Krstic Appeal Decision*,⁵¹ the Trial Chamber ruled that the applicants had failed to meet the tests required for the court to exercise its discretion to issue a subpoena to the President of the Republic of Sierra Leone.⁵² The Trial Chamber came to this conclusion on the basis of two tests. The purpose or *legitimate forensic purpose* test requires that the “evidence must be of *substantial or considerable assistance* to the Accused in

⁴⁵ *Prosecutor v. Alfred Musema* (Judgment and Sentence) ICTR-96-13-A (27 January 2000) paras 35-38.

⁴⁶ Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 108 Footnotes 64 & 65.

⁴⁷ *Prosecutor v. Dario Kordic and Mario Cerkez*, (Decision On Appeal Regarding Statement Of A Deceased Witness) Case No. IT-95-14/2 (21 July 2000) para 28.

⁴⁸ *Prosecutor v. Norman, Fofana, Kondewa*, (Decision on motions by Moinina Fofana and Sam Hinga Norman for the issuance of a subpoena *ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone) Case Nos. SCSL-04-14-T-617-1 & SCSL-04-14-T-617-2 (13 June 2006), hereinafter referred to as the ‘*Subpoena Decision* (Trial)’; *Prosecutor v. Norman, Fofana, Kondewa*, (Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing To Subpoena The President of Sierra Leone) Case No. SCSL-2004-14-T (11 September 2006), hereinafter referred to as the ‘*Subpoena Decision* (Appeal)’.

⁴⁹ See *Subpoena Decision* (Trial), paras 28 – 30.

⁵⁰ *Prosecutor v. Sefer Halilovic* (Decision On The Issuance Of Subpoenas) Case No. IT-01-48-AR73 (21 June 2004).

⁵¹ *Prosecutor v. Radislav Krstic* (Decision On Application For Subpoenas) Case No. IT-98-33-A (1 July 2003).

⁵² *Subpoena Decision* (Trial); see the discussion on the tests of “purpose” or “legitimate forensic purpose” requirement and the “necessity” or “last resort” requirement for issuing subpoena at, para 28 Footnote 78; para 29 Footnotes 78, 79 & 80; para 30 Footnotes 81-84; and para 31 Footnotes 85-86, para 32.

relation to a *clearly identified issue* that is relevant to the trial”, while the necessity or *last resort* test requires the applicant to demonstrate whether the information sought is not obtainable through other means and whether it is necessary to ensure that the trial is informed and fair.⁵³

However, Counsel for the Second Accused argued that “President Kabbah is in possession of information specifically relevant to the Second Accused’s alleged liability pursuant to Articles (1), 6(1) and 6(3) of the Statute of the Special Court.” In particular, that the President can provide evidence (i) on the activities of the CDF as he (the President) commanded, supported materially and communicated with the alleged CDF leadership; (ii) on the existence and extent of the Second Accused participation in a joint criminal enterprise; (iii) on the command structure of the CDF and hence on command responsibility; and (iv) “that President Kabbah ‘was specifically mentioned by at least seven Prosecution witnesses, some indicating that he may have played a role within the alleged CDF command structure’, and thus the relevance of what President Kabbah may have to say in this respect is self-evident...”⁵⁴ Counsel for the First Accused adopted similar arguments to those of the Second Accused and added that the Applicants have made a proper showing to satisfy the requirements for the issuance of a subpoena and the evidence of President Kabbah would materially assist the First Accused’s case.⁵⁵ On the test of necessity, both applicants pleaded with the court that it was necessary to issue a subpoena to require President Kabbah to give evidence in that they had made reasonable but unsuccessful attempts to obtain President Kabbah’s voluntary cooperation.⁵⁶

However, the Trial Chamber declined to issue a subpoena to President Kabbah. To do so, the Chamber noted, would amount to a “fishing expedition” on the part of the applicant. Justice Bankole Thompson held the view that the extent to which the majority examined the tests for the issuance of the subpoena meant the Trial Chamber failed to properly consider the merits of the case under Rule 89. Such detailed consideration of the legitimate forensic

⁵³ *Subpoena Decision* (Trial) at para 7 Footnotes 14-17. This paragraph adopts the tests laid down in the ICTY cases of *Halilovic* and *Krstic*. For the SCSL Trial Chamber’s elaborate explanation of these tests, please see *Subpoena Decision* (Trial) paras 29 & 30.

⁵⁴ *Subpoena Decision* (Trial), para 10 but at paras 34-48 the Trial Chamber debunks all of the above grounds upon which the Second Accused relied upon for the issuance of the subpoena and that with regards to (i) and (ii) above, the applicant failed to identify sufficient and specific indictment-related issues for which the President’s evidence will be of material assistance to his (the Second Accused’s) case. “Therefore, there is no legitimate forensic purpose in calling him to verify these facts”, the Trial Chamber concludes at para 41. At para 48, the Second Accused is said to have failed to properly plead his case for simply following direct orders as opposed to having command responsibility and that his reliance on the President’s testimony could not relieve him of liability as charged under the indictment. Hence, if anything, the President’s evidence may be relevant in the determination of an appropriate sentence but not relevant for the purposes for which it is being sought at this stage. Regarding (iii) above, the Trial Chamber notes even though the applicant has shown indictment-related issues which the President’s evidence would be of relevance, however, “[t]he Trial Chamber is not satisfied that a subpoena to President Kabbah was necessary on the basis that he could testify on the CDF command structure, where the information is obtainable through other means. Therefore, the Chamber declines to issue the subpoena on this basis”, *Subpoena Decision* (Trial) para 55. The First Accused’s arguments are also debunked by the Trial Chamber at paras 49-54 using more or less similar grounds as those used in the Second Accused case.

⁵⁵ *Subpoena Decision* (Trial) , para 12.

⁵⁶ *Subpoena Decision* (Trial), para 15.

purpose and last resort test was not necessary at the admissibility stage under Rule 89 but regardless the majority took that formalistic approach.⁵⁷

At the Appeals Chamber, Justice Geoffrey Robertson agreed with Justice Bankole Thompson, and referred to such approach as “restrictive to” and a “relatively narrow dimension of a Rule 54 decision.”⁵⁸ He observed that Rule 54 rightly governs the issuing of subpoenas. However, Rule 54 “says nothing about the nature of the evidence to be elicited, from the witnesses or document custodians to whom the orders may be directed, and it sets out no “requirements” (of the kind detected by the trial chamber majority...”⁵⁹ Justice Geoffrey Robertson also suggested that the majority in the Trial Chamber misunderstood the test for issuing subpoenas under Rule 54. All Rule 54 requires is a showing that an order is necessary to bring the relevant evidence into the court. Paragraph 29 of the *Subpoena Decision* (Trial) shows that the Trial Chamber mistakenly conflated these practical considerations as to whether evidence might be material with the test in Rule 54 for deciding whether it is necessary to issue a summons to obtain it.⁶⁰

The Trial Chamber appears to have come to its decision chiefly on consideration of Rule 54 with at least partial disregard for other provisions in the SCSL Statute (like Article 17) and RPE (like Rules 71, 85(D), 90(A)). This paper argues that even under Rule 95, admitting President Kabbah’s evidence would not have brought the administration of justice into disrepute. However, the Trial Chamber does not appear to have considered Rule 95.

Even if the Trial and Appeals Chambers are correct in their view that the *Subpoena Decision* was based on the exercise of discretion, the case of *Kordic* tells us that the exercise of “discretion was not unfettered and should be exercised ‘in harmony with the Statute and the other Rules to the greatest extent possible’.”⁶¹ It is acknowledged that the word ‘may’ in Rule 89(C) means even where evidence (and in this instance that of President Kabbah) is relevant and has probative value, it is at the discretion of the Trial Chamber that such evidence is admitted. However, the discretion should not be exercised where doing so conflicts with other Rules and the general scheme for the admission and presentation of evidence established by the Rules.⁶²

To a large extent, because Rule 54 of the SCSL RPE is identical to that in the ICTY and ICTR, it is appropriate for the SCSL to refer or even adopt the ICTY and ICTR decisions on cases involving Rule 54 and other RPE rules, including Rule 89. However, by choosing to not consider whether the

⁵⁷ *Prosecutor v Norman, et al.* (Dissenting Opinion of Honourable Justice Bankole Thompson on Decision on Motions By Moinina Fofana and Sam Hinga Norman For the Issuance of a Subpoena *Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone) Case No. SCSL-2004-14-T (13 June 2006) para 4; (hereinafter referred to as ‘*Dissenting Opinion on Subpoena Decision* (Thompson)’).

⁵⁸ *Prosecutor v Norman, et al.*, (Dissenting Opinion of Honourable Justice Robertson on Decision Interlocutory Appeals Against Trial Chamber Decision Refusing To Subpoena The President of Sierra Leone) Case No. SCSL-2004-14-T (11 September 2006), para 27; hereinafter referred to as ‘*Dissenting Opinion on Subpoena Decision* (Robertson)’.

⁵⁹ *Dissenting Opinion on Subpoena Decision* (Robertson), para 3.

⁶⁰ *Dissenting Opinion on Subpoena Decision* (Robertson), paras 23-25; but the Appeals Chamber disagreed, see *Subpoena Decision* (Appeal), para 18.

⁶¹ *Prosecutor v Dario Kordic and Mario Cerkez* (Decision on Appeal Regarding Statement of a Deceased Witness) Case No. IT-95-14/2 (21 July 2000), para 20.

⁶² *Prosecutor v Zlatko Aleksovski*, (Dissenting Opinion of Judge Patrick Robinson) Case No. IT-95-14/1 (16 February 1999), paras.4-24.

President's evidence is admissible, the court, Accused and even victims have been denied the opportunity to know the extent to which President Kabbah's evidence may or may not be relevant to the guilt or innocence of the CDF Accused. In view of this, it is suggested that the tenets of a fair trial (a cardinal principle underpinning any criminal proceedings) have been ignored. Justice Bankole Thompson would have preferred a flexible approach "in the process of receptivity of evidence, as it had been in the case of the Prosecution, so as to ensure that no relevant evidence vital to the discovery of the truth is foreclosed by reason of legal technicalities... or outmoded juridical doctrines not contemplated by the plain and ordinary meaning of the applicable statutory provisions and rules."⁶³

It is doubtful whether the SCSL *Subpoena Decision* has created a precedent or made a positive contribution to existing jurisprudence in this area of law. Decisions of ad hoc international criminal courts are only persuasive. There will be occasions when future cases might depart or distinguish this *Subpoena Decision* because it failed to follow consistent practice in this area of law.⁶⁴ Further, this case is said to be concerned with the exercise of discretion. If this is correct, it is argued that the guidance provided by the ICTY on the exercise of discretion provide reason for future international tribunals to depart from it:

*"a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."*⁶⁵

Although in a later decision⁶⁶ the SCSL grants a subpoena application against Former President Kabbah, it is however argued that the importance of this decision as a precedent is limited or at the very least reveals inconsistent jurisprudence on the part of the SCSL in this area of procedure and law. The two decisions are different in their outcome; however, the Trial Chamber in the latter decision claims to have ruled in favour of granting the subpoena on the reasoning of the *Subpoena Decision* (Trial) in that the proposed testimony was likely to be of material assistance to the First Accused in this case.⁶⁷ The subpoena applicant in the RUF case also used more or less a similar argued but was not granted the subpoena sought.

⁶³ *Dissenting Opinion on Subpoena Decision* (Thompson), para 2; see also *Dissenting Opinion on Subpoena Decision* (Robertson), para 32.

⁶⁴ see *Dissenting Opinion on Subpoena Decision* (Appeal), generally paras 22-29, para 35 and in particular paras 37-49.

⁶⁵ *Slobodan Milosevic v Prosecutor*, (Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel) Case No. IT-02-54-AR73.7 (1 November 2004), para 10.

⁶⁶ *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (Written reasoned decision on motion for issuance of a subpoena to H.E. Dr. Ahmad Tejan Kabbah, former President of the Republic of Sierra Leone) Case No. SCSL-04-15-T-1189 (30 June 2008).

⁶⁷ *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (Written reasoned decision on motion for issuance of a subpoena to H.E. Dr. Ahmad Tejan Kabbah, former President of the Republic of Sierra Leone) Case No. SCSL-04-15-T-1189 (30 June 2008), para 19.

V. Exclusion of Evidence at the SCSL

A. Best evidence rule

The SCSL Trial Chamber refused to admit an unsigned incriminating declaration⁶⁸ and letter of a defence witness.⁶⁹ The Trial Chamber took the view that the ‘best evidence rule’ requires the original declaration and letter to have been signed before being admitted into evidence. As Ms Fortune had travelled abroad after giving her evidence and unsigned letter, and as the declaration was not signed, the Trial Chamber concluded that “these important documents were unauthenticated and therefore unreliable”.⁷⁰ The Declaration was eventually admitted after it had been signed by Mr. White.

The Appeals Chamber dismissed reliance by the Trial Chamber on the so-called “best evidence rule” as an anachronism and ruled that

“There is no rule that requires, as a precondition for admissibility, that relevant statements or submissions must be signed. That may be good practice, but it is not a rule about admissibility of evidence. Evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission. It follows that the Judge made an error of law in refusing to admit the statement of Ms Fortune, who had attended court to give evidence on the previous hearing but had been unable to sign her statement because she was overseas...”⁷¹

Although the Appeals Chamber found for Fofana on the issue of inadmissibility of Ms Fortune’s statement, admission of this evidence “could not have affected the result” of the Trial Chamber’s findings.⁷² In other words, the weight to be given to a piece of evidence is not symptomatic of the fact of its admission. Authenticity of a document, if anything, goes to its weight, not its admission.⁷³

B. Confession and exclusionary rules

SCSL Rule 92 (subject to its provisos)⁷⁴ and Rule 95 govern confessions and the exclusion of evidence. To some extent, Rule 70(F) may also be relevant on issues relating to exclusion of evidence. In *Prosecutor v. Sesay, Kallon*,

⁶⁸ by a prosecution witness (Mr. Alan White, Chief of Investigations in the Office of the Prosecution).

⁶⁹ Ms Frances Fortune, (regional director of a non-governmental organisation), giving assurance as a surety for the release on bail of the accused, Fofana.

⁷⁰ *Prosecutor v Norman, Fofana, Kondewa* (Fofana – Appeal against Decision Refusing Bail) Case No. SCSL-04-14-AR65 (11 March 2005), paras 6-8.

⁷¹ *ibid* paras 24-25.

⁷² *ibid* paras 30 & 45.

⁷³ *Prosecution v Norman, Fofana, Kondewa* (Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis) Case No. SCSL-04-14-T (9 October 2006), Para 18; also Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing Limited, London 2003), 302 Footnote 75.

⁷⁴ questioning of suspects and accused, voluntary waiver of right to counsel and audio/video recording requirements, Rules 43 & 63 SCSL RPE.

Gbao,⁷⁵ the SCSL Trial Chamber declined to admit alleged confessional statements. The Prosecution contended that the confessional statements allegedly made by the First Accused in the RUF case, were voluntary and made following the waiver of his right to Counsel. However, the Trial Chamber found that

“...the alleged statements... were not voluntary in that they were obtained by fear of prejudice and hope of advantage held out by persons in authority, the Prosecution having failed to discharge the burden of proving beyond reasonable doubt, the provision of Rule 92 as read conjunctively with Rules 43 and 63 of the Rules of Procedure and Evidence...

“The Chamber, accordingly RULES that the alleged statements are inadmissible under Rule 95 and cannot be used even for the limited purpose advance by the Prosecution of cross-examining the First Accused in order to impeach his credibility.”⁷⁶

The *voir dire* revealed that prosecution investigators employed coercion, made promises it would not honour, and failed to avail the First Accused of his Article 17 rights. Invariably, serious doubts were cast on the reliability and voluntariness of the confessional statements which offended Rule 95.⁷⁷

This decision is in line with, and builds upon, other decisions in this area of law in international criminal trials. For instance, in the *Delalic* case, following his arrest by Australian police, the accused was interviewed but was not accorded his right to counsel. While in ICTY custody, the accused was interviewed with all his rights and guarantees given to him. Ruling on whether both the Australian police interview and the ICTY interview were confessional statements, the Chamber found that

“...[t]here is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95.

“...that there was no reason to conclude in this case that the Second Interviews fell within the provisions of either Rule violating Mucic’s right to a fair trial such that they should have been excluded.”⁷⁸

A further contribution to the international law of evidence was made by the *Prosecutor v. Sesay, Kallon, Gbao*.⁷⁹ That case expounded upon the standard

⁷⁵ (Oral Ruling On The Admissibility of Alleged Confessional Statements Obtained by Investigators of The Office of The Prosecutor From The First Accused, Issa Hassan Sesay) Case No. SCSL-04-15-T (5 July 2007).

⁷⁶ *Oral Ruling on the Admissibility of Alleged Confessional Statements*, paras 4 & 5.

⁷⁷ Author’s notes made while attending the *voir dire* proceeding on 12th – 19th June 2007 at the SCSL Trial Chamber 1 to determine admissibility of Sesay’s alleged confessional statements.

⁷⁸ *Prosecutor v. Zejnil Delalic et al.*, (Judgment) Case No. IT-96-21-A (20 February 2001), para 555.

⁷⁹ (Oral Ruling On The Admissibility of Alleged Confessional Statements Obtained by Investigators of The Office of The Prosecutor From The First Accused, Issa Hassan Sesay) Case No. SCSL-04-15-T (5 July 2007).

of proof required for excluding confession evidence. As a non-mandatory exclusionary provision, Rule 95 is predicated upon a refutable presumption to admit confession statement unless it is proved that the statement was not freely and voluntarily obtained. Ilias Bantekas and Susan Nash observe that it is not clear what standard of proof is required for rebutting this presumption.⁸⁰ However they support DD Ntanda Nsereko's suggestion that "the burden should be on a balance of probabilities or preponderance of evidence and not beyond a reasonable doubt."⁸¹

C. Hearsay evidence

There is no rule in international criminal law that is comparable to the common law "hearsay rule". In international criminal law, hearsay is a category of evidence and does not form part of the regime for excluding evidence. From the historical tribunals to the SCSL, hearsay evidence⁸² has been regarded as admissible.⁸³ The SCSL has ruled that under Rule 89(C) of the Rules, the judges have broad discretion to admit relevant hearsay evidence.⁸⁴ In an earlier decision the SCSL held: "that the hearsay evidence given by the Witness is relevant evidence and is therefore admissible evidence under Rule 89(C)... the evidence in our view is so clearly relevant that the judicial process would be brought into disrepute by excluding it."⁸⁵

This general admissibility approach to hearsay evidence in international tribunals does not necessarily offend other provisions in their constitutive documents such as Article 17(4) (e) of the SCSL Statute, Article 20(4) (e) of the ICTR Statute and Article 21(4) (e) of the ICTY Statute. This approach, based on interests of justice arguments, is aimed at avoiding technicalities ensuring parties can adduce evidence even in the absence of witnesses. This should, however, be distinguished from hearsay evidence relating to the determination of guilt. In *Kordic and Cerkez*, the ICTY Appeals Chamber overturned the lower court's decision admitting unsworn testimony on the grounds that it lacked reliability and it should not have been relied upon to convict the accused.⁸⁶

In a 2005 SCSL decision, the Appeals Chamber employed the tests of admissibility in refusing to exclude hearsay evidence in spite of the defence contention that to admit such evidence "may lead to a violation of the 'right' to

⁸⁰ Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing Limited, London 2003) 292.

⁸¹ Daniel D. Ntanda Nsereko, 'Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia' in Roger S. Clark and Madeleine Sann (eds), *The Prosecution of International Crimes* (Transaction Publishers, New Brunswick (USA), London 1996) 329.

⁸² i.e. oral or written assertion or non-verbal conduct made while testifying or tendered in proceedings, by a declarant other than the person who made same, in order to establish the truth contained therein or the truth of the matter so asserted.

⁸³ Judge Richard May and Marieke Wierda, *International Criminal Evidence*, (Transnational Publishers, Inc., New York 2002) 116–119; also Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing Limited, London 2003) 302-304.

⁸⁴ *Prosecutor v. Brima, Kamara, Kanu* (Judgment) Case No. SCSL-04-16-T (20 June 2007), para 100.

⁸⁵ *Prosecutor v. Brima, Kamara, Kanu* (Decision on Joint Defence Motion to Exclude all Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95) Case No. SCSL-04-16-PT (24 March 2005) para 24.

⁸⁶ *Prosecutor v. Dario Kordic and Mario Cerkez*, (Decision On Appeal Regarding Statement Of A Deceased Witness) Case No. IT-95-14/2 (21 July 2000) para 28.

cross-examine the ‘original sources’⁸⁷. However, the court repeated its position “that admission of evidence is not indicative of a finding as to its probative value. ...the probative value of hearsay evidence is something to be considered by the Trial Chamber at the end of the trial.”⁸⁸ The Appeals Chamber upheld the decision to admit the hearsay evidence because the defence failed to show that admission would lead to “irreparable prejudice”.⁸⁹

As these tribunals have been set up, *inter alia*, to dispense justice through fair and expeditious trials, determining admissibility of hearsay evidence on the grounds of its relevance and probative value has been noted as the appropriate approach.⁹⁰ Judges at International criminal tribunals are professionals; they are able to accord hearsay evidence its appropriate weight when deliberating its potential materiality in the light of all the evidence before them. It is only when this is done that any disadvantage created by admitting hearsay can be remedied; otherwise, Bantekas and Nash argue that the right to cross-examine remains undermined.⁹¹

D. Documentary and expert evidence

The SCSL RPE, like its counterparts in the ICTY and ICTR, allow evidence to be adduced in written form or deposition in addition to or instead of oral testimony.⁹² Examples of documentary evidence include official reports, maps, charts, and diagrams. In one SCSL case, during cross-examination, the prosecution sought to exhibit a chart, which purports to show the alleged command structure of the RUF, a contentious and disputed issue.⁹³ Ruling in favour of the accused persons, the Trial Chamber held that to admit the chart into evidence would amount to a violation of the prohibition against *leading questions*.⁹⁴ The Trial Chamber explained that leading questions are prohibited in examination-in-chief and re-examination because they are wrong in law and in fact in the sense that the evidence produced therein “would be open to suspicion as being rather the prearranged version of the party than the spontaneous narration of the witness.”⁹⁵ The decision also

⁸⁷ *Prosecutor v Brima, Kamara Kanu* (Decision on Joint Defence Application for Leave to Appeal From Decision on Defence Motion to Exclude All Evidence From Witness TF1-277) Case No. SCSL-04-16-T (2 August 2005) para 2.

⁸⁸ *ibid* paras 5 & 6.

⁸⁹ *ibid* para 10.

⁹⁰ Judge Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, Inc., New York 2002) 118.

⁹¹ Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing Limited, London 2003) 304.

⁹² SCSL RPE Rules 71, 85(D) and 90(A).

⁹³ The chart identifies the names and positions of alleged high-ranking members of the RUF. As the accused have been indicted with, *inter alia*, command responsibility, the allegations in the chart are so incriminating that the Trial Chamber ruled that the chart was a witness statement and should be tendered through the appropriate medium: *Prosecutor v Sesay, Kallon, Gbao* (Ruling on the Admissibility of Command Structure Chart as an Exhibit) Case No. SCSL-04-15-T (4 February 2005) para 22.

⁹⁴ A leading question is a question that suggests the answer to the person being interrogated: especially a question that may be answered by a mere “yes” or “no” - *Prosecutor v Sesay, Kallon, Gbao* (Ruling on the Admissibility of Command Structure Chart as an Exhibit) Case No. SCSL-04-15-T (4 February 2005) para 11 and see also paras 10, 12-14 for a discussion of this “leading questions” generally.

⁹⁵ *Prosecutor v Sesay, Kallon, Gbao* (Ruling on the Admissibility of Command Structure Chart as an Exhibit) Case No. SCSL-04-15-T (4 February 2005) paras 15 & 18.

illustrates the principle that relevant documentary evidence is admitted into evidence only if neither party objects to its admission.

The SCSL has also had the opportunity to consider documentary evidence under Rules 54, 89 and 92bis of its RPE.⁹⁶ The Accused, Fofana, sought to have a written statement and an email print-out admitted into evidence under Rule 92bis without calling the witnesses to testify and be subject to cross-examination. Since the prosecution did not object to the email documentary evidence, and the evidence contained factual assertions relevant and susceptible of corroboration, the written statement and email print-out were admitted into evidence.⁹⁷

Therefore, by virtue of Rules 92bis and 94, the SCSL can admit documentary evidence in lieu of oral testimony. The SCSL Appeals Chamber decision in *Prosecutor v Norman, Fofana Kondewa*,⁹⁸ illustrates that the two provisions are distinguishable but are a linked tool through which a party may seek admission of documentary evidence under one provision and if unsuccessful, may proceed to use it under other provisions.⁹⁹

In the historic trials, documentary evidence in the form of war plans and written orders were said to be the “most compelling witnesses against those who drafted, signed, initiated or distributed” them.¹⁰⁰ The ICTY case of *Tadic* also indicates reliance on a great deal of documentary evidence. To this end, it has been suggested that “there has been a gradual tendency to reliance upon written evidence instead of oral evidence”.¹⁰¹ This may be the case for the ICTY but not for the ICTR and the SCSL where “there is much less in the way of a written record of the events and of the crimes.”¹⁰² This is reflected in the views of Judge Richard May and Marieke Wierde, cited in *Prosecution v Norman, Fofana and Kondewa*,¹⁰³ who note the discernable preference “...for live testimony on matters pertaining directly to the guilt or innocence of the accused...”¹⁰⁴

An affidavit or sworn declaration is another form of documentary evidence. It is often admitted into evidence if the other party does not object and it must be in the interest of justice to admit such evidence. In the event of an objection, the affidavit witness will be required to give oral testimony.¹⁰⁵ A witness who gives opinion evidence on a subject other than the facts in issue is an expert witness. An expert witness must possess the requisite qualification to be able to express a valid opinion and must be impartial.

⁹⁶ *Prosecutor v Norman, Fofana and Kondewa* (Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis) Case No. SCSL-04-14-T (9 October 2006).

⁹⁷ *ibid* paras 13 & 26.

⁹⁸ (Fofana – Decision on Appeal against “Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence”) Case No SCSL-2004-14-AR73 (16 May 2005).

⁹⁹ *ibid* paras 22 & 27.

¹⁰⁰ William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo 2006), 471 Footnote 116.

¹⁰¹ *ibid* 471 Footnote 117.

¹⁰² *ibid* 482.

¹⁰³ (Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis) Case No. SCSL-04-14-T (9 October 2006) para 19.

¹⁰⁴ *Prosecution v Norman, Fofana and Kondewa* (Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis) Case No. SCSL-04-14-T, (9 October 2006) para 19.

¹⁰⁵ William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo 2006) 477.

His/her opinion should “enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field”¹⁰⁶ and such evidence is aimed at assisting the court in its deliberation.¹⁰⁷ In the AFRC case, six expert witnesses were called upon to explain to the Trial Chamber the practice of ‘force marriages’ or ‘bush wives’. Three expert witnesses for the prosecution and two for the defence had their testimonies cross-examined and their reports admitted into evidence under Rule 94bis. The report of the third expert witness for the defence was admitted into evidence without cross-examination.¹⁰⁸ Rule 94bis is the principal provision which governs expert evidence and to a large extent, deals with procedural more than evidentiary matter.

E. Corroboration evidence and evidence in cases of sexual offences

To say *unus testis, nullus testis*¹⁰⁹ is to say that evidence must be corroborated. In the RPE of the ICTY and ICTR, there is a suggestion that in cases of sexual assault, corroboration is not required.¹¹⁰ This implies that in other cases, evidence must be corroborated, as if it is a rule of international criminal law. The rule *unus testis, nullus testis* is a civil law rule that has no application in international criminal proceedings. What the caselaw has demonstrated, from the ICTY cases of *Tadic* and *Delalic* to the ICTR case of *Akayesu*, is that information and testimony has to meet the admissibility requirements for it to be admitted into evidence.¹¹¹

It is now settled that a single piece of evidence that is relevant (as in the case of the SCSL RPE) and whose probative value (as in the case of the ICTR and ICTY) is not outweighed by its prejudicial effect, will be admitted and relied upon to convict. This was the case in *Akayesu*. Only one testimony was presented in support of the rape charge. The defence had invited the Trial Chamber to apply the civil law *unus testis, nullus testis* rule to strike out the single testimony for want of corroboration. The Chamber reiterated that it cannot be bound by national rules of evidence and that in any case, Rule 89(C) and (D) which only require relevance and probative value allow for the admission of even this single testimony.¹¹² “Accordingly, acceptance of and reliance upon uncorroborated evidence, *per se*, does not constitute an error in law.”¹¹³

Rule 96(i) is the only provision in both the ICTY and ICTR RPE that directly deals with corroboration testimony, while Rule 89 deals with the admission of evidence generally. Having identified this relationship, the Chamber noted that the reference to the no corroboration requirement in

¹⁰⁶ *ibid* 480 Footnote 170.

¹⁰⁷ *ibid* 471 & 480-1.

¹⁰⁸ *Prosecutor v. Brima, Kamara, Kanu* (Judgment) Case No. SCSL-04-16-T (20 June 2007) para 149.

¹⁰⁹ i.e. one witness is no witness.

¹¹⁰ ICTR & ICTY RPE Rule 96(i).

¹¹¹ For a discussion of these cases and corroboration evidence, see Judge Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, Inc., New York 2002) 120-121.

¹¹² *Prosecutor v. Jean-Paul Akayesu* (Judgment) Case No. ICTR-96-4-T (2 September 1998) paras 132-136.

¹¹³ *Eliézer Niyitegeka (Appellant) v. The Prosecutor (Respondent)* (Judgment) Case No. ICTR-96-14-A (9 July 2004) para 92.

sexual assault cases means that the testimony of a victim of sexual assault is and should not be treated as less reliable than that of the victim of other offences.¹¹⁴

The SCSL RPE have no exact equivalent to Rule 96(i). Rule 96 of the SCSL, talks about sexual violence while ICTY and ICTR Rule 96(i) talks about sexual assault. The question one author poses is “whether the SCSL will be less rigorous in applying Rule 96 as a result” of these differences.¹¹⁵

In the AFRC Judgment, the SCSL was called upon to rule that ‘forced marriages’ qualify as ‘Other Inhumane Acts’ punishable under Article 2(i) of the Statute.¹¹⁶ This is important as for “...the first time in international legal history, ‘forced marriage’ is being prosecuted as a ‘crime against humanity’ in Sierra Leone’s post-conflict ‘Special Court’”.¹¹⁷ Ruling on the evidence and the burden of proof to be discharged for a successful conviction, the Trial Chamber noted as follows:

“The Prosecution evidence in the present case does not point to even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery...

...that the totality of the evidence adduced by the Prosecution as proof of “forced marriage” goes to proof of elements subsumed by the crime of sexual slavery.”¹¹⁸

For this reason, the SCSL dismissed the offence under Count 8, forced marriage.¹¹⁹

This is a negative decision for the prosecution which had hoped to develop a new offence in international criminal law. However, it has to be noted that if the evidence adduced does not support a successful conviction, it is in the interest of justice for the Trial Chamber to have ruled as it did. Accordingly, the issue is not whether the SCSL had been less rigorous in applying Rule 96 but rather whether it had properly applied the relevant rules (including rules of evidence) in making sure that its determinations are fair, just and lawful.

The SCSL has also dealt with corroboration evidence in matters other than sexual offences. In one judgment, it observed, “[a]s a matter of law, the testimony of a single witness on a material fact does not require

¹¹⁴ *Prosecutor v Jean-Paul Akayesu* (Judgment) Case No. ICTR-96-4-T (2 September 1998) para 134; see also *Prosecutor v. Alfred Musema* (Judgment and Sentence) Case No. ICTR-96-13-A (27 January 2000) para 45.

¹¹⁵ William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo 2006) 469 Footnote 271.

¹¹⁶ *Prosecutor v. Brima, Kamara, Kanu* (Judgment) Case No. SCSL-04-16-T (20 June 2007) para 701

¹¹⁷ Augustine S. J. Park, “‘Other Inhumane Acts’: Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone” (2006) *Social and Legal Studies*, Vol. 15, No. 3, 315-337, at 315.

¹¹⁸ *Prosecutor v. Brima, Kamara, Kanu* (Judgment) Case No. SCSL-04-16-T (20 June 2007) paras 710-711.

¹¹⁹ *ibid* paras 713-714.

corroboration.”¹²⁰ Such evidence must meet the admissibility tests, which looks to relevance and reliability. Accordingly, the SCSL Trial Chamber held that the testimony of Witness George Johnson relating to the command positions of the members of the AFRC in Kono District was unreliable and thus, was inadmissible.

However, when the Trial Chamber further considered this witness’ testimony on the command positions of AFRC members in relation to the offences committed in Bombali District, the court also ruled it inadmissible for want of corroboration evidence:

“The Trial Chamber has found that the evidence of witness George Johnson in relation to the G4 and G5 positions in Kono District was unreliable, and in the absence of the corroboration of other witnesses it does not accept this aspect of the witnesses’ evidence in relation to Bombali District.”¹²¹

The question that persists about the inadmissibility of George Johnson's testimony is whether inadmissibility was based on want of corroborating evidence or on its unreliability resulting from conflicting information he provided in cross-examination. If the former, then this may be contradictory to established practice and the general rule on corroboration evidence that a Trial Chamber may rely on a single witness’s testimony for the proof of a material fact. Accordingly, acceptance of and reliance upon uncorroborated evidence, *per se*, do not constitute an error in law.¹²² However, if the latter applies, this would be the correct approach as any evidence, including corroborating evidence, must be relevant, probative and reliable. Inconsistent and conflicting testimony will not meet these requirements and admitting such evidence will lend itself to miscarriages of justice and violations of the right to fair trial.

One of the aims of this article was to find out whether or how the experience of applying the Rules of Procedure and Evidence at the SCSL helped to meet the objectives of the international criminal justice system. These objectives include holding violators of IHR and IHL accountable; guaranteeing procedural propriety; giving legitimacy to the process; and bestowing confidence in the international criminal justice institutions themselves. The concluding paragraphs will now address this aspect.

VI. Conclusion

It is difficult to make a generalised statement as to whether the SCSL has, on the whole, achieved all the objectives this paper set out to examine. Only a handful of cases were discussed. However, from this limited study, it is clear

¹²⁰ *Prosecutor v. Brima, Kamara, Kanu* (Sentencing Judgment) Case No. SCSL-04-16-T (19 July 2007) para 520.

¹²¹ *Ibid* footnote 120.

¹²² *Eliézer Niyitegeka (Appellant) v. The Prosecutor (Respondent)* (Judgment) Case No. ICTR-96-14-A (9 July 2004) para 92; see also that “there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence”: *Prosecutor v. Zejnil Delalic, Zdravko Mucic (Aka “Pavo”), Hazim Delic and Esad Landžo (Aka “Zenga”)* (Judgment) Case No. IT-96-21-A (20 February 2007) para 506.

that the decisions of the SCSL relating to the application of its rules of evidence lend the court a degree of credibility in its contribution to the development of evidence in international criminal trials.

The view taken in this article is that the SCSL *Subpoena Decision* (Trial) was wrong. It denies the SCSL the opportunity to positively contribute to the incremental development of this area of law. The decision also denies the accused persons in the CDF case as well as the victims, the opportunity to know whether President Kabbah's testimony had any relevance to Fofana's and Norman's guilt or innocence. The decision therefore illustrates the kind of weak jurisprudence from the SCSL in this area.

The decision in *Prosecutor v. Norman et al* could be considered a positive contribution to the rules of evidence in international criminal tribunals.¹²³ The appeal decision makes the point that Rule 89(C) does not require statements or submissions to be signed to be admissible. The Rule is designed to avoid sterile legal debate over admissibility so the court can concentrate on the pragmatic issues.¹²⁴

Further, credit should be accorded to the Appeals Chamber for granting leave to review the lower court's decision. Justice Raja Fernando did not hesitate in making clear his purposes for allowing the appeal – to advance the interest of justice, to acknowledge “good cause” in the appellants' application, and to have the “best evidence rule” tested in relation to Rule 89.¹²⁵ This can only contribute to the positive development of this area of law in international criminal trials.

On the ‘best evidence rule’ (i.e. evidence which best favours a fair determination) the proposition that this is a dead rule, not applicable to international criminal law received approval in another SCSL decision. The SCSL Trial Chamber ruled that ‘...the best evidence rule, originating from the traditional common law, does “not formally apply to exclude evidence in international criminal trials.”’¹²⁶ With this ruling, it appears that the SCSL has made further contribution to developing this area of the evidence law. If the SCSL decisions are followed in future cases, previous decisions (like *Prosecutor v Radoslav Brdanin and Momir Talic*¹²⁷) on the best evidence rule may become bad law. Perhaps this is one area in need of further research.

The SCSL decision in favour of excluding confession evidence obtained involuntarily is welcomed on the ground that it helps to clarify the standard of proof required in criminal trials.¹²⁸ Proof beyond reasonable doubt appears to be a high threshold that may be difficult to reach within the context of international criminal trials for IHL and IHL. This view is supported by Ilias Bantekas and Susan Nash and DD Ntanda Nsereko.¹²⁹ Further, William A Schabas holds a similar view: “Generally, it should be presumed that the

¹²³ (Fofana – Appeal Decision Refusing Bail) Case No. SCSL-04-14-AR65 (11 March 2005).

¹²⁴ *ibid* para 26.

¹²⁵ *ibid* para 9.

¹²⁶ *Prosecution v Sesay, Kallon, Gbao* (Ruling on the Admissibility of Command Structure Chart as an Exhibit) Case No. SCSL-04-15-T (4 February 2005) paras 7 & 20.

¹²⁷ (Order on the Standards Governing the Admission of Evidence) Case No. IT-99-36-T (15 February 2002) para 22.

¹²⁸ *Prosecutor v. Sesay, Kallon, Gbao* (Oral Ruling On The Admissibility of Alleged Confessional Statements Obtained by Investigators of The Office of The Prosecutor From The First Accused, Issa Hassan Sesay) Case No. SCSL-04-15-T (5 July 2007).

¹²⁹ Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing Limited, London 2003) 292.

balance of probabilities standard applies to issues of evidence other than the ultimate question of guilt or innocence, unless there is some special provision.”¹³⁰ If a party seeking to exclude confession evidence on the grounds that it was obtained involuntarily is regarded as making a fresh allegation, then the general principle of proof beyond reasonable doubt is required. In the *Prosecutor v Sesay, Kallon, Gbao*¹³¹ case, there is no doubt that the confession evidence is incriminating and bears directly on the guilt or innocence of the First Accused. Besides, the application to admit the confession evidence was made by the prosecution. Hence, it is suggested that the SCSL adopted the correct standard of proof.

Accordingly, it is argued that the SCSL approach in *Prosecutor v Sesay, Kallon, Gbao*,¹³² in which the alleged confessional statements relate to the guilt or innocence of the First Accused, appropriately required the prosecution to prove their claim beyond reasonable doubt. This is a positive contribution to the law of evidence in international criminal trials relating to confessions.

In relation to hearsay evidence, the SCSL decisions discussed in this paper depart from settled practice. In its consideration of hearsay evidence, the SCSL demonstrated that it was mindful of the impact admissibility of hearsay evidence would have on the right to fair trial and the administration of justice. Incriminating hearsay evidence relating to command responsibility was ruled inadmissible on grounds of unreliability.¹³³

Moreover, even when serious allegations have been made against the accused, the SCSL has not simply endorsed such allegations, as one would expect in a show trial. For example, the SCSL refused to admit unreliable hearsay evidence relating to the rape of young girls and catholic nuns.¹³⁴ On another occasion, the SCSL ruled as follows:

“The Trial Chamber finds that the hearsay evidence of witness TF1-153 that women and girls were raped at PWD and the general evidence of witness TF1-334 that young girls were abducted and brought to PWD is insufficient to satisfy the *actus reus* and *mens rea* elements of rape.”¹³⁵

¹³⁰ William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo 2006) 465.

¹³¹ (Ruling on the Admissibility of Command Structure Chart as an Exhibit) Case No. SCSL-04-15-T (4 February 2005).

¹³² *Ibid.*

¹³³ *Prosecutor v. Brima, Kamara, Kanu* (Sentencing Judgment) Case No. SCSL-04-16-T (19 July 2007), Para 520.

¹³⁴ *Prosecutor v. Brima, Kamara, Kanu* (Judgment) Case No. SCSL-04-16-T (20 June 2007) para 1058.

¹³⁵ *ibid* para 1060.