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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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Office of the Prosecutor  
Bureau du Procureur

Before Trial Chamber II

Case No. 95-1-T

Date filed with Registrar:

**THE PROSECUTOR**

**AGAINST**

**CLEMENT KAYISHEMA**

**AND**

**OBED RUZINDANA**

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**NOTICE OF INTENTION TO PRESENT PROSECUTION EVIDENCE  
IN REBUTTAL AND NOTICE OF TESTIMONY OF EXPERT WITNESS  
RULE 85(A) (iii) AND RULE 94 *BIS* (A)**

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The Prosecutor:

Mr. James K. Stewart

Mr. Jonah Rahetlah

Ms. Brenda Sue Thornton

Ms. Holo Makwaia

Counsel Kayishema:

Monsieur le Bâtonnier A. Ferran

Monsieur le Bâtonnier P. Moriceau

Counsel for Ruzindana:

Maître P. Besnier

Maître W. Van der Griend

**NOTICE OF INTENTION TO PRESENT PROSECUTION EVIDENCE  
IN REBUTTAL AND NOTICE OF TESTIMONY OF EXPERT WITNESS  
RULE 85(A) (iii) AND RULE 94 BIS (A)**

The Prosecutor hereby respectfully gives notice of her intention to call prosecution evidence in rebuttal, pursuant to Rule 85(A)(iii), and notice of the testimony of an expert witness, pursuant to Rule 94 *bis* (A).

This notice pertains to the expert testimony of Dr. R. C. L. Lindsay, Professor of Psychology in the Psychology Department of Queen's University, at Kingston, Ontario, Canada, to be called by the Prosecutor as a witness in rebuttal.

The curriculum vitae of Dr. Lindsay and a copy of his report made to the Office of the Prosecutor are attached to *and hereby filed with*, this notice. Dr. Lindsay is an expert on the subject of eyewitness identification evidence.

It is proposed to call the rebuttal evidence on the following grounds:

1. Dr. Regis Pouget, a psychiatrist permitted to testify as an expert witness at the instance of the defence, testified, on the basis of his report, filed as Defence Exhibit 41A, among other things, that, in matters of identification, error was more frequent than accuracy. In cross-examination, the witness refused to move from that position, although he admitted it was only based upon the few studies cited in his report and his own conversations with French police officers. Dr. Pouget also acknowledged that his opinion related to eyewitness identification of strangers.
2. In leading this evidence, respecting the supposed frailty of eyewitness testimony, especially in relation to identification, the defence have underscored the importance to the prosecution case against the accused of eyewitness evidence, and clearly wish to rely on the opinion of Dr. Pouget to attack it as being unreliable.
3. The prosecution is in a position to rebut the opinion of the defence expert witness, in particular, by establishing through Dr. R. C. L. Lindsay, an expert in the field of eyewitness identification evidence, the following:

- (a) The *opposite* of what Dr. Pouget has asserted is true, that is, *accuracy is more frequent than error, in matters of identification*, in accordance with the research in this area, not what the defence expert maintained. (It is only in the poorest conditions, where the methods used are the most biased, that frequency of error compared to accuracy can reach even 50%.)
- (b) The studies relating to identification accuracy are likely irrelevant to the present case, since the literature pertains to the identification of *strangers*, not, as in the present case, the identification of individuals whom the witnesses say they *knew* beforehand.

These points, and others, subject to the discretion of the Trial Chamber, will be offered in rebuttal through the testimony of Dr. Lindsay, an expert of impeccable credentials and experience.

4. The proposed prosecution rebuttal evidence clearly relates to matters that arise directly and specifically out of defence evidence. See attached: *Prosecutor v. Delalic et al* (IT-96-21-T), Order on the Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, 30 July 1998, page 2.

The prosecution will be in a position to call the rebuttal evidence in question early in September 1998, in accordance with any schedule set for the trial by the Trial Chamber, Dr. Lindsay not being available to travel to Arusha until the beginning of September 1998.

In accordance with Rule 94 *bis* (B), the defence is required to indicate, within the time period stipulated therein, whether it accepts the expert witness statement (that is, the report attached hereto, prepared by Dr. Lindsay), or whether it wishes to cross-examine the expert witness. If the defence accepts the statement of the expert witness, then, in accordance with Rule 94 *bis* (C), the report of Dr. Lindsay may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

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R.C.L. Lindsay

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Publications

òLindsay, R.C.L. (1994). Expectations of eyewitness performance. In D. Ross, D. Read, & M.Toglia (Eds). Adult eyewitness testimony: Current trends and developments, (pp.362-384). New York: Cambridge University Press. òLindsay, R.C.L., Nosworthy, G.J., Martin, R., & Martynuck, C. (1994). Using mugshots to find suspects. Journal of Applied Psychology, 79, 121-130. òRoss, D.F., Hopkins, S., Hanson, E., Lindsay, R.C.L., Hazen, K. & Eslinger, T. (1994). The impact of protective shields and videotape testimony on conviction rates in trials of child sexual abuse. Law and Human Behavior, 18, 553-566. òLindsay, R.C.L., Martin, R., & Webber, L. (1994). Default values in eyewitness descriptions: A problem for the match-to-description lineup foil selection strategy. Law and Human Behaviour, 18, 527-541.

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òLindsay, R.C.L., Ross, D.F., Lea, J.A., & Carr, C. (1995). What's fair when a child testifies? *Journal of Applied Social Psychology*, 25, 870-888. òLindsay, R.C.L., Pozzulo, J.D., Craig, W., Lee, K., & Corber, S. (1997). Simultaneous lineups, sequential lineups, and showups: Eyewitness identification decisions of adults and children. *Law and Human Behavior*, in press.

### Research Interests

My primary research interest continues to address issues of eyewitness memory and police procedures for obtaining information from witnesses. Current studies address limitations of the sequential lineup for obtaining identifications in cases involving multiple suspects and/or criminals who have changed their appearance after committing a crime. A new line of research concerns methods of finding suspects in mug shot files based on data obtained from witnesses (descriptions of the culprit and ratings of similarity of the culprit to a standard set of faces). Another recent addition to my research program are studies of eyewitness identification procedures to be used with children. All of these issues are applied as well as theoretical in nature and lead me to have extensive contact with police and the courts. My contacts with police are particularly valuable as they both assist with dissemination of information to those most in need of it and supply new directions for research by outlining problems that police need assistance resolving.

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Last updated by weblord@pavlov.psyc.queensu.ca on MAY-01-98. 2,730 accesses since MAY-23-97.

A report for the Office of the Prosecutor:  
Eyewitness issues in the case of Kayishama and Ruzindana (ICTR-95-I-T).  
R. C. L. Lindsay, Professor of Psychology, Queen's University, Canada

This report is based on information provided by the prosecution including: 1. summaries of selected witness testimonies for the prosecution; 2. an unofficial English translation of Dr. Pouget's report; and 3. the Official English Transcript of Dr. Pouget's testimony of 30th June to 2nd July, 1998.

Preamble. Eyewitness evidence has been a source of concern to legal authorities for some time and now is considered to be the single leading cause of wrongful convictions (Rattner, 1988; Sobel, 1972; Wall, 1965). For this reason, eyewitness experts are frequently sought out by the defense in criminal cases. I will assess the applicability of eyewitness research to the issues in the current case with particular reference to why the issues addressed in eyewitness research in general are not likely to be applicable in this case.

### **Eyewitness Research**

Psychological research on eyewitness issues has addressed three major categories of influence: 1) characteristics of the crime or situation, 2) characteristics of the witness or criminal, and 3) investigative procedures.

1. Research by Elizabeth Loftus (1979) tests the "reconstructive" nature of memory. Loftus argues that people alter their memories of events to integrate all information that they have about the event into a coherent representation. She argues that people will mix actual memories of events with things they have heard or read about an event. In particular, people exposed to inaccurate information following an event may incorporate such information into memory. To test these effects, people watch slide or videotaped presentations of events and then answer questions about them. The consistent finding is that exposure to incorrect information about events can reduce the accuracy of subsequent memories for an event, particularly by recalling the misinformation as part of the original event (referred to as the "misinformation" effect). Aside from Loftus' work, there is a large literature indicating that memory for events is never flawless but also that the most common errors are in the absence of misleading questions or false feedback are errors of omission, not errors of commission. That is, in the absence of systematic attempts to bias witnesses, witnesses will often fail to notice many details but most of what they do report is correct.

Other aspects of events have been shown to influence witness accuracy as well. The presence of multiple perpetrators, weapons, or other arousing circumstances can influence witness accuracy in complex ways, both increasing and decreasing accuracy depending upon the specific situation and information one is interested in. Complex events (e.g., with many perpetrators) are generally more taxing and the witness is less likely to recall any particular piece of information under such circumstances than when a simpler event occurs. Violence and

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weapons tend to redirect attention and can lead to little recall of less attended material in the situation but also exceptional recall of details that are attended to.

2. In general, research on the characteristics of witnesses and criminals (including factors such as race, age, intelligence, and personality) fails to show strong effects that permit discrimination between accurate and inaccurate witnesses. Many small effects have been demonstrated and some larger effects are likely to exist with, as yet, untested populations. For example, extremely low intelligence, such as may lead to institutionalisation, may be related to witness accuracy, but intelligence within the normal range has not been shown to be related other than to factors such as verbal fluency. Overall, this literature is not particularly helpful in court cases.

3. Investigative procedures have been found to be extremely important as determinants of witness accuracy. Within the domain of memory for events, phrasing of questions has been shown to influence accuracy in two primary ways: First, as discussed earlier, embedding misleading information in questions can distort memory. Second, witness reports tend to be more accurate when less directive or leading questions are used. Thus, open ended questions such as "What did you see?" or "What happened?" produce more accurate responses on average than leading questions such as "Did you see the man run into the store?"

Identification procedures also can be critical determinants of witness accuracy. A variety of lineup biases have been demonstrated to lead to high rates of false positive identifications. Superior identification procedures (such as sequential lineups) have been developed to overcome these problems.

### Relevance to this Case

1. Memory for Events. Certainly the witnesses in this case could have been subject to a number of factors that influence memories for events. Weapons and violence were at the heart of the acts, there were other witnesses about who could have supplied inaccurate information, etc. However, the research on memory for events and inaccurate reporting as a result of misinformation (work by Loftus and her colleagues) does not match the facts of this case for several reasons.

a. Peripheral Details. Most research on the effects of misinformation demonstrates that it is easy to mislead people about peripheral, minor details of an event such as the colour of a car or the nature of a street sign in a video clip (whether a sign is a stop or a yield sign may be of great importance when actually driving, but for the audience of a taped event it is peripheral). The transcripts that I read contained relatively few minor details that seemed critical to the case. Surely it is not in dispute that large numbers of people were killed. Nor does the court have to rely on witness statements concerning the means by which the victims were killed. The bodies provided ample evidence of that. I can't think of any important peripheral details that it would matter to dispute as a result of the eyewitness literature.

b. Central Details. It can be quite difficult to mislead people about central aspects of an event, those aspects that they were particularly attending to. On the other hand, in her most recent work, Loftus has demonstrated that people can be led to remember entire events that did not happen. Again the circumstances that lead to such an effect seem unlikely to exist in this case. Producing such an effect generally requires a long period of indoctrination by people close to the witness and whom the witness has reason to believe are as knowledgeable about the event as the witness or better yet more knowledgeable (e.g., parents convincing their children that something happened to them when they were young).

2. Identification. Clearly the most important evidence in this case is identification evidence. Numerous witnesses have named the accused parties as the people they saw engaged in killing or ordering others to kill innocent, unarmed people. What can be said about the identification evidence in this case?

a. Familiarity. In this case, many of the witnesses knew the accused parties prior to the crimes. This is a critical point that makes the eyewitness literature largely irrelevant. Research in this area tests recognition of unfamiliar faces. Familiar faces should be easier to recognize so the estimates of witness accuracy reported in the eyewitness literature are likely to be underestimates for the situation currently before the court.

b. Identification Accuracy in General. While it is true that identification errors are the leading cause of wrongful convictions, it is also true that identification errors are frequently related to extremely biased identification procedures (see Wells, 1993; Wells, Small, Penrod, Malpass, Fulero, & Brimacombe, 1998). The only conditions reported in the eyewitness literature that lead to rates of false identification that are nearly as high as the rate of correct identification are highly biased lineups (e.g., Lindsay, Lea, Nosworthy, Fulford, Hector, LeVan, & Seabrook, 1991; Lindsay & Wells, 1980). Under such conditions as biased instructions, extremely poor foils, clothing bias, etc. eyewitnesses have been known to make false identifications of strangers at rates comparable to their correct identification rates.

These findings are of questionable relevance in this case because, again, the witnesses were not identifying strangers but rather people they had known for some time and, as far as I could tell from the materials provided, biased identification procedures were not involved.

c. Violence/Weapons/Arousal. The defense claim that violence and weapons increase arousal leading to impaired eyewitness memory is problematic for the following reasons:

i. The research on which this claim is based either was not concerned with facial recognition at all or was dealing with recognition of strangers and thus may not apply in this case.

ii. The research is not adequately described in that arousal does not necessarily

lead to less information encoded into memory so much as it changes what people attend to. Given long and repeated exposures (over weeks of being pursued this would appear to have been possible for at least some witnesses) and prior acquaintance with the perpetrators, there is good reason to believe that the witnesses could have spent some time attending to and thus processing the faces of their assailants. If they did, the weapon effect could lead to better rather than worse identification accuracy due to the narrowed focus of attention being directed to the faces of the perpetrators for at least some period of time.

iii. Even if we accept that the witnesses must be highly aroused under the conditions in this case, theories exist that would predict high rather than low accuracy. The social facilitation effect (Triplett, 1898; Zajonc, 1965) indicates that arousal inhibits performance on poorly learned or difficult tasks but facilitates performance for well learned or easy tasks. Recognition of a familiar face is a very easy and, by definition, well learned task. Thus, arousal may facilitate rather than interfere with eyewitness identification performance.

All of these points highlight the most appropriate conclusion regarding weapons and arousal effects in this case. We do not know what impact weapons and arousal have on the recognition of familiar faces because there are no studies directly addressing the issue. The studies that are available could lead to the conclusion that weapons and arousal could increase the accuracy of recognition for familiar faces, decrease such accuracy, or even have no effect due to different principles with opposite tendencies cancelling out. There is insufficient reason to dismiss identification of familiar faces despite the obviously arousing and threatening nature of the events in this case.

### Conclusions

The most important eyewitness evidence in this case is identification evidence. The identifications are frequently made by witnesses who knew the identified individuals for some time prior to the events that precipitated this trial. The eyewitness literature has little or nothing to say on the issue of identifying familiar faces because systematic studies of the issue have not been conducted. For this reason, attempts to apply the current eyewitness research to this case are probably ill advised. However, if we do examine the eyewitness literature and apply it to this case, it still can not provide convincing evidence that the witnesses who have testified are likely to be in error. A single eyewitness is more likely to be correct than incorrect under most circumstances. In the absence of a systematic source of bias, multiple eyewitnesses are even less likely to be in error.

The claim that eyewitnesses are inaccurate more often than they are accurate is simply incorrect. Under some very special conditions eyewitnesses are inaccurate about as often as they are accurate. Those conditions are that a stranger is seen then an identification is attempted from a procedure such as a lineup in which the guilty person does not appear and in addition the identification

procedure is very biased. It is not clear that any of these conditions apply in this case.

In general, eyewitness identification is a reasonable source of evidence. Errors do occur but on average, in cases involving identification of strangers, eyewitness identification is more likely to be accurate than inaccurate. Given familiarity with the people identified prior to the acts, identification evidence is even more likely to be accurate.

#### References

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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

Case No.: IT-96-21-T

Date: 30 July 1998

Original: English

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding  
Judge Elizabeth Odio Benito  
Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Order of: 30 July 1998

PROSECUTOR

v.

ZEJNIL DELALIĆ  
ZDRAVKO MUCIĆ also known as "PAVO"  
HAZIM DELIĆ  
ESAD LANDŽO also known as "ZENGA"

ORDER ON THE PROSECUTION'S NOTIFICATION OF  
WITNESSES ANTICIPATED TO TESTIFY IN REBUTTAL

The Office of the Prosecutor:

Mr. Grant Niemann  
Ms. Teresa McHenry  
Mr. Giuliano Turone

Counsel for the Accused:

Ms. Edina Rešidović, Mr. Ekrem Galijatović, Mr. Eugene O'Sullivan, for Zejnil Delalić  
Mr. Željko Olujić, Mr. Tomislav Kuzmanović, for Zdravko Mucić  
Mr. Salih Karahđić, Mr. Thomas Moran, for Hazim Delić  
Ms. Cynthia McMurrey, Ms. Nancy Boler for Esad Landžo

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal");

BEING SIESED of the "Prosecution's notification of witnesses anticipated to testify in rebuttal" (Official Record at Registry Page ("RP") D7280-D7328), filed by the Office of the Prosecutor ("Prosecution") on 22 July 1998 ("Motion");

NOTING the "Motion by the defendant Delalić opposing the Prosecution's notification of witnesses anticipated to testify in rebuttal" (RP D7333-D7337), filed by the Defence for Zejnil Delalić on 23 July 1998;

FURTHER NOTING the submissions of the Prosecution and the Defence whilst speaking to the Motion on 24 July 1998;

CONSIDERING that Rule 85 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") provides, *inter alia*, that each party is entitled to call witnesses and present evidence and that, evidence for the defence shall be followed by Prosecution evidence in rebuttal;

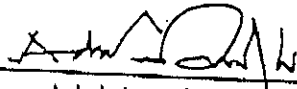
FURTHER CONSIDERING that rebuttal evidence is evidence is limited to matters that arise directly and specifically out of defence evidence;

PURSUANT TO RULES 54 AND 85,

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HEREBY GRANTS leave to the Prosecution to call Dr. Landy Sparr, as a rebuttal witness, to rebut the testimony of Dr. van Leeuwen and Dr. Lagazzi and Dr. Gripon who gave evidence for Esad Landžo.

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

  
Adolphus G. Karibi-Whyte  
Presiding Judge

Dated this thirtieth day of July 1998,  
At The Hague,  
The Netherlands.

[Seal of the Tribunal]