

Evaluation of Inconsistent Judgement Criteria in Ad Hoc Tribunals

Edmund Carr, Miles Boyer

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Abstract

Evidence, in the form of facts and materials, is crucial in proving the truth of a matter in court. Oral testimonies, which are verbal statements made by witnesses during legal proceedings, serve as a key method of gathering evidence. In assessing these testimonies, judges closely examine both the content of the evidence and the witness's background to evaluate credibility and reliability. Reliability hinges on the testimony's quality and accuracy, while credibility is influenced by the witness's objectivity and competence. Objectivity is gauged by considering factors like bias, integrity, and demeanor. Competence, conversely, is determined by the witness's mental state, language proficiency, memory, and other elements that may affect their ability to provide reliable testimony. However, the delivery of evidence is prone to bias. For example, while objectivity aspects are to some degree in the conscious command of a witness, the issues of competence are mostly outside of the witness' control. As a result, evaluation of the evidence is made extremely difficult by the subjective and uncontrollable nature of oral testimonies. To prove the defendant's guilt "beyond reasonable doubt," judges must first presume innocence. This task becomes more complex when the primary evidence is derived from oral testimonies, where the judge's subjective perception may lie at the heart of the matter.

Keywords

Yugoslavia, Tribunal, Ad Hoc, ICTY

1 Introduction

According to the analysis of Chlevickaitė's article "Judicial Witness Assessments at the ICTY, ICTR, and ICC: Is There 'Standard Practice' in International Criminal Justice?", ICCT's legal frameworks do not offer guidelines for evidence assessment. As the precise parameters for credible and reliable testimonies are largely subjective, "confidence [is] vested in professional judges to bring sufficient experience to their jobs" (Chlevickaitė et al.). Judges in international crime tribunals face the complex task of traversing "cultural and linguistic barriers, time gaps, conflict-inspired biases, and traumatic circumstances" (Chlevickaitė et al.). This demands high flexibility, but the lack of concrete guidelines results in uncertainty and questions of fairness. Not only are judges "free to decide on the appropriate approach," (Chlevickaitė et al.) but the rules are also "open to interpretation and amendment" (Chlevickaitė et al.). The freedom delegated to judges stemming from the loose framework allows great room for error. Through the analysis of "all trial judgments issued by the ICTY, ICTR, and ICC," (Chlevickaitė et al.) justice practitioners were found to be susceptible to using alleged deception cues "without any reference to scientific knowledge or precedent" (Chlevickaitė et al.). Even in the case that judges do spot erroneous statements through inconsistencies in the witness's testimony, the freedom of discretion leaves a large margin for error. For example, in the case of assessing objectivity, the treatment of a witness' inconsistent behavior creates gray areas of little legal certainty; some judges may completely overlook inconsistencies that would be serious enough to destroy a witness's credibility. Other judges might see the inconsistencies as a mitigating factor to reduce the severity of the crime or choose to treat inconsistent evidence as exculpatory evidence and clear the defendant of wrongdoings. As a result of the inconsistent and shaky methodologies of assessing evidence, different judges may arrive at different or altogether incorrect conclusions.

2 Review of Objectivity and Competence Factors in Ad Hoc Tribunals

2.1 The Evolution of Judgement Standards

Chlevickaitė's article demonstrates that the guidelines for legal institutions, between 1995 and 2019, are experimental and constantly evolving. In the earliest judgment of the ICTY, the Tadić case, judges sought "minimal external guidance (domestic precedent and expert testimony)" (Chlevickaitė et al.) and the chamber "focused on responding to the challenges by the defense, which centered on witness objectivity." Essentially, the Tadić case gave judges the freedom to make judgments based on how the witness responds to the defense. On the other hand, the earliest ICTR judgment in the Akayesu case made "use of expert testimony," leading to "contribution to witness competence criteria." For example, by referring to factors such as trauma, PTSD, and time-lapse, judges had the discretion to "explain away" testimonial deficiencies. After 2004, the number of new indicators of reliability and credibility significantly reduced while "mostly insider-specific aspects are further developed." This period also saw a shift of focus from competence to objectivity indicators for assessing witness credibility. This change reflects a growing concern over the potential bias in witness testimonies as the emphasis is placed on "the assessment of insider, accomplice, or witnesses." Finally, the timeline demonstrates the reconciliation of cross-institutional inconsistency, especially after 2010. As the guidelines evolved, the existing judging criteria remained stable over time, with tribunals sharing many overlapping indicators in a process of cross-institutional learning.

2.2 Witness Memory

The witness's memory is a contentious issue in court as it pertains to the witness's competency. Historical records have proven that "it is nearly impossible to produce consistent accounts over time." Especially in the cases of traumatic events that the witness had experienced several years prior, any contradiction or gap in memory can weaken the testimony's credibility. Looking at Emil Čakalic's case against Slavko Dokmanović in 1998, Čakalic was especially susceptible to giving inconsistent accounts between his many written statements and multiple oral testimonies. The cross-examiner attempted to undermine Čakalic's case by identifying these contradictions in his recollections. The cross-examiner pointed out that while Čakalic testified to Dokmanovic beating Dado Dukic on November 19th, 1991 in Ovcara, Čakalic's supplementary statement reflected the opposite, which was that he did not actually "see who [Dokmanovic] was hitting" (ICTY Web) To put the witness's competence in further question, the defendant points out contradictions that pertain only to trivial details that do not affect the central components of the testimonies. For instance, the cross-examiner debated over the subtle differences in meaning between words such as "see" and "recognize" in questioning Čakalic. The cross-examiner stated that Čakalic "made a statement saying that [he] did not see other people [on the bus at Ovcara]" (ICTY Web) even though Čakalic testified he recognized people on the bus, to which Čakalic responded, "How could I say that I did not see anyone, there was a bus full of people" (ICTY Web). The case demonstrates that memory could expose vulnerabilities in their testimony as it is a key component of witness competency.

2.3 Witness Bias

The credibility of eyewitness testimony can also be undermined by the perceived bias of personally victimized individuals. For instance, the suffering experienced by victims may cause them to inadvertently "exaggerate the damage sustained" (Chlevickaitė et al.). This phenomenon was evident in the cross-examination of Nedeljko Draganić during his testimony against Zdravko Mucić, Hazim Delić, Esad Landžo, and Zejnir Delalić on April 2 and 3, 1997. The defense employed several strategies to prove Draganić's account was heavily exaggerated. The cross-examiner pointed out the witness's claim that "one [hit Cerici] every 40 seconds [which is] an outrageous amount of shells" (ICTY Web) The cross-examiner went on to further evoke doubt over Draganić's competency by questioning how he calculated the outrageous number despite his mathematics background. This exaggeration may have cast doubts on the other statements Draganić made. As there was no evidence except verbal testimonies to support Draganić's claim that terrorists "beat [him] almost every day," (ICTY Web) Draganić could have overstated the number of beatings he has received. Thus, the credibility of the witness is crucially

important as any perceived exaggeration or bias in testimonies could impugn the overall truthfulness of the testimony.

2.4 Trauma and PTSD

Finally, trauma and PTSD may impact the reliability of a witness’s statement. The foreign court environment, coupled with the stressful nature of recalling distressing events, can exacerbate anxiety and may “impair attention and memory processes” (Chlevickaitė et al.). This effect is particularly pronounced in vulnerable witnesses unfamiliar with Western court procedures, who may feel intimidated by the cross-examiner scrutinizing their testimonies and asking challenging questions. Looking back to the Čakalic case, the cross-examiner deliberately puts Čakalic in a stressful position by twisting his words (mixing up “see” and “recognize”) and questioning his memory. Similarly, in Draganić’s case, the defense strove “to manipulate the witness’s emotional state to make [him] appear less credible” (Chlevickaitė et al.). The cross-examiner attempted to question Draganić’s reliability by asking: “As an intelligent, educated man, are you saying you did not read the newspaper; you did not listen to the news?” (ICTY Web). The question serves to insinuate the witness’s ignorance and incompetence to give accurate information. Lastly, Witness 87’s case on April 2, 2000, further exemplifies this point. Witness 87, who had refrained from “discussing the abuses with anyone, including her mother,” (ICTY Web) was pressured by the cross-examiner to divulge sensitive information. Upon receiving unsatisfactory answers, the cross-examiner complains that the witness “answered, ‘I don’t remember,’ 49 times to my questions” (ICTY Web). These examples underscore the vulnerability exhibited by traumatized witnesses who may be indisposed to offer relevant and credible information.

3 Conclusion

From the study of the above three tribunal cases, it is evident that there is great potential for bias in both the narration of events by witnesses and the interpretation by judges. As historical events, when told through the lens of a witness, take the form of a biased story, courts should perform extensive background checks on the witness to understand how the narration of the story could be flawed. The courts would also benefit from the input of psychologists and psychiatrists to establish more consistent guidelines based on a more scientific approach. Finally, courts such as the ICC, should look to the jurisprudence established by other international tribunals instead of solely depending on their own precedences. Although relying on inside precedence may satisfy internal consistency, cross-institutional standards inevitably become divergent. Ultimately, the nature of tribunal judgments does not call for the standardization of all aspects. However, consistent guidelines informed by modern scientific understanding will facilitate more fair and transparent outcomes.

References

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