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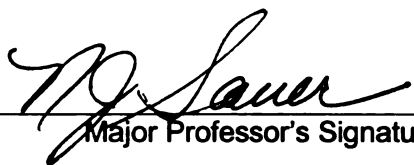
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**PROOF OF DEATH: AN ANALYSIS OF METHODS THAT THE INTERNATIONAL
CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA USED TO ESTABLISH
DEATH.**

By

Jennifer L. Beatty

A THESIS

**Submitted to Michigan State University
in partial fulfillment of the requirements
for the degree of**

MASTERS OF SCIENCE IN FORENSIC SCIENCE

Department of Criminal Justice

2005

ABSTRACT

PROOF OF DEATH: AN ANALYSIS OF THE METHODS THAT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA USED TO ESTABLISH DEATH.

By

Jennifer L. Beatty

The International Criminal Tribunal for the former Yugoslavia's ("ICTY") jurisdiction encompasses three main categories of crime: war crimes, genocide, and crimes against humanity. Between 1997 and 2004, the frequency of Trial Chambers' citations to forensic evidence in establishing a victim's death has decreased. This shift in frequency could be a result of an amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis*, which allows the Trial Chambers to admit confidential and lay witness written statements to establish a victim's death in order to shorten the trial process.

Since 2001, the ICTY Trial Chambers has changed the types of evidence it cited to establish a victim's death. First, the Trial Chambers dramatically decreased the number of expert witness citations. Second, although the Trial Chambers cited similar number of forensic exhibits in pre-and post-Rule 92*bis* judgments, forensic evidence citations decreased forty-four percent in relation to the total number of citations. Third, the Trial Chambers significantly increased their reliance on non-forensic exhibits. Finally, the Trial Chambers cited more confidential 92*bis* statements and 92*bis* statements to establish death than forensic exhibits in post-Rule 92*bis* judgments. This bias attitude toward eyewitness testimony could jeopardize the accuracy and integrity of the trial proceedings.

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To my father,
who introduced me to mass disasters

To my mother,
who taught me that I can
do anything

I would not be the person that I am today without both of your love, patience, and support.

ACKNOWLEDGEMENTS

I would like to thank my committee members, Dr. Norman J. Sauer, Dr. Christopher Smith, and Dr. Todd Fenton. Their help was invaluable and critical in developing this study.

Special thanks are necessary for Dr. Christopher Smith for his constant feedback and criticism during this entire process. Your comments truly molded this study.

I would also like to thank the Forensic Science Foundation for generously granting me the 2003-2004 Acorn Grant. This money help support me during my ICTY internship.

I would also like to thank various individuals at the ICTY that supported this study. Graham Blewitt was graciously began this project by informing the Public Information Services of my existence. I truly appreciated Mr. Christian Chariter's constant contact with me over a six-month period. His contact allowed me to gain the necessary materials for this project. I would also like to thank Carline Ameerali because she actually invited me to return to the ICTY to obtain the data.

I would like to thank my friends and family. Christopher Brown was extremely generous in reading and editing multiple drafts of this paper. He was also invaluable emotional support. Furthermore, I would like to thank Katherine Lacy-Wilson for her hours of mental and emotional support during this process.

Finally, I would like to thank my parents. Their financial support allowed me to solely concentrate on this project full-time. I would also like to thank them for their constant emotional support during this entire process.

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CHAPTER I: FORENSIC SCIENCE IN INTERNATIONAL PROSECUTION

Introduction

The International Criminal Tribunal for the former Yugoslavia's ("ICTY") jurisdiction encompasses three main categories of crime: war crimes, genocide, and crimes against humanity. (ICTY Statute, Art. 2; Art. 3; Art. 4; and Art. 5) Although this Statute describes many types of criminal offenses, this Statute criminalizes six different forms of homicide throughout these main categories. (ICTY Statute, Art. 2; Art. 3; Art. 4; and Art. 5) This recognition is not a coincidence because homicide is the most horrendous offense imaginable; it deprives an individual of the right to life. (African Charter on Human and People's Rights, Art. 4; American Convention on Human Rights, Art. 4; European Convention on the Protection of Human Rights and Fundamental Freedoms, Art. 7; International Covenant on Civil and Political Rights, Art. 6; Universal Declaration of Human Rights, Art . 3)

The Office of the Prosecutor ("OTP"), the ICTY's investigative and prosecutorial branch, has the burden to establish the legal elements of these various forms of homicide. (ICTY Statute, Art. 16) Throughout these six offenses, the OTP must establish the victim's death. (*Krnjelac*, Trial Judgment, March 15, 2002 at ¶ 324; *Kvočka et al.*, Trial Judgment, Nov. 2, 2001 at ¶ 132) The OTP has used various methods to establish death, including lay witness testimony, expert testimony, and exhibits. (*Tadić*, Trial Judgment, May 7, 1997 at ¶¶ 71-87, 202-204; *Delalić et al.*, Trial Judgment, Nov.16, 1998 at ¶¶ 826-834, 836-845, 847-856, 858-866, 869-908; *Blaskić*, Trial Judgment, March 3, 2000 at ¶¶ 351, 371-379, 389-393, 414-417, 427, 540, 547, 572, 607, 610, 612, 618, 622) The OTP even hired specialists in this task. Specifically, the OTP hired forensic specialists to

assist the OTP in establishing multiple deaths. (*Krstic*, Trial Judgment, Aug. 2, 2001 at ¶¶ 71-87; 202-204, 222-225, 229-232; *Jelusic*, Trial Judgment, Dec. 14, 1999 at ¶ 90; *Vasiljevic*, Trial Judgment, Nov. 29, 2002 at ¶ 52)

However, the OTP was not required to hire forensic specialists to assist in this process. Forensic evidence is unnecessary in international prosecution because the Trial Chambers for the ICTY and the International Criminal Tribunal for Rwanda (“ICTR”) explicitly state that eyewitness testimony is sufficient to prove death. (*Tadic*, Trial Opinion and Judgment, May 7, 1997 at ¶ 240; *Musema*, Trial Judgment and Sentence, Jan. 27, 2000 at ¶ 52) The OTP has used lay witness testimony and other types of experts to establish victims’ deaths. (*Tadic*, Trial Opinion and Judgment, May 7, 1997 at ¶¶ 205-206; *Delalic et al.*, Trial Judgment, Nov. 16, 1998 at ¶¶ 826-834, 836-845, 847-856, 858-866, 869-908; *Blaskic*, Trial Judgment, March 3, 2000 at ¶¶ 351, 371-379, 389-393, 414-417, 427, 540, 547, 572, 607, 610, 612, 618, 622)

Funding issues have continuously plagued the ICTY’s exhumation process since 1995. (ICTY Annual Reports 1996, p. 24; ICTY Annual Report 1997, pp. 21-22; ICTY Annual Report 1998, pp. 31-32; ICTY Annual Report 1999, p.33; ICTY Annual Report 2000, p. 28; ICTY Annual Report 2001, pp. 33-34; ICTY Annual Report 2002, p. 37-38) A crisis exists because future courts may not be inclined to fund exhumations because it is unnecessary information; future courts may conservatively route their available funds to safeguard required evidence, such as witness protection.

Moreover, modifications in the ICTY’s policies may be the demise of the forensic evidence in international prosecution. Recently, the ICTY is trying to transition from a purely oral trial to a more documentary-based trial in order to accelerate the trial process.

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(May & Wierda 2002, p. 343-346) This trend is represented through the revisions of the ICTY's Rules of Procedures and Evidence. (May & Wierda 2002, p. 343-346; Fairlie 2003, pp. 61-66) Rule 92*bis* allows the Trial Chambers to admit written statements in lieu of oral testimony regarding crime-based evidence. (Rule 92*bis* (A); Fairlie 2003, pp. 61-66) Confidential and lay witnesses can provide sufficient details concerning homicides. Therefore, future International Criminal Tribunals may be reluctant to hire forensic specialists because these specialists provide expensive and redundant information.

The thesis has four purposes. First, this thesis documents the various means the Trial Chambers cite to establish a victim's death in thirteen adjudicated cases. The inventory is necessary because it determines the exact methods the Trial Chambers recognize in establishing a victim's death. Second, this thesis documents the actual frequencies of the various methods the Trial Chambers cite to establish a victim's death. This step is important because it illustrates which method the Trial Chambers rely upon more heavily in establishing a victim's death. This step can also determine if the Trial Chambers' reliance on particular methods varies through time.

Furthermore, this thesis documents how the modifications in the ICTY's Rules of Procedure and Evidence affect forensic evidence. This thesis investigates whether that the Trial Chambers acknowledge alternative procedural methods to prove a victim's death via crime-based evidence. This step is important because it documents that the Trial Chambers relies upon 92*bis* statements to establish a victim's death. Finally, this thesis documents that the Trial Chambers are relying upon 92*bis* statements more heavily than forensic evidence. This critical analysis determines that the Trial Chambers are directly

establishing a trend to rely on confidential and lay witnesses' statements to establish a victim's death rather than forensic evidence.

Background

United Nations Charter, Chapter VII vests authority in the Security Council to create a tribunal in order to maintain international peace and security. In 1993, Security Council created the ICTY, the third *ad hoc* international criminal tribunal, to restore and maintain peace within the former Yugoslavia. The Security Council detected a threat to international peace and security because numerous homicides in the area violated international humanitarian law. (United Nations Security Council Resolution 827 1993, p.1) The Security Council assumed that prosecuting individuals for their criminal actions would "contribute to the restoration and maintenance of peace." (United Nations Security Council Resolution 827 1993, p.1)

ICTY's jurisdiction consists of serious violations of international humanitarian law committed within the former Yugoslavia since January 1, 1991, by natural persons. (ICTY Statute, Art. 1) The Statute places "serious violations" of international human rights law into three categories: war crimes, genocide, and crimes against humanity.¹ (ICTY Statute, Art. 2; Art. 3; Art. 4; Art. 5) The drafters codified homicide theories through these categories. (ICTY Statute, Art. 2; Art. 4; Art. 5) Between the Statute and case law, ICTY jurisprudence criminalizes at least six offenses associated with homicide. (ICTY Statute, Art. 2; Art. 3; Art. 4; Art. 5)

The Office of the Prosecutor ("OTP"), the ICTY's investigative and prosecutorial branch, possesses the burden of proof because the defendants are presumed innocent.

¹ These three categories encompass numerous crimes; however, this thesis will only elaborate on the homicide theories because this paper documents judicial trends in establishing death.

(ICTY Statute, Art. 16; Art. 21) In a murder indictment, the OTP has the burden to establish a victim's death. (*Krstic*, Trial Judgment, Aug. 2, 2001 at ¶ 485; *Blaskic*, Trial Judgment, March 3, 2000 at ¶ 217; *Kvočka et al.*, Trial Judgment, Nov. 2, 2001 at ¶ 132) Although the ICTY utilized forensic evidence, the ICTY's jurisprudence asserts that the OTP needs only to present witness testimony to establish death. (*Tadic*, Trial Opinion and Judgment, May 7, 1997 at ¶¶ 154-175, 205-207, 223, 284-286, 348-350; *Delalic et al.*, Trial Judgment, Nov. 16, 1998 at ¶¶ 814-904) This dictum also implies that production of physical evidence is unnecessary. In 1997, this implication was explicitly affirmed when the Trial Chamber wrote: "It is inappropriate to apply rules of some national systems that require the production of a body as a proof of death." (*Tadic*, Trial Opinion and Judgment, May 7, 1997 at ¶ 240)

This dictum affirms the ICTY's initial policies promoting oral trials because the case law provides an avenue to establish murder without physical evidence. (Safferling 1999, p 239-240) This bias toward live testimony was further secured when the Trial Chamber opined "the absence of forensic or real evidence shall in no way diminish the probative value of the evidence which is provided to the Chamber; in particular, the absence of forensic evidence corroborating eye-witness testimony shall in no way affect the assessment of those testimonies." (*Musema*, Trial Opinion and Judgment, Jan. 27, 2000 at ¶ 52) As long as the witness testimony is credible and relevant, the Trial Chamber may accept their statement as validation as the sole proof to the killings. (*Tadic*, Trial Opinion and Judgment, May 7, 1997 at ¶¶ 154-175, 205-207, 223, 284-286, 348-350; *Delalic*, Trial Judgment, Nov. 16, 1998 at ¶¶ 814-904) In theory, massacres could

be proven via a single eye-witness' testimony. However, the Trial Chamber prefers to cite numerous witnesses with collaborating testimonies to provide accurate accounts of the massacres. (*Tadic*, Trial Opinion and Judgment, May 7, 1997 at ¶¶ 194-206; *Stakic*, Trial Judgment, July 31, 2003 at ¶¶ 201-274; *Jelusic*, Trial Judgment, Dec. 14, 1999 at ¶ 103)

This case law does not support the use of forensic science in the courtroom. The judges cited numerous cases from common law jurisdictions, such as the United States, to support this affirmation. (*Tadic*, Trial Opinion and Judgment, May 7, 1997 at ¶ 253) This is astounding because common law jurisdictions constantly utilize forensic evidence in homicide cases. The utilization of forensic evidence in international prosecution may be limited in future tribunals because the jurisprudence states that it is unnecessary. (*Tadic*, Trial Opinion and Judgment, May 7, 1997 at ¶ 253) Future tribunals may discontinue the use of forensic science because forensic investigation is an expensive process.

This case law undermines the legal community's recognition that forensic evidence is indispensable corroborative evidence to witness testimony. (Blewitt 1997, pp. 284-288; Knoops 2003, pp. 150-154) Forensic evidence can present powerful accounts because this type of physical evidence establishes a *prima facie*² case for murder. (May & Weirda 2002, p.253) Specifically, ICTY has recognized the vital contributions forensic evidence can provide via the Tribunal's long history with forensic science. In 1995, Richard Goldstein, the first Chief Prosecutor of the International Criminal

² Prima facie evidence is evidence that is sufficient to establish a fact or a group of facts. If the evidence is not rebutted or contradicted, the evidence will remain sufficient to sustain a judgment. (Black 1990, p. 1190)

Tribunal, supported forensic evidence in the investigation process because he allocated funds to cover forensic expenditures and to continue exhumations. (Scharf 2002, p.10)

In 1996, the actual exhuming process began when the OTP subcontracted Physicians for Human Rights (PHR) to investigate and excavate graves. (ICTY Annual Report 1996, p. 24) The teams exhumed four sites in Bosnia: Cerska, Nova Kasaba, Orahovac, and Brajevo Military Farm. (ICTY Annual Report 1996, p. 24; ICTY Annual Report 1997, pp. 21-22) The OTP utilized the evidence from these sites to assist in indicting Radislav Krstic³, General Ratko Mladic⁴, and Radovan Karadzic⁵ for the infamous Srebrenica massacre. (Stover & Peress 1998, p. 319-328; Krstic, Trial Judgment, Aug. 2, 2001 at ¶ 71) PHR exhumed victims of the Ovcar farm massacre in Croatia during the first season. (ICTY Annual Report 1997, p. 21-22) OTP utilized this information to assist in indicting Slavko Dokmanovic⁶ and Colonel Mile Mrksic⁷. (Stover & Peress, 1998, p. 319-328)

During the second season, in 1997, a transition occurred because the OTP hired teams to exhume rather than subcontracting PHR. (ICTY Annual Report 1997, pp. 21-22) The Second Chief Prosecutor, Louis Arbour, raised \$2.2 million from various countries: Austria, Canada, Malaysia, Netherlands, Sweden, Switzerland, and the United States of

³ Krstic was the commander of the Drina Corps. (Krstic, Trial Judgment, August 2, 2001 at ¶ 3) He was convicted for genocide for his role in the Srebrenica massacre. (*Krstic*, Trial Judgment, August 2, 2001 at ¶ 688)

⁴ General Mladic was the Col. General of Serbian Republic of Bosnia & Herzegovina/Rupublika Srpska Army. He was indicted for genocide and crimes against humanity with his connection to the Srebrenica massacre. He was Karadzic's military chief. (Stover & Peress 1998, p. 319-328)

⁵ Karadzic was the President of the Bosnia Rupublika Srpska. The OTP indicted him for genocide. (Stover & Peress 1998, p.319-328)

⁶ Dokmanovic was the President of the Vukovar Municipality from 1990 to 1996. The OTP indicted him for crimes related to the Vukovar Hospital. (Stover & Peress 1998, p. 319-328)

⁷ Col. Mrksic was the commander of the First Guards Motorised Brigade, which occupied Vukovar in mid-1991. The OTP alleged that his troops removed hospital patients, mostly men, and drove them to the Ovcar farm. At the farm, the troops beat and killed over 200 patients and buried them in a mass grave. (Stover & Peress 1998, p. 319-328)

America, to fund the exhumations. (ICTY Annual Report 1997, pp. 21-22; ICTY Annual Report 1998, pp. 31-32). The team uncovered three sites in Bosnia: Kratine, Brcko, and Bosanki Samac as well as a small number of crime scenes. (ICTY Annual Report 1997, pp. 21-22; ICTY Annual Report 1998, pp. 31-32)

In 1998, all exhumation activity convened in Republika Srpska in association with the Srebrenica massacre. (ICTY Annual Report 1998, pp.31-32) The exhumation program excavated eight sites: Petkovci Dam, Cavari Road 12, Cavari Road 3, Hodzici Road 3, Hodzici Road 4, Hodzici Road 5, Lipje 2, and Zeleni Jadar. (ICTY Annual Report 1998, pp. 31-32; ICTY Annual Report 1999, p. 33) The teams removed around 650-800 individuals and gathered over 20,000 photographic images. (ICTY Annual Report 1999, p. 33) The OTP utilized this evidence from all these sites in the *Krstic* case. (*Krstic*, Trial Judgment, Aug. 2, 2001 at ¶ 71) As usual, funding issues surfaced. The OTP requested and received additional funding from Canada, Saudi Arabia, United Kingdom, and the United States to finish the season. (ICTY Annual Report 1999, p. 33)

In 1999, the OTP divided the exhumations efforts between Bosnia and Kosovo. In Bosnia, the teams excavated five sites: Kozluk, Nova Kasaba, Konjevic Polje 1, Konjevic Polji 2 and Golgova 2. (ICTY Annual Report 2000, p. 28) The teams exhumed approximately 1,010 bodies and body parts. (ICTY Annual Report 2000, p. 28) Similar to the previous years, the evidence discovered on these sites was presented in the *Krstic* case. (ICTY Annual Report 2000, p. 28; *Krstic*, Trial Judgment, Aug. 2, 2001 at ¶ 71)

Kosovo represented new frontiers for the OTP. Instead of subcontracting or hiring teams, the OTP requested various countries to dispatch their national teams to the area. Furthermore, unlike Bosnia, the OTP knew the locations of the Kosovo grave sites.

During these four months, the teams exhumed approximately 246 grave sites and 2,730 bodies. (ICTY Annual Report 2000, p.28) The OTP utilized this evidence in indicting Slobodan Milosevic, Milan Milutinovic⁸, Nikola Sainovic⁹, and General Dragoljub Ojdanic¹⁰. (ICTY Annual Report 2000, p.28)

Again, in 2000, OTP divided the exhumation teams among Bosnia, Croatia, and Kosovo. In Kosovo, the national teams finished the exhumations with approximately 4,000 bodies. (ICTY Annual Report 2001, pp. 33-34) The OTP teams exhumed four sites in Bosnia: Lazete 1, Lazete 2c, Ravnice, Glogova 1. (ICTY Annual Report 2001, pp. 33-34) The OTP utilized the evidence from these grave sites in the *Krstic* case. (*Krstic*, Trial Judgment, Aug. 2, 2001 at ¶ 71) The OTP exhumed one grave site in Croatia. (ICTY Annual Report 2001, pp.33-34)

However, another dramatic transition occurred in the exhumation process. The Bosnian Federal Commissions started to exhume their own sites. (ICTY Annual Report 2001, pp. 33-34) To protect the ICTY's interests, the OTP dispatched monitors to these sites with the power to seize physical evidence and bodies associated with their investigations. In 2001, the OTP seized over 380 bodies. (ICTY Annual Report 2001, pp. 33-34)

After the Bosnian Federal Commissions started to exhume, the OTP's exhumation policy was dramatically transformed. The Chief Prosecutor terminated all substantial

⁸ Milan Milutinovic was the Serbian President of the Ministarstvo Unutrasnjih Poslova (MUP). MUP, the Serbian Ministry of Internal Affairs, is the main security force of the Republic of Serbia. MUP is comprised of public security service and state security service. The MUP and VJ were active in Kosovo during 1998-1999 in committing crimes against humanity against the ethnic Albanians. MUP's ultimate authority was Milosevic. (Abraham et al. 2001, p. 230-235)

⁹ Nikola Sainovic was the Yugoslav Deputy Prime Minister of MUP. (Abraham et al. 2001, p. 230-235)

¹⁰ General Dragoljub Ojdanic was the Chief of the Army General Staff of the Yugoslav Army (VJ), who reported to Slobodan Milosevic. The VJ is the Federal Republic of Yugoslavia (FRY) army, which is comprised of three armies. (Abraham et al. 2001, p. 230-235)

exhumations. (ICTY Annual Report 2001, p. 34) The OTP would monitor only the local governments' exhumations. (ICTY Annual Report 2001, p. 34) The OTP dispatched monitors to five sites in Bosnia, three sites in Croatia, and one in the Republic of Macedonia. (ICTY Annual Report 2001, p. 34) In 2002, the OTP monitored only one site. (ICTY Annual Report 2002, p. 37-38)

A dichotomy existed in 2003 concerning the exhumation process. The Bosnian Federal Commissions exhumed Crni Vrh, the largest mass grave exhumed in Bosnia. Consistent with the ICTY's policies, the OTP dispatched a monitoring team to protect the ICTY's interests. However, Carla DePonte, the third Chief Prosecutor of the OTP, revealed that the OTP was limiting the forensic budget because all new substantive investigations were complete.

Although the majority of the forensic evidence collection has been completed, a marriage between the legal and forensic community continues because the OTP submits forensic evidence in their prosecution strategies. As of September 2004, the Prosecution utilized forensic evidence in at least eleven convictions. (*Stakic*, Trial Judgment, July 31, 2003 at ¶¶ 210-211, 263-274, 545-553, 588-601, 632, 653, 776-779; *Kvočka et al.*, Trial Judgment, Nov. 2, 2001 at ¶¶ 19, 90; *Jelusic*, Trial Judgment, Dec. 14, 1999 at ¶ 90; *Kupreskic et al.*, Trial Judgment, Jan. 14, 2000 at ¶¶ 184-198, 229, 242, 277, 395; *Krnojelac*, Trial Judgment, March 15, 2002 at ¶¶ 49, 337; *Naletilic and Martinovic*, Trial Judgment, March 31, 2003 at ¶¶ 470-508; *Vasiljevic*, Trial Judgment, Nov. 29, 2002 at ¶ 52; *Krstic*, Trial Judgment, Aug. 2, 2001 at ¶¶ 4, 71-93, 100-102, 164-171, 222-232, 245-251, 257-260; *Blaskic*, Trial Judgment, March 3, 2000 at ¶¶ 416-417, 507;

Kordic, Trial Judgment, Feb. 26, 2001 at ¶¶ 565-576, 625-638, 644-649, 665, 670-672, 722-729, 739, 744-746; *Brdanin*, Trial Judgment, Sept. 1, 2004 at ¶¶ 397-465; Annex C.

Statement of the Problem

The ICTY trial process has been extremely lengthy. Most of the trials range from twenty-five to over two-hundred and fifty hearing days. (*Jelusic*, Trial Judgment, Dec. 14, 1999 at ¶¶ 13-17; *Brdanin*, Trial Judgment, Sept. 1, 2004 at ¶ 1180) These lengthy trials are financially exhausting. (ICTY Annual Reports 1995-2003) Furthermore, lingering trials are incompatible with the defendant's due process rights. (Cogan 2002, pp. 116-120; DeFrancia 2001, pp. 1425-1427; Murphy 1999, pp. 80-83; Rutledge 2003/2004, pp. 151-152, 184-186; Fairlie 2003, pp. 61-66)

In 2001, the judges amended the Rules of Evidence and Procedure to alleviate procedural restraints in admitting crime-based evidence. The Trial Chambers has admitted crime-based evidence via documentary evidence through Rule 92*bis* (A). (May & Wierda 2002 pp. 343-346; Fairlie 2003, pp.61-66; ICTY Rule 92*bis* (A)) The Trial Chambers has admitted written statements in lieu of oral testimony regarding the events of a homicide. (ICTY Rule 92*bis* (A); Fairlie 2003, pp. 61-66) The Trial Chambers has admitted written statements regarding an individual's death because the witness's testimony explains the crime's events. (Fairlie 2003, pp.61-66)

The Trial Chambers' citations to 92*bis* statements, which include both confidential and lay witness testimony, are adequate to establish a victim's death. The researcher noticed that the number of forensic exhibits citations declined compared to the total number of citations after 2001. The researcher investigated if a correlation existed between the amendment to the ICTY's Rules of Procedure and Evidence to incorporate

Rule 92*bis* and the decline of forensic exhibits citations compared to the total number of citations.

Thesis Significance

This thesis attempts to record the actual integration of forensic evidence in international prosecution. Although articles are published referring to forensic evidence in international prosecution, neither the legal nor the forensic community has presented numerous studies on the methods by which the legal community integrates this evidence in the trial process. For example, in the forensic community, most published articles and books document the horrific human rights abuses through case studies. (Stover & Ryan 2001, pp. 7-25; Simmons 2002, pp. 263-276; Schmitt 2002 pp. 277-292; Rainio et al. 2001, pp. 171-185; Rainio et al. 2001, pp. 166-173; Haglund 2002, pp. 243-261; Haglund 1997, pp. 367-379) In the same vein, law review articles and books related to international criminal law highlight only the existence of forensic evidence in international prosecution. (Blewitt 1997, pp.284-288; May & Wierda 2002, pp. 252-254; Knoop 2003, pp. 150-154; Kirschner 1994, pp. 451-460) This thesis is one of the first studies that attempts to record how the ICTY integrates forensic evidence in the trial process to establish a victim's death.

Definitions

1. Witness testimony: A person's oral declaration under oath that is received as evidence for any purpose. (Black 1990, p. 1603-1604)
2. Confidential Witness testimony: A person called to give testimony whose identity is concealed. Under Rule 69 in the ICTY's Rules of Procedure and Evidence, the

Prosecutor may apply for a non-disclosure order of the witness's identity because the witness may be in danger due to his testimony. (ICTY Rule 69)

3. Lay witness testimony: A person called to give testimony that does not possess any expertise in the matters about which he testifies. (Black 1990, p. 888)
4. Expert witness testimony: Opinion evidence from a person who possesses special skills or knowledge in some science, profession, or business which is not common to the average person. This knowledge is obtained by reasons of his/her special study or experience. (Black 1990, p. 578)
5. Documentary evidence: Evidence furnished by written instruments, inscriptions, and documents of all kinds. (Black 1990, p. 482)
6. Exhibits: A paper or document produced and exhibited to a court during a trial as evidence. (Black 1990, p. 573)
7. Forensic evidence: Exhibits related to the production of dead bodies. This definition includes death certificates, photographs of bodies, photographs of graves, autopsy reports, exhumation reports, and summary forensic reports written by ICTY investigators. A list of dead individuals found submitted in relation to testimony concerning a mass grave is forensic evidence because a production of a body was required to be included on the list.
8. Non-forensic evidence: Exhibits related to everything except dead bodies. This definition can include 92*bis* statements, charts, photographs, maps, military reports, and list of dead individuals.
9. 92*bis* statement: Witness statement admitted via Rule 92*bis*.

10. Confidential 92*bis* statement: A 92*bis* statement admitted under the condition that the witness's identification is retracted.
11. 94*bis* statement: A statement of any expert witness admitted via Rule 94*bis*.
12. Death Certificates: Exhibits that solely include one or more death certificates.
13. Forensic reports: Exhibits that reference exhumations, excavation, and/or autopsy reports. These exhibits are not authored by ICTY investigators.
14. ICTY Investigator report: Reports that are authored by ICTY investigators. These reports could include death certificates, excavation reports, exhumation reports, and/or autopsy reports.
15. Miscellaneous exhibits: Non-forensic exhibits that include charts, photographs, maps, military reports, and list of dead individuals.
16. Photographs related to bodies: Photographs that captured bodies, burials, exhumations, and/or graves.
17. Record of bodies: Lists, reports, or records of bodies discovered at a killing or burial site.
18. Videos related to bodies: Videos that captured bodies, exhumations, and/or burials.

CHAPTER II: HISTORY OF INTERNATIONAL CRIMINAL TRIBUNALS

Introduction

This chapter presents a general background on an individual's fundamental right to life in international law. First, this chapter discusses the theoretical background of an individual's right to life during armed conflicts and peace time. Second, this chapter describes the development of various institutions that enforce this fundamental right. Specifically, this chapter concentrates on the development of international criminal tribunals because these institutions have the ability to protect this fundamental right through prosecuting crimes within the war crimes, genocide, and crimes against humanity categories. Finally, this chapter explains the distinguishing characteristics among the six different forms of homicide described in these three crime categories. This explanation is important because the researcher compiled her data material from case law discussing these different forms of homicide.

Historical International Human Rights

The international humanitarian rights movement has developed international legal concepts regarding human worth. (Benison 1999, p. 143-151; Buerghenthal et al 2002, pp.1-69; Smith 2003, pp. 5-25; Steiner & Alston 2000, pp. 56-135) Customary law and treaties have articulated an unambiguous respect for human life since World War II. (Buerghenthal et al 2002, pp. 27-69; Smith 2003, pp. 38-52) To implement these new attitudes, this movement has provided avenues for institutions to either promote or to enforce these relatively recent ideals. (Buerghenthal et al 2002, pp. 27-29; Smith 2003, pp. 26-30) These principles have evolved via two avenues: armed conflicts and peace-time. (Benison 1999, pp. 143-151)

Armed Conflicts

Commencing from the fourth century, an extensive history exists for countries to provide protection for civilians during wartime via customary international law and bilateral treaties. (Smith 2003, p. 12) These treaties and legal precedents represent the governments' struggles to provide some protection to citizens during armed conflicts. (Steiner & Alston 2002, p. 59-67; Smith 2003, p. 12) For example, a bilateral treaty, in 1785, between the United States and Prussia stated:

of war would arise all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fisherman, unarmed and inhabiting unfortified towns, villages, or places, and in generally all others whose occupation are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments and shall not be molested in their person, nor shall their house or goods be burnt or otherwise destroyed, nor their fields wasted by the armed forces of the enemy, into whose power, by the events of war, they may happen to fall; but if any thing is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price. (Steiner & Alston 2002, p. 61)

The various Nations would enter into these agreements because these treaties would promote the Nations' best interest. These treaties endorse the Nations' best interests because the safeguards allow the countries to continue in a relatively stable environment even during or after a war. (Steiner & Alston 2002, pp. 59-67)

Beginning in the early twentieth century, the international community started to codify¹¹ guidelines to protect civilians during armed conflicts. In 1907, various Nations adopted The Hague Convention and Regulations. (Smith 2003, p. 13) Hague Law codifies laws of war. (Smith 2003, p. 13) This Statute articulated the citizens' rights as well as the belligerents' obligations during an armed conflict. (Smith 2003, p. 13)

¹¹ Rules and regulations discussing a subject of law. (Black 1990. p. 258)

After World War II, the Geneva Convention of 1949 expanded civilians and non-combatants' basic rights during armed conflicts. (Smith 2003, p. 13; Buergenthal et al 2002, p. 21; Steiner & Alston 2000 pp. 68-69) Geneva Convention codifies five basic principles. First, persons who are not involved in the hostiles should be treated humanely. (Smith 2003, p. 13; Buergenthal et al 2002, p. 21; Steiner & Alston 2000 pp. 68-69) Belligerents should care for the citizens without discrimination. (Smith 2003, p. 13; Buergenthal et al 2002, p. 21; Steiner & Alston 2000 p. 68-69) Second, captured combatants must be treated humanely. (Smith 2003, p. 13; Buergenthal et al 2002, p. 21; Steiner & Alston 2000, pp. 68-69) This rule implies that the individual should not be tortured or treated violently. (Smith 2003, p. 13; Buergenthal et al 2002, p. 21; Steiner & Alston, 2000 pp. 68-69) Third, a captured individual should be tried before a court of law. (Smith 2003, p. 13; Buergenthal et al 2002, p. 21; Steiner & Alston, 2000 pp. 68-69) The court proceedings should employ a form of standard judicial procedures. (Smith 2003, p. 13; Buergenthal et al 2002, p. 21; Steiner & Alston 2000, pp. 68-69) Fourth, the military should not inflict superfluous injuries during the course of hostilities. (Smith 2003, p. 13; Buergenthal et al 2002, p. 21; Steiner & Alston 2000, pp. 68-69) Finally, the civilian populations should not be the subject of a military attack. (Smith 2003, p. 13; Buergenthal et al 2002, p. 21; Steiner & Alston 2000, pp. 68-69)

Today, these principles are still applied. These concepts are incorporated into modern criminal tribunals' statutes. Specifically, the drafters of the ICTY's Statute incorporated these principles in Article 2 and Article 3. (ICTY Statute, Art. 2; ICTY Statute, Art. 3)

Peace Time

Historically, international customary law solely encompassed interactions among countries during peace time. (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11) For example, customary law regulated business transactions. (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11) The international legal community rarely intervened in how a Nation treated its citizens. (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11) The way a Nation treated its people was exclusively within domestic jurisdiction because citizens were viewed as properties of the State. (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11)

The jurisprudence on aliens¹² altered this ancient approach. When an individual left his/her original Nation to reside in another State, the individual was still considered the original Nation's property. (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11) An injury to an alien represented an injury to that individual's Nation. (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11) Therefore, a State can impose remedies because the State was harmed via its citizen. (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11)

As the contemporary human rights movement blossomed, a shift in the jurisprudence highlighted human rights rather than the Nation's rights. (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11) The judicial decisions began to assert that aliens possessed "fundamental human rights." (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11) In a natural progression, the lawsuits cited injuries to a human being rather than injuries to the State through a citizen. (Buergenthal et al 2002, pp. 2-3; Smith 2003, pp. 7-11)

¹² "A foreign born person who has not qualified as a citizen of a country." (Black 1990, p. 71)

As the jurisprudence developed, the courts' decisions transformed the manner by which society viewed a human being's worth. As this concept grew, institutions were developed to protect human beings in an international jurisdiction. One of the ICTY's purposes is to prosecute individuals who harm other individuals in Yugoslavia from 1993 to 1999. Specifically, the drafters of the ICTY Statute incorporated this principle through providing protection to citizens in peace time through criminalizing crimes against humanity, Article 5.

Contemporary International Human Rights

Modern human rights law has emerged since World War II. (Smith 2003, pp. 26-36) A reason for this movement was to prevent the duplication of the horrific human rights offenses committed by the Nazi regime. (Smith 2003, pp. 26-36; Powell 2002, pp. 30-35) Two significant institutions emerged: the United Nations and the Nuremberg Criminal Tribunal. (Buergenthal et al 2002, pp. 26-28; Smith 2003, pp. 27-92; Steiner & Alston 2000, pp. 137-142)

Many Nations were compelled to address "the problems of mass violations of human rights." (Buergenthal et al 2002, pp. 26-28; Smith 2003, pp. 27-92; Steiner & Alston 2000, p. 137-142) These countries realized that documents needed to be developed to promote fundamental human rights. (Buergenthal et al 2002, pp. 26-28; Smith 2003, pp. 27-92; Steiner & Alston 2000, pp. 137-142) Drafting¹³ and adopting¹⁴ the United Nation's Charter ("Charter") promoted these ideals because the Charter utilized explicit language that articulates the inherent equality of every individual. (Buergenthal et al 2002, pp. 26-28; Smith 2003, pp. 27-92; Steiner & Alston 2000, pp.

¹³ The UN Charter was drafted in San Francisco in 1945. (Buergenthal et al 2002, pp. 27-34)

¹⁴ The UN Charter was put into force on Oct. 24, 1945. (Buergenthal et al 2002, pp. 27-34)

137-142) By adopting the Charter, the United Nations was created, a current diplomatic body, to promote these ideals. (Buergenthal et al 2002, pp. 26-28; Smith 2003, pp. 27-92; Steiner & Alston 2000, pp. 137-142)

The United Nations' principal responsibility is to maintain international peace and security because this status promotes a "general respect for human rights and fundamental freedoms." (Smith 2003, pp. 26-27; U.N. Charter, Chapter IX, Art. 55) Nations can actually concentrate upon maintaining respect for individuals' autonomy and standard of living during peace time. (Smith 2003, pp. 26-27) By signing the United Nations Charter, each Nation pledges to assume joint and separate responsibility within the Organization to promote and achieve these ideals. (Smith 2003, pp. 26-27; U.N. Charter, Art. 56; Buergenthal et al 2002, pp. 30-34)

The United Nations has drafted various international instruments which represent, as a whole, the International Bill of Rights. (Steiner & Alston 2000, pp. 134-141; Smith 2003, pp. 39-44; Buergenthal et al 2002, pp. 34-70) The Universal Declaration of Human Rights, the first document, was passed in 1948. (Steiner & Alston 2000, pp. 137-141; Smith 2003, pp. 39-44; Buergenthal et al 2002, pp. 34-42) The General Assembly passed this resolution to articulate a universal awareness of human rights and fundamental freedoms. Although this document is not legally binding, many Nations have incorporated these "fundamental rights" in their customary law or codes. (Smith 2003, pp. 39-44; Buergenthal et al 2002, pp. 34-42)

The Universal Declaration of Human Rights is one of the first international documents that articulates an individual's fundamental freedoms. ("UDHR") The UDHR explicitly lists rights and freedoms regarding an individual's person, nationality, and

expectations of his/her government. (Steiner & Alston 2000, pp. 134-141; Smith 2003, pp. 39-44; Buergenthal et al 2002, pp. 34-42) Specially, the Declaration states that everyone is born free with a “right to life, liberty, and security of person.” (Steiner & Alston 2000, pp. 134-141; Smith 2003, pp. 39-44; Buergenthal et al 2002, pp. 34-42)

In 1966, the United Nations drafted two treaties: the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”). (Smith 2003, pp. 45-50; Buergenthal et al 2002, pp. 34-70) Similar to the UDHR, the ICCPR explicitly articulates the fundamental freedoms and individual’s rights. (Smith 2003, pp. 39-44; Buergenthal et al 2002, pp. 34-70) After signing the treaty, the Nations are under immediate obligation to respect the articulated rights. (Smith 2003, pp. 39-44; Buergenthal et al 2002, pp. 34-70)

The ICCPR also incorporated an enforcement policy to ensure that States were complying with the treaty. (Smith 2003, pp. 39-44; Buergenthal et al 2002, pp. 45-49) The Human Rights Committee is a reporting system by which States can report human rights abuses to the United Nations for further investigation. (Smith 2003, pp. 49-59; Buergenthal et al 2002, pp. 49-59) ICCPR amendments have allowed individuals to file petitions against various States. (Smith 2003, pp. 49-59; Buergenthal et al 2002, pp. 49-59) This remedy, however, is only permitted if all other domestic remedies have been exhausted. (Smith 2003, pp. 49-50; Buergenthal et al 2002, pp. 49-50)

The ICESCR requires Nations’ cooperation, individually and/or through international assistance, to ensure human rights regarding economic and technical issues. (Steiner & Alston 2000, pp. 245-249; Smith 2003, pp. 47-49) The rights expressed in the ICESCR concern an individual’s right to be educated and employed in a safe working

environment. (Buergenthal et al 2002, pp. 64-69) ICESCR also articulates an individual's physical and mental health rights. (Buregenthal et al 2002, pp. 64-69)

The ICESCR requires different obligations than the ICCPR because the Nations pledge only to be "progressive or programmatic" in their responsibilities to the United Nations. (Steiner & Alston 2000, pp. 245-248; Smith 2003, pp. 47-49) The ICESCR does not require a Nation to immediately comply with the treaty. (Steiner & Alston 2000, pp. 245-248; Smith 2003, pp. 47-49) The United Nations also applies different standards to determine each Nation's compliance because of the different standards of living between each country. (Steiner & Alston 2000, pp. 245-248; Smith 2003, pp. 47-49)

The ICESCR does not establish any interstate or individual complaint system. (Steiner & Alston 2000, pp. 245-248; Smith 2003, pp. 47-49; Buergenthal et al 2002, pp. 69-70) The treaty requires a Nation only to submit a progress report. (Steiner & Alston 2000, pp. 245-248; Smith 2003, pp. 47-49; Buergenthal et al 2002, pp. 69-70) This progress report should articulate the Nation's adopted measures in observing its obligations to the ICESCR. (Steiner & Alston 2000, p. 245-248; Smith 2003, p. 47-49; Buergenthal et al 2002, p. 69-70)

In 1976, various Nations ratified the two covenants. (Smith 2003, p. 46) This ratification secures the rights articulated in the International Bill of Rights. (Smith 2003, p. 46) International human rights could be adjudicated in an international jurisdiction rather than be exclusively enforceable within a domestic jurisdiction. (Smith 2003, p. 46)

Even though these various documents articulate numerous fundamental freedoms and human rights, the United Nations does not possess the power to enforce these human rights ideals. Under Resolution 1503, the United Nations delegates these powers to other

organizations, such as the High Commissioner of Human Rights or empowering *ad hoc* tribunals to prosecute gross human rights violations. (U. N. Resolution 1503; Buergental et al. 2002, pp. 101-105).

International Criminal Tribunals

The Nuremberg Criminal Tribunal marked the second remarkable development of the human rights movement after World War II. (Smith 2003, p. 27) The London Charter created this Tribunal to “try and punish the major war criminals of the European Axis countries.” (London Charter, 1945) The Nuremberg Tribunal serves as an extraordinary precedent because the agreement holds individuals rather than Nations responsible for their participation in violating international human rights doctrines. (Smith 2003, p. 27)

The United Nations Security Council relied on the precedent set by the Nuremberg Criminal Tribunal in creating both the ICTY and International Criminal Tribunal for Rwanda (“ICTR”). (Smith 2003, p. 27) United Nations Charter, Chapter VII vests authority in the Security Council to create a tribunal in order to maintain international peace and security. (United Nations Charter, Chapter VII) In 1993, Security Council created the ICTY, the third *ad hoc* international criminal tribunal, to restore and maintain peace within the former Yugoslavia. (United Nations Security Council Resolution 827, 1993 p.1) During this time, the Security Council detected a threat to international peace and security because numerous homicides in the area violated international humanitarian law. (United Nations Security Council Resolution 827, 1993 p.1) The Security Council assumed that prosecuting individuals for their criminal actions would “contribute to the restoration and maintenance of peace.” (United Nations Security Council Resolution 827, 1993 p.1) By 1995, the ICTY began its work in The Hague,

Netherlands. According to the ICTY website, the tribunal has publicly indicted over 57 individuals and convicted 26 individuals. (ICTY, 2005)

In 1995, the Security Council created the International Criminal Tribunal for Rwanda (ICTR), the fourth ad hoc international criminal tribunal, to prosecute the perpetrators of genocide of the Tutsi people. (ICTR Statute, Art. 1; U.N. Resolution 955; DeFrancia 2001, p. 1387-1388) In 1994, the Hutu, the ethnic majority group, killed over 800,000 Tutsi and politically moderate Hutu during a three-month civil war. (Powers 2002, p. 334) In 1997, the ICTR began its work in Arusha, Tanzania. (Power 2002, p. 334) According to the ICTR website, the ICTR has publicly indicted over 54 individuals and convicted 10 criminals. (ICTR, 2005)

On July 1, 2002, sixty countries ratified the Rome Treaty, a document that created the first permanent international criminal court (ICC), the fifth international criminal tribunal. (Rome Treaty, 1998; DeFrancia 2001, pp. 1388-1390) Most importantly, similar to the ICTY and ICTY, the ICC can prosecute specific international human rights crimes. (ICTY Statute, 1993; ICTR Statute, 1995; Rome Treaty, 1998) Specifically, the ICTY and ICTY will be models for the manner in which international criminal tribunals prosecute individuals, both procedurally and substantively. (May & Wierda 2002, pp. xiii-xxi)

International Criminal Tribunal's Jurisdiction

The offenses articulated in the International Criminal Tribunals' Statutes incorporate the fundamental rights protected through various instruments implemented by the United Nations. (Smith 2003, pp. 205-218) Specifically, these documents state that an individual's most fundamental right is his/her right to life. (African Charter on Human

and People's Rights, Art. 4; American Convention on Human Rights, Art. 4; European Convention on the Protection of Human Rights and Fundamental Freedoms, Art. 7; International Covenant on Civil and Political Rights, Art. 6; Universal Declaration of Human Rights, Art. 3) The right to life is the ultimate right because all other rights depend upon its pre-existence. (Smith 2003, pp. 205-218)

Within the United Nations, all countries are required to enact legislation to punish perpetrators who deprive individuals of their right to life. (Smith 2003, p. 206) This obligation could include adopting legislation that imposes punishment for murder. (Smith 2003, p. 206) According to most domestic statutes, codes, or case law, murder comprises three legal elements: First, a victim must be dead. Second, the defendant(s)' direct acts or omissions resulted in the victim's death. Finally, the defendant(s) committed these acts with the intention to kill the victim. (*Krnojelac*, Trial Judgment, March 15, 2002 at ¶ 324; *Kvočka et al.*, Trial Judgment, Nov. 2, 2001 at ¶ 132; *Krstić*, Trial Judgment, Aug. 2, 2001 at ¶ 485; *Kordić and Cerkez*, Trial Judgment, Feb. 26, 2001 at ¶¶ 235-236; *Kupreskic et al*, Trial Judgment, Jan. 14, 2001 at ¶¶ 560-561; *Blaskić*, Trial Judgment, March 3, 2000 at ¶ 217; *Jelisić*, Trial Judgment, Dec. 14, 1999 at ¶ 35; *Delalić et al*, Trial Judgment, Nov. 16, 1999 at ¶¶ 422, 439; *Vasiljević*, Trial Judgment, Nov. 29, 2002 at ¶ 205)

The following discussion articulates a general description of the ICTY's jurisdiction over six versions of murder: willful killing, murder under Article 3, genocide, murder under Article 5, extermination, and persecution. These six crimes maintain the essence of historical and modern human rights law by incorporating three overarching legal categories: war crimes, genocide, and crimes against humanity.

War Crimes

War crimes, otherwise known as humanitarian law, criminalized particular behaviors during armed conflicts. (Smith 2003, pp. 12-14; Buergenthal et al 2002, pp. 314-330) Customary laws, treaties, and conventions provide protection for individuals refusing to partake in the armed conflict. (Smith 2003, pp. 12-14; Buergenthal et al 2002, pp. 314-330) According to the ICTY's jurisprudence, an individual can be convicted for war crimes via two different avenues, Article 2 or Article 3.

Grave Crimes against the Geneva Convention of 1949, Article 2, codified willful killing as a form of homicide. The accused must intend to cause the victim's death. The perpetrators must also kill a particular group of individuals¹⁵, otherwise known as "protected persons". (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423) These protected persons include "individuals at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423) The jurisprudence has also restricted the protected person definition by not including individuals protected by Geneva Convention for the Amelioration or the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea of August 12, 1949, and the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423) Therefore, the list of acceptable "protected persons" is an extremely restricted definition.

¹⁵ Article 4 of the Geneva Convention Relative to the Protection of Civilians Persons in the War.

Article 3, the residual clause, applies to all violations of humanitarian law not covered by Article 2, 4, and 5. (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423) This clause is designed to ensure that no serious violation of international humanitarian law is stricken from the ICTY's jurisdiction. (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423) Article 3 imposes individual criminal liability for serious breaches of humanitarian fundamental rules. (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423) Murder is considered a serious breach of humanitarian fundamental rules because the perpetrator is depriving the victim to his/her right to life. (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423)

Article 3's purpose is to provide minimum guarantees for all individuals. (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423) Article 3 does not have the similar restrictions as described in Art. 2. (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423) Victims of an Article 3 violation can include an array of individuals. (*Delalic et al.*, Appeals Chamber, Feb. 20, 2001 at ¶¶ 422, 423) The only formal requirement is that the victim is not a participant in the armed conflict. (*Delalic et al.*, Appeals Chamber, ¶¶ 422, 423)

Genocide

Genocide is the "a denial of the right of existence of entire human groups." (U.N. General Assembly Resolution 96(1), 1946) Genocide is a relatively modern term that was coined subsequent to World War II. (Powers 2002, pp. 53-60; Smith 2003, pp. 213-214) The word "genocide" derives from both Greek and Latin roots: "genos" means race

or tribe in Greek, while “caedere” means to kill in Latin. (*Stakic*, Trial Judgment, July 31, 2003 at ¶518)

In 1948, the United Nations adopted the first international instrument defining the legal offense of genocide, the Convention on the Prevention and Punishment of the Crimes of Genocide. (Power 2002, pp. 53-60; Smith 2003, pp. 213-215) The *ad hoc* tribunals and the International Criminal Court have incorporated this document into their jurisdictional statutes. (ICTY Statute, Art. 4; ICTR Statute, Art. 2) The ICTY is one of the first tribunals to include this crime into their jurisprudence because neither Nuremberg nor the Tokyo War Crime Tribunal incorporated this crime in their prosecution tactics.¹⁶ (Smith 2003, pp. 213-215)

The Prosecution must establish three legal elements to prove genocide. First, the Prosecution must establish at least one of five enumerated offenses in the statute occurred, which includes killing members of a national, ethnic, racial, or religious group. (*Stakic*, Trial Judgment, July 31, 2003 at ¶¶ 513-519; *Krstic*, Trial Judgment, Aug. 2, 2001 at ¶¶ 542-543) These specific enumerated offenses maintain genocide theory integrity because Genocide Convention’s policy prohibits the physical or biological destruction of human groups. (Smith 2003, pp. 213-215)

Second, the Prosecution must establish that the offender committed the criminal act against a specific national, ethnic, racial, or religious group. (*Stakic*, Trial Judgment, July 31, 2003 at ¶ 512; Buergenthal et al 2002, pp. 682-686) However, a clearly

¹⁶When interpreting the genocide, the ICTY Trial Chamber must rely on the following documents: The Convention against Genocide interpreted in accordance with the general rules of interpretation of treaties set out in Article 31 and 32 of the 1969 Vienna Convention on the Laws of Treaties, the object and purpose of the Genocide Convention as reflected in the *travaux préparatoires*, subsequent practices including the jurisprudence of the ICTY, ICTR, and national courts, and publications of international authorities. (*Stakic*, Trial Judgment, July 31, 2003 ¶ 501)

articulated definition of this “protected group” was not drafted in the Genocide Convention. (*Krstic*, Trial Judgment, August 2, 2001 at ¶¶ 541, 552-556) The Trial Chamber must rely on various sources to determine which groups are protected under the Statute. (*Krstic*, Trial Judgment, August 2, 2001 at ¶¶ 541, 552-556)

Finally, the Prosecution must establish that the accused possessed a specific intention, *dolus specialis*, to “destroy the targeted group in whole or in part as a separated and distinct entity.” (*Stakic*, Trial Judgment, July 31, 2003 at ¶ 520; *Jelusic*, Appeal Judgment, July 5, 2001 at ¶¶ 45-46) This intention is important because

killing an individual member of the targeted group, the perpetrator does not thereby only manifest his hatred of the group to which his victim belongs, but also knowingly commits this act as part of a wider-ranging intention to destroy that national, ethnic, racial, or religious group of in which a victim is a member. (*Jelusic*, Trial Judgment, Dec. 14, 1999 at ¶ 79)

Although it is unnecessary to establish the community’s *de facto* destruction, this genocidal intent can be inferred from either “facts, the concrete circumstances, or a pattern of purposeful action.” (*Krstic*, Appeals Judgment, April 19, 2004 at ¶¶ 8-13; *Stakic*, Trial Judgment, July 31, 1999 at ¶ 522) For example,

Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, or a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. (*Krstic*, Trial Judgment, Aug. 2, 2001 ¶ 590)

This intent requirement is critical factor because it distinguishes genocide from various other mass crimes, such as extermination and persecution.

Crimes against Humanity

Crimes against humanity offenses, Article 5, protect civilians¹⁷. The perpetrator must commit “widespread or systematic” attacks against civilians to be distinguished from crimes prosecuted in national courts. (*Stakic*, Trial Chambers, July 31, 2003 at ¶¶ 621-626) According to the ICTY jurisprudence, the perpetrator must have killed the victims within the armed conflict’s vicinity. (*Stakic*, Trial Chambers, July 31, 2003 at ¶¶ 621-626) Furthermore, the perpetrator must be aware that his criminal acts must be part of a larger attack upon the civilian population. (*Stakic*, Trial Chambers, July 31, 2003 at ¶¶ 621-626) Contrary to war crimes, a relationship does necessarily exist between the perpetrator’s acts and armed conflict. (*Stakic*, Trial Chambers, July 31, 2003 at ¶¶ 621-626)

Article 5 lists nine severe crimes against civilians that infringe upon the “recognized values of mankind and humanity.” (ICTY Statute, Art. 5) One-third of these enumerated crimes articulate to a form of homicide: murder, extermination, and persecution. (ICTY Statute, Art. 5) The variation between these crimes depends upon either the number of killed individuals or the perpetrator’s intent. (ICTY Statute, Art. 5) For example, under Article 5(a), a perpetrator can be convicted for murder because he killed a single civilian within the armed conflict’s vicinity. (*Blaskic*, Trial Judgment, March 3, 2000 at ¶¶ 216-217)

¹⁷ A civilian means a person not employed by the military. A civilian could also mean a person positioned *hors de combat*. (Knoops 2003, p.36)

In contrast, under Article 5(b), the Trial Chamber can convict an individual for extermination if the perpetrator killed numerous civilians within the armed conflict's vicinity. (*Stakic*, Trial Judgment, July 31, 2003 ¶¶638-640; *Akayesu*, Trial Judgment, Sept. 2, 1998 at ¶¶ 591-592) Although this offense references mass killings, extermination does not require that the victims share any common characteristic, such as national, ethnic, or religious origins. (*Stakic*, Trial Judgment, July 31, 2003 at ¶¶ 638-640; *Krstic*, Trial Judgment, Aug. 2, 2001 at ¶¶ 500-503) Extermination only requires the perpetrator's intent to annihilate a mass of people. (*Krstic*, Trial Judgment, Aug. 2, 2001 at ¶ 500-503; *Stakic*, Trial Judgment, July 31, 2003 at ¶¶ 641-642)

Under Article 5(h), persecution is a gross or blatant denial of a fundamental right articulated in international customary law. (*Krnojelac*, Appeals Judgment, Sept. 17, 2003 at ¶ 185; *Krnojelac*, Trial Judgment, March 15, 2002 at ¶ 431; *Vasiljevic*, Trial Chamber, Nov. 29, 2002 at ¶ 244; *Stakic*, Trial Judgment, July 31, 2002 at ¶ 732) Persecution is designed to punish individuals that destroy a group or part of a group. (*Krnojelac*, Appeals Judgment, Sept. 17, 2003 at ¶ 185; *Krnojelac*, Trial Judgment, March 15, 2002 at ¶ 431; *Vasiljevic*, Trial Chamber, Nov. 29, 2002 at ¶ 244) Unlike genocide, the perpetrator does not necessarily seek to destroy the community. (*Krnojelac*, Appeals Judgment, Sept. 17, 2003 at ¶ 185; *Vasiljevic*, Trial Chamber, Nov. 29, 2002 at ¶ 244) Killings can become a form of persecution if the accused murdered the individuals for discriminatory purposes. (*Vasiljevic*, Trial Judgment, Nov. 29, 2002 at ¶

244; *Stakic*, Trial Judgment, July 31, 2003 at ¶ 732; *Krnjelac*, Trial Judgment, March 13, 2002 at ¶ 431)

Summary

This chapter presents a general background in international tribunals. The history of international human rights explains the fundamental legal theories underlying the ICTY Statute. The history of the international tribunals discusses the ICTY's significance. Furthermore, the brief description of the six forms of homicide explains the general distinctions between various forms of homicide within the ICTY's jurisdiction.

CHAPTER III: INTERNATIONAL CRIMINAL PROCEDURE

Introduction

This chapter reviews the different theories and procedures detected in both the inquisitorial and adversarial legal systems. This review is necessary because the ICTY is currently struggling to develop international criminal procedural methods that incorporate both systems. Specifically, the ICTY is attempting to integrate more documentary evidence in the trial proceedings to shorten the trial process.

General Theory

Trials are one aspect of the judicial process that attempts to balance two competing ideals: order and liberty. (Luna 1999, pp. 400-401) According to Herbert Packer, two judicial process models articulate these ideals distinctively. (Luna 1999, pp. 400-401) The crime control model maintains social order at the price of individual freedom because the model's ultimate goal is to suppress crime. (Luna 1999, pp. 400-402) A failure to "rein in criminal conduct" slowly undermines order and leads to "a broad contempt for the rule of law." (Luna 1999, pp. 401-402) The crime control model requires efficient law enforcement to "filtering suspects, ascertaining goals, and imposing punishment." (Luna 1999, pp. 401-402) Extensive criminal procedural rules impede this model because the rules decrease the system's efficiency. (Luna 1999, pp. 403-404)

The crime control model is compatible with this hierarchical model form of government. (Luna 1999, pp. 400-402; Kagan 2001, pp. 10, 70-74) According to Damaska, the hierarchical model emphasizes a strong and professional bureaucracy to deliver effective crime regulations. (Kagan 2001, pp. 70-74) The hierarchical model

emphasizes consistent case-by-case decision making by conforming to official government policies. (Kagan 2001, pp. 70-74)

Alternatively, the due process model preserves an individual's autonomy, dignity, and liberty through many procedural rules. (Luna 1999, pp. 404-406) These procedural rules limit the Government's power to investigate, prosecute, and punish an individual. (Luna 1999, pp. 404-406) This model maintains that errors, bias, and prejudice can infest the criminal justice system. These mistakes and emotions can be remedied through "robust procedural safeguards." (Kagan 2001, p. 71) In the United States, these procedural safeguards are incorporated in the Fourth, Fifth, and Sixth Amendments of the Constitution. (U.S. Const. Amend. IV, V, VI)

The due process model complements a coordinated organizational government. (Luna, 1999, pp. 404-406; Kagan 2001, p. 71) According to Damask, a coordinated organizational government is fragmented among several different government bodies. (Kagan 2001, p. 71) These multiple divisions have the capacity to inspect other governmental branches. (Kagan 2001, p. 71) This safeguard counteracts the potential for political bias in a centralized government. (Kagan 2001, p. 71) If the government is not centralized, citizens can challenge the government's capacity via the court system. (Kagan 2001, p. 71)

Judicial systems across the world represent these models in one form or another. Each judicial system represents that particular society's priorities. (Kagan 2001, p. 71) Over time, two primary systems have developed: inquisitorial and adversarial system.

Inquisitorial System

The inquisitorial system, otherwise known as the civil system, has evolved in Continental Europe, especially in France and Germany. (Langbein 1979, pp. 206-210; Langbein 1985, pp. 826-828; Safferling 2001, pp. 3, 5-9) This system's roots lie in the Inquisitions in the Middle Ages. (Safferling 2001, pp. 5-9, May and Wierda 2002, pp. 18; Nijboer 1997, pp. 90-91) This system is still practiced in these countries and its former colonies. (Safferling 2001, pp. 5-9; Langbein 1979, pp. 206-210, Langbein 1985, pp. 826-828)

Although the purpose behind both the inquisitorial and adversarial systems is to discover truth, the theory of truth that drives the systems differs. (Weigend 2003, pp. 159-172) In the inquisitorial system, the system's philosophy maintains that "substantive" truth can be established during a criminal proceeding with sufficient effort. (Weigend 2003, pp. 161-164) To discover the substantive truth, the State entrusts a neutral inquisitorial magistrate to direct the investigations and trial process. (Langbein 1979, pp. 206-208) The judge is a professional bureaucrat; this role is compatible with the hierarchical model. (Kagan 2001, p. 11) The judge bears the main responsibility for gathering and analyzing the evidence. (Kessel 1998, pp. 801-802, May & Wierda 2002, pp. 17-19; Kagan 2001, p. 11) All the evidence is entered into an official dossier. The judge constantly develops the dossier during the entire legal process. (May & Wierda 2002, pp. 17-19)

This system presumes that substantial truth will prevail by understanding the entire event in question. (Weigend 2003, pp. 159-164) Similar to the crime control model, few procedural rules exist because all relevant evidentiary information is

admissible. (May & Wierda 2002, pp. 17-19) Witnesses must be neutral parties because they must reveal all information he or she knows. (Weigend 2003, pp. 159-161)

This necessity for neutrality is reflected by how the court processes the witnesses. First, the formulation of the witness list maintains witness neutrality. (Wolfe 1997, pp. 302-303) The lawyers nominate particular lay witnesses to the court who will aid the client's case. (Wolfe 1997, pp. 302-303) The court calls the witnesses. (Wolfe 1997, pp. 302-303) To avoid party-motivation issues, the lawyers never prepare the witness. (Wolfe 1997, pp. 302-303)

Second, the court hires all expert witnesses. (Kagan 2001, p. 107) This selection process reduces the risk regarding witness bias because the witness is not paid by either party to present an opinion. (Kagan 2001, p. 107; Langbein 1985, pp. 835-836) According to the court's philosophy, the neutrality maintains the expert's credibility. (Kagan 2001, p. 107)

Finally, the judge, rather than the attorneys, questions both lay and expert witnesses during the trial process. (May & Wierda 2002, pp. 17-19) The inquisitorial philosophy assumes that this process reveals the substantial truth because the attorneys are not presenting questions which are purely related to their client's point of view. (Weigend 2003, pp. 160-161) After the testimony, the judge dictates a testimonial summary into the dossier. (Wolfe 1997, pp. 302-303) During this process, the lawyers advocate for their client's side by suggesting improvements in the wording "in order to preserve or to emphasize nuances important to one side or the other." (Wolfe 1997, pp. 302-303) These summaries, as well as other forms of evidence, are what the bench will rely on in assembling its final decision. (Wolfe 1997, pp. 302-303)

Adversarial System

The adversarial system evolved in Anglo-Saxon countries. (Safferling 2001, pp. 9-16) The adversarial system co-exists with the common law system. (Safferling 2001, pp. 9-16) This system is still practiced in the United Kingdom and its former colonies, such as the United States. (Safferling 2001, pp. 9-16)

The adversarial system concerns itself with the fairness of the proceeding because the Anglo-American philosophy is “skeptical about man’s ability to discover the ‘substantive’ truth.” (Weigend 2003, pp. 159-161) Procedural truth, the adversarial standard of truth, is based upon parties conforming to procedural rules. (Weigend 2003, pp. 159-161) The verdict’s legitimacy is based upon complying with the rules. (Weigend 2003, pp. 159-161)

The adversarial system relies on the premise that in order to establish the truth, the opposing parties challenge the accuracy of events and witness’ characters. (Weigend 2003, pp. 159-161) Through this “battle,” a “composite picture of the truth” will emerge during a short time span. (Weigend 2003, pp. 159-161; Safferling 2001, pp. 221-222) Each side presents testimonial, documentary, or physical evidence to be judged by a jury, a neutral decision maker. (Kagan 2001, pp. 107-108) The jury’s decision is based on only the information presented during this event. (Kagan 2001, pp. 11-14) In some situations, this decision could be based upon limited information because one or both parties cannot present the evidence during the trial in a “legally prescribed manner.”(Weigend 2003, pp. 159-161)

This system requires many active participants because the adversarial system thrives in a coordinated organizational government. (Kagan 2001, pp. 107-108) The

defendant's lawyer prepares a defense on his client's behalf. (Kagan 2001, p. 105; May & Weirda 2002, p.17-18; Pizza 1998, p. 844-845) The defense may call witnesses and present exhibits; however, the primary defense involves cross-examination. (Langebein 1985, pp.833-834; May & Weirda 2002, pp. 328-330) One purpose of cross-examination is to test the opposite side's witnesses' credibility or to reveal inconsistencies in the witnesses' direct examination. (Langebein 1985, pp. 833-834, May & Weirda 2002, pp. 328-330) The philosophy underlying cross-examination is that the accused has an opportunity to publicly question his/her accuser. (Langebein 1985, pp. 833-834, May & Weirda 2002, pp. 328-330)

Since the truth-finding is performed in a restricted temporal span, various procedural rules, such as the Rules of Evidence, have been created to protect the accused's rights. (Weigend 2003, pp. 164-165; May & Weirda 2002, pp. 18-19) The adversarial system is compatible with the due process model because both systems thrive on many procedural rules to protect the defendant's due process rights. (Kagan 2002, p. 11-14) The adversarial system assumes that lay individuals cannot "digest and/or adequately process" particular types of evidence because it preys on an individual's emotions rather than critical analytical skills. (Weigend 2003, p. 165-166) The Rules of Evidence excludes this type of prejudicial evidence because the lay juror may be persuaded by his emotions rather than by analysis of the Defense's argument. (Weigend 2003, p. 165-167)

During this entire trial, the judge is "gatekeeper" of the procedural rights. (Weigend 2003, pp. 303-305) One of the primary purposes of a trial judge is to maintain a fair trial by protecting the defendant's rights against the State. (Weigend 2003, pp. 303-

305) The accused's rights must be protected to "attempt to provide some balance of powers between the parties given that State's vast law enforcement resources." (Weigend 2003, p. 304; Pizza 1998, pp. 851-852) Contrary to the civil system, the judge is passive during the testimony and rarely asks the various witnesses' questions. (Kagan 2001, pp. 107-108)

Even with these procedural safeguards, Horowitz argues that the truth in the adversarial system is inherently distorted because the role of adversarial attorneys. (Horowitz 1997, pp. 23-68) The adversarial attorney's role is to depict their clients in the best possible light via the admissible evidence. (Horowitz 1997, pp. 23-68)

In this "spin doctor" role, the attorneys may alter the truth to perform their responsibilities to the court and to their client, a process which is not initiated in the inquisitorial system. (Horowitz 1977, pp. 23-68)

Trial Process

Depending on the system, striking disparities exist regarding the trial lengths. In the inquisitorial system, the trial lengths are relatively shorter than those found in the adversarial system. In a study conducted in 1969, researchers found that 47% criminal trials continued only for about 1/3 of a business day. (Langbein 1979, p. 209) The researcher estimates that 1/3 of a business day is approximately two hours. (Langbein 1979, p. 209)

Researchers revisited the German trial system in the late 1980's to verify the original study. The researchers discovered that the most serious trials lasted about 2.8 days and less serious trials lasted only 2.4 days. (Kagan 2001, p. 87) This study

reconfirms that trials in the inquisitorial system are relatively shorter. (Langbein 1979, p. 207-209; Kagan 2001, p. 82-89)

Alternatively, trials in the adversarial system extend over longer periods of time. In 1968, a felony trial in Los Angeles extended over 7.2 days. (Kagan 2001, p. 82) Similar to the researchers in Germany, social scientists revisited the American trial system in the mid-1980's. (Kagan 2001, p. 82) Researchers revealed that felony trials, on the average, lasted over fourteen hours. (Kagan 2001, p. 82) Homicide trials lasted around forty-four hours. These trials could linger over a two-week period. (Kagan 2001, p. 82)

The striking disparity exists because each system maintains different procedural requirements. (May & Wierda 2002, pp. 17-19) These procedural rules preserve the integrity of the defendant's rights. (Safferling 2001, pp. 291-292) Each trial's fairness and credibility depends upon how the court maintains the integrity of the defendant's rights.

The adversarial system requires a layman jury to perform an independent fact-finding function. (May & Wierda 2002, pp. 18-19) The layman jury also determines the defendant's guilt. (May & Wierda 2002, pp. 18-19) A jury trial lengthens the trial process significantly because of required procedures to preserve the juror's impartiality. (Kagan 2001, p. 107-108) For example, in the United States, lawyers adhere to a set of exclusionary rules, Rules of Evidence, to prevent juror bias or error of fact. (U.S. Fed. R. Evidence, 2004)

Under the inquisitorial system, these procedural requirements do not exist because a panel of professional judges and laymen determine the defendant's culpability. (Langbein 1979, p. 206-208) In theory, the panel can determine and disregard prejudicial

evidence during deliberations. (Langbein 1979, p. 206-208) Exclusionary rules are not required to preserve impartiality. This system attests that credibility is preserved by requiring the panel to draft a document on how the panel compiled their decision. (Langbein 1979, p. 206-208) These written findings can be reviewed by an appeals board. (Langbein 1979, p. 206-208)

The trial length can be ascertained by determining how the evidence is presented to the court. (Horowitz 1977, pp. 23-68) In the adversarial system, the Prosecutor possesses the burden of proof beyond reasonable doubt. (Safferling 2001, pp. 256-260) The trial may be longer because the Prosecution must present sufficient inculpatory¹⁸ evidence to establish all the legal elements of the crime. (May & Wierda 2002, p. 18; Kagan 2001, pp. 107-108)

Alternatively, in the inquisitorial system, the panel must be satisfied that the trial proceeding reveals the truth. (Langbein 1985, pp. 826-828) As previously stated, the court determines the defendant's culpability via the dossier, which includes both exculpatory¹⁹ and inculpatory evidence. (Kagan 2001, pp. 87-88) The trial is not consumed by the Prosecution establishing every contestable point. (Kagan 2001, pp. 107-108)

In the international jurisdiction, the court must balance the two legal philosophies in an effective and time-efficient manner, which can be a disconcerting issue. (May & Wierda 2002, pp. 17-19) The rest of this chapter will discuss international jurisdiction in more detail as well as the issues concerning an efficient and effective trial system.

¹⁸ Evidence that intends to incriminate (Black 1990, p. 768)

¹⁹ Evidence that intends to tends to clear an individual from alleged fault or guilt (Black 1990, p. 566)

International Criminal Procedure

In a criminal trial, the accused has the right to any orderly proceeding that includes an array of procedural due process rights.²⁰ These procedural due process rights can include the right to be heard and the right to confront every material fact in question. (Black 1990, pp. 500-501) Maintaining these due process rights is one of the signposts for a fair trial. (Black 1990, p. 596; DeFrancia 2001, pp. 1437-1438)

A fair trial is “a proceeding which the judgment is rendered only after a trial consideration of the evidence and facts as a whole.” (Black 1990, p. 596) Although each legal system maintains a different threshold standard of a “fair trial,” the several national and international documents incorporate this concept.²¹ (Cogan 2002, pp. 116-119) A government or an institution must develop a reasoned body of procedure to protect the defendant’s due process rights to ensure that the accused receives a fair trial. (Jorda 1999, pp. 180-181)

The ICTY has developed a version of the Rules of Evidence and Procedure to preserve the trial process’s integrity and credibility. (Safferling 2001, pp. 291-293; DeFrancia 2001, pp. 1437-1439) This document encompasses approximately one-hundred and twenty-seven rules to guarantee a balance between an effective investigation, efficient trial process, and the defendant’s due process rights. (ICTY Rules of Procedure and Evidence, 2004; Jorda 1999, p. 180-181) This document actually

²⁰ Due Process rights are “all rights which are of such a fundamental importance as to require compliance with due process standards of fairness and justice.”(Black 1990, pp. 501-502)

²¹ Magna Carta (1215), French Declaration of Rights of Man and the Citizen (1789); United States Constitution, Article 1, Article 3 (1791); United States Bill of Rights, 5th Amendment, 6th Amendment, 7th Amendment (1791), 14th Amendment (1868); American Declaration of Rights and Duties (1948), Article 26, Universal Declaration of Human Rights (1948), Articles 10 and 11; European Convention of Human Rights (1950), Articles 6 and 7; American Convention on Human Rights (1969), Article 8; International Covenant on Civil and Political Rights (1976), Articles 14 and 15; African Charter on Human and People’s Rights (1981), Article 7; ICTY Statute (1993), Article 21

articulates seven minimum due process rights. (ICTY Rules of Procedure and Evidence, 2004) However, due to space, this chapter will only discuss two of the guarantees: “the right to be tried without undue delay” and “the right to examine the witness against him.”

Speedy Trial

A speedy trial protects all parties, especially the accused, against excessive procedural delay. (Safferling 2001, pp. 250-256) This necessary protection limits the amount of time the accused remains uncertain of his fate. (Safferling 2001, pp. 250-256) This certainty is extremely important because the accused is presumed innocent. (Safferling 2001, p. 250-256) A speedy trial also maintains the public’s confidence in the justice system because the undue delay damages the system’s credibility. (Fairlie 2003, p. 62-63)

Although the ICTY grants the right to speedy trial, neither the Statute nor the Rules of Evidence and Procedure articulate a specific time frame to assure this inalienable right. (ICTY Statute, Article 21; ICTY Rules, 2004) This disparity could be inconspicuous; however, the ICTY trials have a tendency to be extremely long trials. (Wald 2001, pp. 535-536) For example, ICTY trials can be prolonged over two hundred and fifty hearing days. (*Brdanin*, Trial Judgment, Sept. 1, 2004 at ¶ 1180) This vast number of hearing days can endure over two-year time frame. (Wald 2001, pp. 535-536)

Moreover, the trial phase does not include either the pre-trial or appeal phase. The accused is usually detained in the Netherlands during this process. (Wald 2001, pp. 97-98) These proceedings could unduly extend an individual’s incarceration. (Wald 2001, pp. 97-100)

Cross-examination

Cross-examination is a fundamental tool in discovering the truth in the adversarial legal system. (Safferling 2001, pp. 283-288; May & Wierda 2002, p. 17; Langbein 1985, pp. 833-834; Rutledge 2003/2004, pp. 176-178) The absence of cross-examination denies the accused the opportunity to confront the witness. (Safferling 2001, pp. 283-288; May & Wierda 2002, p. 17; Langbein 1985, pp. 833-834; Rutledge 2003/2004, pp. 176-178) Cross-examination also allows the fact-finder the opportunity to observe the witness's demeanor. (Wald 2001, pp. 112-113) This visual inspection can impact the juror opinion regarding the witness's credibility.

The judges incorporated the defendant's right to cross-examine the witness via Rule 90(h) in an effort to balance the adversarial and inquisitorial system at the ICTY. (ICTY Rule 90) Similar to the adversarial system, the parties or counsel has the right to cross-examine the witness on "subject-matter of the evidence-in-chief and matters affecting the credibility of the witness." (ICTY Rule 90) The judges have also reserved the right for the Trial Chamber to cross-examine a witness, similar to the inquisitorial system. (ICTY Rule 90)

Currently, the ICTY is struggling to balance these two inalienable rights in its inherent aspiration to achieve a "fair trial." (May & Wierda 2002, pp. 327-328) Since 1999, the judges have amended the Rules of Evidence and Procedure in an effort to expedite the trial process while maintaining the integrity of the defendant's due process rights. (May & Wierda 2002, pp. 327-328) One of the judicial trends is to rely on documentary evidence rather than solely upon witness testimony to balance these

competing rights. (May & Wierda 2002, pp. 343-346; Wald 2001, pp. 540-542; Fairlie 2003, pp. 63-83)

Current Trends in ICTY's Criminal Procedure

Historically, International Criminal Tribunals have relied on documentary evidence rather than live witness testimony. In the Nuremberg Trials, Robert Jackson, the Chief Prosecutor, intended for prosecution to rely mostly on paper. (Fairlie 2003, pp. 52-53; Rutledge 2003/2004, pp. 184-185; Wald 2001, pp.537-539) The prosecution relied on affidavits because of “the negative ramifications that exclusion would have upon the expediency of the proceeding, noting that the Tribunal’s acceptances of the sworn statements were indispensable if we are going to make progress in this case.” (Fairlie 2003, pp. 52-53) The prosecution utilized over 300,000 affidavits gathered from the German government and only 113 live witnesses to established war crimes and crimes against humanity²². (Rutledge 2003/2004, pp. 184-185)

The contemporary *ad hoc* tribunals oppose this paper strategy. At the inception of the ICTY and ICTR’s, both courts preferred live testimony to establish a crime. (ICTR Rule 90(A); ICTY Rule 90(A); Wald 2001, pp. 539-540; Fairlie 2003, pp. 54-55) Rule 90(A) states that “witnesses shall, in principle, be heard directly by the Chamber.” (ICTR Rule 90(A); ICTY Rule 90(A); May & Wierda 2002, pp. 163-165) The Appeals Chamber interpreted this Rule to be “the witnesses shall, as a general rule, be heard directly by the Judges of the Trial Chamber.” (May & Wierda 2002, pp. 163-165; *Aleksovski*, Appeals Chamber Decision on Admissibility of Evidence, February 16, 1999 ¶ 10) The Appeal

²² The circumstances surrounding this strategy decision are rare. Since the Allies were the “unconditional victor” of the World War II, the countries had access to all the documents. The Allies seized at least six freight cars of documents related to the crimes. A massive paper trail was left behind because the Nazi High Command documented every death in the concentration camps. (Fairlie 2003, pp. 52-53; Rutledge 2003/2004, pp. 184-185)

Chambers reasoned that live witness testimony protects the defendant's due process rights because the defendant has the opportunity to "obtain the attendance and examination of the witness on his behalf". (May & Wierda 2002, pp. 163-165; *Aleksovski*, Appeals Chamber Decision on Admissibility of Evidence, February 16, 1999 at ¶ 10)

Live witness testimony allows the judges, the independent fact-finders, to evaluate the witness's credibility. (May & Wierda 2002, pp. 163-164; *Kupreskic et al.*, Appeals Chamber, Decision on Appeal by Dragon Papic against Ruling to proceed by Deposition, July 15, 1999 at ¶ 18) Judge Patricia M. Wald, a former ICTY's judge, stresses that live testimony is critical in international prosecution to maintain the Tribunal's credibility because she has

seen too many instances in which witnesses on the stand have changed, reneged, or even repudiated earlier statements which though closer in time to the events, had not been tested in any way and were unsworn... There is little doubt that it would be infinitely more efficient for witnesses merely to affirm prior statements than to give their testimony live and be cross examined on it. But the excruciating process of facing one's torturer, reliving awful time, and defending one's account on cross-examination may sometimes be indispensable to the integrity of the Tribunal's final product. (Wald 2001, p. 112)

Although the concept of solely relying on live witness testimony is commendable, live testimony can overburden the court. (Fairlie 2003, pp. 59-61) The United Nations started to notice that the ICTY trials were extremely long. (Fairlie 2003, pp. 59-61) The General Assembly asked the Secretary-General to evaluate the efficiency of the ICTY's operations and functions. (Fairlie 2003, pp. 59-61) As the product of these pressures, the ICTY judges determined that their goal was to develop a "flexible solution to enable the judges to work with their increasing caseload and the expectations of the accused, the victims, and the international community" by 2000. (Fairlie 2003, pp. 59-61)

The judges amended the Rules of Evidence and Procedure to diminish the explicit preference for oral evidence.²³ On December 2000, the judges deleted Rule 90(A). Rule 89(F) replaced Rule 90(A). (Wald 2001, pp. 548-549) Rule 89(F) states that “a Chamber may receive the evidence of a witness orally or, where the interest of justice allows, in written form.” (May & Wierda 2002, pp. 343) According to the case law, live evidence should be obtained in more critical issues, such as superior or individual responsibility. (May & Wierda 2002, pp. 343-346)

The judges have also altered the language of other procedural rules to expedite the trial process. (Wald 2001, pp. 539-541) Rule 71 authorizes the Trial Chamber to receive testimony via deposition or video-conference link in lieu of live testimony. (Wald 2001, pp. 539-541) When this Trial Chamber originally drafted this rule, the judges could rely only on this rule in “exceptional circumstances.” (Wald 2001, pp. 539-541) Exceptional circumstances could range from witness’s illness to the length of the pre-trial stage. (Wald 2001, pp. 539-541) In 2000, during the plenary session, the judges removed the “exceptional circumstances” requirement because the new wording would allow the Trial Chambers to admit more depositions and video-conference testimony in lieu of witness testimony. (Wald 2001, pp. 545-546)

In December 1998, the judges incorporated *94ter* into the Rules of Evidence and Procedure. (Wald 2001, pp. 540-542; Fairlie 2003, pp. 64-66) *94ter* permitted affidavits in lieu of witness testimony. (Wald 2001, pp. 540-542; Fairlie 2003, pp. 64-66) Although the judges’ intent was to expedite the trial process via this new rule, applying *94ter* became extremely difficult because of the procedural restrictions. (Wald 2001, pp. 540-

²³ Under ICTY’s statute Article 15, the judges have the power to draft the Rules of Evidence and Procedure.

542; Fairlie 2003, pp. 64-66) After one failed interlocutory appeal, the trial judges deleted this rule in December 2000. (Wald 2001, pp. 540-542; Fairlie 2003, pp. 70-72)

Rule 92*bis* provides a vehicle for either the prosecution or the defense to establish facts either via written statements or transcripts from previous ICTY's proceedings.

(Wald 2001, pp. 547-548; Fairlie 2003, pp. 72-83; Rutledge 2003/2004, pp. 183-186;

May & Wierda 2002, pp. 344-346) Rule 92*bis* is applicable only if the parties are using testimony not directly related to the defendant's behavior. (Wald 2001, pp. 547-548;

Fairlie 2003, p. 72-83; Rutledge 2003/2004, p. 183-186; May & Wierda 2002, pp. 344-

346) In theory, 92*bis* seems to expedite the trial process. (Wald 2001, pp. 547-548;

Fairlie 2003, pp. 72-83; Rutledge 2003/2004, pp. 183-186; May & Wierda 2002, pp. 344-

346) However, restrictions do exist to maintain the defendant's rights. (Wald 2001, pp.

547-548; Fairlie 2003, pp. 72-83; Rutledge 2003/2004, pp. 183-186; May & Wierda

2002, pp. 344-346) For example, the Trial Chamber admits the witness statement on the

condition that the witness can be available for cross-examination. (Wald 2001, pp. 547-

548; Fairlie 2003, pp. 72-83; Rutledge 2003/2004, pp. 183-186; May & Wierda 2002, pp.

344-346)

ICTY's Rules of Evidence

Proof of death evidence may be admitted through various means. Witness statements can be admitted through at least four avenues. (ICTY Rule 90; ICTY Rule 89(F); ICTY Rule 92*bis*; ICTY Rule 94*bis*) Live witness testimony is usually admitted via Rule 90 because this rule explains the exact procedure in presenting an oral witness. (ICTY Rule 90; See Appendix A)

The Trial Chamber also admits witness statements through written formats. (ICTY Rule 89(f); ICTY Rule 92*bis*; ICTY Rule 94*bis*) Rule 89 (F) allows the Trial Chamber to admit evidence in a written format in the interest of justice. (ICTY Rule 89(f); See Appendix A) The Trial Chamber admits confidential and lay witness testimony under 92*bis* in lieu of the witness's oral testimony. (ICTY Rule 92*bis*; See Appendix A) However, in this format, the witness testimony becomes an exhibit rather than typical oral testimony.

The witness's testimony must discuss events not directly related to the defendant's behavior. (ICTY Rule 92*bis*; See Appendix A) Proof of death evidence describes a victim's death. Proof of death evidence does not discuss if the accused actually killed the victim. The former information must be presented orally because of the defendant's due process rights to cross exam as well as the defendant's right to confront his accuser. (May & Wierda 2002, pp. 219-223, 284-288) This oral testimony is necessary because the accuser's testimony is directly related to the defendant's actions. (May & Wierda 2002, pp. 219-288, 284-288)

The Trial Chamber can admit expert testimony via 94*bis*. (ICTY Rule 94*bis*; See Appendix A) The Trial Chamber can admit forensic expert testimony via this avenue. (ICTY Rule 94*bis*; *Naletilic and Martinovic*, Trial Judgment, March 31, 2003 at ¶ 476) This type of testimony can discuss exhumations and autopsy reports to establish a victim's death. *Natletilic and Martinovic*, Trial Judgment, March 31, 2003 at ¶¶ 476-480).

In proof of death evidence, the Trial Chamber can admit the exhibits via 89(c) because this rule allows the chamber to admit any relevant evidence which deems to have

probative value. (Rule 89(c); See Appendix A) Under 89(c), the Trial Chamber usually admits autopsy reports, forensic reports, and other forms of proof of death exhibits while the witness authenticates each exhibit during trial proceeding. (*Krstic*, Trial Transcript, May 26, 2000; *Brdanin*, Trial Transcript, Oct. 8, 2002) From 1997-2004, the Trial Chamber has admitted most of proof of death exhibits via 89(c).

Summary

The chapter presents an overall view of the ICTY's struggle to incorporate two different legal systems via their procedural rules. The ICTY is altering its rules to incorporate more documentary evidence in order to protect the defendant's due process rights. The Trial Chamber has admitted proof of death evidence via Rules 89, 90, 92*bis* and 94*bis* in order to incorporate these new procedures in their trial proceedings.

CHAPTER IV: METHODOLOGY

Introduction

This chapter discusses the type of research used in this project. First, this discussion includes a theoretical background on unobstructive research and its applicability to case studies in the legal arena. Second, this chapter introduces the study's intentions. In this section, the research subject, hypothesis, and research questions are presented. Finally, this chapter describes research procedures executed in this study, which includes case selection, data collection, and analytical procedures performed by the researcher.

Unobstructive Research

Unobstructive measures are “nonreactive methods of gathering data.” (Hagan 1989, p. 174) The subjects are unaware that the investigator is recording them. (Hagan 1989, pp. 144-174; Kellehear 1993, pp. 3-5; Binder & Geis 1983, p. 138; Fitzgerald & Cox 1994, p. 103; Bouchard 1976, pp. 267-270) The subjects are unaware of the study because the investigator is removed from the actual events. (Hagan 1989, pp. 144-174; Kellehear 1993, pp. 3-5) This manner of data collection can often produce more accurate results because the subject's reaction to the study will not threaten the findings' validity. (Hagan 1989, pp. 174-175; Kellehear 1993, pp. 3-5)

Archival data is an example of unobtrusive research. (Hagan 1989, pp. 144-174; Kellehear 1993, pp. 3-5; Binder & Geis 1983, p. 138; Fitzgerald & Cox 1994, p. 103; Bouchard 1976, pp. 267-270; Dane 1990, pp. 168-169) Researching existing public records and documents can provide “rich sources” of information. (Jones 1996, p. 103) In the criminal justice community, national organizations encourage the use of previously

recorded data. (Hagan 1989, pp. 177-178) For example, the National Advisory Committee Criminal Justice Standards and Goals (“NACCJSG”) asserted that collecting new data should be financed only after the investigator justifies that the previously recorded sources cannot assist the investigator in researching a new criminal justice issue. (Hagan 1989, p. 177)

Archival research presents numerous benefits to the investigator. First, archival research is usually easily accessible. (Kellehear 1993, pp. 5-7; Hagan 1989, pp. 199-200) Second, archival research is relatively inexpensive. (Kellehear 1993, pp. 5-7; Hagan 1989, pp. 199-200) Third, archival research permits the researcher to study a phenomenon over time. (Kellehear 1993, pp. 5-7; Hagan 1989, pp. 199-200) Finally, archival research promotes reliable and valid studies because independent investigators can re-evaluate the same data to confirm the original findings. (Kellehear 1993, pp. 5-7; Hagan 1989, pp. 199-200)

As with any research method, archival research has disadvantages. Investigators can use archived data only in specific studies because the recorded information must correlate with the investigator’s research design. (Dane 1990, p. 185) The archived data may be distorted to either hide information or to create an illusion of something different. (Jones 1996, p. 116; Kellehear 1993 pp. 5-8) Furthermore, the archived information may also be incomplete because the original recorder did not document all the information relative to the study. (Jones 1996, p. 116)

The criminal justice community routinely analyzes groups of legal cases with similar characteristics to discover, study, or explain a judicial trend. (Bedau & Radelet 1987, pp. 21-90; Liebman, Fagan, & West 2000, pp. 1-126; Drizin & Leo 2004, pp. 894-

1007; Fitzgerald & Cox 1994, pp. 103-105) Investigators utilize various types of documents, such as trial transcripts, published judicial decisions, and pre-trial hearing transcripts, to research and record trends. (Bedau & Radelet 1987, pp. 21-90; Liebman, Fagan, & West 2000, pp. 1-126; Drizin & Leo 2004, pp. 894-1007)

Bedau and Radelet (1987) investigated the frequency of erroneous convictions in capital cases from 1900 to 1985. The researchers systematically examined three-hundred and fifty cases across fifty-three American jurisdictions. (Bedau & Radel 1987, pp. 27-40) The investigators used various document forms, such as published judicial decisions, trial transcripts, and news articles. (Bedau & Radel 1987, pp. 27-40) The researchers documented numerous trends through this data: the number of erroneously convicted individuals in each jurisdiction, the number of years a wrongfully convicted person was incarcerated, and the number of individuals erroneously executed. (Bedau & Radel 1987, pp. 27-40)

The Liebman et al (2000) study began as a research project to calculate the frequency of relief in capital habeas corpus cases. (Liebman et al 2000, p. 27) In 1995, the researchers significantly expanded the study's scope to attempt to explain the reasons relief was granted in particular capital cases. (Liebman et al 2000, p. 27) Overall, their data incorporated around 772 federal-and 4,600 state-overturned capital cases from 1973 to 1999. (Leibman et al 2000, pp. 27-32) The research teams extracted over 1300 variables from each case in an attempt to explain the motivations for overturning death sentences. (Liebman et al 2000, pp. 27-32)

Drizin and Leo (2004) identified and studied one-hundred and twenty-five post-Miranda false confession cases. (Drizin & Leo 2004, pp. 924-932) The researchers

analyzed the consequences of false confessions on the defendant. (Drizin & Leo 2004, pp. 924-932) This study concentrated upon the likelihood that false confessions lead to wrongful arrest, prosecution, conviction, and incarceration due to policemen, prosecutors, and jurors' bias regarding the false confessions. (Drizin & Leo 2004, pp. 924-932)

Unlike the Liebman et al study, Drizin and Leo incorporated other archival documents in their analysis, such as police reports, trial transcripts, pre-trial hearing transcripts, and depositions to track the defendant's progress through the judicial system. (Drizin & Leo 2004, pp. 924-932)

Research Subject

This study's purpose is to analyze the methods the Trial Chambers cited to establish a victim's death. According to the ICTY's jurisprudence, proof of death evidence encompasses various types of evidence, which includes witness statements, autopsy reports, photographs, or forensic reports. (*Stakic*, Trial Judgment, July 31, 2003 at ¶¶ 210-211, 263-274, 545-553, 588-601, 632, 653, 776-779; *Kvocka et al.*, Trial Judgment, Nov. 2, 2001 at ¶¶ 19, 90; *Jelusic*, Trial Judgment, Dec. 14, 1999 at ¶ 90; *Kupreskic et al.*, Trial Judgment, Jan. 14, 2000 at ¶¶ 184-198, 229, 242, 277, 395; *Krnojelac*, Trial Judgment, March 15, 2002 at ¶¶ 49, 337; *Naletilic and Martinovic*, Trial Judgment, March 31, 2003 at ¶¶ 470-508; *Vasiljevic*, Trial Judgment, Nov. 29, 2002 at ¶ 52; *Krstic*, Trial Judgment, Aug. 2, 2001 at ¶¶ 4, 71-93, 100-102, 164-171, 222-232, 245-251, 257-260; *Blaskic*, Trial Judgment, March 3, 2000 at ¶¶ 416-417, 507; *Kordic and Cerkez*, Trial Judgment, Feb. 26, 2001 at ¶¶ 565-576, 625-638, 644-649, 665, 670-672, 722-729, 739, 744-746; *Brdanin*, Trial Judgment, Sept. 1, 2004 ¶¶ 397-465; Annex C) This type of evidence is considered crime-based evidence because this information

relates to the actual crime rather than the perpetrator's participation in the crime. (Fairlie 2003, pp. 61-66)

Since January 2001, the ICTY's current judicial trend is to shorten trial lengths by altering the Rules of Procedure and Evidence. (May & Wierda 2002, pp. 343-346; Fairlie 2003, pp. 61-66) Judges have amended the Rules of Procedure and Evidence to alleviate procedural restraints in admitting crime-based evidence. (May & Wierda 2002, pp. 343-346; Fairlie 2003, pp. 61-66) The researcher is attempting to determine if the amended Rules of Procedure and Evidence actually affect the methods the Trial Chambers cite to establish a victim's death. By documenting the frequency of the Trial Chambers' citations, the researcher can attempt to determine if procedural rule changes actually affect the methods the Trial Chambers used to establish a victim's death.

Hypothesis

Between 1997 and 2004, the number of Trial Chambers' citations to forensic evidence in establishing a victim's death has decreased in relation to the total number of citations. In 2001, the judges in the Trial Chambers amended the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis*, which provided a vehicle for the Trial Chambers to establish facts either via written statements or transcripts from previous ICTY's proceedings to shorten the trial process. This decrease in the number of forensic evidence citations could be a result of Rule 92*bis*, which allowed the Trial Chambers to admit confidential and lay witness testimony via written statements or transcripts from previous proceeding to establish a victim's death.

Research Questions

This investigator explored this hypothesis via two main research questions. The researcher analyzed the changes in the number of Trial Chambers' witness citations statements prior to and after 2001. The witness statement category was further divided into three sub-categories: confidential witnesses, expert witnesses, and lay witness citations. The researcher analyzed the fluctuations in frequency of Trial Chambers' citations prior to and after 2001 in each of these sub-categories. These four categories were formulated into null hypotheses for statistical analysis.

The researcher also investigated the fluctuations in frequency of Trial Chambers' exhibit citations prior to and after 2001. The exhibit statement category was further divided into three sub-categories: confidential exhibits, forensic exhibits, and non-forensic exhibits. Moreover, in order to analyze the crux of the main hypothesis, the researcher compared the fluctuations in the number of confidential Rule 92*bis* statements and Rule 92*bis* statements in pre-and post-Rule 92*bis* judgments. Each of these five categories was formulated into null hypotheses. Overall, nine null hypotheses were drafted for statistical analysis.

Protection of the Participants

Prior to conducting this study, the researcher acquired approval from University Committee on Research Involving Human Subjects ("UCRIHS") at Michigan State University's Office of Research, Ethics, and Standards. An anticipated risk did not exist because this study used data from public judicial records from the ICTY's Court and Record Management Section ("CMSS") rather than extracting data from human subjects.

Research Procedures

In this study, the researcher analyzed thirteen adjudicated ICTY cases from 1997 to 2004. Adjudicated cases were studied because the data regarding these cases were public information. The researcher applied a careful screening process to determine each case's eligibility for this study. After inspecting all of the ICTY cases via the Tribunal's website, the researcher compiled a list of adjudicated cases. The researcher read the indictments for each of these cases to determine if the OTP charged the defendant(s) on a homicide theory, which included willful killing, murder (Article 3 and Article 5), extermination, persecution, or genocide. Only the cases which the defendant(s) were charged with a homicide theory were retained. After compiling a list of adjudicated homicide cases, the exact homicide theory was recorded.

After this initial selection, the researcher read every case from the compiled list. If the defendant(s) pled guilty to a homicide charge, the case was discarded because the judgments did not cite either the witness testimony or the exhibits regarding proof of death. Of the remaining homicide cases, the defendant's guilt or innocence was recorded.

The researcher divided the compiled adjudicated homicide case list into two sections: "cases that utilize forensic science" and "cases that did not utilize forensic science." The researcher accumulated a list of exhibits and witness statements that the Trial Chamber cited in the trial judgments to establish death from these sections. The researcher presented these lists to the ICTY's CMMS.

The researcher returned to the ICTY in December 2004. The CMSS granted the researcher access to their intranet and a few interoffice databases under supervision. The researcher obtained exact date which the witness testified or the exact date the exhibit

was submitted to the court through these databases. The public exhibits' substantive titles were also obtained in this process.

After returning from the ICTY, the researcher searched the ICTY's trial transcripts via the Internet to determine by which Rule of Evidence the witness or exhibit evidence was submitted. The researcher extracted four variables for each piece of evidence: the date of the admittance, the case name, the evidence rule, and evidence title.

After inputting this information into the database, the researcher divided the witness evidence into three categories: confidential witnesses, expert witnesses, and lay witnesses. The expert witnesses were then divided into seven categories: investigators, forensic anthropologists, forensic archeologists, forensic pathologist, military experts, demographic experts, and lawyers. The researcher counted and recorded the number of times the Trial Chambers cited each category.

The researcher also divided the exhibits into three categories: confidential exhibits, forensic exhibits, non-forensic exhibits. The forensic exhibits were then divided into seven categories: forensic reports, death certificates, records of bodies, ICTY's investigator reports, photographs related to bodies, video related to bodies, and *94bis* statements. Furthermore, the non-forensic exhibits were then divided into two categories: *92bis* statements and miscellaneous exhibits. The researcher counted and recorded the number of times the Trial Chambers cited each category.

Analysis

Two types of mathematical analysis were used in this study. In regards to the relative frequency analysis, the researcher calculated the percentage of citations for the six types of evidence, confidential witnesses, expert witnesses, lay witnesses, confidential

exhibits, forensic exhibits, and non-forensic exhibits, in relation to the total number of citations for each year. (Bennett, Briggs & Triola 2001, pp. 97-150) These percentages were compared to determine the exact increase or decrease of the Trial Chambers' citations by year.

The researcher also calculated the percentage of citations in three distinct time periods for each type of evidence. These percentages were compared to determine the exact increase or decrease of the Trial Chambers' citations within three distinct time periods: 1997-2000, 2001, and 2002-2004. (Bennett, Briggs & Triola 2001, pp. 97-150) These three time categories represented pre-Rule 92*bis*, a transition year, and post-Rule 92*bis* opinions. These classifications were critical because it re-evaluates the data in relation to the ICTY's Rules of Procedure and Evidence amendment. This perspective determined if a fluctuation occurred in the Trial Chambers' citations before and after Rule 92*bis*.

The researcher also performed nonparametric statistical analysis because the small sample size. The Mann-Whitney U test was performed because this statistical test compares two independent samples. (Bachman & Paternoster 1997, pp. 535-540) In this study, the Mann-Whitney U test was applicable because the researcher compared the number of Trial Chambers' citations before and after the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis*.

Summary

The criminal justice community has used archival data to study trends within a court system. These relatively inexpensive studies promote reliable and valid studies because independent investigators can re-evaluate the same data to confirm the original

findings. In this study, the researcher studied judicial opinions and trial transcripts to analyze the methods the ICTY's Trial Chambers cited to establish a victim's death in thirteen homicide cases between 1997 and 2004. Specifically, relative frequency analysis and Mann-Whitney U test were performed to determine if a shift in frequency regarding Trial Chambers' citations to six types of evidence occurred after 2001.

CHAPTER V: RESULTS

Introduction

This study analyzes thirteen judgments between 1997 and 2004, an eight-year time span. The Trial Chambers tried twenty-seven different defendants in these thirteen judgments. (See Table 5.1) These judgments depict event in nine different geographic regions across the former Yugoslavia: Bruko, Celebici Camp, Foca, Lasva Valley, Mostar, Omarska and Kerterm Camps, Prijedor, Srebrenica, and Visegard. (See Table 5.1)

In this study, the Trial Chambers tried a significant number of defendants regarding events in the Lasva Valley because three of the thirteen judgments (22%) involved this area. The Trial Chambers also tried a significant number of defendants regarding events in the Prijedor area because three of the thirteen cases (22%) involved this area. The Trial Chambers tried one case each (8%) in all the other regions.

Bruko	Celebici Camp	Foca	Lasva Valley	Mostar	Omarska and Kerterm Camp	Prijedor	Srebrenica	Visegard
Jelusic	Delalic	Krnjelac	Kupreski	Naletilic	Kvocka	Tadic	Krstic	Vasiljevic
			Blaskic			Stakic		
			Kordic			Brdanin		

Table 5.1- Defendants Separated by Geographical Area

The researcher originally collected a list of three-hundred seventy-five witness statements and two-hundred forty-six exhibits that the Trial Chambers cited to establish a victim's death. These citations were collected from ICTY judicial opinions from three different Trial Chambers. However, the researcher had to discard five witness statements (1%) because the researcher could not verify if the Trial Chambers admitted the testimony viva voce. Similarly, the researcher disregarded twenty-two exhibits (8%)

because the researcher was able to verify if the Trial Chambers admitted the exhibits via Rule 89(c), Rule 92*bis*, or Rule 94*bis*. The disregarded exhibits should not affect the results because the researcher only disregarded seven exhibits (2%) between 2002 and 2004.

This study analyzed five hundred nine-four pieces of evidence, which included either witness statements or exhibits. (See Table 5.2) Data included three hundred seventy witness statements, which was roughly sixty-three percent of the study. (See Table 5.2) The researcher analyzed three different types of witness statements: confidential witnesses, expert witnesses, and lay witnesses. (See Table 5.2) Data also included two hundred twenty-four exhibits. Thirty-seven percent of the study discussed three distinct types of exhibits: confidential exhibits, forensic exhibits, and non-forensic exhibits. (See Table 5.2)

Case Name	Year	Confidential Witnesses	Expert Witnesses	Lay Witnesses	Confidential Exhibits	Forensic Exhibits	Non-forensic Exhibits	Total
Tadic	1997	0	0	6	0	0	0	6
Delalic	1998	7	0	19	0	1	0	27
Jelusic	1999	0	3	1	0	2	1	7
Kupreski	2000	28	9	3	4	38	2	84
Blaskic	2000	11	15	14	0	0	3	43
Kordic	2001	20	7	10	12	26	6	81
Krstic	2001	18	14	4	0	17	12	65
Kvocka	2001	13	2	14	0	1	1	31
Kmojelac	2002	32	2	8	0	3	4	49
Vasiljevic	2002	11	2	5	1	7	5	31
Stakic	2003	14	1	13	7	11	10	56
Naletilic	2003	7	0	1	0	3	1	12
Brdanin	2004	28	1	27	13	12	21	102
Total		189	56	125	37	121	66	594

Table 5.2- Witness Statements and Exhibits Separated by Category and Year

The researcher analyzed each type of witness statement or exhibit via two avenues. The researcher plotted the number of witness statements or exhibits across an

eight-year timeline. This analysis presented a general overview of the number of Trial Chambers' citations to a particular category per year.

The researcher also divided each category into three time periods: 1997-2000, 2001, and 2002-2004. These three time categories represented pre-Rule 92*bis*, a transition year, and post-Rule 92*bis* opinions. These classifications were critical because it re-evaluates the data in relation to the ICTY's Rules of Procedure and Evidence amendment. This perspective may determine if a fluctuation occurred in the Trial Chambers' citations before and after Rule 92*bis*. All images in this thesis are presented in color regarding these two types of analysis.

Aggregated Analysis

The Trial Chambers preferred to cite witness testimony rather than exhibits to establish a victim's death. Between 1997 and 2000, sixty-nine percent of the citations referenced witness testimony while thirty-one percent of the citations mentioned exhibits. (See Table 5.3; Figure 5.2) In 2001, fifty-seven percent of the citations referenced witness testimony while forty-three percent of the citations referenced exhibits. (See Table 5.3; Figure 5.2) Sixty-two percent of the Trial Chambers citations discussed witness statements while thirty-eight percent of the citations discussed exhibits between the 2002 and 2004 time period. (See Table 5.3; Figure 5.2) Rule 92*bis* did not affect the number of witness citations because only a ten-percent decrease in the number of witness citations existed between the 1997 and 2000 time period and between the 2002 and 2004 time period. (See Table 5.3; Figure 5.2)

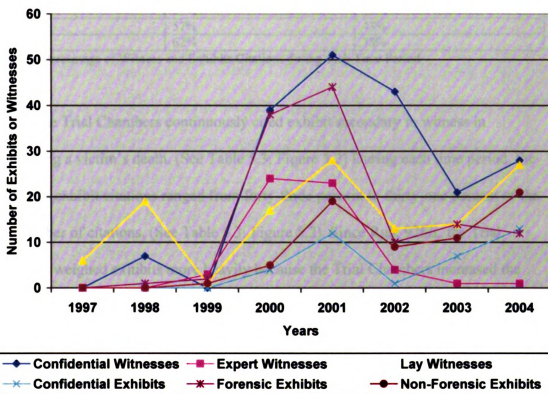


Figure 5.1 Witness and Exhibit Timeline

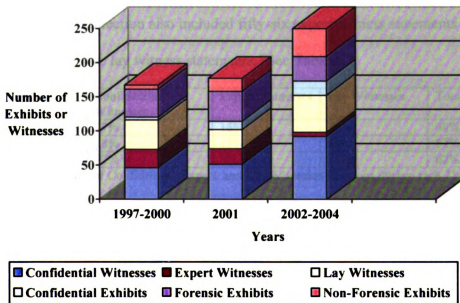


Figure 5.2 Aggregated Witnesses and Exhibits in Relation to Rule 92bis

Time Periods	Percentages of Witness	Percentages of Exhibits
1997-2000	69%	31%
2001	57%	43%
2002-2004	62%	38%

Table 5.3- Percentage of Witness and Exhibits Citations during each Time Period

The Trial Chambers continuously cited exhibit secondary to witness in establishing a victim's death. (See Table 5.3; Figure 5.2) During each time period, the number of exhibit citations ranged from forty-three percent to thirty-one percent of the total number of citations. (See Table 5.3; Figure 5.2) Since Rule 92*bis*, the Trial Chambers weighed exhibits more heavily because the Trial Chambers increased the number of exhibit citations by twenty-three percent between the 1997 and 2000 time period and between the 2002 and 2004 time period. (See Table 5.3; Figure 5.2)

Witness Statements

The witness statement collection comprised confidential, expert, and lay witness statements. The researcher compiled a list of one-hundred eighty-nine confidential witnesses. This collection also included fifty-six expert witness statements and one-hundred twenty-five lay witness statements. (See Table 5.2)

Time Periods	Confidential Witnesses	Expert Witnesses	Lay Witnesses	Total
1997-2000	27%	16%	26%	69%
2001	28%	13%	16%	57%
2002-2004	37%	3%	22%	62%

Table 5.4-Percentage of Confidential, Expert, and Lay Witnesses Citations during each Time Period

The percentage of citations regarding the three different types of witness testimony varied during each time period. Within the witness category, confidential witness testimony was the most popular form of evidence because the Trial Chambers cited confidential witnesses the most frequently during all three time periods. (See Table 5.3; Table 5.4; Figure 5.2) Between 1997 and 2000, twenty-seven percent of the total

number of exhibits referenced confidential witnesses. (See Table 5.3; Table 5.4; Figure 5.2) In 2001, twenty-eight percent of the total number of exhibits discussed confidential witness statements. (See Table 5.3; Table 5.4; Figure 5.2) Between 2002 and 2004, thirty-seven percent of the total number of Trial Chambers' citations mentioned confidential witnesses. (See Table 5.3; Table 5.4; Figure 5.2) The Trial Chambers increased the confidential witness citations by thirty-seven percent in pre-and post-Rule 92*bis* judgments. (See Table 5.3; Table 5.4; Figure 5.2)

The Trial Chambers' citations to expert witnesses constantly decreased thorough the three time periods. Sixteen percent of the total number of Trial Chambers' citations referenced expert witnesses between the 1997 and 2000 time period. (See Table 5.3; Table 5.4; Figure 5.2) In 2001, thirteen percent of the total number of citations discussed expert witnesses. (See Table 5.3; Table 5.4; Figure 5.2) Between the 2002 and 2004 time period, only three percent of the total number of citations mentioned expert witnesses. (See Table 5.3; Table 5.4; Figure 5.2)

Rule 92*bis* has affected the frequency of expert witness citations. Between 2002 and 2004, expert witness citations was the least cited type of evidence. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) The number of expert witness citations represented only three percent of the total number of citations. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) This status was concerning because expert witness citations ranked fourth in pre-Rule 92*bis* judgments. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) This drop in status was a result of an eighty-one percent decrease in the number of expert witness citations between pre-and post-Rule 92*bis* judgments. (See Table 5.3; Table 5.4; Figure 5.2)

Lay witness testimony was the second most popular type of evidence cited by the Trial Chambers in two time periods. (See Table 5.3; Table 5.4; Figure 5.2) Between 1997 and 2000, twenty-six percent of the total number of Trial Chambers' citations referenced lay witness testimony. (See Table 5.3; Table 5.4; Figure 5.2) In 2001, sixteen percent of the total number of citations referenced lay witnesses. (See Table 5.3; Table 5.4; Figure 5.2) Between 2002 and 2004, twenty-two percent of the total number of citations mentioned lay witnesses. (See Table 5.3; Table 5.4; Figure 5.2) Rule 92*bis* did not affect the number of lay witness citations because a fifteen-percent decrease existed between the 1997 and 2000 time period and between the 2002 and 2004 time period. (See Table 5.3; Table 5.4; Figure 5.2)

Confidential Witnesses

The researcher could not examine the confidential witness statements due to ICTY's confidentiality agreements. The researcher could only confirm that the Trial Chambers cited a particular number of confidential witnesses per case.

Throughout the eight years, the Trial Chambers cited between zero to fifty-one confidential witnesses to establish a victim's death per year. (See Table 5.2; Figure 5.3) In 1997 and 1999, the Trial Chambers cited zero confidential witnesses. (See Table 5.2; Figure 5.3) In contrast, the Trial Chambers' citations to confidential witnesses peaked when the Trial Chambers cited fifty-one confidential witnesses in 2001. (See Table 5.2; Figure 5.3) Between 2002 and 2003, the frequency of the Trial Chambers' citations to confidential witnesses decreased with only forty-three and twenty-one citations, respectively. (See Table 5.2; Figure 5.3) In 2004, the frequency of the Trial Chambers' citations to confidential witnesses rebounded slightly. (See Table 5.2; Figure 5.3)

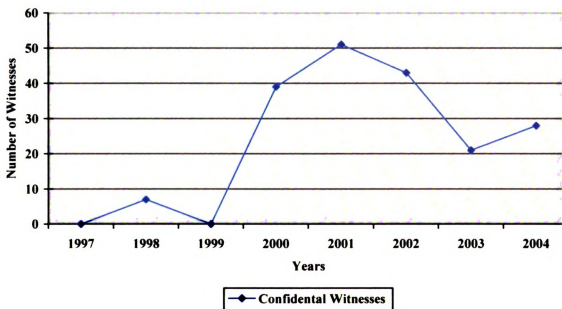


Figure 5.3 Confidential Witness Timeline

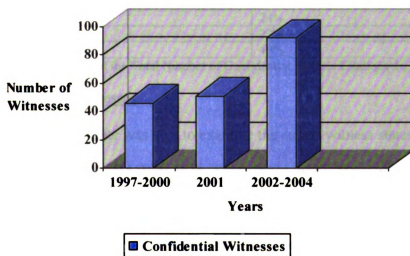


Figure 5.4 Confidential Witnesses in Relation to Rule 92bis

The data presented an alternative view in relation to Rule 92bis. The frequency of the Trial Chambers' citations to confidential witnesses continuously increased throughout these three time periods. (See Table 5.2; Table 5.5; Figure 5.4) Between 1997 and 2000,

the Trial Chambers cited forty-six confidential witnesses. (See Table 5.2; Figure 5.4) These citations represented twenty-four percent of the total number of confidential witness statements. (See Table 5.5; Figure 5.4) In 2001, the frequency of Trial Chambers' citations increased to fifty-one citations. (See Table 5.2; Figure 5.4) These fifty-one citations represented twenty-seven percent of the total number of confidential witness citations. (See Table 5.5; Figure 5.4) A dramatic increase occurred when the Trial Chambers cited ninety-two confidential witnesses between 2002 and 2004, which represented forty-nine percent of the entire confidential witness citations. (See Table 5.2; Table 5.5; Figure 5.4) The number of confidential witness citations increased one-hundred and four percent between pre-and post-Rule 92*bis* judgments. (See Table 5.5; Figure 5.4)

Time Periods	Percentage of Confidential Witnesses
1997-2000	24%
2001	27%
2002-2004	49%

Table 5.5- Percentage of the Total Number of Confidential Witness Citations during each Time Period

Expert Witnesses

The researcher was able to examine the expert witness statements via the ICTY transcripts on the World Wide Web. Throughout the eight years, the Trial Chambers cited between zero and twenty-four expert witnesses to establish a victim's death per year. (See Table 5.2; Figure 5.5) In 1999, the Trial Chambers began citing expert witnesses in the *Jelusic* judgment. (See Table 5.2; Figure 5.5)

In 2000 and 2001, the Trial Chambers significantly increased the frequency of expert witness citations. (See Table 5.2; Figure 5.5) In 2000, the Trial Chambers cited twenty-four experts. (See Table 5.2; Figure 5.5) Similarly, in 2001, the Trial Chambers cited twenty-three experts. (See Table 5.2; Figure 5.5)

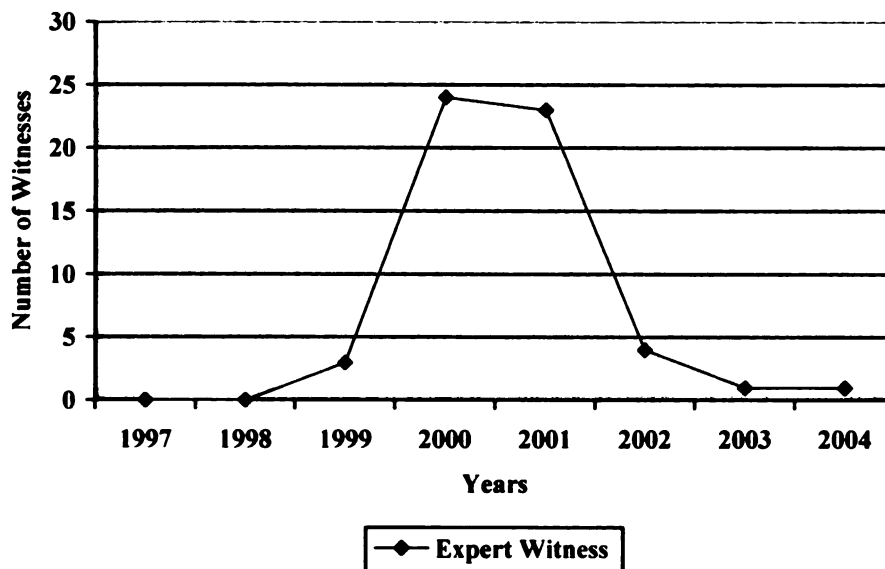


Figure 5.5 Expert Witness Timeline

The Trial Chambers did not maintain this high frequency of expert witness citations for an extended period of time. (See Table 5.2; Figure 5.5) In 2002, a significant decrease occurred when the Trial Chambers cited only four different expert witnesses. (See Table 5.2; Figure 5.5) The Trial Chambers' citations continued to decrease when the Trial Chambers cited only one expert witness per year between 2003 and 2004. (See Table 5.2; Figure 5.5)

In contrast to confidential witnesses, the Trial Chambers' citations to expert witnesses dramatically decreased throughout the three time periods. (See Table 5.2; Figure 5.6) Between 1997 and 2000, the Trial Chambers cited twenty-seven expert witnesses to establish a victim's death. (See Table 5.2; Figure 5.6) These twenty-seven citations represented forty-eight percent of the total number of expert witness citations. (See Table 5.6; Figure 5.6) In 2001, the Trial Chambers' citations to expert witnesses slightly decreased because the Trial Chambers cited only twenty-four expert witnesses.

(See Table 5.2; Figure 5.6) The Trial Chambers' citations exhibited forty-one percent of the total number of expert witness citations in 2001. (See Table 5.6; Figure 5.6) The frequency of Trial Chambers' citations to expert witnesses dramatically decreased because the Trial Chambers cited only six expert witnesses throughout five judgments between 2002 and 2004. (See Table 5.2; Figure 5.6) These six citations represented eleven percent of the total number of expert witness citations. (See Table 5.6; Figure 5.6)



Figure 5.6 Expert Witnesses in Relation to Rule 92bis

Time Periods	Percentage of Expert Witnesses
1997-2000	48%
2001	41%
2002-2004	11%

Table 5.6-Percentage of the Total Number of Expert Witnesses Citations during each Time Period

The Trial Chambers consistently cited fewer expert witness citations in pre- and post-Rule 92bis judgments. (See Table 5.6; Figure 5.6) The Trial Chambers' referenced eighty-nine percent of the total expert witness citations between the 1997 and 2000 time period and 2001. (See Table 5.6; Figure 5.6) The Trial Chambers citations to expert

witnesses decreased seventy-seven percent between pre-and post-Rule 92*bis* judgments.

(See Table 5.6; Figure 5.6)

The researcher further categorized the expert witnesses into seven groups: investigators, forensic anthropologists, forensic archeologists, forensic pathologists, military personnel, demographic experts, and lawyers. (See Table 5.7)

Case Name	Year	Investigator	F. Anthropologists	F. Archeologists	F. Pathologists	M	D	L	Total
Tadic	1997	0	0	0	0	0	0	0	0
Delalic	1998	0	0	0	0	0	0	0	0
Jelusic	1999	0	0	1	1	1	0	0	3
Kupreski	2000	1	0	0	0	7	0	1	9
Blaskic	2000	0	0	0	0	14	0	1	15
Kordic	2001	0	0	0	0	7	0	0	7
Krstic	2001	2	2	1	1	7	1	0	14
Kvocka	2001	1	0	0	0	1	0	0	2
Krnjelac	2002	1	0	0	0	0	0	1	2
Vasiljevic	2002	0	0	1	0	0	0	1	2
Stakic	2003	1	0	0	0	0	0	0	1
Naletilic	2003	0	0	0	0	0	0	0	0
Brdanin	2004	1	0	0	0	0	0	0	1
Total		7	2	3	2	37	1	4	56

D= Demographic Expert; M=Military Personnel; L=Lawyer

Table 5.7- Expert Witness Statement Separated by Category

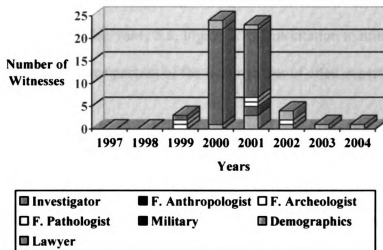


Figure 5.7 Aggregated Expert Witnesses

Years	Investigator	F. Anthropologists	F. Archeologists	F. Pathologists	M	D	L
1997	0%	0%	0%	0%	0%	0%	0%
1998	0%	0%	0%	0%	0%	0%	0%
1999	0%	0%	33%	33%	33%	0%	0%
2000	4%	0%	0%	0%	88%	0%	8%
2001	13%	8%	4%	4%	68%	4%	0%
2002	25%	0%	25%	0%	0%	0%	50%
2003	100%	0%	0%	0%	0%	0%	0%
2004	100%	0%	0%	0%	0%	0%	0%

M=Military personnel; D=Demographic Expert; L=Lawyer

Table 5.8-Percentage of Expert Witnesses Cited each Year

Similar to the previous discussion, the Trial Chambers cited a significant number of expert witnesses in 2000 and 2001. (See Table 5.7; Figure 5.7) Surprisingly, the Trial Chambers relied on military personnel the most frequently in establishing a victim's death. (See Table 5.7; Figure 5.7) The Trial Chambers referenced thirty-seven citations regarding military personnel throughout the thirteen judgments. (See Table 5.7; Figure 5.7)

The frequency of Trial Chambers' citations to military personnel is quite erratic. (See Table 5.7; Figure 5.7) The Trial Chambers cited only military personnel between

1999 and 2001. (See Table 5.7; Figure 5.7) The Trial Chambers referenced one military personnel in 1999. (See Table 5.8; Figure 5.7) This citation to military personnel represented thirty-three percent of the total number of cited experts in 1999. (See Table 5.8; Figure 5.7)

The frequency of citations to military personnel increased when the Trial Chambers cited twenty-one military personnel in 2000. (See Table 5.7; Figure 5.7) These citations comprised eighty-eight percent of the total number of experts in 2000. (See Table 5.8; Figure 5.7) In 2001, citations to military experts represented fifteen citations. (See Table 5.7; Figure 5.7) These fifteen citations represented sixty-eight percent of the total number of cited experts in 2001. (See Table 5.8; Figure 5.7) The Trial Chambers abruptly stopped citing military personal in 2002. (See Table 5.7; Figure 5.7) This sudden interruption was surprising because four of the six defendants tried after 2001 participated in military action. (*Krnojelac*, Trial Judgment, March 15, 2002 at ¶¶ 1-4, *Vasiljevic*, Trial Judgment, Nov. 29, 2002 at ¶¶ 1-4; *Stakic*, Trial Judgment, July 31, 2003 at ¶¶ 1-9; *Naletilic and Martinovic*, Trial Judgment, March 31, 2003 at ¶¶ 2-3; *Brdanin*, Trial Judgment, Sept. 1, 2004 at ¶¶ 1-13)

After 2002, the Trial Chambers shifted their attention to lawyers' and investigators' testimony to establish a victim's death. (See Table 5.7; Figure 5.7) In 2002, the Trial Chambers cited two different lawyers in the *Krnojelac* and *Vasiljevic* judgments. (See Table 5.7; Figure 5.7) The citations to lawyers represented fifty percent of the total number of experts in 2002. (See Table 5.8; Figure 5.7)

In 2003, the Trial Chambers continuously narrowed their focus because the Trial Chambers cited only investigators. (See Table 5.7; Figure 5.7) Between 2003 and 2004,

the Trial Chambers continued this trend because the Trial Chambers cited only investigators to establish a victim's death. (See Table 5.7; Table 5.8; Figure 5.7)

Surprisingly, the Trial Chambers sporadically cited forensic experts to establish a victim's death throughout these eight years. The Trial Chambers cited forensic experts in 1999, 2001, and 2002. (See Table 5.7; Figure 5.7) The Trial Chambers cited only one archeologist in 1999 and 2002. (See Table 5.7; Figure 5.7) In 2001, the frequency of Trial Chambers citations to forensic experts peaked when the Trial Chambers cited one pathologist, one archeologist, and two anthropologists. (See Table 5.7; Figure 5.7)

The percentages of citations to forensic specialists shifted each year. In 1999, the citations to forensic specialists represented sixty-six percent of the total number of expert witnesses. (See Table 5.8; Figure 5.7) The citations to forensic specialists comprised only twelve percent of the total number of experts in 2001. (See Table 5.8; Figure 5.7) In 2002, the percentages of citations to forensic specialists increased to twenty-five percent of the total number of expert witnesses. (See Table 5.8; Figure 5.7)

The Trial Chambers integrated demographic experts throughout each of the judgments. However, the Trial Chambers did not cite demographic experts very often to establish a victim's death. (See Table 5.7; Figure 5.7) In this study, the Trial Chambers cited only one demographic expert in the *Krstic* case. (See Table 5.7; Figure 5.7) This citation represented four percent of the total number of expert witnesses for 2001. (See Table 5.8; Figure 5.7)

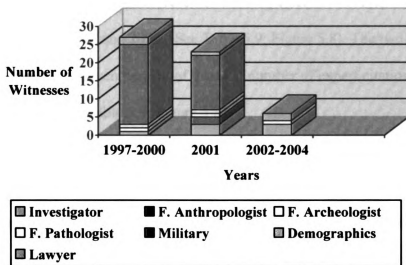


Figure 5.8 Aggregated Expert Witness in Relation to Rule 92bis

Time Periods	Investigator	F. Anthropologist	F. Archeologist	F. Pathologist	M	D	L
1997-2000	4%	0%	4%	4%	81%	0%	7%
2001	13%	9%	4%	4%	65%	4%	0%
2002-2004	50%	0%	17%	0%	0%	0%	33%

Table 5.9-Percentage of Total Number of Expert Witnesses Citations in each Time Period

In relation to Rule 92bis, this data presented an alternative picture. Between 1997 and 2000, the Trial Chambers regularly cited military personnel to establish a victim's death. The Trial Chambers cited twenty-two citations referencing military experts throughout these five cases. (See Table 5.7; Figure 5.8) These citations represented eight-one percent of the total number of expert witness citations between the 1997 and 2000. (See Table 5.7; Table 5.9; Figure 5.8)

Between 1997 and 2000, the Trial Chambers relied on other types of experts to establish a victim's death. The Trial Chambers cited four other experts during these three years: a forensic pathologist, a forensic archeologist, an investigator and two lawyers.

(See Table 5.7; Figure 5.8) The one citation to a forensic pathologist, forensic archeologist, and investigator represented twelve percent of the total number of expert citations between 1997 and 2000. (See Table 5.9; Figure 5.8) The two citations to lawyers represented seven percent of the total number of expert citations between the 1997 and 2000. (See Table 5.9; Figure 5.8)

In 2001, the Trial Chambers still heavily relied on military personnel to establish a victim's death. (See Table 5.7; Table 5.9; Figure 5.8) The Trial Chambers cited fifteen citations referencing military personal. (See Table 5.7; Figure 5.8) These citations represented sixty-five percent of the total number of citations to expert witnesses. (See Table 5.9; Figure 5.8)

However, in 2001, the Trial Chambers cited other types of experts more frequently. (See Table 5.7; Figure 5.8) The Trial Chambers cited three forensic experts: two anthropologists and one archeologist. (See Table 5.3; Figure 5.8) These citations to forensic specialists represented seventeen percent of the total number of expert witness citations during in 2001. (See Table 5.9; Figure 5.8)

The Trial Chambers also cited a demographic expert in the *Krstic* judgment. (See Table 5.7; Figure 5.8) This citation represented four percent of the total number of expert witnesses' citations in 2001. (See Table 5.9; Figure 5.8) Furthermore, the Trial Chambers' increased the frequency of investigator citations to three citations throughout the *Krstic* and *Kvocka* judgments. (See Table 5.7; Figure 5.8) These citations represented thirteen percent of the total number of expert witnesses' citations in 2001. (See Table 5.9; Figure 5.8)

Between 2002 and 2004, the Trial Chambers altered its focus to other types of experts to establish a victim's death. Between 1997 and 2000, the Trial Chambers relied on an array of experts, which included investigators, forensic specialists, military personnel, demographic experts, and lawyers. (See Table 5.9; Figure 5.8) Since 2001, Trial Chambers stopped citing four types of experts: military personnel, forensic anthropologists, forensic pathologists, and demographic experts. (See Table 5.9; Figure 5.8) This decrease in citations represented a one-hundred percent decrease in citations regarding these types of experts in post-Rule 92*bis* judgments. (See Table 5.9; Figure 5.8)

Trial Chambers cited only three types of experts, lawyers, forensic archeologists, and investigators, in post-Rule 92*bis* judgments. (See Table 5.9; Figure 5.8) The frequency of Trial Chambers' citations to investigators increased throughout the three time periods. (See Table 5.7; Table 5.9; Figure 5.8) Between 1997 and 2000, the expert witness citations to investigators represented four percent of the total number of expert witness citations. (See Table 5.9; Figure 5.8) The investigator citations represented fifty percent of the total number of expert witness citations in post-Rule 92*bis* judgments. (See Table 5.7; Table 5.9; Figure 5.8) The frequency of citations to investigators increased one-thousand fifty-percent between the 1997 and 2000 time period and between the 2002 and 2004 time period. (See Table 5.7; Table 5.9; Figure 5.8)

The Trial Chambers also cited two lawyers in post-Rule 92*bis* judgments. (See Table 5.7; Figure 5.6) The citations to lawyers represented thirty-three percent of the total number of expert witness citations between 2002 and 2004. (See Table 5.9; Figure 5.8) The frequency of citations to lawyers increased three-hundred seventy-one percent between pre-and post-Rule 92*bis* judgments. (See Table 5.9; Figure 5.8)

The single citation to a forensic archeologist comprised seventeen percent of the total number of expert witness citations between the 2002 and 2004. (See Table 5.7; Table 5.9; Figure 5.8) The frequency of citations to forensic archeologist increased three-hundred percent between pre-and post-Rule 92*bis* judgments. (See Table 5.7; Table 5.9; Figure 5.8)

The variation in percentages regarding lawyers and forensic archeologists were misrepresentations. The Trial Chambers referenced the same number of lawyers and forensic archeologists between the 1997 and 2000 time period and the 2002 and 2004 time period. (See Table 5.7) The increase in percentage resulted from the Trial Chambers decreasing the citations to other types of forensic experts. (See Table 5.7; Table 5.8; Table 5.9)

Since Rule 92*bis*, the Trial Chambers increased the citations only to ICTY's investigators. (See Table 5.7; Table 5.9; Figure 5.8) Between 1997 and 2000, the Trial Chambers only cited one investigator. (See Table 5.7; Table 5.9; Figure 5.8) The Trial Chambers cited three investigators between 2002 and 2004. (See Table 5.7; Table 5.9; Figure 5.8) Moreover, in 2002 and 2003, the expert witness citations only referenced ICTY investigators. (See Table 5.7; Table 5.9; Figure 5.8)

The Trial Chambers may be only interested in ICTY investigators as expert witness. This implication is not impracticable. ICTY investigators save the Tribunal time and money. These investigators are easy to summon because they usually live in The Hague. Moreover, ICTY investigators expedite the trial process because they are familiar with the Tribunal's customs and policies.

Rule 92*bis* has also affected forensic specialists in an extremely interesting manner. Between 1997 and 2000, forensic specialists' citations comprised of eight percent of the total number of expert witnesses. (See Table 5.9; Figure 5.8) In 2001, the frequency of citations of forensic specialists rose to encompass seventeen percent of the total number of expert witnesses. (See Table 5.9; Figure 5.8) The number of citations to forensic specialists continued to represent seventeen percent of the total number of expert witnesses between 2002 and 2004. (See Table 5.9; Figure 5.8)

The distribution of three sub-specialists changed through each time period. Between 1997 and 2000, the Trial Chambers cited forensic archeologists and forensic pathologists. (See Table 5.9; Figure 5.8) In 2001, the Trial Chambers cited forensic anthropologists, forensic archeologists, and forensic pathologists, which incorporates all three sub-specialties. (See Table 5.9; Figure 5.8) The Trial Chambers cited only forensic archeologists between 2002 and 2004. (See Table 5.9; Figure 5.8)

In post-Rule 92*bis* judgments, the Trial Chambers may be solely interested in archeologists regarding forensic specialists. Similar to ICTY investigators, archeologists save the Tribunal time and money because of their dual capacity. First and foremost, archeologists discuss archeological procedures. Archeologist can also discuss trauma on human skeletons. The Tribunal is obtaining two different sets of information via one single individual.

Lay Witnesses

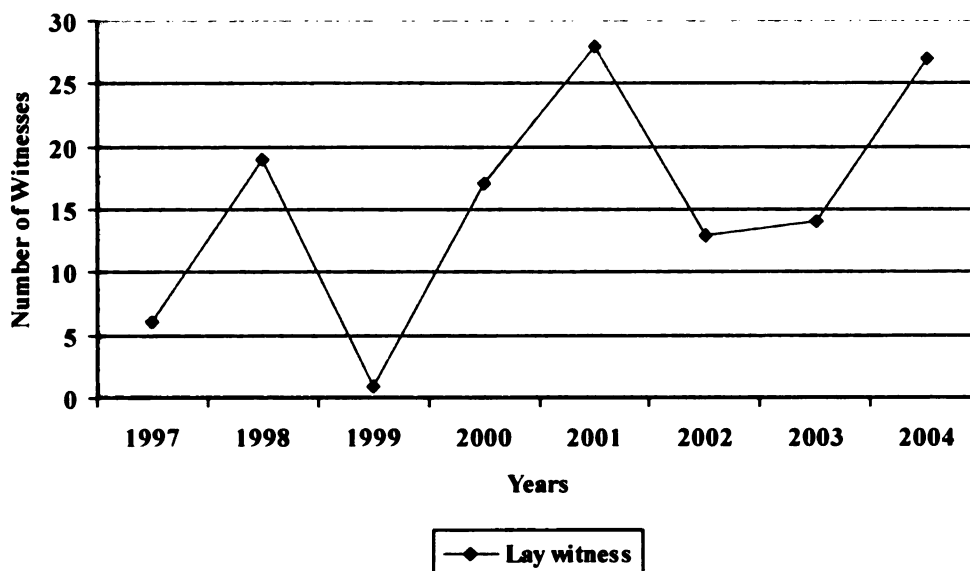


Figure 5.9 Lay Witness Timeline

Similar to confidential witnesses, the lay witness timeline is erratic. (See Table 5.2; Figure 5.3; Figure 5.9) Between 1997 and 1998, the frequency of the Trial Chambers' citations to lay witnesses increased from seven to nineteen citations. (See Table 5.2; Figure 5.9) In 1999, the frequency of the Trial Chambers' citations dramatically decreased to only one citation. (See Table 5.2; Figure 5.9) Between 2000 and 2001, the frequency of Trial Chambers' citations to lay witnesses continued to rise to twenty-eight citations. (See Table 5.2; Figure 5.9) Similarly, in 2003, the Trial Chambers' citations fell to thirteen citations. (See Table 5.2; Figure 5.9) The frequency of Trial Chambers citations continued to rise with twenty-seven citations in 2004. (See Table 5.2; Figure 5.9)



Figure 5.10 Lay Witnesses in Relation to Rule 92bis

Contrary to the confidential and expert witnesses data, the frequency of Trial Chambers' citations did not continuously increase or decrease with respect to Rule 92bis. (See Table 5.2; Figure 5.4; Figure 5.6; Figure 5.10) Between 1997 and 2000, the Trial Chambers cited forty-three lay witnesses to establish a victim's death. (See Table 5.2; Figure 5.10) These forty-three citations represented thirty-five percent of the total number of lay witness citations during this time-period. (See Table 5.10; Figure 5.10) The frequency of citations fell when the Trial Chambers cited only twenty-eight lay witnesses in 2001. (See Table 5.2; Figure 5.10) These citations comprised twenty-two percent of the total number of lay witness citations. (See Table 5.10; Figure 5.10) Between 2002 and 2004, the frequency of Trial Chambers' citations increased when the Trial Chambers cited fifty-four lay witnesses. (See Table 5.2; Figure 5.10) These citations represented forty-three percent of the total number of lay witness citations. (See Table 5.10; Figure 5.10) The Trial Chambers increased the lay witness citations by twenty-three percent between pre-and post-Rule 92bis judgments. (See Table 5.10; Figure 5.10)

Time Periods	Percentage of Lay Witnesses
1997-2000	35%
2001	22%
2002-2004	43%

Table 5.10-Percentage of Lay Witness Citations during each Time Period

Exhibits

The researcher separated the exhibits into three categories: confidential exhibits, forensic exhibits, and non-forensic exhibits. This exhibit section was comprised of thirty-seven confidential exhibits, one-hundred twenty-one forensic exhibits, and sixty-six non-forensic exhibits. (See Table 5.2)

Time Periods	Confidential Exhibits	Forensic Exhibits	Non-forensic exhibits	Total
1997-2000	2%	25%	4%	31%
2001	7%	25%	11%	43%
2002-2004	8%	14%	16%	38%

Table 5.11-Percentage of Confidential, Forensic, and Non-forensic Exhibits Citations during each Time Period

The percentage of citations regarding the three different types of exhibits changed during each time period. Between 1997 and 2000, two percent of the total number of citations composed of confidential exhibits. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) In 2001, seven percent of the total number of citations referenced confidential exhibits. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) Between 2002 and 2004, eight percent of the total number of Trial Chambers' citations mentioned confidential exhibits. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) The Trial Chambers increased the number of confidential exhibit three-hundred percent between pre-and post-Rule 92bis judgments. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) After 2001, the confidential exhibits citations ranked as the fifth most popular type of evidence. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2)

The Trial Chambers' citations to forensic exhibits fell. Between the 1997 and 2000 time period and 2001, twenty-five percent of the total number of Trial Chambers' citations referenced forensic exhibits. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) Between 2002 and 2004, fourteen percent of the total number of citations discussed forensic exhibits. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.3) The forensic exhibits citations decreased forty-four percent between pre-and post-Rule 92*bis* judgments. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2)

The Trial Chambers increased the non-forensic exhibits citations throughout the three time periods. Between the 1997 and 2000 time period, only four percent of the total number of Trial Chambers' citations referenced non-forensic exhibits. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) In 2001, eleven percent of the total number of citations referenced non-forensic exhibits. (See Table 5.3; Table 5.11) Between the 2002 and 2004, sixteen percent of the total number of citations discussed non-forensic exhibits. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2) This represented a three-hundred percent increase between pre-and post-Rule 92*bis* judgments. (See Table 5.3; Table 5.4; Table 5.11; Figure 5.2)

Confidential Exhibits

Similar to the confidential witness statements, the researcher could not examine the confidential exhibits due to the ICTY's confidential agreements. The researcher could only confirm that the Trial Chambers cited a particular number of exhibits.

Similar to the confidential and lay witness timeline, the confidential exhibit timeline presents an unexplained pattern. (See Table 5.2; Figure 5.3; Figure 5.9; Figure 5.11) The Trial Chambers began citing confidential exhibits in 2000. (See Table 5.2;

Figure 5.11) The frequency of the Trial Chambers' citations to confidential evidence rose dramatically when the Trial Chambers cited twelve exhibits in the *Kordic* case. (See Table 5.2; Figure 5.11) However, the frequency dropped significantly when the Trial Chambers cited only one confidential exhibit in 2002. (See Table 5.2; Figure 5.11) The frequency of Trial Chambers citations rebounded when the Trial Chambers cited seven confidential exhibits in 2003. (See Table 5.2; Figure 5.11) The frequency of citations continued to rise when the Trial Chambers cited thirteen confidential exhibits in 2004. (See Table 5.2; Figure 5.11)

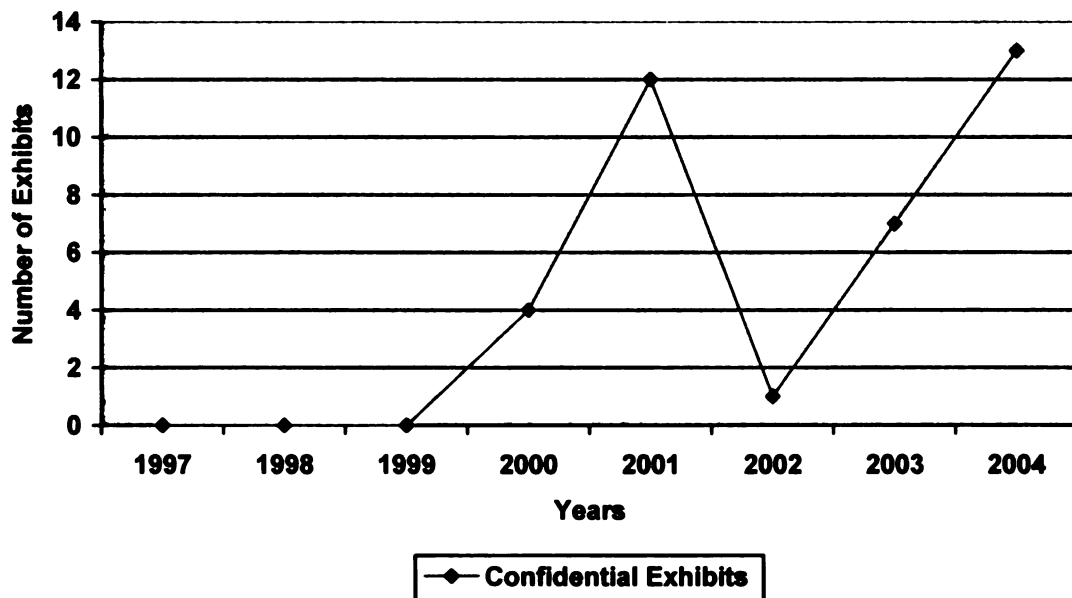


Figure 5.11 Confidential Exhibit Timeline

Similar to confidential witnesses, the frequency of Trial Chambers' citations to confidential exhibits continued to rise throughout these three time periods. (See Table 5.2; Figure 5.4; Figure 5.12) The Trial Chambers cited only four confidential exhibits between 1997 and 2000. (See Table 5.2; Figure 5.12) These four citations represented eleven percent of the total number of confidential exhibit citations. (See Table 5.12;

Figure 5.12) In 2001, the frequency of citations to confidential exhibits increased when the Trial Chambers cited twelve confidential exhibits. (See Table 5.2; Figure 5.12) These twelve citations comprised thirty-two percent of the total number of confidential exhibit citations. (See Table 5.12; Figure 5.12) Between 2002 and 2004, the frequency of citations almost doubled when the Trial Chambers cited twenty-one confidential exhibits. (See Table 5.2; Figure 5.12) These twenty-one citations represented fifty-seven percent of the total number of confidential exhibits citations. (See Table 5.12; Figure 5.12) The Trial Chambers increased the confidential exhibit citations four-hundred eighteen-percent between pre-and post-Rule 92bis judgments. (See Table 5.12; Figure 5.12)

Time Periods	Percentage of Confidential Exhibits
1997-2000	11%
2001	32%
2002-2004	57%

Table 5.12-Percentage of the Total Number of Confidential Exhibits during each Time Period

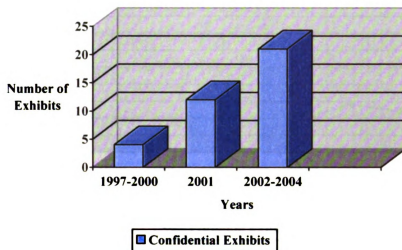


Figure 5.12 Confidential Exhibits in Relation to Rule 92b/s

Forensic Exhibits

The researcher was able to examine the forensic exhibits more thoroughly via the ICTY's intranet, interoffice programs, and trial transcripts via the World Wide Web. Similar to the expert witness timeline, the forensic exhibit timeline graphs peaked between 2000 and 2001. (See Table 5.2; Figure 5.5; Figure 5.13) In 1998, the Trial Chambers started to cite forensic exhibits when the Trial Chambers referenced one forensic exhibit. (See Table 5.2; Figure 5.13) In 1999, the frequency of Trial Chambers' citations slightly increased when the Trial Chambers referenced two forensic exhibits. (See Table 5.2; Figure 5.13) The frequency of Trial Chambers' citations dramatically rose in 2000 when the Trial Chambers cited forty forensic exhibits. (See Table 5.2; Figure 5.13) In 2001, the Trial Chambers' citations to forensic exhibits peaked when the Trial Chambers cited forty-four exhibits. (See Table 5.2; Figure 5.13)

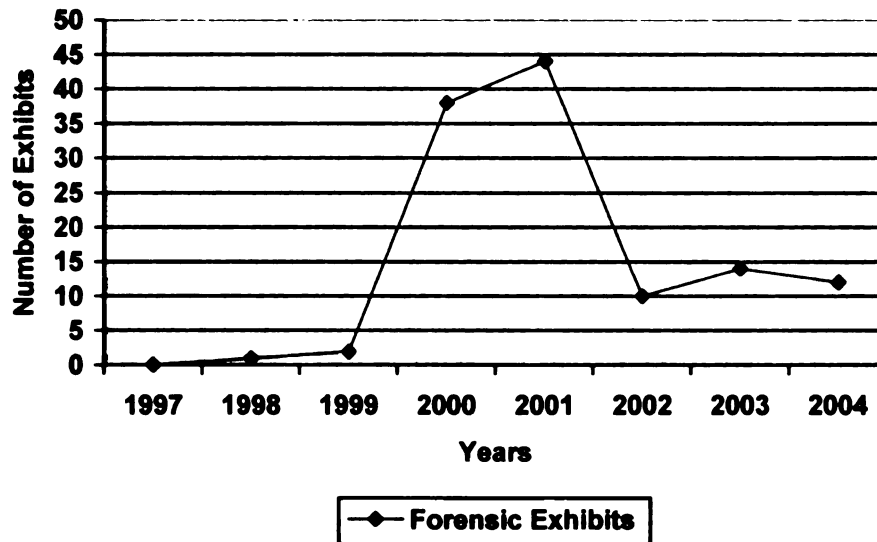


Figure 5.13 Forensic Exhibit Timeline

However, in 2002, the frequency of Trial Chambers’ citations to forensic exhibits abruptly plummeted. (See Table 5.2; Figure 5.13) The Trial Chambers cited only ten forensic exhibits. (See Table 5.2; Figure 5.13) The frequency of Trial Chambers’ citations to forensic exhibits never rebounded. (See Table 5.2; Figure 5.13) In 2003, the Trial Chambers cited fourteen exhibits. (See Table 5.2; Figure 5.13) The Trial Chambers’ citations to forensic exhibits further decreased when the Trial Chambers cited only twelve exhibits in 2004. (See Table 5.2; Figure 5.13)

In relation to Rule 92*bis*, the forensic exhibit data did not present a dramatic fluctuation between time periods as the timeline graph analysis. (See Figure 5.13; Figure 5.14) Between 1997 and 2000, the Trial Chambers cited forty forensic exhibits. (See Table 5.2; Figure 5.14) These forty citations represented thirty-four percent of the total number of forensic exhibit citations. (See Table 5.13; Figure 5.13) In 2001, the frequency of Trial Chambers’ citations slightly increased when the court cited forty-four forensic

exhibits. (See Table 5.2; Figure 5.14) These forty-four citations comprised thirty-six percent of the total number of forensic exhibit citations. (See Table 5.13; Figure 5.14) Between 2002 and 2004, the frequency of Trial Chambers' citations slightly decreased when the Trial Chambers cited thirty-six forensic exhibits. (See Table 5.2; Figure 5.14) These citations represented thirty percent of the total number of forensic exhibit citations. (See Table 5.13; Figure 5.14) A forty-four percent decrease occurred in forensic exhibit citations from pre- to post-Rule 92*bis* judgments. (See Table 5.13; Figure 5.14)

Time Periods	Percentage of Forensic Exhibits
1997-2000	34%
2001	36%
2002-2004	30%

Table 5.13- Percentage of the Total Number of Forensic Exhibits Citations during each Time Period

This relatively consistent number of citations could signify that the Trial Chambers has accepted to other types of evidence, such as confidential witnesses, confidential exhibits, and non-forensic exhibits, as the norm to establish a victim's death. The Trial Chambers increased the total number of citations from pre-and post-Rule 92*bis* judgments. (See Table 5.2; Figure 5.2) But, the Trial Chambers may have not increased the number of forensic exhibit citations at a similar rate as the other forms of evidence. This inconsistency may infer that the Trial Chambers were not weighing forensic exhibits as heavily in post-Rule 92*bis* judgments than in pre-Rule 92*bis* judgments.

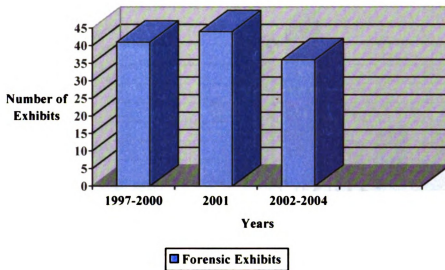


Figure 5.14 Forensic Exhibits in Relation to Rule 92bis

The researcher further separated forensic exhibits into seven categories: forensic reports, death certificates, records of bodies, ICTY investigator reports, photographs of bodies, videos of bodies, and 94bis statements.

Case Name	Year	Forensic Reports	DC	Records	ICTY	Photo	Videos	94Bis	Total
Tadic	1997	0	0	0	0	0	0	0	0
Delalic	1998	0	1	0	0	0	0	0	1
Jelusic	1999	1	0	1		0	0	0	2
Kupreski	2000	2	0	0	0	34	2	0	38
Blaskic	2000	0	0	0	0	0	0	0	0
Kordic	2001	0	12	0	0	14	0	0	26
Krstic	2001	9	0	0	2	6	0	0	17
Kvocka	2001	0	0	0	1	0	0	0	1
Krnjelac	2002	1	0	2	0	0	0	0	3
Vasiljevic	2002	7	0	0	0	0	0	0	7
Stakic	2003	10	0	0	1	0	0	0	11
Naletilic	2003	0	1	0	0	1	0	1	3
Brdanin	2004	9	0	1	2	0	0	0	12
Total		39	14	4	6	55	2	1	121

ICTY= ICTY Investigator Reports; DC= Death Certificates; Records = Records related to bodies; Photos= Photographs related bodies; Video= Video Related to bodies

5.14 Forensic Exhibits Separated by Category

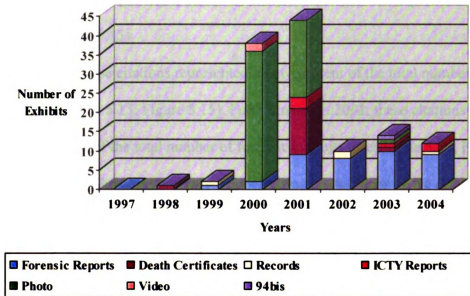


Figure 5.15 Aggregated Forensic Exhibit Categories

Years	FR	DC	Records	ICTY	Photos	Videos	94bis
1997	0%	0%	0%	0%	0%	0%	0%
1998	0%	100%	0%	0%	0%	0%	0%
1999	50%	0%	50%	0%	0%	0%	0%
2000	5%	0%	0%	0%	90%	5%	0%
2001	20%	27%	0%	7%	46%	0%	0%
2002	80%	0%	20%	0%	0%	0%	0%
2003	72%	7%	0%	7%	7%	0%	7%
2004	75%	0%	8%	16%	0%	0%	0%

FR=Forensic Reports; DC=Death Certificates; Records=Records related to bodies; ICTY=ICTY investigator report; Photos= Photos related to bodies; Videos= Videos related to bodies
 Table 5.15- Percentage of Forensic Exhibits Cited each Year

The Trial Chambers definitely preferred to cite particular types of forensic evidence. Over the entire eight years, the Trial Chambers preferred to cite photographs and forensic reports. (See Table 5.14; Table 5.15; Figure 5.15) However, the distribution of the Trial Chambers' citations to these two types of forensic exhibits was dramatically different. (See Table 5.14; Table 5.15; Figure 5.15) Between 2000 and 2001, the majority of Trial Chambers' citations to forensic exhibits discussed photographs of the deceased's body. (See Table 5.14; Table 5.15; Figure 5.15) The Trial Chambers cited

thirty-four and twenty photographs in 2000 and 2001, respectively. (See Table 5.14; Table 5.15; Figure 5.15)

In 2000, these citations represented ninety percent of the total number of forensic exhibits. (See Table 5.15; Figure 5.15) Furthermore, in 2001, these citations comprised forty-nine percent of the total number of forensic exhibits. (See Table 5.15; Figure 5.15) In 2002, the Trial Chambers abruptly stopped citing photographs of the deceased's body. (See Table 5.14; Figure 5.15) This interruption was extremely dramatic because the frequency of citations to photographs was an extremely high percentage of the forensic exhibits cited in 2000 and 2001. (See Table 5.15; Figure 5.15) The frequency of Trial Chambers' citations to photographs of the deceased's body never rebounded. The Trial Chambers cited only one forensically related photograph in 2003. (See Table 5.14; Figure 5.15)

The Trial Chambers began citing forensic reports in 1999. (See Table 5.14; Figure 5.15) The frequency of Trial Chambers' citations increased through 2001, when the Trial Chambers cited two and nine forensic reports in 2000 and 2001, respectively. (See Table 5.14; Figure 5.15) The Trial Chambers have continuously cited from eight to nine forensic reports each year between 2002 and 2004. (See Table 5.14; Figure 5.15) Throughout these years, citations to forensic reports comprised five to seventy-five percent of the total cited forensic exhibits per year. (See Table 5.15; Figure 5.15)

The Trial Chambers slowly increased their references to ICTY's investigator reports. (See Table 5.14; Figure 5.15) In 2001, the Trial Chambers cited three ICTY investigator reports. (See Table 5.14; Figure 5.15) The Trial Chambers continued citing ICTY investigator reports in 2003 and 2004 when the Trial Chambers cited the same

report in both the *Stakic* and *Brdanin* judgment. (See Table 5.14; Figure 5.15) However, ICTY's investigator reports represented only seven to sixteen percent of the total cited forensic exhibits per year. (See Table 5.15; Figure 5.15)

The Trial Chambers sporadically cited death certificates and records of bodies throughout the eight years. (See Table 5.14; Figure 5.15) In 1998, the Trial Chambers cited one exhibit related to death certificates. (See Table 5.14; Figure 5.15) This citation was the only forensic exhibit cited during this year. (See Table 5.14; Figure 5.15) In 2001, the frequency of Trial Chambers citations jumped to twelve exhibits related to death certificates. (See Table 5.14; Figure 5.15) Similar to photographs, in 2002, the Trial Chambers abruptly stopped citing exhibits related to death certificates. (See Table 5.14; Figure 5.15) The Trial Chambers cited only one more exhibit related to death certificates in 2003. (See Table 5.14; Figure 5.15)

The Trial Chambers also cited records related to bodies sporadically. In 1999, the Trial Chambers began citing records related to bodies. (See Table 5.14; Figure 5.15) This citation represented fifty percent of the total forensic exhibited cited in 1999. (See Table 5.15; Figure 5.15) The Trial Chambers cited these types of records in only two other cases, the *Krnjelac* and *Brdanin* judgment. (See Table 5.14; Figure 5.15)

The Trial Chambers rarely referenced videos and 94bis statements. The Trial Chambers referenced only two videos in the *Kupreski* case. (See Table 5.14; Figure 5.15) These references represented five percent of the forensic exhibits cited in 2000. (See Table 5.15; Figure 5.15) The Trial Chambers referenced only one 94bis statement in the *Naletilic* case. (See Table 5.14; Figure 5.15) This citation represented seven percent of the forensic exhibits cited in 2003. (See Table 5.15; Figure 5.15)

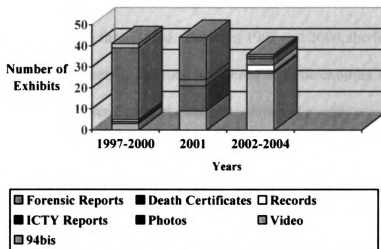


Figure 5.16 Aggregated Forensic Exhibits in relation to Rule 92bis

Time Period	FR	DC	Records	ICTY	Photos	Videos	94bis
1997-2000	8%	2%	2%	0%	83%	5%	0%
2001	20%	27%	0%	7%	46%	0%	0%
2002-2004	76%	3%	8%	8%	3%	0%	3%

FR=Forensic Reports; DC=Death Certificates; Records=Records related to bodies; ICTY=ICTY investigator report; Photos= Photos related to bodies; Videos= Videos related to bodies
 Table 5.16- Percentage of Each Type of Forensic Exhibit during each Time Period

In relation to Rule 92bis, the Trial Chambers shifted their reliance on written documents rather than upon visual aids to establish an individual's death. The Trial Chambers have steadily increased their citations to forensic reports throughout the three time periods. (See Table 5.14; Figure 5.16) Between 1997 and 2000, the Trial Chambers cited only three forensic reports. (See Table 5.14; Figure 5.16) In 2001, frequency of Trial Chambers' citations increased to nine references. (See Table 5.14; Figure 5.16) The number of citations tripled when the Trial Chambers referenced twenty-seven citations between 2002 and 2004. (See Table 5.14; Figure 5.16)

The percentage of forensic reports to the total number of forensic exhibits increased during each time period. Between 1997 and 2000, the forensic report citations represented eight percent of the total number of forensic exhibits. (See Table 5.16; Figure 5.16) In 2001, the forensic report citations comprised twenty percent of the total number of forensic exhibits. (See Table 5.16; Figure 5.16) Between 2002 and 2004, the forensic report citations represented seventy-six percent of the total number of forensic exhibits. (See Table 5.16; Figure 5.16) The citations to forensic reports increased eight-hundred seventy-five percent between the 1997 and 2000 time period and the 2002 and 2004 time period. (See Table 5.16; Figure 5.16)

The Trial Chambers consistently cited ICTY investigator reports throughout the last two time periods: 2001, 2002-2004. (See Table 5.14; Figure 5.16) These reports represented seven and eight percent of the total number of cited forensic exhibits for each year, respectively. (See Table 5.16; Figure 5.16) The citations to ICTY investigator reports increased eight percent from pre-to post-Rule 92*bis* judgments. (See Table 5.16; Figure 5.16)

The Trial Chambers referenced similar authors in few cases. For example, in 2001, the Trial Chambers cited three different ICTY investigator reports. (See Table 5.14; Figure 5.16) However, the same ICTY investigator authored two of the three reports. (*Krstic*, Trial Judgment, Aug. 2, 2001 at ¶ 71) Between 2002 and 2004, the Trial Chambers referenced ICTY investigator reports in both the *Stakic* and *Brdanin* judgments. (See Table 5.14; Figure 5.14) Similar to 2001, the same ICTY investigator authored reports in both cases. (*Stakic*, Trial Judgment, July 31, 2003 at ¶213; *Brdanin*, Trial Judgment, Sept. 1, 2004 at Annex C.)

The Trial Chambers continuously cited death certificates throughout the three time periods. (See Table 5.14; Figure 5.16) Between 1997 and 2000, the Trial Chambers referenced only one exhibit related to death certificates. (See Table 5.14; Figure 5.16) This citation represented two percent of the total number of forensic exhibits. (See Table 5.16; Figure 5.16) In 2001, the frequency of Trial Chambers' citations jumped to twelve references. (See Table 5.14; Figure 5.16) These twelve references represented twenty-seven percent of the total number of forensic exhibits in 2001. (See Table 5.16; Figure 5.16) The Trial Chambers continued to reference exhibits related to death certificates when the Trial Chambers referenced one exhibit between 2002 and 2004. (See Table 5.14; Figure 5.16) This exhibit represented three percent of the total number of cited forensic reports between 2002 and 2004. (See Table 5.16; Figure 5.16) The Trial Chambers increased death certificate citations by fifty percent between pre-and post-Rule 92bis judgments. (See Table 5.16; Figure 5.16)

The Trial Chambers referenced records related to bodies in two of the three time period categories. (See Table 5.14; Table 5.16; Figure 5.16) Between 1997 and 2000, the Trial Chambers referenced one record related to bodies. (See Table 5.14; Figure 5.16) This citation represented two percent of the total number of forensic exhibits between 1997 and 2000. (See Table 5.16; Figure 5.16) Furthermore, the Trial Chambers cited three records related to bodies between 2002 and 2004. (See Table 5.14; Figure 5.16) These three citations represented eight percent of the total number of forensic exhibits. (See Table 5.16; Figure 5.16) The number of citations to records concerning bodies increased three-hundred percent between the pre-and post-92bis time periods. (See Table 5.16; Figure 5.16)

The Trial Chambers began to cite other forms of written evidence to establish a victim's death. Between 2002 and 2004, the Trial Chambers cited one *94bis* statement regarding a pathologist's testimony concerning an autopsy. (See Table 5.14; Figure 5.16) This citation represented three percent of the total number of forensic exhibits during this time period. (See Table 5.16; Figure 5.16) The number of citations to *94bis* statements increased three-percent during these two time periods. (See Table 5.16; Figure 5.16)

The Trial Chambers decreased their references to visual forensic evidence throughout these three time periods. (See Table 5.14; Table 5.16; Figure 5.16) Visual forensic evidence could be incorporated into other types of forensic evidence, such as forensic reports. However, the researcher did not fully research this possibility.

The frequency of the Trial Chambers' citations to photographs of the deceased's body constantly decreased throughout the three time periods. (See Table 5.14; Figure 5.16) Between 1997 and 2000, thirty-four of the forty-one cited forensic exhibits were photographs. (See Table 5.14; Figure 5.16) In 2001, twenty of the forty-four cited forensic exhibits were photographs. (See Table 5.14; Figure 5.16) The Trial Chambers cited only one photograph between 2002 and 2004, which represented three percent of the forensic exhibits citations during this time period. (See Table 5.14; Table 5.16; Figure 5.16) The number of photograph citations decreased from eighty-three percent of the total number of forensic exhibits in the pre-*92bis* judgments to three percent of the total number of forensic exhibits in the post-*92bis* years. (Table 5.16; Figure 5.16) This fluctuation represented a ninety-six percent decrease in photograph citations. (Table 5.16; Figure 5.16)

The Trial Chambers did not heavily rely on videos of bodies in either of the three time periods. (See Table 5.14; Table 5.16; Figure 5.16) The Trial Chambers referenced two videos between 1997 and 2000. (See Table 5.14; Figure 5.16) These references represented five percent of the total number of forensic exhibit citations during this time period. (See Table 5.16; Figure 5.16) The Trial Chambers did not reference videos in 2001 or between 2002 and 2004. (See Table 5.14; Figure 5.16) Furthermore, number of videos citations decreased from five percent of the total number of forensic exhibits in the pre-92*bis* judgments to zero percent in the post-92*bis* judgments. (See Table 5.14; Figure 5.16) This fluctuation represented a one-hundred percent decrease in video citations. (See Table 5.14; Figure 5.16)

Similar to expert witnesses, some of changes in percentages were misrepresentations. The Trial Chambers cited the same number of death certificates from pre-and post-92*bis* judgments. (See Table 5.14; Figure 5.16) The Trial Chambers cited only two more records related to bodies between 1997 and 2000 time period and between 2002 and 2004 time period. (See Table 5.14; Figure 5.16) These variations in percentages were misleading because the Trial Chambers decreased the number of visual forensic exhibit citations.

Non-forensic exhibits

Compared to other timelines, the non-forensic exhibit timeline was the least volatile. (See Table 5.2; Figure 5.17) The Trial Chambers began citing non-forensic exhibits when the Trial Chambers referenced one exhibit in 1999. (See Table 5.2; Figure 5.17) The Trial Chambers gradually increased the frequency of citations to non-forensic exhibits when the Trial Chambers cited five exhibits in 2000. (See Table 5.2; Figure

5.17) In 2001, the frequency of Trial Chambers' citations to non-forensic exhibits dramatically increased when the Trial Chambers cited nineteen different exhibits. (See Table 5.2; Figure 5.17) The frequency of Trial Chambers' citations dramatically decreased when the Trial Chambers cited only nine different non-forensic exhibits in 2002. (See Table 5.2; Figure 5.17) Between 2003 and 2004, the frequency of Trial Chambers' citations gradually increased when the Trial Chambers cited eleven and twenty-one non-forensic exhibits, respectively. (See Table 5.2; Figure 5.17)

Similar to confidential witness and confidential exhibits, citations to non-forensic exhibits increased continuously through the three time periods. Between 1997 and 2000, the Trial Chambers cited six non-forensic exhibits. (See Table 5.2; Figure 5.18) These six citations comprised nine percent of the total number of non-forensic exhibit citations. (See Table 5.2; Table 5.17; Figure 5.18) In 2001, the Trial Chambers increased the number of citations to nineteen different exhibits. (See Table 5.2; Figure 5.18) These citations represented twenty-nine percent of the total number of non-forensic exhibits. (See Table 5.2; Table 5.17; Figure 5.18) The frequency of Trial Chambers' citations increased dramatically when the Trial Chambers cited forty-one non-forensic exhibits between 2002 and 2004. (See Table 5.2; Figure 5.18) These citations represented sixty-two percent of the total number of non-forensic exhibit citations. (See Table 5.17; Figure 5.18) This fluctuation represented a five-hundred eighty-eight percent increase in non-forensic exhibit citations from pre-to post-Rule 92*bis* judgments. (See Table 5.17; Figure 5.18)

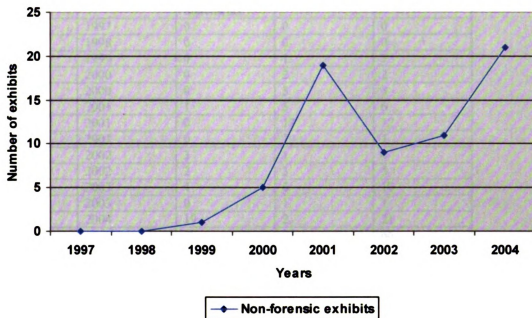


Figure 5.17 Non-forensic exhibit timeline

Time Period	Percentage of Non-forensic exhibits
1997-2000	9%
2001	29%
2002-2004	62%

Table 5.17-Percentage of the Total Number of Non-forensic Exhibits during each Time Period

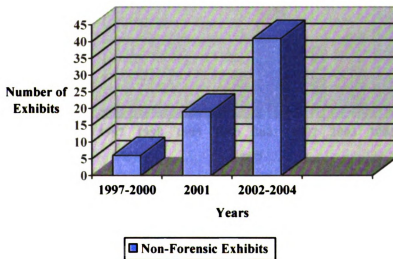


Figure 5.18 Non-forensic Exhibits in Relation to Rule 92b*is*

Case	Year	92bis Statements	Miscellaneous	Total
Tadic	1997	0	0	0
Delalic	1998	0	0	0
Jelasic	1999	0	1	1
Kupreski	2000	0	2	2
Blaskic	2000	0	3	3
Kordic	2001	1	5	6
Krstic	2001	0	12	12
Kvocka	2001	0	1	1
Krnjelac	2002	3	1	4
Vasiljevic	2002	2	3	5
Stakic	2003	4	6	10
Naletilic	2003	0	1	1
Brdanin	2004	19	2	21
Total		29	37	66

Table 5.18- Non-forensic Exhibits Divided by Category

The researcher separated the non-forensic exhibits into two categories: 92bis statements and miscellaneous exhibits.

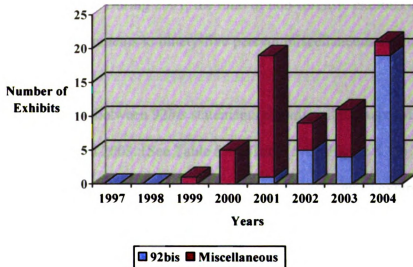


Figure 5.19 Aggregated Non-Forensic Exhibits

Years	92bis statements	Miscellaneous
1997	0%	0%
1998	0%	0%
1999	0%	100%
2000	0%	100%
2001	5%	95%
2002	56%	44%
2003	36%	64%
2004	90%	10%

Table 5.19- Percentage of 92bis Statements and Miscellaneous Exhibits during each Year

From 1997 to 2004, the Trial Chambers dramatically altered the percentage of 92bis statements and miscellaneous exhibits cited in the judgments. (See Table 5.18; Table 5.19; Figure 5.19) The Trial Chambers cited only miscellaneous exhibits because 92bis statements did not exist between 1999 and 2000. (See Table 5.18; Table 5.19; Figure 5.19) In 2001, the Trial Chambers began referencing 92bis statements when the Trial Chambers cited one 92bis statement in the *Kordic* judgment. (See Table 5.18; Table 5.19; Figure 5.19) During 2001, the ratio of non-forensic exhibits citations was five percent 92bis statements to ninety-five percent miscellaneous exhibits. (See Table 5.19; Figure 5.19)

This ratio between 92bis statements and miscellaneous exhibits did not change between 2002 and 2003. (See Table 5.18; Table 5.19; Figure 5.19) The Trial Chambers cited a similar number of 92bis statements and miscellaneous exhibits when the Trial Chambers cited five 92bis statements and four miscellaneous exhibits in 2002. (See Table 5.18; Table 5.19; Figure 5.19) This ratio became slightly unbalanced when the Trial Chambers cited four 92bis statements and seven miscellaneous exhibits in 2003. (See Table 5.18; Table 5.19; Figure 5.19)

By 2004, the ratio of 92bis statements to miscellaneous exhibits was the antithesis of the ratio established in 2001. (See Table 5.18; Table 5.19; Figure 5.19) The Trial

Chambers cited nineteen 92bis statements and only two miscellaneous exhibits. (See Table 5.18; Figure 5.19) Of the twenty-one cited non-forensic exhibits, ninety percent of the exhibits were 92bis statements while the remaining ten percent were miscellaneous exhibits. (See Table 5.19; Figure 5.19)

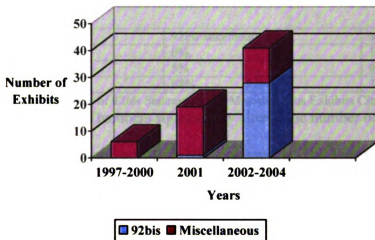


Figure 5.20 Aggregated Non-Forensic Exhibits in Relation to Rule 92bis

A similar analysis can be illustrated via the three time periods. The Trial Chambers solely cited miscellaneous exhibits because 92bis statements did not exist between 1997 and 2000. (See Table 5.18; Table 5.20; Figure 5.20) In 2001, Trial Chambers cited nineteen non-forensic exhibits; five percent of the exhibits were 92bis statements while ninety-five percent of the exhibits were miscellaneous exhibits. (See Table 5.18; Table 5.20; Figure 5.20) This Trial Chambers' single citation to a 92bis statement created this disproportionate ratio between 92bis statements and miscellaneous exhibits. (See Table 5.18; Table 5.20; Figure 5.20)

The ratio between 92bis statements and miscellaneous exhibits in 2001 was the antithesis of the ratio between 92bis statements and miscellaneous exhibits between 2002 and 2004. (See Table 5.18; Table 5.20; Figure 5.20) Between 2002 and 2004, the Trial

Chambers cited twenty-eight *92bis* statements, which was sixty-eight percent of the non-forensic exhibits. (See Table 5.18; Table 5.20; Figure 5.18) Alternately, the Trial Chambers cited only twelve miscellaneous statements, which was thirty-two percent of the non-forensic exhibits during this time period. (See Table 5.18; Table 5.20; Figure 5.20)

Time Periods	<i>92bis</i> statements	Miscellaneous
1997-2000	0%	100%
2001	5%	95%
2002-2004	68%	32%

Table 5.20-Percentage of *92bis* Statements and Miscellaneous Exhibits Citations during each Time Period
The Trial Chambers significantly altered the number of non-forensic exhibit

citations from pre-and post-Rule *92bis* judgments. The Trial Chambers decreased the number of miscellaneous exhibits by sixty-eight percent in pre-and post-Rule *92bis* judgments. (See Table 5.18; Table 5.20; Figure 5.20) In a similar vein, the Trial Chambers increased the number of non-forensic exhibits by three hundred percent in pre-and post-Rule *92bis* judgments. (See Table 5.18; Table 5.20; Figure 5.20)

Forensic Exhibits versus *92bis* statements

The researcher compared the number of Trial Chambers' citations to forensic exhibits with the number of Trial Chambers' citations to *92bis* statements to emphasize the importance of *92bis* statements in establishing a victim's death.

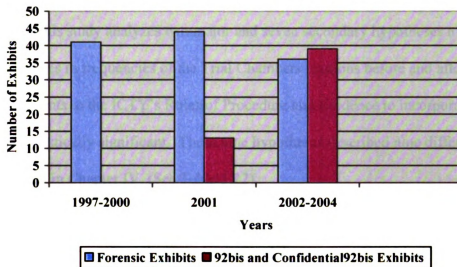
In this analysis, the researcher included both confidential *92bis* statements and *92bis* statements because both types of statements represent witness testimony. Confidential *92bis* statements are confidential witness statements admitted via Rule *92bis*. *92bis* statements are lay witness statements admitted via Rule *92bis*. Both types of statements are basically the same concept except that the witness's identity is retracted for protection purposes in confidential *92bis* statements.

	Year of Judgment	Confidential 92bis	92bis	Total
Tadic	1997	0	0	0
Delalic	1998	0	0	0
Jelusic	1999	0	0	0
Kupreski	2000	0	0	0
Blaskic	2000	0	0	0
Kordic	2001	12	1	13
Krstic	2001	0	0	0
Kvocka	2001	0	0	0
Krnjelac	2002	1	3	4
Vasiljevic	2002	0	2	2
Stakic	2003	7	4	11
Naletilic	2003	0	0	0
Brdanin	2004	2	19	21
Total	-----	22	29	51

Table 5.21- 92bis Statements Separated by Category

This analysis is comparable to the previous discussion concerning non-forensic exhibits during the three specific time periods. (See Table 5.21; Figure 5.19; Figure 5.20; Figure 5.21) Similar to previous graphs, the Trial Chambers cited only forensic exhibits during the first time period because 92bis statements did not exist between 1997 and 2000. (See Table 5.21; Figure 5.19; Figure 5.20; Figure 5.21)

In 2001, the Trial Chambers still heavily relied on forensic exhibits to establish a victim's death. (See Table 5.2; Table 5.21; Figure 5.21) The Trial Chambers cited forty-four forensic exhibits. (See Table 5.2; Table 5.21; Figure 5.21) The Trial Chambers' citations increased because the Trial Chambers cited three more forensic exhibits in 2001 compare to the previous time period. (See Table 5.2; Table 5.21; Figure 5.21) Furthermore, the Trial Chambers cited only thirteen 92bis statements, which included both confidential and non-forensic 92bis statements. (See Table 5.6; Table 5.21; Figure 5.21)



5.21 Forensic Exhibits versus 92bis and Confidential 92bis Exhibits in Relation to Rule 92bis

The Trial Chambers' reliance shifted to 92bis statements to justify a victim's death between 2002 and 2004. (See Table 5.2; Table 5.21; Figure 5.21) The Trial Chambers were actually citing more 92bis statements than forensic exhibits. (See Table 5.2; Table 5.21; Figure 5.21) The Trial Chamber cited thirty-eight 92bis statements while citing only thirty-six forensic exhibits. (See Table 5.2; Table 5.21; Figure 5.21)

Although the difference between the two categories was minimal, the rate of the Trial Chambers' increasing reliance on 92bis statements was remarkable. (See Table 5.2; Table 5.21; Figure 5.21) The Trial Chambers cited twenty-five more 92bis statements within a two year time period. (See Table 5.2; Table 5.21; Figure 5.21) Furthermore, the Trial Chambers were definitely decreasing the number of citations to forensic exhibits because the Trial Chambers cited eight fewer exhibits between 2002 and 2004 than 2001. (See Table 5.2; Table 5.21; Figure 5.21)

Statistical Analysis

This study analyzes two major and seven secondary hypotheses to determine if the changes in frequencies of the Trial Chambers citations before and after the amendments to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* were statistically significant. These nine hypotheses described nine different scenarios described in Chapter IV. (See Table 5.22)

The researcher performed the Mann-Whitney U test. The researcher calculated the U and U_1 for every hypothesis and compared the result to the critical value of U . The critical value of U was four for three reasons: First, these hypotheses were all two-tailed tests. Second, the first sample's number of observations (" n_1 ") was five. Finally, the second's sample's numbers of observations (" n_2 ") was five. The researcher rejected the null hypothesis if U or $U_1 \leq U(\alpha)$. The researcher did not calculate z because the small size was too small.

1. H_{01} : There is no significant difference between the Trial Chambers' citations to witnesses in establishing a victim's death prior to and after 2001.
 H_{a1} : There is a significant difference between the Trial Chambers' citations to witnesses in establishing a victim's death prior to and after 2001.

The Trial Chambers cited more witnesses in five judgments ($M= 30.4$, $SD= 19.04$) after the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* than in the five judgments ($M=23.2$, $SD= 17.58$) decided before the amendment to incorporate Rule 92*bis*. (See Table 6.13) The data was subject to a

Mann-Whitney U test, which yielded a non-significant result $17 \text{ or } 8 \geq 4$, n.s. (See Table 6.13) This result suggests that the amendment to incorporate Rule 92*bis* did not have an effect on the frequency of witness citations.

Category	Group	Mean	Standard Deviation	N ₁	N ₂	U	U ₁	$\alpha=.05$	Asterisk if statistical significant
Witness	1	23.2	17.58	5	n/a	17	n/a	4	
Witness	2	30.4	19.04	n/a	5	n/a	8	4	
Confidential Witness	1	9.2	11.51	5	n/a	19.5	n/a	4	
Confidential Witness	2	18.4	10.97	n/a	5	n/a	5.5	4	
Expert Witness	1	5.4	6.50	5	n/a	9	n/a	4	
Expert Witness	2	1.2	.836	n/a	5	n/a	16	4	
Lay Witness	1	8.6	7.635	5	n/a	13.5	n/a	4	
Lay Witness	2	10.8	10.059	n/a	5	n/a	11.5	4	
Exhibit	1	10.2	.816	5	n/a	21	n/a	4	
Exhibit	2	19.6	.816	n/a	5	n/a	4	4	*
Confidential Exhibits	1	.8	1.78	5	n/a	18	n/a	4	
Confidential Exhibits	2	4.2	5.718	n/a	5	n/a	7	4	
Forensic Exhibits	1	8.2	16.67	5	n/a	20	n/a	4	
Forensic Exhibits	2	7.2	4.26	n/a	5	n/a	5	4	
Non-forensic Exhibits	1	1.2	1.30	5	n/a	22.5	n/a	4	
Non-forensic Exhibits	2	8.2	7.85	n/a	5	n/a	2.5	4	*
Sum of Confidential 92 <i>bis</i> statements and 92 <i>bis</i> statements	1	0	0	5	n/a	22.5	n/a	4	
Sum of Confidential 92 <i>bis</i> statements and 92 <i>bis</i> statements	2	7.6	8.56	n/a	5	n/a	2.5	4	*

Table 5.22- Statistical Calculations for Nine Hypotheses

2. $H_{01.1}$: There is no significant difference between the Trial Chambers' citations to confidential witnesses in establishing a victim's death prior to and after 2001.

$H_{a1.1}$: There is significant difference between the Trial Chambers' citations to confidential witnesses in establishing a victim's death prior to and after 2001.

The Trial Chambers cited more confidential witnesses in five judgments ($M=18.4$, $SD=10.97$) after the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* than in the five judgments ($M=9.2$, $SD=11.52$) decided before the amendment to incorporate Rule 92*bis*. (See Table 6.13) The data was subject to a Mann-Whitney U test, which yielded a non-significant result 19.5 or $5.5 \geq 4$, n.s. (See Table 6.13) This result suggests that the amendment to incorporate Rule 92*bis* did not have an effect on the frequency of confidential witness citations.

3. $H_{01.2}$: There is no significant difference between the Trial Chambers' citations to expert witnesses in establishing a victim's death prior to and after 2001.

$H_{a1.2}$: There is a significant difference between the Trial Chambers' citations to expert witnesses in establishing a victim's death prior to and after 2001.

The Trial Chambers cited more expert witnesses in five judgments ($M=5.4$, $SD=6.50$) before the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* than in the five judgments ($M=1.2$, $SD=.837$) decided after the amendment to incorporate Rule 92*bis*. (See Table 6.13) The data was subject to a Mann-Whitney U test, which yielded a non-significant result 9 or $16 \geq 4$, n.s. (See Table 6.13)

This result suggests that the amendment to incorporate Rule 92*bis* did not have an effect on the frequency of expert witness citations.

4. $H_{01.3}$: There is no significant difference between the Trial Chambers' citations to lay witnesses in establishing a victim's death prior to and after 2001.

$H_{a1.3}$: There is a significant difference between the Trial Chambers' citation to lay witnesses in establishing a victim's death prior to and after 2001.

The Trial Chambers cited more lay witnesses in five judgments ($M= 10.8$, $SD= 10.059$) after the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* than in the five judgments ($M=8.6$, $SD= 7.635$) decided before the amendment to incorporate Rule 92*bis*. (See Table 6.13) The data was subject to a Mann-Whitney U, which yielded a non-significant result 13.5 or $11.5 \geq 4$, n.s. (See Table 6.13) This result suggests that the amendment to incorporate Rule 92*bis* did not have an effect on the frequency of lay witness citations.

5. H_{02} : There is no significant difference between the Trial Chambers' citations to exhibits in establishing a victim's death prior to and after 2001.

H_{a2} : There is a significant difference between the Trial Chambers' citation to exhibits in establishing a victim's death prior to and after 2001.

The Trial Chambers cited more exhibits in five judgments ($M= 19.6$, $SD= 17.415$) after the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule

92*bis* than in the five judgments ($M=10.2$, $SD=18.939$) decided before the amendment to incorporate Rule 92*bis*. (See Table 6.13) The data was subject to a Mann-Whitney U test, which yielded a significant result $21 \text{ or } 4 \leq 4$ (See Table 6.13) This result suggests that the amendment to incorporate Rule 92*bis* did have an effect on the frequency of exhibit citations.

6. $H_{02.1}$: There is no significant difference between the Trial Chambers' citations to confidential exhibits in establishing a victim's death prior to and after 2001.
 $H_{a2.1}$: There is a significant difference between the Trial Chambers' citation to confidential exhibits in establishing a victim's death prior to and after 2001.

The Trial Chambers cited more confidential exhibits in five judgments ($M= 4.2$, $SD= 5.718$) after the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* than in the five judgments ($M=.80$, $SD=1.788$) decided before the amendment to incorporate Rule 92*bis*. (See Table 6.13) The data was subject to a Mann-Whitney U test, which yielded a non-significant result $18 \text{ or } 7 \geq 4$ n.s. (See Table 6.13) This result suggests that the amendment to incorporate Rule 92*bis* did not have an effect on the frequency of confidential exhibit citations.

7. $H_{02.2}$: There is no significant difference between the Trial Chambers' citations to forensic exhibits in establishing a victim's death prior to and after 2001.
 $H_{a2.2}$: There is a significant difference between the Trial Chambers' citation to forensic exhibits in establishing a victim's death prior to and after 2001.

The Trial Chambers cited more forensic exhibits in five judgments ($M= 8.2$, $SD= 16.67$) before the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* than five in the judgments ($M=7.2$, $SD=4.266$) decided after the amendment to incorporate Rule 92*bis*. (See Table 6.13) The data was subject to a Mann-Whitney U test, which yielded a non-significant result $20 \text{ or } 5 \geq 4$ n.s. (See Table 6.13) This result suggests that the amendment to incorporate Rule 92*bis* did not have an effect on the frequency of forensic exhibit citations.

8. $H_{02.3}$: There is no significant difference between the Trial Chambers' citations to non-forensic exhibits in establishing a victim's death prior to and after 2001.
- $H_{a2.3}$: There is a significant difference between the Trial Chambers' citation to non-forensic exhibits in establishing a victim's death prior to and after 2001.

The Trial Chambers cited more non-forensic exhibits in five judgments ($M= 8.2$, $SD= 7.854$) after the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* than in the five judgments ($M=1.2$, $SD=1.30$) decided before the amendment to incorporate Rule 92*bis*. (See Table 6.13) The data was subject to a Mann-Whitney U, which yielded a significant result $2.5 \text{ or } 22.5 \leq 4$ (See Table 6.13) This result suggests that the amendment to incorporate Rule 92*bis* did have an effect on the frequency of non-forensic exhibit citations.

9. $H_{02.4}$: There is no significant difference between the Trial Chambers' citations to the sum of confidential *92bis* statements and regular *92bis* statements in establishing a victim's death prior to and after 2001.

$H_{a2.4}$: There is a significant difference between the Trial Chambers' citation to the sum of confidential *92bis* statements and regular *92bis* statements in establishing a victim's death prior to and after 2001.

The Trial Chambers cited more confidential *92bis* statements and *92bis* statements in five judgments ($M = 7.6$, $SD = 8.561$) after the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule *92bis* than in the five judgments ($M = 0$, $SD = 0$) decided before the amendment to incorporate Rule *92bis*. (See Table 6.13) The data was subject to a Mann-Whitney U, which yielded a significant result $2.5 \text{ or } 22.5 \leq 4$ (See Table 6.13) This result suggests that the amendment to incorporate Rule *92bis* did have an effect on the frequency of confidential *92bis* statements and *92bis* statement citations.

Summary

The Trial Chambers favored witness testimony to establish a victim's death through these eight years. During the three time periods, the Trial Chambers' citation to witness testimony ranged from either fifty-seven percent to sixty-nine percent of the total number of citations. Rule *92bis* did not affect the number of witness citations because only a ten-percent decrease in the number of witness citations existed between the 1997 and 2000 time period and between the 2002 and 2004 period. On an analytical level, this ten-percent decrease was not statistically significant; however, this result conformed to

the researcher's expectations because the researcher realized that the Trial Chambers primarily relied upon witness testimony to establish a victim's death throughout each of the cases.

The Trial Chambers preferred particular types of witnesses in post-Rule 92*bis* judgments. Within the witness category, the Trial Chambers cited confidential exhibits the most frequently. The Trial Chambers increased the number of citations to confidential witnesses by thirty-seven percent since Rule 92*bis*. Similar to the witness category, the increase in confidential witness citations was not statistically significant. This result conformed to the researcher's expectations because the fluctuation in the Trial Chambers citations regarding the overall witness category was not statistically significant.

Lay witness testimony was the second most popular type of evidence cited by the Trial Chambers between the 1997 and 2000 time period and between the 2002 and 2004 time period. Rule 92*bis* did not affect the number of lay witness citations because only a fifteen-percent decrease existed between the 1997 and 2000 time period and the 2002 and 2004 time period. Again, similar to confidential witnesses, the decrease in Trial Chambers citations was not statistically significant. This result conformed to the researcher's expectations because the fluctuation in the Trial Chambers citations regarding the overall witness category was not statistically significant.

Since Rule 92*bis*, the Trial Chambers decreased the number of expert witness citations. Between 1997 and 2000, expert witness citations were ranked the fourth most popular type of evidence cited by the Trial Chambers. Expert witness citations slipped to the least cited type of evidence in post-Rule 92*bis* judgments. The Trial Chambers

decreased the number of expert witness citations by eighty-one percent in post-Rule 92*bis* judgments. This fluctuation was not statistically significant; however, this result conformed to the researcher's expectations because the fluctuation in the Trial Chambers citations regarding the overall witness category was not statistically significant.

The Trial Chambers referenced different types of expert witness in pre-and post-Rule 92*bis* judgments. Between 1997 and 2001, the Trial Chambers relied on an array of experts, which included investigators, forensic anthropologists, forensic archeologists, forensic pathologists, military personnel, and lawyers. In post-Rule 92*bis* judgments, the Trial Chambers only referenced investigators, lawyers, and archeologists.

Since Rule 92*bis*, the Trial Chambers has changed their attitudes on exhibits. First, the Trial Chambers definitely favored exhibits because they significantly increased the number of citations to exhibits from pre-and post-Rule 92*bis* judgments. The Trial Chambers increased the frequency of exhibit citations by twenty-three percent from pre-and post-Rule 92*bis* judgments. Specifically, the Trial Chambers relied on non-forensic exhibits because they have significant increased number of citations to non-forensic exhibits from pre-and post-Rule 92*bis* judgments. The fluctuation in non-forensic exhibits resulted in a five-hundred eighty-eight percent increased between 1997 and 2000 time period and 2002 and 2004 time period.

Second, the Trial Chambers decreased the number of citations to forensic exhibits. The Trial Chambers decreased the number of forensic exhibit citations by forty-four percent from pre-and post-Rule 92*bis* judgments. This fluctuation was not statistically significant. Although the Trial Chambers increased the total number of citations from pre-and post-Rule 92*bis* judgments, the Trial Chambers consistently cited

similar number of citations during three time periods. The Trial Chambers may not have increased the number of forensic exhibit citations at a similar rate as the other forms of evidence. This inconsistency may infer that the Trial Chambers were not relying on forensic exhibits as heavily in post-Rule 92*bis* judgments as in pre-Rule 92*bis* judgments.

Third, similar to expert witnesses, the Trial Chambers referenced different types of forensic exhibits in pre-and post-Rule 92*bis* judgments. Between 1997 and 2001, the Trial Chambers relied on both written and visual forensic exhibits to establish a victim's death. In post-Rule 92*bis* judgments, the Trial Chambers usually referenced written documents, which included forensic reports, death certificates, records regarding bodies, ICTY investigator reports, and 94*bis* statements, rather than visual forensic exhibits.

Fourth, the Trial Chambers has dramatically increased the number of 92*bis* statements citations since 2001. This rule represented an alternative route for the Trial Chambers to admit individual testimony to establish a victim's death. The Trial Chambers can admit eyewitness testimony to establish death through two avenues: directly via witness testimony and indirectly through 92*bis* statements. The Trial Chambers approved of this rule and trend because the number of 92*bis* statement citations increased by sixty-eight percent from pre-and post-Rule 92*bis* judgments.

Finally, the Trial Chambers cited more confidential 92*bis* statements and 92*bis* statements than forensic exhibits to establish death in post-92*bis* judgments. The Trial Chamber cited thirty-eight 92*bis* statements while citing only thirty-six forensic exhibits between 2002 and 2004. Although the difference between the two categories was minimal, the increasing rate of the Trial Chambers' reliance on 92*bis* statements was remarkable. The Trial Chambers cited twenty-five more 92*bis* statements within a two

year time period. Furthermore, the Trial Chambers were definitely decreasing the number of citations to forensic exhibits because the Trial Chambers cited eight fewer exhibits between 2002 and 2004 than 2001. This trend could signify that the Trial Chambers were placing more weight on non-forensic exhibits rather than forensic exhibits to establish death. This observation is corroborated by the fact that the composite increase in confidential 92*bis* statements and 92*bis* statements were statistically significant between pre-and post-Rule 92*bis* judgments. In the future, the Trial Chambers could decrease the number of citations to forensic exhibits rather than maintaining a consistent number of citations.

CHAPTER VI: DISCUSSION

Introduction

The policy justifications for the ICTY incorporate a variety of reasons. First, the ICTY creates an historical record of events occurring in the former Yugoslavia between 1991 and roughly 2000. This historical record is necessary to understand the events leading to and occurring during the war. Hopefully, this knowledge will prevent future similar situations. (McCelland 2002, pp. 2-5) Second, this tribunal can dispense justice in the “eyes of the victim, defendants, and the world community.” (McCelland 2002, pp. 2-5) One way of enforcing humanitarian law is to identify and prosecute individuals for their criminal actions. (McCelland 2002, pp. 2-5) Prosecution encourages public trust and respect for the criminal justice system because it makes individuals accountable for their actions. Finally, since these types of tribunals are relatively rare, ICTY presents a vehicle to develop international humanitarian jurisprudence. (McCelland 2002, pp. 2-5)

Without accurate information, these justifications will deteriorate. For example, the historical record will be incorrect. Various experts and lay individuals will not understand the events leading to and occurring in the former Yugoslavia during this specific time period. (McCelland 2002, pp. 2-5)

On a smaller scale, the victims and/or the defendants will not achieve justice via the court system. With inaccurate information, doubt will cloud the Trial Chambers’ proceedings. (McCelland 2002, pp. 2-5) The defendant(s) may not receive a fair trial because incorrect information may lead to a false conviction or release a guilty individual. (McCelland 2002, pp. 2-5) If a false conviction is the result of this inaccurate information, the defendant(s) suffer because a wrongfully convicted individual rarely

obtains compensation or release from their sentence. (Judges 2000, pp. 231-240)

Furthermore, if the incorrect information leads to release of a guilty individual, society suffers because the objectives of retribution and deterrence are not advanced. (Judges 2000, pp. 231-232) As a result, the ICTY's reputation will slowly deteriorate.

Besides theoretical policy issues, the developments in international humanitarian jurisprudence will stop. With inaccurate information, any legal precedent set by the ICTY will be flawed. These defects will continuously perpetrate inferior legal precedent. (McCelland 2002, pp. 2-5)

As previously discussed in Chapter III, the ICTY's Rules of Procedure and Evidence represent a blend of two legal traditions, the adversarial and inquisitorial system. The policies regarding the evidentiary rules signify the underlying concept of the truth each system is attempting to achieve. Obviously, the evidentiary rules in the adversarial system are exclusionary to prevent particular types of evidence to be admitted. (McCelland 2002, pp. 10-13; Weigend 2003, pp. 159-161; May & Wierda 2002, pp. 18-19; Kagan 2002, pp. 11-14) As a consequence, procedural truth is the only tangible form of truth. Alternatively, inquisitorial systems' rules of evidence are inclusive because "all relevant and best evidence" should be admissible to ascertain the substantive truth. (McCelland 2002, pp. 10-13; Weigend 2003, pp. 159-172; Langbein 1979, pp. 206-208)

Witness Testimony

To establish either standard of truth, the courts admit various types of evidence. In most domestic and international courts, the courts favor eyewitness testimony to portray and depict events. (Judges 2000, pp. 231-234; May & Wierda 2002, pp. 163-169)

Eyewitness testimony can present first-hand accounts of the events. At the ICTY, eyewitness testimony could discuss the crime site, the events of a murder, and the identification of the perpetrator. (*Jelusic*, Trial Judgment, Dec. 14, 1999 at ¶¶ 88-95; *Vasiljevic*, Trial Judgment, Nov. 29, 2002 at ¶¶ 95-115) According to *Tadic*, the Trial Chambers may solely rely on eyewitness testimony to depict these events as well as identify the perpetrator. (*Tadic*, Opinion and Judgment, May 7, 1997 at ¶ 240.) The Trial Chambers hopes that procedural safeguards, such as cross-examination and judicial factfinders, articulated in the Rules of Procedure and Evidence will prevent incorrect information to be incorporated into the trial transcript and judicial opinions. (May & Wierda 2002, pp. 24-25, 284-288) The Trial Chambers also considers “whether a statement was made contemporaneously to the events described, whether it was made under oath and whether the evidence is corroborated” to determine the witness’s creditability. (May & Wierda 2002, pp. 285)

Eyewitness testimony can introduce inaccurate information into the trial transcript even with these safeguards. First, an assortment of factors can affect witness testimony. For example, the time lapse between the actual incident and time of testimony can influence the accuracy of the witness’s testimony. Moreover, the seriousness of the crime and the presence of a weapon can alter the witness’s ability to recall the event or identify the perpetrator. (Judges 2000, pp. 231-234)

These types of factors are relatively common at the ICTY. Many of these trials depicted events that occurred between five to fourteen years ago. Furthermore, all of the events tried at the ICTY are considered “serious acts against humanity.” (May & Wierda 2002, pp. 166-168) By the definition, most of the crimes discussed in the ICTY

courtroom are extraordinary violent crimes. (May & Wierda 2002, pp. 166-168) Many of these cases portray events during military actions, concentration camps, violent interrogations, and annihilation of a population within short periods of time. (*Tadic*, Opinion and Judgment, May 7, 1997 at ¶¶ 195-294; *Krstic*, Trial Judgment, Aug. 2, 2001 at ¶¶ 37-70; *Kordic and Cerkez*, Trial Judgment, Feb. 26, 2001 at ¶¶ 557-576; *Stakic*, Trial Judgment, July 31, 2003 at ¶¶ 197-200)

Second, investigators can also contaminate witness statements. The “post-event information contamination effect” reveals that witnesses will response to investigators’ suggestions or leading questions to appease authority figures rather than recall events from their own independent recollection. (Judges 2000, pp. 264-270) This contamination can occur regarding the accuracy of the witness’ recollection as well as the witness’s subjective assessment of the statement’s accuracy. (Judges 2000, pp. 264-270) However, the researcher cannot and will not comment on the ICTY investigators’ techniques in securing a witness statement.

Finally, a witness’s confidence level can also influence the accuracy of the court proceedings. Although an attorney has impeached a witness through cross-examination, incorrect eyewitness testimony will be believed because the legal system “places so much weight on witness confidence as an indicator of witness creditability”. (Judges 2000, pp. 248-251; Doyle 1998, pp. 12-14) However, the ICTY Trial Chambers has tried to combat this issue by realizing that “confident demeanor is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy.” (*Kupreskic et al.*, Appeals Chamber Judgment, Oct. 23, 2001 at ¶ 138; May & Wierda 2002, p. 169)

Forensic Evidence and Expert Witness Testimony

The goal of forensic science is to provide “the best context, the fairest context, and the optimal context” to discover the truth. (Kiely 2000, pp. 404-406) Forensic scientists are required to use well documented procedures in the recognizing, collecting, and protecting physical evidence. (Kiely 2000, pp. 404-406) By following these procedures, the information discovered at the crime sites maintains its integrity. (Kiely 2000, pp. 404-406) Creditable information can lead to accurate reenactment of events.

In the judicial process, forensic evidence can be “used to reconstruct the historical events that encompass the crime being prosecuted” through potentially two avenues. (Kiely 2000, pp. 415-416) Forensic evidence can corroborate eyewitness testimony in an objective manner. For example, in the *Krstic* case, evidence discovered in mass grave exhumations corroborated eyewitness testimony regarding the event in the Srebrenica massacres. (*Krstic*, Trial Judgment, Aug. 2, 2001 at ¶ 71) The human remains and religious symbols excavated from these graves supported the survivors’ testimony from Srebrenica. (*Krstic*, Trial Judgment, Aug. 2, 2001 at ¶¶ 72-79) This physical evidence corroborated the witness’ testimony, which amplified the witness’s creditability. Under these circumstances, the judges assumed that the information was accurate.

Forensic evidence can also provide a factual account of a victim’s fate when eyewitness testimony is insufficient. (Avery 2004, pp. 235-253) For example, in Argentina, many individuals were kidnapped, tortured, and killed during the military regime in the late 1970s. (Avery 2004, pp. 239-240) By 1976, the regime was kidnapping thirty individuals per day. The victim’s fate was rarely known; “only 1

percent of the victims whereabouts [were] verified—the other 99 percent...had to be given up for dead.” (Avery 2004, pp. 239-240)

In this chaos, the military regime was abducting pregnant women. These women were sent to concentration camps and forced to give birth. (Avery 2004, pp. 250-253) The biological mothers were killed while the newborn babies were given to “politically acceptable parents.” (Avery 2004, pp. 214-242) All documentation regarding this practice was destroyed. (Avery 2004, pp. 250-251)

Forensic science provided factual information regarding both victims many years after the event. A forensic anthropologist testified that the identified female body was pregnant before death. (Avery 2004, pp. 250-254) Furthermore, forensic anthropologist testified that the identified female body delivered her child before death and she was killed in execution style. (Avery 2004, pp. 250-254) The children of these women are now being identified through DNA. (Avery 2004, pp. 252-254) Through the court system, the children are being returned to their biological families.

Forensic evidence used to clarify a victim’s fate can be found in the ICTY case law. In the *Stakic* case, the Trial Chambers stated that forty-four people were removed from a concentration camp and put on a bus. (*Stakic*, Trial Judgment, July 31, 2003 at ¶ 210) These forty-four individuals were never seen again. The Trial Chambers reported that “during the exhumation in Jama Lisac, 56 bodies were found. Most of them died from gunshot injuries.” (*Stakic*, Trial Judgment, July 31, 2003 at ¶ 210) The DNA analysis aided the ICTY investigator in identifying the bodies. (*Stakic*, Trial Judgment, July 31, 2003 at ¶ 210)

Forensic evidence is usually presented via expert witness testimony. An expert is a “witness who has requisite knowledge and experience to make inferences based upon technical matters.” (Siegel 1997, pp. 170-171) For example, a forensic anthropologist can discuss the manner which an individual died based upon trauma on the human skeleton. In theory, expert testimony can provide an objective scientific opinion about a particular subject.

However, similar to eyewitness testimony, expert witness testimony can be tainted. The theory regarding forensic evidence assumes that the scientist completes his analysis in an ethical manner. Without this professional integrity, this type of evidence will be undependable and possible lead to inaccurate information. (Brown, Williamson & Barkacs 2002, pp. 85-87)

As previously discussed in Chapter III, one of the procedures in protecting the evidence’s reliability is to question the expert’s objectivity. In the inquisitorial system, an expert testimony is inherently objective because the investigative judge hired the expert. (Kagan 2001, p. 107; Langbein 1985, pp. 835-836) Neither the judge nor the expert has a professional interest in the lawsuit. In contrast, in the adversarial system, the argument arises that the expert testimony may be tainted because the expert is hired by either the prosecutor or the defense to describe the evidence in the “best possible light” for their side. (Kagan 2001, p. 105; May & Weirda 2002, p.17-18; Pizza 1998, p. 844-845) The ICTY’s trial procedures are similar to the adversarial process regarding this aspect because the OTP and defense hires its own experts. (McCelland 2002, pp. 32-34; Table 5.2; Table 5.8; Table 5.9; Figure 5.7; Figure 5.8)

Another procedure in protecting the forensic evidence's and expert witness's creditability is to scrutinize the reliability of scientific process. In the United States, the federal court system requires the expert witness testimony to be a "product of reliable principles and methods" and "witness has applied the principles and methods reliability to the facts of the case." (FED.R.EVID 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)) The ICTY Trial Chambers may not be using this safeguard because the judge's gate-keeping task is unnecessary at this Tribunal. (Broeders 2003, p. 8)

Imbalance

Eyewitness testimony and forensic evidence have their positive attributes as well as their downfalls. Within the criminal justice system, both types of evidence compliment each other. Forensic evidence corroborates eyewitness testimony in order to improve the witness's creditability. Although this type of evidence is expensive and unnecessary, forensic evidence can also provide answers when eyewitness testimony may inadequate. However, forensic evidence can never replace eyewitness testimony because expert witnesses or forensic evidence could never fully describe the events during the trial proceedings. A balance between eyewitness testimony and forensic evidence will proved the courts with the most accurate information.

The ICTY Trial Chambers definitely favored eyewitness testimony. (See Table 5.2; Table 5.4; Table 5.11; Figure 5.2) This bias attitude was apparent in the analysis regarding the total number of citations. (See Table 5.2; Table 5.4; Table 5.11; Figure 5.2) Between 1997 and 2000, confidential witnesses and lay witness comprised fifty-three percent of the total number of citations. (See Table 5.2; Table 5.4; Table 5.11; Figure 5.2)

Expert testimony and forensic evidence composed of forty-one percent of the total number of citations. (See Table 5.2; Table 5.4; Table 5.11; Figure 5.2) During this time period, the total number of citations was relatively balanced between eyewitness testimony, expert witness testimony, and forensic exhibits. (See Table 5.2; Table 5.4; Table 5.11; Figure 5.2)

In post-Rule 92*bis* judgments, an entirely different trend existed. Confidential witnesses and lay witness citations composed fifty-nine percent of the total number of citations. (See Table 5.2; Table 5.4; Table 5.11; Figure 5.2) This increase was a result of the Trial Chambers increasing the number of confidential witnesses during each time period. (See Table 5.5; Figure 5.4) Furthermore, the number of lay witness citations increased because the Trial Chambers cited forty-three percent of these citations between 2002 and 2004. (See Table 5.10; Figure 5.10) In contrast, expert witness and forensic exhibit citations comprised sixteen percent of the total number of citations. (See Table 5.2; Table 5.4; Table 5.11; Figure 5.2)

This comparison did not incorporate the non-forensic exhibits, which represented sixteen percent of the total number of citations. (See Table 5.4; Table 5.11) Sixty-eight percent of these citations are 92*bis* statements. (See Table 5.18; Table 5.19; Table 5.20) This type of statement represented an alternative avenue for the Trial Chambers to admit lay witness testimony. The 92*bis* statement citations should be included in this comparison.

The Trial Chambers curbed their reliance on expert witnesses and forensic evidence. In post-Rule 92*bis* judgments, the Trial Chambers decreased the number of expert witnesses by eighty-one percent. (See Table 5.2; Table 5.4; Table 5.11) This

dramatic drop was a result of the Trial Chambers referencing only eleven percent of the expert witness citations between 2002 and 2004. (See Table 5.6; Figure 5.6)

This decrease in the number of citations affected the status of expert witnesses. (See Table 5.2; Table 5.4; Table 5.11) In pre-Rule 92*bis* judgments, expert witness citations were the fourth most popular type of evidence cited by the Trial Chambers. (See Table 5.2; Table 5.4; Table 5.11) Between 2002 and 2004, expert witness citations were the least popular type of evidence. (See Table 5.2; Table 5.4; Table 5.11)

Within the expert witness category, the Trial Chambers relied on impartial experts. In post-Rule 92*bis* judgments, ICTY investigators represented fifty percent of the expert witness citations. (See Table 5.7; Table 5.9; Figure 5.8) These individuals definitely have a professional interest in the proceedings because they were employees of the Tribunal. The remaining type of experts, an archeologist and lawyers, also have a professional interest because they were hired by the OTP to articulate their opinion. (See Table 5.7; Table 5.9; Figure 5.8)

Moreover, forensic exhibit citations dwindled by forty-four percent in post-Rule 92*bis* judgments. (See Table 5.2; Table 5.13; Figure 5.14) Although the Trial Chambers consistently cited similar number of citations during the three time periods, the Trial Chambers increased the total number of citations from pre-and post-Rule 92*bis* judgments. (See Table 5.2; Figure 5.13; Figure 5.2) The Trial Chambers did not increase the number of forensic exhibit citations at a similar rate as the other forms of evidence. This inconsistency may infer that the Trial Chambers were not relying on forensic exhibits as heavily in post-Rule 92*bis* judgments.

The Trial Chambers also increased the number of eyewitness citations via non-forensic exhibits. In post-Rule 92*bis* judgments, the Trial Chambers increased the number of non-forensic exhibits by five-hundred eighty-eight percent, which was statistically significant. (See Table 5.2; Table 5.11; Table 5.22) This increase was a result of the Trial Chambers referencing sixty-two percent of the non-forensic citations between 2002 and 2004. (See Table 5.17; Figure 5.18) Specifically, the Trial Chambers increased the number of 92*bis* statement by sixty-eight percent in post-Rule 92*bis* judgments. (See Table 5.18; Table 5.19; Table 5.20; Figure 5.20)

Furthermore, the Trial Chambers favored 92*bis* statements more than forensic exhibits to establish a victim's death in post-Rule 92*bis* judgments. (See Table 5.2; Table 5.11; Table 5.21; Figure 5.21) Although the Trial Chamber cited only two more 92*bis* statements between 2002 and 2004 than forensic exhibits, the increasing rate of the Trial Chambers reliance on 92*bis* statements was remarkable. (See Table 5.2; Table 5.11; Table 5.21; Figure 5.21) This observation was corroborated by the fact that the composite increase in confidential 92*bis* statements and 92*bis* statements were statistically significant between pre-and post-Rule 92*bis* judgments. (See Table 5.22)

The scales of justice regarding the types of evidence to establish a victim's death are out of balance. Although 92*bis* statements may accelerate the trial process, the ICTY may be sacrificing accurate information. This sacrifice may be extremely significant because it may affect the Tribunal's integrity. Eventually, this imbalance could taint the policy justifications for this court.

CHAPTER VII: CONCLUSION

Introduction

This chapter discusses the researcher's conclusions regarding this study. This researcher recaps the research questions, methods, results, implications, and limitations. Furthermore, the investigator recommends future research concerning the ICTY's policies regarding forensic science.

Questions

After researching the ICTY's policies, the researcher detected that the ICTY's judges amended the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* in December 2000. Rule 92*bis* provided a vehicle for either the prosecution or the defense to establish facts either via written statements or transcripts from previous ICTY's proceedings to expedite the trial process. Specifically, Rule 92*bis* allowed the Trial Chambers to admit written statements in lieu of oral testimony regarding the events of a homicide. The Trial Chambers have relied on written statements regarding an individual's death because the witness's testimony explains the crime's events.

This researcher noticed that the number of forensic exhibits citations declined compared to the total number of exhibits after 2001. This data corresponded with the amendment to incorporate Rule 92*bis*. The study investigated if a correlation existed between the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis* and the decline of forensic exhibits citations compared to the total number of citations. During this investigation, the researcher expanded the study to include the variations in both witness statements and exhibits citations in establishing a victim's death in pre-and post-Rule 92*bis* judgments.

This issue was explored via two main research questions. The researcher analyzed the changes in the number of Trial Chambers' witness citations statements prior to and after 2001. The witness statement category was further divided into three sub-categories: confidential witnesses, expert witnesses, and lay witness citations. The researcher analyzed the fluctuations in frequency of Trial Chambers' citations prior to and after 2001 in each of these sub-categories. These four categories were formulated into null hypotheses for statistical analysis.

The researcher also investigated the fluctuations in frequency of Trial Chambers' exhibit citations prior to and after 2001. The exhibit statement category was further divided into three sub-categories: confidential exhibits, forensic exhibits, and non-forensic exhibits. Moreover, in order to analyze the crux of the main hypothesis, the researcher compared the fluctuations in the number of confidential Rule 92*bis* statements and Rule 92*bis* statements in pre-and post-Rule 92*bis* judgments. Each of these five categories was formulated into null hypotheses. Overall, nine null hypotheses were drafted for statistical analysis.

Methods

The researcher analyzed thirteen cases related to homicide between 1997 and 2004. After reading the cases, the researcher recorded the methods the ICTY Trial Chambers used to establish a victim's death. After this process, the researcher tallied number of citations and analyzed each type of witness statements or exhibit via two avenues.

Two types of mathematical analysis were used in this study. In regards to the relative frequency analysis, the researcher calculated the percentage of citations for the

six types of evidence, confidential witnesses, expert witnesses, lay witnesses, confidential exhibits, forensic exhibits, and non-forensic exhibits, in relation to the total number of citations for each year. (Bennett, Briggs & Triola 2001, pp. 97-150) These percentages were compared to determine the exact increase or decrease of the Trial Chambers' citations by year.

The researcher also calculated the percentage of citations in three distinct time periods for each type of evidence. These percentages were compared to determine the exact increase or decrease of the Trial Chambers' citations within three distinct time periods: 1997-2000, 2001, and 2002-2004. (Bennett, Briggs & Triola 2001, pp. 97-150) These three time categories represented pre-Rule 92*bis*, a transition year, and post-Rule 92*bis* opinions. These classifications were critical because it re-evaluates the data in relation to the ICTY's Rules of Procedure and Evidence amendment. This perspective determined if a fluctuation occurred in the Trial Chambers' citations before and after Rule 92*bis*.

The researcher also performed nonparametric statistical analysis because the small sample size. The Mann-Whitney U test was performed because this statistical test compares two independent samples. (Bachman & Paternoster 1997, pp. 535-540) In this study, the Mann-Whitney U test was applicable because the researcher compared the number of Trial Chambers' citations before and after the amendment to the ICTY's Rules of Procedure and Evidence to incorporate Rule 92*bis*.

Results

The Trial Chambers favored witness testimony to establish a victim's death through these eight years. During the three time periods, the Trial Chambers' citation to witness testimony ranged from either fifty-seven percent to sixty-nine percent of the total

number of citations. Rule 92*bis* did not affect the number of witness citations because only a ten-percent decrease in the number of witness citations existed between the 1997 and 2000 time period and between the 2002 and 2004 period. On an analytical level, this ten-percent decrease was not statistically significant; however, this result conformed to the researcher's expectations because the researcher realized that the Trial Chambers primarily relied upon witness testimony to establish a victim's death throughout each of the cases.

The Trial Chambers preferred particular types of witnesses in post-Rule 92*bis* judgments. Within the witness category, the Trial Chambers cited confidential exhibits the most frequently. The Trial Chambers increased the number of citations to confidential witnesses by thirty-seven percent since Rule 92*bis*. Similar to the witness category, the increase in confidential witness citations was not statistically significant. This result conformed to the researcher's expectations because the fluctuation in the Trial Chambers citations regarding the overall witness category was not statistically significant.

Lay witness testimony was the second most popular type of evidence cited by the Trial Chambers between the 1997 and 2000 time period and between the 2002 and 2004 time period. Rule 92*bis* did not affect the number of lay witness citations because only a fifteen-percent decrease existed between the 1997 and 2000 time period and the 2002 and 2004 time period. Again, similar to confidential witnesses, the decrease in Trial Chambers citations was not statistically significant. This result conformed to the researcher's expectations because the fluctuation in the Trial Chambers citations regarding the overall witness category was not statistically significant.

Since Rule 92*bis*, the Trial Chambers decreased the number of expert witness citations. Between 1997 and 2000, expert witness citations were ranked the fourth most popular type of evidence cited by the Trial Chambers. Expert witness citations slipped to the least cited type of evidence in post-Rule 92*bis* judgments. The Trial Chambers decreased the number of expert witness citations by eighty-one percent in post-Rule 92*bis* judgments. This fluctuation was not statistically significant; however, this result conformed to the researcher's expectations because the fluctuation in the Trial Chambers citations regarding the overall witness category was not statistically significant.

The Trial Chambers referenced different types of expert witness in pre-and post-Rule 92*bis* judgments. Between 1997 and 2001, the Trial Chambers relied on an array of experts, which included investigators, forensic anthropologists, forensic archeologists, forensic pathologists, military personnel, and lawyers. In post-Rule 92*bis* judgments, the Trial Chambers only referenced investigators, lawyers, and archeologists.

Since Rule 92*bis*, the Trial Chambers has changed their attitudes on exhibits. First, the Trial Chambers definitely favored exhibits because they significantly increased the number of citations to exhibits from pre-and post-Rule 92*bis* judgments. The Trial Chambers increased the frequency of exhibit citations by twenty-three percent from pre-and post-Rule 92*bis* judgments. Specifically, the Trial Chambers relied on non-forensic exhibits because they have significant increased number of citations to non-forensic exhibits from pre-and post-Rule 92*bis* judgments. The fluctuation in non-forensic exhibits resulted in a five-hundred eighty-eight percent increased between 1997 and 2000 time period and 2002 and 2004 time period.

Second, the Trial Chambers decreased the number of citations to forensic exhibits. The Trial Chambers decreased the number of forensic exhibit citations by forty-four percent from pre-and post-Rule 92*bis* judgments. This fluctuation was not statistically significant. Although the Trial Chambers increased the total number of citations from pre-and post-Rule 92*bis* judgments, the Trial Chambers consistently cited similar number of citations during three time periods. The Trial Chambers may not have increased the number of forensic exhibit citations at a similar rate as the other forms of evidence. This inconsistency may infer that the Trial Chambers were not relying on forensic exhibits as heavily in post-Rule 92*bis* judgments as in pre-Rule 92*bis* judgments.

Third, similar to expert witnesses, the Trial Chambers referenced different types of forensic exhibits in pre-and post-Rule 92*bis* judgments. Between 1997 and 2001, the Trial Chambers relied on both written and visual forensic exhibits to establish a victim's death. In post-Rule 92*bis* judgments, the Trial Chambers usually referenced written documents, which included forensic reports, death certificates, records regarding bodies, ICTY investigator reports, and 94*bis* statements, rather than visual forensic exhibits.

Fourth, the Trial Chambers has dramatically increased the number of 92*bis* statements citations since 2001. This rule represented an alternative route for the Trial Chambers to admit individual testimony to establish a victim's death. The Trial Chambers can admit eyewitness testimony to establish death through two avenues: directly via witness testimony and indirectly through 92*bis* statements. The Trial Chambers approved of this rule and trend because the number of 92*bis* statement citations increased by sixty-eight percent from pre-and post-Rule 92*bis* judgments.

Finally, the Trial Chambers cited more confidential *92bis* statements and *92bis* statements than forensic exhibits to establish death in post-*92bis* judgments. The Trial Chamber cited thirty-eight *92bis* statements while citing only thirty-six forensic exhibits between 2002 and 2004. Although the difference between the two categories was minimal, the increasing rate of the Trial Chambers' reliance on *92bis* statements was remarkable. The Trial Chambers cited twenty-five more *92bis* statements within a two year time period. Furthermore, the Trial Chambers were definitely decreasing the number of citations to forensic exhibits because the Trial Chambers cited eight fewer exhibits between 2002 and 2004 than 2001. This trend could signify that the Trial Chambers were placing more weight on non-forensic exhibits rather than forensic exhibits to establish death. This observation is corroborated by the fact that the composite increase in confidential *92bis* statements and *92bis* statements were statistically significant between pre-and post-Rule *92bis* judgments. In the future, the Trial Chambers could decrease the number of citations to forensic exhibits rather than maintaining a consistent number of citations.

Implications

Eyewitness testimony and forensic evidence have their positive attributes as well as their downfalls. Within the justice system, both types of evidence compliment each other. Forensic evidence corroborates eyewitness testimony in order to improve the witness's creditability. Although this type of evidence is expensive and unnecessary, forensic evidence can also provide answers when eyewitness testimony may be lacking. However, forensic evidence can never replace eyewitness testimony because expert witnesses or forensic evidence could never fully describe the events during the trial

proceedings. A balance between eyewitness testimony and forensic evidence will proved the courts with the most accurate information.

The Trial Chambers preferred eyewitness testimony either in viva voce or written statements format from individuals involved in the conflict rather than experts or forensic evidence to establish a victim's death. In post-Rule 92*bis* judgments, Trial Chambers citations to expert witnesses and forensic exhibits represent a small portion of the total number of citations. The decline in Trial Chambers citations to expert witnesses and forensic exhibits signifies an imbalance between eyewitness testimony, forensic exhibits, and expert witnesses.

The scales of justice regarding the types of evidence to establish a victim's death are out of balance. Although 92*bis* statements may accelerate the trial process, the ICTY may be sacrificing accurate information. This sacrifice may be extremely significant because it may affect the Tribunal's integrity. Eventually, this imbalance could taint the policy justifications for this court.

Limitations

1. An ideal study would incorporate data from the ICTR and the ICTY because the OTP in both *ad hoc* tribunals utilized forensic evidence in their strategies. On the other hand, the ICTR's current jurisprudence does not represent a transition towards documentary evidence because the Trial Chamber is trying to maintain oral trials.
2. In an ideal setting, this research study would be performed after the ICTY closes. At this time period, the researcher may have the luxury of analyzing all cases.

3. The judges amended the Rules of Evidence and Procedure to promote this new policy in December 2000; only four years have passed since this transition. To document this trend thoroughly, a study should expand over a longer time frame.

Recommendations for Future Research

Many opportunities arise for future research in this area. Here are a few possible recommendations:

1. A researcher could compile a frequency study of the types of evidence the OTP submits in establishing a victim's death. This study could determine the methods the OTP favors in establishing a victim's death.
2. A researcher could determine the exact differences between the Trial Chambers citations and what type of evidence the OTP submits. This type of study could determine exactly the type of evidence the Trial Chambers favors in justifying a victim's death.
3. A researcher could poll the various judges at the ICTY with questioners to determine the reasons why the judges favored a particular type of evidence in justifying a victim's death. This study could also determine why the judges disfavored particular types of evidence in justifying a victim's death.
4. Since judges are appointed from various countries around the world, a researcher could study if a correlation exists between the judge's background and the type of evidence cited in the trial judgment. This study could be extremely interesting if a researcher could prove a correlation between the judge's background and the use of forensic evidence in the trial judgment.

APPENDICES

APPENDIX A

Applicable ICTY Rules of Procedure and Evidence

Rule 89
General Provisions
(Adopted 11 Feb 1994)

(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence. (Amended 1 Dec 2000 and 13 Dec 2000)

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form. (Amended 1 Dec 2000 and 13 Dec 2000)

Rule 90

Testimony of Witnesses

(Adopted 11 Feb 1994, revised 30 Jan 1995, amended 25 July 1997, amended 17 Nov 1999, amended 1 Dec 2000 and 13 Dec 2000)

(A) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth".

(B) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgment, however, cannot be based on such testimony alone. (Revised 30 Jan 1995)

(C) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

(D) Notwithstanding paragraph (C), upon order of the Chamber, an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings. (Amended 25 July 1997, amended 1 Dec 2000 and 13 Dec 2000)

(E) A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony. (Revised 30 Jan 1995, amended 1 Dec 2000 and 13 Dec 2000)

(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to

(i) make the interrogation and presentation effective for the ascertainment of the truth; and

(ii) avoid needless consumption of time.

(Amended 10 July 1998)

(G) The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73 *bis* (C) and 73 *ter* (C). (Amended 12 Apr 2001)

(H) (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give

evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

(Amended 10 July 1998, amended 17 Nov 1999)

Rule 92 bis
Proof of Facts other than by Oral Evidence
(Adopted 1 Dec 2000 and 13 Dec 2000)

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

(i) Factors in favour of admitting evidence in the form of a written statement include but are not limited to circumstances in which the evidence in question:

(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;

(b) relates to relevant historical, political or military background;

(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

(d) concerns the impact of crimes upon victims;

(e) relates to issues of the character of the accused; or

(f) relates to factors to be taken into account in determining sentence.

(ii) Factors against admitting evidence in the form of a written statement include whether:

(a) there is an overriding public interest in the evidence in question being presented orally;

(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

(B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and

(i) the declaration is witnessed by:

(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or

(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

(ii) the person witnessing the declaration verifies in writing:

(a) that the person making the statement is the person identified in the said statement;

(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;

(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and

(d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:

(i) is so satisfied on a balance of probabilities; and

(ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.

(D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.

(E) Subject to Rule 127 or any order to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

Rule 94 bis
Testimony of Expert Witnesses
(Adopted 10 July 1998)

(A) The full statement of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.
(Amended 14 July 2000, amended 1 Dec 2000 and 13 Dec 2000, amended 13 Dec 2001)

(B) Within thirty days of disclosure of the statement of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement; or

(ii) it wishes to cross-examine the expert witness; and

(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the report and, if so, which parts

(Amended 12 Dec 2002)

(Amended 13 Dec 2001)

(C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

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