Judicial Witness Assessments at the ICTY, ICTR and ICC

Is There 'Standard Practice' in International Criminal Justice?

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Abstract

Accurate assessment of witness testimonies underpins judicial fact-finding at international criminal courts and tribunals (ICCTs). However, the lack of formal assessment criteria and uncoordinated methods, coupled with advances in the scientific understanding of the psychology of witnessing, calls for a re-examination of the judicial practice. This study critically evaluates the state of the art of witness assessments at the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Court (ICC), based on all the trial judgments issued in 1996–2019. The analysis results in a consolidation of this ad hoc, constantly evolving jurisprudence, into a framework that has been in development since the 1990s. The authors reflect upon the scientific validity of the criteria used throughout the analysis, based on up-to-date findings from psychology and criminology, and identify the areas that would most benefit from standardized procedures.

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1. Introduction

> *'Nowhere does international justice feel more* ***experimental and insecure*** *than at the evidentiary coal face of the witness hearing.'*[1]

Accurate assessment of evidence underpins judicial fact-finding, and is at the core of the raison d'être of any criminal court or tribunal: establishing individual criminal accountability. It is no question that the judiciary faces many challenges that influence their ability to determine the facts, especially so when the evidence originates from human beings, providing their story in an unusually stressful environment. Indeed, as Damaška pointed out, in the previous century we witnessed 'the realization of the *fallibility* of our fact-finding methods, particularly when human behaviour is the object of investigation'.[2]

Nowhere is this *fallibility* more evident than in the adjudication of international crimes cases, where oral testimony of eyewitnesses is preferable and forms the majority of evidentiary record in the case.[3] Not only is this type of evidence most prevalent in truth finding on an international level, it is also uniquely complex. To assess the truthfulness and accuracy of a witness, the judges at international criminal courts and tribunals (ICCTs) must traverse cultural and linguistic barriers, time gaps, conflict-inspired biases, and traumatic circumstances, to name but a few. These special burdens, coupled with the complexity and scope of international crimes cases, beg careful scrutiny of the ways the judges approach the determination of the facts. Are their methods indeed *experimental and insecure*?

Despite the significance of the task, the legal framework of the ICCTs offers no guidance for evidence assessment: the decision makers are free to decide on the appropriate approach, bound only by the application of the provisions of their Statutes and Rules of Procedure and Evidence.[4] Neither of them contains instructions for the assessment of evidence. Furthermore, the Rules are open to interpretation and amendment,[5] allowing for broad discretion in judicial

1 A. Zahar, 'Witness memory and the manufacture of evidence at the international criminal tribunals', in C. Stahn, and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press, 2010) 600–611, at 603 (emphasis added).

2 M. Damaška, 'Truth in Adjudication', 49 *Hastings Law Journal* (1998) 289–308, at 294 (emphasis added).

3 G. Chlevickaite, B. Hola, and C. Bijleveld, 'Thousands on the Stand: Exploring Trends and Patterns of International Witnesses', 32 *Leiden Journal of International Law* (*LJIL*) (2019) 819–836; Y. McDermott, 'The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis', 26 *LJIL* (2013) 971–989, at 982; G. Chlevickaite, and B. Hola, 'Empirical Study of Insider Witnesses' Assessments at the International Criminal Court', 16 *International Criminal Law Review* (2016) 673–702.

4 Rule 89 ICTY RPE; Rule 89 ICTR RPE; Rule 63 ICC RPE.

5 At the ICTY/ICTR the Rules were relatively open-ended and left leeway to the judges to develop more detailed rules on evidentiary matters through their own decisions. The regulations are more restrictive at the ICC. For an in-depth discussion see e.g. T.A. Doherty, 'Evidence in International Criminal Tribunals: Contrast between Domestic and International Trials', 26 *LJIL* (2013) 937–945; M. Caianiello, 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models', 36 *North Carolina Journal of International Law and Commercial Regulation* (2011) 287–318.

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decision-making.[6] This freedom stems from the confidence vested in professional judges to bring sufficient experience to their jobs, rendering additional safeguards unnecessary.[7] Freedom of assessment, however, can come at the expense of certainty for trial participants.[8] While high judicial flexibility may be necessary in international cases, which are typically of high complexity, marred with difficulties in obtaining evidence, this leeway also raises issues of fairness. The loose framework leads to a considerable amount of uncertainty and lack of predictability regarding the criteria that the judges apply in assessing witness testimony. The large discretion engenders the possibility that two different chambers, faced with comparable situations, could come to different results in their weighing of the evidence.[9] That this is no hypothetical scenario has been shown on a number of occasions.[10] While we accept that considerable variation in the Chambers' approaches is a result of the specificities of the cases before them, it may also stem from uncoordinated methods of weighing evidence, adjusting the approach on a case-by-case basis, with little likelihood of it being reviewed on appeal.[11] In these circumstances, it is fair to question whether the 'free evaluation of evidence' in practice means ad hoc reliance on personal and professional experiences and preferences rather than consistent methodology.[12]

6 On the principle of free assessment of evidence at the ICCTs, see R. Dixon, 'Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals', 7 *Transnational Law and Contemporary Problems* (1997) 81–102; M. Swart, 'Judicial Lawmaking at the Ad Hoc Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation"', 70 *Heidelberg Journal of International Law* (*HJIL*) (2010) 459–486; G. Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility', 12 *Criminal Law Forum* (*CLF*) (2001) 41–90.

7 Caianiello, *supra* note 5.

8 G. McIntyre, *ICTR – Assessment of Evidence*, A Compendium on the Legacy of the ICTR and the Development of International Law, 2014, available online at http://unictr.irmct.org/en/compendium-legacy-ictr-and-development-international-law (visited 14 August 2019).

9 P. Behrens, 'Assessment of International Criminal Evidence: The Case of the Unpredictable Génocidaire', 71 *HJIL* (2011) 661–689, at 661.

10 See e.g. Witness Ruggiu's evidence was rejected in *Ntagerura et al.* (Judgment and Sentence, *Ntagerura et al.* (ICTR-99-52), Trial Chamber, 25 February 2004, §§ 548–549) but he nonetheless was called and cited in the *Bagosora et al.* case (Judgement and Sentence, *Bagosora et al.* (ICTR-98-41), Trial Chamber, 18 December 2008, § 1984). At the ICTY, M. Nikolic testified in at least six trials, despite negative credibility assessments: Judgment, *Blagojević & Jokić* (IT-02-60), Trial Chamber, 17 January 2005; Judgment, *Perišić* (IT-04-81), Trial Chamber, 6 September 2011; Judgment, *Popović et al.* (IT-05-88), Trial Chamber, 10 June 2010 ('*Popović et al.* Trial Judgment'); Judgment, *Mladić* (IT-09-92), Trial Chamber, 22 November 2017 ('*Mladić* Trial Judgment'); Judgment, *Tolimir* (IT-05-88/2), Trial Chamber, 8 April 2015; Judgment, *Karadžić* (IT-95-5/18), Trial Chamber, 24 March 2016 ('*Karadžić* Trial Judgment').

11 The Appeals Chambers generally prefer not to disturb the trial chambers' findings on witness credibility, as trial chambers are better placed to observe and assess the witnesses in court. However, re-assessments have occurred. See Judgment, *Rutaganda* (ICTR-96-3), Appeals Chamber, 26 May 2003, § 197: due to errors in the assessment of testimonies of witnesses AA and UU one ground of appeal was granted; Judgment, *Nahimana et al.* (ICTR-99-52), Appeals Chamber, 28 November 2007, § 466: the assessment of witness EB overturned.

12 Legal psychologists, recognizing the risk of judicial decision makers employing intuitive or heuristic reasoning in evidence assessment (e.g. confirmation bias or ex-post-facto reasoning)

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The question of how the *holders of the truth* approach the evidence before them has generated much attention in recent years. International courtrooms are, albeit important, by far not the only places where witness assessments are centre-stage. In the domestic domain, the ability of practitioners to assess this *human-experience evidence* accurately has been examined in numerous studies spanning the fields of law, criminology, intelligence and psychology, the overarching conclusion pointing to our inherent inability to determine factually whether someone is telling the truth.[13] Repeated studies found lack of superior skills in truthfulness assessments in professional judges,[14] especially in cross-cultural settings.[15] Justice practitioners were found to be similarly susceptible to reliance on alleged deception cues invalidated by empirical research, and to misunderstand the basic science of human memory and witnessing,[16] discrediting the long-standing assumptions that witness assessments are best guided by professionals' common sense.[17] A number of researchers have put forward methods to improve the judiciary's approach to evidence assessments: (forensic) psychologists have devised detailed guidelines for considering identification

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have suggested the use of formalized processes, scripts or checklists to reduce the likelihood of relying on intuition, A.J. Wistrich, and J.J. Rachlinski, 'Implicit Bias in Judicial Decision Making. How it Affects Judgment and What Judges Can Do About It', *American Bar Association, Enhancing Justice* (2017) 87–130, at 119; C.E. Jones, 'The Troubling New Science of Legal Persuasion: Heuristics and Biases in Judicial Decision-Making', *41 Advocates Quarterly* (2013) 49–122, at 119. See also McIntyre, *supra* note 8; M. Klamberg, 'Epistemological Controversies and Evaluation of Evidence in International Criminal Trials', in K.J. Heller et al., *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020), at 2.

13 A. Vrij et al., 'A Cognitive Approach to Lie Detection: A Meta-Analysis', 22 *Legal and Criminological Psychology* (2017) 1–21; B.A. Spellman et al., 'Credible Testimony in and out of Court', 17 *Psychonomic Bulletin & Review* (2010) 168–173; B.M. DePaulo, and W.L. Morris, 'Discerning Lies from Truths: Behavioural Cues to Deception and the Indirect Pathway of Intuition', in P.A. Granhag, and L.A. Strömwall (eds), *The Detection of Deception in Forensic Contexts* (Cambridge University Press, 2004) 15–40.

14 S. Magnussen et al., 'Beliefs about Factors Affecting the Reliability of Eyewitness Testimony: A Comparison of Judges, Jurors and the General Public', 24 *Applied Cognitive Psychology* (2010) 122–133; C.F. Bond, and B. DePaulo, 'Accuracy of Deception Judgments', 10 *Personality & Social Psychology Review* (2006) 214–234.

15 S. Leal et al., 'Cross-Cultural Verbal Deception', 23 *Legal and Criminological Psychology* (2018) 192–213. Also see P.J. Taylor et al., 'Culture Moderates Changes in Linguistic Self-presentation and Detail Provision when Deceiving Others', 4 *Royal Society Open Science* (2017) 1–11; P.J. Taylor et al., 'Cross-cultural Deception Detection', in P.A. Granhag, A. Vrij, and B. Verschuere (eds), *Detecting Deception: Current Challenges and Cognitive Approaches* (Wiley-Blackwell, 2015) 171–201.

16 For an overview of critical thinking errors and reliance on false indicators see V. Denault and N.E. Dunbar, 'Credibility Assessment and Deception Detection in Courtrooms: Hazards and Challenges for Scholars and Legal Practitioners', in T. Docan-Morgan (eds), *The Palgrave Handbook of Deceptive Communication* (Palgrave Macmillan, 2019).

17 A. Vrij, P. Granhag, and S. Porter, 'Pitfalls and Opportunities in Lie Detection', 11 *Psychological Science In The Public Interest* (2010) 89–121; S. Porter, and L. ten Brinke, 'Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Courtroom', 14 *Legal and Criminological Psychology* (2009) 119–134.

and recognition evidence, traumatized and vulnerable witnesses and eyewitness memory overall.[18]

Some of this research has penetrated the international courtrooms as well, via internally devised guidelines,[19] expert witness testimonies,[20] or judicial deference to national practices and jurisprudence.[21] Researchers of international criminal law and practice are increasingly acknowledging and investigating the especially problematic nature of fact-finding at the ICCTs (i.e. the prominent cross-cultural aspects, time lapses, mass victimization). Extensive empirical examinations of the evidentiary shortcomings and challenges caused by witness testimony have uncovered the far from ideal evidentiary standards at the ICCTs.[22] As a response, proposals for reform, some with reference to statistical and mathematical approaches to judicial reasoning, have been put forward.[23]

These advances notwithstanding, we still know very little about the ICCT's witness assessment methodology. None of the studies to date have empirically examined the criteria that judges claim to apply in deciding what they find to be credible and reliable evidence. The difficulties in accurate

18 M.L. Howe, L.M. Knott, and M.A. Conway, *Memory and Miscarriages of Justice* (Routledge, 2018); D.L. Schacter, and E.F. Loftus, 'Memory and Law: What Can Cognitive Neuroscience Contribute?' 16 *Nature Neuroscience* (2013) 119–123; G.R. Loftus, 'What Can a Perception-Memory Expert Tell a Jury?' 17 *Psychonomics Bulletin & Review* (2010) 143–148. Some examples of multidisciplinary assessment recommendations: Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification, *Identifying the Culprit: Assessing Eyewitness Identification* (National Academies Press, 2014); G.L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence* (draft) (2018), available online at http://ap-ls.wildapricot.org/resources/Documents/Scientific_Review_Paper/APLS%20Scientific%20Review%20Paper%20initial%20draft%20July%2030%202018.pdf (visited 14 August 2019).

19 At the ICC, the investigations division conducts mandatory source evaluation training, based on forensic psychology principles, see X. Agirre, 'On How Analysis Can Enhance the Quality of Investigation and Case Preparation', Public Lecture at CILRAP, 22 February 2019, available online at https://www.cilrap.org/cilrap-film/190222-agirre/ (visited 14 August 2019). A formalized evidence assessment scheme reportedly is in development in one of the trial chambers as well, see S. De Smet, 'Enhancing the Quality of Reasoning about the Link Between Evidence and Factual Propositions', Public Lecture at CILRAP, 22 February 2019, available online at https://www.cilrap.org/cilrap-film/190222-smet (visited 14 August 2019).

20 See Section 4.B, fn. 92.

21 See Section 5, fns109–110.

22 T. Kelsall, *Culture under Cross Examination* (Cambridge University Press, 2006); N.A. Combs, 'Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials', 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 235–273; N.A. Combs, 'Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law', 58 *Harvard International Law Journal* (2017) 47–125; Chlevickaite and Hola, *supra* note 3.

23 Y. McDermott, 'Strengthening the Evaluation of Evidence in International Criminal Trials', 17 *International Criminal Law Review* (2017) 682–702; Y. McDermott, 'Analysis of Evidence in International Criminal Trials Using Bayesian Belief Networks', 16 *Law, Probability and Risk* (2017) 111–129; E. Fry, 'The Nature of International Crimes and Evidentiary Challenges: Preserving Quality While Managing Quantity', in E. van Sliedregt, and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2014); S. De Smet, 'Justified Belief in the Unbelievable?' in M. Bergsmo (ed.), *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher, 2013) 73–138.

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assessments, the lack of formal criteria and uncoordinated methods, coupled with the advances in scientific understanding of the psychology of witnessing, call for examination of the practices of *international witness assessments*. With this study, we aim to critically evaluate the state of the art of witness assessments at international criminal courts and tribunals. We systematically review all the trial judgments of the ICTR, the ICTY and the ICC,[24] and extract the criteria the judges claim to apply in their assessments of witness testimonies together with the basis for those criteria. By constructing a timeline, which records whenever the ICCTs' judges introduced any new witness assessment criterion in the case law, and by comparing the use of criteria across the courts and cases, we explore whether the approach is consistent within and across the institutions.[25] On this basis, we derive a consolidated framework for witness assessments, which has been in development since the 1990s, and upon which numerous chambers have relied with varying degrees of commitment. We reflect upon the scientific validity of the criteria, based on up-to-date empirical findings from (legal) psychology and criminology, and identify the areas that would most benefit from standardized procedures.

The following section starts with discussing the components of judicial witness evaluations at the ICCTs, and presents the consolidated framework of oral evidence assessment, consisting of the credibility and reliability criteria reportedly used by the judges at the ICTR, the ICTY and the ICC. The subsequent section then dives deeper into the main areas of this framework and its development: factors of witness objectivity and competence. Finally, we discuss the main deficiencies in the existing approach, how they could be remedied, and how this knowledge may benefit the parties at trial.

2. Judicial Assessment of Witness Testimony at the ICCTs

A. General Approach to Witness Assessments

Broadly speaking, the core of assessing a witness on the stand is comprised of determining whether a witness is truthful (credible), whether his/her evidence

24 We include the ICTY, the ICTR, and the ICC in the analysis as they are the only three *purely international* criminal tribunals, which due to their set-up and design can be more readily compared with each other rather than with the *hybrid* institutions (tribunals incorporating elements of domestic law and procedure). See S. Nouwen, '"Hybrid courts". The Hybrid Category of a New Type of International Crimes Courts', 2 *Utrecht Law Review* (2006) 190–214.

25 The bulk of our analysis is based on the *general considerations of evidence* or equivalent sections of the ICTR, the ICTY, and the ICC trial judgments issued up to July 2019 (guilty pleas and administration of justice cases excluded, 93 judgments in total), with some additional information from appeals decisions, trial transcripts and parties' motions. We extracted all the credibility and reliability factors mentioned by the judges in these sections together with any internal or external jurisprudence cited.

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is accurate (reliable) and relevant, and consequently, what weight it merits in the context of the complete evidentiary record.[26] Though straightforward at a first glance, the concepts of credibility and reliability, both critical to understanding the judicial assessments of evidence, have proven elusive for ICCTs. Neither scholars nor practitioners seem to have reached a full agreement on their definition,[27] or on what the terms encompass.[28] Inconsistent approaches notwithstanding, credibility considerations generally entail the assessment of aspects indicative of witness objectivity (i.e. truthfulness, honesty) and competence (ability to observe, remember and communicate). While objectivity aspects are at least to some degree in the conscious command of a witness, the issues of competence are mostly outside of his/her control, e.g. trauma, language, conditions of observation or socio-cultural factors. These factors may stand in the way of a witness's ability to appear credible and to provide reliable information, or hamper the judges' capacity of accurate assessment. Reliability, on the other hand, depends on the contents of the testimony. Principally, it pertains to the quality of the information a witness has provided, and is determined by means of criteria that are relatively objective: e.g. consistency, corroboration or detail. While it is only the credibility/reliability distinction that is enshrined in the ICC Rules[29] and recent ICCT case law,[30] we systematize the witness assessment factors into three categories based on their focus: witness objectivity, competence and the quality of the information provided.

B. Deriving a Consolidated Framework for Witness Assessments

Figure 1 below provides a visual overview of the chronological development of witness assessments at the ICTY, ICTR and ICC, based on the trial judgments issued in 1996–2019. This timeline is constructed by extracting all the oral witness assessment criteria (sometimes clustered) mentioned in the 'Approach to evidence' sections of the judgments, and follows the addition of new criterion over time until no new criteria are mentioned. The first case code in the figure corresponds with the first mention of a criterion, the second case code — the last or the latest mention, allowing to assess the stability of the

26 Stanford Encyclopedia of Philosophy, 'The Legal Concept of Evidence', available online at https://plato.stanford.edu/entries/evidence-legal/#StrEviProWei (visited 24 April 2019).

27 For an overview see G. Sluiter et al., *International Criminal Procedure* (Oxford University Press, 2013), at 1025. See also Chlevickaite and Hola, *supra* note 3, at 681.

28 E.g. Klamberg argues that reliability encompasses credibility as well as other issues, such as accuracy and authenticity, see M. Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Vol. 2 (Martinus Nijhoff Publishers, 2013), at 174.

29 Rule 140(2)(b) ICC RPE provides that 'the prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters'.

30 See e.g. Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, 21 March 2016 ('*Bemba* Trial Judgment'), § 228: 'In assessing the weight to be given to the testimony of a witness, a Trial Chamber needs to assess the credibility of the witness and the reliability of his or her testimony'; *Mladić* Trial Judgment, § 5279: 'Trial Chamber took into account the witnesses' credibility and reliability, which sometimes varied for different portions of their evidence.'

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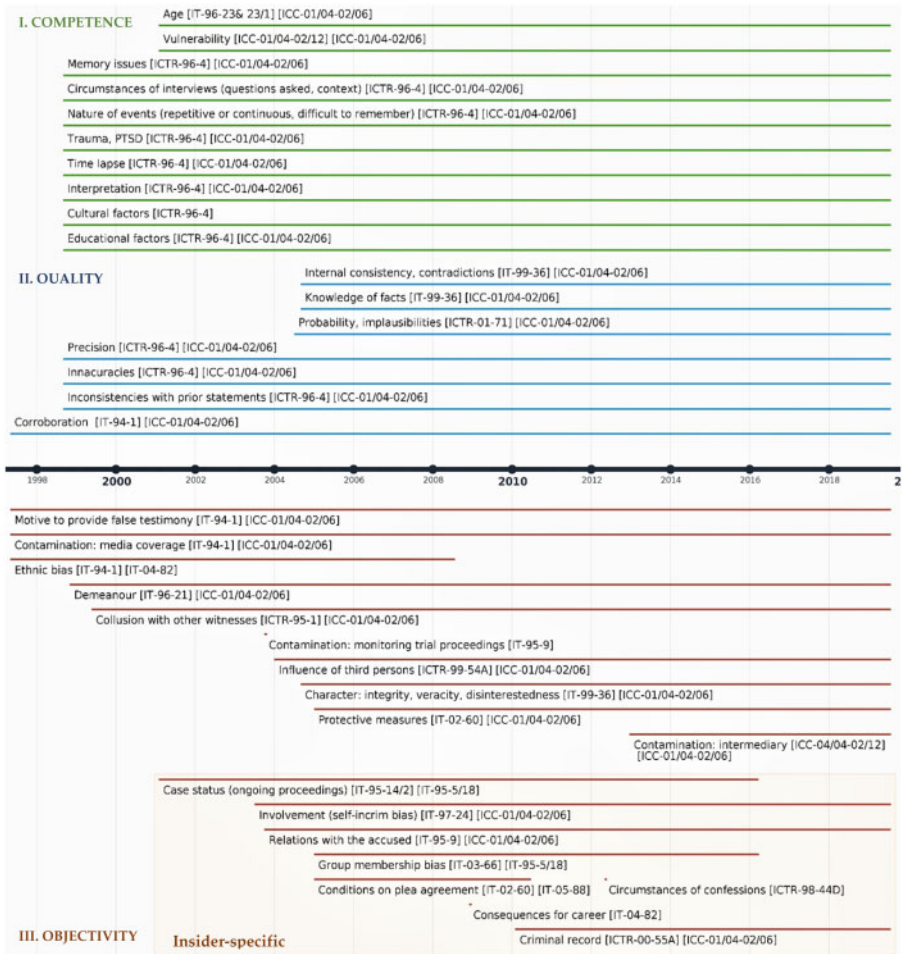

Figure 1. Chronological overview of witness assessment factors at the ICTY, ICTR and ICC

framework. The colours represent the factors related to witness competence (green), quality (blue) and objectivity (orange).

As is apparent from Figure 1, the core criteria were adopted in the earliest judgments of the ICTY/ICTR: *Tadić* and *Akayesu*, which formed the basis of witness assessments for years to come.[31] Here, the broad judicial discretion came strongly to the fore: the *Tadić* judges reaffirmed their position at the centre of the evidence-related questions by seeking minimal external guidance

31 E.g. at the ICTR, a number of trial judgments refer to the *Akayesu* oral evidence assessment framework directly, with little to no amendments, while others listed the same criteria without attributing it to a source: Judgment, *Ntagerura et al.* (ICTR-99-46), Trial Chamber, 25 February 2004, § 26; Judgment, *Semanza* (ICTR-97-20), Trial Chamber, 15 May 2003, § 36; Judgment, *Rwamakuba* (ICTR-98-44C), Trial Chamber, 20 September 2006, § 40.

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(domestic precedent and expert testimony), instead relying on their own experience and opinion. Furthermore, rather than explaining the overall approach to testimonial assessments, the *Tadić* chamber focused on responding to the challenges by the defence, which centred on witness objectivity. On the other hand, the *Akayesu* trial judgment, making use of expert testimony, made a lasting contribution to witness competence criteria. As seen in Figure 1 they referred to factors specific to international crimes cases: e.g. trauma and stress disorders, time lapse, continuous nature of events, which were all to be taken into account when assessing shortcomings in the quality of testimonies (e.g. inconsistencies or lack of detail). In practice, this meant that a certain degree of testimonial deficiencies could be 'explained away',[32] and endowed the judges with further freedom of assessment.

Several other observations in the chronological development deserve to be explored. First, we see that the addition of new indicators reduces greatly at around 2004, after which mostly insider-specific aspects are further developed. These early criteria are continuously implemented in the later cases, as both the ICTY and the ICTR commonly cite prior judgments to base their approach to witness assessment. While the combination of indicators mentioned in each judgment is not identical, reflecting the circumstances of the case, the composition of the bench, the types of witnesses and their unique concerns, overall, they are not lost over time: majority of the criteria are still present in 2019, the latest ICC judgment in the *Ntaganda* case (see *infra* Sections 3–5).

Secondly, we see a shift in focus. While the initial criteria mostly concerned competence, explaining why, or why not, a witness would be able to provide a reliable account, after 2002 objectivity indicators became the dominant addition to the framework. Besides, objectivity criteria were more often introduced by the Trial Chambers at the ICTY than at the ICTR. However, the chief concern at both institutions in the later years appears to have been the same: the assessment of insider, or accomplice, witnesses. As we shall discuss in Section 3(C), this increasing focus on insiders led not only to the expansion of assessment criteria over time, but also to the introduction of requirements for trial chambers in explaining the reliance on their testimony.

Finally, we see an increase in cross-institutional consistency. Initially divergent, the criteria mentioned in the trial judgments grew increasingly similar over time, especially regarding specific types of evidence, such as identifications or testimonies of insiders, as discussed further in Sections 3(C) and 5. While both the ICTY and the ICTR more commonly referred to their own jurisprudence,[33] the actual indicators mentioned post-2010 at both institutions are largely consistent. This approach continues at the ICC. The first ICC judgment,

32 Combs, *supra* note 22, at 264; Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 5 April 2012 ('*Lubanga* Trial Judgment'), §§ 102; see Section 4.B.

33 From a total of 96 ad hoc cases cited by the ICTR trial chambers in relation to witness assessments, 82 were ICTR cases, and 14 ICTY. At the ICTY, out of 63 total cases cited 57 were ICTY cases.

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Lubanga, albeit without direct reference to existing jurisprudence, encompasses majority of the indicators depicted in Figure 1. The set of criteria mentioned also remains rather stable over time, and is similar to those in the latest ICTY and ICTR judgments.[34]

What this chronological overview tells us is that already by 2012, and even more so by now, we can derive a general witness assessment framework, which has developed over time in the case law of the ICTY and ICTR, and is being used at the ICC to assess witness objectivity, competence, and the quality of the testimony.[35] Table 1 presents the framework in a consolidated form below, grouping similar indicators into categories based on their focus.[36]

While rich in detail, this framework does not capture how the criteria came to be introduced and utilized, and whether their inclusion is sufficiently backed by current scientific knowledge, which we discuss in the following sections, focusing on witness objectivity and competence.

3. Witness Objectivity Factors

The assessment of witness objectivity, as demonstrated by the list of indicators in Table 1, is a highly complex endeavour resting largely on subjective factors, as judicial decision makers essentially attempt to decide whether a witness is telling the truth as he/she knows it. In a court this inference mainly rests upon the assessment of a witness's behaviour on the stand (e.g. demeanour, attitude), and any background information available (e.g. relationships, biases, prior fraudulent behaviour).

34 See e.g. *Lubanga* Trial Judgment, §§ 102–106; *Bemba* Trial Judgment, §§ 228–231; Judgment, *Ntaganda* (ICC-01/04-02/06), Trial Chamber, 8 July 2019, §§ 77–88. Majority of the criteria overlap with e.g. *Mladić* Trial Judgment, §§ 5279–5280; *Karadžić* Trial Judgment, §§ 11–18; Judgment, *Ngirabatware* (MICT-12-29), Trial Chamber, 20 December 2012 ('*Ngirabatware* Trial Judgment'), §§ 52–53.

35 We also acknowledge that similar indicators are being regularly used in domestic jurisdictions, e.g. corroboration, consistency, or clarity, which can be found in *inter alia* jury instructions in the UK, the US or Canada; The Crown Court Compendium, *Part I: Jury and Trial Management and Summing Up* (2016), available at https://www.judiciary.uk/wp-content/uploads/2016/05/crown-court-compendium-part-i-jury-and-trial-management-and-summing-up.pdf (visited 10 December 2019); Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Jury Instructions* (2010), available at https://www.judiciary.uk/wp-content/uploads/2016/05/crown-court-compendium-part-i-jury-and-trial-management-and-summing-up.pdf (visited 10 December 2019); Canadian Judicial Council, *Final Instructions* (2012), available online at https://www.cjc-ccm.gc.ca/cmslib/general/jury-instructions/Final/NCJI-Jury-Instructions-Final-E.pdf (visited 10 December 2019). However, we also note certain aspects of the witness assessment framework might be more reflective of the characteristics of international criminal cases: the attention to witness language, social and cultural factors, as well as time lapse or trauma. While such witness competence concerns are not unique to international criminal proceedings, the nature of the crimes adjudicated are in line with more prominent judicial consideration.

36 For instance, the different types of individual bias identified in Figure 1, i.e. ethnicity, group membership, here are subsumed under *Bias: background.* Relationships, whether with other witnesses, the accused, or members of the criminal organization, fall under *Bias: personal relationships.*

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Table 1. Consolidated witness assessment framework ICTY/ICTR/ICC

I. Objectivity	II. Competence	III. Quality of testimony
Bias: background	Age, vulnerability	Consistency with prior testimony
Bias: involvement	Circumstances of observation	Corroboration
Bias: personal relationships	Circumstances of the interview	Knowledge demonstrated
Case status, plea agreement	Educational factors	Plausibility / Probability
Character, integrity	General physical/medical condition	Precision (level of detail)
Contamination, influence	Language and interpretation	Quality: clarity, coherence
Demeanour	Mental state (trauma, stress, fear)	
Motive, self-interest	Social and Cultural factors	
	Memory issues	
	Time lapse	

A. The Qualities of a Credible Witness: Judging by Observing

Judicial preference for oral testimony rests on the belief that seeing witnesses' conduct on the stand enables the judges to determine their credibility more accurately. This belief in the ability to *see* truthfulness based on the body language or the manner of responding to questions is highly prevalent at the ICCTs, and is frequently cited as the main reason for a witness to be heard in person.[37] The international judges regularly refer to highly subjective behavioural characteristics[38] as informing them of a witness's credibility and helping to 'form an impression of whether the witness appeared to be trying to give a reliable account'.[39] Besides the general scientific critique, pointing out the lack of evidence that demeanour can be used to infer truthfulness,[40] even more issues arise when such determinations are made cross-culturally.[41] While the judges routinely engage in cross-cultural behavioural determinations with

37 E.g. Judgment, *Mucić et al.* (IT-96-21), Trial Chamber, 16 November 1998, § 597 states that demeanour is an important factor in credibility assessments and a leading reason for the preference for oral testimony; Judgment, *Karadžić* (IT-95-5/18), Trial Chamber, 24 March 2016, § 17 notes that live testimony enabled the chamber to observe witness's demeanour in the assessment of their testimony.

38 E.g. 'evasive', 'personality', 'conduct', 'reluctant', 'not forthcoming' see *Mladić* Trial Judgment, § 5280; Judgment, *Haradinaj et al.* (IT-04-84), Trial Chamber, 3 April 2008 ('*Haradinaj* Trial Judgment'), § 13; Judgment, *Brđanin* (IT-99-36), Trial Chamber, 1 September 2004 ('*Brđanin* Trial Judgment'), § 25; *Nigrabatware* Trial Judgment, § 203; Judgment, *Nahimana et al.* (ICTR-99-52), Trial Chamber, 3 December 2003 ('*Nahimana et al.* Trial Judgment'), § 333.

39 Judgment, *Šainović et al.* (IT-05-87), Trial Chamber, 26 February 2009 ('*Šainović et al.* Trial Judgment'), § 60.

40 See *supra* notes 13–16.

41 International organizations working in cross-cultural settings warn against the reliance on demeanour as a deception indicator: UNHCR, *Beyond Proof. Credibility Assessment in EU Asylum Systems* (2013), available online at https://www.unhcr.org/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html (visited 14 August 2019), at 189; European Asylum Support Office, *EASO Practical Guide: Evidence Assessment* (2015), available online at https://www.easo.europa.eu/sites/default/files/public/EASO-Practical-Guide_-Evidence-Assessment.pdf (visited 14 August 2019) at 11, 42.

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little to no recourse to research or expert testimony on the matter,[42] current empirical studies show that cross-cultural communicative errors are common and can lead *honest communicators to be perceived as liars.*[43]

Even more so, with courtroom setting and interpretation, what the judges perceive as manner or demeanour is a second-hand, emotionless version of an interaction between the lawyer and the witness, mediated by a third party (interpreter), not the witness retelling the events in their own way.[44] While interpretation is mentioned as a concern from time to time, demonstrating some awareness of its damage to effective communication, there is no acknowledgment of the impact of the legal setting itself. As the opposing parties strive to manipulate the witness's emotional state to make them appear less credible or less sympathetic, the likelihood of making invalid observations increases, especially with witnesses unfamiliar with western or adversarial courtroom procedures. The presence of the accused is another stressor, which, combined with cross-examination practices employed at the ICCTs, could seriously hamper perceived credibility of (vulnerable) witnesses.[45]

B. Reasons for Being (Un-)Truthful: Individual Circumstances of the Witness

Due to the nature and scope of the conflicts preceding international criminal prosecutions, it is nearly inevitable that fact witnesses will have some degree of connection to the crimes: they may have been personally victimized, have family members or members of the extended community fallen victim to the crimes, lost important religious or cultural monuments, or their livelihood. The suffering at the hands of the accused's group might have led certain victims to exaggerate the damage sustained, or to remain fiercely loyal to those who are perceived as defenders against a stronger aggressor.[46] Particular background of

42 The first expert to testify on demeanour and culturally specific behaviours was a socio-linguist, Mr. Ruzindana in *Akayesu.* See Judgment, *Akayesu* (ICTR-96-4), Trial Chamber, 2 September 1998 ('*Akayesu* Trial Judgment'), §§ 155–156. No other cultural behaviour experts were referred to in the witness assessment sections of any trial judgments. Another expert touching upon the assessment of demeanour was Prof. Wagenaar in *Kupreškić et al.* Here the Appeals Chamber overturned the Trial Chamber's reliance on Witness H, based on the Mr. Wagenaar's testimony. See Judgment, *Kupreškić et al.* (IT-95-16), Appeals Chamber, 14 January 2000 ('*Kupreškić et al.* Appeals Judgment'), § 138.

43 For an overview see Taylor et al., *supra* note 15; Vrij and Verschuere, *supra* note 15.

44 C.S. Namakula, *Language and the Right to Fair Hearing in International Criminal Trials* (Springer, 2014), at 101–138.

45 E. Henderson, 'Communicative Competence? Judges, Advocates and Intermediaries Discuss Communication Issues in the Cross-Examination of Vulnerable Witnesses', 9 *Criminal Law Review* (2015) 659–678.

46 Exaggeration on the victim-witness side mentioned in e.g. Judgment, *Strugar* (IT-01-42), Trial Chamber, 31 January 2005, § 7; *Šainović et al.* Trial Judgment, § 53. In *Limaj et al.* the trial judges noted that the cautious assessment applied to victim-witnesses, where cultural factors played a part in the amount and nature of evidence they were willing to provide, Judgment, *Limaj et al.* (IT-03-66), Trial Chamber, 30 November 2005 ('*Limaj et al.* Trial Judgment'), § 13.

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a witness, such as being known in a community, may also be conducive to fearing the accused, shying away from incriminating testimony.[47] Besides, witnesses may expect financial gains from the court.[48] Therefore, in addition to examining the witness's performance on the stand, judges often scrutinize the biographical, background information, especially the factors that may induce a witness to provide a partial version of the events: e.g. relationships, victimization and membership in social groups.

Besides direct victimization, the highly politicized context of conflicts, often pitting ethnic, national or religious groups against each other is conducive to enduring group loyalties and struggles for power or revenge, which remain after the armed violence has ended. This de-individualized view of the influence of conflict experiences is manifest in the initial rulings of the ICTY and the ICTR, where defence made broad allegations of bias on the part of all the witnesses for the prosecution.[49] Interestingly, while at the ICTY ethnic affiliations as a source of bias were discussed since the first trial judgment, its Rwandan counterpart shied away from any public discussions of ethnicity, the nature of the conflict notwithstanding. Similarly, the ICC to date has acknowledged the potential effects of victimization or affiliation to an ethnic/national group as a concern for witness credibility in a limited manner, constricting the analysis to group level, not as an inherent characteristic of individual witnesses to be assessed.[50]

The challenge in determining bias lies not only in inferring its existence, but even more so in deciding to what extent can partiality explain certain deficiencies in the testimony, or whether a witness can be trusted overall. Different Chambers have approached potentially biased testimony with varying degrees of caution and transparency of their decision-making.

C. 'Special Caution' Directive: Accomplices/Insiders

While the judges have not been indifferent to indicia of bias in relation to the crime-base or victim witnesses, the concerns expressed towards individuals

47 E.g. *Limaj et al.* Trial Judgment, § 15; *Haradinaj et al.* Trial Judgment, § 14.

48 E.g. in *Martić*, several witnesses were assessed with caution as they had sought financial assistance from the Office of the Prosecutor (OTP). The chamber consequently found their credibility to be doubtful, Judgment, *Martić* (IT-95-11), Trial Chamber, 12 June 2007 ('*Martić* Trial Judgment'), §§ 36–38. See also *Limaj et al.* Trial Judgment, § 28. Financial motivations were also prevalent at the ICTR, see C. Buisman, *Evidential Collusion*, A Compendium on the Legacy of the ICTR and the Development of International Law, 2014, available online at http://unictr.irmct.org/en/compendium-legacy-ictr-and-development-international-law (visited 14 August 2019), at 60–61.

49 See e.g. *Akayesu* Trial Judgment, §§ 138–141; see also Judgment, *Tadić* (IT-94-1), Trial Chamber, 14 July 1997 ('*Tadić* Trial Judgment'), §§ 540–541.

50 Judge Van den Wyngaert expressed her concern that the Majority in the *Katanga* trial chamber had extrapolated the collective characteristics of social and ethnic groups to the individual motivations of group members. See Minority Opinion of Judge Christine Van den Wyngaert, *Katanga* (ICC-01/04-01/07), Trial Chamber, 7 March 2014, §§ 257–258.

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(formerly) affiliated with the political groups or armed forces are significantly more extensive.[51] It is especially so if a witness is an insider (aka *accomplice*),[52] the type of witness present in majority of international crimes cases.[53] As stated by the ICTY judges in *Kordić & Čerkez*: it is 'essentially a matter of common sense' that witnesses who have vested interests may seek to inculpate others or exculpate themselves.[54] Hence, motive and bias are singled out as the most significant factors in the insiders' credibility assessments. While the general expectation is that such witnesses would lie to avoid self-incrimination, the judges have also identified the motivation to protect the armed forces (reputation), their colleagues, or even careers.[55] Insiders are also likely to have personal relationships with the accused or other individuals involved in the events, which may similarly affect their willingness to provide truthful and complete accounts out of fear or loyalty.[56]

In response to growing concerns over insiders' credibility, the ICTY judges set out a '*caution*' directive, whereby upon determining a witness to be an insider,[57] their evidence was to be relied upon only if

51 The problematic is highlighted in e.g. A. Whiting, 'In International Criminal Prosecutions, Justice Delayed can be Justice Delivered', 50 *Harvard International Law Journal* (2009) 323–364, at 349–358; C. Del Ponte, 'Investigation and Prosecution of Large-scale Crimes at the International Level', 4 *Journal of International Criminal Justice* (2006) 539–558.

52 A precise definition of insider or accomplice witness is not enshrined in the statutory frameworks at the ICCTs. Based on the jurisprudence, insiders are individuals who are in some way linked to the crimes listed in the indictment, the criminal organizations, or the suspect.

53 Chlevickaite and Hola, *supra* note 3; McIntyre, *supra* note 8.

54 Judgment, *Kordić and Čerkez* (IT-95-14/2), Trial Chamber, 26 February 2001 ('*Kordić and Čerkez* Trial Judgment'), § 629.

55 Career concerns mentioned as reasons for inconsistent testimony in e.g. Judgment, *Boškoski and Tarčulovski* (IT-04-82), Trial Chamber, 10 July 2008, § 13.

56 Relationships with the accused over time became one of the standard issues to factor in the partiality determinations, see e.g. *Martić* Trial Judgment, § 25; Judgment, *Bikindi* (ICTR-01-72), Trial Chamber, 2 December 2008, § 45; Judgment, *Muvunyi* (ICTR-00-55A), Trial Chamber, 12 September 2006 ('*Muvunyi* Trial Judgment'), § 8. Personal relationships deemed especially important for alibi witnesses, more prevalent at the ICTR: according to McDermott, alibi defences were introduced in over half of all ICTR contested cases, compared to fewer than 10 defendants (out of 110) at the ICTY. See Y. Mcdermott, 'The ICTR's Fact-Finding Legacy: Lessons for the Future of Proof in International Criminal Trials', 26 *CLF* (2015) 351-372, at 357.

57 At the ICTR, the degree of a witness's interest in the outcome of the case was the determining factor for being classified as a direct accomplice and being treated with a higher degree of caution than the *indirect* accomplices. The latter comprised prior convicted persons, detained individuals (not for the same crimes as the accused before the ICTR), those acquitted of the relevant criminal conduct, or facing charges similar to those of the accused. See e.g. Judgment, *Nchamihigo* (ICTR-01-63), Appeals Chamber, 18 March 2010 ('*Nchamihigo* Appeals Judgment'), §§ 47–48; Judgment, *Muvunyi* (ICTR-00-55A), Appeals Chamber, 29 August 2008, § 12; Judgment, *Ntagerura et al.* (ICTR-99-46), Appeals Chamber, 7 July 2006 ('*Ntagerura et al.* Appeals Judgment'), §§ 239–240. Among the *indirect accomplices* the detainees demanded the most scrutiny as their testimony may increase chances of early release, especially salient keeping in mind the poor conditions of some Rwandan prison facilities, see Buisman, *supra* note 48, at 2, referring to C. Tertsakian, *Le Chateau, The Lives of Prisoners in Rwanda* (Arves Books, 2008) 360–380.

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corroborated.[58] This blanket corroboration requirement was later abandoned and replaced by a directive to *demonstrate caution* by providing a reasoned opinion on 'why [the Chamber] accepted the evidence of witnesses who may have had motives or incentives to implicate the accused'.[59] The requirement of caution was confirmed in subsequent trial judgments,[60] and consolidated with the ruling that the 'Trial Chambers cannot merely state they exercised caution when assessing the evidence of an accomplice witness, but must establish that they in fact did so'.[61] An ICTR judge has claimed this to be 'perhaps the most important safeguard to ensuring the proper assessment of evidence'.[62]

Accordingly, in some of the later judgments, a *test* for assessing accomplice witnesses emerged, comprising a two-tiered approach. First, whether a witness would have a motive to provide false testimony, thus determining the degree of caution the judges should apply; and second, whether his/her testimony is satisfactory on the face of it. The general credibility and reliability criteria (e.g. demeanour, contradictions or inconsistencies) were followed by accomplice-specific concerns: whether the witness had made a plea agreement, the status of his/her own case (especially problematic if ongoing),[63] any other reason for holding a grudge, and acknowledgement of guilt.[64]

Even though the definitions of insider witnesses vary between the institutions, the approach towards their assessment is a clear example of cross-institutional consistency between the ICTY and the ICTR. However, while the ICC has also relied on insider-type testimony extensively,[65] the specific assessment criteria, as used in the other tribunals, are not established yet. At the ICC, biases and motives form the core of the insiders' assessment, and caution is not a requirement. That is understandable to an extent. The ICC, due to its much lower case-load and higher geographic dispersion of the cases, has heard fewer insiders of the most problematic profile: e.g. co-accused, witnesses who had taken a plea deal, or those against whom the proceedings

58 The trial chamber 'must determine to what extent his evidence is confirmed by other evidence', *Kordić and Čerkez* Trial Judgment, § 629.

59 *Muvunyi* Trial Judgment, §§ 14–15.

60 See e.g. Judgment, *Niyitegeka* (ICTR-96-14), Appeals Chamber, 9 July 2004, § 98; *Ntagerura et al.* Appeals Judgment, §§ 203–206; Judgment, *Krajišnik* (IT-00-39), Appeals Chamber, 17 March 2009, § 146.

61 Judgment, *Kanyarukiga* (ICTR-02-78), Trial Chamber, 1 November 2010, § 52, referring to *Nchamihigo* Appeals Judgment, § 46.

62 McIntyre, *supra* note 8, at 8.

63 First mentioned in *Simić et al.*, in relation to co-accused testimony, Judgment, *Simić et al.* (IT-95-9), Trial Chamber, 17 October 2003 ('*Simić et al.* Trial Judgment'), § 21.

64 Acknowledging guilt explicitly mentioned in *Popović et al.* Trial Judgment, § 51, referring to the testimony of Momir Nikolić.

65 For an overview and analysis of insider testimony at the ICC, see Chlevickaite and Hola, *supra* note 3.

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were ongoing. On the other hand, it is not hard to find indications of the ICC judges dismissing some warnings of insider's biases,[66] and ignoring the need for caution or corroboration.[67]

4. Testimonial Quality and Witness Competence: the 'Appropriate Allowances' Standard

While detecting deceit is notoriously unreliable, and psychological research on the subject is mostly a cautionary tale, the same cannot be said about assessing witness competence and observational sensitivity. Appropriately considering the factors relevant to how well a witness can observe, retain, and retell the information can be strongly aided by current scientific recommendations.

A. Socio-cultural Background of a Witness: Assessing the 'Culturally Inaccessible'[68]

The social and cultural differences between the fact-finder and the witness render credibility assessments an extremely complicated task, to the degree that Combs concluded: 'the cultural and linguistic ''distance'' between fact-finders and witnesses is so vast that it leaves fact-finders without any meaningful frame of reference'.[69]

As mentioned, these difficulties were first recognized by the *Akayesu* Chamber, upon the evidence provided by a prosecution expert witness Mr Ruzindana.[70] He explained a number of issues in relying on eyewitness accounts of Rwandans, i.e. the cultural taboos, mannerisms, inabilities to answer certain questions. The ICTR judgments that followed repeatedly referred to his testimony. According to some, after *Akayesu*, the potential influence of

66 Examples lie in dissenting and appeals decisions, e.g. regarding assessment of D03-88 in the *Ngudjolo*, the appeals judges ruled that the Trial Chamber barring the OTP from conducting investigations into D03-88 potential contamination disabled the OTP from finding the truth; see Judgment, *Ngudjolo* (ICC-01/04-02/12), Appeals Chamber, 7 April 2015, § 276.

67 Judge Christine Van den Wyngaert expressed concern about the Majority's treatment of several testimonies of insiders in the *Katanga* case, highlighting the inconsistent meaning of 'caution' in relation to several witnesses; *Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, §§ 156–173.

68 Zahar, *supra* note 1, at 607.

69 Combs, *supra* note 22, at 261–262.

70 The Trial Chamber interpreted Mr. Ruzindana's evidence to mean that no adverse conclusions of *witness credibility* can be drawn from a witness's 'reticence and circuitousness in responding to questions which required specificity as to dates, times, distances, locations or where witnesses seemed to be inexperienced with maps, films or graphic representations of localities'. See *Akayesu* Trial Judgment, §§ 155–156.

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Rwandan culture on a witness's manner of and ability to provide testimony of high standard became an incontestable 'fact of common knowledge'.[71] Meanwhile, the situation was vastly different at the ICTY. Here, culture was ignored until the cases concerning Kosovo. In *Limaj et al.*, expert evidence explaining Albanian cultural values of loyalty, family and honour were used to shine light on the unwillingness of certain witnesses 'to speak the truth in court about some issues'.[72] The chamber claimed that some of these factors were applicable to former KLA (Kosovo Liberation Army) members, but also to victim witnesses, prone to exaggerations or 'speaking as if with one voice'.[73] Cultural concerns were later mentioned in other cases involving witnesses of ethnic Albanian roots, sometimes resulting in the chamber's inability to accept their evidence as fully reliable.[74]

The role of culture has received surprisingly meagre consideration at the ICC. Even though all the cases before the ICC to date have involved non-Western witnesses of various national and ethnic affiliations, the 'General considerations of evidence' sections contain no socio-cultural aspects or references to experts on the cultural, societal, or linguistic interpretations.[75] As an example, a number of alleged former child soldiers testified in the trial of a Congolese militia leader Thomas Lubanga. While a lot of attention was given to their age assessments and the potentially damaging role of intermediaries, the judges did not explore the possibility that the witnesses were uneasy for reasons beyond their understanding.[76] More awareness is evident in *Katanga*, where the judges in fact reprimanded the prosecution for not conducting thorough enough investigations into the socio-cultural backgrounds of the witnesses, as it would have helped the chamber to assess their credibility.[77] It remains to be seen whether the culture-related witness evidence in the *Ongwen* trial will influence the judges' approaches to examining the truthfulness and

71 R.A. Wilson, 'Expert Evidence on Trial: Social Researchers in the International Criminal Courtroom', 43 *American Ethnologist* (2016) 730–744, at 736. Seen in e.g. Judgment, *Niyitegeka* (ICTR-96-14), Trial Chamber, 16 May 2003, § 273.

72 The expert report was written by an anthropologist Stephanie Schwander-Sievers. See *Limaj et al.* Trial Judgment, § 13.

73 *Ibid.*, § 15.

74 *Haradinaj et al.* Trial Judgment, § 11.

75 The *Ntaganda* Trial Judgment approach to evidence refers to culture in explaining the stigma of rape victims in the DRC, though making it clear that it does not consider it to be DRC-specific: 'Although noting that Ms Maeve Lewis's experience is based on areas outside the DRC . . ., the Chamber is of the view that it has nonetheless been acquired in comparable post-conflict areas and is thus relevant to the present case.' *Ntaganda* Trial Judgment, fn.192.

76 The Trial Chamber called a psychologist who gave expert testimony on the psychological impact of a child having been a soldier, though it was focused on trauma's effect on memory; *Lubanga* Trial Judgment, § 105.

77 *Ngudjolo* Trial Judgment, §§ 121–123.

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accuracy of testimonies.[78] With the trial still ongoing, the criticism for 'brushing over' the non-Western aspects of the testimonies, is starting to arise.[79]

Given the limited local experience of the majority of the international judges,[80] which is even more complex at the ICC considering its geographical scope, it is difficult to see how, without reference to experts, the judges can assess what is 'normal and credible',[81] and avoid the biases inherent in cross-cultural, multi-lingual assessments.[82] The likely application of socially and culturally inapplicable standards of e.g. demeanour 'threatens the integrity of the court's assessment of evidence, and the soundness of any inferential conclusions drawn from that, including the court's final verdict'.[83]

B. Trauma and PTSD Impact on Memory

Unsurprisingly, the judges at the tribunals repeatedly noted that many witnesses before them were likely traumatized by the events they were to provide the testimony on. While societal trauma also had its place in the courtroom,[84] the most pertinent issue in relation to the witnesses was how the individual suffering and post-traumatic stress disorders may have influenced the quality of witness's memories and their ability to express them. Such assessments were

78 Anthropologists were called by both the prosecution (Prof. Tim Allen, see Transcript, *Ongwen* (ICC-02/04-01/15), Trial Chamber, 17 January 2017) and the defence (Kristof Titeca, see Transcript, *Ongwen* (ICC-02/04-01/15), Trial Chamber, 19 November 2011); Ugandan psychiatrists Seggane Musisi and Catherina Abbo also testified about Acholi culture and trauma (Musisi: Transcript, *Ongwen* (ICC-02/04-01/15), Trial Chamber, 23 May 2018; Abbo: Transcript, *Ongwen* (ICC-02/04-01/15), Trial Chamber, 28 March 2018).

79 K. Titeca, 'I Testified at the Trial of One of Joseph Kony's Commanders. Here's What the Court Didn't Understand', *The Washington Post*, 17 January 2019, available online at https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/17/i-testified-at-the-icc-trial-of-one-of-joseph-konys-commanders-heres-what-the-law-doesnt-seem-to-understand/ (visited on 14 August 2019).

80 Currently, but also throughout the ICTY and ICTR functioning, there has been no judge from Rwanda or the former Yugoslavian states at the ICTY/ICTR/International Residual Mechanism for Criminal Tribunals (IRMCT), and no judge from a situation country in the trial chambers of the ICC. ICC, 'Who's Who', available online at https://www.icc-cpi.int/bios-2 (visited on 14 August 2019); United Nations International Residual Mechanism for Criminal Tribunals, 'Judges', available online at https://www.irmct.org/en/about/judges (visited 14 August 2019).

81 L.A. Fujii, 'Shades of Truth and Lies: Interpreting Testimonies of War and Violence', 47 *Journal of Peace Research* (2010) 231–241, at 240.

82 E.g. truth-bias when observing native-language speakers, see G. Oxburgh et al. (eds), *Communication in Investigative and Legal Contexts* (Wiley Blackwell, 2016), at 279.

83 R. Cryer, 'A Message from Elsewhere: Witnesses before International Criminal Tribunals', in P. Roberts and M. Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Bloomsbury, 2007), at 390.

84 The ICTY admitted evidence from trauma experts describing the national and intergenerational effects of being victimized: See e.g. Transcript of Hearing with Dr Ibrahimefendić, *Plavšić* (IT-00-39 & 40/1), Trial Chamber, 16 December 2002; Transcript of Hearing with Dr Ibrahimefendić, *Mladić* (IT-09-92-T), Trial Chamber, 18 July 2013.

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especially important for the evaluation of identification evidence, where high-stress conditions could render the testimony unsafe to rely on (see Section 5).[85]

Recognizing the difficulty of psychological appraisals in the courtroom, expert evidence on the issue was sought already in the early years. A number of psychologists and psychiatrists provided their opinions on whether, and how, trauma could affect the ability of a witness to remember and communicate the past.[86] Ranging from wholesale claims that traumatized witnesses are entirely unreliable, to studies demonstrating the opposite effects, these experts provided the judges with more choice than guidance. Evidently, after being presented with opposing claims from the experts for the defence and the prosecution, the trial chamber in *Kayishema and Ruzindana*, ruled: 'different witnesses, like different academics, think differently'.[87] Thereupon they came to their own conclusions: 'testimonies cannot be simply disregarded because they describe traumatic and horrific realities. Some inconsistencies and imprecision in the testimonies are expected and were carefully considered in *light of the circumstances faced by the witnesses'*.[88] The chambers also recognized the effect detention may have had on witness memory,[89] as well as the difficulty in remembering 'repetitive, continuous, or traumatic events',[90] and accordingly allowed for a certain degree of imprecision.[91] Variations of these positions are repeated throughout the judgments at the ICTR and the ICTY, without further reference to expert evidence or scientific knowledge.[92] Perhaps, due to the

85 Two identification/recognition witnesses were found unreliable in *Kupreškić et al.'* citing the 'the appalling ordeal,' and the 'most stressful conditions imaginable' in relation to the circumstances of their observations, Judgment, *Kupreškić et al.* (IT-95-16-T), Trial Chamber, 14 January 2000, § 427.

86 Usually, such experts did not engage in individual psychiatric evaluations of the witnesses, and provided evidence of a more general nature, or the effects of trauma on certain populations e.g. in *Lubanga*, the judges praised expert witness evidence on the psychological impact of a child having been a soldier and the effect of trauma and memory for being useful 'when the Chamber assessed the accounts of the individuals in this category'. *Lubanga* Trial Judgment, § 105. In *Ntaganda*, the chamber took into account the evidence on trauma and memory from a forensic psychology expert Prof. John Yuille, but also, curiously, cited the opinion of forensic anthropology expert and the ICC Office of the Prosecutor consultant Dr Derek Congram in relation to the effects of trauma and time lapse on witness memory (*Ntaganda* Trial Judgment, fn. 172 and fn. 2022).

87 Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, § 74.

88 *Ibid.*, §75. Similarly, the judges made final determinations upon hearing the experts for both sides in Judgment, *Furundžija* (IT-95-17/1), Trial Chamber, 10 December 1998 ('*Furundžija* Trial Judgment'), §§ 108–109, emphasis added.

89 See e.g. Judgment, *Kunarac et al.* (IT-96-23 & 23/1), Trial Chamber, 22 February 2001, § 564: 'The fact that these witnesses were detained over weeks and months without knowledge of dates or access to clocks, and without the opportunity to record their experiences, only exacerbated their difficulties in recalling the detail of those incidents later'.

90 See e.g. Judgment, *Kunarac et al.* (IT-96-23 & 23/1), Appeals Chamber, 12 June 2002 ('*Kunarac et al.* Appeals Judgment'), § 267; Judgment, *Naletilić and Martinović* (IT-98-34), Trial Chamber, 31 March 2003, § 10; Judgment, *Vasiljević* (IT-98-32), Trial Chamber, 29 November 2002, § 21; *Furundžija* Trial Judgment, § 113.

91 *Simić et al.* Trial Judgment, § 22. See also *Brđanin* Trial Judgment, § 25: lack of peripheral details do not necessarily discredit the evidence.

92 Cryer, *supra* note 83, at 397, citing *Kunarac et al.* Appeals Judgment, § 324.

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adversarial nature of the international criminal trials, one should not expect that experts called by the parties would offer analogous theories, thus the judges maintain a non-committal position as well. Such a stance allows for significant flexibility in deciding how to use the indicia of trauma. It is commonly employed to 'improve' the reliability of the account: some inconsistencies, lack of detail, or evasiveness can be explained away by the suffering experienced by the witness, even without individual examinations by mental health specialists.[93] On the other hand, somewhat circuitously, the judges are also free to dismiss a witness as not credible if the consequences of trauma appear to be too extensive.

Such an approach partially reflects the current state of understanding of the relationship between trauma and memory. In a nutshell, trauma-exposed individuals show significantly less memory specificity.[94] Thus, requiring highly detailed testimonies or penalizing omissions could be harmful to the process of testifying.[95] However, there is no reason to believe that traumatic memories are weaker than those for positive or neutral events: in fact, central details for negative events are likely to be just as strong, or even stronger.[96] One of the most important factors to consider in this respect is the stress that may be associated with the event to be recalled: the anxiety and stress experienced by a witness during attempted recall may impair attention and memory processes, and thus needs to be monitored during the testimonies.[97] The more concerning practice is the lack of individual psychological or psychiatric evaluations of the witnesses to determine the extent of traumatization or the existence of any stress-related disorders.[98] It effectively bars the judges from accurately interpreting testimonial deficiencies in line with current understanding of trauma and memory.

93 It is to be noted that generally, where the judges refer to trauma, they do not do so on the basis of medical evidence that a particular witness was in fact traumatized. Exceptions to this certainly exist, see e.g. *Furundžija* Trial Judgment, §§ 99–109.

94 P. Spachtholz, C. Kuhbandner, and R. Pekrun, 'Affect Influences Feature Binding in Memory: Trading between Richness and Strength of Memory Representations', 16 *Emotion* (2016) 1067–1073; T.J. Barry et al., 'Meta-Analysis of the Association between Autobiographical Memory Specificity and Exposure to Trauma', 31 *Journal of Traumatic Stress* (2018) 35–46.

95 B. Graham, J. Herlihy, and C.R. Brewin, 'Over General Memory in Asylum Seekers and Refugees', 45 *Journal of Behavior Therapy and Experimental Psychiatry* (2014) 375–380; C.R. Brewin, 'Memory and Forgetting', 20 *Current Psychiatry Reports* (2018) 87–95.

96 J.A. Bisby et al., 'Negative Emotional Content Disrupts the Coherence of Episodic Memories', 147 *Journal of Experimental Psychology* (2018) 243–256.

97 K.A. Deffenbacher et al., 'A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory', 28 *Law and Human Behavior* (2004) 687–706; Howe, Knott and Conway, *supra* note 18, at 79.

98 It has been raised by the defence in e.g. *Lubanga*, where the chamber's expert testified that none of the witnesses were proven to have stress disorders, while at the same time allowances for their traumatic experiences and their effects on the memory were considered. *Lubanga* Trial Judgment, § 478.

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C. Time Lapse, Repeated Interviewing, and Memory

Memory related concerns also feature prominently as an explanatory factor for witnesses' testimonies lacking in detail, containing contradictions or inconsistencies. The conditions surrounding the testimonies at the ICCTs are ripe for misremembering: witnesses often testify about potentially traumatizing events that took place years ago, are interviewed multiple times (and sometimes appear at multiple trials), and the high-profile of the events increases the risk of post-crime information and contamination. In these circumstances the judges acknowledge that some inconsistencies between the various pre-trial statements and the oral testimony may be caused by different approaches by investigators, distinct questions being asked, or witnesses simply remembering more details at a later time, and seem not to take issue with it unless inconsistencies pertain to central details in the testimony.[99] The judges also examine any explanations provided by the witness on the stand and the circumstances in which these inconsistent statements have been tendered, though they are constrained by the common use of witness statements produced by the investigators, with no transcripts of the actual interviews. The common approach is to treat inconsistencies between the testimony and non-judicial (e.g. statements to the NGOs, victim application forms) statements less seriously than inconsistencies between successive statements or testimonies.[100] Thus, with time, we can see that while the initial allowances for inconsistencies, provided for in *Akayesu* and *Tadić*, are continuously reinstated, they are applied with more rigour, even as the trials grow increasingly distant in time from the experiences of the witnesses.[101]

While certain judges regard matters of memory as *common sense* knowledge, where no expertise is needed,[102] it looks like the expert witness testimonies have left their mark, judging by the contents of their expert reports and the judicial criteria developed thereafter.[103] The approach towards evidence of

99 See e.g. *Lubanga* Trial Judgment, § 102: 'allowance for imprecisions, implausibilities and inconsistencies;' *Kunarac et al.* Trial Judgment, § 564: 'the Trial Chamber has not treated minor discrepancies … as discrediting their evidence'. Similar allowances are repeated throughout the ICTY, ICTR, ICC jurisprudence.

100 See e.g. *Ntaganda* Trial Judgment, § 85; *Simić et al.* Trial Judgment, § 24; *Akayesu* Trial Judgment, § 137.

101 An outlier in the approach is the chamber in *Stakić*, which expressly stated their preference for documentary evidence: 'Apart from the fact that much time has passed since 1992, the Trial Chamber is aware of the limited value of witness testimony in general,' Judgment, *Stakić* (IT-97-24), Trial Chamber, 31 July 2003, § 15.

102 E.g. Judge May in *Furundžija* questioning the value of Prof. Loftus testimony: 'Do we need an expert to tell us that memories fade or that if somebody received some information after an event, that it may affect their memory or their recall? … these are all matters which, even for a jury … are common knowledge.' Transcript, *Furundžija* (IT-95-17/1), Trial Chamber, 22 June 1998, at 610–611.

103 For instance, allowing minor inconsistencies and less focus on peripheral details is in line with the testimony of Dr Elisabeth Loftus who claimed that a memory of an event will start to fade over time and become more vulnerable to post-crime information (contamination); in case of violent occurrences core details are more likely to be retained while peripheral details are

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historical nature, memories of repeated events, and focus on the details central to the case, are in line with at least some scientific evidence on the topic, which supports the notion that it is nearly impossible to produce consistent accounts over time.[104] The *Ntaganda* judgment is a welcome addition in this regard, where the trial judges, with deference to psychological expert testimony, explicitly allowed for delayed reporting of rape with no effect to the witness's credibility.[105]

Nevertheless, Zahar argues that judicial *psychologising* about memory and its impact on the quality of testimony may be 'no more than a rhetorical device to eliminate an evidentiary difficulty'.[106] It is not difficult to see how this claim comes about, as the judges use psychological arguments inconsistently, often foregoing explanations of the link between testimonial deficiencies and time lapse or another impediment to remembering, or assessing memory on a group-level.[107] As such, treating inconsistencies in accounts from years ago with more leniency may actually not lead to more reliable fact-finding if the judiciary does not endorse a thorough and consistent approach in individual assessments of the causes and consequences of inconsistencies.

5. Reliable Identifications: Objective and Competent?

Overall, one of the most contentious types of evidence is witness identification/recognition of the accused. Unreliable identifications have led to numerous false convictions domestically,[108] and generated heated debates at the ICCTs.[109] The early-years assessments of identifications at the ICCTs provide a good example of judicial disdain towards established, empirically supported practices: the judges, upon hearing expert recommendations, opted to apply their own reasoning instead, openly accepting identification procedures of sub-

more likely to be forgotten or not reported. Transcript, *Furundžija* (IT-95-17/1), Trial Chamber, 22 June 1998, at 593–626.

104 For an overview of psychological research into cross-statement consistency, see F. Gabbert et al., 'The Role of Initial Witness Accounts within the Investigative Process', in Oxburgh et al. (eds), *supra* note 82, 107–131. Also see B.S. Cooper et al. (eds), *Applied Issues in Investigative Interviewing, Eyewitness Memory, and Credibility Assessment* (Springer, 2013); Howe, Knott and Conway, *supra*, note 18, at 63.

105 The judges made reference to the evidence of psychological expert Ms Maeve Lewis and other witnesses familiar with the DRC's cultural context, *Ntaganda* Trial Judgment, § 88, fn.192.

106 Zahar, *supra* note 1, at 608.

107 As evidenced by *Kayishema and Ruzindana* Trial Judgment, §§ 73–75; see also C. Van den Wyngaert, *supra* note 50, at § 152: 'Majority sometimes seems eager to explain away contradictions and inconsistencies on the basis of the fact that a long time has passed since the events took place, or indeed that witnesses may have suffered trauma … .'

108 S.R. Gross, 'What we Think, What we Know, and What we Think we Know about False Convictions', 14 *Ohio State Journal of Criminal Law* (2017) 753–786; see also The Innocence Project, 'DNA Exonerations', available online at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (visited 14 August 2019).

109 See e.g. Judgment, *Limaj et al.* (IT-03-66-A), Appeals Chamber, 27 September 2007. Both the defendants (§§ 18–35) and the prosecution (§§ 172–219) alleged improper evaluation of identification evidence by the Trial Chamber.

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par quality.[110] On this point Prof Wagenaar, who provided his testimony at the ICTY and the ICTR no less than six times, issued stinging critique, calling the identification procedures at the ad hoc tribunals abysmal, in violation of 'even the basic principles developed in many years of research in the area of psychology and law'.[111]

This state of affairs did not hold for long: the extent of highly contested evidence in a number of cases, initiated by the defence, led to increased judicial examination of and deference to domestic procedures and case law,[112] as well as expert witness testimony.[113] Assessment of visual identifications is the area with the most pronounced learning and consolidation in approach within and between the ad hoc tribunals. The latest criteria applied at the ICTY/ICTR contain a holistic mix of indicators, not too astray from recommended best practices.[114] Importantly, these criteria were not issued with an advisory function in mind: following the *Kupreškić et al.* appeals judgment, the ICTY trial chambers were directed to provide a reasoned opinion in cases where identification evidence made under difficult circumstances is used to establish guilt.[115] This direction, as well as the guidance on factors to consider, has been lost on the ICC until the *Bemba* trial judgment.[116] At the behest of the defence, the *Bemba* trial chamber presented an elaborate framework for the assessment of various types of identifications, relying almost exclusively on the ad hoc tribunals' jurisprudence.[117]

Trials of high-ranking accused, remote from the scene of the crime, also rest on evidence establishing their responsibility based on intercepted communications. Recordings of the accused demonstrating their involvement in ordering the commission of the crimes or their knowledge of the crimes at the time of their commission has been introduced by the prosecutors at the ICTY[118] and

110 *Tadić* Trial Judgment, § 550.

111 W.A. Wagenaar, 'Expert Witness in International War Crimes Tribunals', 15 *Psychology, Crime & Law* (2009) 583–596 at 583.

112 Extensive references to domestic jurisprudence present in *Kupreškić et al.* Appeals Judgment, § 40; *Kayishema and Ruzindana* Trial Judgment, § 71; *Kunarac et al.* Trial Judgment, § 561; *Limaj et al.* Trial Judgment, §§ 16–20.

113 Experts in witness identification/recognition were called in i.e. *Tadić*, *Furundžija, Kayishema & Ruzindana*. See Transcript, *Tadić* (IT-94-1), Trial Chamber, 25 October 1996, at 7692–7751; Transcript, *Furundžija* (IT-95-17), Trial Chamber, 22 June 1998, at 593–626; Transcript, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 2 July 1998, at 5–123.

114 See identification criteria as listed in Judgment, *Nyiramasuhuko et al.* (ICTR-98-42), Appeals Chamber, 14 December 2015, §§ 811–819. It includes most of the factors contained in the recommendations of e.g. Wells et al., *supra* note 18.

115 Judgment, *Lukić and Lukić* (IT-98-32/1), Appeals Chamber, 4 December 2012, § 136, referring to *Haradinaj et al.* Appeals Judgment, § 152. See also Judgment *Kvocka et al.* (IT-98-30/1), Appeals Chamber, 28 February 2005, § 24; *Kupreškić et al.* Appeals Judgment, § 39; Judgment, *Renzaho* (ICTR-97-3), Appeals Chamber, 16 February 2006, § 527.

116 See *Bemba* Trial Judgment, § 240: 'other chambers of this Court have considered evidence identifying individuals, in particular, alleged perpetrators, but did not set out general principles on how to assess such evidence'.

117 *Bemba* Trial Judgment, §§ 240–244; *Ntaganda* Trial Judgment, §§ 71–74.

118 One of the pivotal cases for intercept use was *Krstić*, where the accused referred to the killing of Bosnian Muslim men; Judgment, *Krstić* (IT-98-33), Trial Chamber, 2 August 2001, § 383.

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the ICC.[119] However, determining that the voice in the audio is indeed that of the accused is a task more complex than painted by the prosecutions at the ICCTs. Here, though often strongly countered by the defence,[120] the radio operators' competence to accurately recognize/identify individuals in the audio is commonly assessed based on their own confidence in their abilities. In the meantime, the ICC continues to call intercept/radio operators to authenticate the intercepts and confirm the identities of the individuals recorded.[121] So far, their work experience and familiarity with the accused also appear to be the determining factors establishing the reliability of the authentications. These *common sense* approaches of questionable validity to the extremely complex type of voice identification evidence are in contrast to expert recommendations available domestically.[122]

6. Conclusion: Towards a 'General Framework for Witness Assessments' at the ICCTs?

With this article, we reviewed all trial judgments issued by the ICTY, ICTR and ICC, and systematized the criteria judges have claimed to apply in their assessments of witness testimonies over time. We discussed their chronological development, implementation and the scientific validity of the criteria used to assess credibility of witnesses and reliability of their evidence, and identified the areas where more empirically grounded, standardized procedures would be most beneficial to the fact-finders.

The practice of judicial assessment of witnesses at the ICCTs to date has been, at best, variable. Throughout the analysis, we saw credibility and reliability evaluations based on a combination of the judges' beliefs and experiences, national and international jurisprudence, and expert witness evidence. Regrettably, by far the most often we found the judges assessing a certain credibility or reliability issue without any reference to scientific knowledge or precedent: majority of the criteria are based on a *common sense* reasoning of

Intercept operators are listed as a separate category of witnesses in the ICTY, *Manual on Developed Practices*, 2009, at 76.

119 Intercept evidence is cited in e.g. *Bemba* Trial Judgment, §§ 213–225; Prosecution's Pre-Trial Brief, *Ongwen* (ICC-02/04-01/15), Trial Chamber IX, 6 September 2016, §§ 70–77.

120 The defence in *Mladić* challenged the basis for accurate voice recognitions, as prosecution's intercept operators provided identifications without any evidence of their methodology. Notice of Filing of Public Redacted Final Trial Brief, *Mladić* (MICT-13-56), Appeals Chamber, 8 March 2018, §§ 2659–2665. See also Decision on Admissibility of Intercepted Communications, *Popović et al.* (IT-05-88), Trial Chamber, 7 December 2007, § 15, §§ 42–43.

121 Prosecution's Pre-Trial Brief, *Ongwen* (ICC-02/04-01/15), §§ 70–77.

122 Voice identification assessment recommendations: G. Edmond et al., 'Unsound Law: Issues with (''Expert'') Voice Comparison Evidence', 35 *Melbourne University Law Review* (2011) 52–112; C. Sherrin, 'Earwitness Evidence: The Reliability of Voice Identifications', 52 *Osgoode Hall Law Journal* (2015) 819–862; Judicial Commission of New South Whales, 'Identification evidence - voice identification', available online at https://www.judcom.nsw.gov.au/publications/benchbks/criminal/identification_evidence-voice.html (visited 30 April 2019). For visual identification assessment recommendations: see *supra* note 18.

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individual chambers. The courts are attempting complex psychological assessment techniques without any training in psychology, and overlooking or explaining away a great number of inconsistencies that would be serious enough to destroy a witness's credibility in a domestic courtroom.[123] Besides the lack of empirical basis for some of the criteria utilized, it appears that the ICTY and the ICTR demonstrate more direct cross-institutional learning, which is lacking at the ICC. Until recently, none of the indicators utilized by the ICC judges were included with reference to external sources or jurisprudence: besides identification evidence criteria, all five trial judgments directly cite only the ICC precedent.[124] It appears that the ICC judges favour their perceived independence and intra-institutional consistency over reliance on jurisprudence.

It is high time to stop calling international criminal justice an 'emerging system', justifying its lack of established practices due to the novelty of the task. In over two decades of modern ICCTs, the methodologies of evidence evaluation have improved considerably, and the fact-finding practices of future international criminal proceedings must be further guided by the best standards available. While the exercise of judicial independence and a flexible approach towards evidence is indispensable, the necessity for consistent guidelines, informed by current scientific understanding of witnesses, their memory and best practices to facilitate recall in a courtroom environment, is ever more important. Although it would be far-fetched and even impossible to expect standardization on all aspects of witness assessment, certain areas: i.e. assessment of trauma, time lapse, memory and stress disorders, and validity of identifications, would vastly benefit from the input of e.g. (cross-cultural) psychologists and psychiatrists. Other aspects (i.e. culture, bias, motivations) need to be addressed in-house, with extensive communication between the office of the prosecutor and the judiciary on the information necessary to be collected (e.g. interview transcripts instead of summaries, Article 56 hearings, expert evidence on local culture), and inclusion of more staff with local experience at all organizational levels, to make an informed judicial assessment at trial stage. Re-introduction of caution requirement for insiders, with specific guidance on what it would entail (corroboration or a direction to provide reasoned opinion) would also be beneficial for the reliability of judicial fact-finding and the predictability of a court's work, and could help bridge the diverging approaches from different judicial traditions. Development of such principles and guidelines would not aim at constraining judicial freedoms *per se*, but would contain guidance designed to assist international judges in their role as facilitating fair and predictable outcomes satisfying the standards expected from them. Furthermore, it could help to move away from the intangible, non-replicable

123 Combs, *supra* note 22, at 241.

124 E.g. *Ngudjolo* and *Katanga* trial chambers refer to the assessment criteria of *Lubanga* Trial Judgment only, see *Katanga* Trial Judgment, § 83, *Ngudjolo* Trial Judgment, §§ 49–51, § 87. *Bemba* Trial Judgment, issued several years later, refers to *Lubanga* Trial and Appeals Judgments, *Katanga* and *Ngudjolo* Trial Judgments, i.e. all the ICC judgments issued prior to *Bemba*; see *Bemba* Trial Judgment, § 228.

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and non-transparent decision tools, be it standards of proof or common sense, and allow for critical evaluation of judicial decision-making.[125] Ultimately, the proposed changes could help to ameliorate some of the legitimacy concerns currently voiced against the ICC by making the judiciary more transparent and more accountable to the public.

In this study we have confined ourselves to the analysis of *what the judges say they do*, that is, the criteria they say they apply at the outset of the judgments. We hereby stress the need for systematic analysis of whether, and how, the various credibility and reliability indicators are applied in practice, and how they affect the ultimate credibility and reliability determinations of individual witnesses. Only then, a fuller picture of international witness assessments can emerge. This article is furthermore confined to judicial witness assessments, while undoubtedly much of the lessons from (forensic) psychology and criminology could be constructively applied at investigative stages, e.g. assessments of interviewing techniques, various modes of interviewing, or deception detection. A study into the applicability of currently used techniques in cognitive interviewing or self-administered interviews for the context of international criminal investigations would therefore be also timely.

125 As expressed by S. de Smet, 'By providing more information about the information, the receiver of the report is given maximal insight in the justifications for each of the findings and is thereby able to critically evaluate them', *supra* note 23, at 136.

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