



E15 Proof of Death: An Analysis of the Methods That the International Criminal Tribunal (ICTY) for the Former Yugoslavia Used to Establish Death

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By attending this presentation, attendees will learn how the International Criminal Tribunal for the former Yugoslavia's Trial Chambers establishes a victim's death via witness statements and exhibits. Specifically, the attending will learn how the Trial Chambers has changed its focus on particular types of evidence after the judges amended the ICTY's Rules of Procedures and Evidence in 2001.

This presentation will impact the forensic community and/or humanity by illustrating how forensic evidence is applied and relied upon in international prosecution.

Forensic evidence has been used to establish the occurrence of human rights violations in various countries, such as Rwanda, Central America, Argentina, and the Balkans. Since the 1990's, forensic scientists have collected evidence to aid the Office of the Prosecutor at the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) in establishing victim's deaths in war crimes, genocide, and crimes against humanities. In 2001, the judges at the ICTY amended their Rules of Procedure and Evidence to incorporate Rule 92*bis*, which allowed the Trial Chambers to admit confidential and lay witness written statements to establish a victim's death. The purpose of Rule 92*bis* was to shorten the trial process; however, this rule indirectly impeded the use of expert witness testimony and forensic exhibits in establishing a victim's death.

Methods: This study analyzed 594 citations, which included either witness statements or exhibits, from 13 homicide cases between 1997 and 2004. The data included 370 witness statements, which was roughly 63 % of the study. These citations were categorized into three different groups: confidential witnesses (n=189), expert witnesses (n=56), and lay witnesses (n=125). The data also included 224 exhibits. Thirty-seven percent of the study discussed three distinct types of exhibits: confidential exhibits (n=37), forensic exhibits (n=121), and non-forensic exhibits (n=66).

Each type of data was analyzed during three time periods: 1997-2000, 2001, and 2002-2004. These three time periods represented pre-Rule 92*bis*, a transition year, and post-Rule 92*bis* opinions. These classifications were critical because it evaluated the data in relation to the ICTY's Rules of Procedure and Evidence amendment. This perspective determined if a fluctuation existed in the Trial Chambers' citations before and after Rule 92*bis*. Nonparametric statistical analysis, the Mann-Whitney U test, was performed because of the small sample size.

Results: Throughout the eight years, the Trial Chambers favored witness testimony over exhibits. During the three time periods, the Trial Chambers' citation to witness testimony ranged from either 57% to 69% of the total number of citations. The fluctuation of witness citations between pre- and post-Rule 92*bis* judgments were not statistically significant because the Trial Chambers only decreased the number of citations by 10%.

The Trial Chambers preferred particular types of witnesses in post-Rule 92*bis* judgments. In both pre- and post-Rule 92*bis* judgments, the confidential witnesses were the most frequently cited types of witness statement. The Trial Chambers increased the number of citations to confidential witnesses by 37% since Rule 92*bis*. Moreover, 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. Only a 15% decrease in lay witness citations existed between pre- and post-Rule 92*bis* judgments.

The Trial Chambers decreased the number of expert witness citations since Rule 92*bis*. Expert witness citations decreased by 81% from pre- and post-Rule 92*bis* judgments. This decrease in the number of citations resulted in a slip in ranking for 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.

On an analytical level, the increase or decrease in confidential, lay, and expert witness citations were not statistically significant; however, this result conformed to the researcher's expectations because the fluctuation in the total number of witness citations was not statistically significant.

Since Rule 92*bis*, the Trial Chambers has altered their attitudes on exhibits. First, the Trial Chambers definitely increased its reliance on exhibits because the Trial Chambers increased the frequency of exhibit citations by 23% from pre- and post-Rule 92*bis* judgments. This resulted in a significant increase in the total number of exhibit citations from pre- and post-Rule 92*bis* judgments. Specifically, the Trial Chambers increased the number of non-forensic exhibit citations by five-hundred 88% between 1997 and 2000 time period and 2002 and 2004 time period, which resulted in a significant increase in the number of citations.

Second, the Trial Chambers decreased the number of citations to forensic exhibits by 44% from pre- and post-Rule 92*bis* judgments. 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 forensic exhibit citations during the three time periods. Forensic exhibit citations were not increased 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



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post-Rule 92*bis* judgments as in pre-Rule 92*bis* judgments.

Finally, the Trial Chambers cited more confidential 92*bis* statements and standard 92*bis* statements than forensic exhibits to establish death in post-92*bis* judgments. The Trial Chamber cited 38 92*bis* statements while citing only 36 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 25 more 92*bis* statements within a two year time period. 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 standard 92*bis* statements were statistically significant between pre- and post-Rule 92*bis* judgments.

Discussion and Conclusion: Eyewitness testimony and forensic evidence possess 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 credibility. 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 provide the courts with the most accurate information.

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. 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.

International Criminal Tribunal, Forensic Evidence, Legal Proceedings