Symposium on The Legacy of The International Criminal Tribunal for Rwanda (ICTR)
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13.30-16.00 Panel 2 Sexual Violence Crimes and Assessment of Evidence in International Tribunals – 10 minute presentation

Topic: ICTR – Assessment of Evidence

Introduction

The evaluation of evidence is central to the work of the ICTR and other courts, and it is anything but straightforward. In the following I will provide an overview of the legal framework that underpins the ICTR's approach to the fact-finding process, some of the evidentiary challenges it has faced in dealing with witness evidence in particular and how it has endeavored to meet those challenges. I will then consider some of the criticism leveled primarily at the ICTR's reliance on witness testimony and conclude by suggesting that whatever view one takes of the evidentiary rigor of the work of the ICTR, it has left a valuable legacy for other international courts.

Legal Framework

The ICTR has handled the evaluation of evidence through an interesting hybrid approach drawing on both civil and common-law traditions. The presentation of evidence has followed the adversarial model, whereas the rules governing the admissibility and evaluation of evidence may be seen as more akin to the inquisitorial model and leave wide discretion to the Judges. Thus the Rules of Procedure and Evidence of the ICTR allow great freedom to the Judges in the evaluation of evidence – in keeping with civil law norms. Rule 89, the primary evidentiary rule, provides that national rules of evidence are not binding (rule 89(A)) and that when evidentiary matters arise for which the Rules make no provision, the Trial Chamber "shall apply rules of evidence which will

best favor a fair determination of the matter before it" (rule 89(B)). Rule 89(C) provides that the "Chamber may admit any relevant evidence which it deems to have probative value".

The guiding principle in the weighing of the evidence is the freedom of assessment. The task of weighing and assessing evidence is primarily with the Trial Chamber and it is for the Trial Chamber to determine whether or not a witness is credible and reliable. It also falls to the Trial Chamber to take the approach that it considers most appropriate for the assessment of evidence and to provide reasoning of its evaluation of witnesses' credibility and reliability. On appeal, such evidentiary assessments are due significant deference by the Appeals Chamber and are only exceptionally disturbed.

The rationale for this freedom derives from the fact that international criminal trials are bench trials and there is no need to protect jurors from lay prejudice. As professional judges, members of the Trial Chamber are considered to bring a sufficient amount of experience to their job when it comes to the weighing of evidence.

However, the freedom of Trial Chambers in their evaluation of evidence is restrained in a number of ways by Rule 89. First, for evidence to be admissible under Rule 89(C) it must have some modicum of reliability. A piece of evidence may be so lacking in terms of the indicia of reliability that it is not probative and therefore inadmissible. Second, a number of tests or approaches have developed in the jurisprudence of the ICTR for the evaluation of evidence as a means of ensuring "a fair determination of the matter". Third, Rule 89(C) must be interpreted so that safeguards are provided to ensure that the Trial Chamber can be satisfied that the evidence is reliable, for example, through cross-examination.

The freedom of the assessment of evidence and the flexibility that freedom offers has been particularly useful at the ICTR given its heavy reliance on witness testimony. Unlike cases at its Nuremberg predecessor where documentary evidence played a key role, ICTR cases have rested primarily and sometimes solely on witness evidence.

Indeed, the Rules of the ICTR generally reflect a preference for direct, live, in-court testimony. Rule 90(A) provides that witnesses, shall, in principle, be heard directly by the Chamber.

Evidentiary Challenges and Approaches Adopted to Address these Challenges

The most general evidentiary challenges cross-cutting all cases before the ICTR are the impact of trauma suffered by witnesses and, secondly, the passage of time between the event and the giving of evidence by witnesses. It is quite standard in ICTR judgments for the evaluation of evidence to be premised by a caveat that the witnesses lived through traumatic events and that the emotional and psychological reactions that may be provoked by reliving those events may have impaired the ability of some witnesses to clearly and coherently articulate their stories. Additionally, it is recognized that where a significant period of time has elapsed between the acts charged in the indictment and the trial it is not always reasonable to expect the witness to recall every detail with precision. In most cases, the ICTR Trial Chambers were faced with inconsistencies between statements that had been given by witnesses to investigators and their in-court testimony before the Chamber.

To ensure a fair assessment of evidence when time and trauma have eroded the ability of witnesses to precisely recall the details of events, the Trial Chambers have applied a test in which they distinguish between details that were peripheral to the event as opposed to the facts and details that make up the essence of the event. For example, if the facts and details that make up the essence of the event are consistent and coherent then the inability of the witness to recall the precise details, such as the day or the time of the event or the exact number of victims would not be a basis for impugning the credibility of the witness. The same applies to the assessment of witness credibility with respect to an earlier statement given to investigators that differs in details from evidence given in court. Provided the discrepancies between the witness's earlier statement and the in-court testimony are not material differences, they will not be sufficient to impugn the credibility of the witness.

Where the discrepancies are material discrepancies the Trial Chambers will consider the explanation given for the discrepancies – often such explanation will arise from cross-examination of the witness. If the explanation is reasonable, then a Trial Chamber may accept the in-court version of the witness's testimony. If there is no reasonable explanation for the discrepancies the witness's credibility may be undermined such that the Chamber determines the witness unreliable with respect to the evidence on which the discrepancies are not adequately explained. In this respect, a Trial Chamber can accept parts of a witness's testimony and reject others. While it may not accept a part where there is a material contradiction, other parts of the witness's testimony may still be accepted as credible and reliable, particularly where they are corroborated by other evidence on the record.

A related evidentiary challenge identified by Trial Chambers as possibly impacting the consistency of a witness's prior statement to investigators and his or her in-court testimony is the problem of language. Most witnesses gave their earlier statements in the Kinyarwanda language and they were then translated into one of the official languages of the Tribunal, English and/or French. The problem was further compounded by the fact that many of the witnesses were illiterate and were unable to read for themselves the prior statements they signed. Translation was also challenging as the syntax and everyday expressions of the Kinyarwanda language were difficult to translate into English and/or French. Additionally, the witnesses' in-court testimony given in Kinyarwanda and translated into English or French was challenging, as was the translation of questions put by Counsel in English or French into Kinyarwanda. All of these translation issues related to the witnesses' language had to be taken into account by the Trial Chamber to ensure a fair assessment of the witnesses' reliability and credibility when evaluating their evidence.

A further evidentiary challenge faced by the ICTR is the impact of social and cultural factors on the way witnesses give evidence. In the very first trial at the ICTR, the *Akayesu* case, the Trial Chamber was confronted with the problem of whether witnesses

were systematically lying and colluding to ensure convictions as the defense claimed, or whether other factors were at work. This issue arose persistently in the ICTR in a number of other cases also. The Trial Chamber in *Akayesu* tried to come to grips with how cultural factors impacted testimony over time and called expert testimony to assist it in dealing with defense allegations of systematic lying. Referring to the expert evidence it had received it noted that: "[m]ost Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts are personally witnessed or recounted by someone else. Since not many people are literate or own a radio much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazards of distortion of the information each time it is passed on to a new listener"[1] Similarly the Chamber noted that on examination it was at times clarified that evidence which had been reported as an eye witness account was in fact a second-hand account of what was witnessed.

Armed with this expert evidence the Trial Chamber was able to assess the claim of systematic lying. Additionally, aware of the impact of an oral tradition in Rwanda the Trial Chamber was able to make "a consistent effort to ensure that this distinction" – between what a witness saw and was told – "was drawn out throughout the trial proceedings". In this way, the Trial Chamber made sure it was aware as to whether the witness was giving evidence of what he or she had directly witnessed or what they had been told, an important distinction in terms of assessing the credibility and reliability of the evidence.

This did not mean that hearsay evidence would be automatically disregarded by the Chamber as unreliable. Rule 89 permits the Chamber to freely assess the probative value of all relevant evidence. Thus all relevant evidence having probative value may be admitted into evidence provided that it is in accordance with the requisites of a fair trial. In the jurisprudence of the ICTR hearsay evidence is not inadmissible *per se* but should be assessed with caution. Where hearsay evidence takes the form of direct in-court

[1] *Akayesu* Trial Judgement, para. 155.

testimony, absent an objection, it will form part of the record of the case. The main safeguard with respect to assessing the reliability of the evidence in that circumstance is the right of cross-examination. Further, the Trial Chamber is required to demonstrate that it has acted with caution in respect of the hearsay evidence admitted and relied upon. Acting with caution may, for example, be satisfied by identifying corroborating evidence on the record before relying on the hearsay evidence. Where the Chamber is not satisfied that through cross-examination or corroboration sufficient indicia of reliability has been established it will not rely upon the hearsay evidence.

While in the *Akayesu* case the Trial Chamber relied on expert evidence to help its assessment of witness testimony, in the *Rutaganda* case, the Trial Chamber relied primarily on its own observation of the witnesses in determining that cultural and social factors needed to be taken into account in the assessment of certain witness testimony. In relation to the approach taken to the assessment of evidence the Chamber noted that "[s]ome of the witnesses were farmers and people who did not have a high standard of education, and they had difficulty in identifying and testifying to some of the exhibits, such as photographs of various locations, maps etc […] These witnesses also experienced difficulty in testifying as to dates, times, distances, colors and motor vehicles".[2]

Rutaganda appealed the Trial Chamber's reliance on cultural and social factors in assessing witness testimony to the Appeals Chamber. Rutaganda argued that the Trial Chamber had improperly taken judicial notice of social and cultural factors – which were not matters of common knowledge in respect of which judicial notice could be taken under the Rules of Procedure and Evidence. He further claimed that in doing so the Judges made generalizations that were not corroborated by evidence or especially by expert opinion and in fact the matters being noted as matters of common knowledge were in reality only matters of personal knowledge and stereo-types that the various members of the Chambers may have had on Rwandan people.

[2] *Rutaganda* Trial Judgement, para. 23.

The Appeals Chamber found no error in the approach of the Trial Chamber holding that it had properly clarified the approach it took to assessing testimonial evidence with the cultural and social factors it observed. With respect to Rutaganda's argument that the Trial Chamber had taken a general approach, without indicating in which cases, and to what extent, in its assessment, it applied the test based on social and cultural factors, the Appeals Chamber found that the Trial Chamber had made sufficient clarifications about the witnesses to whom its observation applied: "farmers and people who did not have a high standard of education" and who had "difficulty in testifying as to dates, times, distances, colors and motor vehicles". Considering some examples of the testimony of these witnesses from the trial record, the Appeals Chamber held that it was "[c]lear that the difficulties faced by witnesses in estimating distances or giving a geographical distance must be taken into account in assessing the scope of reliability of certain aspects of his testimony: but these do not affect the testimony as a whole or its credibility". Acknowledging these difficulties allowed the Trial Chamber to put the evidence of these witnesses into perspective and to make a fair assessment of their credibility and reliability.[3]

Another evidentiary challenge that has beset the ICTR is its reliance on accomplice witnesses. In some cases most or all of the evidence relied upon has been the evidence of accomplice witnesses. These witnesses had more often than not been involved in some way in the same events of which the accused was being tried before the ICTR and many had themselves had been tried and convicted by Rwandan courts and/or under the Gacaca system. As accomplice evidence was an important evidentiary source for the ICTR – but also evidence considered in many national jurisdictions as inherently unreliable due to the interest on the part of an accomplice to minimize their own role in a crime – the ICTR developed a detailed approach to determining the reliability of accomplice evidence.

Thus, in ICTR jurisprudence accomplice evidence can form the basis of a conviction provided that the evidence is treated with appropriate caution, "the main question being to assess whether the witness concerned might have motive or incentive to implicate the

[3] *Rutaganda* Appeal Judgement, para. 230.

accused".[4] If such a motive cannot be excluded by the Trial Chamber it will be necessary for the Trial Chamber to consider whether the testimony of that accomplice witness is corroborated. However, even if corroboration cannot be found that Trial Chamber still retains full discretion to assess the appropriate weight and credibility to be afforded to the accomplice witness as it would any witness. In that regard, the Trial Chamber has to consider relevant factors on a case by case basis, including the witness's demeanor in court; his or her role in the events in question; the plausibility and clarity of his or her testimony, including whether there are contradictions or inconsistencies in successive statements or between the witness's testimony and other evidence; any prior examples of false testimony; any motivation to lie; and the witness's responses during cross-examination. Where the witness is an accomplice, other factors are particularly relevant, including: the extent to which discrepancies in the testimony were explained; whether the accomplice witness has made a plea agreement with the Prosecutor; whether the accomplice witness has already been tried and, if applicable, sentenced for his or her own crime or is still awaiting the completion of any trial; and whether the accomplice witness may have any other reason for holding a grudge against the accused.[5]

Thus, the jurisprudence of the ICTR holds that the evidence of a single witness – including an accomplice witness – which is consistent and coherent as to its essence can be relied upon without corroboration provided the bench is satisfied that the witness is reliable and credible. This is a departure from the principle found in civil law systems that one witness is no witness and whereby corroboration of evidence is required if it is to be admitted. In this respect, it is notable that Rule 96(i) of the Rules of Procedure and Evidence specifically stipulates that no corroboration shall be required with respect to the testimony of victims of sexual assault thus according the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes.

Perhaps the most important safeguard to ensuring the proper assessment of evidence is the requirement that the Trial Chamber give reasons for its finding. The setting out by a

[4] *Nchamihigo* Appeal Judgement, para. 42.
[5] *Ibid.*, para. 47.

Trial Chamber of the approach taken to the evaluation of evidence – or a failure to set out such an approach – in a reasoned decision arms the parties with the information needed to assess whether any particular evidentiary finding of the Trial Chamber warrants appeal.

The cornerstone of the Appeals Chamber's role is that the Appeals Chamber must give deference to the Trial Chamber. The ICTR Appeals Chamber has consistently held that as a general rule, a Trial Chamber is primarily responsible for assessing and weighing the evidence presented at trial, and that it is incumbent on the Trial Chamber to consider whether a witness is reliable and whether evidence presented is credible. In making this assessment, the Trial Chamber has the inherent discretion to decide what approach is most appropriate for the assessment of evidence in the circumstances of the case.[6]

Importantly, the issue on appeal is not whether the Appeals Chamber "agrees with" the evidentiary findings of the Trial Chamber, but whether it is satisfied that the findings under review could have been reached by a reasonable Trial Chamber. Accordingly, the Appeals Chamber will not review *de novo* the trial findings, but will examine specific arguments made by the parties with respect to particular errors alleged to have been made by the Trial Chamber with the potential to undermine the conviction. In that sense, the Appeals Chamber undertakes a role much more similar to a common law appellate court – in civil law systems, courts of appeal have the power to review *de novo* and revise both factual and legal findings. This is not the case in international criminal tribunals.

In the type of cases that international tribunals adjudicate the absence of hard and fast rules to which the ICTR Judges must adhere when they engage in the task of evaluating the evidence adduced before them affords a flexibility that has advantages. The trauma suffered by witnesses, the passage of time between events and the giving of in court testimony, translation challenges, cultural and social factors coupled with the complexity of cases before the Tribunal – large factual situations, large volumes of evidence, and difficulties in obtaining evidence – all support a flexible approach to the evaluation of evidence.

[6] *Rutaganda* Appeal Judgement, para. 28.

However, this approach also creates the possibility that two different Trial Chambers, faced with comparable situations, come to different results in their weighing of the evidence, which may both be perfectly valid. Both the Rules and the jurisprudence of the ICTR and the ICTY accept the risk of inconsistent rulings. In the seminal *Tadic* case of the ICTY, for example, the Appeals Chamber accepted that two judges "both acting reasonably can reach different conclusions on the available evidence".[7] In practice, however, the risk has rarely materialized but the fact that such an outcome can materialize and is acceptable is at odds with the focus of civil law traditions in finding "the truth" through judicial proceedings.

Conclusion

In conclusion, the mix of common law and civil law approaches in the admissibility, assessment and evaluation of evidence at the ICTR has allowed Trial Chambers to respond to the particular evidentiary challenges presented by the adjudication of complex international trials. An issue for debate is whether this response has actually been effective, providing an adequate and reliable means to ensure the establishment of the facts at issue in a trial beyond reasonable doubt.

Some commentators are of the view that the evidentiary challenges faced by international courts like the ICTR are impediments to the fact-finding process that are not overcome by the application of particular tests or approaches to evidence. Indeed, the claim has been made that the variety of fact-finding challenges faced by courts such as the ICTR in the context of witness evidence call into question the accuracy of the factual determinations made. Rather than responding effectively to evidentiary challenges, according to such commentators, international courts display a cavalier attitude towards testimonial deficiencies, are eager to explain away discrepancies as innocent mistakes and fail to find reasonable doubt in the most doubtful of instances. It is argued that international judges adopt such approaches because the consequences of acquittal are too high – international

[7] *Tadic* Appeal Judgement, para. 64.

courts are expected to deliver results and results are convictions, not fair trials. Thus, it is argued, Judges are indirectly biased towards convictions.[8]

In my view, this criticism is too harsh. There is no doubt that the Chambers of the ICTR have faced tremendous evidentiary challenges in determining the cases before them. However, as I have endeavored to illustrate, in response to those challenges they have devised methods of approaching the fact-finding process that acknowledge those challenges, seek to understand how the challenges impact on the particular evidence before them and take that impact into account in making evidentiary findings. The Chambers have also been transparent in the fact-finding process by providing reasons for their evidentiary conclusions. The possibility of wrongful conviction resulting from evidentiary deficiencies is minimized by the obligation placed upon the Chamber to give reasons for its evidentiary assessments and by the right of appeal to the Appeals Chamber to challenge the reasonableness of a Trial Chamber's findings. There have also been full and partial acquittals at trial and appeal at the ICTR that run counter to the criticism that the Judges prioritize convictions over fair trials.

While there may be different views concerning the rigor of the evidentiary approaches adopted by the ICTR and its success in accurately establishing the facts in the cases before it, the principle of the freedom of assessment of evidence and the ICTR's melding of different legal traditions, sensitivity to local circumstances and emphasis on both common sense and reasoned discourse have allowed the Tribunal to respond to the particular evidentiary challenges it has faced with the aim of ensuring the fairness of the proceedings, thereby offering an important legacy for other international courts and commissions of inquiry.

[8] See Nancy Combs, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press, 2010.