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Nancy Amoury Combs
William & Mary Law School, ncombs@wm.edu

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Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions

Nancy Amoury Combs*

Abstract

Mass atrocity prosecutions are credited with advancing a host of praiseworthy objectives. They are believed to impose much-needed retribution, deter future atrocities, and affirm the rule of law in previously lawless societies. However, mass atrocity prosecutions will accomplish none of these laudable ends unless they are able to find accurate facts. Convicting the appropriate individuals of the appropriate crimes is a necessary and foundational condition for the success of mass atrocity prosecutions. But it is a condition that is frequently difficult to meet, as mass atrocity prosecutions are often bedeviled by pervasive and invidious obstacles to accurate fact-finding. This Article deconstructs those obstacles. Isolating fact-finding challenges and ascertaining their impact is no mean feat because mass atrocity prosecutions are a heterogeneous combination of a variety of different kinds of crimes and different kinds of proceedings. Mass atrocity prosecutions take place in international courts, domestic

* Ernest W. Goodrich Professor of Law, Kelly Professor of Teaching Excellence, William & Mary Law School. I am grateful for the helpful comments of the participants of the Stanford International Criminal Law Roundtable, the Panel on Emerging Issues in International Criminal and Human Rights Law at the SEALS Annual Conference, and the University of Copenhagen "Doing Justice to Truth: Taking Stock of the Epistemic Critique of International Criminal Tribunals" conference. These include, among others, Adam Branch, Caroline Davidson, Mark Drumbl, Nigel Eltringham, Megan Fairlie, Caroline Fournet, Jessica Greenberg, Barbora Holá, Jakob Holtermann, Máximo Langer, Christian Axboe Nielsen, Jenny Martinez, Saira Mohamed, Mark Osiel, Victor Peskin, Jaya Ramji-Nogales, Henry Redwood, Barrie Sander, Bill Schabas, Simon de Smet, Alette Smeulers, Carsten Stahn, James Stewart, Jane Stromseth, Cora True-Frost, Jenia Turner, Beth Van Schaak, and Penelope Van Tuyl. Thanks in addition to Mary Antley, Laura Bladow, Avery Dobbs, and Erik Gerstner for excellent research assistance. Any errors are my own.

courts, and hybrid international/domestic courts. Mass atrocity prosecutions encompass international crimes and domestic crimes, and they encompass a wide range of horrific acts perpetrated by a wide range of individuals, acting in a wide range of contexts. Previous scholarship has identified international criminal law as a discipline intensely marked by pluralism; this Article contends that that same pluralism characterizes the fact-finding challenges that confront international criminal prosecutions. Moreover, this Article advances the debate by isolating three particularly significant factors likely to create factual uncertainty at trial. Taken together, this examination produces a startling revelation: that the "gold standard" of mass atrocity prosecution—international criminal tribunal prosecutions of international crimes—is at greatest risk for inaccurate fact-finding at trial.

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I. Introduction

International criminal law has the potential to be a powerful and effective means of deterring mass atrocities and imposing well-deserved punishment on those who perpetrate those atrocities. However, international criminal law also faces unprecedented challenges. Some of these challenges generate widespread publicity. The decision of three African states to withdraw from the International Criminal Court (ICC), for instance, made headlines worldwide,[1] as did the high-profile battle between the ICC and Kenya's President and Vice President.[2] Other

1. *See* Somini Sengupta, *As 3 African Nations Vow to Exit, International Court Faces its Own Trial*, N.Y. TIMES (Oct. 26, 2016), https://www.nytimes.com/2016/10/27/world/africa/africa-international-criminal-court.html?_r=0 (last visited Jan. 22, 2018) ("Three nations, all from Africa, have announced that they will no longer work with the tribunal, intensifying a longstanding debate over whether it is biased against the continent.") (on file with the Washington and Lee Law Review). For the ICC, things may get worse before they get better. *See, e.g.*, Elias Meseret, *African Leaders OK Strategy for Mass Withdrawal From ICC*, ASSOCIATED PRESS (Jan. 31, 2017), https://apnews.com/0e19488f91bc4ccfad1e167c6c5742d5/african-leaders-ok-strategy-mass-withdrawal-icc (last visited Jan. 22, 2018) ("Late last year, South Africa, Burundi and Gambia all announced plans to leave the court, leading to concerns that other states would follow.") (on file with the Washington and Lee Law Review).

2. *See, e.g.*, *Kenya President: International Criminal Court Not Impartial*, VOA NEWS (Dec. 12, 2016, 9:21 AM), http://www.voanews.com/a/kenya-president-international-criminal-court-not-impartial/3632789.html (last visited Jan. 22, 2018) ("Kenyatta was elected in 2013 as he and his running mate, William Ruto, faced criminal charges at the ICC over their alleged roles in post-election violence in 2007-2008.") (on file with the Washington and Lee Law Review); *Kenya's William Ruto Wins ICC Witness Ruling*, BBC NEWS (Feb. 12, 2016), http://www.bbc.com/news/world-africa-35563556 (last visited Jan. 22, 2018)

challenges are less publicized but just as concerning. The challenge that forms the focus of this Article is the so-called "epistemic critique of international criminal law."[3] That critique can take many forms. Some scholars, for instance, accuse international criminal judgments of exhibiting selective contextualization;[4] other scholars question the ability of international criminal law to create a historical record;[5] and still other scholars explore, more broadly and philosophically, the limits of the knowledge that we can attain about atrocities.[6] My own scholarship launched one highly pragmatic strand of epistemic criticism by identifying pervasive and invidious obstacles to accurate fact-finding in international criminal proceedings.[7]

(detailing the prosecutors' struggle to build a case against Kenyan President Ruto) (on file with the Washington and Lee Law Review).

3. *See Doing Justice to Truth: Taking Stock of the Epistemic Critique of International Criminal Tribunals*, U. COPENHAGEN (June 9, 2016), http://jura.ku.dk/icourts/calendar/2016/doing-justice-to-truth/ (last visited Jan. 22, 2018) (featuring more than a dozen scholars and practitioners from a broad range of disciplines at a two-day conference to address the topic of an epistemic critique of the International Criminal Tribunals) (on file with the Washington and Lee Law Review).

4. *See, e.g.*, Barrie Sander, Doing Justice to History: The Construction of Historical Narratives Within International Criminal Courts (2017) (unpublished Ph.D. thesis, Graduate Institute of International Development Studies), at Part Four ('The Culpability Frame') (discussing consequences of selectivity both for the culpability of the individuals on trial and the broader narratives constructed by judges in their judgments) (on file with author).

5. *See, e.g.*, MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 79–94 (1997) ("The relation between criminal judgment and historical interpretation is problematic in a myriad of ways."); Timothy William Waters, *A Kind of Judgment: Searching for Judicial Narratives After Death,* 42 GEO. WASH. INT'L L. REV. 279, 343 (2010) (arguing that the narrative theory of judicial decisionmaking is undermined when a trial does not reach a verdict); Richard Ashby Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908, 909–16 (2005) ("[C]ourts are inappropriate venues to construct wide-ranging historical explanations of past conflicts."); *see also* Nigel Eltringham, *The Judgement is Not Made Now; The Judgement Will be Made in the Future: Positive Appraisals of the International Criminal Tribunal for Rwanda's Historical Record among Politically Motivated Defence Lawyers* (2016), http://humanityjournal.org/wp-content/uploads/2017/07/09.-N.-Eltringham-Judgement-Is-not-Made-Now.pdf.

6. *See* Henry Redwood, Power, Knowledge and Ownership—The Archives of the ICTR (June 2016) (unpublished manuscript) (highlighting the limits of knowledge about mass atrocities even when information about those atrocities are contained in massive archives) (on file with author).

7. *See* NANCY AMOURY COMBS, FACT-FINDING WITHOUT FACTS: THE

What neither I nor any other scholar has adequately explored, however, are the factors that give rise to these severe fact-finding obstacles. Do some prosecutions feature greater factual uncertainty and, if so, can we identify and isolate the causal factors? This article will tackle these questions, and in doing so, it will reveal the complexity and nuance that surrounds epistemic criticisms of mass atrocity prosecutions. This complexity and nuance derives largely from the complexity and nuance that surrounds mass atrocity prosecutions themselves. Most international criminal law scholarship, including my own, focuses exclusively on prosecutions of international crimes conducted by international courts or hybrid international-domestic courts,[8] but many other possibilities exist. In addition to international and hybrid courts, mass atrocities are also prosecuted in a range of different kinds of domestic courts.[9] Moreover, some mass atrocities

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UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 4 (2010) [hereinafter FACT-FINDING WITHOUT FACTS] ("My study will reveal that international criminal trials confront severe impediments to accurate fact-finding, impediments that should give rise to serious doubts about the accuracy of the trial Chambers' factual determinations."). Some other works explore these questions as well. *See, e.g.*, Martin Witteveen, *Closing the Gap in Truth Finding: From the Facts of the Field to the Judge's Chambers*, *in* COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE: AN INTERDISCIPLINARY APPROACH 383 (Alette Smeulers ed., 2010) (noting such fact-finding difficulties as cultural and linguistic barriers with victims of mass atrocities, among other issues); Mark Findlay & Sylvia Ngane, *Sham of the Moral Court? Testimony Sold as the Spoils of War*, 1 GLOBAL J. COMP. L. 73, 74 (2012) (analyzing the shortcomings of witness testimony in the ICC); John Jackson, *Finding the Best Epistemic Fit for International Criminal Tribunals,* 7 J. INT'L CRIM. JUST. 17, 19 (2009) (arguing "that while the present hybrid of adversarial gathering and presentation of evidence combined with its liberal admission may satisfy certain minimum guarantees of fairness, it falls short of providing the optimal epistemic conditions for ensuring that verdicts are based upon a rigorous investigation and testing of the evidence").

8. *See, e.g.*, NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 3 (2007) (examining the guilty plea practices of the ICTY, ICTR and Special Panels in East Timor); FACT-FINDING WITHOUT FACTS, *supra* note 7, at 5 (identifying fact-finding obstacles in ICTR, SCSL and Special Panels trials); Nancy Amoury Combs, *Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law*, 58 HARV. INT'L L. J. 47, 55 (2017) (conducting an empirical study of ICTR trials); Nancy Amoury Combs, *Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing*, 41 YALE J. INT'L L. 1, 4 (2016) (developing sentencing theory for international and hybrid tribunals).

9. When mass atrocities are prosecuted in the state where the crimes took place, they can be prosecuted in that state's ordinary courts. *See* STEVEN R.

are prosecuted as domestic crimes, whereas others are prosecuted as international crimes.[10] Finally, mixing and matching takes place between the categories. A mass atrocity characterized as a domestic crime may be prosecuted in an international court,[11] whereas a mass atrocity characterized as an international crime may be prosecuted in domestic court.[12] Each of these variations has epistemic implications.

Variations between different sorts of mass atrocities also have epistemic consequences. Mass atrocities can comprise a wide range of unspeakable acts committed in a wide range of circumstances. Certainly, large-scale killings qualify as mass atrocities, but so do

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RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 169–71, 173–78 (2d ed. 2001) (describing Ethiopian, Rwandan and Argentine prosecutions). They can also be prosecuted in specialized courts that are created specifically to prosecute mass atrocities. *See, e.g.*, *The Statute of the Iraqi Special Tribunal*, HUM. & CONST. RIGHTS (Mar. 26, 2008), http://www.hrcr.org/hottopics/statute/section1.html (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review). In addition, pursuant to universal jurisdiction, foreign domestic courts can prosecute mass atrocities that occurred in other states. *See* Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 GEO. WASH. INT'L L. REV. 419, 427 (2011) ("[I]f a crime transcends the interest of a single state, this supports vesting jurisdiction over the crime to all states.").

10. *See* U.S. DEP'T OF STATE: TRANSITIONAL JUSTICE INITIATIVE: CRIMINAL PROSECUTIONS 1 (2016), https://www.state.gov/documents/organization/257773.pdf ("[Mass atrocities] may be investigated and prosecuted by the International Criminal Court, where it has jurisdiction, but they are also penalized in the domestic laws of many countries.").

11. The Special Tribunal for Lebanon, for instance, is currently prosecuting its defendants for crimes under Lebanese law, such as intentional homicide and terrorism. *See generally* Prosecutor v. Ayyash et al., Case No. STL-11-01I11PTJ, Indictment, ¶ 1 (June 10, 2011). Similarly, the Special Court for Sierra Leone (SCSL) had jurisdiction over Sierra Leonean crimes, Statute of the Special Court for Sierra Leone, art. 5, U.N. Doc. S/2002/21246, and the Extraordinary Chambers in the Courts of Cambodia (ECCC) have jurisdiction over Cambodian crimes, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 3, Oct. 27, 2004, ECCC Doc. No. NSIRKMJI004/006

12. States frequently provide their courts criminal jurisdiction over international crimes such as genocide, crimes against humanity, and war crimes. *See* Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT'L L. 120, 121–22 (2001) (describing several former heads of state who were not afforded immunity in their home courts and noting that "these developments may reflect the entry of a new era in which domestic prosecutions for international crimes will flourish").

widespread rapes, tortures, detentions, and other inhumane acts.[13] Mass atrocities also vary in size and scope. An isolated set of war crimes qualifies as a mass atrocity as does a genocide that kills many hundreds of thousands. Some mass atrocities are committed by state-sponsored armies, whereas others are committed by rebel forces. Some mass atrocities are committed during brief internal armed conflicts; others are committed during protracted wars involving numerous nations, and still others occur during ostensible peace-time. Finally, mass atrocities can take place in dramatically different locations: for instance, mass atrocities were committed on Guantanamo Bay—that is, on the territory of arguably the richest, most industrialized nation on the planet.[14] And they were committed in the most desperately poor regions of Sierra Leone and the Democratic Republic of the Congo (DRC).

Mass atrocities and their prosecutions, therefore, are characterized by a pluralism that has only just begun to be systematically examined.[15] This Article contends that that same pluralism characterizes the epistemic challenges that confront the prosecutions of mass atrocities. In particular, the epistemic challenges bedeviling a mass atrocity prosecution are a product of a host of factors relevant to the facts and circumstances of the atrocity and its prosecution. As these factors combine and coalesce

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13. *See* U.N., FRAMEWORK OF ANALYSIS FOR MASS ATROCITY CRIMES: A TOOL FOR PREVENTION 27 (2014), http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf (defining "crimes against humanity" as inclusive of many atrocious crimes, including rape, torture, and "severe deprivation of physical liberty" via the Rome Statute).

14. John Haltiwanger, *Torture Used by U.S. Military at Guantanamo Bay Despite Being Banned, UN Says*, NEWSWEEK (Dec. 13, 2017), http://www.newsweek.com/torture-used-us-military-guantanamo-bay-despite-being-banned-un-says-747373 (last visited Feb. 18, 2018) (on file with the Washington and Lee Law Review).

15. Most accounts of the pluralism of international criminal law explore variations in the prosecutions of mass atrocities. *See, e.g.*, PLURALISM IN INTERNATIONAL CRIMINAL LAW 3 (Elies van Sliedregt & Sergey Vasiliev eds., 2014) ("The first layer of complexity consists in the fact that [international criminal justice] is centered on the international and hybrid criminal courts, bound together into a decentralized and hierarchical 'community.'"). *See generally* Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2004); Volker Nerlich, *Daring Diversity–Why There is Nothing Wrong with 'Fragmentation' in International Criminal Procedures*, 26 LEIDEN J. INT'L L. 777 (2013).

in different ways, the epistemic challenges likewise shift and transform.

At the same time, this Article's detailed exploration of these epistemic challenges reveals that three factors stand out as having particularly significant epistemic consequences. They are: the location of the atrocity,[16] the nature of the atrocity,[17] and the body prosecuting the atrocity.[18] Part II addresses the location of the atrocity. It argues that a mass atrocity's location—and in particular the development status of that location—has a dramatic impact both on the kinds of evidence available as well as the probative value of that evidence. Part III considers various descriptive features of the atrocities themselves. Part III first documents the way in which the large size and scope of atrocity crimes gives rise to evidentiary challenges that do not arise in the prosecutions of discrete, isolated crimes committed in the same locations. That is, the size and scope of a mass atrocity stands as an independent factor driving fact-finding challenges. Part III also contends that the characterization of a mass atrocity as an international crime, as opposed to a domestic crime, increases fact-finding challenges. Finally, Part IV explores the way in which different prosecutorial bodies face different epistemic challenges. Specifically, Part IV contends that trials in international courts and tribunals generally feature more pronounced fact-finding challenges than similar trials in domestic bodies. The Article concludes by observing that, although each of these factors independently gives rise to evidentiary difficulties, they tend to coalesce in the current international tribunal prosecutions of international crimes.[19] That is, international criminal tribunals that prosecute international crimes in developing nations face the most severe obstacles to accurate fact-finding.

This conclusion is worrisome. International tribunal prosecutions of international crimes in developing nations have constituted a core feature—indeed, some would say a necessary component—of the much-lauded "justice cascade"[20] that has finally

16. *Infra* Part II.A.

17. *Infra* Part III.

18. *Infra* Part IV.

19. *Infra* Part V.

20. *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 5 (2011) (using the term "justice

begun imposing accountability on large-scale human rights offenders. Indeed, it was through just such international tribunal prosecutions that the world saw its first genocide conviction,[21] its first conviction for the enlistment and conscription of child soldiers,[22] and its first sitting president brought to justice,[23] among many other landmarks.[24] But the analysis herein suggests that, for all of their accomplishments, international tribunal prosecutions of international crimes in developing nations are also uniquely likely to suffer from the kinds of profound epistemic challenges that can seriously undermine efforts to use criminal prosecutions to prevent and punish large-scale violence.

II. Location, Location, Location: The Evidentiary Implications of the Place Where the Crime Took Place

As noted, mass atrocities can vary in countless respects, and each variation can have evidentiary implications. For instance, forensic evidence may exist to link perpetrators with the mass killings that they committed years or decades before,[25] but not with the mass rapes that they committed at the same time.[26] Similarly,

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cascade" to mean an "interrelated, dramatic new trend in world politics toward holding individual state officials, including heads of state, criminally accountable for human rights violations").

21. *See generally* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998) [hereinafter Akayesu Judgment].

22. *See* Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, ¶ 1358 (Mar. 14, 2012), https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf [hereinafter Lubanga Judgment].

23. *See generally* Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement (May 18, 2012) (finding President Charles Taylor of the National Patriotic Front of Liberia guilty for crimes against humanity, including murder, rape, and sexual slavery).

24. It was likewise in international tribunal prosecutions of international crimes in developing nations that the gender-based crimes of forced marriage and sexual slavery were first defined and prosecuted. For an example, see Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Judgment, ¶¶ 187–196 (Feb. 22, 2008).

25. *See generally* Marija Definis Gojanović & Davorka Sutlović, *Skeletal Remains from World War II Mass Grave: From Discovery to Identification*, 48 CROAT. MED. J. 520 (2007) (conducting a forensic analysis on human remains found in Croatia to determine whether a human rights violation occurred).

26. *See* OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, MANUAL ON THE EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER

the criminal acts of government officials or high-level perpetrators may give rise to large quantities of documentary evidence,[27] whereas the criminal acts of non-state actors and/or low-level perpetrators may not.[28] Although all such variations will have some evidentiary consequences, one factor has particularly significant evidentiary impact: the location of the crimes. And, from an evidentiary point of view, the most influential aspect of the location of the crimes is its level of development. Most specifically, the development level of a crime's location can have a dramatic influence on both the kinds of evidence that are available to prove the crimes and the probative value of that evidence.

A. Available Evidence

Trials of crimes that occur in developed nations typically feature a variety of different kinds of evidence. Certainly, eyewitness testimony stands as a core component of many such criminal trials,[29] but that testimony is also frequently supplemented by an array of non-testimonial evidence.[30] Witnesses in developed nations sometimes videotape or audiotape key actions,[31] and surveillance cameras often passively document

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CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, ¶ 223, U.N. Doc. HR/P/PT/8/Rev.1, U.N. Sales No. E.04.XIV.3 (2004) (suggesting that no physical evidence of rape exists one week after the commission of the crime).

27. Christian Axboe Nielsen, *Leadership Analysis in International Criminal Justice*, *in* INTERNATIONAL CRIMINAL INVESTIGATIONS: CHALLENGES, LESSONS LEARNED AND BEST PRACTICES 7 (Adejoké Babington-Ashaye & Aimée Comrie eds., 2016) ("[L]eadership documentation can also often be a good deal more revealing and self-incriminatory than the causal student of international conflicts and authoritarian regimes might commonly believe."). *But see* Alex Whiting, *In International Criminal Prosecutions, Justice Delayed can be Justice Delivered*, 50 HARV. INT'L L.J. 323, 338 (2009) ("With respect to linkage, the accused commander is often far removed from the crimes and there are generally no documents directly connecting him to the commission of those crimes.").

28. *See* Whiting, *supra* note 27, at 339 ("When the case involves non-state actors, the task of proving linkage becomes even more complex.").

29. *See, e.g.*, SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTIONS CASES 28 (2004) ("[E]yewitness testimony accounts continue to provide the foundation, and sometimes the only basis, for many prosecutions.").

30. *See, e.g.*, 1 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 1:3 (7th ed. 2016).

31. *See, e.g.*, Andrew Rosado Shaw, Note, *Our Duty in Light of the Law's Irrelevance: Police Brutality and Civilian Recordings*, 20 GEO. J. ON POVERTY L. &

important events.[32] Communications, such as letters, emails, phone calls, voicemail messages, and texts, also frequently help to prove the elements of crimes, as do other forms of documentary evidence, such as records, advertisements, and diaries.[33] Even when cases turn on the veracity and accuracy of witness testimony, non-testimonial evidence can serve to reduce the number of contested issues and to corroborate or refute the witnesses' testimony.[34] A witness will not be able to convince the judge or jury that the defendant accompanied her to a movie theatre, for instance, if a surveillance video shows that the witness entered the theatre by herself. And phone records documenting numerous calls between a defendant and an alleged co-conspirator serve to corroborate testimony tying the defendant to the criminal activities of the co-conspirator.[35]

Those prosecuting crimes in developing nations, by contrast, tend to possess far less non-testimonial evidence of the crimes they

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POL'Y 161, 162 (2012) (discussing civilians' use of cell phones to record police misconduct); METTE MORTENSEN, JOURNALISM AND EYEWITNESS IMAGES: DIGITAL MEDIA, PARTICIPATION, AND CONFLICT 3 (2014) ("As increasing proportions of the world's population are able to disseminate their photographs and videos of ongoing conflicts, an unprecedented landslide of visual information has emerged within a relatively short time span.").

32. For example, one of the key pieces of evidence identifying the suspects in the 2013 Boston Marathon terrorist attack was surveillance camera footage from a nearby department store. *See generally* Sari Horwitz et al., *Boston Marathon Bombings: Investigators Zero in on Possible Suspect*, WASH. POST (April 17, 2013), https://www.washingtonpost.com/world/national-security/boston-marathon-bombings-investigators-sifting-through-images-debris-for-clues/2013/04/17/a5238caa-a 75b-11e2-b029-8fb7e977ef71_story.html (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review).

33. *See* FISHMAN & MCKENNA, *supra* note 30, § 1:3 ("[A] common form of evidence is documentary evidence such as public records, private writings, business records, photographs, maps, and the like.").

34. *See id.* § 11:7 ("[E]vidence is often relevant because it circumstantially corroborates other evidence.").

35. *See* HUMAN RIGHTS CTR., DIGITAL FINGERPRINTS: USING ELECTRONIC EVIDENCE TO ADVANCE PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT 3 (2014), https://www.law.berkeley.edu/files/HRC/Digital_fingerprints_interior_cover2.pdf [hereinafter DIGITAL FINGERPRINTS] ("The strongest cases are often those in which several different kinds of evidence . . . can corroborate witness testimony."); *see also* United States v. Munguia, 273 F. App'x 517, 518–19 (6th Cir. 2011) (affirming the district court's holding that cell phone records be admitted as evidence because "the evidence was highly probative as corroboration of the co-conspirators' testimony that they were in contact with [the defendant]").

seek to prove. Certainly, surveillance cameras are less prevalent in developing nations,[36] and computers and other forms of technology are also rarer.[37] So, trials of crimes in developing locations are less likely to feature audio, video, or cellular evidence. Moreover, literacy rates are lower in developing nations—sometimes dramatically so[38]—and those who are illiterate are not writing letters, keeping written records, or otherwise documenting their activities in the way that literate individuals do. For that reason, even basic evidence of identity, such as birth certificates, are unavailable in some developing countries,[39] as is evidence of ownership, such as deeds.[40] Indeed, records of all sorts, including

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36. Consider that, in 2014, the African surveillance camera market was worth approximately $200 million, compared to the global market, which was worth over $15 billion. *See* Josh Woodhouse, *Potential in African Video Surveillance Market as Market Size Surpasses $200 Million*, IHS TECH. (Jan. 30, 2014), https://technology.ihs.com/485243/potential-in-african-video-surveillance-market-as-market-size-surpasses-200-million (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review).

37. In Sierra Leone, for instance, between 2008 and 2012, only 33% of the population used cell phones, and 1.3% used the internet. *At a Glance: Sierra Leone*, UNICEF, http://www.unicef.org/infobycountry/sierraleone_statistics.html# (last updated Dec. 27, 2013) (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review).

38. Many countries in Western Europe, such as Germany, France, and the United Kingdom, have had literacy rates at or above 99% for at least a decade. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2010). By contrast, developing nations such as Liberia, Sierra Leone, and the Democratic Republic of the Congo, as of 2015, had literacy rates of 47.6%, 48.1%, and 63.8%, respectively. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2016); *see also* Edward Sawyer & Tim Kelsall, *Truth vs. Justice? Popular Views on the Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 7 ONLINE J. PEACE & CONFLICT RES. 36, 40 (2007) (reporting on a survey of Sierra Leoneans in which 45% of those interviewed had either never been to school or had not completed primary education).

39. For example, only 31% of births are registered in the Democratic Republic of the Congo, 49% in the Central African Republic, and 51% in Sierra Leone. For further information, see UNICEF, TABLE 9: CHILD PROTECTION (2011), https://www.unicef.org/protection/Table_9_child_labour.pdf.

40. *See* Greenville Barnes et al., *Land Registration Modernization in Developing Economies: A Discussion of the Main Problems in Central/Eastern Europe, Latin America, and the Caribbean*, 12 URISA J. 27, 28–30 (2000) (noting that "[i]n many cases, [land] transfers are not recorded by following legally defined and documented procedures").

employment, banking, and medical, can be hard to come by in developing societies.[41]

For this reason, the evidence used to prove mass atrocities perpetrated in developing nations can look very different from the evidence used to prove mass atrocities perpetrated in developed nations. A comparison of the evidentiary bases for convictions at the first two modern international criminal tribunals—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—provides a striking display of these differences. Indeed, the differences are particularly notable because the tribunals were similar in so many important respects. The tribunals were established at about the same time to prosecute crimes that occurred at about the same time.[42] The tribunals were established through the same mechanism—a U.N. Security Council Resolution—and were structured in the same way.[43] The tribunals initially shared a Prosecutor;[44] they continued to share an Appeals Chamber,[45] and they utilized virtually the same procedural rules.[46]

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41. *See* Leora Klapper et al., *Income Biggest Barrier to Banking in Developing Countries*, GALLUP (Dec. 19, 2012), http://www.gallup.com/poll/159380/income-biggest-barrier-banking-developing-countries.aspx (last visited Jan. 22, 2018) ("Approximately one in five adults cites lack of proper documentation as a barrier, regardless of income level. Many banks require proof of permanent residence or wages slips, and in countries where large numbers of people are informally involved in the economy, this documentation can be difficult to come by.") (on file with the Washington and Lee Law Review); *see also* Christopher Cramer, Carlos Oya & John Sender, *Lifting the Blinkers: A New View of Power, Diversity, and Poverty in Mozambican Rural Labour Markets, in* RURAL WAGE EMPLOYMENT IN DEVELOPING COUNTRIES: THEORY, EVIDENCE, AND POLICY 95 n.14 (Carlos Oya & Nicola Pontara eds., 2015) (reporting that in Mozambique, between 42% and 80% of middle-scale agricultural farms employ temporary workers, "who by definition are not officially registered for the purposes of employment records").

42. *See* Lilian A. Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT'L J. HUM. RTS. 349, 350–51 (2006).

43. *See id.* at 354 ("Similar to the ICTY . . . [the U.N. Security Council passed] Resolution 955 authori[zing] the creation of the ICTR . . . .").

44. *See* S.C. Res. 955 art. 15, ¶ 3 (Nov. 8, 1994) [hereinafter ICTR Statute] ("The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda.").

45. *See id*. art. 13(3).

46. *Compare* ICTY, RULES OF PROCEDURE AND EVIDENCE (2013) (as amended), http://www.icty.org/x/file/Legal%20Library/Rules_procedure

However, despite these many similarities, the evidentiary bases of the tribunals' judgments differed significantly. To be sure, witness testimony formed a key component in both tribunals' trials,[47] but for the ICTR, it formed virtually the exclusive basis for the tribunal's convictions.[48] The same is true for two other tribunals that prosecuted crimes in developing nations. In particular, I have carefully examined the evidentiary bases of trials at the ICTR, the Special Court for Sierra Leone (SCSL), and the Special Panels for Serious Crimes in East Timor (Special Panels), and I found that very little non-testimonial evidence was submitted and almost none of it was central to any factual finding.[49] By contrast, the ICTY, which prosecuted crimes committed in the more developed former Yugoslavia, collected massive quantities of documents and

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evidence/IT032Rev50_en.pdf, *with* ICTR, RULES OF PROCEDURE AND EVIDENCE (2015) (as amended), http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf.

47. *See* Patricia M. Wald, *Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal,* 5 YALE HUM. RTS. & DEV. L.J. 217, 219 (2014) (providing statistics on the ICTY's use of witnesses).

48. *See* Göran Sluiter, *The ICTR and the Protection of Witnesses*, 3 J. INT'L CRIM. JUST. 962, 963 (2005); *see also* Joanna Pozen, Note, *Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials*, 38 N.Y.U. J. INT'L L. & POL'Y 281, 281 (2006) (comparing the ICTR to other international tribunals that relied more on documentary evidence rather than witness testimony).

49. *See* FACT-FINDING WITHOUT FACTS, *supra* note 7, at 12–14 (noting that the vast majority of evidence used at the ICTR, SCSL, and Special Panels was witness testimony). Prosecutions at the ECCC, by contrast, have featured non-trivial quantities of documentary evidence because the Khmer Rouge documented many of their atrocities. *See* HUMAN RIGHTS CTR., BEYOND REASONABLE DOUBT: USING SCIENTIFIC EVIDENCE TO ADVANCE PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT 5 (2012), https://www.law.berkeley.edu/files/HRC/HRC_Beyond_Reasonable_Doubt_FINAL.pdf [hereinafter BEYOND REASONABLE DOUBT] ("[T]he Court has relied heavily on documentary evidence, including lists of prisoners who were executed, photographs, and annotations written on 'confessions' of prisoners by their torturers."); Prosecutor v. Kaing Guek Eav "Duch," Case No. 001/18-07-2007-ECCC/TC, Judgement, ¶ 56 (July 26, 2010) [hereinafter Duch Judgment] ("Over the course of the trial, approximately 1,000 documents were put before the Chamber and subjected to examination."). But the ECCC is unusual in this regard for modern tribunals.

In a forthcoming piece, I document the way in which criminal evidence is changing in developing societies. In particular, in recent years, prosecutors of mass atrocities in developing nations have begun gaining access to greater quantities of non-testimonial evidence. Nancy Amoury Combs, *The New Face of International Criminal Evidence* (forthcoming).

other non-testimonial evidence,[50] and it made good use of it.[51] Virtually all ICTY cases featured some highly-probative non-testimonial evidence, and cases that involved high-level political and military leaders featured a great deal of it.[52]

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50. *See* Alexander Zahar, *Pluralism and the Rights of the Accused in International Criminal Proceedings, in* PLURALISM IN INTERNATIONAL CRIMINAL LAW 224, 233–36 (Elies van Sliedregt & Sergey Vasiliev eds., 2014) (discussing the "sheer volume of evidence" during ICTY proceedings); *see also* Marko Divac Öberg, *Processing Evidence and Drafting Judgments in International Criminal Trial Chambers*, 24 CRIM. L.F. 113, 117–18 (2013) ("In the *Popović and others* case . . . more than 58,000 exhibit pages, not counting translations, were admitted into evidence at trial . . . ."); Nielsen, *supra* note 27, at 15 (noting that at the ICTY, the "only persons who could reasonably hope to digest and master document collections consisting of potentially hundreds of thousands of pages were those analysts whose full-time job was to do so").

51. Nielsen, *supra* note 27, at 8 (noting that personnel and financial records "featured prominently in the prosecution of the genocide committed in Srebrenica").

52. *See, e.g.*, Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY*, 4 J. INT'L CRIM. JUST. 539, 554–55 (2006) (describing minutes of the Municipal assembly relied on in the Stakić trial, the recordings of President Tudjman's meetings relied on in the Naletilić and Martinović trials, and the transcripts of intercepts relied on in the Krstić trial). ICTY Trial Chambers benefited from considerable documentary evidence found in military archives. For instance:

> [I]n the *Galić* and *Dragomir Milošević* cases, detailed military documents as to the movements of armed forces and orders given to conduct military activities proved crucial to establishing the pattern of shelling and sniping in Sarajevo. In *Mrkšić and Šljivančanin*, military documents were used in the case against two senior military leaders for their failure to prevent the torture and killing of hundreds of prisoners of war evacuated from the Vukovar hospital. Likewise in the *Stakić, Brđanin* and *Krajišnik* cases, minutes of meetings of municipal, regional and State political bodies proved important in establishing the existence of joint criminal enterprises at leadership levels to ethnically cleanse large parts of Bosnia.

SPECIAL TRIBUNAL FOR LEB., ANNUAL REPORT ¶ 89 (2009–2010), https://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/226-Annual-Report-2009-2010. Videos also proved an important source of probative evidence at the ICTY. In *Kupreškić*, for instance, international troops apparently visited a massacre site a few hours after the crimes were perpetrated and filmed the destruction they found. *Id.* Similarly, in *Krstić*, prosecutors submitted the video from a TV interview of the defendant which showed buses removing Bosnian Muslim refugees from Potočari right behind the defendant. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶ 348 (Aug. 1, 2001) [hereinafter Krstić Judgment]. The video contradicted the defendant's claim that he was only in Potočari for a brief period and neither saw nor heard anything alerting him to the ongoing removal of Bosnian Muslim refugees. *Id.*

Prosecutions that rely almost exclusively on witness testimony feature greater factual uncertainty for the simple reason that the accuracy of witness testimony is frequently uncertain. Although eyewitness testimony used to be considered a particularly reliable form of evidence, a wide range of field experiments in recent years have demonstrated the frequent fallibility of eyewitness perception.[53] And the inaccuracies are not confined to field experiments. In the United States, DNA testing has confirmed the problematic nature of eyewitness testimony by showing that nearly 80% of American wrongful convictions can be attributed to eyewitness error.[54] This research, therefore, suggests the unsurprising conclusion that fact-finding based solely on eyewitness testimony is less likely to be accurate than fact-finding that is additionally supported by non-testimonial evidence.[55]

B. Problematic Features of Available Evidence

The previous section indicates that the location of the mass atrocity influences the kinds of evidence that are available to prove the mass atrocity. More particularly, it suggests that prosecutions

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53. *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 8–13 (1995) (describing field experiments that show high likelihood of inaccuracies in eyewitness identifications); Douglas J. Narby et al., *The Effects of Witness, Target, and Situational Factors on Eyewitness Identifications*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 23, 24–48 (Siegfried L. Sporer et al. eds., 1996) (analyzing the factors that influence a witness's ability to perceive information correctly and store the information in their memory); Brian L. Cutler et al., *Conceptual, Practical, and Empirical Issues Associated with Eyewitness Identification Test Media*, *in* ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 163, 166–181 (David F. Ross et al. eds., 1994) (discussing three controlled experiments that tested eyewitness identification accuracy); *see also* Public Prosecutor v. Joseph Mpambara, Case Nos. 09/750009-06 and 09/750007-07, Judgment, Chapter 6, ¶¶ 7, 8 (District Court of The Hague, The Netherlands Mar. 23, 2009) (summarizing research).

54. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (2011); Deborah Davis & Elizabeth Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769, 770 (2012).

55. *Cf.* DIGITAL FINGERPRINTS, *supra* note 35, at 5 (quoting an interview originally broadcasted on Radio Netherlands Worldwide between Franck Petit and former ICC Judge Bruno Cotte, where it was noted that witness testimonies are "often fragile").

of mass atrocities occurring in developing nations face greater fact-finding challenges because they are forced to rely more heavily on eyewitness testimony. This section suggests that the location of the crime not only influences the quantity and kinds of available evidence, but also its probative value. To be sure, the inherent unreliability of witness testimony transcends location. That is, there is no reason to believe that eyewitness testimony of crimes in developing nations is any more or less reliable than eyewitness testimony of crimes in developed nations.[56] However, there is reason to believe that eyewitness testimony of crimes in developing nations may be less detailed than eyewitness testimony of crimes in developed nations.

After reviewing thousands of pages of trial transcripts relating to international crimes in Rwanda, Sierra Leone, and East Timor, I discovered that many witnesses from those locations failed to provide fact-finders with information that is highly relevant to proving or disproving the criminal charges. For instance, many witnesses were unable or unwilling to date the events they witnessed with any sort of precision;[57] many were unable or unwilling to estimate distances or provide other estimations;[58] and many were unable or unwilling to read maps or make use of sketches, photographs, or other two-dimensional representations of crime scenes or other locations.[59] Finally, many were unfamiliar with the kinds of details that might be useful to fact-finders, such as the make and model of a car or the type of weapon used in an attack.[60] To be sure, many witnesses in these trials *were* willing and able to provide such information. Moreover, witnesses from every location in the world sometimes fail to answer some of the questions put to them on the witness stand. That said, the types of

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56. Dr. John Charles Yuille, a Canadian forensic psychologist who testified as an expert in the Ntaganda case, opined for instance, that "there is no evidence that basic memory processes are affected by culture. Culture can influence what is remembered and how the memory is described but, as far as we know, culture does not impact the underlying memory processes." Prosecutor v. Ntaganda, ICC-01/04-02/06-T-87-ENG, Transcript, at 6 (Apr. 21, 2016).

57. *See* FACT-FINDING WITHOUT FACTS, *supra* note 7, at 24–27.

58. *See id.* at 27–36; *see also* Witteveen, *supra* note 7, at 397 (recalling an interview with a witness who estimated a distance to be two kilometers when it was in fact 100 kilometers).

59. *See* FACT-FINDING WITHOUT FACTS, *supra* note 7, at 36–38.

60. *See id.* at 38–39.

questions that the witnesses in my study failed to answer and the frequency with which they failed to answer them were notable. In particular, my research suggested that Rwandan, Sierra Leonean, and East Timorese witnesses frequently failed to convey the kind of information that is "crucial to the Trial Chamber's ability to find facts and assess credibility."[61]

As noted in subpart A, a cursory comparison between ICTY and ICTR trials showed that ICTY convictions were based on a wider range of different kinds of evidence than ICTR convictions. Similarly, as relevant here, a cursory comparison between witness testimony at the ICTY, on the one hand, and witness testimony at the ICTR, SCSL, and Special Panels, on the other, shows a notable difference in the quantity of information the two sets of witnesses conveyed. I must acknowledge that I reviewed far fewer ICTY transcripts than ICTR, SCSL, and Special Panels transcripts. But I did review enough to convince me of a qualitative difference between the two sets of witness testimonies. By and large, ICTY witnesses answered the who, what, where, and when questions that were asked of them. Many ICTR, SCSL, and Special Panels witnesses did as well, but a far greater proportion than at the ICTY did not.

Although a host of factors undoubtedly drive the differences between the two sets of witness testimonies, there is good reason to believe that the differing development levels in the relevant countries played a substantial role. Certainly, many of the Rwandan, Sierra Leonean, and Timorese witnesses who failed to answer questions on the stand explained that failure by pointing to their illiteracy or lack of education. Take, for example, the Sierra Leonean witness, who described himself as just "a primitive man from the bush,"[62] or the Timorese witness, who observed that he "might have known the right words" if he had attended school,[63] among many similar witnesses.[64] Other witnesses maintained that

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61. *Id.* at 44.

62. Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 25 (June 16, 2004).

63. Los Palos Case Notes, July 27, 2001, at 83.

64. *See, e.g.*, Prosecutor v. Taylor, Case No. SCSL-03-01-T, Transcript, at 5976 (Mar. 13, 2008) (quoting a witness that stated during trial, "I told them that I am not a learned—I'm not educated"); Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 74 (June 21, 2004) [hereinafter Fofana Transcript,

they could not estimate distances because they had never learned units of measurement,[65] and they could not identify locations or landmarks on a map or sketch because they had never been asked

June 21, 2004] (transcribing a witness stating, "I'm not learned so I didn't record it. Those who are learned, you know, those are the people who record things on paper, but I am not learned"); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 34 (Apr. 8, 2005) [hereinafter Brima Transcript, Apr. 8, 2005] ("I do not know types of guns and I have not been to school. How would I be able to know these names."); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 21, 36 (June 28, 2005) (quoting a witness claiming that he did not understand writing he observed due to his lack of education); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 51 (July 14, 2005) [hereinafter Brima Transcript, July 14, 2005] ("I can't recall because I am not literate, I can't write. In fact, when the night comes and the day comes I can't count anything. Since I was born I have never been to school. I know nothing."); Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71, Transcript, at 10 (Sept. 15, 2003) ("You know, I'm a peasant, I'm a farmer, so in my conditions I wouldn't be able to give you the models of or makes of cars."); Lolotoe Case Notes, Apr. 9, 2002, at 4; Los Palos Case Notes, July 12, 2001, at 18; *id.,* July 23, 2001, at 55; *id.,* July 27, 2001, at 83; *id.,* July 16, 2001, at 25; *id*., Aug. 9, 2001, at 142, 143; *id.*, Aug. 21, 2001, at 179; *id.*, Aug. 22, 2001, at 192; *id.*, Jan. 10, 2001, at 319.

65. *See* Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71, Transcript, at 22 (Sept. 29, 2003) ("I cannot give the distance in terms of kilometres because I haven't been to school."); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Transcript, at 25 (Oct. 24, 1997) (responding that, when asked the distance to a nearby river, "I do not know. That would be known by somebody who has been to school"); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Transcript, at 29 (July 19, 2001) ("I have already told you that I am not in a position to estimate, say, in terms of metres. I am talking about metres, but I don't really know what that represents."); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 31 (Mar. 8, 2005) ("Q. How long does it take you to walk one mile? A. I've never walked that mile, never. I don't know."); Prosecutor v. Karera, Case No. ICTR-01-74-T, Judgement, ¶ 296 (Dec. 7, 2007) [hereinafter Karera Judgment] (summarizing testimony in which witness maintains that he does not understand the metric system and can estimate only by "paces"); Los Palos Case Notes, July 27, 2001, at 84 ("I don't know what 100 meters is, I only found out when a journalist told me."); Los Palos Case Notes, July 30, 2001, at 94 ("I really don't know about meters."); Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71, Transcript, at 22–23 (Sept. 16, 2003) ("I am an ordinary person, so how do you want me to measure in metres? Maybe you should better put that question to somebody who is an agronomist."); *see also* Prosecutor v. Taylor, Case No. SCSL-03-01-T, Transcript, at 7620 (Apr. 15, 2008) (featuring a witness who was unable to estimate distance by means of football fields); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Transcript, at 7738–39 (Apr. 16, 2008) (featuring a witness who was unable to estimate distance by units of measurement). Whereas distance estimations frequently proved challenging for ICTR, SCSL and SPSC witnesses, a cursory look at ICTY transcripts suggests that it did not bedevil that Tribunal's witnesses to nearly the same degree. *See, e.g.*, Prosecution v. Lukić, Case No. IT-98-32/1, Transcript, at 305, 348 (July 10, 2008) (estimating distances in meters).

to do so before.[66] Given that Sierra Leone, Rwanda, and East Timor had low literacy and education rates, particularly when their mass atrocities occurred,[67] these explanations seem plausible. Witnesses from the countries of the former Yugoslavia, by contrast, were dramatically more likely to be literate and to have completed primary and secondary schools.[68] Consequently, it is not surprising that they were more often able to convey to the ICTY the kinds of basic factual information that ICTR, SCSL, and Special Panels' witnesses sometimes failed to provide.

It goes without saying that the failure to provide such information impairs a court's ability to find accurate facts. In previous scholarship, I have identified the specific kinds of fact-finding challenges that arise when questions involving dates,[69] distances,[70] and physical locations[71] go unanswered. These difficulties have an especially negative impact on a defendant's ability to contest the charges against him. As I have observed elsewhere:

> A vague account devoid of details is an account that cannot be effectively challenged. When a witness cannot date the events she witnessed, the witness prevents the defendant from presenting an alibi. When a witness cannot name the make of the defendant's car, then the witness's account cannot be

66. *See, e.g.*, Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Transcript, at 130 (Feb. 13, 2002).

67. Sierra Leone's literacy rate in 2000 was just 31%, CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2000), and East Timor's in 2001 was 38%, *Timor-Leste*, UNESCO INST. FOR STATS., http://uis.unesco.org/en/ country/TL (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review). Just before the genocide, in 1991, Rwanda's literacy rate was 58%, *Rwanda*, UNESCO INST. FOR STATS., https://en.unesco.org/countries/ rwanda (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review). In 1997, approximately 24% of Rwandans had completed primary school, U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999: RWANDA 33 (1999), http://hdr.undp.org/sites/default/files/reports/260/hdr_ 1999_en_nostats.pdf.

68. In 1994, the literacy rate in the former Yugoslavia was 90%, CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK (1994), and about five years after the war ended, Bosnia, Croatia, and Serbia all had literacy rates of between 96 and 98 percent, *Background Bosnia and Herzegovina*, U.S. DEPT. OF STATE ARCHIVE (2009), https://2001-2009.state.gov/r/pa/ei/bgn/2868.htm (last visited Feb. 17, 2018) (on file with the Washington and Lee Law Review).

69. FACT-FINDING WITHOUT FACTS, *supra* note 7, at 27.

70. *Id.* at 33.

71. *Id.* at 37–38.

> undermined by evidence showing that the defendant drove a car of a different make. When a witness is unable to say for how long the rebels occupied his village, then the witness's testimony cannot be inconsistent with that of another witness who might estimate a shorter or longer occupation. And when a witness professes not to understand maps or photographs, the witness renders the defense unable to prove that she was never even at the scene of the crime. In other words, all manner of innocent inaccuracies as well as deliberate lies can be concealed through a witness's plausible claim that he is unable to answer a question.[72]

III. The Size, Scope, and Legal Characterization of the Crime

The previous Part revealed that the location of the crimes has important evidentiary implications for mass atrocity prosecutions. Specifically, prosecutions of mass atrocities in developing nations must rely more heavily on testimonial evidence, which itself renders the resulting fact-finding less reliable.[73] In addition, the testimonial evidence in those trials tends to be somewhat less informative than testimonial evidence regarding crimes perpetrated in developed nations.[74] Location, therefore, is a highly relevant factor driving international criminal law's epistemic challenges. But it is not the only factor. If it were, then prosecutions of domestic crimes in developing nations would feature fact-finding impediments similar to those appearing in mass atrocity prosecutions.[75] To be sure, prosecutors of domestic crimes in developing countries do face many challenges, but the

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72. *Id.* at 44.

73. *Supra* note 52 and accompanying text.

74. *Supra* note 64 and accompanying text.

75. I have not found descriptions of such difficulties in the literature and have no reason to think that they exist.

most notable appear to stem from lack of funding, lack of security, and corruption,[76] rather than from evidentiary deficiencies.[77]

For that reason, this Part explores a second significant factor that drives fact-finding challenges in mass atrocity prosecutions, namely the nature of the crimes being prosecuted. Subpart A describes the way in which the large size and scope of mass atrocity crimes gives rise to substantial evidentiary difficulties whereas subpart B considers the impact of the legal characterization of mass atrocities as international or domestic crimes.

A. Size Matters: The Fact-Finding Implications of Large-Scale Criminality

Mass atrocity prosecutions, by definition, involve large-scale criminality; that is, they involve crimes that take place in the context of hundreds or thousands of other similar crimes.[78] Finding accurate facts about crimes that are embedded in large-scale criminality is more difficult than finding accurate facts about discrete, isolated crimes. On the one hand, this conclusion may seem obvious; that is, it goes without saying that a crime involving 100 victims presents a more complex (and probably more uncertain) evidentiary picture than a crime involving one victim.

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76. *See* MOHAMED SUMA, SIERRA LEONE: JUSTICE SECTOR AND THE RULE OF LAW 103–04 (2014), http://issat.dcaf.ch/download/48039/758786/Sierra%20Leone%20Justice.pdf (discussing lack of interpreters and delays); 1 CRIME AND PUNISHMENT AROUND THE WORLD 4 (Graeme R. Newman et al. eds., 2011) (finding that most rape cases in Angola "never reach prosecution stage because of limited investigative resources, low level forensic capabilities, and an ineffective judicial system"); *id.* at 35–36, 39 (detailing challenges facing the criminal justice system of Central African Republic, such as vigilante justice that results from the population's lack of confidence in law enforcement and the judiciary); CTR. FOR ACCOUNTABILITY & THE RULE OF LAW, HARROWING TRIALS: TIME TO BRING CLOSURE ON PROLONGED TRIALS FOR ACCUSED PERSONS IN SIERRA LEONE'S CRIMINAL JUSTICE SYSTEM 4–5 (2015) (calling on the state to "provide more resources to the justice system, particularly the judiciary to be able to carry out its functions effectively and efficiently").

77. *But see* SUMA, *supra* note 76, at 82, 104, 106 (discussing the implications of witness intimidation, inadequate witness protection mechanisms, and the burdens that inefficient Preliminary Investigation imposes on travelling witnesses in Sierra Leone).

78. *See* Whiting, *supra* note 27, at 335 ("Sometimes war crimes occur in isolation, but generally they occur systematically or on a mass scale, either in the context of armed conflict or the disintegration of society.").

But the enhanced fact-finding challenges involved in prosecuting mass atrocities extend far beyond that self-evident fact. In particular, most mass atrocities occur within certain contexts and display certain features, and it is these contexts and features that create many fact-finding challenges. What are these facts and features? First, mass atrocities usually take place either during an armed conflict or, if in peacetime, then at the hands of a repressive government. Second, mass atrocities usually are perpetrated by large numbers of offenders. Sections 1 and 2 will address these features in turn. In doing so, they highlight the enhanced fact-finding challenges that attend mass atrocity prosecutions as compared to prosecutions of isolated crimes. Section 3 will show how the fact-finding obstacles resulting from these contextual features combine with the location-based obstacles identified in Part I to create unique, additional impediments to accurate fact-finding. Finally, section 4 will explore the different fact-finding challenges that attend mass atrocities of different sizes and scopes.

1. The Context Surrounding Mass Atrocities: Armed Conflicts, Obstructionist Governments, and Evidentiary Implications

Mass atrocities occur during armed conflicts or as components of large-scale human rights violations. As a consequence, those who investigate mass atrocities frequently confront three obstacles that subsequently cause fact-finding uncertainty at trial: governmental interference with investigations, inadequate security in the region, and delay-induced destruction and degradation of evidence. The impact of the latter two factors depends largely on the timing of the prosecutions, which I will discuss in subsection a. Specifically, prosecutions can be undertaken while the conflict is still underway or while perpetrators or other parties who have a stake in the prosecutions remain in power. Alternatively, prosecutions can be delayed until the conflict has ended or a regime change has put the authors of the atrocities out of power. Each option leads to unique fact-finding challenges, as this section will detail. The third obstacle—governmental interference with investigations—frequently

transcends the timing of the prosecutions, so it will be considered in subsection b.

a. Now or Later: The Dangers of Contemporaneous Prosecutions Versus the Losses Incurred by Delayed Prosecutions

As noted, mass atrocities generally take place in the context of an armed conflict or some other large-scale societal rupture. When prosecutors or defense counsel seek to investigate the crimes before the region has stabilized, they typically find it difficult to obtain high-quality evidence. Investigators may not be able to travel to crime sites at all.[79] When ICC investigators first began their investigations into crimes in the DRC, they could not visit the eastern part of the country due to security concerns,[80] and early ICC investigations in Libya were similarly impeded.[81] Even when the instability is not so grave as to entirely prevent investigations, it can impede forensic activities[82] and deter potential witnesses

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79. *See* BEYOND REASONABLE DOUBT, *supra* note 49, at 6 (highlighting the "operational challenges" of the timely collection of evidence after an atrocity, "including the need to balance security risks with the need for timely evidence collection"); DIGITAL FINGERPRINTS, *supra* note 35, at 3 ("In the aftermath of atrocities, investigators may be restricted from collecting evidence because of ongoing violence or an inability to access crime scenes."); Peggy O'Donnell, *Using Scientific Evidence to Advance Prosecutions at the International Criminal Court* 10 (unpublished workshop paper) (on file with author) (describing the security assessment the ICC undertakes to determine whether to send investigators to a crime site). Obviously, when investigators are unable to visit the crime sites, they will be unable to discover certain forensic evidence or to interview local witnesses. *See* Whiting, *supra* note 27, at 335–36 (noting that lack of access to crime scenes after an atrocity is one of the major logistical challenges that prosecutors must overcome to bring charges against perpetrators). *See generally* CHRIS MAHONY, THE JUSTICE SECTOR AFTERTHOUGHT: WITNESS PROTECTION IN AFRICA (2010).

80. *See* Caroline Buisman, *Delegating Investigations: Lessons to be Learned from the* Lubanga *Judgment*, 11 NW. J. INT'L HUM. RTS. 30, 41–42 (2013).

81. *See* OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, ELEVENTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UNITED NATIONS SECURITY COUNCIL PURSUANT TO UNSCR 1970 (2011), ¶ 11 (May 26, 2016), https://www.icc-cpi.int/itemsDocuments/otp_report_lib_26052016-eng.pdf ("The Office underscores that due to the prevailing instability and current security situation, it is impossible for investigators to undertake investigative activities in Libya.").

82. *See* JEAN M. MORGAN, PROVING GENOCIDE: THE ROLE OF FORENSIC ANTHROPOLOGY IN DEVELOPING EVIDENCE TO CONVICT THOSE RESPONSIBLE FOR GENOCIDE 14–15 (2011) (unpublished thesis, Florida State University) (on file

from talking to investigators.[83] In certain situations, for instance, the ICC's Office of the Prosecutor has had to go to extraordinary lengths to approach potential witnesses without exposing them. These efforts have included "identify[ing] safe sites for interviews; secur[ing] discreet transportation for investigators and witnesses; provid[ing] for the contingency of moving witnesses to safe locations without attracting attention; and even check[ing] the relationships of drivers and hotel owners with the suspects."[84] As one ICC prosecutor put it:

> Secret locations had to be found to interview individuals. International officials, whether white or black people, coming into certain areas were immediately identified as outsiders. This had major consequences for the quality of the evidence because those who were willing to be interviewed were not necessarily the best witnesses. Even those who might be willing to speak at first later change their mind when they realize who has been charged. People who are outside this institution looking at this say, "Ok, let's charge Gaddafi, it's easy, it's obvious." But who is going to be willing to come and testify against Gaddafi if their car could blow up while coming?[85]

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with the Florida State University Libraries), https://fsu.digital.flvc.org/islandora/object/fsu:183025/datastream/PDF (describing the government's placing of booby traps and mines around mass graves so as to prevent excavations).

83. *See, e.g.*, SPECIAL TRIBUNAL FOR LEB., SECOND ANNUAL REPORT 25–26 (2010–11), https://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/227-Second-Annual-Report-2010-2011

> There has been intimidation of witnesses in a number of ways: commencing in the last quarter of 2010, several calls have been made for a boycott of the Tribunal; public threats have been made to dissuade cooperation with the Tribunal; and unlawful broadcasts of audio recordings of witness interviews made in confidence to the UN International Independent Investigation Commission have been aired on some Lebanese television channels.

84. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, REPORT ON THE ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS (JUNE 2003–JUNE 2006), at 7 (Sept. 12, 2006), https://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747 378AB2/143680/OTP_3yearreport20060914_English.pdf.

85. John D. Jackson & Yassin M. Brunger, *Fragmentation and Harmonization in the Development of Evidentiary Practices in International Criminal Tribunals*, *in* PLURALISM IN INTERNATIONAL CRIMINAL LAW, *supra* note 50, at 159, 171 (citation omitted).

Prosecutors in other international tribunals have faced similar challenges.[86] Constrained investigations frequently generate sub-par evidence that subsequently creates fact-finding uncertainty during trials. Evidence and witnesses who should appear often do not, and those who do may not be the most probative. Such difficulties were on full display in the ICC's first case—*Prosecutor v. Lubanga*[87]—which featured a Congolese defendant accused of enlisting and conscripting child soldiers.[88] Prosecutors determined that prospective Congolese witnesses would be endangered if even interviewed by ICC employees,[89] so they instead enlisted local persons—denominated intermediaries—to act as liaisons between potential witnesses and the ICC.[90] It was intermediaries, then, who selected and interviewed the individuals who later appeared as witnesses at trial.[91] Although the prosecution's use of intermediaries may have been well-intentioned, it backfired spectacularly. Nine witnesses who claimed to have been child soldiers testified, yet the Trial Chamber did not credit or rely on a single one of them.[92] The very first prosecution witness recanted his testimony, claiming that an intermediary had instructed him to provide a false account,[93] and several subsequent witnesses made similar allegations.[94] In the end, the Trial Chamber rejected virtually all of the evidence provided by intermediaries and harshly criticized the prosecution for their use.[95] Although the Trial Chamber's criticism may have

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86. *See* MAHONY, *supra* note 79, at 72–75 (discussing challenges facing ICTR prosecutors).

87. Lubanga Judgment, *supra* note 22, ¶¶ 269–283.

88. *See id.*

89. *See* O'Donnell, *supra* note 79, at 11–13.

90. *See* Buisman, *supra* note 80, at 34–35.

91. *See id.* at 35.

92. *See* Lubanga Judgment, *supra* note 22, ¶ 479 (recognizing "the trauma the children called by the prosecution are likely to have suffered" but finding them "unreliable as regard the matters that are relevant to the charges in this case").

93. *See id.* ¶¶ 330, 430, 449.

94. *See* Buisman, *supra* note 80, at 44.

95. *See id.* at 32 ("The judgment is scathing about the investigative failures of the Prosecutor and particularly the excessive reliance on these intermediaries."); Lubanga Judgment, *supra* note 22, ¶ 482 ("The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries . . . .").

been justified, one cannot deny that it was the unstable security situation in the Eastern DRC that prompted the prosecution's employment of intermediaries in the first place.[96]

Because on-going conflicts render investigations so difficult to conduct, mass atrocity investigations are commonly delayed until the conflict ends and the region stabilizes.[97] Such delays reduce the kinds of evidentiary difficulties just described, but they give rise to other evidentiary difficulties. For instance, time lags give perpetrators an opportunity to destroy evidence or conceal it,[98] and many perpetrators have made use of this opportunity over the years. The Japanese destroyed documents in anticipation of the Tokyo Tribunal trial,[99] the Khmer Rouge destroyed documents as

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96. *See* Prosecutor v. Katanga, ICC-01/04-01/07-3394-Red, Defence Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013, ¶ 15 (Aug. 5, 2013) https://www.icc-cpi.int/drc/katanga/Documents/KatangaEng.pdf (noting that even in 2013, "current, extreme security difficulties pertaining in Ituri and North Kivu render[] investigations either extremely difficult or impossible to conduct").

97. *See* Mike P.J. Cole, *Investigating Military Operations: Added Value or Added Hype?*, 212 MIL. L. REV. 194, 207 (2012) (noting, among other things, that "witnesses become more willing to speak when it is clear that the previous government will not return"). To be sure, evidence gathering can be fraught with difficulty even when the conflict has unquestionably ended and the ruling party unquestionably supports prosecutions. Rwanda was in this comparatively favorable position following the 1994 genocide; nonetheless, many potential Rwandan witnesses were afraid to speak with investigators, and virtually all who testified at the ICTR did so using pseudonyms. *See* Sluiter, *supra* note 48, at 967, 976 (explaining the need for witness protection). The fears of ICTR witnesses were well-founded. *See* Second Annual Report of the ICTR, ¶ 51, U.N. Docs. A/52/582 and S/1997/868 (Dec. 2, 1997) (reporting on the murders of scores of ICTR witnesses); PAUL MAGNARELLA, JUSTICE IN AFRICA: RWANDA'S GENOCIDE, ITS COURTS AND THE UN CRIMINAL TRIBUNAL 74 (2000) (same).

98. Whiting, *supra* note 27, at 336.

99. The Japanese War Ministry ordered the burning of all inculpatory documents in the possession of its troops. *See* Yuma Totani, *The Case Against the Accused*, *in* BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED 147, 154–55 (Yuki Tanaka et al. eds., 2011); *see also* ARNOLD C. BRACKMAN, THE OTHER NUREMBERG 40 (1987) (noting that Japanese militarists destroyed inculpatory documents "by the warehouseful"); PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951, at 10 (1980) ("Rapid demobilization and repatriation of ex-POWs, witnesses and evidence scattered literally throughout the world, wholesale destruction of key documents by Japanese, incredible difficulties in identifying, locating and apprehending suspects in Japan proper and East Asia and other factors combined to render nearly impossible the tasks given to Allied prosecutors.").

Cambodia was being overrun by Vietnamese troops,[100] and the Serbs, though not able entirely to destroy evidence of the Srebrenica massacres, did conceal a great deal of it by burying the victims in secret mass graves and repeatedly moving the remains from one grave to another.[101] Evidence also disappears for innocent reasons as time passes. In the ordinary course of time, witnesses die, documents are lost, and various forms of forensic evidence can lose their probative value.[102]

Delaying prosecutions can also undermine the quality of the evidence that is discovered. For one thing, research shows what we all know, that memories fade over time,[103] so testimony about long-ago events is less likely to be accurate than testimony about recent events. The international tribunals have repeatedly recognized this fact and found deficiencies and inconsistencies in witness testimony attributable to the lengthy delay between the events in question and testimony about those events.[104] The

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100. *See* CRAIG ETCHESON, AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE 64–65 (2005).

101. *See* Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgement, ¶¶ 382–383 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), https://web.archive.org/web/20070310174358/http://www.un.org/icty/blagojevic/trialc/judgement/index.htm ("The Trial Chamber is also of the opinion that the opening of the mass graves and the reburial of the victims in other locations was an attempt to conceal the evidence of the mass killings."); *see also* Zekerija Mujkanović, *The Orientation Criteria Document in Bosnia and Herzegovina*, *in* CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMINAL CASES 79, 80 (Morton Bergsmo ed., 2d ed. 2010) (reporting that "complete archive materials were secretly carried out of" Bosnia).

102. *See* ETCHESON, *supra* note 100, at 64–65 (describing the destruction of forensic evidence in Cambodia); Whiting, *supra* note 27, at 332 (explaining causes of "degradation of evidence"); Witteveen, *supra* note 7, at 388 ("The time lapse between the moment of the occurrence of the facts and crimes, and the actual investigations and trials has consequences. . . . [E]vidence will have been lost.").

103. *See* JOHN W. SHEPHERD ET AL., IDENTIFICATION EVIDENCE: A PSYCHOLOGICAL EVALUATION 80–86 (1982) (describing authors' study showing that memory remained relatively constant for a few months after an event but declined sharply after eleven months); Hadyn D. Ellis, *Practical Aspects of Face Memory*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 12, 23–25 (Gary L. Wells & Elizabeth F. Loftus eds., 1984) (summarizing research). *But see* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-T-84-ENG, Transcript, at 23 (Apr. 18, 2016) [hereinafter Ntaganda Transcript, Apr. 18, 2016] (providing expert witness Dr. John Charles Yuille's description of the hypermnesia of some trauma victims who repeatedly relive their traumatic experiences and thereby retain strong memories of them).

104. *See, e.g.*, Prosecutor v. Ngudjolo, ICC-01/04-02/12-3-tENG, Judgment

probative value of forensic evidence can also decline over time.[105] A mass grave that is examined a decade after the atrocity, for instance, typically will reveal less probative evidence than a mass grave that is examined three months after the atrocity.[106] As this

pursuant to Article 74 of the Statute, ¶ 49 (Dec. 18, 2012), https://www.icc-cpi.int/CourtRecords/CR2013_02993.PDF [hereinafter Ngudjolo Judgment] (providing examples of witness recollection issues due to delay between the event being testified about and the trial); Lubanga Judgment, *supra* note 22, ¶ 103 (same); Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶ 65 (Apr. 28, 2005) [hereinafter Muhimana Judgment] (same); Prosecutor v. Gacumbitsi, Case No. ICTR-01-64-T, Judgement, ¶ 83 (June 17, 2004) [hereinafter Gacumbitsi Judgment] (same); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgement, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) ("The Chamber further observes that the seven years that have passed since the events in the Indictment have, in all likelihood, affected the accuracy and reliability of the memories of witnesses, understandably so."); Prosecutor v. Fofana et al., Case No. SCSL-04-14J, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, ¶ 44 (Aug. 2, 2007) ("The Chamber duly advised itself that evidence about facts which took place 10 or more years prior to testifying may well involve inherent uncertainties due to the imperfections and vagaries of human perception and recollection.").

105. *See* BEYOND REASONABLE DOUBT, *supra* note 49, at 6 (stating that experts "stressed that arriving as early as possible at crime scenes and collecting evidence promptly can help ensure that evidence is not tampered with, degraded, or destroyed"); O'Donnell, *supra* note 79, at 16–17 (describing the way in which investigative delays impeded investigators' ability to obtain probative forensic evidence in the *Lubanga* case). Different types of forensic evidence will degrade over differing timelines. For example, DNA evidence will become severely damaged, as a result of exposure to environmental effects such as temperature extremes, humidity, or microbial activity, over the course of thirty or forty years. *See* Lisa Lane Schade & Leonard Klevan, *Identifying Degraded DNA*, FORENSIC MAG. (Jan. 2, 2007, 3:00 AM), https://www.forensicmag.com/article/2007/01/identifying-degraded-dna (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review). At the other end of the spectrum, fresh fingerprints might last only eight hours before deteriorating. JOSEPH J. VINCE & WILLIAM E. SHERLOCK, EVIDENCE COLLECTION 45 (2005).

106. *See* ETCHESON, *supra* note 100, at 65–66 (describing the way in which "[m]ass graves are particularly vulnerable to destruction both by humans and the environment"); *see also* Shaoni Bhattacharya, *Vital Evidence Lost from Iraq's Mass Graves*, NEW SCIENTIST (May 14, 2003), https://www.newscientist.com/article/dn3733-vital-evidence-lost-from-iraqs-mass-graves/ (last visited Jan. 22, 2018) ("'Once bodies have been buried, there is a certain amount of decomposition but then the environment stabilises . . . . But when people have been digging and exposing the grave to the air, 'you get a resumption of decay.'") (on file with the Washington and Lee Law Review); *Iraq: Protect Mass Graves*, HUM. RIGHTS WATCH (Jan. 30, 2016, 12:00 AM), https://www.hrw.org/news/2016/01/30/iraq-protect-mass-graves (last visited Jan. 22, 2018) ("Exhumations without forensic experts can destroy critical evidence . . . .") (on file with the Washington and Lee

discussion shows, then, the context of conflict and instability that surrounds mass atrocities creates unique and often severe fact-finding challenges for those later seeking to prosecute or defend their alleged perpetrators.

b. Governmental Interference in Prosecutions

Because most mass atrocities are embedded in large-scale conflicts involving governmental officials, the prosecutions of mass atrocities frequently give rise to governmental interference. In some cases, governmental authorities flat-out prevent investigations: Burundi, for instance, has denied the ICC access to its territory since the ICC's Prosecutor opened a preliminary investigation in April 2016.[107] President al Bashir of Sudan likewise prevented the ICC from conducting in-state investigations in Darfur,[108] and his obstructionism eventually led ICC prosecutors to suspend investigations entirely.[109] Other governments interfere to support prosecutions and convictions. The Government of Rwanda, for instance, allegedly prevented ICTR defense counsel from entering Rwanda;[110] similarly, in 2012,

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Law Review); Morgan, *supra* note 82, at 67–68 (explaining probative value of forensic evidence in mass atrocities).

107. Jane E. Stromseth, *Assessing the International Criminal Court*, at 12 (unpublished draft) (on file with author); *see also Burundi Warns Against Execution Investigations at ICC,* AGENCE FRANCE-PRESSE (Mar. 30, 2016), https://www.yahoo.com/news/burundi-warns-against-execution-investigations-icc-105538473.html (last visited Feb. 6, 2018) (warning victims of extrajudicial executions not to provide evidence to the ICC) (on file with the Washington and Lee Law Review).

108. *See* Göran Sluiter, *Responding to Cooperation Problems at the STL*, *in* THE SPECIAL TRIBUNAL FOR LEBANON 134, 148–49 (Amal Alumuddin et al. eds., 2014) (explaining that investigations in Darfur are "practically impossible" because Sudan's government refuses to cooperate). Sudan, indeed, has made cooperating with the ICC a criminal offense. *See* Prosecutor v. Banda, ICC-02/05-03/09-274, Defense Request for a Temporary Stay of Proceedings, ¶ 2 (Jan. 6, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_00037.PDF.

109. *See* David Smith, *ICC Chief Prosecutor Shelves Darfur War Crimes Probe*, GUARDIAN (Dec. 14, 2014), https://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan (last visited Jan. 22, 2018) (discussing circumstances prompting suspension of the ICC's investigation in Darfur) (on file with the Washington and Lee Law Review).

110. *See generally* Thierry Cruvellier, *Grass-Roots Justice*¸ INT'L JUST. TRIB., Mar. 29, 1999. *See also* Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgement

when ICC defense counsel to Libyan defendant Saif al-Islam travelled to Zintan, Libya to interview her client, she was arrested by Libyan authorities and detained for several weeks.[111]

Even when government officials do not close the borders to investigators or physically bar their access to witnesses, they can prevent probative evidence from reaching the courtroom. ICC investigators, for instance, were able to acquire sufficient evidence to convince the court's Pre-Trial Chamber to confirm charges against Kenyan President Kenyatta[112] and Vice President Ruto,[113] but thereafter the defendants or their associates allegedly intimidated prospective witnesses to such a degree that a large proportion of them recanted their inculpatory statements.[114] As a

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and Sentence, ¶¶ 41–43 (Dec. 13, 2005); Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on Motion Concerning Alleged Witness Intimidation, ¶ 1 (Dec. 28, 2004) (alleging intimidation prevented defence counsel from fact finding); Kai Ambos, *International Criminal Procedure: "Adversarial," "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1, 36 (2003) ("There are various cases where defence counsel were denied permission to enter the territory of . . . Rwanda."); Frederik Harhoff, *The Role of the Parties Before International Criminal Courts in Light of the International Criminal Tribunal for Rwanda*, *in* INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 645, 655–56 (Horst Fischer et al. eds., 2001) ("Defence Counsels were flatly denied permission to enter into Rwanda . . . ."); Steven Kay & Bert Swart, *The Role of the Defence*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1421, 1424 (Antonio Cassese et al. eds., 2002) (observing that Rwanda obstructs defense counsel's access to the State).

111. *See* Marlise Simons, *Libya Refuses to Release Hague Court Workers*, N.Y. TIMES (June 14, 2012), http://www.nytimes.com/2012/06/15/world/africa/libya-refuses-to-release-hague-staff-in-custody.html?_r=0 (last visited Jan. 22, 2018) (discussing the arrest of Melinda Taylor and other ICC attorneys) (on file with the Washington and Lee Law Review); *Libya ICC Lawyer Melinda Taylor and Colleagues Fly Out*, BBC NEWS (July 3, 2012), http://www.bbc.com/news/world-africa-18683786 (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review).

112. *See* Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 428 (Jan. 23, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF.

113. *See* Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 302 (Jan. 23, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF.

114. *See* Prosecutor v. Ruto, ICC-01/09-01/11-1866-Red, Public redacted version of "Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses," 29 April 2015, ICC-01/09-01/11-1866-Conf + Annexes, ¶ 2 (May 21, 2015); Press Release, Kenya Human Rights Comm'n, Kenya: Termination of Ruto and Sang case at the ICC: Witness Tampering Means Impunity Prevails over Justice Again (Apr. 7, 2016), http://www.khrc.or.ke/2015-

consequence of these witness defections, an ICC Trial Chamber acquitted Ruto,[115] and the prosecution withdrew its case against Kenyatta for lack of evidence.[116] These examples and many others show that governmental authorities have the power to dramatically impact the quantity and quality of evidence available in a mass atrocity prosecution, and they commonly make use of that power.

2. Fact-Finding Challenges Caused by Group Criminality

The previous section highlighted the conditions of conflict that surround most mass atrocities, and it considered the evidentiary implications of those conditions. Another important contextual factor, one that this section will take up, relates to the perpetrators of mass atrocities. Specifically, mass atrocities are typically perpetrated by massive numbers of individuals, but in most cases, only a small proportion of those individuals can be prosecuted. That fact alone does not create evidentiary difficulties; indeed, few fact-finding challenges would arise if prosecutors targeted their limited number of prosecutions against those for whom there was the greatest evidence of criminality. But usually—and understandably—they do not. Rather, prosecutors typically target the high-level government and military officials who orchestrated the atrocities, and they leave unprosecuted the individuals who

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03-04-10-37-01/press-releases/528-kenya-termination-of-ruto-and-sang-case-at-the icc-witness-tampering-means-impunity-prevkenya-termination-of-ruto-and-sang-case-at-the-icc-witnesstampering-means-impunity-prevails-over-justice-again.html (last visited Feb. 17, 2018) ("[T]he Prosecutor sought to admit the testimonies . . . [because] a number of witnesses, after giving their initial testimony, stopped cooperating due to threats . . . .") (on file with the Washington and Lee Law Review); Tom Maliti, *Prosecutor Withdraws Seven Witnesses in Kenyatta Case in Past Year*, INT'L JUST. MONITOR (Jan. 16, 2014), http://www.ijmonitor.org/2014/01/prosecutor-withdraws-seven-witnesses-in-kenyatta- case-in-past-year/ (last visited Jan. 22, 2018) (explaining circumstances surrounding witnesses' removal) (on file with the Washington and Lee Law Review).

115. *See* Prosecutor v. Ruto, ICC-01/09-01/11-2027-Red-Corr, Public Redacted Version of: Decision on Defence Applications for Judgments of Acquittal, ¶ 464 (Apr. 5, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04384.PDF.

116. *See* Prosecutor v. Kenyatta, ICC-01/09-02/11-983, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ¶ 2 (Dec. 5, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09939.PDF.

actually carried out the offenses.[117] This sort of targeting makes good sense both from a political standpoint as well as a penological standpoint,[118] but it also creates a great deal of uncertainty at trial.

Domestic prosecutors have long found it difficult to obtain good quality evidence against leaders of large criminal networks, such as organized crime syndicates or drug cartels,[119] and that same difficulty arises and creates tremendous uncertainty in trials of mass atrocity leaders. Some of the uncertainty stems from the fact that the evidence available to prove the criminal liability of high-level offenders is generally weaker and less certain than the evidence available to prove the criminal liability of direct perpetrators.[120] Consider, for instance, forensic evidence. Even in developing nations, where less non-testimonial evidence exists, those prosecuting isolated, domestic murders frequently rely on forensic evidence to identify perpetrators and prove their criminal liability.[121] Section 1 just revealed that such forensic evidence

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117. *See generally* MARIA NYSTEDT ET AL., A HANDBOOK ON ASSISTING INTERNATIONAL CRIMINAL INVESTIGATIONS 43 (2011); Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 627 (2007). ICTY prosecutors initially targeted lower-level offenders in an effort to build cases against more senior officials, but tribunal judges successfully opposed that strategy. *See* Claudia Angermaier, *Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia*, *in* CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMINAL CASES 27, 29–31 (Morton Bergsmo ed., 2d ed. 2010) (observing that prosecutors prioritize indictment of high-level officials over those actually carrying out the crimes).

118. *See* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 149 (2005) (discussing benefits of the "command responsibility doctrine").

119. *See generally* Lauren Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077 (2017); Spencer Martinez, Note, *Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency*, 47 CLEV. ST. L. REV. 141, 142 (1999).

120. Whiting, *supra* note 27, at 339.

121. *See, e.g.*, Uganda v. Engonu, HCCC No. 29 of 2012 (Uganda) (June 8, 2015), http://www.ulii.org/ug/judgment/hc-criminal-division/2015/18/; Uganda v. Mukalu, HCCC No. 86 of 2013 (Uganda) (Mar. 9, 2015), http://www.ulii.org/ug/judgment/high-court-criminal-division/2015/2; Uganda v. Okello et al. (Criminal Session Case No. 100 of 2012.) [2015] UGHCCRD 5 (Uganda) (May 26, 2015), http://www.ulii.org/ug/judgment/hc-criminal-division/2015/5; Nyander v. RL, [2011] LRSC 9 (Liberia) (Jan. 21, 2011), http://www.liberlii.org/cgi-bin/disp.pl/lr/cases/LRSC/2011/9.html?stem=0&synonyms=0&query=murder; Fartoma v. RL, [2011] LRSC 7 (Liberia) (Jan. 20,

might not be available in mass atrocity prosecutions if prosecutions are delayed for years or decades. But even when forensic evidence of a mass atrocity does exist, it frequently has little probative value.

It has little probative value because it does not answer the questions that most mass atrocity prosecutions seek to answer. That is, forensic evidence of an isolated murder can help to identify the person who killed the victim. Forensic evidence of a mass killing might do the same, but because the direct perpetrators of mass atrocities are rarely prosecuted, the forensic evidence is usually far less important.[122] To be sure, a mass grave will show

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2011), http://www.liberlii.org/cgi-in/disp.pl/lr/cases/LRSC/2011/7.html?stem=0&synonyms=0&query=murder; Williams v. RL, [2014] LRSC 45 (Liberia) (Aug. 15, 2014), http://www.liberlii.org/cgi-bin/disp.pl/lr/cases/LRSC/2014/ 45.html?stem=0&synonyms=0&query=murder; Republic v. Mngulwi, [2003] TZHC 7 (Tanzania) (May 2, 2003), http://www.saflii.org/cgi-bin/disp.pl?file=tz/cases/TZHC/2003/7.html&query=murder; Republic v. Maneno, [2005] TZHC 60 (Tanzania) (Nov. 11, 2005), http://www.saflii.org/cgi-bin/disp.pl?file=tz/cases/TZHC/2005/60.html&query=murder; Republic v. Muasya, (2009) (H.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/ view/97451/; Republic v. Kokane, (2009) (H.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/104682/.

122. Because the Special Panels were able to apprehend only low-level Timorese soldiers who actually perpetrated the crimes, they did make use of some forensic evidence. *See* MOHAMED C. OTHMAN, ACCOUNTABILITY FOR INTERNATIONAL HUMANITARIAN LAW VIOLATIONS: THE CASE OF RWANDA AND EAST TIMOR 106–07 (2005) (explaining that forensic evidence is useful for identifying victims); Prosecution v. Tacaqui, Case No. 20/2001, Judgement, at 6 (Special Panels for Serious Crimes, Dist. Court of Dili, Timor-Leste Dec. 9, 2004), http://www.worldcourts.com/un_etta/eng/decisions/2004.12.09_Prosecutor_v_Tacaqui.pdf (using forensic evidence to give "comprehensive picture of the case" at trial rather than proving the accused's wrongdoing); Prosecution v. Correia, Case No. 27/2003, Judgement, at 7 (Special Panels for Serious Crimes, Dist. Court of Dili, Timor-Leste Apr. 25, 2005), http://www.worldcourts.com/un_etta/eng/decisions/2005.04.25_Prosecutor_v_Alves_Correia.pdf; Prosecution v. Mesquita, Case No. 28/2003, Judgement, ¶ 43 (Special Panels for Serious Crimes, Dist. Court of Dili, Timor-Leste June 12, 2004), http://www.worldcourts.com/un_etta/eng/decisions/2004.12.06_Prosecutor_v_Mesquita.pdf. The ICTR, for its part, abandoned its forensic program after only one mass excavation; although the excavation exhumed the remains of nearly 500 individuals, only a handful of these individuals could be identified. *See* Eric Stover & Rachel Shigekane, *Exhumation of Mass Graves: Balancing Legal and Humanitarian Needs*, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 85, 89 (Eric Stover & Harvey M. Weinstein eds., 2004); *see also* Caroline Buisman, *The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?*, 27 LEIDEN J. INT'L L. 205, 211 (2014) [hereinafter Buisman, *Prosecutor's Obligation*] (observing that in *Katanga* "no proper exhumation was conducted to identify the number and causes

that a large-scale killing took place, but that sort of fact is rarely contested in mass atrocity trials.[123] Forensic analysis can also show that large numbers of victims were summarily executed,[124] which can suggest that the crimes were committed as part of a systematic or coordinated attack.[125] Certainly, these facts can suggest the involvement of a military commander or a civilian leader. However, because mass atrocity trials typically feature defendants who have no physical link to the crime,[126] forensic evidence will usually be far less probative in such trials than in trials of isolated criminality.[127]

Eyewitness testimony is also likely to be more problematic in prosecutions of mass atrocities in general and prosecutions of high-level offenders in particular. For one thing, whereas isolated crimes are often perpetrated by individuals who are known to victims,[128] mass atrocities are more frequently perpetrated by

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of deaths and the status (civilian or military) of the victims").

123. *See, e.g.*, Duch Judgment, *supra* note 49, ¶ 208 (noting that defendant admitted that at least 12,273 people died or were executed at Tuol Sleng while he commanded the prison camp); Prosecutor v. Kanyarukiga, Case No. ICTR-02-78-T, Judgement and Sentence, ¶ 561 (Nov. 1, 2010) [hereinafter Kanyarukiga Judgment] ("It is not disputed that the Nyange Parish Church was destroyed on 16 April 1994 or that the Tutsi civilians who had taken refuge there were killed.").

124. *See, e.g.*, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶¶ 5217–5218 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf [hereinafter Karadžić Judgment] (describing the cause of death for 150 individuals).

125. *See, e.g.*, Krstić Judgment, *supra* note 52, ¶¶ 71–79 (finding that the forensic evidence corroborated witness's testimony of mass killings).

126. *See* Morten Bergsmo & William H. Wiley, *Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes*, *in* MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS 11 (2008), http://www.jus.uio.no/smr/english/about/programmes/nordem/publications/manual ("[I]nternational criminal jurisdictions . . . can be expected to primarily pursue alleged perpetrators who were not physically present when criminal conduct was committed.").

127. *See* Whiting, *supra* note 27, at 338 ("With respect to linkage, the accused commander is often far removed from the crimes and there are generally no documents directly connecting him to the commission of those crimes.").

128. In both developed and developing nations, violent crime is commonly perpetrated by the victims' friends and family members. A Bureau of Justice Statistics study showed, for instance, that in 2010 in the United States, about 38% of non-fatal violent crimes were committed by strangers, compared to about 62% committed by non-strangers. *See* ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT VICTIMIZATION COMMITTED BY STRANGERS, 1993–2010, at 1 (2012), https://www.bjs.gov/content/pub/

those who have no pre-existing relationships with their victims. Thus, to the extent that the identity of perpetrators is relevant in a mass-atrocity case, then fact-finders must rely on the most questionable evidence of all—stranger eyewitness identifications.[129] In addition, when high-level offenders are prosecuted, then the most probative witnesses are usually insiders; that is, those who worked with the defendants to commit the atrocities. Unlike unfamiliar victim witnesses, insider witnesses have no difficulty identifying the defendant, but they often do have incentives to falsely inculpate or exculpate him. To be sure, the perjuring proclivities of insider witnesses also create evidentiary challenges in trials of domestic crimes,[130] so trials of

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pdf/vvcs9310.pdf (providing statistics concerning relationship between homicide victims and their killers). The study further found that between 1993 and 2008, between 21% and 27% of homicides were committed by strangers, versus 73% to 79% by non-strangers. *Id.* The relative proportions can vary considerably depending on the gender of the victim. In particular, women are far more likely to be victimized by someone they know than are men. *See* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T. OF JUSTICE, 2015 NATIONAL CRIME VICTIMS' RIGHTS WEEK RESOURCE GUIDE 10 (2015), https://ovc.ncjrs.gov/ncvrw2015/pdf/FullGuide.pdf

> In cases in 2012 where victims indicated their relationship to the offender, males experienced aggravated assault by a nonstranger (including intimate partner, other relative, and friend/acquaintance) in 34.8 percent of cases and by a stranger in 53.0 percent. Females experienced aggravated assault by a nonstranger in 52.4 percent of cases and by a stranger in 37.9 percent of cases.

For similar statistics regarding Liberian crime, see SMALL ARMS SURVEY, ISSUE BRIEF, READING BETWEEN THE LINES: CRIME AND VICTIMIZATION IN LIBERIA 2, 10 (2011), http://www.smallarmssurvey.org/fileadmin/docs/G-Issue-briefs/Liberia-AVA-IB2.pdf.

129. *See* Gaetano Noël Best, Fair and Accurate Fact-Finding in Dutch Atrocity Crimes Cases (Oct. 20, 2016) (unpublished Ph.D. dissertation, University of Amsterdam) (discussing the inherent unreliability of eyewitness evidence and describing it as "regularly inaccurate, even if it has been gathered under the most favourable of circumstances") (on file with author).

130. *See, e.g.*, Michael Cassidy, *"Soft Words of Hope":* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1140 (2004) ("Not only do accomplice witnesses have a motive to fabricate, they have an ability to fabricate and to fabricate convincingly."); Martinez, *supra* note 119, at 151 ("Courts have repeatedly acknowledged the witness' strong motive to lie" when cooperation agreement reduces jail time); C. Blaine Elliott, *Life's Uncertainties: How To Deal With Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1, 7 (2003) ("The testimony of informants who have received deals from prosecutorial agencies is suspicious from the outset."); Emily Jane Dodds, Note, *I'll Make You a Deal: How Repeat Informants are Corrupting the Criminal Justice System and What to Do About It*, 50 WM. & MARY L. REV. 1063, 1075 (2008)

mass atrocities are not uniquely plagued by that phenomenon. Perjuring insiders are, however, likely to have a more pronounced and distortive effect on fact-finding in mass atrocity prosecutions because, as noted above, such prosecutions are far less likely to receive other probative evidence that might reveal or cast doubt on the perjured testimony. International criminal transcripts are filled with the testimony of insider witnesses who fell out with their former partners-in-crime and later detested them;[131] insiders who sought to shift blame to defendants in order to minimize their own criminal responsibility;[132] and insiders who sought to exculpate defendants with whom they shared continuing bonds of loyalty.[133] Not surprisingly, the international tribunals have

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(describing an Innocence Project report that found that an insider witness testified against the defendant in more than 15% of wrongful convictions subsequently overturned by DNA evidence).

131. *See, e.g.*, Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 30 (Mar. 11, 2005) (stating that insider witness had reason to dislike defendant because defendant had fired the witness).

132. *See, e.g.*, Kanyarukiga Judgment, *supra* note 123, ¶ 578 & n.1607 ("Given that Witness CDL is still serving time in Rwanda for crimes related to the events of 1994, he could have personal motivations to implicate the Accused while minimising his own role in the attacks."); Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, Judgement and Sentence, ¶ 244 (Dec. 30, 2011), http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-01-68/trial-judgements/en/111230.pdf [hereinafter Ndahimana Judgment] ("As shown by the evidence in this case, the witness may have tried to minimise his own role in events."); Prosecutor v. Setako, Case No. ICTR-04-81-T, Judgement and Sentence, ¶ 156 (Feb. 25, 2010), http://unictr.unmict.org/sites/unictr.org/files/ case-documents/ictr-04-81/trial-judgements/en/100225.pdf [hereinafter Setako Judgment] ("The potential, therefore, exists that the witness's testimony may be influenced by a desire to positively impact his circumstances in Rwanda or to shift blame to Setako either to minimize his own involvement or based on the belief that Setako was behind his increased sentence."); Prosecutor v. Munyakazi, Case No. ICTR-97-36A-T, Judgement and Sentence, ¶ 119 (July 5, 2010), http://www.refworld.org/pdfid/4c722d350.pdf [hereinafter Munyakazi Judgment] ("[A]t earlier stages of the proceedings in Rwanda, the witness may have attempted to minimise his involvement in the genocide."); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgement and Sentence, ¶ 156 (Sept. 12, 2006), http://hrlibrary.umn.edu/instree/ICTR/MUVUNYI_ICTR-00-55/MUVUNYI_ICTR-2000-55A-T.pdf ("[Witness] had reason to enhance Muvunyi's participation in the genocidal campaign and in that way attempt to diminish his own role therein."); *see also id.* ¶¶ 131, 309, 371, 420, 421 (describing witness's involvement with crimes).

133. *See, e.g.*, Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgement, ¶ 566 (Mar. 2, 2009), http://www.rscsl.org/Documents/Decisions/RUF/1234/ SCSL-04-15-T-1234-searchable.pdf [hereinafter RUF Judgment] (rejecting one witness's

recognized the increased uncertainty inherent in insider witness testimony and have typically treated it "with caution."[134]

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testimony because the "witness did not testify in order to assist the Chamber . . . but to assist the Accused").

134. Prosecutor v. Fofana et al., Case No. SCSL-04-14J, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, ¶ 47 (Aug. 2, 2007); *see also* Prosecutor v. Renzaho, Case No. ICTR-97-31-T, Judgement and Sentence, ¶¶ 166, 240, 312, 321, 410, 487, 557, 569, 594, 652, 734 (July 14, 2009), http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-97-31/trial-judgements/en/090714.pdf [hereinafter Renzaho Judgment] (carefully scrutinizing insider witnesses' testimony); Prosecutor v. Gacumbitsi, Case No. ICTR-01-64-T, Judgement, ¶ 86 (June 17, 2004) (same); Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Judgement and Sentence, ¶ 405 (Mar. 31, 2011), http://www.refworld.org/pdfid/4d9c16642.pdf [hereinafter Gatete Judgment] (assessing witness's for bias because his testimony "may have been influenced by a desire to positively impact his circumstances in Rwanda"); Prosecutor v. Hategekimana, Case No. ICTR-00-55B-T, Judgement and Sentence, ¶¶ 278, 449, 547, 552 (Dec. 6, 2010), http://unictr.unmict.org/sites/ unictr.org/files/case-documents/ictr-00-55b/trial-judgements/en/101206.pdf [hereinafter Hategekimana Judgment] (considering credibility of the witnesses with caution); Kanyarukiga Judgment, *supra* note 123, ¶¶ 181, 198, 306, 440–441, 452–453, 487, 576, 591 (treating insider witness testimony with caution); Karera Judgment, *supra* note 65, ¶¶ 52, 165, 189, 215 ("[Witness] testimonies may have been influenced by a wish to positively affect proceedings against them in Rwanda."); Munyakazi Judgement, *supra* note 132, ¶¶ 10, 119, 199, 206, 255, 366, 417; Ndahimana Judgement, *supra* note 132, ¶¶ 48–49, 248–249, 443, 454, 459–461, 631, 687 (finding that "accomplice witness testimony" should be treated with caution); Prosecutor v. Ngirabatware, Case No. ICTR-99-54-T, Judgement and Sentence, ¶¶ 66, 193, 201, 283, 311, 479 (Dec. 20, 2012), http://wwww.unictr.org/sites/unictr.org/files/case-documents/ictr-99-54/trial-judgements/en/121220.pdf [hereinafter Ngirabatware Judgment] (using caution when evaluating accomplice testimony); Prosecution v. Nizeyimana, Case No. ICTR-2000-55C-T, Judgement and Sentence, ¶¶ 113, 504, 560, 608, 621, 811, 820, 836–838, 1107–1108 (June 19, 2012), http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-00-55c/trial-judgements/en/120619.pdf [hereinafter Nizeyimana Judgment] ("Witness ZBH's incarceration at the time of his testimony necessitate[s] that his evidence be viewed with the appropriate caution."); Prosecutor v. Ntawukulilyayo, Case No. ICTR-05-82-T, Judgement and Sentence, ¶¶ 199, 219, 233, 266, 434 (Aug. 3, 2010), http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-05-82/trial-judgements/en/100803.pdf [hereinafter Ntawukulilyayo Judgment]; Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Judgement and Sentence, ¶¶ 226, 1064, 1142, 1210, 1276, 1348, 1447, 1480 (May 31, 2012), http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-98-44d/trial-judgements/en/120531.pdf [hereinafter Nzabonimana Judgment] ("[T]he Chamber does not doubt that detained accomplice witnesses may be motivated to testify falsely for a number of reasons."); Setako Judgment, *supra* note 132, ¶¶ 50, 72, 167, 200, 203, 250, 264, 339, 348, 367, 424 ("The Chamber has determined elsewhere that there is a need to view his evidence with caution . . . ."). *See*

Finally, because most defendants in mass atrocity trials are not direct perpetrators, prosecutors frequently must employ complex theories of liability to link the defendant to the crimes on the ground. In some cases, prosecutors seek to hold high-ranking defendants liable for the acts of their subordinates, but to do so, they must establish a chain of command from the perpetrator to the defendant along with the defendant's authority over the direct perpetrators.[135] Although evidence of these elements might be relatively easy to establish in cases where well-defined military forces unquestionably carried out the crimes, armed conflicts in many states feature combatants who hail both from regular military forces and irregular paramilitary groups, so it is often unclear which set of combatants is responsible for a given massacre[136] and, correspondingly, which commander bears responsibility for the acts. Even when it is easy to identify the group that perpetrated the atrocities, it may be difficult to know whether the defendant exercised authority over that group. In such cases, de jure authority may not reflect actual authority,[137] and de facto authority may be the subject of unclear, conflicting evidence.[138]

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generally RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE § 6.23 (2002).

135. It is well-established in the case law that, to convict a defendant on a theory of command responsibility, the prosecution must prove that the defendant and the direct perpetrators stood in a superior-subordinate relationship. *See* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 346, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (providing the essential elements of command responsibility); Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgement, ¶ 781 (June 20, 2007) [hereinafter AFRC Judgment].

136. *See, e.g.*, Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶¶ 150–54 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf (finding that an array of different violent groups could be performing killings).

137. *See* Prosecutor v. Delalić, Case No. IT-96-21-A, Judgement, ¶ 193 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf ("The power or authority to prevent or punish does not solely arise from *de jure* authority conferred through official appointment.").

138. *See* Danner & Martinez, *supra* note 118, at 130 ("In many conflict situations, there may be no clear evidence of a de jure hierarchy and it may be difficult to prove the scope of a defendant's effective de facto authority."); *see also* AFRC Judgment, *supra* note 1365, ¶¶ 539–544, 551, 564, 569, 581–584, 616, 626.

3. The Coalescence of Location and Large-Scale Criminality

Sections 1 and 2 show that large-scale criminality creates its own unique fact-finding challenges that are independent of the challenges that stem from the location of the crime. In other words, large-scale crimes give rise to certain fact-finding challenges regardless of whether the crimes are perpetrated in developed or developing nations. That said, this section will show that many of the fact-finding challenges that arise during the prosecution of large-scale crimes are exacerbated when those crimes take place in developing nations. Similarly, this section will show that many of the fact-finding challenges that arise when a crime occurs in a developing nation are exacerbated when the crime is part of a mass atrocity. A few examples will show how the size of the crime interacts with the location of the crime to produce additional fact-finding obstacles.

First, consider the command responsibility doctrine just discussed in section 2. To hold a defendant liable on a command responsibility theory, prosecutors must prove that the defendant was in a superior/subordinate relationship with the direct perpetrators of the crime.[139] As section 2 indicated, that element can be difficult to prove no matter where the crime is located. Indeed, the ICTY acquitted a number of Yugoslav defendants of command responsibility charges because prosecutors could not prove beyond a reasonable doubt that the defendants had authority over the direct perpetrators.[140] However, as difficult as it is to obtain convincing evidence of command responsibility in

139. *Infra* note 135 and accompanying text.

140. *See, e.g.*, Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgement, ¶¶ 605, 612, 1101 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006), http://www.icty.org/x/cases/hadzihasanovic_kubura/tjug/en/had-judg060315e.pdf (rejecting prosecution's allegations because defendants did not have "effective control" of the brigade); Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgement, ¶ 841 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf (acquitting defendant because "he possessed neither the authority to prevent the crimes that were committed, nor to punish the perpetrators"); Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 752 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005), http://www.icty.org/x/cases/halilovic/tjug/en/ tcj051116e.pdf ("[Defendant's] influence falls short of the standard required to establish effective control.").

developed nations, it is usually harder in developing nations. For instance, after civilians were attacked in South Sudan, the spokesman for the South Sudanese Army highlighted the difficulty of knowing which group was responsible. As he observed: "Everyone is armed, and everyone has access to uniforms and we have people from other organized forces."[141] In addition, chains of authority are often more fluid and transitory during conflicts in developing nations. Shifting, temporary allegiances were notorious features of the conflict in the DRC,[142] for example, and in various SCSL trials, judges heard wildly conflicting testimony regarding the structure, hierarchy, and leadership of the various fighting forces in Sierra Leone.[143] Indeed, in the *RUF* case, the SCSL struggled to make sense of complexly organized rebel groups that displayed multiple functional layers that were not strictly hierarchically structured.[144] The SCSL faced similar challenges in the *AFRC* case, where the Trial Chamber candidly acknowledged "that the AFRC was not a traditional military organization"[145] and that the defendant "had less control over his troops than a commander would have over highly disciplined troops in a regular

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141. Jason Patinkin, *Rampaging South Sudan Troops Raped Foreigners, Killed Local*, AP (Aug. 16, 2016), https://apnews.com/237fa4c447d74698804be210512c3ed1 (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review).

142. *See* COUNCIL ON FOREIGN RELATIONS, THE EASTERN CONGO: A CFR INFOGUIDE PRESENTATION, https://www.cfr.org/interactives/eastern-congo#!/ ("[A] multitude of ethnically based local militias have added to the chaos with their opaque networks of shifting alliances."); S. AFR. INST. OF INT'L AFFAIRS, INTELLIGENCE UPDATE, GUERRILLAS IN THEIR MIDST: SHIFTING ALLIANCES IN THE DRC 1 (July 13, 1999) (discussing alliance shifts in the Democratic Republic of Congo); *see also* Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, ¶ 601 (Mar. 7, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF (explaining that Ngiti combatants were part of different alliances).

143. *See* AFRC Judgment, *supra* note 1365, ¶¶ 539–544, 551, 564, 569, 581–584, 616, 626 (describing hierarchy of the organization); RUF Judgment, *supra* note 133, at nn.1205, 1213–19, 1222–24 (citing testimony in closed session).

144. *See* Harmen van der Wilt, *Command Responsibility in the Jungle: Some Reflections on the Elements of Effective Command and Control*, *in* THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW 144, 151 (Charles Chernor Jalloh ed., 2014) ("[T]he SCSL had to grapple with a complex organization, displaying several functional layers that were not strictly hierarchically structured.").

145. AFRC Judgment, *supra* note 1365, ¶ 1738.

army."[146] Finally, the chains of authority that do exist in developing nations are less likely to be committed to writing. As noted, SCSL trials featured considerable, if conflicting, testimony about chains of authority,[147] but little documentary evidence corroborating that testimony.

Second, the problematic features of the evidence available in developing nations are apt to be magnified when the crime under prosecution is a mass atrocity. For instance, Part I noted that eyewitness testimony is frequently unreliable, so the predominance of eyewitness testimony in trials in developing nations renders their judgments less certain than judgments that are based on both testimonial and non-testimonial evidence. But the quality of the eyewitness testimony—or stated differently, the likelihood that it is inaccurate—varies with the trial, and I maintain that trials of mass atrocity are more likely to feature unreliable or inaccurate witness testimony than trials of isolated crimes. For one thing, whereas isolated crimes are prosecuted soon after they occur, mass atrocities frequently are not prosecuted for years and sometimes decades after their occurrence.[148] Because memories of events fade over time, for that reason alone we can expect a greater proportion of witnesses in mass atrocity

146. *Id.* ¶ 1740.

147. *See id.* ¶¶ 553, 561, 564, 576 (finding discrepancy between testimonies about who was in command). *See generally* Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 5 (Jan. 21, 2005) (same); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 77 (Jan. 27, 2005) (same); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 112 (May 4, 2007) (same); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 29 (May 22, 2007) (same); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 20 (May 23, 2007) (same); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 71–72, 101–102 (Oct. 22, 2007) (same); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 44 (Nov. 23, 2007) (same); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 3–6; 30–33 (June 9, 2008) (same).

148. Witnesses testifying in the most recent ICTY and ICTR cases described events that had occurred nearly twenty years before their testimony. *See* Prosecutor v. Stanišić, Case No. IT-08-91-T, Judgement, ¶ 145 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013), http://www.icty.org/x/cases/zupljanin_stanisicm/tjug/en/130327-1.pdf (noting that witnesses testified about events in 1992 and acknowledging the risks of time passing). And ECCC witnesses described events that took place in the 1970s; that is, approximately 40 years before their testimony. *See* Duch Judgment, *supra* note 49, ¶ 11 (noting, in 2009, that the charges against the defendant stemmed from actions taken between 1975 and 1979).

prosecutions to testify inaccurately than witnesses in prosecutions of isolated crimes. We also might expect a greater proportion of witnesses in mass atrocity prosecutions to testify inaccurately because the events they witnessed were so devastating. Research shows that those who witness violent events are more likely to misperceive than those who witness nonviolent events[149] because an individual's ability to perceive declines when he or she is experiencing stress.[150] Similarly, studies indicate that traumatic memories are stored differently than non-traumatic memories and are usually recalled in a more fragmented, non-chronological way.[151] Although all crime victims are apt to be traumatized by their criminal experience, on average victims of mass atrocity may well suffer greater trauma as a result of the arguably greater suffering they endured. Many Tutsi victims of the Rwandan genocide spent days and weeks literally hiding for their lives, while all of their Tutsi family, friends, and neighbors were massacred around them.[152] Similarly, many Muslim women from Srebrenica

149. *See* ELIZABETH LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 25 (2007) (finding that the "accuracy of person descriptions was poorer in the violent condition" compared with nonviolent conditions in the experience).

150. *See, e.g.*, John C. Brigham et al., *The Effect of Arousal on Facial Recognition*, 4 BASIC & APPLIED SOC. PSYCHOL. 279, 291 (1983) ("Considering the generally stressful experience of crimes, eyewitnesses can be expected to provide relatively unreliable evidence."); Sven-Ake Christianson & Elizabeth F. Loftus, *Memory for Traumatic Events*, 1 APPLIED COGNITIVE PSYCHOL. 225, 227 (1987) ("[T]he more peripheral details of an emotional event are remembered less well than the peripheral details of a non-emotional event."); Brian R. Clifford & Clive R. Hollin, *Effects of the Type of Incident and the Number of Perpetrators on Eyewitness Memory*, 66 J. APPLIED PSYCHOL. 364, 369 (1981) ("[T]he direct effect of witnessed violence was the impairment of eyewitness memory . . . ."); Saul M. Kassin, *Eyewitness Identification: Victims Versus Bystanders*, 14 J. APPLIED SOC. PSYCHOL. 519, 520 (1984) (finding that bystanders provide more accurate testimony of a crime than victims); Douglas P. Peters, *Eyewitness Memory and Arousal in a Natural Setting*, *in* 1 PRACTICAL ASPECTS OF MEMORY: CURRENT RESEARCH AND ISSUES: MEMORY IN EVERYDAY LIFE 89, 94 (Michael M. Gruneberg et al. eds., 1988) (finding that eyewitness testimony is less accurate when witness is subjected to high stimulus environment).

151. *See* Ntaganda Transcript, Apr. 18, 2016, *supra* note 103, at 23 (testimony of expert witness Dr. John Charles Yuille); Hugues F. Herve, Barry S. Cooper & John C. Yuille, *Biophysical Perspectives on Memory Variability in Eyewitnesses*, *in* APPLIED ISSUES IN INVESTIGATIVE INTERVIEWING, EYEWITNESS MEMORY, AND CREDIBILITY ASSESSMENT 99, 104 (Barry S. Cooper et al. eds., 2013).

152. *See, e.g.*, Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgement and Sentence, ¶¶ 153–155 (Feb. 25, 2004); Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgement, ¶ 350 (Jan. 22, 2004); Prosecutor v. Musema, Case

lost all of their male relatives—their husbands, sons, brothers, fathers and nephews—while some of the few men who survived did so by lying amongst piles of corpses until they were able to escape.[153] Thus, as awful as it is to witness or be the victim of an isolated violent crime, in terms of trauma, it likely pales in comparison to being a witness or victim of a mass atrocity.[154]

The long duration of many mass atrocities also negatively impacts victims' ability to accurately recall their details. Many witnesses in the ICC's *Lubanga* case were girls who had been abducted and had endured repeated rapes and other forms of sexual assault over long periods of time.[155] Similarly, the "bush wives" in Sierra Leone, who testified before the SCSL, were subjected to collective rape and various forms of sexual slavery for months and years at a time.[156] Research shows that individuals such as these—who are victims of repeated, similar crimes—blend their memories of the individual traumatic events that they suffered into a generalized recollection called a "script memory."[157]

No. ICTR-96-13-A, Judgement and Sentence, ¶¶ 806–813 (Jan. 27, 2000) [hereinafter Musema Judgment].

153. *See* Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 5663 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016) ("Some witnesses described hiding underneath the bodies of their fellow detainees and escaping the killing sites under perilous circumstances."); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶¶ 69, 207 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) ("At several of the sites, a few wounded people survived by pretending to be dead and then crawled away.").

154. *See* Witteveen, *supra* note 7, at 385 (describing the gruesome nature of mass atrocities and the trauma experienced by witnesses).

155. *See* Lubanga Judgment, *supra* note 22, ¶¶ 890–895 (describing sexual violence experienced by women at "demobilisation centres"); *see also* U.N. ORG. STABILIZATION MISSION IN THE DEM. REP. CONGO (MONUSCO), INVISIBLE SURVIVORS: GIRLS IN ARMED GROUPS IN THE DEMOCRATIC REPUBLIC OF CONGO FROM 2009 TO 2015 (2015), https://childrenandarmedconflict.un.org/wp-content/uploads/2015/11/151123-Girls-in-Armed-Groups-2009-2015-Final.pdf (stating abducted Congolese girls spent an average of six months with their abductors and as long as four years).

156. AFRC Judgment, *supra* note 1365, ¶¶ 701, 709–713; *see also* U.N. SEC. COUNCIL, SIXTH REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS OBSERVER MISSION IN SIERRA LEONE 6–9 (1999), http://www.refworld.org/docid/3ae6af804.html. *See generally* CHRIS COULTER, BUSH WIVES AND GIRL SOLDIERS: WOMEN'S LIVES THROUGH WAR AND PEACE IN SIERRA LEONE 126–50 (2009) (discussing "[w]ar [r]apes and [g]endered [vi]olence" experienced by women).

157. *See* Ntaganda Transcript, Apr. 18, 2016, *supra* note 103, at 35–36

Such victims typically are able to recall the script with reasonable accuracy, but are unable to recall the isolated events that gave rise to the script.[158] Accurately recalling the script may be sufficient for some mass atrocity prosecutions, but not for those that require witnesses to testify about specific events.

Finally, the characteristics of witnesses from developing nations also combine with the characteristics of mass atrocities to produce unique fact-finding challenges. Take, for example, the fact that mass atrocity witnesses from developing nations often are unable to date the events they witnessed. That inability—and the resulting fact-finding uncertainty at trial—stems neither from the location of the crimes alone nor the size and scope of the crimes alone, but rather from a combination of the two. We know that it is not the developing status of the location of the crime alone that drives witnesses' dating difficulties because witnesses from those same locations regularly establish the dates of the isolated crimes that they witness.[159] Moreover, even if a given witness cannot accurately date an isolated crime, his or her failure to do so usually does not impair accurate fact-finding because the date will have been recorded when the crime was initially reported.[160] Because most mass atrocities, by contrast, feature large numbers of similar crimes that take place over the course of months or years, they prove far more difficult to date. Indeed, most mass atrocities do not

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(containing the testimony of expert witness Dr. John Charles Yuille); Herve et al., *supra* note 151, at 107.

158. *See* Ntaganda Transcript, Apr. 18, 2016, *supra* note 103, at 35–36; Herve et al., *supra* note 151, at 107.

159. Isolated crimes are usually reported immediately after they occur, so a witness who may have no clue as to the date of a mass atrocity will often be able to date an isolated crime. *See, e.g.*, Davis v. Republic, (127 of 2005) TZCA 2 (June 27, 2005) (Tanzania) (providing dates for isolated crime); Nyander v. RL, LRSC 9 (21 Jan. 2011) (Liberia) (same); Fallah v. RL, LRSC 16 (9 Aug. 2007) (Liberia) (same); Nimungu v. Uganda (Criminal Appeal No. 06 of 2012) UGCA 25 (6 June 2016) (Uganda) (same).

160. *See, e.g.*, Uganda v. Ssemanda, (HCT-06-CR-SC-0059 of 2013) UGHCCRD 44 (28 Apr. 2016) (Uganda) (stating the alleged rape occurred on September 30, 2012 and was immediately reported to the police, and the date of the offense was corroborated by the medical report admitted into evidence documenting the victim's medical exam that immediately followed the offense); People v. Twambo, (2016) J1, J9 [HC] (Zam.) (stating the offense occurred on May 24, 2013, was reported to the police the following day, and the date of the offense was corroborated by the medical report admitted into evidence documenting medical attention provided immediately following the offense).

even become the subject of an official investigation until years after they occurred, so frequently, the only way to determine when they did occur is to rely on the testimony of witnesses, witnesses whose memories have faded by that time.[161] At the same time, it is also not the size of the crime alone that leads to dating difficulties, but also its location. Although any witness is apt to have difficulty recalling the precise date of a crime that occurred long ago and in the context of numerous similar crimes that were perpetrated over the course of months or years, witnesses from a developing nation, who may not be able to read a calendar or who have little need for Western-style precision regarding dates,[162] will have considerably more difficulty. As discussed below, many Sierra Leonean witnesses could not even pinpoint the year or month of the crime they were describing[163] whereas that level of imprecision is rare among Western witnesses.

Although the coalescence of the nature of the crime and the location of the crime explains much of the fact-finding uncertainty we have observed over the years, it does not reduce its impact. If a Trial Chamber cannot ascertain when the relevant crimes took place, then the defendant cannot prove that he was in another location at the time of the crimes. More generally, Trial Chambers that cannot determine simple facts surrounding the crimes find themselves confronting many other uncertainties. In numerous ICTR cases, for instance, witnesses who testified about meetings, speeches, or other events were found not to corroborate one another because their accounts were so undetailed that the Trial Chambers could not determine whether the witnesses were even describing the same event.[164]

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161. *Supra* notes 127–128 and accompanying text.

162. *See* NYSTEDT ET AL., *supra* note 117, at 85 (advising those interviewing witnesses that "[i]n some areas of the world people will not relate to the international calendar [so interviewers should] try asking them to relate [the event in question] to a particular season, holiday, or feast day or agricultural event (e.g., a harvest)"); *id.* at 48 (stating that time markers such as important holidays or agricultural events "are often used by local inhabitants when explaining when significant events occurred"); *see also* FACT-FINDING WITHOUT FACTS, *supra* note 7, at 82 (observing that witnesses may have different understandings of distance and time).

163. *Infra* notes 179–183 and accompanying text.

164. *See* Ndahimana Judgment, *supra* note 132, ¶¶ 539–541 (finding inconsistencies in the testimony of different witnesses); Gatete Judgment, *supra* note 134, ¶¶ 199, 223 (same); Ntawukulilyayo Judgment, *supra* note 134, ¶¶ 231,

4. Variations in Size, Scope, and Political Context

Thus far, this section has explored the fact-finding difficulties that arise when large-scale criminality is prosecuted. Throughout the section, I have compared prosecutions of mass atrocities with prosecutions of isolated crimes in order to show the way in which prosecutions that involve large-scale criminality give rise to unique, often severe, fact-finding challenges. Up until now, and for the sake of comparison, I have largely treated mass atrocities as a uniform phenomenon and compared them to isolated domestic crimes, which I have also treated somewhat monochromatically. But, of course, much variation exists in both sets of crimes; mass atrocities in particular come in a variety of shapes, sizes, and political contexts. This subsection, then, explores some of those variations and considers their evidentiary implications. In particular, whereas this section as a whole has shown that mass atrocity prosecutions are more likely to feature factual uncertainty than isolated crime prosecutions, this subsection asks whether we can draw distinctions among mass atrocities of different sizes and scopes. Put another way, it asks whether there is reason to believe that prosecutions of more-massive mass atrocities feature greater fact-finding obstacles than prosecutions of less-massive mass atrocities.

Before delving into this question, we must first recognize that the size and scope of a given mass atrocity can differ dramatically from the size and scope of the particular crimes that prosecutors might choose to charge. We have already observed that prosecutors of mass atrocities charge only a small subset of mass atrocity offenders.[165] In addition, prosecutors of mass atrocities—and particularly prosecutors targeting high-level offenders—routinely charge only a subset of the crimes they believe that a given defendant committed because prosecuting the defendant for all of his indictable offenses would cost too much and take too long.[166]

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389 (same).

165. *See* NYSTEDT ET AL., *supra* note 117, at 43.

166. Indeed, commentators have criticized international prosecutors for issuing broad indictments or seeking the joinder of indictments to create one overly broad trial. *See, e.g.*, Gideon Boas, *Slow Poison: Joinder and the Death of Milošević*, *in* THE MILOŠEVIĆ TRIAL: AN AUTOPSY 106, 113–18 (Timothy William Waters ed., 2013); Gwynn MacCarrick, *Lessons from the Milosevic Trial*, ON LINE

This selective charging has obvious fact-finding implications: all things being equal, the more events, crime sites, and charges that prosecutors include in an indictment, the greater the likelihood that the fact-finder will reach mistaken conclusions about some of those events, crime sites, and charges. Stated differently, all things being equal, narrowly-tailored indictments will give rise to less fact-finding uncertainty than broader, more expansive indictments.

Because that observation is somewhat self-evident, we can put prosecutorial charging discretion to one side and consider the more interesting question of the way in which the size and scope of the atrocity itself might impact accurate fact-finding. However, even this question requires some preliminary analysis because the size and scope of an atrocity can be measured in a host of different ways. We might measure the size and scope of an atrocity by its number of victims, for instance, or by its duration, or its

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OPINION (Apr. 26, 2006), http://www.onlineopinion.com.au/view.asp? article=4394 (last visited Jan. 22, 2018) (same) (on file with the Washington and Lee Law Review). *Cf.* Öberg, *supra* note 50, at 115 (observing that "[m]ost international criminal indictments are very broad in their scope"). Partly in response, ICC prosecutors brought a very narrow indictment against the Court's first defendant, Thomas Lubanga, and charged him only with the enlistment and conscription of child soldiers, when he could have been charged with many other crimes. *See* Roman Graf, *The International Criminal Court and Child Soldiers*, 10 J. INT'L CRIM. JUST. 945, 946 (2012). Similarly, Iraqi High Tribunal prosecutors initially prosecuted Saddam Hussein only for the massacres in Dujail, when Hussein was believed to have killed hundreds of thousands as part of other crimes. *See Alleged Crimes of Saddam Hussein,* GUARDIAN (Oct. 19, 2005), https://www.theguardian.com/world/2005/oct/19/iraq (last visited Jan. 22, 2018) (listing alleged crimes of Saddam Hussein's from 1970's to 2003) (on file with the Washington and Lee Law Review). Indictments deemed too narrowly tailored are also subject to criticism. *See* Prosecutor v. Deronjić, Case No. IT-02-61-S, Dissenting Opinion of Judge Wolfgang Schomburg, ¶¶ 4–12 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 30, 2004) (criticizing the prosecution for issuing indictments that "arbitrarily present facts, selected from the context of a larger criminal plan and, for unknown reasons, limited to one day and to the village of Glogova only"); Mariana Goetz, *Reparative Justice at the International Criminal Court: Best Practice or Tokenism*, *in* REPARATIONS FOR VICTIMS OF CRIMES AGAINST HUMANITY: THE HEALING ROLE OF REPARATION 53, 59 (Jo-Anne M. Wemmers ed., 2014) (reporting on victims' shock and dismay upon learning that the ICC's charges against Lubanga would be limited to his involvement in the enlistment and conscription of child soldiers); Paul Seils, *The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court*, *in* CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMINAL CASES 69, 74 (Morton Bergsmo ed., 2d ed. 2010) (same).

geographical scope. Or we might assess the size and scope of an atrocity by the level of harm inflicted; on that measure, we might distinguish between an atrocity featuring mass killings and an atrocity featuring mass detentions, and rank the former as more massive by virtue of its enhanced gravity.

Differences in the measures just described will certainly have some fact-finding impact, but not an impact that is easy to ascertain or that systematically points to greater or lesser factual uncertainty at trial. For instance, atrocities that feature more victims will likely feature more individuals who can later testify about the crimes (if the victims survive to tell the tale), or more forensic evidence (if the victims do not). Differences in the severity of the harms encompassed in an atrocity will likely have a similar impact. Large-scale killings might give rise to fewer victim witnesses and more forensic evidence, whereas large-scale detentions might give rise to more victim witnesses and less forensic evidence. These distinctions, however, are not likely to have a dramatic impact on fact-finding accuracy. Victim witnesses are not generally hard to come by,[167] and, as mentioned above, forensic evidence often has little relevance if the defendant is a high-level offender who never set foot at the crime scene.[168]

Indeed, international criminal lawyers frequently distinguish between crime-base evidence and linkage evidence.[169] As those names suggest, crime-base evidence informs fact-finders about the actual crimes that took place; for example, the killings, rapes, or property destruction that occurred during an attack.[170] Linkage

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167. Indeed, because testifying can endanger witnesses, some prosecutors seek to use as few as possible. *See* MAHONY, *supra* note 79, at 31 ("The prosecution hopes to require only a small number of witnesses, usually between 20 or 30, for each case.").

168. *See supra* notes 118–126 and accompanying text.

169. *See* Whiting, *supra* note 27, at 338 (stating that the prosecutor's "focus will generally be less on the crimes themselves than on the linkage between the crimes and the Accused"); Bergsmo & Wiley, *supra* note 126, at 8–11 (describing the two components of the initial phases of inquiries and investigations of an international criminal investigation as the work to establish the crime in the case and the process to develop the link between the suspect and the perpetrator of the crime); Jackson, *supra* note 7, at 30–31 (detailing how in some tribunals, different evidentiary rules govern the introduction of the two different kinds of evidence).

170. *See* BEYOND REASONABLE DOUBT, *supra* note 49, at 7–8 (defining the crime base as "the event and actors present at or near the scene of the crime").

evidence serves to link the defendant to those crimes.[171] The distinctions in size, scope, and severity just described are most likely to influence the quantity and quality of crime-base evidence available at a given trial, not the linkage evidence.[172] Thus, a crime that features more victims will provide prosecutors with more potential crime-base witnesses to describe the atrocity, but unless this is a rare instance in which the defendant is accused of personally perpetrating the crime, the increased number of crime-base witnesses will only make it easier to prove the (often uncontested) fact that the crime took place; it will not enhance the prosecutor's ability to link (physically distant) defendants to the crime. Moreover, because crime-base evidence tends to be far more plentiful than linkage evidence, increases or decreases in the former generally have little evidentiary impact.

The duration of the atrocities is also unlikely to have considerable evidentiary impact, and their geographical scope may have no evidentiary impact at all. For one thing, any difficulties occasioned by an atrocity's sprawling geographical or temporal scope are apt to be ameliorated through the prosecution's charging decisions.[173] That is, prosecutors frequently focus their indictments on atrocities occurring during a particular time frame or in a particular region in order to make their trials more manageable. Even if they do not, however, little likely turns on it. To be sure, it is more costly and time-consuming to investigate crimes that span a broad geographical area than it is to investigate more geographically circumscribed crimes.[174] But there is little reason to believe that investigations of geographically sprawling atrocities give rise to less credible or less plentiful evidence than investigations of less geographically sprawling crimes. By

171. *See* NYSTEDT ET AL., *supra* note 117, at 43 (explaining how "investigators and analysts must . . . work together to uncover information which can be used as evidence linking those allegedly most responsible for the commission of the crimes to the crime scene").

172. *Id.*

173. *See* Seils, *supra* note 166, at 71 (discussing the ICC's case selection criteria as including "the scale of the crime in question, including the number of victims and possible considerations of temporal and geographic intensity").

174. *See* U.N. High Comm'r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*, at 8, U.N. Doc. HR/PUB/06/4 (2006) ("Trials for system crimes tend to be large and costly, as demonstrated by the ad hoc International Criminal Tribunals.").

contrast, atrocities that occur over long periods of time may give rise to less accurate testimony in part because it is harder to accurately date a particular event when that event is one of a series of similar events that occurred over a long period of time.[175] My previous research bears out this common-sense conclusion. Although many witnesses at all three of the tribunals that I studied[176] had difficulty providing exact dates for the events they witnessed,[177] SCSL witnesses—who were victims of a decade-long war—frequently could not even get close.[178] Indeed, SCSL witnesses who could recall the month a crime occurred were comparatively precise,[179] given that many SCSL witnesses could testify only that the crime occurred during the dry season or the

175. FACT-FINDING WITHOUT FACTS, *supra* note 7, at 24–25.

176. The tribunals under study were the ICTR, SCSL, and Special Panels. *See generally id.*

177. *Id.* at 24–27.

178. *Id.* at 25.

179. *See, e.g.*, Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 61 (Apr. 6, 2005); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 86 (Apr. 11, 2005); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 96 (June 27, 2005) [hereinafter Brima Transcript, June 27, 2005]; Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 100 (June, 20, 2005) (recalling that an event occurred in May 1997); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 8 (July, 1, 2005) (recollecting that an event occurred in March of 1998); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 44 (July 7, 2005) [hereinafter Brima Transcript, July 7, 2005] (demonstrating the witness's inability to recall the date he was captured); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 56, 74–75 (July 11, 2005) (discussing the witness's inability to recount dates attacks occurred); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 25 (July 12, 2005) (showing discrepancies in witness's dating of events); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 26, 49 (July 13, 2005) ("I could not remember day, but it was in August."); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 80–81 (Oct. 4, 2004) (demonstrating the witness's ability to the recount the month an event occurred); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 182 (Oct. 8, 2004) ("It was June I said."); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 50, 57, 78 (Oct. 14, 2004) ("I can recollect the month, but not the date."); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 31, 92 (Oct. 18, 2004); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 96 (Oct. 25, 2004) ("I can't remember the date now, but it did happen."); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 13–14 (Oct. 27, 2004) (showing that a witness could date an event as within a couple of months).

rainy season[180] or during a particular year.[181] Some witnesses, indeed, could not even identify the year in which the crime occurred.[182] Indeed, in the SCSL's *CDF* case, date questions proved so difficult for witnesses that when one defense counsel, Dr. Jabbi, asked a witness, "on what day did the Kamajors enter Kenema?" the presiding judge remarked sarcastically, "Dr. Jabbi, I wish you luck."[183]

For this reason, atrocities of longer duration are probably subject to more fact-finding uncertainty than atrocities of a shorter duration, but the differences may not have significant practical import because many international criminal witnesses have difficulty accurately dating events regardless of the atrocity's duration. To be sure, witnesses are more likely to *dramatically* misdate events when they occur in the context of longer-running

180. *See, e.g.,* Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 2–3, 11 (July 21, 2004); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 8, 21–22 (Oct. 21, 2004); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 94–97 (Jan. 13, 2005); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 79 (Mar. 17, 2006); Fofana Transcript, June 21, 2004*, supra* note 64, at 54–55; Prosecutor v. Taylor, Case No. SCSL-03-01-T, Transcript, at 6966 (Apr. 8, 2008); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Transcript, at 7017, 7052 (Apr. 9, 2008); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Transcript, at 7388 (Apr. 14, 2008); Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 160 (Sept. 14, 2004); Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 17, 24–25, 53 (Nov. 8, 2004) [hereinafter Fofana Transcript, Nov. 8, 2004]; Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 4 (Nov. 12, 2004); Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 45 (Nov. 16, 2004); Brima Transcript, Apr. 8, 2005, *supra* note 64, at 47; Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 82–83, 97–99 (June 30, 2005); Brima Transcript, July 7, 2005, *supra* note 179, at 102, 112–13 (July 7, 2005); Brima Transcript, July 14, 2005], *supra* note 64, at 41–42, 49; Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 68 (Sept. 15, 2005); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 62 (Sept. 19, 2005).

181. *See* Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 20 (Nov. 11, 2004) [hereinafter Fofana Transcript, Nov. 11, 2004] (questioning a witness who could not recall the precise date or month an event occurred); *see also* Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 3–4 (Oct. 11, 2004) ("I can't be too exact on the time frame.").

182. *See, e.g.*, Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 30 (July 25, 2005) (conveying Witness TF1-157's inability to recall even the year in which rebels attacked Bonoya); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 73–74 (Apr. 7, 2005) (demonstrating Witness TF1-085's inability to state what year she was captured); Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 37 (Sept. 21, 2004) [hereinafter Fofana Transcript, Sept. 21, 2004].

183. Fofana Transcript, Sept. 21, 2004, *supra* note 182, at 37.

atrocities than shorter-running atrocities,[184] but the misdating need not be dramatic to cause problematic uncertainty during trial. For instance, the crimes comprising the Rwandan genocide occurred, in most regions, over a few short weeks, yet dating disparities and confusions were rife among ICTR witnesses.[185] These dating disparities spanned only days or weeks and not months or years, yet their impact on fact-finding was nonetheless significant. As noted above, Trial Chambers often refused to find one witness's account of an event corroborative of another's when the witnesses dated the event differently.[186] Likewise, Trial Chambers often considered testimony that featured date inconsistencies to be unreliable.[187]

The foregoing analysis suggests that the size and scope of a mass atrocity is not likely to predict the level of evidentiary

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184. *See supra* notes 174–183 and accompanying text (detailing witness's misdating of events that occurred during an atrocity that spanned ten years).

185. *See, e.g.*, Nzabonimana Judgment, *supra* note 134, ¶ 419 (observing that Witness CNR1's dating of events was not consistent with Embassy telegrams); Hategekimana Judgment, *supra* note 134, ¶ 175 (noting the Trial Chamber's concern about "the inconsistency in the Prosecution and Defence evidence about the date on which Witness BUQ's employers left their home in the Taba neighbourhood"); Setako Judgment, *supra* note 132, ¶ 438 (explaining that "the chronology provided by the witness for the events is not clear"); Ngirabatware Judgment, *supra* note 134, ¶ 787 (describing discrepancies in the witness's estimates of time). Frequently, witnesses dated events differently in their pretrial statements than they did in their testimony. *See, e.g.*, Karera Judgment, *supra* note 65, ¶¶ 135, 164, 226, 229; Kanyarukiga Judgment, *supra* note 123, ¶¶ 605–606 ("Witnesses CBK and CDL gave testimony at trial that was inconsistent with their prior statements."); Prosecution v. Kajelijeli, Case No. ICTR-98-44A-A, Judgment, ¶ 112 (May 23, 2005) (discussing "discrepancies between prior statements and testimony"); Hategekimana Judgment, *supra* note 134, ¶¶ 131, 479 (describing two instances in which witnesses dated events differently during pre-trial statements and trial testimony); Muhimana Judgment, *supra* note 104, ¶¶ 45–47, 65; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, ¶¶ 55–60 (May 15, 2003); Nizeyimana Judgment, *supra* note 134, ¶ 41, 191; Prosecution v. Rutaganda, Case No. ICTR-96-3-A, Judgement, ¶¶ 175–179, 194, 196, 204, 208–210, 218, 224, 318–327, 333–336, 342–343, 348, 366 (May 26, 2003); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, ¶ 88 (May 16, 2003) ("The witness could not confirm the date on which he fled and became a refugee, although he provided this date in his statement dated 31 January 1996."); Prosecution v. Renzaho, Case No. ICTR-97-31-A, Judgement, ¶ 453 (Apr. 1, 2011).

186. *Supra* note 174 and accompanying text.

187. *See, e.g.*, Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, Judgement and Sentence, ¶ 239 (July 15, 2004).

obstacles that trial participants will later experience. However, as we saw earlier in this section, mass atrocities occur in certain predictable contexts, and differences in these contextual features can give rise to dramatically different levels of factual uncertainty at trial.[188] In this regard, two components appear particularly influential: (1) the length of time that elapses between the crime and the prosecution; and (2) the level of governmental interference in the trial.

Turning first to the time lapse, subpart A showed that prosecutions of atrocity crimes frequently must be delayed to allow on-going conflicts to conclude and regions to stabilize. Subpart A likewise observed that, although delaying prosecutions may be a practical necessity in some circumstances, such delays inevitably give rise to certain evidentiary costs, such as evidence destruction and degradation. Here, I make the (hopefully uncontroversial) additional observation that the longer the delay, the greater the evidentiary costs that are likely to be incurred. That is, those prosecutions that are delayed for longer periods of time are likely to feature more fact-finding impediments than those that are delayed for shorter periods of time.[189] Craig Etcheson, for instance, has compellingly described the way in which the forty-year delay in Khmer Rouge prosecutions negatively impacted evidence in Cambodia:

> Many a time we have observed cows and pigs consuming human bones that have been placed in open, unsecured genocide memorials. Even the earth itself passively consumes the evidence of genocide. The soils in much of Cambodia are highly acidic, and they rapidly dissolve the remains of victims in mass graves, including the bones of those interred in the graves. The simple environmental encroachment of rats, insects, mildew, seedlings, rust and rot in the extremely humid tropical environment takes a fearsome toll not only on paper records and human skeletal remains but also on more durable artifacts such as torture devices and shackles and even permanent structures like thatch, wooden, and even concrete or brick buildings. Finally, in Cambodia, there is annual flooding . . . and thus we

188. *Supra* Part III.A.4.

189. *See* ETCHESON, *supra* note 100, at 66 ("[I]t is essential to move early and move fast to gather the evidence of genocide and other crimes against humanity from the field. Humans, animals, and the environment itself, . . . inexorably consume the evidence of violations of international humanitarian law.").

> have seen numerous instances where mass graves have been washed away by the erosion of wandering rivers as they eat into riverbanks.[190]

Finally, governmental interference in the prosecutions can have a profound impact on the quantity and quality of the evidence presented at trial. In most cases, governmental interference serves to obstruct prosecutions, as will be discussed again in Part IV. To that end, governments have destroyed incriminating evidence,[191] hidden incriminating evidence,[192] and intimidated witnesses to prevent them from testifying.[193] Less frequently, governments will

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190. *Id.*

191. *See, e.g.*, *supra* notes 99–100 and accompany text.

192. *See* VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 82, 95, 106 (2008) (describing Croatia's and Serbia's withholding of evidence from prosecutors); ERIC STOVER ET AL., HIDING IN PLAIN SIGHT: THE PURSUIT OF WAR CRIMINALS FROM NUREMBERG TO THE WAR ON TERROR 57 (2015) (describing incidents in which American officials withheld evidence for political or military reasons); *see also supra* note 113 and accompanying text (describing Serbs' attempts to conceal evidence of Srebrenica massacres). Finally, some governments do not bother hiding evidence; they simply refuse to provide it to when asked by the court. *See, e.g.*, LIONEL NICHOLS, THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA 165–66 (2015) (discussing the way in which Kenyan authorities withheld requested evidence); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (describing Croatia's failure to open its archives during the trial stage).

193. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CROATIA 1 (2006) ("[Croatia's] intimidation of some witnesses in domestic war crimes trials remained a problem . . . ."); Prosecutor v. Ruto et al., ICC-01/09-01/11-1866-Red, Public Redacted Version of "Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses," 29 April 2015, ICC-01/09-01/11-1866-Conf + Annexes, ¶ 51, (May 21, 2015) (discussing testimony that was subject to interference); Press Release, Kenya Human Rights Comm'n, Termination of Ruto and Sang Case at the ICC: Witness Tampering Means Impunity Prevails Over Justice Again (Apr. 7, 2016), http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/528-kenya-termination-of-ruto-and-sang-case-at-the-icc-witness-tampering-means-impunity-prevkenya-termination-of-ruto-and-sang-case-at-the-icc-witness-tampering-means-impunity-prevails-over-justice-again.html (describing the systematic witness tampering and intimidation in Kenya cases); Tom Maliti, *Prosecutor Withdraws Seven Witnesses in Kenyatta Case in Past Year*, INT'L JUST. MONITOR (Jan. 16, 2014), http://www.ijmonitor.org/2014/01/prosecutor-withdraws-seven-witnesses-in-kenyatta-case-in-past-year/ (last visited Jan. 22, 2018) ("The International Criminal Court's (ICC's) prosecutor has withdrawn at least seven witnesses in the case against President Uhuru Muigai Kenyatta over the past year because the witnesses fear testifying, they have recanted their earlier statements to investigators, or for other unspecified reasons.") (on file with the

impede defense counsel in an effort to ensure convictions.[194] Regardless of whether the governmental interference serves to obstruct the prosecution or the defense, it unquestionably introduces significant factual uncertainty into the trial. Indeed, this section has concluded that a variety of factors that serve to differentiate one mass atrocity from another—including the number of victims of the atrocity, the kinds of crimes comprising the atrocity, and the duration and geographical scope of the atrocity—likely have either a limited or an uncertain impact on fact-finding. By contrast, governmental interference, we can say with confidence, undermines fact-finding certainty in almost every case. When governments interfere in prosecutions—whether to withhold evidence or intimidate witnesses—they necessarily distort the factual picture presented to fact-finders. Not all such distortions have a dispositive impact on the trials' verdicts, but all do reduce the certainty of the Trial Chamber's factual findings and the confidence we can place in the accuracy of those findings.

B. The Legal Characterization of the Crime

Subpart A of this Part has identified the large size and scope of mass atrocity crimes as an important factor explaining the fact-finding challenges that confront many mass atrocity prosecutions. In this subpart, we turn our attention from the factual contours of the crimes to consider their legal characterization. In particular, mass atrocities can be characterized as international crimes or domestic crimes. For example, a mass killing can be charged as domestic murder, or it can be charged as one of a number of international crimes: genocide, murder as a crime against humanity, or the war crime of willful killing.[195] This subpart shows that that characterization decision can have important evidentiary implications.

Washington and Lee Law Review); Jackson & Brunger, *supra* note 85, at 171 (observing that states that are unwilling to investigate crimes themselves "may have an interest in causing harm to witnesses").

194. *See* Buisman, *Prosecutor's Obligation*, *supra* note 122, at 208 (describing the Congolese government's refusal to allow defense counsel access to witnesses); *see also supra* note 110 and accompanying text ("The Government of Rwanda, for instance, allegedly prevented ICTR defense counsel from entering Rwanda . . . .").

195. *See* U.S. INST. FOR PEACE, MODEL CODES FOR POST CONFLICT CRIMINAL

It is reasonable to assume that greater fact-finding uncertainty attends the prosecutions of international crimes than domestic crimes for the simple reason that international crimes have more elements than domestic crimes. Indeed, international crimes typically include the elements of domestic crimes but also feature additional attendant circumstances or *mens rea* elements. Consider, for instance, a mass killing. If that mass killing is charged as the domestic crime of murder, then prosecutors will likely need to prove only that the defendant intentionally killed the victim.[196] By contrast, if that same mass killing were charged as the war crime of willful killing, then the prosecutor would not only need to prove that the defendant intentionally killed the victim, but that the victim was a "protected person" under the Geneva Conventions, that the killing took place in connection with an international armed conflict, and that the defendant was aware of the circumstances establishing the protected status of the victim and the existence of the armed conflict.[197] Similarly, if the mass killing was charged as murder as a crime against humanity, then the prosecutor would have to show both that the defendant intentionally killed the victim and also that he did so in the context of a widespread or systematic attack against a civilian population of which he was aware.[198] At a very minimum, then, proving international crimes requires prosecutors to prove more elements and thereby requires them to obtain and present more evidence.

JUSTICE 195 (2007), https://www.usip.org/sites/default/files/MC1/MC1-Part2Section1.pdf ("Intentional killing can be prosecuted under the MCC as a war crime (willful killing), a crime against humanity (murder), and genocide (killing).").

196. *See* 18 U.S.C. § 1111 (2012) (defining the elements of murder in the first and second degree).

197. *See, e.g.*, U.N. Preparatory Commission for the International Criminal Court, *Elements of Crimes*, art. 8(2)(a)(i), U.N. Doc. PCNICC/2000/1/Add.2 (June 30, 2000), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement [hereinafter ICC Elements of Crimes] (listing the elements of the war crime of willful killing).

198. *See* ICTR Statute, *supra* note 44, art. 3 (listing elements of the crime against humanity); S.C. Res. 827, art. 5 (May 25, 1993), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute] (same). At the ICC, prosecutors additionally must prove that the widespread or systematic attack occurred "pursuant to or in furtherance of a State or organizational policy to commit such attack." ICC Elements of Crimes, *supra* note 197, art. 7.

These additional evidentiary burdens necessarily translate into some additional fact-finding uncertainty, but how much depends to some degree on which international crime is under prosecution. In particular, the additional fact-finding uncertainty is apt to be modest when the international crime in question is a war crime or crime against humanity, but much more substantial when the international crime is genocide. The reason is this: the additional elements needed to prove crimes against humanity or war crimes generally pertain to the violent context in which the subject crimes were perpetrated, and rarely is there considerable factual uncertainty about the existence of that violent context. In war crimes prosecutions, for instance, there is seldom any serious question that an armed conflict took place.[199] It can be harder to gather evidence of an attack on a civilian population, in order to prove crimes against humanity, but the difficulties usually stem primarily from time and resource constraints,[200] rather than a lack of evidence.[201] Prosecutors at the Special Panels in East Timor, for example, were forced to charge most of their early defendants with domestic crimes, because they did not have the money or time to gather the additional evidence needed to prove crimes against humanity.[202] But the evidence of the contextual elements for crimes against humanity was available,[203] and Special Panels'

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199. To be sure, determining whether the armed conflict should be categorized as international or non-international can be challenging, *see, e.g.*, Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶¶ 76–123 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), but the existence of some kind of armed conflict—which is the primary distinction between a domestic crime and a war crime—is typically supported by ample evidence, s*ee* DAVID CHUTER, WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD 78 (2003).

200. *See* Bergsmo & Wiley, *supra* note 126, at 6 ("The search for evidence [necessary to prove the widespread or systematic requirement of crimes against humanity] requires investigative resources that are very often unavailable.").

201. *See* Öberg, *supra* note 50, at 115 ("International criminal trials are usually very complex and heavy on evidence.").

202. *See* Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185, 215 (2001) [hereinafter Linton, *Cambodia, East Timor and Sierra Leone*]; Suzannah Linton, *Correspondents' Reports*, 2 Y.B. INT'L HUM. L. 471, 481 (2000) (charging domestic crimes as a "pragmatic" decision caused by the "inadequate resources and the immensity of the task of proving international crimes" and that because suspects could not be detained indefinitely pending investigation of international crimes, "[t]he only other acceptable option would have been to release the suspects").

203. *See* Linton, *Cambodia, East Timor and Sierra Leone, supra* note 202, at

prosecutors soon began charging defendants with international crimes.[204]

The additional elements needed to prove a genocide, by contrast, relate not to the contextual violence that surrounds the subject crimes but rather to the offender's specific intent and the victims' membership in a protected group.[205] In particular, genocide is defined as the commission of an enumerated crime against a racial, ethnic, religious, or national group, with the specific intent to destroy the group in whole or in part.[206] Finding evidence of that specific intent can be extraordinarily challenging:[207] ICTY prosecutors repeatedly failed to prove genocidal intent,[208] and the ICC's judiciary has also been sharply

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207–08 (describing evidence of "clear patterns of a widespread, systematic attack on the civilian population of East Timor coupled with official Indonesian government involvement, the key elements of crimes against humanity").

204. *See* David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, *in* ASIAPACIFIC ISSUES, NO. 61, at 3 (2002).

205. *Cf.* AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT'L CRIMINAL COURT, THE INTERNATIONAL CRIMINAL COURT AND GENOCIDE 7 (2007), https://docs.wixstatic.com/ugd/e13974_1c0840ebd4fd4a0bae137d8c15580a60.pdf ("Neither war crimes nor crimes against humanity require the special intent that is necessary to prove the crime of genocide, thus these crimes are often easier than genocide to prove in court even though they may be just as grave as genocide.").

206. *See* ICC Elements of Crimes, *supra* note 197, art. 6 (defining the elements of genocide at the ICC); *see also* ICTR Statute, *supra* note 44, art. 2 (defining the elements of genocide at the ICTR); ICTY Statute, *supra* note 198, art. 4 (defining the elements of genocide at the ICTY).

207. *See* M. Cherif Bassiouni, *Observations Concerning the 1997–98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397, 413 (1997) (stating that genocide's "specific intent requirement makes its proof very difficult"); L. Tabassi & E. van der Borght, *Chemical Warfare as Genocide and Crimes Against Humanity*, 2 HAGUE JUST. J. 5, 7 (2007) ("Genocide has been described as 'the crime of crimes' and is considered to be the most difficult crime to prove due to the special intent that must be established in order to convict a perpetrator."); Michael J. Kelly, *The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 983, 984 (2005) ("[G]enocide has traditionally been the most difficult crime for prosecutors to prove.").

208. *See* Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 108 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) ("All things considered, the Prosecutor has not established beyond all reasonable doubt that genocide was committed . . . ."); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement, ¶ 989 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) (finding there was insufficient evidence to find the specific intent required for genocide); Prosecutor

divided on the issue.[209] Although it might be obvious that a defendant intended to kill large numbers of individuals, it is often much less obvious whom exactly he was targeting and, most importantly, why.

In sum, characterizing a mass atrocity as an international crime unquestionably increases the amount of evidence submitted in a case[210] and thereby increases—sometimes dramatically—the cost and length of a trial.[211] Somewhat less dramatic is its effect on fact-finding. It is reasonable to assume that characterizing the offense as an international crime rather than a domestic crime introduces some additional uncertainty because the more elements that fact-finders must decide, the more likely that they will decide one of those elements erroneously. However, only when the crime in question can be charged as a genocide might we reasonably assume that the decision to characterize the crime as international

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v. Krajišnik, Case No. IT-00-39-T, Judgement, ¶ 869 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006) ("Considering the evidence as a whole, the Chamber can make no conclusive finding that any acts were committed with the intent [to commit genocide]."); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶ 560 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003) (acquitting the defendant of genocide); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (finding that the defendant's genocidal intent had not been proven).

209. For instance, in the *Al Bashir* case, the Pre-Trial Chamber initially refused to issue a warrant of arrest against Al Bashir for genocide, determining that specific genocidal intent was not the only reasonable conclusion that could be drawn from the evidence the Prosecution submitted. *See* Prosecutor v. Al Bashir, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶¶ 205–206 (Mar. 4, 2009). Subsequently, the Appeals Chamber determined that the Pre-Trial Chamber misapplied the relevant standard of proof. *See* Prosecutor v. Al Bashir, ICC-02/05-01/09-73, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," ¶ 33 (Feb. 3, 2010). On remand, the Pre-Trial Chamber found that there were reasonable grounds to believe that Al Bashir had acted with specific genocidal intent, so it added three charges of genocide to the initial arrest warrant. *See* Prosecutor v. Al Bashir, ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest, ¶ 5 (July 12, 2010).

210. *See* Öberg, *supra* note 50, at 116 (describing international criminal indictments as holding "the potential for a flood of evidence").

211. *See* Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 1 (2014) ("One of the most persistent criticisms of international criminal tribunals has been that they cost too much and take too long.").

rather than domestic will introduce considerable additional fact-finding uncertainty.

IV. At Home or Abroad? The Fact-Finding Impact of the Prosecuting Body

The two preceding Parts have established, respectively, that the location of the mass atrocities and their size, scope, and legal characterization are significant factors impacting the level of factual uncertainty present in a mass atrocity trial. This Part examines the evidentiary and fact-finding implications of the body prosecuting the mass atrocities. In general, mass atrocities are prosecuted in one of four different kinds of fora: a domestic court in the state where the crimes took place (territorial court);[212] a domestic court in a non-territorial state, usually pursuant to universal jurisdiction (foreign court);[213] a court that has both domestic and international components (hybrid court);[214] and a fully international court.[215] As scholars have noted, different court systems present different sets of advantages and disadvantages for the prosecution of international crimes. For the purposes of this paper, I focus solely on the differential fact-finding challenges that typically attend the prosecutions of mass atrocities in the different court systems. As the following discussion reveals, I conclude that domestic courts exercising territorial jurisdiction confront the fewest impediments to accurate fact-finding whereas wholly international courts confront the most.

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212. A few examples of states that prosecuted their own international crimes include Argentina, Rwanda, and Ethiopia. RATNER & ABRAMS, *supra* note 9, at 169–71, 173–78.

213. *See* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 7 (2011) (seeking to identify every universal jurisdiction complaint from 1961 to 2011).

214. Some examples of courts featuring both domestic and international components include the SCSL, the ECCC, and the Special Panels. For a book-length description of these tribunals, see generally INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA (Cesare P.R. Romano et al. eds., 2004).

215. Examples of fully international courts include the ICTY, the ICTR, and the ICC.

Before comparing the various bodies' fact-finding capabilities, we must first put to one side one factor that creates considerable fact-finding uncertainty regardless of the body that is prosecuting the offenses. That factor is governmental opposition to the prosecutions. Part III already identified governmental opposition to the prosecutions as a factor that is uniquely likely to create fact-finding uncertainty at trial because governments that oppose prosecutions typically obstruct investigations and/or prevent access to relevant evidence and witnesses.[216] We need to put such opposition to one side, however, because its potential to impair fact-finding inaccuracy—while substantial—transcends the criminal justice system in which the crimes are prosecuted. That is, governmental opposition to prosecutions has impaired fact-finding accuracy in every possible court system. Governmental opposition distorted fact-finding in fully international courts, such as the ICTY[217] and ICC,[218] in hybrid courts, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC)[219] and the Special Panels,[220] and even in foreign courts prosecuting international crimes pursuant to universal jurisdiction.[221] Governmental opposition to prosecutions rarely

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216. *Supra* Part III.A.1.b.

217. *See, e.g.*, PESKIN, *supra* note 192, at 46–53.

218. Kenya's opposition to prosecutions substantially impeded the ICC's ability to find accurate facts in the *Kenyatta* and *Ruto* cases. *See, e.g.*, *supra* note 126 and accompanying text (discussing intimidation of witnesses by the Kenyan government). Some reports indicate that Russia will seek to obstruct the ICC's investigations into international crimes in Georgia. *See Russia refuses to Cooperate with ICC Investigation into 2008 War Crimes*, AGENDA.GE (Feb. 2, 2016), http://agenda.ge/news/51706/eng (last visited Jan. 22, 2018) (describing Russia's failure to cooperate in ICC investigations) (on file with the Washington and Lee Law Review); *Moscow Hints that it will not Cooperate with ICC's Investigation into 2008 Russo-Georgian War*, UAWIRE (Feb. 19, 2016), http://uawire.org/news/icc-will-not-yet-release-names-of-suspected-war-criminals-in-2008-russo-georgian-war (last visited Jan. 22, 2018) (discussing Russia's intent to not further cooperate in ICC investigations) (on file with the Washington and Lee Law Review).

219. *See Cambodia: Stop Blocking Justice for Khmer Rouge Crimes*, HUM. RIGHTS WATCH (Mar. 22, 2015, 11:07 PM), https://www.hrw.org/news/2015/03/22/cambodia-stop-blocking-justice-khmer-rouge-crimes (last visited Jan. 22, 2018) (describing Cambodian resistance to ECCC investigations) (on file with the Washington and Lee Law Review).

220. Cohen, *supra* note 204, at 10.

221. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 291 (2003) (discussing some of the pitfalls of universal jurisdiction as including States'

arises in domestic courts that would prosecute atrocities occurring on their own territory for the simple reason that courts in states that oppose prosecutions are not able even to initiate prosecutions.[222] But for our purposes, the relevant point is that when the government of the state where the crime took place opposes prosecutions, then probative evidence located in that state will be difficult to obtain no matter where those prosecutions are being held.

When we put governmental opposition to prosecutions to one side, we find a number of factors that suggest that fully international courts, hybrid courts, and foreign courts all face graver impediments to accurate fact-finding than territorial domestic courts. First, whereas territorial court personnel usually can communicate directly with defendants and witnesses, international, hybrid, and foreign courts must employ language interpretation to do so.[223] The need for language interpretation in court proceedings is well-established to cause considerable factual uncertainty in those proceedings,[224] so I will not rehearse the

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reluctance to hand over evidence); Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 962 (2009); Menno T. Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 HUM. RTS. Q. 940, 959–60 (2001). Sometimes governmental opposition to universal jurisdiction prosecutions is so robust that it leads not only to the dismissal of a particular case but also to revisions in the law authorizing the exercise of universal jurisdiction. *See* Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 889 (2003) (describing Belgium's willingness to gut its universal jurisdiction statute following United States' opposition).

222. It is common for international judges to observe that international courts have more difficulty carrying out their prosecutions than domestic courts because international courts do not have police or other law enforcement mechanisms at their disposal in the way that domestic courts do. *See* SPECIAL TRIBUNAL FOR LEB., ANNUAL REPORT ¶ 61 (2009–2010), https://www.stl-ts l.org/en/documents/president-s-reports-and-memoranda/226-Annual-Report-2009-2010; Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 13 (1998) (describing how the ICTY cannot fulfill its function without state cooperation). However, that claim is slightly misleading. Domestic courts that are better able to conduct mass atrocity prosecutions are domestic courts that are located in states that do not oppose such prosecutions. When governmental opposition does exist, it impairs fact-finding accuracy no matter which criminal justice system is conducting prosecutions.

223. *See* FACT-FINDING WITHOUT FACTS, *supra* note 7, at 66 (discussing the need for language translation in international tribunals).

224. *See* Joshua Karton, *Lost in Translation: International Criminal*

problems at length here. Suffice it to say that international court transcripts are replete with interpretation and translation mistakes that eventually came to light,[225] so we can presume that many other, similar mistakes were made but never identified. Consequently, all things being equal, the factual findings generated by a trial featuring language interpretation are apt to be less accurate than the factual findings generated by a trial where no interpretation is needed.

Familiarity and knowledge about the atrocities and their participants is another factor relevant to fact-finding accuracy at trial, and one that also suggests an advantage for territorial courts. It is safe to assume that the personnel of international, hybrid, and foreign courts are, in general, less familiar with the cultural practices of the defendants, witnesses, and victims of the mass atrocities they prosecute and also less knowledgeable about relevant political, social, and historical features of the atrocities.[226]

Tribunals and the Legal Implications of Interpreted Testimony, 41 VAND. J. TRANSNAT'L L. 1, 1 (2008) ("When courtroom interpreters translate a witness's testimony, errors are not just possible, they are inherent to the process."); Robert Cryer, *Witness Evidence Before International Criminal Tribunals*, 3 L. & PRAC. INT'L CTS. & TRIBUNALS 411, 420–28 (2003) (articulating the problems associated with translating witnesses' testimony); FACT-FINDING WITHOUT FACTS, *supra* note 7, at 66–79 (describing errors in language translation). For a discussion of uncertainties caused by language interpretation at the Nuremberg and Tokyo Tribunals, see JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 263 (1994); HILARY GASKIN, EYEWITNESSES AT NUREMBERG 47 (1990); BRACKMAN, *supra* note 99, at 23, 299. For a discussion of uncertainties caused by language interpretation in East Timor, see FACT-FINDING WITHOUT FACTS, *supra* note 7, at 69–72. For a discussion of uncertainties caused by language interpretation at the ICC, see Lubanga Judgment, *supra* note 22, ¶¶ 113–114; Ngudjolo Judgment, *supra* note 104, ¶ 62. For a discussion of uncertainties caused by language interpretation at the ICTR, see Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 23 (Dec. 6, 1999); *see also* Prosecutor v. Tadić, Case No. IT-94-I-T, Transcript, at 47 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1996); Prosecutor v. Mucić et al., Case No. IT-96-21, Transcript, at 6797–98 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 4, 1997).

The need for language interpretation not only gives rise to inaccurate reporting but sometimes also sabotage. *See* NYSTEDT ET AL., *supra* note 129, at 85 ("Past experience in conflict issues shows that infiltration of mission is most frequently accomplished through the use of interpreters and other local staff.").

225. *See* FACT-FINDING WITHOUT FACTS, *supra* note 7, at 68–73.

226. *See, e.g.*, Del Ponte, *supra* note 52, at 552 (noting that "international judges are not from the region and generally have no knowledge of relevant factors such as geography, locations where the crime took place, distances, language, cultural sensitivities and relevant political or historical background.").

Tim Kelsall's book, *Culture Under Cross-Examination*, provides an in-depth account of the way in which Sierra Leonean culture created significant challenges for SCSL personnel who were unfamiliar with it.[227] My own research, likewise, has documented numerous errors and misunderstandings that resulted from the failure of international court personnel to understand such aspects of local culture as taboos and superstitions,[228] sexual mores,[229] and patterns of demeanor and speech.[230] Lawyers and judges at international, hybrid, and foreign courts have been confused by witnesses who invoke non-Western understandings of family relationships,[231] witnesses who refuse to provide direct answers to questions involving sensitive topics,[232] and witnesses who fail to distinguish between events they witnessed and events that had been described to them,[233] among other things. Of course, such confusion is likewise possible in domestic courts of the state where

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227. *See generally* TIM KELSALL, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE 2 (2009).

228. FACT-FINDING WITHOUT FACTS, *supra* note 7, at 89–94.

229. *See id.* at 86–88 ("Cultural taboos surrounding sexual violence have also given rise to communication difficulties at the international tribunals.").

230. *See id.* at 98–100 ("A final arena in which cultural norms can impede communication between international witnesses and their Western listeners relates to patterns of speech and modes of communication."); Cryer, *supra* note 224, at 428–29 ("The role of culture in witness evaluation and understanding is also a matter to which attention should be paid.").

231. *See* Fofana Transcript, Nov. 8, 2004, *supra* note 180, at 28 (featuring a witness who initially described a woman as her sister but subsequently acknowledged that the woman was only a friend); Fofana Transcript, Nov. 11, 2004, *supra* note 181, at 110 (presiding judge seeking to clarify witness's testimony about familial relationships); Witteveen, *supra* note 7, at 404 (describing the difficulty of determining whether a witness was the biological mother of her son); FACT-FINDING WITHOUT FACTS, *supra* note 7, at 84–85 (describing broad notions of family relationships in East Timor that are at odds with Western conceptions).

232. *See* Akayesu Judgment, *supra* note 21, ¶ 156 ("[I]t is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate.").

233. *See id.* ¶ 155 ("Dr. Mathias Ruzindana noted that most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else."); Musema Judgment, *supra* note 152, ¶ 103 ("[T]here appears, as the Defence argued, to be in Rwandan culture a 'tradition that the perceived knowledge of one becomes the knowledge of all' . . . ." (citation omitted)); Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 49–50 (Mar. 1, 2005).

the crime took place, but it is far less likely to occur when all of the courtroom participants hail from the same country.

Territorial courts are also likely to have a comparative advantage when it comes to conducting investigations. Some contend that, in international and hybrid courts, "the standards for collecting evidence [a]re not as high as in domestic jurisdictions, which could generally rely on centuries of practice in handling evidentiary issues."[234] But even if the relevant standards are comparable, international court investigations are comparatively disadvantaged by their distance from the crime sites and the unfamiliarity that that distance begets. Some of that unfamiliarity relates to the linguistic and cultural issues just described. International investigators in the field, like the international lawyers in the courtroom, must rely on interpreters to communicate with potential witnesses.[235] The use of interpretation at the investigative stage is at least as likely to create factual uncertainty as it does at trial simply because interpretation increases the likelihood that factual errors will be introduced. In addition, some investigations' interpreters have been found to be incompetent or otherwise inappropriate for their positions,[236] and witnesses frequently blame interpreters for inaccurately interpreting their statements.[237] International investigators' cultural unfamiliarity has also been cited as negatively impacting investigations.[238] Jackson and Brunger,

234. Jackson & Brunger, *supra* note 85, at 169.

235. FACT-FINDING WITHOUT FACTS, *supra* note 7, at 66.

236. *See* David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, *in* EAST-WEST CENTER SPECIAL REPORTS, NO. 9, at 27 (2006) (describing a Special Panels interpreter who was in the "very early stages of learning English." (internal quotation marks and citation omitted)); Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 17 (Mar. 2, 2005) (discussing a SCSL investigator who used unlicensed interpreters who were connected with the witnesses being interviewed).

237. Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 45 (July 7, 2005); *see* Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Transcript, at 100–02 (Mar. 7, 2005) (maintaining that discrepancies appeared in statements because the interpreters "didn't listen clearly"); Brima Transcript, June 27, 2005, *supra* note 179, at 59; Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 50 (Apr. 11, 2002) ("[G]iven the way that interpreter that particular morning was doing interpretation, he was confused overall . . . ."); Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Transcript, ¶ 61 (Sept. 19, 2001).

238. *See* Jackson & Brunger, *supra* note 85, at 174 ("Another set of problems . . . concerned the particular challenges in obtaining information from

among other scholars, describe international investigators who "failed to be culturally sensitive to the situation they were investigating, 'blundering in,' as one [ICTY staff member] described it, by asking a series of inappropriate questions that could upset people."[239]

International investigations are also hampered by the literal distance between the international courtrooms and mass atrocity crime sites. Domestic investigators, by definition, are located in country and for that reason, they are able to conduct more thorough, less time pressured investigations. International investigators, by contrast, frequently must travel long distances to reach crimes sites, and must conduct their operations within specific, delineated time frames.[240] In addition, because most international investigators hail from far-off locations, they are easily identified as outsiders, so locals may not trust them or may fear retaliation if it becomes known that they provided information to them.[241] Local investigators, by contrast, are less likely to stand out, so they can more easily gain access to witnesses and earn the trust of local communities. Local investigators, finally, are apt to be more familiar with the nuances of the conflict, the parties to the conflict, and the impacted local communities;[242] thus, they have a better sense of where to start, whom to interview, and what to ask.[243] In recent years, international court investigations have

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persons who came from unfamiliar cultures.").

239. *Id*. (citation omitted).

240. *See generally* WAR CRIMES RESEARCH OFFICE, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT'S OFFICE OF THE PROSECUTOR 35–36 (2012) [hereinafter WAR CRIMES RESEARCH OFFICE].

241. *See, e.g.*, Jackson & Brunger, *supra* note 85, at 171.

242. *See* Bernard A. Muna, *The Early Challenges of Conducting Investigations and Prosecutions Before International Criminal Tribunals*, OBSERVATIONS AT THE COLLOQUIUM OF PROSECUTORS OF INTERNATIONAL CRIMINAL TRIBUNALS (Nov. 25–27, 2004) (stating that local investigators "possess a bank of knowledge about criminals in the country and have informers whom they can contact").

243. For instance, Corinne Dufka was charged with educating SCSL investigators about important contextual issues regarding the war in Sierra Leone, but despite her efforts, many early investigators "remained unfamiliar with the basic geographical lay of the land in Sierra Leone, and never quite mastered the political power divisions and nature of the conflict between the RUF, the AFRC and the CDF." PENELOPE VAN TUYL, U.C. BERKELEY WAR CRIMES STUDIES CTR., EFFECTIVE, EFFICIENT, AND FAIR?: AN INQUIRY INTO THE INVESTIGATIVE PRACTICES OF THE OFFICE OF THE PROSECUTOR AT THE SPECIAL

been subject to scathing criticism often because they were unable to overcome some of the challenges just delineated.[244] Domestic investigations, though not without their own challenges, do escape some of the most significant impediments to accurate fact-finding that international and foreign tribunals confront.[245]

Finally, we can assume that the factual findings of territorial courts are less likely to be distorted by perjured testimony. To be sure, perjury occurs in both domestic and international tribunals. Ample evidence exists, for instance, that witnesses before the ICTR and witnesses before Rwandan domestic courts have provided false testimony.[246] But there is also reason to believe that witnesses are less likely to lie when their lies are more likely to be detected, and domestic investigators and judges—due to their proximity and familiarity with the conflict and its participants—are more likely to detect lies. Indeed, Rwanda's *gacaca* courts dispensed justice "on the grass" in the heart of local communities, and one of the most significant perceived advantages of such local

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COURT FOR SIERRA LEONE 50 (2008).

244. *See* Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT'L CRIM. JUST. 400, 416 (2005) ("[W]e wish to cast a critical glance on the methods of the International Tribunals' investigators . . . ."); Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 49, 53 (Eric Stover & Harvey M. Weinstein eds., 2004) (discussing criticisms of ICTR investigations). ICC prosecutors in particular have been the target of blistering criticism, most notably from ICC judges. *See* Ngudjolo Judgment, *supra* note 104, ¶¶ 115–123 (describing deficiencies in prosecutorial investigations). Criticism has also come from commentators who have questioned the prosecution's "small team" approach to investigations. *See generally* WAR CRIMES RESEARCH OFFICE, *supra* note 240, at 4–5, 24–30. Additionally, commentators have criticized prosecutors' failure to conduct more in-state investigations. *See* Buisman, *supra* note 80, at 45–54. Finally, commentators have urged ICC prosecutors to adopt a more informed approach to investigations. *See* Dermot Groome, *No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations*, 3 PENN. ST. J.L. & INT'L AFF. 1, 5–28 (2014).

245. *See* Buisman, *supra* note 80, at 45–54 ("As a result of their infrequent presence in the crime-base areas, many steps a diligent prosecutor anywhere in the world would be expected to take have so far not been taken.").

246. For a discussion of perjury at the ICTR, see Nancy Amoury Combs, *A New Look at Fact-Finding at the ICTR: Advances in Judicial Acknowledgement*, 26 CRIM. L.F. 387, 392–96 (2016). For Rwandan domestic courts, see Des Forges & Longman, *supra* note 244, at 59 & 66 n.37 ("[F]alse accusations were used to settle scores, exact vengeance, or for political purposes.").

justice was its ability to ascertain what actually happened.[247] Proponents of *gacaca,* in particular, believed that witnesses would be less likely to testify falsely—or to get away with it if they did—when surrounded by their neighbors who could easily contradict or refute their falsehoods.[248]

All of the factors just described suggest that territorial courts have a greater capacity to find accurate facts than fully international courts, but as noted at the outset, other fora exist for the prosecution of mass atrocities, including foreign courts and hybrid domestic/international courts. Turning first to foreign courts, reports of practitioners suggest that they experience many, if not all, of the same fact-finding challenges that fully international courts confront. Martin Witteveen, a Magistrate in the District Court of The Hague, for instance, describes witnesses' cultural practices that are unfamiliar to Dutch judges,[249] witnesses' patterns of speech that are unfamiliar to Dutch judges,[250] and interpretation difficulties that are even more challenging than those that arise in international courts due to the difficulty of finding competent interpreters who can translate the witnesses' testimony into uncommon languages such as Dutch.[251]

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247. *See* PHIL CLARK, THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS 189–90 (2011).

248. *See* HUMAN RIGHTS WATCH, JUSTICE COMPROMISED: THE LEGACY OF RWANDA'S COMMUNITY BASED GACACA COURTS 28 (2011) (describing the expectation that "the local community's participation at trials would be sufficient to guarantee a fair trial because community members could speak out if a witness lied and could question witnesses").

249. Witteveen, *supra* note 7, at 403.

250. *See id.* at 405–06 (highlighting the cultural issues that had to be explained to Dutch judges).

251. *Id.* at 400. As a Human Rights Watch Report described it:

> [S]everal practitioners with experience in extraterritorial investigators noted that translation problems hampered their ability to assess the reliability of a potential witness's statement. Belgian investigators who traveled to Rwanda relied on local authorities to question witnesses in the local language, Kinyarwanda, and commented that it was often difficult to determine whether a question was being accurately put to the witness. When on one occasion British investigators hired a translator in Afghanistan, they discovered upon returning to the UK that the translations were inaccurate, forcing them to make another trip to Afghanistan with a professional translator in order to re-take the statements.

NEHAL BHUTA & JÜRGEN SCHURR, HUMAN RIGHTS WATCH, UNIVERSAL JURISDICTION

Other scholars and practitioners involved in foreign court prosecutions of mass atrocities identify similar evidentiary challenges.[252] Indeed, Belgian officials charged with investigating genocide crimes in Rwanda were so aware of the fact-finding difficulties facing foreigners that they called upon Rwandan officials to conduct the investigations.[253] As investigating judge Damien Vandermeersch put it, in addition to "an increased knowledge of the field and the culture, local authorities could take testimony in the witnesses' language (*kinyarwanda*), which enabled them to corroborate the truth of their statements and limited subsequent challenges to the translation, since it was always possible to refer to the original statement taken in *kinyarwanda*."[254]

To be sure, important differences in the fact-finding competencies of international courts and foreign courts may also exist. Domestic criminal justice systems may have more or fewer resources than ad hoc international courts, and their investigations staff may have more or less training. In addition, fact-finding at international courts may be uniquely impeded by the fact that they must synthesize the work of staff who are recruited from around the world and whose work habits and pre-dispositions are necessarily informed by a variety of cultural and legal backgrounds. Thus, if we view accurate fact-finding capacity as a continuum with territorial courts having the greatest capacity, then these differences might, in a particular case, move international courts or foreign courts closer to or farther from the

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IN EUROPE: THE STATE OF THE ART 17 (2006).

252. *See* Kamminga, *supra* note 221, at 959 (describing the practical problem of obtaining evidence of offenses committed abroad); Vandermeersch, *supra* note 244, at 410 ("Due to the extraneous nature of such cases, administering evidence for crimes against international humanitarian law committed abroad is particularly cumbersome and requires substantial resources."); *see also* Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 412 (2001) ("The exercise of universal jurisdiction raises special evidentiary challenges because the majority of the evidence necessary to make out a case may lie in the control of another jurisdiction . . . .").

253. *See* BHUTA & SCHURR, *supra* note 251, at 14 ("[A]ll six convictions in the two trials of participants in the Rwandan genocide were built on investigations carried out in Rwanda by the special Belgian police unit that deals exclusively with international crimes.").

254. Vandermeersch, *supra* note 244, at 413.

ideal. However, it is the literal and figurative "distance"—in miles, knowledge, culture, and language—between crime site and court room that primarily distinguishes international and foreign courts on the one hand and territorial courts on the other, and on these measures international and foreign courts are largely indistinguishable.

Conceptualizing accurate fact-finding capacity as a continuum is also helpful in assessing the relative capacity of hybrid tribunals. Admittedly, there is no fixed blueprint for hybrid tribunals. Although they are all characterized by having both international and domestic components, each tribunal features a different amalgam of components, and each amalgam will impact the tribunals' ability to engage in accurate fact-finding. In general, however, we can assume that hybrid tribunals with more domestic features will enjoy greater fact-finding capacity than hybrid tribunals with fewer domestic features. For instance, hybrid tribunals that are located in the state where the crime took place should gain some of the logistical and investigative advantages that territorial criminal justice systems enjoy. Similarly, hybrid tribunals that employ judges and lawyers from the state where the crimes took place are likely to benefit from the cultural and linguistic knowledge of the local personnel. Sierra Leonean and Timorese judges and lawyers, for instance, regularly corrected interpretation mistakes at the SCSL and Special Panels[255] and educated their international colleagues when witnesses' cultural inclinations created confusion.[256]

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255. *See, e.g.*, Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 38–39 (Nov. 3, 2004) (featuring a Sierra Leonean judge who repeatedly insisted (correctly) that the witness had said "yes" to a question, when the interpreter interpreted the witness's response as "no"); Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Transcript, at 48–49 (Mar. 10, 2005) (reporting that, although the interpreter indicated that the witness said that he had beaten a victim, defense counsel explained that the witness in fact claimed to have tied up the victim).

256. *See* Prosecutor v. Sesay, Case No. SCSL-04-15-T, Transcript, at 77–80 (July 19, 2004) (featuring witness testimony that did not make sense to Western counsel until Sierra Leonean and Cameroonian judges explained a superstition that underlay the testimony).

V. Conclusion

Mass atrocity prosecutions are credited with advancing a host of praiseworthy objectives,[257] but none of these will be attained unless those prosecutions are capable of finding accurate facts. We have known for some years that finding those accurate facts can prove a challenging enterprise.[258] This Article explores why that is so and what conditions make it more or less challenging. Just as medical researchers identify particularly significant risk factors for cancer, heart disease, and other ailments, this Article has identified particularly significant risk factors for inaccurate factual findings in mass atrocity trials.

This Article reveals that the proceedings most at risk for factually inaccurate findings are international tribunal prosecutions of international crimes in developing nations that oppose the prosecutions. Some aspects of that finding are unsurprising. For instance, no one would be shocked to learn of the out-sized role that government opposition plays in creating factual uncertainty at trial. Indeed, governmental opposition has been so influential a factor that few international prosecutions of mass atrocities in developing nations have even been attempted in the face of it. The ICC took steps to bring such prosecutions in Kenya, Sudan, and Libya, but those steps have dead-ended. Governmental opposition has entirely thwarted the ICC's efforts to prosecute

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257. Some scholars have contended that mass atrocity prosecutions affirm the rule of law in previously lawless societies, *see, e.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 25 (1998) ("To respond to mass atrocity with legal prosecutions is to embrace the rule of law."); RUTI G. TEITEL, TRANSITIONAL JUSTICE 55–56 (2000) ("Criminal justice plays a role not only in delineating individual and collective responsibility but relatedly in defining legitimate institutions of judgment . . . ."), advance peaceful transitions to democracy in post-conflict nations, *see* Cassese, *supra* note 222, at 9–10 (asserting that "calling offenders to account" can bring about a "return to peaceful relations on the ground"), deter future mass atrocities, *see* Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice and Reclamation, in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 1, 3–4 (2004), and create a historical record of the conflict, *see* Richard May & Marieke Wierda, *Evidence Before the ICTY*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 249, 252–53 (Richard May et al. eds., 2001); Antonio Cassese, *Reflections on International Criminal Justice,* 61 MOD. L. REV. 1, 6–9 (1998) (discussing the advantages of international criminal tribunals).

258. *Supra* note 7 and accompanying text.

mass atrocities in Sudan and Libya; neither Sudan nor Libya has been willing to surrender defendants to the ICC,[259] so no trials have even begun. The ICC's efforts to prosecute mass atrocities in Kenya advanced slightly farther, but they met a similar fate[260] amidst a plethora of credible claims that prospective witnesses had been intimidated[261] and even killed.[262] The unsurprising

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259. The ICC indicted three Libyan defendants, Muammar Gaddafi, Abdullah al-Senussi, and Saif al-Islam Gaddafi. Muammar Gaddafi was killed before he could be transferred to The Hague. *See* Kareem Fahim et al., *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES (Oct. 20, 2011), http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review). The al-Senussi case was found to be inadmissible before the ICC. *See* Press Release, Int'l Criminal Court, Al-Sensussi Case: Appeals Chamber Confirms Case is Inadmissible Before ICC, ICC Press Release ICC-CPI-20140724-PR1034 (July 24, 2014), https://www.icc-cpi.int/Pages/item.aspx?name=pr1034 (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review). The ICC has made vigorous efforts to obtain custody over Saif Gaddafi, but Libya has failed to surrender him. *See* Jennifer Easterday, *Prosecution Asks Chamber to Order Libya to Surrender Gaddafi to the ICC*, INT'L JUST. MONITOR (Aug. 24, 2015), https://www.ijmonitor.org/2015/08/prosecution-asks-chamber-to-order-libya-to-surrender-gaddafi-to-the-icc/ (last visited Jan. 22, 2018) (reporting the request by the Office of the Prosecutor to surrender Saif al-Islam Gaddafi to the ICC) (on file with the Washington and Lee Law Review). Similarly, the ICC issued warrants of arrest for five Sudanese defendants, *Situation in Darfur, Sudan*, ICC, ICC-02/05, https://www.icc-cpi.int/darfur (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review), but none has been surrendered to the ICC, so no trials can begin. Fatou Bensouda (ICC Prosecutor), *Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation Darfur, pursuant to UNSCR 1593 (2005)*, UNITED NATIONS SECURITY COUNCIL (Dec. 13, 2016), https://www.icc-cpi.int/Pages/item.aspx?name=161213-otp-stat-unsc-darfur (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review).

260. *See generally* Prosecutor v. Ruto, ICC-01/09-01/11-2027-Red-Corr, Public redacted version of: Decision on Defence Applications for Judgments of Acquittal (Apr. 5, 2016) (terminating case due to lack of evidence); Prosecution v. Kenyatta, ICC-01/09-02/11-983, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta (Dec. 5, 2014) (prosecution withdrawing charges for lack of evidence after prosecution witnesses were allegedly intimidated and recanted their inculpatory statements); Prosecution v. Muthaura, ICC-01/09-02/11-687, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura (Mar. 11, 2013) (same).

261. *See* Prosecutor v. Ruto, ICC-01/09-01/11-2027-Red-Corr, Public redacted version of: Decision on Defense Applications for Judgments of Acquittal, Reasons of Judge Eboe-Osuji, ¶¶ 141–181 (Apr. 5, 2016) (reporting substantial evidence of interference with witnesses).

262. *See* Murithi Mutiga & David Smith, *Discovery of Witness's Mutilated Body Feeds Accusations of State Killings,* GUARDIAN (Jan. 6, 2015, 1:55 PM),

take-away from this Article's analysis, therefore, is that governments that oppose international court prosecutions not only have the power to distort factual findings, they also have the power to prevent prosecutions entirely.[263]

The surprising conclusion to emerge from this study is that the proceedings most at risk for factually inaccurate findings are *international* tribunal prosecutions of *international* crimes in developing nations. This conclusion is not only startling but troubling because international criminal tribunals have been considered the gold standard institutions for the prosecution of mass atrocities. Proponents view them as more neutral than domestic courts,[264] more legitimate than domestic courts,[265] and more appropriate for the prosecution of crimes that have global—and not just domestic—impact.[266] To be sure, some scholars have

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https://www.theguardian.com/world/2015/jan/06/witness-mutilated-body-kenya-government-killing-meshack-yebei-william-ruto (last visited Jan. 22, 2018) (reporting on the gruesome murder of a man who was due to testify in the ICC trial of Kenya's deputy president) (on file with the Washington and Lee Law Review).

263. Numerous other examples exist. Cambodia opposes the ECCC's efforts to prosecute Cases Nos. 003 and 004 and thus far has been able to prevent the prosecutions from moving forward. *See Cambodia: Stop Blocking Justice for Khmer Rouge Crimes*, HUM. RIGHTS WATCH (Mar. 22, 2015 11:07 PM), https://www.hrw.org/news/2015/03/22/cambodia-stop-blocking-justice-khmer-rouge-crimes (last visited Jan. 22, 2018) (examining the Cambodian government's refusal to cooperate in bringing Khmer Rouge leaders before the ECCC) (on file with the Washington and Lee Law Review). Similarly, Indonesia refused to surrender Special Panels' indictees and thereby prevented their prosecutions. *See* David Cohen, *Accountability in the Balance: Trials Before the Special Panels for Serious Crimes in East Timor 1999–2005*, *in* CRITICAL ASSESSMENTS OF INTERNATIONAL CRIMINAL COURTS 103, 126 (Magda Karagiannakis ed., 2009).

264. *See* Cassese, *supra* note 221, at 7; *see also* B.V.A. Röling, *The Law of War and the National Jurisdiction Since 1945*, *in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 323, 354 (1960-II).

265. *See* Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 301–03 (2003) (arguing that hybrid international courts ameliorate some of the legitimacy concerns that arise when domestic courts seek to prosecute mass atrocities).

266. *See* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 6 (2007) (describing the view that mass atrocities are "so egregious that they victimize all of us and, hence, must be condemned internationally"); Alain Pellet, *Internationalized Courts: Better than Nothing . . .*, *in* INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 437, 438 (Cesare P.R. Romano et al. eds., 2004) (explaining that mass atrocities are of concern to the international community as a whole "and it is then important that they not be 'confiscated' by any particular state including the one in which the

contested this vision and highlighted the cost-effectiveness of domestic courts[267] and their arguably greater credibility in the eyes of local communities.[268] But most scholars have continued to consider international criminal tribunals to be most capable of providing the kind of state-of-the-art justice that the international community seeks to deliver. International criminal courts spend fantastic sums[269] in an effort to uphold their defendants' due process rights and to comply with international human rights norms more generally.[270] That their prosecutions face an enhanced risk of factual inaccuracy is thus a highly unwelcome conclusion.

Unwelcome or not, it is a conclusion that must be faced. Finding accurate facts is not one among a host of equally important values: it is arguably the most important, foundational function at the core of mass atrocity prosecutions, in whatever form they take.

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crime has been committed or of which the victims or the authors are nationals"); *cf.* Margaret M. deGuzman, *Harsh Justice for International Crimes?*, 39 YALE J. INT'L L. 1, 27 (2014) ("[T]he central project of international criminal courts is to build a normative community . . . .").

267. *See* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice,* 49 HARV. INT'L L.J. 53, 68 (2008) ("National courts also are generally the most cost-effective entities to undertake prosecutions . . . .").

268. *See, e.g.*, U.N. Secretary-General, *Letter Dated 1 October 1994 From the Secretary-General Addressed to the President of the Security Council*, ¶ 134, U.N. Doc. S/1994/1125 (Oct. 4, 1994) (opining that domestic courts might be more attuned to the needs of local communities and can issue judgments that may have "greater and more immediate symbolic force because they were rendered by courts familiar to the local community"); José E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 403–04 (1999) ("[I]t matters a great deal [to Rwandan victims and survivors] whether an alleged perpetrator of mass atrocity is paraded before the local press, judged in a local courtroom in a language that they can understand, subjected to local procedures, and given a sentence that accords with local sentiments . . . ."); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 596–99, 610 (2005).

269. *See* Nancy Amoury Combs, *From Prosecutorial to Reparatory: A Valuable Post-Conflict Change of Focus*, 36 MICH. J. INT'L L. 219, 227 n.28 (2015) ("[T]he ICC [has spent] approximately $1.5 billion between 2003 and 2014.").

270. *See* Jackson, *supra* note 7, at 22–23 ("[A] core aim remains the need to determine whether accused persons are guilty of international crimes and there is a consensus that for this purpose there needs to be full adherence to international fair trial norms."). *See generally* Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. J. HUM. RTS. 1 (2009); KRIT ZEEGERS, INTERNATIONAL CRIMINAL TRIBUNALS AND HUMAN RIGHTS LAW: ADHERENCE AND CONTEXTUALIZATION (2016).

If a mass atrocity trial cannot find facts to an appropriate level of certainty, then it cannot legitimately achieve any other goal. Consequently, the risk factors identified in this Article should inform prosecutorial charging decisions as well as institutional design. Although a vast body of literature exists regarding the ICC's selection of cases and situations,[271] none of it centers on the ICC's relative fact-finding competence in differing arenas. Likewise, although a vast body of literature considers the relative merits of different types of criminal justice systems for the prosecution of mass atrocities,[272] heretofore, these merits have rarely included fact-finding competence. But they should. Although it might be abstractly preferable to charge mass atrocities as international crimes rather than domestic crimes,[273]

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271. *See, e.g.*, Fabricio Guariglia, *The Selection of Cases by the Office of the Prosecutor of the International Criminal Court*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 209 (Carsten Stahn & Göran Sluiter eds., 2008); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 511 (2003); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 267 (2012) ("[T]his Article seeks to reframe the debate about the ICC's selection decisions by shifting from the current focus on the boundaries between 'legal' and 'political' criteria to a constructive dialogue about the most appropriate goals and priorities for the Court."). *See generally* Alette Smeulers et al., *The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance*, 15 INT'L CRIM. L. REV. 1 (2015) (evaluating the ICC Prosecutor's situation selection policy); William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535 (2010); *The Selection of Situations and Cases for Trial before the International Criminal Court*, HUM. RIGHTS WATCH (Oct. 26, 2006, 5:33 PM), https://www.hrw.org/news/2006/10/26/selection-situations-and-cases-trial-international-criminal-court (last visited Jan. 22, 2018) (recommending criteria for the ICC Prosecutor to consider in the selection of situations and cases) (on file with the Washington and Lee Law Review).

272. *See, e.g.*, Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality*, *in* INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 3 (Cesare P.R. Romano et al. eds., 2004) (comparing international criminal tribunals and courts with mixed or internationalized tribunals and courts, and examining the reasons motivating the establishment of these mixed or internationalized courts); Alvarez, *supra* note 268, at 366 (examining the arguments that have been used to justify the creation, jurisdiction, and ongoing operation of the Balkan and Rwanda tribunals); Drumbl, *supra* note 268, at 539.

273. *See* DRUMBL, *supra* note 266, at 4 (2007); *see also* Suzannah Linton, *Prosecuting Atrocities at the District Court of Dili*, 2 MELB. J. INT'L L. 414, 422 (describing the frustration of the East Timorese judge that because all but one of the then-current indictments charged domestic crimes); *id.* at 438 (reporting the

perhaps that preference should be reconsidered if it will be harder to find the facts of international crimes. Although one case or situation may feature arguably graver crimes than another, the less grave case or situation should be seriously considered if the facts thereof can be found to a higher level of certainty. Finally, the selection and design of prosecutorial bodies should be informed by their relative fact-finding competence. It is unquestionably relevant that a criminal justice system has impartial judges or greater resources for criminal defense, but that criminal justice system's capacity to find accurate facts is at least an equally important metric on which it should be assessed.

Fact-finding competence is so foundational that it is often taken for granted by scholars and commentators. Scholars theorize about the capacity of mass atrocity prosecutions to effect deterrence[274] or impose retribution,[275] but they blithely assume

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many concerns voiced about the prosecution's failure to lay charges for international crimes).

274. *See, e.g.*, M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191, 192 (2003) (arguing that sacrificing justice and accountability for the immediacy of *realpolitik* represents a short-term vision of expediency over the more enduring human value of deterrence); Alejandro Miguel Garro & Enrique Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283, 343 (1987); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2544 (1991) ("[T]o the extent that a deterrence rationale justifies prosecution of state crimes, the underlying objective is best served when international law precludes the possibility of impunity."). *See generally* Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT'L J. TRANSITIONAL JUST. 434 (2013) (surveying the theory of criminal deterrence in order to assemble a more clearly specified set of expectations about how deterrence might be expected to operate in the international arena); Hyeran Jo & Beth Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 226 (2016) (assessing the deterrent effects of the ICC for both state and non-state actors); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2007); Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 9 (1990) ("Deterrence as fear of suffering future punishment . . . is unlikely to be effective in cases where military personnel engage in human rights violations.").

275. *See, e.g.*, deGuzman, *supra* note 271, at 303 ("Whatever its force as a justification for punishment, retribution does not provide an adequate basis for most ICC selection decisions."); Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT'L L. 969 (2014) (arguing that retributivism can provide a meaningful framework for understanding

their capacity to find accurate facts, a capacity that necessarily underlies the higher-order goals that these commentators seek to advance. This Article reveals that fact-finding competence, like most important values, is not evenly distributed across different kinds of crimes or prosecutions. The careful unpacking of that unequal distribution that emerges from this Article should guide policymakers henceforth.

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international criminal law); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 81 (2007) (arguing that retribution is a problematic justification for international criminal law punishment because it presupposes a coherent community and relatively stable sociopolitical or legal order characterized by shared values); Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633 (2011).