

2009

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Repository Citation

Combs, Nancy Amoury, "Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials" (2009). *Faculty Publications*. 336.

<https://scholarship.law.wm.edu/facpubs/336>

TESTIMONIAL DEFICIENCIES AND EVIDENTIARY UNCERTAINTIES IN INTERNATIONAL CRIMINAL TRIALS

*Nancy Amoury Combs**

In this article, the author describes the flaws inherent in the process of international criminal tribunals which seek to punish the inhumane actions of dictators. The author first describes how international criminal trials confront severe impediments to accurate fact-finding. It continues on to discuss the failure of witnesses in these tribunals to accurately convey the information needed to make a fully-informed decision. This problem is compounded by the fact that what clear information is provided during witness testimony often is inconsistent with the information that the witness previously provided in a pre-trial statement. The author also explores the causes behind the lack of accuracy in witness testimony, which include the lack of education or life experiences and the lack of familiarity with trial procedures.

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INTRODUCTION

After decades of inactivity, international criminal law has lately emerged as one of the most rapidly developing and influential subjects of international law and global politics. Sixty years after Nazi offenders were prosecuted at Nuremberg, the international community established an international criminal tribunal to prosecute those responsible for international crimes in the former Yugoslavia (ICTY). The ICTY spawned a number of progeny, including the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Special Panels in the Dili District Court in East Timor (Special Panels), the Extraordinary Chambers in the Courts of Cambodia, and, most importantly, a permanent International Criminal Court (ICC). The establishment of these institutions constitutes, in Mark Drumbl's words, "one of the more extensive waves of institution-building in modern international relations."¹

Most international law scholars warmly greeted the establishment of these tribunals.² Although large-scale atrocities have been committed since the dawn of humanity, for most of human history these atrocities have not elicited criminal sanctions. So, the move to impose accountability on brutal dictators who were responsible for widespread death, suffering and destruction was considered a tremendous advance, and early commentators credited international criminal prosecutions with advancing a host of praise-worthy purposes. International criminal prosecutions were said to affirm the rule of law in previously lawless societies,³ to promote peace-building and transi-

¹ MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 10 (2007).

² Richard Goldstone called the new international tribunals "a tremendous and exciting step forward," Richard Goldstone, *Conference Luncheon Address*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1, 2 (1997), while Payam Akhavan hailed them as "an unprecedented institutional expression of the indivisibility of peace and respect for human rights" that represented "a radical departure from the traditional realpolitik paradigm which has so often and for so long ignored the victims of mass murder and legitimized the rule of tyrants in the name of promoting the purported *summum bonum* of stability," Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 327 (1997) (italics added). At least that was the view of commentators with an internationalist perspective. Scholars of a realist bent have questioned the wisdom and viability of international trials. See, e.g., Jack Goldsmith & Stephen Krasner, *The Limits of Idealism*, DÆDALUS, 47-53, Winter 2003, available at <http://www.jstor.org/stable/20027822>; Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 500-02 (1994). For a brief discussion of the realist critique of international criminal law, see DRUMBL, *supra* note 1, at 10.

³ See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 25 (1998); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 56 (2000)

tion to democracy in war-torn lands,⁴ to assist in reconciling former enemies,⁵ to deter future megalomaniacs from committing similar crimes,⁶ to create a historical record of the conflict,⁷ and to diminish the victims' propensity to blame collectively all those in the offenders' group.⁸ International criminal justice was, in sum, the subject of a great deal of soaring and inspirational rhetoric.

In recent years, the glow surrounding international criminal justice has begun to fade. The scandalous cost of international criminal trials has driven some critiques, while inadequate outreach efforts have formed the basis for others.⁹ On a much broader scale, Larry May, in his trilogy on crimes

(arguing that "criminal justice plays a role...in defining legitimate institutions of judgment. Individuating wrongdoing lifts collective responsibility from the prior regime and relegitimizes state authority."); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 L. & CONTEMP. PROBS. 81, 83 (1996); The Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 39, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

⁴ Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 9-10 (1998) [hereinafter Cassese, *On the Current Trends*].

⁵ For a discussion of this literature, 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).

⁶ Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991); Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283, 343 (1987); Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 12 (1990); M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191, 192 (2003). Indeed, the Security Council established the ICTY while the Yugoslavian conflict was still underway with the express goal of deterring international crimes. See Provisional Agenda of the Forty-Ninth Regular Session of the General Assembly, ¶ 13, 49th Sess., U.N. Doc. A/49/150 (July 22, 1994).

⁷ 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); Cassese, *On the Current Trends*, *supra* note 4, at 9-10; Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6-9 (1998).

⁸ Cassese, *On the Current Trends*, *supra* note 4, at 9; see also MINOW, *supra* note 3, at 40; Richard J. Goldstone, *50 Years after Nuremberg: A New International Criminal Tribunal for Human Rights Criminals*, in CONTEMPORARY GENOCIDES: CAUSES, CASES, CONSEQUENCES 215, 215-16 (Albert J. Jongman ed., 1996).

⁹ See, e.g., Geoffrey Nice & Philippe Vallières-Roland, *Procedural Innovations in War Crime Trials*, 3 J. INT'L CRIM. JUST. 354, 355 (2005); Samantha Power, *Rwanda: The Two Faces of Justice*, 50 N.Y. REV. OF BOOKS, Jan. 16, 2003; Ivan Šimonović, *Dealing with the Legacy of*

against humanity, war crimes and aggression,¹⁰ has carefully scrutinized and explicated the normative foundations of international criminal law, rejecting much that does not conform to his moral minimalist account. Other scholars have begun questioning the ability of international criminal tribunals to achieve many of the goals that previously had been reflexively attributed to them. Thus, whereas early commentators unquestioningly assumed that international criminal prosecutions would serve to deter the next generation of genocidal maniacs, more recently scholars have questioned that assumption.¹¹ Recent empirical research also has called into question the ability of international criminal tribunals to advance reconciliation and peace-building efforts following large-scale violence.¹² And Mark Drumbl, for his part, has offered a comprehensive and sophisticated critique of international criminal justice, concluding that there exists a palpable disconnect between the effects of sentencing and the penological theories that are expected to justify the imposition of criminal punishment.¹³

These are impressive studies because they scrutinize many of the foundational beliefs that drove the establishment of the international criminal tribunals. However, as impressive as they are, they assume the question that forms the basis for my work. The scholars I have mentioned might question whether the prosecution of certain international crimes can be justified given their infringement on state sovereignty,¹⁴ or they might conclude that international criminal trials impair the prospects for reconciliation rather than advance them,¹⁵ but their critiques presuppose that international trials—even if

Past War Crimes and Human Rights Abuses: Experiences and Trends, 2 J. INT'L CRIM. JUST. 701, 706-07 (2004); Christopher M. Gosnell, *A Court Too Far*, INT'L HERALD TRIB., Mar. 28, 2008.

¹⁰ LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* (Cambridge Univ. Press 2005); LARRY MAY, *WAR CRIMES AND JUST WAR* (Cambridge Univ. Press 2007) [hereinafter MAY, *CRIMES AGAINST HUMANITY*]; LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* (Cambridge Univ. Press 2008) [hereinafter MAY, *AGGRESSION*].

¹¹ See, e.g., Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777 (2006); Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 8-11 (2002).

¹² ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* (2005); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002); Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151 (2004).

¹³ DRUMBL, *supra* note 1, at 149-80.

¹⁴ See, e.g., MAY, *CRIMES AGAINST HUMANITY*, *supra* note 10, at 83 (contending that "international prosecutions require a showing that harm that is group-based has occurred").

¹⁵ See e.g., STOVER, *supra* note 12, at 15.

they can do nothing else—can determine with some measure of certainty whether or not a defendant engaged in the acts alleged in the indictment.¹⁶ That is, even if international trials have uncertain philosophical foundations, even if they regularly fail to deter, rehabilitate or reconcile, international criminal trials have at least been considered useful mechanisms for determining who did what to whom during a mass atrocity.

It is that assumption that I will challenge. This article summarizes the research and conclusions that appear in my forthcoming book *Factfinding Without Facts: The Uncertain Evidentiary Foundations for International Criminal Convictions* (forthcoming 2010, Cambridge University Press). My research reveals that international criminal trials confront severe impediments to accurate fact-finding, impediments that should give rise to serious doubt about the accuracy of the Trial Chambers' factual determinations. The basis for my study is a large-scale review of transcripts from the ICTR, the SCSL and the Special Panels. From this review, I conclude that much eyewitness testimony at the international tribunals is of highly questionable reliability. In particular, many international witnesses are unable to convey the information that court personnel expect—and need—to receive, if they are to have confidence in the factual determinations they make. Sometimes, witnesses claim not to know the sought-after information, while in other instances, the communication breaks down as a result of the questioning process. Moreover, what clear information is provided during witness testimony often is inconsistent with the information that the witness previously provided in a pre-trial statement. Section I will summarize my findings regarding these testimonial deficiencies, findings that appear in Chapters Two and Four of my book. Section II will summarize Chapter Three of the book by canvassing some of the causes of the deficiencies. Section II reports, for instance, that many witnesses lack the education and life experiences to be able to read maps, tell time, or answer questions concerning distances and dates. Cultural norms and taboos create additional communication difficulties, as some witnesses are reluctant to speak directly or at all about certain events and as international judges may inappropriately assess witnesses' demeanor and willingness to answer questions by Western norms. The need for language interpretation for virtually every fact witness—sometimes

¹⁶ When Larry May, for instance, proposed a series of reforms designed to reduce the appearance of political influence over international trials, he acknowledged that accepting his proposals would make "the pursuit of the truth of the causes of the larger atrocity harder to ascertain by means of trials." He consoled readers, however, that "[t]here will be truths nonetheless that will emerge . . . namely that truth concerning whether a given defendant did participate in an atrocity and to what extent." MAY, AGGRESSION, *supra* note 10, at 337.

through multiple interpreters—and the unfamiliarity of most witnesses with the predominantly adversarial trial procedures in use at the international tribunals only compound these problems.

My review does not encompass ICTY proceedings because the ICTY is an outlier amongst the Tribunals that have prosecuted international crimes and that will be doing so in the future. Although a cursory review of ICTY transcripts reveals that those proceedings do feature some of the problems that will be described in the following pages, because the ICTY prosecutes crimes that took place in Europe, the educational, cultural and linguistic divergences between witnesses and courtroom staff that so impair communication at the ICTR, the SCSL and the Special Panels do not prove as distortive. That in itself, would not be reason to exclude the ICTY from my study, but the fact that the ICC is currently focused exclusively on African conflicts suggests that the fact-finding impediments that I have identified in ICTR, SCSL and Special Panels' proceedings constitute a continuing concern for international criminal justice despite the fact that the ICTY does not feature them in the same number or severity.

As a consequence of the fact-finding impediments that I will describe, the testimony of international witnesses often is vague, unclear and lacking in the information necessary for fact-finders to make reasoned factual assessments. As I noted, these deficiencies can be explained by the educational, cultural and linguistic factors referred to in Section II but they also can be explained by witness mendacity. Indeed, many of the testimonial difficulties canvassed in Section I—from the failure to answer questions of date, time and distance to the circuitous responses that so lengthen and complicate communication—could also stem from a witness's desire to evade. Although every criminal justice system in the world has its share of lying witnesses, Section II reports that ICTR and the SCSL have more than their share. The group-based loyalty and ethnic divisions that gave rise to the international crimes in the first place can create powerful incentives to put enemies in prison, whether they belong there or not, and the international tribunals provide additional incentives—perhaps unwittingly—through the financial assistance that they provide to testifying witnesses. Whatever the causes of the false testimony, Section II reveals that some international criminal tribunals hear a lot of it. Indeed, my review of ICTR cases shows that more than 90 percent of them featured an alibi or another example of diametrically opposing testimony from defense and prosecution witnesses. Although some of these witnesses may be honestly mistaken, the use of alibis and the incidence of contradictory testimony so vastly exceeds that which is common to domestic trials that it would seem naïve to dismiss a substantial

portion of it as arising from honest mistakes.

Section III will summarize the final five Chapters of my book by exploring the conceptual and normative implications of the aforementioned testimonial deficiencies.

I. TESTIMONIAL DEFICIENCIES

International criminal trials employ Western-style criminal procedures that presuppose a smooth flow of questions and answers between counsel and witnesses. In particular, it is expected that in response to counsel's questioning, eyewitnesses will convey the details of the events they witnessed in a form that the fact-finder can both understand and critically evaluate. To be sure, clear communication between witnesses and fact-finders is not always realized even in domestic cases. Trials involving medical malpractice, products liability and patent claims – to provide only a few examples – frequently feature testimony about scientific or technological issues that are difficult for witnesses to clearly explain and for fact-finders to satisfactorily grasp. But the ordinary domestic criminal trial rarely presents these problems. Eyewitnesses have a story to tell about certain events relevant to the defendant's criminal culpability and, through questioning, they are able to tell that story in a way that is not only comprehensible to the fact-finder but provides the fact-finder sufficient information to draw reasonable conclusions about the defendant's liability. Witnesses in domestic criminal trials may not answer questions accurately, but they do answer the questions and they do answer them intelligibly.

The same is frequently not the case at the ICTR, SCSL and Special Panels. Indeed, the smooth flow of questions and answers that is the norm in the domestic criminal trial often is unattainable at those tribunals. As my book describes in considerably greater detail, international witnesses frequently are unable or unwilling to relate whole categories of information that are crucial to accurate fact-finding. Sometimes, witnesses claim not to know the sought-after information, while at other times, the difficulties seem to stem from the mode of courtroom questioning. Some witnesses claim not to understand counsel's questions, for instance, while others respond evasively or otherwise unresponsively, and still others testify in a manner that is almost entirely unintelligible to courtroom personnel. Make no mistake: many of these difficulties stem from factors beyond the witnesses' control. Indeed, as I just noted, Section II will consider various educational, cultural and linguistic explanations for the testimonial deficiencies. But whatever their causes, these difficulties create tremendous uncertainty about even the

most basic aspects of the criminal activities at issue in international trials.

To begin, international witnesses often have difficulty answering basic questions that are asked of them. So, for instance, with some notable exceptions, international witnesses have trouble providing the dates of the events that they witnessed.¹⁷ Sometimes a witness will be able to say that the event in question occurred during the dry season or the rainy season,¹⁸ or better

¹⁷ Prosecutor v. Hinga Norman et al., Case No. SCSL-2004-14-T, Transcript, June 16, 2004, 5, 26; *id.*, Transcript, at 34 (June 18, 2004); *id.*, Transcript, at 29 (June 21, 2004); *id.*, Transcript, at 119 (Sept. 9, 2004); *id.*, Transcript, at 58 (Sept. 20, 2004); *id.*, Transcript, at 17, 37, 39, 74-75, 79-80 (Sept. 21, 2004); *id.*, Transcript, at 20-21 (Sept. 23, 2004); *id.*, Transcript, at 25-27 (Sept. 29, 2004); *id.*, Transcript, at 33, 88, 131; *id.*, Transcript, at 111-12 (Nov. 8, 2004); *id.*, Transcript, at 39 (Nov. 9, 2004); *id.*, Transcript, at 26 (Nov. 12, 2004); *id.*, Transcript, at 95 (Nov. 16, 2004); *id.*, Case No. SCSL-2004-14-T, Transcript, at 7-8 (Feb. 9, 2005); *id.*, Transcript, at 37-38 (Mar. 10, 2004); *id.*, Transcript, at 46 (Mar. 14, 2004); *id.*, Transcript, at 20, 60 (June 1, 2006); Prosecutor v. Brima et al., Case No. SCSL-2004-16-PT, Transcript, at 16 (Apr. 6, 2005); *id.*, Transcript, at 61 (Apr. 7, 2005); *id.*, Transcript, at 115-16 (June 24, 2005); *id.*, Transcript, at 41, 95-96 (June 27, 2005); *id.*, Transcript, at 9 (June 28, 2005); *id.*, Transcript, at 6, 24 (June 29, 2005); *id.*, Transcript, at 96 (June 30, 2005); *id.*, Transcript, at 46 (July 7, 2005); *id.*, Transcript, at 18-19; 34-35 (July 8, 2005); Prosecutor v. Sesay et al., SCSL-04-15-T, Transcript, at 47, 74 (July 19, 2004); *id.*, Transcript, at 24 (Apr. 15, 2004); *id.*, Transcript, at 44 (Dec. 8, 2005); Prosecutor v. Ghankay Taylor, Case No. SCSL 2003-01-T, Transcript, at 6440-41 (Apr. 2, 2008); *id.*, Transcript, at 6686 (Apr. 4, 2008); *id.*, Transcript, at 7307-08 (Apr. 11, 2008); *id.*, Transcript, at 8548-49 (Apr. 24, 2008); *id.*, Transcript, at 10277 (May 20, 2008); *id.*, Transcript, at 10592, 10615 (May 22, 2008); *id.*, Transcript, at 14235-36, 14303 (Aug. 21, 2008); *id.*, Transcript, at 15603-04 (Sept. 5, 2008); *id.*, Transcript, at 15889 (Sept. 10, 2008); *id.*, Transcript, at 16028 (Sept. 11, 2008); *id.*, Transcript, at 16374-75, 16355-57 (Sept. 16, 2008); *id.*, Transcript, at 16431-32 (Sept. 17, 2008); Judicial System Monitoring Programme, Los Palos Case Notes, at 26 (July 16, 2001) [hereinafter Los Palos Case Notes] (on file with author); Judicial System Monitoring Programme, Lolotoe Case Notes, at 2 (May 9, 2002) [hereinafter Lolotoe Case Notes] (on file with author); *id.* at 1 (Oct. 23, 2002); *id.* at 18-20 (Mar. 17, 2003); Prosecutor v. Karera, Case No. ICTR-01-74-T, Transcript, at 27 (Jan. 9, 2006); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Transcript, at 83 (July 18, 2001) (on file with author); Prosecutor v. Ntakirutimana, Case No. ICTR-96-17-T, Transcript, at 62-63 (Sept. 28, 2001) (on file with author); Prosecutor v. Ndindabahizi, Case No. ICTR-01-71-T, Transcript, at 41 (Sept. 3, 2003); *id.*, Transcript, at 2 (Sept. 8, 2003); *id.*, Transcript, at 28 (Sept. 15, 2003); *id.*, Transcript, at 47 (Sept. 16, 2003); *id.*, Transcript, at 42 (Sept. 29, 2003); Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Transcript, at 115 (Jan. 28, 2002) (on file with author); *id.*, Transcript, at 11 (Feb. 5, 2002) (on file with author).

¹⁸ *Sesay et al.*, SCSL-04-15-T, Transcript, at 2-3, 11 (July 21, 2004); *id.*, Transcript, at 8, 21-22 (Oct. 21, 2004); *id.*, Transcript, at 94-97 (Jan. 13, 2004); *id.*, Transcript, at 79 (Mar. 17, 2006); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 54 (June 21, 2004); *id.*, Transcript, at 160 (Sept. 14, 2004); *id.*, Transcript, at 17, 24, 44 (Nov. 8, 2004); *id.*, Transcript, at 4 (Nov. 12, 2004); *id.*, Transcript, at 115-19 (Nov. 16, 2004); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 20 (Apr. 8, 2005); *id.*, Transcript, at 82-83, 97-99 (June 30,

yet, during a particular month;¹⁹ but that is often about as precise as the dating gets, and many witnesses cannot provide even that much information.²⁰ Failing to specify when particular events occurred substantially impairs the Tribunal's ability to find facts. The failure to date events can conceal inconsistencies between witness accounts that would otherwise come to light. More importantly, it prevents the defendant from presenting an alibi in defense. We all recognize that it is a more compelling defense to assert: "I did not make a speech calling for the extermination of the Tutsi at a rally in Cyangugu on February 12, 1994, and I can prove it because I was attending a meeting of government ministers in Kigali on that day," than it is to say, "I did not make a speech calling for the extermination of the Tutsi at a rally in Cyangugu." But the fact that the defendant was at a meeting in Kigali on February 12, 1994 means nothing if the witness can say only that the rally occurred sometime during the rainy season.

International witnesses also frequently have difficulty estimating distances. Some witnesses assert that they do not know the lengths of Western units of measurement, such as miles or kilometers.²¹ Sometimes witnesses try to estimate when they are not really able. Asked how wide a road was, one Timorese witness responded "maybe 100 meters wide." He went on to

2005); *id.*, Transcript, at 102, 112-13 (July 7, 2005); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 6966 (Apr. 8, 2008); *id.*, Transcript, at 7017, 7052 (Apr. 9, 2008); *id.*, Transcript, at 7388 (Apr. 14, 2008).

¹⁹ *Ndindabahizi*, Case No. ICTR-01-71-T, Transcript, at 36 (Sept. 3, 2003); *Ntakirutimana*, Case No. ICTR-96-17-T, Transcript, at 8, 29 (Sept. 24, 2001); *id.*, Transcript, at 43-46, 58 (Sept. 26, 2001); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 61 (Apr. 6, 2005); *id.*, Transcript, at 86 (Apr. 11, 2005); *id.*, Transcript, at 96 (June 27, 2005); *id.*, Transcript, at 100 (June 30, 2005); *id.*, Transcript, at 8 (July 1, 2005); *id.*, Transcript, at 44 (July 7, 2005); *id.*, Transcript, at 56, 74-75 (July 11, 2005); *id.*, Transcript, at 25 (July 12, 2005); *Sesay et al.*, SCSL-04-15-T, Transcript, at 80-81 (Oct. 4, 2004); *id.*, Transcript, at 182 (Oct. 8, 2004); *id.*, Transcript, at 50, 57, 78 (Oct. 14, 2004); *id.*, Transcript, at 31, 92 (Oct. 18, 2004); *id.*, Transcript, at 96 (Oct. 25, 2004); *id.*, Transcript, at 13-14 (Oct. 27, 2004).

²⁰ *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 30 (July 25, 2005); *id.*, Transcript, at 73-74 (Apr. 7, 2005); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 20 (Nov. 11, 2004).

²¹ *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 31 (Mar. 8, 2005); *Karera*, Case No. ICTR-01-74-T, Judgment and Sentence, ¶ 296 (Dec 7, 2007) (Witness maintains that he does not understand the metric system and can estimate only by "paces."); Los Palos Case Notes, *supra* note 17, at 84 (July 27, 2001) ("I don't know what 100 meters is, I only found out when a journalist told me."); *id.* at 94 (July 30, 2001) ("I really don't know about meters."); *see also Taylor*, Case No. SCSL 2003-01-T, Transcript, at 7620 (Apr. 15, 2008); *id.*, Transcript, at 7738-39 (Apr. 16, 2008) (witness unable to estimate by means of football fields).

testify that it was wide enough for one car to fit.²² And a Sierra Leonean witness insisted that he walked 12 miles in 45 minutes even after it was pointed out to him that it would be hard to drive the distance in that amount of time, let alone to walk it.²³ Accurate answers to distance questions are of key importance to fact-finders. How much weight a Trial Chamber can justifiably place on a witness's identification of a defendant at a particular scene will depend in large part on how far the witness was from the defendant. A Trial Chamber that hears only that "the distance was not great" is making factual findings in the dark.

Duration estimates²⁴ and numerical estimates²⁵ also frequently prove

²² Los Palos Case Notes, *supra* note 17 (July 31, 2001).

²³ *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 29 (July 5, 2005).

²⁴ See, e.g., Lolotoe Case Notes, *supra* note 17, at 4 (Apr. 9, 2002); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 20-21 (Sept. 23, 2004); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 58-59 (Mar. 8, 2005); *id.*, Transcript, at 112 (Apr. 7, 2005); *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Transcript, at 15 (Mar. 19, 2003); *Ndindabahizi*, Case No. ICTR-01-71-T, Transcript, at 8-9 (Sept. 16, 2003); *Kamuhanda*, Case No. ICTR-99-54A-T, Transcript, at 61, 64 (Feb. 12, 2002) (on file with author); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 6684-86 (Apr. 4, 2008); *id.*, Transcript, at 14869 (Aug. 28, 2008); *Sesay et al.*, SCSL-04-15-T, Transcript, at 77 (July 19, 2004); *id.*, Transcript, at 6 (July 15, 2004); *id.*, Transcript, at 2-3 (July 21, 2004); *id.*, Transcript, at 52, 57 (July 27, 2004); *id.* Transcript, at 80, 84 (Oct. 21, 2004); *id.*, Transcript, at 39-40 (Apr. 12, 2005); *id.* Transcript, at 32 (Nov. 4, 2005); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 127-28 (Sept. 23, 2004); *id.*, Transcript, at 106 (Sept. 27, 2004); *id.*, Transcript, at 3-4 (Nov. 3, 2004); *id.*, Transcript, at 46 (Mar. 14, 2005); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 58 (Mar. 8, 2005); *id.*, Transcript, at 46, 106 (Apr. 7, 2005); *id.*, Transcript, at 24-25 (Apr. 8, 2005); *id.*, Transcript, at 7 (June 27, 2005); *id.*, Transcript, at 6 (June 29, 2005); *id.*, Transcript, at 96 (June 30, 2005); *id.*, Transcript, at 110 (July 7, 2005); *id.*, Transcript, at 74, 80-81, 109, 117 (July 11, 2005); Los Palos Case Notes, *supra* note 17, at 34 (July 18, 2001); *id.* at 306 (Sept. 28, 2001).

²⁵ See, e.g., *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 436 (Jan. 27, 2000); *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, ¶ 118 (May 16, 2003); *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Transcript, at 67-68 (Apr. 30, 2004); *Ndindabahizi*, Case No. ICTR-01-71-T, Transcript, at 35 (Sept. 16, 2003); *Ntakirutimana*, Case No. ICTR-96-17-T, Transcript, at 29, 39, 70-72 (Sept. 28, 2001); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 50 (June 21, 2004); *id.*, Transcript, at 18 (Feb. 9, 2005); *id.*, Transcript, at 35 (June 3, 2005); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 43 (Mar. 8, 2005); *id.*, Transcript, at 79, 80, 87-88, 90 (June 27, 2005); *id.*, Transcript, at 14 (July 1, 2005); *id.*, Transcript, at 108 (July 7, 2005); *id.*, Transcript, at 17, 76-77 (July 11, 2005); *id.*, Transcript, at 5, 12 (July 12, 2005); *id.*, Transcript, at 34 (July 14, 2005); *id.*, Transcript, at 106 (July 18, 2005); *id.*, Transcript, at 53-54 (Sept. 19, 2005); *Sesay et al.*, SCSL-04-15-T, Transcript, at 11, 46 (July 22, 2004); *id.*, Transcript, at 17 (July 27, 2004); *id.*, Transcript, at 32 (Oct. 5, 2004); *id.*, Transcript, at 53, 67, 72, 73, 74 (Oct. 18, 2004); *id.*, Transcript, at 94-95 (Oct. 21, 2004); *Taylor*, Case No. SCSL 2003-01-T, Tran-

problematic. So, for instance, witnesses have difficulty saying how long a particular attack lasted or how many attackers participated. And sometimes counsel try to elucidate or test a witness's account by means of maps, photographs, sketches and other two-dimensional representations, but the witnesses often cannot make sense out of them.²⁶ Defense counsel show witnesses these representations to see if the witness was even present at the site, but if the witness says she cannot understand the picture, then there is no way to tell if she was there or not. Even if the Trial Chamber is sure that the witness was there, it might wish to pinpoint her exact location in order to assess the weight to give to her testimony. One ICTR witness, for instance, was able to point out her position on a photograph of a stadium, and because she was able to do so, the Trial Chamber was able to determine that she would have had a hard time identifying anyone located where the witness said the defendant was located.²⁷

In the foregoing examples, witnesses did not answer questions because they claimed not to know the answers to those questions. But sometimes questions go unanswered because witnesses do not understand the questions they are asked or the Western court personnel do not understand the answers that they receive. Sometimes the witness will not understand the terminology used in the question,²⁸ and other times it is the form of the question that

script, at 6667 (Apr. 4, 2008); Los Palos Case Notes, *supra* note 17, at 119 (Aug. 2, 2001).

²⁶ See, e.g., *Ntakirutimana*, Case No. ICTR-96-17-T, Transcript, at 126-27 (Sept. 24, 2001); *id.*, Transcript, at 8-11 (Sept. 25, 2001); *Kamuhanda*, Case No. ICTR-99-54A-T, Transcript, at 88-90 (Sept. 12, 2001) (on file with author); *id.* Transcript, at 32 (Sept. 19, 2001); *id.*, Transcript, at 29-31 (Sept. 24, 2001); *id.*, Transcript, at 4-7, 10, 26 (Feb. 14, 2002); *id.*, Transcript, at 84 (Sept. 11, 2002); *id.*, Transcript, at 130 (Feb. 13, 2002); *id.*, Transcript, at 108-09 (Sept. 4, 2001); *Kajelijeli*, Case No. ICTR-98-44A-T, Transcript, at 58 (Dec. 12, 2001) (on file with author); *Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, ¶¶ 380, 436, 838 (Jan. 27, 2003); *Niyitegeka*, Case No. ICTR 96-14-T, Judgment and Sentence, ¶ 151 (May 16, 2003); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Transcript, at 41 (Oct. 27, 2007) (on file with author); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 38 (Nov. 4, 2004); Los Palos Case Notes, *supra* note 17, at 78 (July 26, 2001). AFRC witness TF1-157 similarly testified that he had never seen a map or a chart. *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 29 (July 25, 2005).

²⁷ *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, ¶¶ 648-49 (June 7, 2001).

²⁸ See, e.g., *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 14278 (Aug. 21, 2008); *id.*, Transcript, at 16328-31 (Sept. 16, 2008); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 19 (Feb. 9, 2005); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 111-12 (June 30, 2005); *Sesay et al.*, SCSL-04-15-T, Transcript, at 20 (July 28, 2004); *id.*, Transcript, at 79-80 (Oct. 6, 2004); *id.*, Transcript, at 199 (Oct. 8, 2004); *id.*, Transcript, at 58-59, 113-14, 142 (Oct. 11, 2004); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 60 (June 15, 2004); *id.*, Transcript, at 26-27 (June 16, 2004). See also *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 16-17 (June 18, 2004); *id.*, Transcript, at 65 (Nov. 8

gives rise to the difficulties. Compound questions have proven especially problematic, and judges at the international tribunals have frequently had to remind counsel to divide up their questions into smaller, more intelligible parts. So, for instance, one witness could not answer the following question: “when . . . the *Kamajors* told you that Chief Norman was coming to talk to them were you eager to go and hear Chief Norman?” Consequently, one of the judges reformulated the question into the following series of questions:

President: You know [Chief Norman] very well, huh? . . .

Witness: Yes, sir.

President: Right. He is your chief?

Witness: Yes, sir.

President: He was coming to hold a meeting with you.

Witness: Yes, sir.

President: Were you happy to go to the meeting?

Witness: Yes, I was glad.²⁹

In other cases, it is not entirely clear what the problem is, but it is clear that there is some problem because the witness's answer will not in any way match counsel's question.³⁰ In other cases, the confusion—or some sort of communication difficulty—will become apparent because counsel must ask a question multiple times in order to get a responsive answer from the witness.³¹ And it is not infrequent that counsel never gets a pertinent answer as

2004); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript at 21-22 (Apr. 6, 2005).

²⁹ *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 18-19 (June 18, 2004).

³⁰ Lolotoe Case Notes, *supra* note 17, at 4 (Nov. 4, 2002); *id.* at 8 (Apr. 8, 2002); Los Palos Case Notes, *supra* note 17, at 156 (Aug. 14, 2001); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 28 (Nov. 2, 2004); *id.*, Transcript, at 22 (Sept. 21, 2004); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 37 (June 28, 2005); *id.*, Transcript, at 64 (June 27, 2005); *id.*, Transcript, at 81 (July 7, 2005); *id.*, Transcript, at 102 (Mar. 8, 2005); *id.*, Transcript, at 96-97 (Apr. 7, 2005); *id.*, Transcript, at 40 (Apr. 6, 2005); *Sesay et al.*, SCSL-04-15-T, Transcript, at 15 (July 21, 2004); *id.*, Transcript, at 6, 8, 47, 48, 50 (July 22, 2004); *id.*, Transcript, at 52 (July 27, 2004); *id.*, Transcript, at 29 (July 28, 2004); *id.*, Transcript, at 89 (Oct. 6, 2004); *id.*, Transcript, at 56, 57-58 (Oct. 21, 2004); *id.*, Transcript, at 2-3 (Oct. 22, 2004); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 7423, 7533-34 (Apr. 14, 2008); *id.*, Transcript, at 8536 (Apr. 24, 2008); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 14257 (Aug. 21, 2008); *id.*, Transcript, at 15441-42 (Sept. 4, 2008); *id.*, Transcript, at 15708 (Sept. 8, 2008); *Kamuhanda*, Case No. ICTR-99-54A-T, Transcript, at 12 (Jan. 21, 2003); *Ndinda-bahizi*, Case No. ICTR-01-71-T, Transcript, at 3 (Sept. 15, 2003); *Ntakirutimana*, Case No. ICTR-96-17-T, Transcript, at 82 (Sept. 24, 2001).

³¹ *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 767-74 (Jan. 9, 2008); *id.*, Transcript, at 6765-66 (Apr. 7, 2008); *id.*, Transcript, at 7543-44 (Apr. 14, 2008); *id.*, Transcript, at 8616-18 (Apr. 25, 2008); *id.*, Transcript, at 9563, 10100-05 (May 12, 2008); *id.*, Transcript, at 10212-15 (May 19, 2008); *id.*, Transcript, at 10246-47 (May 20, 2008); *id.*, Transcript, at 14888-90,

witnesses frequently seem to talk around the relevant topics.

A final problem concerns testimony that is inconsistent with previous statements. Investigators interview witnesses before they come to court, and they draft written statements ostensibly containing the information that the witnesses conveyed to them. The problem is that a substantial proportion of witnesses testify inconsistently with their written statements or with their in-court testimony in previous cases. While some of these inconsistencies are trivial, many are not. As my book reveals, the inconsistencies cover a wide range of information. Discrepancies are particularly apt to appear in testimony that concerns dates, distance, duration, numerical estimations and the other sorts of key details that international witnesses have such trouble providing.³² In other cases, the inconsistencies relate to the specific facts of the

14892-95, 14900-02 (Aug. 28, 2008); *id.*, Transcript, at 15835-36 (Sept. 9, 2008); *id.*, Transcript, at 15905-06 (Sept. 10, 2008); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 49-51, 55-56 (Sept. 21, 2004); *id.*, Transcript, at 4-10 (June 18, 2004); *id.*, Transcript, at 106-07 (Nov. 26, 2004); *id.*, Transcript, at 5-8 (Feb. 15, 2005); *id.*, Transcript, at 137-38 (Feb. 17, 2005); *id.*, Transcript, at 49-54 (Mar. 1, 2005); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 46-47 (Apr. 6, 2005); *id.*, Transcript, at 21, 26, 73-75 (Apr. 8, 2005); *id.*, Transcript, at 108-10 (June 27, 2005); *id.*, Transcript, at 110-12, 119-20 (June 28, 2005); *id.*, Transcript, at 22-23 (July 5, 2005); *id.*, Transcript, at 62 (July 7, 2005); *id.*, Transcript, at 113, 134-35, 145-46 (July 11, 2005); *id.*, Transcript, at 14, 40-42, 67 (Sept. 22, 2005); *id.*, Transcript, at 13-17, 23-24, 39-41 (Sept. 23, 2005); *Sesay et al.*, SCSL-04-15-T, Transcript, at 38 (July 14, 2004); *id.*, Transcript, at 31-32 (July 21, 2004); *id.*, Transcript, at 66, 68-69 (July 27, 2004); *id.*, Transcript, at 48-50 (Oct. 5, 2004); *id.*, Transcript, at 82-91 (Oct. 6, 2004); *id.*, Transcript, at 58-60 (Oct. 7, 2004); *id.*, Transcript, at 23-24, 121-25 (Oct. 11, 2004); *id.*, Transcript, at 34-35 (Oct. 20, 2004); *id.*, Transcript, at 16-17, 23-28 (Apr. 8, 2005); *id.*, Transcript, at 24, 41 (Apr. 15, 2005); *id.*, Transcript, at 40-42 (July 7, 2005); Lolo-toe Case Notes, *supra* note 17, at 4-5 (Apr. 8, 2002); *id.* at 3 (Oct. 28, 2002); *Karera*, Case No. ICTR-01-74-T, Transcript, at 49-50 (Feb. 1, 2006); *Ndindabahizi*, Case No. ICTR-01-71-T, Transcript, at 16-18 (Sept. 16, 2003); *Ndindabahizi*, Case No. ICTR-01-71-T, Transcript, at 16-17 (Sept. 15, 2003); *Kamuhanda*, Case No. ICTR-99-54A-T, Transcript, at 8-10 (May 6, 2002); *Ntakirutimana*, Case No. ICTR-96-17-T, Transcript, at 132-33 (Sept. 24, 2001); *id.*, Transcript, at 7-8 (Sept. 25, 2001); *id.*, Transcript, at 30-31 (Sept. 27, 2001); *id.*, Transcript, at 3-4, 7-8 (Oct. 23, 2001); *id.*, Transcript, at 20-21 (Oct. 25, 2001); Los Palos Case Notes, *supra* note 17, at 39 (July 18, 2001). Arnold Brackman recounts numerous instances in which Japanese defendants and witnesses before the International Military Tribunal for the Far East “circled” questions without answering them. See, e.g., ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG* 287, 294-95 (1987).

³² Los Palos Case Notes, *supra* note 17, at 192 (Aug. 22, 2001); *id.* at 206 (Aug. 23, 2001); Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶ 27 (Apr. 28, 2005); *id.*, Judgment and Sentence, ¶¶ 269-70 (Apr. 28, 2005); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 225-26, 236 (Sept. 2, 1998); Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment and Sentence, ¶¶ 167, 169, 382 (Dec. 13, 2005); *Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, ¶¶ 59, 60, 65, 99, 102, 167, 277, 278, 306 (May

crime³³ and sometimes pertain to fundamental aspects of the witness's ac-

16, 2003); *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 680 (Dec. 1, 2003); *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgment and Sentence, ¶ 171 (Sept. 12, 2006); *Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, ¶¶ 385-87 (Jan. 27, 2000); *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, ¶ 123 (June 17, 2004); *Bagilishema*, Case No. ICTR-95-1A-T, Judgment, ¶¶ 403, 412-13 (June 7, 2001); *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 171 (May 15, 2003); *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Transcript, at 9-10, 22, 30 (July 2, 2003); *id.*, Transcript, at 56, 59-60 (July 3, 2003); *Nyiramasuhuko*, Case No. ICTR-98-42-T, Transcript, at 25-30, 32-35, 60-61 (Mar. 20, 2003); *Muhimana*, Case No. ICTR-951B-T, Transcript, at 4, 18-19 (Mar. 31, 2004); *id.*, Transcript, at 43-45 (Apr. 19, 2004); *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Transcript, at 17-20 (Dec. 5, 2003); *Prosecutor v. Kamuhanda*, Case No. 99-54A-T, Judgment and Sentence, ¶¶ 327, 339 (Jan. 22, 2004); *id.*, Transcript, at 62-65 (Sept. 19, 2001); *id.*, Transcript, at 29-30 (Sept. 4, 2002); *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Transcript, at 43-47 (Aug. 6, 2003); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 6079 (Mar. 13, 2008); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 54 (June 21, 2004); *id.*, Transcript, at 85-87 (Sept. 9, 2004); *id.*, Transcript, at 101-03 (Sept. 13, 2004); *id.*, Transcript, at 80-81 (Dec. 6, 2004); *id.*, Transcript, at 18 (Feb. 9, 2005); *id.*, Transcript, at 73-75, 91-104 (Feb. 22, 2005); *id.*, Transcript, at 14-19, 24-28 (Mar. 4, 2005); *id.*, Transcript, at 45 (Mar. 8, 2005); *Sesay et al.*, SCSL-04-15-T, Transcript, at 25-26 (July 21, 2004); *id.*, Transcript, at 138-40 (Oct. 8, 2004); *id.*, Transcript, at 27-33, 38-40 (Apr. 14, 2005); *id.*, Transcript, at 91, 100 (Apr. 15, 2005); *id.*, Transcript, at 66-67 (May 12, 2005); *id.*, Transcript, at 29-30 (Nov. 22, 2005); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 24-27 (Apr. 6, 2005); *id.*, Transcript, at 79 (Apr. 8, 2005); *id.*, Transcript, at 34-38, 38-39, 53-60, 63-65, 67-69 (Apr. 12, 2005); *id.*, Transcript, at 52-59 (Apr. 19, 2005); *id.*, Transcript, at 21-25 (Apr. 20, 2005); *id.*, Transcript, at 53-64 (June 21, 2005); *id.*, Transcript, at 26-27, 47-48 (June 22, 2005); *id.*, Transcript, at 132-35 (June 23, 2005); *id.*, Transcript, at 122-23 (June 30, 2005); *id.*, Transcript, at 151-52 (July 11, 2005); *id.*, Transcript, at 85 (July 12, 2005); *id.*, Transcript, at 82-83, 96 (July 21, 2005); *id.*, Transcript, at 96 (July 26, 2006); *id.*, Transcript, at 45-46 (Sept. 19, 2005); *Los Palos Case Notes*, *supra* note 17, at 109 (Aug. 1, 2001); *id.* at 120 (Aug. 2, 2001); *id.* at 179 (Aug. 21, 2001); *id.* at 306 (Sept. 28, 2001); *Prosecutor v. Paulino de Jesus*, Special Panel for Serious Crimes, Case No. 6/2002, Judgment, at 10-11 (Dili Dist. Ct., Jan. 28, 2004).

³³ *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 50 (July 7, 2005); *id.*, Transcript, at 97-98 (July 26, 2006); *Ndindabahizi*, Case No. ICTR-01-71-T, Transcript, at 48 (Sept. 29, 2003); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 7-9 (Feb. 25, 2005); *Kamuhanda*, Case No. ICTR-99-54A-T, Transcript, at 31-40 (Feb. 14, 2002) (on file with author); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 103-04 (June 23, 2005); *id.*, Transcript, at 111-14 (June 24, 2005); *Sesay et al.*, SCSL-04-15-T, Transcript, at 61-66 (May 12, 2005); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 1089-91 (Jan. 11, 2008); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 63-72, 152-54 (Sept. 27, 2004); *Ntakirutimana*, Case No. ICTR-96-17-T, Transcript, at 74-81 (Sept. 20, 2001); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 28 (Feb. 9, 2005); *Kamuhanda*, Case No. ICTR-99-54A-T, Transcript, at 75-76 (Sept. 19, 2001); *Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 171 (May 15, 2003); *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, ¶ 151 (Sept. 11, 2006); *Musema*, Case No. ICTR-96-13-A, Judgment and

Sentence, ¶ 811 (Jan. 27, 2000); *Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, at ¶ 192 (June 17, 2004); *Prosecutor v. Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, ¶¶ 366-70 (Feb. 21, 2003); *Kamuhanda*, Case No. 99-54A-T, Judgment and Sentence, ¶ 440 (Jan. 22, 2004); *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Judgment, ¶ 113 (Sept. 20, 2006); *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 407 (Sept. 2, 1998); *Bagosora et al.*, Case No. ICTR-98-41-T, Transcript, at 24-25, 39-40, 54 (July 4, 2003); *Ntakirutimana*, Case No. ICTR-96-17-T, Transcript, at 109-21, 140-41, 142-43 (Sept. 24, 2001); *id.*, Transcript, at 69-71 (Sept. 27, 2001); *Nyiramasuhuko*, Case No. ICTR-98-42-T, Transcript, at 43 (Mar. 20, 2003); *Gacumbitsi*, Case No. ICTR-2001-64-T, Transcript, at 41 (Aug. 6, 2003); *Kajelijeli*, Case No. ICTR-98-44A-T, Transcript, at 97-107 (Dec. 11, 2001) (on file with author); *Karemura et al.*, Case No. ICTR-98-44-T, Transcript, at 65 (Dec. 8, 2003); *Kamuhanda*, Case No. ICTR-99-54A-T, Transcript, at 46 (Sept. 4, 2001) (on file with author); *id.*, Transcript, at 77-79 (Jan. 31, 2002); *id.*, Transcript, at 92-94 (Feb. 7, 2002); *Muhimana*, Case No. ICTR-95-1B-T, Transcript, at 29-31 (Apr. 1, 2004); *id.*, Transcript, at 32, 34-36 (Apr. 7, 2004); *id.*, Transcript, at 26-29, 36, 48-50 (Apr. 8, 2004); *id.*, Transcript, at 20 (Apr. 20, 2004); *id.*, Transcript, at 47-49, 54-55 (Apr. 30, 2004); *id.*, Transcript, at 80-81 (Sept. 26, 2001); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 2118-24, 2130-32, 2134-36 (Jan. 24, 2008); *id.*, Transcript, at 6096-97, 6100-01, 6133-36 (Mar. 14, 2008); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 11-12 (June 18, 2004); *id.*, Transcript, at 108 (Sept. 9, 2004); *id.*, Transcript, at 123-30 (Nov. 2, 2004); *id.*, Transcript, at 52-59 (Nov. 3, 2004); *id.*, Transcript, at 4-8, 12, 13-14 (Nov. 4, 2004); *id.*, Transcript, at 52-53 (Nov. 30, 2004); *id.*, Transcript, at 32-34 (Feb. 14, 2005); *id.*, Transcript, at 108-10 (Feb. 22, 2005); *id.*, Transcript, at 25-30 (Feb. 25, 2005); *id.*, Transcript, at 94 (Mar. 4, 2005); *Sesay et al.*, SCSL-04-15-T, Transcript, at 1-3 (July 15, 2004); *id.*, Transcript, at 77, 86-87 (July 19, 2004); *id.*, Transcript, at 27, 30-32 (July 21, 2004); *id.*, Transcript, at 37-38 (July 22, 2004); *id.*, Transcript, at 154-70 (Oct. 7, 2004); *id.*, Transcript, at 156-63 (Oct. 11, 2004); *id.*, Transcript, at 86-87 (Jan. 13, 2005); *id.*, Transcript, at 66-67, 68-73 (Feb. 3, 2005); *id.*, Transcript, at 101-02 (Apr. 7, 2005); *id.*, Transcript, at 40-41, 46-62, 79 (Apr. 8, 2005); *id.*, Transcript, at 8-9, 15, 22, 40-41, 56, 60-61, 101 (Apr. 15, 2005); *id.*, Transcript, at 22, 24 (Apr. 18, 2005); *id.*, Transcript, at 12-16, 30-32 (July 7, 2005); *id.*, Transcript, at 40-42, 43-46 (July 8, 2005); *id.*, Transcript, at 48 (Aug. 2, 2005); *id.*, Transcript, at 32-51 (Nov. 4, 2005); *id.*, Transcript, at 11-13 (Nov. 7, 2005); *id.*, Transcript, at 90-95 (Nov. 22, 2005); *id.*, Transcript, at 42-57 (Nov. 23, 2005); *id.*, Transcript, at 79, 83-93 (Dec. 5, 2005); *id.*, Transcript, at 43 (Dec. 8, 2005); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 121 (Apr. 7, 2005); *id.*, Transcript, at 40-43, 43-44, 79-80 (Apr. 8, 2005); *id.*, Transcript, at 3-4 (Apr. 12, 2005); *id.*, Transcript, at 47-48 (Apr. 19, 2005); *id.*, Transcript, at 47-49, 51-52 (Apr. 20, 2005); *id.*, Transcript, at 13-15, 126-28 (June 20, 2005); *id.*, Transcript, at 33-35 (June 21, 2005); *id.*, Transcript, at 110 (June 24, 2005); *id.*, Transcript, at 47-49 (June 28, 2005); *id.*, Transcript, at 13-16, 18-19 (June 29, 2005); *id.*, Transcript, at 34-35 (July 1, 2005); *id.*, Transcript, at 57-58 (July 7, 2005); *id.*, Transcript, at 150-51 (July 11, 2005); *id.*, Transcript, at 13-14, 20-21, 76-77, 78 (July 12, 2005); *id.*, Transcript, at 38-39 (July 14, 2005); *id.*, Transcript, at 27, 31, 102-05 (July 18, 2005); *Sesay et al.*, SCSL-04-15-T, Transcript, at 19-20, 70-72 (July 27, 2005); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 13-14 (July 12, 2005); *id.*, Transcript, at 12-14 (Sept. 26, 2006); *id.*, Transcript, at 36, 41-47 (Oct. 17, 2005); *Lolotoe Case Notes*, *supra* note 17, at 4-5 (Apr. 11, 2002); *id.* at 6 (Apr. 12, 2002); *id.* at 4 (May 7, 2002); *id.* at 24 (Nov. 14, 2002); *Los Palos Case Notes*, *supra* note 17, at 57 (July 23, 2001); *id.* at 59, 60, 62, 66 (July 24, 2001); *id.* at 83, 90 (July 27, 2001); *id.* at 75, 78 (July 26, 2001);

count. To provide just one of many examples, *AFRC* witness TF1-209's statement said that she fled with her 2-year old son but later lost him and has never seen him again. She testified, by contrast, that her son was 6 and that he was shot and killed in her presence.³⁴

If discrepancies about the crimes themselves were not worrisome enough, witnesses also frequently testify inconsistently about the defendant's involvement in the crime. Sometimes the witness's testimony will inculcate the defendant when the statement did not.³⁵ *Akayesu* witness Karangwa testified, for instance, that the defendant shot and killed all three of Karangwa's brothers, but his statement says that the defendant shot and killed one of the witness's brothers but that the other two were killed by machete by men who were with the defendant.³⁶ Sometimes, by contrast, the later testimony seeks to exculpate, not inculcate.³⁷ Most worryingly of all perhaps, witnesses sometimes testify about the defendant's key involvement in the crime, even though the witness's statement, which may feature a detailed description of the crime and surrounding scenes, fails even to mention the defendant.³⁸

id. at 120, 122, 125 (Aug. 2, 2001); *id.* at 145 (Aug. 8, 2001); *id.* at 173 (Aug. 21, 2001); *id.* at 190 (Aug. 22, 2001); *id.* at 173 (Aug. 21, 2001); *id.* at 226, 229 (Sept. 20, 2001); *id.* at 273 (Sept. 25, 2001); *id.* at 287 (Sept. 26, 2001); *id.* at 309 (Sept. 29, 2001); Alison Thompson, *Special Court Monitoring Program Weekly Report, Update No. 71*, U.C. BERKELEY WAR CRIMES STUD. CTR., 4-5 (Mar. 3, 2006).

³⁴ *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 50 (July 7, 2005).

³⁵ See, e.g., *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Judgment, ¶¶ 907-08 (June 20, 2007); *Sesay et al.*, SCSL-04-15-T, Transcript, at 91-93, 109-17 (Apr. 7, 2005); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 35-47 (June 3, 2005); *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 185 (Sept. 2, 1998); *Bagosora et al.*, Case No. ICTR-98-41-T, Transcript, at 32-35 (July 2, 2003); *Ntakirutimana*, Case No. ICTR-96-17-T, Transcript, at 108-11 (Sept. 26, 2001) (on file with author); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 755-58 (Jan. 8, 2008); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 3348-51 (Feb. 7, 2008); *Taylor*, Case No. SCSL 2003-01-T, Transcript, at 5974-76 (Mar. 13, 2008); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, 145-46 (July 11, 2005); *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on Sesay Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness TF1-366, ¶¶ 45-48 (July 25, 2006).

³⁶ *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 237 (Sept. 2, 1998).

³⁷ *Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, ¶ 192 (June 17, 2004); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 6-7 (Mar. 9, 2005); *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 48-50 (June 21, 2004).

³⁸ See, e.g., *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 248, 266 (Sept. 2, 1998); *Simba*, Case No. ICTR-01-76-T, Judgment, ¶¶ 108, 195 (Dec. 13, 2005); *Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, ¶ 54 (June 17, 2004); *Rwamakuba*, Case No. ICTR-98-44C-T, Judgment, ¶¶ 114, 145, 192 (Sept. 20, 2006); *Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 467 (Dec. 1, 2003); *Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T,

These sorts of inconsistencies would be troubling enough if they happened only occasionally. Again, more details are provided in the book, but suffice it here to say that in reviewing the transcripts of all of the SCSL cases and a handful of ICTR cases, I found that on average, approximately 50 percent of the witnesses testified seriously inconsistently with their past statements.³⁹ I recognize that my assessment of seriousness is subjective, but I have little doubt that the inconsistencies that I considered serious (and indeed plenty of those that I did not so consider) are sufficiently grave that they would substantially impair the credibility of the witness if he were appearing in a municipal court.

II. CAUSES OF THE TESTIMONIAL DEFICIENCIES

Having summarily canvassed the impediments bedeviling international criminal trials, I will now briefly mention some of the causes of those impediments. The causes are of key significance because they affect the Trial Chambers' assessment of the testimony.

Education: The most obvious factor contributing to many of the impediments is lack of education and life experiences. A large percentage of the witnesses appearing at the international tribunals are illiterate and have had no or virtually no formal education. Thus, many of these witnesses not only

Judgment and Sentence, ¶ 255 (Feb. 21, 2003); *Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, at ¶ 440 (Jan. 27, 2000); *Karera*, Case No. ICTR-01-74-T, Judgment and Sentence, ¶ 53 (Dec. 7, 2007); *Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, ¶¶ 101, 154, 158 (May 16, 2003); *Prosecutor v. Da Costa & Punef*, Special Panel for Serious Crimes, Case No. 22/2003, Judgment, 5 (Dili Dist. Ct., Apr. 25, 2005); *Paulino de Jesus*, Case No. 6/2002, Judgment, at 9 (Jan. 28, 2004); *Prosecutor v. Tacaqui*, Special Panel for Serious Crimes, Case No. 20/2001, Judgment, 26-27 (Dili Dist. Ct., Dec. 9, 2004); *Gacumbitsi*, Case No. ICTR-2001-64-T, Transcript, at 22 (Aug. 19, 2003); *Kajelijeli*, Case No. ICTR-98-44A-T, Transcript, at 27-28 (Dec. 7, 2001); *id.*, Transcript, at 72-96 (Dec. 5, 2001) (in French); *Muhimana*, Case No. ICTR-951B-T, Transcript, at 55-56 (Mar. 30, 2004); *id.*, Transcript, at 22-24 (Apr. 29, 2004); *Ntakirutimana*, Case No. ICTR-96-17-T, Transcript, at 32-33 (Sept. 20, 2001); *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Transcript, at 24-25 (Aug. 13, 2002) (on file with author); *Sesay et al.*, SCSL-04-15-T, Transcript, at 18-20 (Oct. 19, 2004); *id.*, Transcript, at 95-111 (Jan. 24, 2005); *id.*, Transcript, at 36-40 (Feb. 3, 2005); *id.*, Transcript, at 77-80, 141-45 (Mar. 23, 2006); *Brima et al.*, Case No. SCSL-2004-16-PT, Transcript, at 140-50 (July 11, 2005); *Kamuhanda*, Case No. ICTR-99-54A-T, Transcript, at 71-72 (Sept. 19, 2001) (on file with author); Los Palos Case Notes, *supra* note 17, at 255-56 (Sept. 18, 2001).

³⁹ Citations to and explanations of the relevant cases can be found in Chapter Four of my book, NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH (2007).

do not know how to read and write but also have never been taught to tell time, or to measure, for instance. It consequently should come as no surprise when these witnesses are unable to answer many of the questions put to them.

Culture: Cultural differences between the witnesses and Western court personnel also prove an additional impediment to accurate fact-finding. Indeed, an inability to answer certain questions may be driven less by educational factors than by cultural factors. Anthropologist James Littlejohn's research, for instance, suggests that Sierra Leonean and Western notions of space differ radically. Littlejohn determined that the Temne people (who make up the largest tribe in Sierra Leone) do not view space as either "arithmetically measured [or geometrically analysed]" but instead break it up into units such as "a day's journey," or for shorter distances, "the earshot." Littlejohn observes that although Westerners have become so accustomed to organizing space through geometrical analysis and arithmetical measurements that it has come to seem the natural thing to do, Temne space is ordered otherwise. "The size of a farm for example is arrived at by estimating the number of bags of rice it ought to produce, . . . [and] [w]hen men hire themselves out to hoe for a farmer, the farmer and the labourer agree on an area which the labourer should complete in a day's work. The day's work, however, consists of completing the area."⁴⁰ In addition, many cultures do not attach particular importance to such objective units of measure, and one sees that play out at the international tribunals under study as well. International witnesses frequently express impatience when questioned on such details, and some make clear that they consider it of little importance to provide truly accurate answers. Rwandan Witness J, for instance, testified that the man who raped her remained on top of her for four hours. When an ICTR judge expressed skepticism that it was actually four hours, Witness J said: "For me, it was about four hours or maybe one year because the suffering was too much."⁴¹ Similarly, Sierra Leonean witness TF1-012 initially testified that a certain rebel returned after "a week." When the witness later suggested that the rebel returned after several weeks, counsel pointed out the inconsistency. TF1-012 replied off-handedly, "[w]e are native people, that which is not up to a month, we call it week [sic]."⁴²

Culture can also affect the style of answering questions. A linguistics expert testified in one of the ICTR cases that "it is a feature of the Rwandan

⁴⁰ James Littlejohn, *Temne Space*, 36 ANTHROPOLOGICAL Q. 1, 4 (1963).

⁴¹ Prosecutor v. Musema, Case No. ICTR-96-13-A, Transcript, at 48 (Mar. 11, 1999) (on file with author).

⁴² *Sesay et al.*, SCSL-04-15-T, Transcript, at 70 (Feb. 3, 2005).

culture that people are not always direct in answering questions, especially if the question is delicate.”⁴³ That is certainly a useful piece of information for the Trial Chambers to have. Because Western speech patterns tend to be more direct, witnesses who provide indirect, circuitous answers are often thought at best to lack confidence in their perceptions and at worst to be deceptive. Such inferences are obviously not appropriate with respect to witnesses from certain cultures, but because the trial judges are not intimately familiar with the culture in question, they are left not knowing what speech signals or kinds of demeanor would legitimately give rise to concern.

Taboos can likewise prevent clear, forthright testimony. In the *Los Palos* case at the Special Panels, for instance, one of the defendants was questioned as to who had been on a bus during an ambush. After naming seven people, the prosecutor asked whether an individual named Harasio, who had subsequently been killed, had also been on the bus. The defendant refused to give a clear answer, and a frustrating exchange between the prosecutor and the defendant was ended only when East Timorese defense counsel informed the court of a “cultural tradition where you cannot mention dead people.”⁴⁴

In this case, the taboo was identified, but international criminal transcripts feature so many confusing passages that one has to wonder whether unidentified taboos are getting in the way. And even when cultural divergences are identified, they can substantially impair the Trial Chamber’s ability to assess credibility. For instance, *Niyitegeka* witness GGO said in his statement that a man named Kabanda was “captured and taken to Gitwa Hill” to certain leaders including defendant Niyitegeka. In court, however, GGO testified that he saw Kabanda being decapitated from his hiding spot in the pine forests of Kazirandimwe. The witness insisted that there was no discrepancy between his statement and the testimony, however, claiming that when he had said that Kabanda had been taken to the leaders on Gitwa Hill, he had meant that Kabanda’s head had been taken. As he put it: “It was the head of the victim which was brought to the leaders, including Niyitegeka. . . . [W]hen someone is decapitated and is emasculated, for us, it’s the individual as a whole who has passed on, who has disappeared.”⁴⁵ GGO’s explanation may well have reflected Rwandan cultural traditions, but judges who

⁴³ *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶156 (Sept. 2, 1998).

⁴⁴ *Los Palos* Case Notes, *supra* note 17, at 33 (July 18, 2001). For a discussion of the ways in which taboos also can complicate Aboriginal witness testimony, see Michael Walsh, *Interactional Styles in the Courtroom: An Example from Northern Australia*, in *LANGUAGE AND THE LAW* 217, 229-230 (John Gibbons ed., Longman Group UK Limited 1994).

⁴⁵ *Niyitegeka*, Case No. ICTR-96-14-T, Transcript, at 48 (Aug. 29, 2002) (on file with author).

lack substantial familiarity with those will have little way of knowing.

Language Interpretation: The need for language interpretation only exacerbates the problems already mentioned. In some tribunals, witness testimony must proceed through multiple translations. In the Special Panels for instance, many questions were interpreted from English to Bahasa Indonesia to Bunak and then were interpreted back again when the witness answered. Similarly, the ICTR has few interpreters who can translate directly from Kinyarwanda to English, so interpreters typically interpret from Kinyarwanda to French and then from French to English.⁴⁶ Each translation increases the likelihood of mistakes, and while it is not always easy to determine when interpretation problems are occurring, sometimes witness answers are so unresponsive that one must suspect inaccurate interpretation.

Lying: The explanations just canvassed can be deemed "innocent." Although testimonial deficiencies caused by educational, cultural and linguistic factors may well impair the defendant's ability to present a defense, because vague, undetailed testimony is testimony that is less easy to rebut, these causes do not call the witness's credibility into question. If the witness has never learned to tell time, she won't know what time the crime occurred. If the witness's relevant cultural norms give rise to circuitous speech, the witness's testimony will seem evasive but in fact will not be. The problem is that many of these same phenomena can also be plausibly explained as purposeful efforts to conceal.

Indeed, the very fact that questioning at the international tribunals seems so frequently bedeviled by educational deficits, interpretation errors, and cultural divergences means that witnesses can invoke these communication impediments even when they are not at play, as a means of concealing lying, inconsistencies or other weaknesses in witness testimony. International witnesses who are falsely accusing a defendant may, for instance, find it most profitable to provide a vague account that is devoid of meaningful details. Dating events permits a defendant to contradict the witness's testimony, so it may prove a safer bet for the witness to claim that he does not know the relevant dates. Making distance and numerical estimates can likewise leave a witness vulnerable to contradiction, so they too are better left unstated. The same goes for the numerous examples of frustrating exchanges and unresponsive responses. While these may reflect a cultural proclivity toward cir-

⁴⁶ Stephen J. Rapp, *Achieving Accountability for the Greatest Crimes: The Legacy of the International Tribunals*, 55 *DRAKE L. REV.* 259, 277 (2007); see also *Akayesu*, Case No. ICTR-96-4-T, Judgment, at ¶ 145 (Sept. 2, 1998); *Kamuhanda*, Case No. ICTR-99-54A-T, Transcript, at 99 (Sept. 19, 2001); Alexander Zahar, *The ICTR's "Media" Judgment and the Reinvention of Direct and Public Incitement to Genocide*, 16 *CRIM. L. F.* 33, 41 n.26 (2005).

cautious answers and generally indirect speech, they may also reflect a witness's desire to evade the question at hand or at least to buy himself some time to consider the answer he wishes to give. It certainly seems to be the case that witnesses have more difficulty understanding questions that challenge their testimony or that highlight their potentially self-interested motivations. Indeed, more than one defense counsel has observed that witnesses frequently sail through direct examination but upon cross-examination become "non-understanding, non-educated."⁴⁷

There is no way to determine whether a particular testimonial problem results from perjury or one of the many innocent explanations, but I have been able to evaluate whether perjury seems in general to be a problem at the international tribunals, and I conclude that it is. Some witnesses outright admit that they lied in their testimony or in their written statements.⁴⁸ And sometimes the lying becomes apparent just through use of common sense. When one Sierra Leonean witness maintained that he was not acquainted with another witness and it later turned out that the other witness was his

⁴⁷ *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 79 (Sept. 9, 2004). The practice of witness proofing provides an innocent explanation for this phenomenon, if it in fact exists, since proofed witnesses would understandably be better able to answer questions on direct examination than on cross-examination. For a discussion of the controversy relating to witness proofing at the international tribunals, see Ruben Karemaker, B. Don Taylor III & Thomas Wayde Pittman, *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, 21 LEIDEN J. INT'L L. 683 (2008); Kai Ambos, 'Witness Proofing' Before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman, 21 LEIDEN J. INT'L L. 911 (2008); Ruben Karemaker, B. Don Taylor III & Thomas Wayde Pittman, *Witness Proofing in International Criminal Tribunals: Response to Ambos*, 21 LEIDEN J. INT'L L. 917 (2008). Defense counsel Charles Margai, who is himself Sierra Leonean, accused a witness of being more intelligent than he wanted the court to believe. *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 48-49 (June 17, 2004). See also *ICTR/Zigiranyirazo - Bagaragaza Witness Gives the Defence a Hard Time*, HIRONDELLE NEWS AGENCY, June 15, 2006 (observing that although on direct-examination, the witness gave detailed testimony, on cross-examination, he eluded defense counsel's questions and "said as little as possible").

⁴⁸ See, e.g., *Karemera et al.*, Case No. ICTR-98-44-T, Transcript, at 25-32 (Nov. 17, 2006); *id.*, Transcript, at 18-63 (Apr. 14, 2008); Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgment, ¶ 73 (Dec. 13, 2006); Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Decision on the Motions Relating to the Scheduled Appearances of Witness BLP and the Defence Investigator, ¶¶ 2, 5 (July 4, 2007); Thijs Bouwknegt, *Rwanda's Genocide Tribunal's Witness 'Hiding.'* RADIO NETH. WORLDWIDE, Oct. 2, 2008, available at <http://static/rnw.nl/migratie/www.rnw.nl/internationaljustice/tribunals/ICTR/081002-ictr-witness-redirected>; Kamuhanda v. Prosecutor, Case No. ICTR-99-54A-A, Judgment, ¶¶ 212-13 (Sept. 19, 2005).

son, we can feel confident that he was lying.⁴⁹ In another case, a Rwandan witness claimed that the defendant had killed her sister. It was revealed on cross-examination that this witness had testified in Rwandan courts that his sister had been killed by another person in a different part of Rwanda. When confronted with this inconsistency, the witness maintained that she had been testifying in the Rwandan courts about a different sister – both sisters, however, just happened to have the same Christian name.⁵⁰

Examples such as these abound, but even in cases where we do not have this kind of evidence of lying we would know that perjury is prevalent at the ICTR in particular because virtually every ICTR case has featured either an alibi or some other form of blatant contradiction between witnesses for the defense and for the prosecution. Reviewing ICTR transcripts and judgments, I found that 90 percent of the cases featured at least one example of diametrically opposed testimony between one or more witnesses.⁵¹

⁴⁹ *Hinga Norman et al.*, Case No. SCSL-2004-14-T, Transcript, at 37-38 (Dec. 7, 2004). See also *Rwamakuba*, Case No. ICTR-98-44C-T, Judgment, ¶ 62 (Sept. 20, 2006) (observing it “interesting” that witness GIT “claimed not to know whether his brother was testifying in this case, although they live near one another and both testified in this case within a short space of time”).

⁵⁰ *Rwamakuba*, Case No. ICTR-98-44C-T, Judgment, ¶ 189 (Sept. 20, 2006).

⁵¹ Many of the cases contain more than one example of starkly contradictory testimony. For the sake of brevity, however, I list only one for each case. In *Kayishema & Ruzindana*, prosecution witnesses testified that they saw Kayishema order an attack on the Catholic church in Kibuye town on April 17, 1994, Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶¶ 328-30 (May 21, 1999), while Kayishema’s wife testified that Kayishema was in hiding with her from April 16 to April 20, 1994, *id.* ¶ 245. In *Musema*, prosecution witness F testified that he saw Musema at Muyira Hill on May 13, 1994, taking part in a large-scale attack on the Tutsi. *Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 404 (Jan. 27, 2000). Defense witness MH, however, testified to having met Musema in Rubona on May 13, 1994. *Id.* ¶ 329. In *Ndindabahizi*, both prosecution witness CGH and defense witness DN were hiding in the home of Augustin Karara, *bourgmestre* of Gitesi Commune. Whereas witness CGH testified that he observed Ndindabahizi come to Karara’s house at the end of April and was in the room when Ndindabahizi admonished Karara not to spare any Tutsis, Prosecutor v. Ndindabahizi, Case No. ICTR-01-71-I, Judgment and Sentence, ¶¶ 183-85 (July 15, 2004), witness DN testified that witness CGH would hide in his room whenever there were visitors, and he testified that Ndindabahizi did not visit Karara’s house until June, well after witness CGH had fled, *id.* ¶ 199. *Ntakirutimana* featured contradictory testimony with respect to allegations against both defendants accused in that case. Prosecution witness KK testified that he saw Elizaphan Ntakirutimana at the ESI Chapel massacre site on April 16 between 9:00 a.m. and 9:30 a.m., while prosecution witnesses GG and HH testified that they saw Gérard Ntakirutimana shoot and kill Charles Ukobizaba on April 16th between noon and 1:00 p.m. *Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, at ¶¶ 344-346, 365-366 (Feb. 21, 2003). Defense witness 4, by contrast, testified that he and several others, including Elizaphan and Gérard Ntakirutimana left for Gishyita

before 8:00 am on the morning of April 16. *Id.* at ¶¶ 258-59, 328. In *Kajelijeli*, prosecution witness GDO testified that she witnessed the brutal rape and killing of her daughter. Defense witness RHU30 testified that the witness's daughter had been killed but not raped and that the witness had not been present during the attack on her daughter. *Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, at ¶ 680 (Dec. 1, 2003). In *Rutaganda*, prosecution witness H testified as to seeing Rutaganda on April 11, 1994, during various episodes of violence. *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment & Sentence, ¶¶ 276-77 (Dec. 6, 1999). Defense witness DDD testified that she and Rutaganda arrived in Kiyovu at 9:00 a.m. on April 11, 1994, and stayed with a friend who was living there until about midday on that same day. According to witness DDD, she and Rutaganda then traveled to Masango, arriving there at about 6:00 p.m. *Id.* ¶ 155. In *Semanza*, prosecution witness VF testified seeing Semanza during a massacre in Rugende at 10:00 a.m. on April 10, 1994. *Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, at ¶ 150 (May 15, 2003). Defense witness PFM testified, however, that she accompanied Semanza to Gitarama town around 9:00 or 10:00 a.m. on April 10th and remained in the market with him every day. She maintained that he never left her except to go to the bathroom. *Id.* ¶ 122. In *Ntagerura et al.*, prosecution witness MZ testified that while hiding out in his tea plantation in Cyangugu on April 17, he heard Ntagerura give a speech, calling for the extermination of the Tutsi. *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Judgment and Sentence, ¶¶ 153-54 (Feb. 25, 2004). However, defense witness Nkurunziza testified that Ntagerura was with him on April 16 and 17, attending cabinet meetings on Murambi Hill. *Id.* ¶ 162. As for Ntagerura's co-defendant, Imanishimwe, prosecution witness LAK testified that Imanishimwe arrived at a roadblock outside of LAK's workplace on April 9, 1994. Once there, according to LAK, Imanishimwe provided weapons to soldiers at the roadblock. *Id.* ¶¶ 443-44. Defense witness PCG, who worked at the roadblock, contradicted LAK's testimony, stating that the roadblock was not located in front of LAK's workplace but was a kilometer away. PCG further testified that he and the others manning the roadblock did not receive any weapons or any visits from officials on April 9, 1994. *Id.* ¶ 475. In *Mpambara*, the testimonies of prosecution witness AHY and defense witness, Elizabeth Hardinge, conflicted regarding Mpambara's whereabouts on the morning of April 9, 1994. AHY had Mpambara at the Paris Centre, distributing weapons and encouraging the killing of Tutsi, while Hardinge had Mpambara at Karubamba and subsequently back at Gahini. *Mpambara*, Case No. ICTR-01-65-T, Judgment, ¶¶ 122-23 (Sept. 11, 2006). *Rwamakuba* featured numerous instances of divergent testimonies between prosecution and defense witnesses. As one example, a number of prosecution witnesses testified that they were at Butare University Hospital when Rwamakuba came in and killed some Tutsi patients. *Rwamakuba*, Case No. ICTR-98-44C-T, Judgment, ¶ 163 (Sept. 20, 2006). Defense witnesses 1/1 and 9/1, however, testified that on the dates that prosecution witnesses placed Rwamakuba at the hospital, he was in fact with them at Gisenyi. *Id.* ¶ 197. Prosecution witness YH in *Simba* testified that on April 21, 1994, Simba encouraged a crowd of Hutu assailants to kill Tutsi in anticipation of a massacre that occurred in Kaduha Parish. *Simba*, Case No. ICTR-01-76-T, Judgment and Sentence, ¶ 142 (Dec. 13, 2005). Defense witness AJTI contradicted that testimony by testifying that Simba was with her during the Kaduha Parish massacre. *Id.* ¶ 367. Two of the three defendants accused in the *Nahimana* case were the subject of contradictory witness testimony. Several prosecution witnesses testified that they saw defendant Ngeze on April 7, 1994, distributing weapons and the like. *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 825 (Dec. 3, 2003). Ngeze maintained that he had been arrested on April 6 and had not been released until April 9, an

alibi that was supported by several defense witnesses. *Id.* ¶ 826-28. Prosecution witness AEN testified that Ngeze's co-defendant Nahimana appeared at a meeting on March 29, 1994, during which he expressed his hatred for Tutsi and called for their extermination. *Id.* ¶ 622. Nahimana's wife and doctor, however, testified that Nahimana was home, sick with malaria, on March 29. As a result of this illness, Nahimana's doctor testified that it would have been impossible for Nahimana to travel anywhere. *Id.* ¶¶ 628-29. In *Seromba*, Prosecution witness CDL testified that Seromba participated in a security meeting held on April 11, 1994. *Seromba*, Case No. ICTR-2001-66-I, Judgment, ¶ 68 (Dec. 13, 2006); *Prosecutor v. Seromba*, Case No. ICTR-01-66-T, Transcript, at 57 (Jan. 19, 2005). Defense witnesses FE27 and CF 23 testified, by contrast, that Seromba did not attend the meeting but submitted a letter, which was read at the meeting. *Seromba*, Case No. ICTR-2001-66-I, Judgment, ¶¶ 70-71 (Dec. 13, 2006). In *Bagilishema*, some contradictory testimony was proffered by two sets of prosecution witnesses. Witnesses A and AC placed the defendant at the Gitwaro Stadium in Kibuye town — where thousands of Tutsi refugees were detained and mistreated — at 9:00 a.m. on April 14th, while two other prosecution witnesses alleged that he was 16 kilometers away in Mabanza commune at just that time. *Bagilishema*, Case No. ICTR-95-1A-T, Judgment, ¶¶ 544-53 (June 7, 2001). In *Muvunyi*, prosecution witness CCR testified that Muvunyi convened meetings at Nyantanga Trade Center on April 20 and 21, 1994, during which he called on the audience to fight the *Inyenzi*. *Muvunyi*, Case No. ICTR-2000-55A-T, Judgment and Sentence, ¶ 160-61 (Sept. 12, 2006). A number of defense witnesses who lived and worked at the Nyantanga Trade Center testified that no meeting took place there in April 1994. *Id.* ¶ 174. *Muhimana* prosecution witness BC placed Muhimana at the scene of a gruesome attack at Ngendombi Hill on April 10, 1994. She testified that, in addition to launching a grenade that killed a number of Tutsi, Muhimana killed BC's children and cut off her hand. *Muhimana*, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶¶ 57-58. Defense witness TQ1 testified, by contrast, that Muhimana attended his son's funeral on April 10th and remained at his home until April 16th. *Id.* ¶ 59; *Muhimana*, Case No. ICTR-951B-T, Transcript, at 3-4, 12, 15 (Aug. 23, 2004). In *Gacumbitsi*, prosecution witnesses testified that, on April 13, 1994, Gacumbitsi ordered his tenants to leave the house he owned, and intimated that the house was not meant for Tutsis. *Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, at ¶¶ 179, 181 (June 17, 2004). However, defense witness UPT testified that Gacumbitsi did not expel his tenants. *Id.* ¶ 182; *Gacumbitsi*, Case No. ICTR-2001-64-T, Transcript, at 22-23, (Oct. 16, 2003). In *Karera*, prosecution witnesses placed Karera in Kigali-Ville and Rural Kigali prefectures on various dates in April 1994, while defense witnesses testified that he was with them in Ruhengeri prefecture on those dates. *Karera*, Case No. ICTR-01-74-T, Judgment and Sentence, ¶¶ 457-58, 460 (Dec. 7, 2007). Prosecution witness AMA in *Rukundo* testified that the defendant along with several soldiers had removed from the CND compound in a minibus fifteen refugees who were never seen again. *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Judgment, ¶¶ 397-98 (Feb. 27, 2009). *Rukundo* defense witness CNB, by contrast, accused witness AMA of "telling lies" and maintained that "he saw every vehicle that came to the CND" and he never saw Rukundo or any blue minibus. *Id.* ¶¶ 424-25. In *Zigiranyirazo*, prosecution witness AVY testified that he had attended a meeting at Umuganda Stadium in the last week of April 1994, during which a helicopter arrived carrying Zigiranyirazo. According to witness AVY, Zigiranyirazo took the podium and encouraged the people to continue killing Tutsi. *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgment, ¶¶ 150-51 (Dec. 18, 2008). One prosecution witness and four defense witnesses corroborated AVY's testimony that a meeting had occurred and that certain of the speakers that AVY mentioned

Certainly, some of the instances of contradictory testimony probably reflect poor memory and perception, rather than perjury, but conflicting testimony is so prevalent in ICTR cases that it would be hard to dismiss all—or even a significant percentage of it—as the result of honest mistakes.

I have thus far shown that international tribunal testimony is deficient in many respects, and while there are many innocent factors that can plausibly explain these deficiencies, there also exist less-innocent explanations that are

had addressed the crowd, but these five witnesses each testified that Zigiranyirazo had not attended the meeting. *Id.* ¶ 156. In *Kalimanzira*, prosecution witness AZT testified that Kalimanzira spoke at a meeting at the market square in Nyirakanywero and instructed the people to fight the “accomplices” with all their energy. *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgment, ¶¶ 259-61 (June 22, 2009). Several defense witnesses, by contrast, denied that Kalimanzira was present at the meeting. *Id.* ¶¶ 273-77. In *Nchamihigo*, prosecution witnesses BRF, LAG and LDC testified that they witnessed Nchamihigo’s involvement in the murder of Father Boneza, while defense witnesses who also saw the killing denied that Nchamihigo was present. *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, Judgment and Sentence, ¶¶ 135-40 (Nov. 12, 2008). Prosecution witness BKW in *Bikindi* testified that Bikindi had participated in the military training of a selected group of *Interahamwe* by French soldiers in Gabiro, Mutara region, around 1992-1993. However, defense witness Jean Berchmans Hakorimana, a former Rwandan military member, explained that he had received training at the training center from the French, but he stated that the Gabiro training centre was reserved uniquely for the military and that no *Interahamwe* were trained there. *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶¶ 96-98 (Dec. 2, 2008). *Bagosora et al.*, featured contradictions pertaining to each of the defendants. For instance, prosecution witness LAI testified that he was present when defendant Kabiligi addressed *Interahamwe* youth and helped Kabiligi to offload weapons from a helicopter. *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment and Sentence, ¶¶ 260-62 (Dec. 18, 2008). By contrast, some defense witnesses whom LAI had placed at the same locations denied having been there, and documentary evidence showed Kabiligi to be out of the country at the time LAI placed him at the above events. *Id.* at ¶¶ 265-73. As for defendant Bagosora, prosecution witnesses testified that he encouraged the killing of Tutsi at one or more meetings at the beginning of June 1994, *id.* ¶¶ 1680, 1697, while defense witnesses testified that Bagosora was traveling abroad with them during that period, *id.* ¶¶ 1684, 1949, 1951-54, 1959. With respect to defendant Nsengiyumva, prosecution witness DO testified that he was with Nsengiyumva at the Gisenyi military camp on April 7, 1994, at 8:30 a.m., *id.* ¶ 1014, while defense witness LSK-1, a neighbor of witness DO, maintained that he spent the entire morning of April 7 with DO, so that “it was impossible for Witness DO to have attended a meeting at Gisenyi military camp on the morning of 7 April 1994, as he was in his company at this time,” *id.* ¶ 1031. Finally, prosecution witness AH testified that at about 10:00 a.m. on April 8, he saw Ntabakuze, accompanied by members of the Para Commando Battalion, driving slowly through the area in a blue Toyota Hilux and supervising the killings. Witness AH testified that he had a conversation with Ntabakuze. *Id.* ¶ 912. Defense witness Colonel Dewez, the commander of UNAMIR’s Kigali Battalion referred to the Kigali Battalion’s *Chronique*, a daily record of the activities of the Belgian UNAMIR contingent from April 6 to 19, 1994, and it showed that Ntabakuze was with U.N. officers on the morning of April 8. *Id.* ¶¶ 915-17.

equally plausible. How much we need to worry about this state-of-affairs, however, depends on the overall nature and quantity of the evidence supporting the international criminal convictions.

Unfortunately, the news here is not good. Unlike at Nuremberg, where prosecutors submitted literally thousands of documents to the Tribunal, the evidence received by current international tribunals almost exclusively comes in the form of witness testimony. Further, many key facts in any given case are attested to by only one or two eyewitnesses. And finally, because most recent mass atrocities have taken place in oral societies, defense counsel have little ability to challenge the prosecutors' eyewitnesses except by presenting more eyewitnesses.

Indeed, unlike the Nuremberg Tribunal, which received from the prosecution reams of documents that proved beyond any shadow of a doubt the defendants' commission of certain acts, the ICTR, SCSL and Special Panels operate in a fact-finding fog of inconsistent, vague and sometimes incoherent testimony that leaves them unable to say with any measure of certainty who did what to whom. Perhaps Jean de Dieu Kamuhanda led an attack against the Tutsi at the Gikomero Parish Church, as alleged by the prosecution, but the only evidence that he did comes from alleged eyewitnesses, and the defense has a passel of its own witnesses who claim that Kamuhanda was with them, far from the massacre site. Perhaps Alex Tamba Brima was commander of the AFRC troops in the Kono district in May 1998, as the prosecution claims, but he and defense witnesses maintain that he was in RUF custody at that time.⁵² No forensic evidence is available to inform these questions, and the traditional means that judges employ to evaluate the credibility of witness testimony are un-illuminating because they presuppose similarities in language and culture between judges and witnesses that simply do not exist in the international context. Witnesses fail to answer questions, and we cannot know whether it is because they do not know the answers, or because they do not wish to provide them. Witnesses testify haltingly and dance around the relevant topics, and we cannot know whether they do so because that is their normal pattern of speech, because they do not understand the questions they have been asked, because they have in fact answered directly but a mistranslation has created a seeming divergence between question and answer, or because the witness purposely wishes to evade the question. And there is no possibility of knowing what to make of the many inconsistencies between witness testimony and pre-trial statements that pervade international criminal proceedings. Witnesses attribute these

⁵² *Brima et al.*, Case No. SCSL-2004-16-PT, Judgment, ¶¶ 335-41 (Feb. 18, 2005).

inconsistencies to investigators' errors. Defense counsel attribute them to witness mendacity. And each explanation, along with a host of others, is plausible.

III. IMPLICATIONS OF THE TESTIMONIAL DEFICIENCIES

The testimonial deficiencies that I have described above have serious implications for the way in which we conceptualize international criminal fact-finding. In my book, I argue international criminal trials are a much less reliable fact-finding mechanism than they appear on the surface. I will briefly discuss that conclusion in Section A, and will then go on to describe the Trial Chambers' own assessment of the testimonial deficiencies in Section B. That discussion reveals that the judges of the ICTR, SCSL and Special Panels take a cavalier approach to testimonial deficiencies, and at least partially as a consequence, convict virtually every defendant who comes before them. I seek finally in Section C to explain the Trial Chambers' cavalier approach by invoking organization liability principles derived from the Nuremberg Charter. My study also raises various normative questions, which I can only touch upon here, but which I thoroughly address in my book.

A. The Implications of Testimonial Deficiencies on International Criminal Fact-Finding

International criminal tribunals conduct their trials pursuant to a blend of adversarial and inquisitorial criminal procedures. The procedures vary slightly from one Tribunal to the next, and they diverge even more markedly from domestic procedures that are predominantly adversarial or inquisitorial.⁵³ These differences notwithstanding, international criminal trials, both in their broad structural outlines and in their ostensible commitment to Western due process norms, very much resemble a domestic criminal trial that might

⁵³ No domestic system of criminal procedure contains purely adversarial or purely non-adversarial forms; every system is something of a blend. See, e.g., Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 577 (1973); Richard S. Frase, *Comparative Criminal Justice Policy, in Theory and in Practice*, in PROCEEDINGS OF THE INT'L CONF. FOR THE 25TH ANNIVERSARY OF THE INT'L INST. OF HIGHER STUD. IN CRIM. SCI., COMPARATIVE CRIMINAL JUSTICE SYSTEMS: FROM DIVERSITY TO RAPPROCHEMENT 109, 112-13 (1998); Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569, 574 (2000). But despite this hybridization, most systems of domestic criminal procedure are predominantly adversarial or non-adversarial.

be held in any Western nation. And therein lies a problem, for while international criminal trials appear on the surface to be Western-style trials, they in fact constitute a much less reliable fact-finding mechanism. Indeed, the Western trial form in which international criminal proceedings cloak themselves, embody certain fact-finding expectations that international criminal proceedings are unable to fulfill.

At the most basic level, it is expected that fact witnesses will recount their first-hand experiences in a way that is comprehensible to the recipients of their testimony and that provides those recipients sufficient information about the events in question. That is not to say that witnesses in Western domestic trials always attend to and convey key details. Nor is it to say that international witnesses never provide a reasonably detailed account of the events they witnessed. But they frequently do not, and on the whole, the Western trial form embodies the expectation that witnesses will provide a more detailed, more thorough account of the events they witnessed than international witnesses routinely are able to deliver.

The use of the Western trial form also conveys the expectation that when called upon to decide between competing factual accounts, fact-finders will be able to inform their decisions by assessing the credibility of the witnesses who appear before them. Concededly, the value of such credibility assessments is open to question even in municipal trials where fact-finders and witnesses share the same cultural norms and language. Recent research suggests, for instance, that people are not as good at detecting prevarication as they think they are.⁵⁴ At the international tribunals, however, the cultural and linguistic "distance" between fact-finders and witnesses is so vast that it leaves fact-finders without any meaningful frame of reference. The use of interpreters makes it difficult for fact-finders even to know *how* the witness is testifying; that is, whether the witness is hesitating before answering, for instance, or rather is answering expeditiously with seeming confidence. And even when that information is known, it is of little value because international fact-finders cannot know what to make of it.

The Western trial form also creates the expectation that pre-trial investigations will serve to narrow contested issues both by establishing background facts and providing an efficacious means of testing witness accounts. Investigations are presumed capable of providing fact-finders with a degree of certainty about a wide range of issues surrounding those issues that are disputed at trial. Investigations are assumed to be capable, moreover, of identifying some quantity of witness lying and deterring a great deal more.

⁵⁴ Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913 (1991).

A witness will not falsely claim that an anti-Tutsi rally took place in a certain stadium, for instance, if she knows that a cursory investigation into the stadium's records will show that no rally occurred. Investigations can rarely perform either of these functions at the international criminal tribunals, however. Investigations are costly and difficult to conduct in the regions in question and are frequently unproductive even when they are conducted. Because so much daily life is carried out without written documentation, investigations rarely locate evidence that will conclusively prove a given fact. In most instances, the best that international investigators can hope to find are witnesses who will contradict the accounts given by the witnesses for the opposing side.

These arguments, which are presented here in very summary form, are fleshed out and supported in the book. To further summarize, however, I argue that current international criminal proceedings are conducted in a way that creates the illusion that they are routinely capable of reaching justifiable factual conclusions on the basis of evidence presented to them, when in fact, they are not.

B. The Trial Chambers' Treatment of Testimonial Deficiencies

I have contended that the testimonial deficiencies detailed above render international criminal fact-finding a far more uncertain endeavor than it outwardly appears. Here, I will consider how that conclusion impacts the accuracy of Tribunal judgments.

Prosecutors at the ICTR, SCSL and Special Panels charge defendants with performing specific acts in specific places during specific times. Assessing these allegations proves a considerable challenge given the vague, inconsistent and conflicting testimony that comprises so many international criminal proceedings. Indeed, if the Trial Chambers were asked to determine whether Emmanuel Ndindabahizi participated in attacks against Tutsi on Gitwa Hill, for instance, we might expect them to answer incorrectly a substantial portion of the time since the fact-finding impediments described above make it so difficult to reach accurate determinations of specific events. The Trial Chambers are not, however, asked to determine whether Ndindabahizi participated in the Gitwa Hill attacks. That question would place a preponderance-of-the-evidence standard on the prosecution. The Trial Chambers are rather asked to determine whether the prosecution has proven its factual allegations beyond a reasonable doubt. That is a very different and potentially much easier question to answer, for while the testimonial deficiencies that pervade international criminal proceedings may

make it virtually impossible to determine who did do what to whom in an international case, that does not mean that it is difficult to determine whether or not the prosecution has proven its allegations beyond a reasonable doubt. That is, while we may expect that Trial Chambers would regularly reach erroneous conclusions if asked to decide cases on a preponderance-of-the-evidence standard, a beyond-a-reasonable-doubt standard stacks the deck in favor of the defendant and makes it much easier for Trial Chambers to answer correctly the legal question they have been asked.

Whether the Trial Chambers usually do reach the "correct" legal conclusions is not a question that I can answer. But what I can assess is whether the Trial Chambers' treatment of fact-finding deficiencies appears consistent with the beyond-a-reasonable-doubt standard of proof that ostensibly governs international criminal fact-finding. As I discuss in more detail in the book, some Trial Chambers fail even to mention serious testimonial deficiencies in their judgments, and while most Trial Chambers do acknowledge various problems, at least in a general way, they often unquestioningly attribute those problems to innocent causes that do not impact the witness's credibility. Those attributions may be appropriate in many cases, but they also may not be, and even when testimonial deficiencies do have innocent causes, they nonetheless can seriously impair the defendant's ability to present his defense. Chapter Seven describes the Trial Chambers' treatment of fact-finding deficiencies in some detail, so I will confine myself here to reporting that, as a general matter, the Trial Chambers adopt a cavalier attitude toward testimonial deficiencies. They invoke educational or experiential deficiencies to explain the failure of many witnesses to provide relevant details or to answer whole ranges of questions, and because the Trial Chambers apparently consider it unfair to hold such deficiencies against the witnesses, they overlook the potential impact of vague and undetailed testimony on the defendant's ability to present a defense. When it comes to inconsistencies between witnesses' testimony and their previous statements, the Trial Chambers explain these away as products of the passage of time, the frailty of memory, and errors introduced by investigators and interpreters. The Trial Chambers thus give the prosecution witnesses the benefit of the doubt, and they explain away problematic features of their testimony on the basis of innocent factors that are beyond the witnesses' control. In sum, Trial Chambers are often content to base their convictions on deeply flawed testimony.

Given the vague, inconsistent testimony that is the standard fare at the international tribunals, the high incidence of perjury, and the difficulty in verifying even the most basic facts at issue in a case, one might have thought that Trial Chambers would rarely be able to conclude that the prosecution

had proven its allegations beyond a reasonable doubt. That is, we might have expected that the prevalence and severity of the testimonial deficiencies would lead Trial Chambers to acquit a substantial proportion of defendants. In fact, quite the opposite is true: the international tribunals convict virtually every defendant who comes before them of at least one of the crimes for which they are charged.

The SCSL is running a one-hundred percent conviction rate at present, having convicted all eight of the defendants who have thus far come before the Court. The Special Panels is not far behind with a ninety-seven percent conviction rate. The Special Panels acquitted a paltry three defendants out of the eighty-seven that it tried,⁵⁵ and even those figures understate the true acquittal rate because in two of the three acquittals, prosecutors themselves recognized that there was insufficient evidence on which to base a conviction and sought to withdraw their indictments. Thus, only one out of eighty-seven defendants was acquitted after a contested trial. The ICTR's conviction rate – at eighty-five percent – is considerably lower than the other two tribunals, and its six acquittals in fact help us to reconceptualize Tribunal fact-finding, a topic I mention below and thoroughly detail in Chapter Eight of the book.

Suffice it to say here that the Trial Chambers' lackadaisical attitude toward testimonial deficiencies appears to reflect a pro-conviction bias. Now, let me be clear that when I maintain that the Tribunals' fact-finding embodies a pro-conviction bias, I am not suggesting that the Trial Chambers are convicting innocent defendants. Far from it, as I will discuss below. What I am suggesting, however, is that the Trial Chambers' cavalier attitude toward fact-finding impediments is inconsistent with the beyond-a-reasonable-doubt standard of proof. As I have noted, many cases of problematic testimony feature uncertain causes. Circuitous answers could reflect culturally influenced patterns of speech or efforts to evade. Inconsistencies between testimony and a pre-trial statement could signify an investigator's errors or a witness's desire to frame the defendant. Because there do exist persuasive reasons in most instances for overlooking discrepancies and explaining them and other problematic features of witness testimony on the basis of "innocent" explanations, the Trial Chambers' inclination to do so would be unproblematic *if* they were deciding cases on a preponderance of the evidence standard; that is, if they had only to decide which account of events—the prosecution's or the defense's—was more likely than not to be the accurate

⁵⁵ The Secretary-General, *End of Mandate Report of the Secretary-General on the United Nations Mission of Support in East Timor*, ¶ 20, delivered to the Security Council, UN. Doc. S/2005/310 (May 12, 2005).

one. The Trial Chambers are not so charged, however. They are required to acquit the defendant unless the prosecution has proven its facts beyond a reasonable doubt. The question, then, is not whether a particular testimonial deficiency can be plausibly explained away—most of them can. The question is rather whether the existence of that deficiency in testimony that is sharply contested by defense witnesses and cannot be objectively verified by documentary or forensic evidence should be considered to give rise to a reasonable doubt. Considered in isolation, I believe that the answer to that question in most cases is yes. The Trial Chambers do not consider the question in isolation, as I explain below, and that fact goes some ways towards explaining why the Trial Chambers so rarely reach that answer.

C. Reconceptualizing International Criminal Fact-Finding

A final question that I will address here is why the Trial Chambers treat testimonial deficiencies so cavalierly. Are the judges conviction-happy? Certainly some judges may not possess the most steadfast commitment to due process standards, and other judges may be unconsciously influenced by the fact that acquittals do not play well either with the international community that funds the Tribunals or with the victims of international crimes. But the most compelling explanation for the Trial Chambers' willingness to overlook testimonial deficiencies lies in notions of organizational liability that derive from the Nuremberg Charter. Article 9 of the Nuremberg Charter authorized the Nuremberg Tribunal to declare an organization of which a defendant was a member to be a criminal organization. Once the organization was declared criminal, then its members could be convicted in subsequent trials solely on the basis of their membership in the organization. Under Article 9, then, the prosecution could convict large numbers of Nazis in summary proceedings. The Nuremberg Tribunal ended up gutting the plan by holding that the prosecution had to prove not only that the defendant was a member of the criminal organization but that he had voluntarily joined the organization and knew of its criminal purposes. The imposition of these proof requirements substantially diminished the logistical advantages that Article 9 was intended to deliver, so it was not surprising that the charge of membership in a criminal organization played a relatively minor role in the subsequent trials of Nazis held pursuant to Control Council Law No. 10. A meager eighty-seven defendants were charged and tried on this ground, and of the seventy-four who were convicted, only ten were convicted on the

membership charge alone.⁵⁶ That, then, seemed to put an end to organizational liability; indeed, no other subsequent tribunal has even considered including a provision resembling Article 9. I argue, however, that the thinking that underlay organizational liability continues to powerfully influence international criminal fact-finding and serves to explain the Trial Chamber's cavalier treatment of testimonial deficiencies.

In particular, although international criminal indictments typically charge defendants with performing particular acts – distributing weapons at a massacre site, for instance, or participating in the massacre itself – these acts are difficult to assess. In consequence of that difficulty, I believe that the Trial Chambers draw inferences from the defendant's group membership or official position and use those inferences to supplement the often problematic witness testimony that ostensibly forms the bases for the Trial Chambers' judgments. Such inferences have long been influential in domestic criminal fact-finding. In medieval and early modern times, probabilities were drawn from the sex, age, education and status of the defendant. Children were thought to be much like their parents, so a family's lifestyle might be invoked to prove a defendant's dishonesty or scandalous behavior. Men were thought more likely to be robbers and women poisoners, while well-bred men of professional classes were considered more likely to be innocent of the charges than men of more modest occupations or slaves.⁵⁷ Modern-day fact-finders are just as likely to draw inferences from various aspects of a defendant's life, which is why evidence of a defendant's gang membership, for instance, is typically excluded from the jury.⁵⁸

Inferences drawn from official position are apt to be all the more influential in the context of international crimes for a number of reasons. First of all, the fact that the international tribunals face such daunting evidentiary challenges raises the value of such indirect evidence as official position.

⁵⁶ TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 93 (1949).

⁵⁷ BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 117 (Univ. of Cal. Press 1991); *see also* Barbara J. Shapiro, "Fact" and the Proof of Fact in Anglo-American Law (c. 1500 – 1850), in HOW LAW KNOWS 25, 29 (Austin Sarat et al. eds., 2007); THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, 17 (Univ. of Chi. Press 1985).

⁵⁸ *People v. Williams*, 940 P.2d 710, 738 (Cal. 1997); *see also* *United States v. Butler*, 71 F.3d 243, 251 (7th Cir. 1995); *People v. Cardenas*, 647 P.2d 569, 572-73 (Cal. 1982); *People v. Perez*, 170 Cal. Rptr. 619, 622-23 (Ct. App. 1981); *People v. Avitia*, 24 Cal. Rptr. 3d 887, 891-95 (Cal. Ct. App. 2005); *People v. Luparello*, 231 Cal. Rptr. 832, 837-40 (Cal. Ct. App. 1986); *People v. Smith*, 565 N.E.2d 900, 907-08 (Ill. 1991).

Moreover, given the nature of international crimes, a defendant's official position truly does provide useful information about the defendant's likely culpability in many cases. International crimes such as those which form the subject matter of current international trials involve large-scale violence perpetrated by large numbers of offenders. These are crimes that are orchestrated by the state or by state-like entities that carry out their activities through more or less well-organized sub-bodies that feature more or less well-established lines of authority. Thus, once it has been proven that a particular group is responsible for the atrocities, then the defendant's official position in that group is unquestionably probative of his involvement in the atrocities.

Say, for instance, that the prosecution charges the defendant with ordering civilian killings during a particular attack. As former ICTY and ICTR lead Prosecutor, Carla Del Ponte, has observed: "When large-scale crimes are carried out systematically by military, police or quasi military organs requiring communication and coordination it is logical to infer that criminal activity must have been the result of orders."⁵⁹ And if the defendant was the commander of that attack, it is equally logical to infer that the orders were given *by the defendant*. For that reason, even if the prosecution's direct evidence that the defendant ordered the killings is only meager and problematic witness testimony, the fact that the defendant was the commander of an attack that featured the widespread and systematic killing of civilians is a fact that can compellingly supplement the meager and problematic witness testimony about the orders the defendant gave.

That example highlights the way in which a defendant's position might be relevant to the specific crimes for which he is charged, but often the relationship between the official position and the crime derives not so much from the specific facts of the crimes or the precise contours of the defendant's official duties, but rather from a more amorphous, common-sense understanding that the defendant could not have held the position he did without playing *some* role in the atrocities. Consider Adolf Eichmann who was Head of the Gestapo's Office of Jewish Affairs. Merely to recognize his title is to presume his involvement in Nazi atrocities against the Jews. The contours and implementation mechanisms of modern-day massacres in Rwanda, Sierra Leone and East Timor are less well-known to Western audiences, but they too can feature Eichmann analogues. For instance, Foday Sankoh's position as the leader of the RUF—the Sierra Leonean rebel force that is wide-

⁵⁹ 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, 548 (2006).

ly blamed for having amputated the limbs of thousands of civilians—creates the strong inference of his involvement in international crimes. The leadership of the Rwandan genocide is less clear-cut, but even there, some positions appear patently pertinent to the defendant's likely culpability. For instance, the *Interahamwe* – which was the youth wing of the MRND political party – has been widely blamed for zealously implementing the genocide throughout Rwanda. As a consequence, the fact that ICTR defendant Georges Rutaganda was Vice President of the National Committee of the *Interahamwe* has to be relevant—at least in a gestalt sort of way—to the Trial Chamber's assessment of the testimony that placed Rutaganda at various massacre sites.

However persuasive a defendant's official position might be in suggesting that the defendant played some—if an undefined—role in the atrocities, those suggestions rarely come to the fore because prosecutors typically present direct evidence of the defendant's role in the atrocities. So, although Rutaganda's position as Vice President of the National Committee of the *Interahamwe* is in and of itself suggestive of Rutaganda's criminal culpability given the *Interahamwe*'s well-established role in the Rwandan genocide, the prosecution sought to prove that Rutaganda personally distributed weapons, hunted down Tutsi, and participated in massacres, and it presented witnesses who testified that he had. Consequently, it is these allegations that appear in the indictments, these allegations that prosecutors seek to prove by means of the problematic witness testimony described and these allegations that underlie the convictions that are the end result of virtually every case. The problem, of course, is that it is these allegations that are so difficult to prove beyond a reasonable doubt for all the reasons heretofore discussed. Of course, the Trial Chambers do routinely find them proven beyond a reasonable doubt. But this is where the defendant's official position becomes relevant, for the Trial Chambers find these allegations proved beyond a reasonable doubt, I believe, in large part because the Chambers supplement the very muddy evidentiary picture that is presented to them at trial with common-sense inferences that they draw from the defendant's official position. These common-sense inferences, indeed, can be seen as bridging the gap between the prosecution's poorly supported factual allegations and the Trial Chambers' convictions. Reliance on such inferences, in fact, helps both to explain and to justify factual findings that seem questionable on their face. I discuss numerous examples in my manuscript and what I found is that the more a defendant's official position seems almost to scream out his liability for some crime, the less concerned that the Trial Chambers seem to be about testimonial deficiencies that might undermine the prosecution's account of this or that particular act.

In sum, because objective or reliable evidence is so hard to come by in international proceedings, Trial Chambers rely on official position as a proxy, an indicator, if you will, of the defendant's involvement in the atrocities. Prosecutors must still present some evidence to support the specific allegations appearing in the indictment, but the stronger the inferences that can reasonably be drawn from official position, the more that Trial Chambers are willing to attribute problematic features of prosecution witness testimony to innocent causes. But just as a defendant's official position can suggest a defendant's involvement in the atrocities and by doing so can lead Trial Chambers to take a cavalier attitude toward testimonial deficiencies, other proxies can motivate Trial Chambers to more carefully scrutinize testimonial deficiencies. Indeed, although I have maintained that Trial Chambers are generally inclined to ignore or explain away testimonial deficiencies, a careful examination of the ICTR acquittals reveals that that is not always the case. Indeed, in a number of these acquittals, the evidence supporting the prosecution's allegations was similar in quality and quantity to the evidence supporting most ICTR convictions. The cases resulted in acquittals rather than convictions, however, and the different results stemmed from the different treatment given to the deficiencies.

In particular, in these acquittal cases, the Trial Chambers appeared to make far more searching inquiries into testimonial deficiencies than is the norm at the ICTR. The Trial Chambers scrutinized identifications more carefully, they discredited testimony on the basis of vagueness or inconsistencies of the sort that are routinely overlooked or explained away in other cases, and they seemed, as a general matter, to apply the beyond-a-reasonable-doubt standard with greater rigor. And while one can hypothesize numerous factors that might contribute to this enhanced scrutiny—from the temperament of the judges on the panel to the demeanor of witnesses on the stand—a careful examination of the cases suggests that the inclination of these Trial Chambers to conduct a more searching inquiry into testimonial deficiencies was driven primarily by the Chambers' sense that the defendant did not generally support the genocide. In *Bagilishema*, for instance, defense counsel presented the defendant's letters that showed his efforts to maintain security in his commune and protect the Tutsi from violence. In *Mpambara*, the defense presented two particularly credible witnesses – a British physio-therapist and a Spanish priest – who testified that the defendant was likewise trying to stem the violence that was engulfing his commune. And in *Bagambiki*, the defendant did take some actions against the Tutsi, but his actions suggested his desire to reduce the overall level of violence, not facilitate or expand it. In *Bagilishema*, *Mpambara* and *Bagam-*

biki, prosecution witnesses attested to the defendants performing various genocidal acts, as in other cases, yet instead of overlooking the typical testimonial deficiencies that pervade witness testimony, the Trial Chambers carefully scrutinized those deficiencies and invoked them to justify their rejection of the witnesses' testimony.

In sum, just as the Trial Chambers' general sense that the defendant was involved in the genocide in some way—that he was one of the bad guys, as it were—inclines it to accept problematic inculpatory testimony about the specific acts that are attributable to the defendant in the indictment, the Trial Chamber's general sense that the defendant did not support the genocide—that he was one of the good guys, as it were—inclines it to reject problematic inculpatory testimony about those same sorts of acts. And because any given testimonial deficiency can be plausibly explained on the basis of innocent or not-innocent grounds, the Trial Chamber may choose from an array of rationales to justify its factual determinations.

My analysis suggests that while the Trial Chambers may be adrift with respect to assessing the specific allegations that appear in the indictments—the claim that the defendant called for the extermination of the Tutsi at a particular rally in Cyangugu, for instance, or the claim that at a particular passing out ceremony, the defendant instructed his subordinates to kill civilians—that uncertainty is less worrisome than it appears at first glance because frequently it is not the Trial Chambers' determinations about those specific allegations that drives their decision to convict or acquit defendants. The prosecution presents witnesses who testify in support of these allegations, and the Trial Chambers ostensibly assess this testimony and determine whether it is sufficient to prove the allegations beyond a reasonable doubt. The Trial Chamber's fact-finding about these allegations in turn form the bases for the Trial Chambers' legal conclusions—their decision whether a defendant committed genocide, for instance, or merely conspiracy to commit genocide or crimes against humanity. My analysis suggests, however, that Tribunal fact-finding is actually broader and less focused on the defendant's specific acts. The Trial Chambers are, I believe, engaging in a more comprehensive and holistic process that seeks to determine beyond a reasonable doubt whether the defendant was involved in the violence in some substantial way.

D. The Normative Analysis

The conclusions that I have thus far summarized give rise to a series of normative questions that I address in the final two chapters of the book. My

analysis of these normative issues is lengthy and complex, and in light of the space constraints of this article, I will offer only the briefest of summaries.

First and foremost, my study requires us to explore improvements that might be made to enhance the accuracy of international criminal fact-finding. Two paths present themselves. The more attractive of the two seeks to improve testimonial quality so that it will provide a more solid foundation for the judgments that the Trial Chambers will eventually reach. To that end, I advocate various adaptations to the pre-trial, trial, and post-trial processes that currently exist at the international tribunals. I go on, moreover, to explore more radical reforms; in particular, I consider whether international trial procedures should be fundamentally reformulated, as a means of improving testimonial quality. The second, less desirable, path to improving fact-finding accuracy focuses not on improving the quality of the testimony offered in support of the Trial Chamber's judgments but rather on adapting the charges that the prosecution brings so that they better fit the (problematic) evidence that the Trial Chambers will receive. The second approach, then, assumes sub-optimal testimony and considers how we might use certain existing but controversial liability doctrines, such as joint criminal enterprise, to create a better alignment between the evidence that is received and the convictions that are entered. Improving that alignment, I argue, requires prosecutors to focus less on an individual defendant's particular actions and more on the defendant's role in the group criminality that characterized the atrocity as a whole.

Finally, the book's final chapter addresses the broadest and most pressing normative question: Will the fact-finding impediments that I have identified, if they persist, fatally undermine the work of the international tribunals? To explore that question, I first consider the adequacy of drawing inferences from official position and institutional affiliation. Although these proxies can provide useful information in many cases, they do so only when prosecutors target the "right" individuals and when the Trial Chambers have a sophisticated and nuanced understanding of the way the violence was carried out in the region in question. Assuming that these requirements are not always met, I evaluate the fact-finding approach adopted by the SCSL's Appeals Chamber in the *AFRC* case, since it would reduce the impact of the testimonial deficiencies. Concluding that this approach is also deficient in some regards, I consider the most controversial, most problematic means of justifying current international criminal fact-finding: a reduction in the standard of proof. I rely on historical precedents, epistemological arguments, and a comparison with domestic prosecutions to conclude that a standard-of-proof reduction can be defended as a theoretical matter. Nonetheless, I con-

clude that it should not be undertaken. I go on, however, to consider recent legal and empirical scholarship that views the beyond-a-reasonable-doubt standard as a variable standard that signifies (and that should signify) different levels of certainty in different cases. This research not only provides an alternative explanation for international criminal fact-finding but also enables us to construct a solid justification for it.