

Grave Crimes and Weak Evidence: Fact-Finding Evolution in International Criminal Law *PART I-II*

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ABSTRACT International criminal courts carry out some of the most important work that a legal system can conduct: prosecuting those who have visited death and destruction on millions. Despite the significance of their work-or perhaps because of it-international courts face tremendous challenges. Chief among them is accurate fact-finding. With alarming regularity, international criminal trials feature inconsistent, vague, and sometimes false testimony that renders judges unable to assess with any measure of certainty who did what to whom in the context of a mass atrocity. This Article provides the first-ever empirical study quantifying fact-finding in an international criminal court. The study shines a spotlight both on the testimonial deficiencies that impede accurate fact-finding and on the judges' assessments of deficient witness testimony. Although my previous work on fact-finding has been generally critical of international criminal courts, this large-scale empirical study provides far more reason for optimism. This study reveals a host of interesting and sometimes unexpected findings. Taken as a whole, however, it depicts a criminal justice system that labors in the face of severe fact-finding challenges but that has, over the years, appropriately altered its fact-finding practices to respond to those challenges.

KEY WORDS Forensic identification, Craniofacial superimposition, Skull-face overlay, Coevolution, Cooperative coevolutionary algorithm, Fuzzy landmarks, Evolutionary algorithms, Forensic science

I. INTRODUCTION

International courts that prosecute crimes such as genocide, war crimes, and crimes against humanity have provided human rights advocates with a novel and potentially powerful enforcement tool. These courts have achieved many notable successes in the twenty years since the first modern tribunal was created.^[1] The International Criminal Tribunal for Rwanda (ICTR), for instance, has played a vital role in developing the law of genocide^[2] and the prohibition of sexual violence in international criminal law.^[3] The International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), for their parts, made history by indicting sitting heads of state,^[4] whereas the

SCSL and the International Criminal Court (ICC) have issued ground-breaking decisions involving the enlistment and conscription of child soldiers.^[5] In addition to these successes, however, international criminal courts and tribunals have also faced a multitude of challenges. International criminal tribunals must contend with obstructionist defendants who seek to delay and distort proceedings,^[6] insufficient budgets that require them to pit fairness against efficiency,^[7] and recalcitrant governments that

¹ The International Criminal Tribunal for the former Yugoslavia (ICTY) is considered the first international criminal tribunal of the modern era.

² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), para. 36 (Feb. 3, 2015) (separate opinion of Judge Bhandari), <http://www.icj-cij.org/docket/files/152/18860.pdf>.

³ See THE INT'L CTR. FOR ETHICS, JUSTICE, AND PUB. LIFE, BRANDEIS UNIV., SYMPOSIUM ON THE LEGACY OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS IN AFRICA 18-25 (2010), <http://www.brandeis.edu/ethics/pdfs/internationaljustice/LegacyofCICTRinAfricaCEJPL.pdf>, see generally Leila Nadya Sadat, The Contribution of the ICTR to the Rule of Law, in PROMOTING ACCOUNTABILITY UNDER INTERNATIONAL LAW FOR GROSS HUMAN RIGHTS VIOLATIONS IN AFRICA (Charles C. Jalloh & Alhagi B.M. Marong eds., 2015).

⁴ EDWARD M. WISE ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 397 (3rd ed. 2009).

⁵ See, e.g., Prosecutor v. Norman, Case No. SCSL-04-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (May 31, 2004); Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Judgment pursuant to Art. 74 of the Statute, paras. 478-84 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.pdf [hereinafter Lubanga Judgment].

⁶ For a description of the disruptive tactics perpetrated by two of the most notorious obstructionist defendants, Slobodan Milošević and Vojislav Šešelj, see Nancy A. Combs, Legitimizing International Criminal Justice: The Importance of Process Control, 33 MICH. J. INT'L L. 321, 348-53 (2012). See also Devon Whittle, Frivolous Motions and Abuses of Process at the Ad Hoc International Criminal Tribunals, 22 CARDOZO J. INT'L & COMP. L. 1, 16-19, 27 (2013) (describing defense motions that were intended to delay proceedings or disturb "the fair and expeditious conduct of the trial"); Press Release, ICC, Bemba Case: Four Suspects Arrested for Corruptly Influencing Witnesses; Same Charges Served on Jean-Pierre Bemba Gombo (Nov. 24, 2013), <https://www.icc-cpi.int/en-menu/iccpress%20and%20medialpress%20releases/Pages/pr962.aspx> (describing charges of offenses against the administration of justice brought against the defendant and his lawyers for allegedly "corruptly influencing witnesses before the ICC and presenting evidence that they knew to be false or forged").

⁷ See, e.g., Sara Kendall, Marketing Accountability at the Special Court for Sierra Leone, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY 387, 403-05 (Charles C. Jalloh ed., 2014); AARON FICHTELBERG, HYBRID

refuse to surrender indictees,^[8] evidence,^[9] and witnesses.^[10]

Additionally, and equally pressingly, international criminal tribunals must contend with a host of factors that impede their ability to find accurate facts. Many of these factors have been on embarrassing display lately at the ICC. There, judges have already refused to confirm charges against several suspects,^[11] have acquitted one of the court's first four defendants,^[12] and have sharply scolded prosecutors for the evidentiary deficiencies in their cases.^[13] Fact-finding impediments have never been a more serious problem in international criminal law.

In previous works, I brought to light a wide range of deficiencies common to eyewitness testimony in international criminal tribunals.^[14] This Article dramatically expands that previous research and breaks new ground by providing quantitative assessments of two phenomena that are vitally important to accurate fact-finding. First, this Article presents a quantitative analysis of the testimonial deficiency in international criminal trials that is both most prevalent and that has the greatest potential to impair accurate fact-finding: inconsistencies between witnesses' current testimony and their previous representations. Second, because testimonial deficiencies tell only part of the story of international criminal

fact-finding, this Article quantitatively explores another, even more crucial part: The Trial Chambers' treatment of witness testimony. I explore these issues through an empirical analysis of 342 prosecution witnesses who testified before the ICTR over the course of that Tribunal's life.

Part II explains my research focus and my methodology. Part III details my findings on inconsistencies. To set the stage, I explain here what these inconsistencies are and how they arise. Before persons appear at an international criminal tribunal to testify for the prosecution, they tell their story at least once and often multiple times. At the very least, a prospective witness tells her story to a tribunal investigator who drafts a written statement, ostensibly containing the information that the prospective witness conveyed. Some prospective witnesses are interviewed multiple times and give multiple pre-trial statements. Additionally, some witnesses testify in multiple cases about the same set of events, so, by the time these witnesses testify for the prosecution, they have already testified under oath either before another Trial Chamber or before another court entirely. Inconsistencies arise when a witness's testimony diverges from the representations that appear in the witness's pre-trial statements or previous testimonies.

These sorts of inconsistencies are by no means confined to testimony before the ICTR. My previous research found such inconsistencies to be a prevalent feature of witness testimony in all of the international criminal tribunals I studied, and they pertain to a whole range of topics relevant to the disposition of the trial. Some inconsistencies center on such details as dates, distances, duration, and numbers,^[15] whereas others concern central aspects of the

TRIBUNALS: A COMPARATIVE EXAMINATION 44 (2015); Georgia/Russia: ICC Judges OK Investigation, HUM. RTS. WATCH (Jan. 27, 2016), <https://www.hrw.org/news/2016/01/27/georgia-russia-icc-judges-ok-investigation>; Public Hearing on Serbia's Non-Compliance Slated for Next Week, SENSE NEWS AGENCY (Feb. 5, 2016), <http://www.sense-agency.com/icty/public-hearing-on-serbia-s-noncompliance-slated-for-next-week.29.html?newsid=16952>; David Cohen, Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?, 61 ASIA PACIFIC ISSUES 1, 3, 5 (2002), <http://www.eastwestcenter.org/fileadmin/stored/pdfs/api061.pdf>; NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 274 n.1176 (2010) [hereinafter FACT-FINDING WITHOUT FACTS] (providing sources discussing the ICTY's and ICTR's underfunding).

⁸ See, e.g., Press Release, ICC, ICC Prosecutor's Statement to the United Nations Security Council on the Situation in Darfur UNSCR 1593 (2005) (June 5, 2012), <https://www.icc-cpi.int/Pages/item.aspx?name=PR803> (describing Sudan's failure to surrender indicted President Omar al-Bashir); Fatou Bensouda, Prosecutor of the ICC, Statement to the United Nations Security Council on the Situation in Libya pursuant to UNSCR 1970 (2011) (Nov. 5, 2015), <http://www.haguejusticeportal.net/index.php?id=13377> (discussing Libya's failure to surrender Saif Gaddafi); Cohen, *supra* note 7, at 7 (discussing Indonesia's refusal to turn over Special Panels for Serious Crimes indictees).

⁹ See ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence, BBC (Dec. 5, 2014), <http://www.bbc.com/news/world-africa-30347019>.

¹⁰ See KINGSLEY CHIEDU MOGHALU, RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 140 (2005) (describing Rwanda's refusal to permit ICTR witnesses to leave Rwanda).

¹¹ See, e.g., Prosecutor v. Garda, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges (Feb. 8, 2010); Prosecutor v. Mbarushimana, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges (Dec. 16, 2011); Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of the Rome Statute, para. 425 (Jan. 23, 2012); Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of the Rome Statute, para. 293 (Jan. 23, 2012).

¹² Defendants Thomas Lubanga, Germain Katanga, and Jean-Pierre Bemba, were convicted, see Lubanga Judgment, *supra* note 5, para. 1358; Prosecutor v. Katanga, ICC-01/04-01/07-3436-ENG, Judgment pursuant to Art. 74 of the Statute, 658-59 (Mar. 7, 2014) (hereinafter Katanga Judgment); Prosecutor v. Bemba, ICC-01/05-01/08-3343, Judgment pursuant to Art. 74 of the Statute, 364 (Mar. 21, 2016), whereas Mathieu Ngudjolo was acquitted, see Prosecutor v. Ngudjolo, ICC-01/04-02/12-3-ENG, Judgment pursuant to Art. 74 of the Statute, 197 (Dec. 18, 2012) [hereinafter Ngudjolo Judgment].

¹³ See Ngudjolo Judgment, *supra* note 12, paras. 115-123; Dermot Groome, No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations, 3 PENN. ST. J.L. & INT'L AFF. 1, 4, 19-21 (2014); see also Alex Whiting, Investigations and Institutional Imperatives at the International Criminal Court, in THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS 140 (Martha Minow et al. eds., 2015) (noting that in both judgments issued to date "the judges set aside considerable parts of the prosecution's evidence, finding that it lacked sufficient credibility").

¹⁴ See *infra* text accompanying notes 28 and 29.

¹⁵ See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, para. 236 (June 1, 2001) (hereinafter Akayesu Judgment); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment paras. 403, 412-13 (June 7, 2001); Prosecutor v. Gacumbitsi, Case No. ICTR-01-64-T, Judgment, para. 123 (June 17, 2004) [hereinafter Gacumbitsi Judgment]; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment, para. 680 (Dec. 1, 2003) [hereinafter Kajelijeli Judgment]; Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment, paras. 327, 339 (Jan. 22, 2004); Prosecutor v. Karera, Case No. ICTR-01-74-T, Judgment, paras. 116, 164, 226-28, 299 (Dec. 7, 2007) [hereinafter Karera Judgment]; Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment, paras. 269-270 (Apr. 28, 2005) [hereinafter Muhimana Judgment]; Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment, paras. 385-87 (Jan. 27, 2000) [hereinafter Musema Judgment]; Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgment, para. 171 (Sept. 12, 2006) [hereinafter Muvunyi Judgment]; Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment, paras. 59-60, 65, 99, 102, 167, 277-78, 306 (May 16, 2003) (hereinafter Niyitegeka Judgment); Prosecutor v. de Jesus, Case No. 06/2002, Judgment, at 10-11 (Jan. 28, 2004) (hereinafter Paulino de Jesus Judgment); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, para. 171 (May 15, 2003); Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment, paras. 167, 169, 382 (Dec. 13, 2005) [hereinafter Simba Judgment]; Transcript of Continued Trial at 56, 59-60, Prosecutor v. Bagosora (July 3, 2003) (ICTR-98-41-T); Transcript of Continued Trial at 9, 22, 30, Prosecutor v. Bagosora (July 2, 2003) (ICTR-98-41-T) [hereinafter Military I Transcript, July 2, 2003]; Transcript of Continued Trial at 43, 44, 46, Prosecutor v. Gacumbitsi (Aug. 6, 2003) (ICTR 01-64-T); Transcript of Continued Trial at 62-65, Prosecutor v. Kamuhanda (Sept. 19, 2001) (ICTR-99-54A-T) [hereinafter Kamuhanda Transcript, Sept. 19, 2001]; Transcript of Continued Trial at 29-31, Prosecutor v. Kamuhanda (Sept. 4, 2002) (ICTR-99-54A-T); Transcript of Continued Trial at 17-18, 20, Prosecutor v. Karemera (Dec. 5, 2003) (ICTR-98-44-T); Transcript of Continued Trial at 9-10, Prosecutor v. Karera (Jan. 31, 2006) (ICTR-01-74-T); Transcript of Continued Trial at 43-45, Prosecutor v. Muhimana (Apr. 19, 2004) (ICTR-95-1B-T) (hereinafter Muhimana Transcript, Apr. 19, 2004); Transcript of Continued Trial at 4, 18-19, Prosecutor v. Muhimana (Mar. 31, 2004) (ICTR-95-1B-T); Transcript of Continued Trial at 12, 22-23, Prosecutor v. Ndindabahizi (Sept. 22, 2003) (ICTR-01-71-T); Transcript of Continued Trial at 25-35, 60-61, Prosecutor v. Nyiramasuhuko (Mar. 20, 2003) (ICTR-98-42-T); Transcript of Trial at 45-46, Prosecutor v. Brima (Sept. 19, 2005) (SCSL-04-16-T); Transcript of Trial at 96, Prosecutor v. Brima (July 26, 2005) (SCSL-04-16-T) [hereinafter AFRC Transcript, July 26, 2005]; Transcript of Trial at 82-83, 96, Prosecutor v. Brima (July 21, 2005) (SCSL-04-16-T) [hereinafter AFRC Transcript, July 21, 2005];

crime^[16] and/or the defendant's involvement in the crime.^[17] Sometimes, a witness's statement will inculpate the defendant when her testimony does not, and sometimes it is the witness's testimony that inculpates when her statement does not.^[18] Finally, some

witnesses testify about the defendant's key involvement in the crime, even though the witness's pretrial statement, or series of statements, fails even to mention the defendant.^[19]

For my past research, I did make some limited efforts to quantify inconsistencies to get a rough idea of the scope of the problem,^[20] but for this research, I dramatically expanded those quantification efforts by creating a large and rich dataset and by considering a host of explanatory factors. Part II conveys my findings in considerable depth, so it suffices to note here some of the myriad issues that I explore. My research reveals the percentage of prosecution witnesses who testified inconsistently with their previous statements/testimonies, and more importantly, the percentage whose inconsistencies are sufficiently worrisome that we would call them "serious," a term I will subsequently define.^[21] In addition, I considered a variety of explanatory variables such as the witness's gender, ethnicity, accomplice status, and imprisonment status. Thus, for instance, Part II presents tabular data showing whether male witnesses were more likely to testify seriously inconsistently than female witnesses; whether Hutu

Transcript of Trial at 85, Prosecutor v. Brima (July 12, 2005) (SCSL-04-16-T); Transcript of Trial at 151-52, Prosecutor v. Brima (July 11, 2005) (SCSL-04-16-T) [hereinafter AFRC Transcript, July 11, 2005]; Transcript of Trial at 122-23, Prosecutor v. Brima (June 30, 2005) (SCSL-04-16-T); Transcript of Trial at 132-35, Prosecutor v. Brima (June 23, 2005) (SCSL-04-16-T) [hereinafter AFRC Transcript, June 23, 2005]; Transcript of Trial at 26-27, 47-48, Prosecutor v. Brima (June 22, 2005) (SCSL-04-16-T); Transcript of Trial at 53-64, Prosecutor v. Brima (June 21, 2005) (SCSL-04-16-T); Transcript of Trial at 21-25, Prosecutor v. Brima (Apr. 20, 2005) (SCSL-04-16-T); Transcript of Trial at 52-59, Prosecutor v. Brima (Apr. 19, 2005) (SCSL-04-16-T); Transcript of Trial at 34-38, 38-39, 53-60, 63-65, 67-69, Prosecutor v. Brima (Apr. 12, 2005) (SCSL-04-16-T); Transcript of Trial at 79, Prosecutor v. Brima (Apr. 8, 2005) (SCSL-04-16-T); Transcript of Trial at 24-27, Prosecutor v. Brima (Apr. 6, 2005) (SCSL-04-16-T); Transcript of Trial at 45, Prosecutor v. Norman (Mar. 8, 2005) (SCSL-04-14-T); Transcript of Trial at 14-19, 24-28, Prosecutor v. Norman (Mar. 4, 2005) (SCSL-04-14-T); Transcript of Trial at 73-74, 91-104, Prosecutor v. Norman (Feb. 22, 2005) (SCSL-04-14-T); Transcript of Trial at 18, Prosecutor v. Norman (Feb. 9, 2005) (SCSL-04-14-T) [hereinafter CDF Transcript, Feb. 9, 2005]; Transcript of Trial at 80-81, Prosecutor v. Norman (Dec. 6, 2004) (SCSL-04-14-T); Transcript of Trial at 101-03, Prosecutor v. Norman (Sept. 13, 2004) (SCSL-04-14-T); Transcript of Trial at 85-87, Prosecutor v. Norman (Sept. 9, 2004) (SCSL-04-14-T); Transcript of Continued Trial at 54-55, Prosecutor v. Norman (June 21, 2004) (SCSL-04-14-PT) [hereinafter CDF Transcript, June 21, 2004]; Transcript of Trial at 3-4, Prosecutor v. Sesay (Mar. 31, 2006) (SCSL-04-15-T); Transcript of Trial at 29-30, Prosecutor v. Sesay (Nov. 22, 2005) (SCSL-04-15-T); Transcript of Trial at 66-67, Prosecutor v. Sesay (May 12, 2005) (SCSL-04-15-T) [hereinafter RUF Transcript, May 12, 2005]; Transcript of Trial at 91, 100, Prosecutor v. Sesay (Apr. 15, 2005) (SCSL-04-15-T); Transcript of Trial at 27-33, 38-40, Prosecutor v. Sesay (Apr. 14, 2005) (SCSL-04-15-T); Transcript of Trial at 138-40, Prosecutor v. Sesay (Oct. 8, 2004) (SCSL-04-15-T); Transcript of Continued Trial at 25-26, Prosecutor v. Sesay (July 21, 2004) (SCSL-04-15-T); Transcript of Trial at 9544, Prosecutor v. Taylor (May 12, 2008) (SCSL-03-01-T); Transcript of Trial at 6079, Prosecutor v. Taylor (Mar. 13, 2008) (SCSL-03-01-T) [hereinafter Taylor Transcript, Mar. 13, 2008]; Transcript of Trial at 3622-24, Prosecutor v. Taylor (Feb. 12, 2008) (SCSL-03-01-T); Transcript of Trial at 758-59, Prosecutor v. Taylor (Jan. 8, 2008) (SCSL-03-01-T) [hereinafter Taylor Transcript, Jan. 8, 2008]; Case Notes of Judicial System Monitoring Programme at 306, Prosecutor v. Marques (Sept. 28, 2001) (Case No. 9/2000) Case Notes of Judicial System Monitoring Programme at 179, Prosecutor v. Marques (Aug. 21, 2001) (Case No. 9/2000); thereafter Los Palos Case Notes, Aug. 21, 2001; Case Notes of Judicial System Monitoring Programme at 120, Prosecutor v. Marques (Aug. 2, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 109, Prosecutor v. Marques (Aug. 1, 2001) (Case No. 9/2000); see generally FACT-FINDING WITHOUT FACTS, supra note 7, at 106-07.

¹⁶ See, e.g., Transcript of Trial at 75-81, Prosecutor v. Ntakirutimana (Sept. 20, 2001) (ICTR 96-17-T) [hereinafter Ntakirutimana Transcript, Sept. 20, 2001]; Transcript of Continued Trial at 31-40, Prosecutor v. Kamuhanda (Feb. 14, 2002) (ICTR-99-54A-T); Transcript of Continued Trial at 48, Prosecutor v. Nindabahizi (Sept. 29, 2003) (ICTR-01-71-T); AFRC Transcript, June 23, 2005, supra note 15, at 103-04; Transcript of Trial at 111-14, Prosecutor v. Brima (June 24, 2005) (SCSL-04-16-T); Transcript of Trial at 50, Prosecutor v. Brima (July 7, 2005) (SCSL-04-16-T); AFRC Transcript, July 26, 2005, supra note 15, at 97-98; Transcript of Trial at 63-72, Prosecutor v. Norman (Sept. 27, 2004) (SCSL-04-14-T); CDF Transcript, Feb. 9, 2005, supra note 15, at 28; Transcript of Trial at 7-9, Prosecutor v. Norman (Feb. 25, 2005) (SCSL-04-14-T); RUF Transcript, May 12, 2005, supra note 15, at 61-66; Transcript of Trial at 1089-91, Prosecutor v. Taylor (Jan. 11, 2008) (SCSL-03-01-T). See generally FACTFINDING WITHOUT FACTS, supra note 7, at 108-09.

¹⁷ See, e.g., Akayesu Judgment, supra note 15, paras. 185, 237; Prosecutor v. Brima, Case No. SCSL-04-16-A, Judgment, para. 907 (Feb. 22, 2008); Military I Transcript, July 2, 2003, supra note 15, at 32-35; Transcript of Trial at 108-11, Prosecutor v. Ntakirutimana (Sept. 26, 2001) (ICTR 96-17-T); Case Notes of Judicial System Monitoring Programme at 158, Prosecutor v. Marques (Aug. 14, 2001) (Case No. 09/2000) [hereinafter Los Palos Case Notes, Aug. 14, 2001]; AFRC Transcript, July 11, 2005, supra note 15, at 145-46; Transcript of Trial at 35-47, Prosecutor v. Norman (June 3, 2005) (SCSL-04-14-T); Transcript of Trial at 91-93, 109-17, Prosecutor v. Sesay (Apr. 7, 2005) (SCSL-04-15-T); Decision on Sesay Defense Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness TFI-366, paras. 45-48, Prosecutor v. Sesay (July 26, 2006) (SCSL-04-15-T); Taylor Transcript, Jan. 8, 2008, supra note 15, at 75 5-58; Transcript of Trial at 3348-5 1, Prosecutor v. Taylor (Feb. 7, 2008) (SCSL-03-01-T); Taylor Transcript, Mar. 13, 2008, supra note 15, at 5974-76. See generally FACTFINDING WITHOUT FACTS, supra note 7, at 110-11.

¹⁸ See, e.g., Bagilishema Judgment, supra note 15, paras. 403, 415; Gacumbitsi Judgment, supra note 15, para. 192; Prosecutor v. Guterres, Case No. 18a/2003, Judgment, at 3 (Feb. 28, 2005) [hereinafter Guterres Judgment]; Transcript of Continued Trial at 24, Prosecutor v. Karera (Feb. 1, 2006) (ICTR-01-74-T) [hereinafter Karera Transcript, Feb. 1, 2006]; Transcript of Continued Trial at 63, Prosecutor v. Muhimana (Apr. 15, 2004) (ICTR-95-1B-T) [hereinafter Muhimana Transcript, Apr. 15, 2004]; Muhimana Transcript, Apr. 19, 2004, supra note 15, at 55; Transcript of Continued Trial at 68-69, Prosecutor v. Muhimana (Apr. 30, 2004) (ICTR-95-1B-T) [hereinafter Muhimana Transcript, Apr. 30, 2004]; Transcript of Trial at 109-19, Prosecutor v. Brima (Mar. 8, 2005)

(SCSL-04-16-T); Brima Transcript, July 21, 2005, supra note 15, at 43-5 1; Transcript of Trial at 6-7, Prosecutor v. Brima (Mar. 9, 2005) (SCSL-04-16-T); CDF Transcript, June 21, 2004, supra note 15, at 48-50; Transcript of Trial at 78-79, Prosecutor v. Norman (Feb. 11, 2005) (SCSL-04-14-T); Transcript of Trial at 90-91, Prosecutor v. Norman (Feb. 24, 2005) (SCSL-04-14-T); Transcript of Trial at 18-27, Prosecutor v. Sesay (Mar. 23, 2006) (SCSL-04-15-T); Transcript of Trial at 18-27, Prosecutor v. Sesay (Jan. 25, 2005) (SCSL-04-15-T); Transcript of Trial at 32-35, 80, 99-101, 104-06, Prosecutor v. Sesay (Apr. 8, 2005) (SCSL-04-15-T); Transcript of Trial at 17-18, Prosecutor v. Sesay (Nov. 7, 2005) (SCSL-04-15-T); Case Notes of Judicial System Monitoring Programme at 103, Prosecutor v. Marques (July 31, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 129, Prosecutor v. Marques (Aug. 7, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 141, Prosecutor v. Marques (Aug. 8, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 164, 167, Prosecutor v. Marques (Aug. 16, 2001) (Case No. 9/2000); Los Palos Case Notes, Aug. 14, 2001, supra note 17, at 158; Los Palos Case Notes, Aug. 21, 2001, supra note 15, at 177; Case Notes of Judicial System Monitoring Programme at 223, Prosecutor v. Marques (Sept. 20, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 265-66, Prosecutor v. Marques (Sept. 24, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 272, Prosecutor v. Marques (Sept. 25, 2001) (Case No. 9/2000). See generally FACT-FINDING WITHOUT FACTS, supra note 7, at 111-12.

¹⁹ See, e.g., Akayesu Judgment, supra note 15, paras. 248, 266; Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgment and Sentence, para. 269 (Dec. 18, 2008); Gacumbitsi Judgment, supra note 15, para. 54; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, para. 467 (Dec. 1, 2003) [hereinafter Kajelijeli Judgment]; Karera Judgment, supra note 15, para. 53; Musema Judgment, supra note 15, para. 440; Niyitegeka Judgment, supra note 15, paras. 101, 154, 158; Prosecutor v. Ntakirutimana, Case No. ICTR-96-17-T, Judgment and Sentence, para. 244 (Feb. 21, 2003); Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, Judgment, paras. 114, 145, 192 (Sept. 20, 2006); Simba Judgment, supra note 15, paras. 107-08, 195; Prosecutor v. Da Costa, Case No. 22/2003, Judgment, at 5 (Apr. 25, 2005); Paulino de Jesus Judgment, supra note 15, at 9; Prosecutor v. Tacaqui, Case No. 20/2001, Judgment, at 26-27 (Dec. 9, 2004); Brima Transcript, July 11, 2005, supra note 15, at 140-50; Transcript of Continued Trial at 22, Prosecutor v. Gacumbitsi (Aug. 19, 2003) (ICTR-01-64-T) [hereinafter Gacumbitsi Transcript, Aug. 19, 2003]; Transcript of Trial at 85-96, Prosecutor v. Kajelijeli (Dec. 5, 2001) (ICTR-98-44A-T) [hereinafter Kajelijeli Transcript, Dec. 5, 2001]; Transcript of Trial at 27-28, Prosecutor v. Kajelijeli (Dec. 7, 2001) (ICTR-98-44A-T) [hereinafter Kajelijeli Transcript, Dec. 7, 2001]; Kamuhanda Transcript, Sept. 19, 2001, supra note 15, at 72-73; Transcript of Continued Trial at 55-56, Prosecutor v. Muhimana (Mar. 30, 2004) (ICTR-95-1B-T); Transcript of Continued Trial at 22-24, Prosecutor v. Muhimana (Apr. 29, 2004) (ICTR-95-1B-T) [hereinafter Muhimana Transcript, Apr. 29, 2004]; Ntakirutimana Transcript, Sept. 20, 2001, supra note 16, at 32-33; Transcript of Trial at 24-25, Prosecutor v. Niyitegeka (Aug. 13, 2002) (ICTR-96-14-T) [hereinafter Niyitegeka Transcript, Aug. 13, 2002]; Transcript of Trial at 95-111, Prosecutor v. Sesay (Jan. 24, 2004) (SCSL-04-15-T); Transcript of Trial at 18-20, Prosecutor v. Sesay (Oct. 19, 2004) (SCSL-04-15-T); Transcript of Trial at 30, Prosecutor v. Sesay (Nov. 25, 2004) (SCSL-04-15-T); Transcript of Trial at 36-40, Prosecutor v. Sesay (Feb. 3, 2005) (SCSL-04-15-T); Sesay Transcript, Mar. 23, 2006, supra note 18, at 77-80, 141-45; Los Palos Case Notes, Sept. 18, 2001, at 255-56.

²⁰ See FACT-FINDING WITHOUT FACTS, supra note 7, at 118-21.

²¹ See infra text at note 64.

witnesses were more likely to testify seriously inconsistently than Tutsi witnesses; and whether witnesses who were imprisoned for genocide crimes were more likely to testify seriously inconsistently than witnesses who were not. In addition to witness characteristics, I considered various factors regarding the type, number, and timing of the witness's previous representations. Consequently, Part II details correlations between seriously inconsistent testimony and (1) the number of previous statements/testimonies a witness provided; (2) the judicial system in which those statements/testimonies were provided; and (3) the time that elapsed between the statements/testimonies and the later inconsistent testimony. Finally, Part II considers time trends and presents the results of several regressions ^[22] that took into account a comprehensive set of explanatory variables. These regressions reveal which factors are statistically significant predictors of serious inconsistencies. Testimonial deficiencies such as serious inconsistencies.

Testimonial deficiencies such as serious inconsistencies provide important information about the evidentiary foundations of international criminal judgments, but they tell only part of the story of fact-finding. The more important part examines the Trial Chambers' responses to testimonial deficiencies. Whatever the quality of the evidence a Trial Chamber receives, it will not affect the soundness of its judgments so long as the Trial Chamber accurately assesses the quality of the evidence and finds facts in accordance with that assessment. In other words, deficient testimony need not lead to deficient fact-finding. For purposes of my 2010 book, I took a summary look at the Trial Chambers' treatment of testimonial deficiencies, and I reported some troubling findings. For one thing, although some Trial Chambers mentioned some testimonial deficiencies, many did so only passingly, and some did not mention them at all. ^[23] In addition, when Trial Chambers did mention testimonial deficiencies, they seemed almost reflexively inclined to attribute them to innocent causes that had no negative bearing on the witness's credibility. For instance, some Trial Chambers invoked the witness's educational or experiential deficiencies to explain their failure to provide relevant information or to answer whole ranges of probative questions. ^[24] As for serious inconsistencies in particular, I concluded that Trial Chambers often "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." ^[25] In sum, although my prior research was not comprehensive or quantitative, it suggested that many Trial Chambers adopted a cavalier attitude toward testimonial deficiencies in general and serious

inconsistencies in particular.

This Article quantifies the qualitative impressions just described. Specifically, in this Article, I have assessed each and every factual allegation brought by the prosecution in each of the nineteen cases studied. I have determined which witnesses' testimonies supported which allegations, and I have coded the Trial Chambers' conclusions regarding each witness's testimony. My findings are presented in Part III, and they paint a fascinating picture of the Trial Chambers' assessments of witness testimony and the factors that influence those assessments. Again, I have considered a variety of explanatory variables to assess whether gender, ethnicity, imprisonment status, accomplice status, or the presence of a serious inconsistency played a role in the Trial Chambers' treatment of witness testimony. In addition, and most notably, I have considered the Trial Chambers' testimonial assessments over time and learned that the somewhat unflattering picture I presented six years ago has changed for the better. Part III provides the relevant details but suffice it to say here that during the course of the ICTR's life, its Trial Chambers became increasingly skeptical of prosecution witness testimony and subjected that testimony to increasingly rigorous scrutiny.

Part IV seeks to explain the study's findings, many of which are surprising. The incidence of serious inconsistencies did not change as I expected, and it was not correlated with as many explanatory variables as I expected. The data do, however, reveal important clues about the most significant question surrounding serious inconsistencies: their cause. Obviously, multiple causes underlie a phenomenon as multi-faceted as serious inconsistencies; however, the data do suggest that some causes play a more prominent role than others. In particular, the data indicate that defense counsel may have had it right all along when they claimed that serious inconsistencies usually reflect false testimony. Turning to the big picture, the research, taken in its entirety, depicts a tribunal that confronted a relatively constant stream of evidentiary deficiencies but that altered-for the better-its responses to those deficiencies. The reasons for that evolution cannot be ascertained with certainty, but Part IV identifies both external circumstances that likely played a role as well as an internal maturation process that encompasses the ICTR but that extends far beyond it. Indeed, the research presented here has particularly broad implications for the international criminal justice project as a whole, many of which are explored in this Article's conclusion.

II. EXPLANATIONS AND METHODOLOGY

Section A explains why I chose the particular topics that form the basis of this study and how this research will enhance understanding of international criminal fact-finding. Section B details my methodology.

A. Explaining the Research Focus: A Spotlight on Serious Inconsistencies and judicial Assessments of Witness Testimony

In past work, I identified a host of testimonial deficiencies that

²² A regression refers to the average relationship between a dependent variable that a researcher is trying to explain and one or more explanatory variables.

²³ See FACT-FINDING WITHOUT FACTS, *supra* note 7, at 180-83.

²⁴ *Id.* at 190.

²⁵ Nancy Amoury Combs, Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials, 14 *UCLA J. INT'L L. & FOREIGN AFF.* 235, 264 (2009).

challenge international criminal fact-finding. Having decided in this piece to explore fact-finding through a rigorous empirical study, I necessarily had to narrow my focus. However, such a narrowing has the potential to distort, first because fact-finding is a holistic endeavor that cannot be reduced to a few isolated phenomena, and second because the phenomena that form the basis for the study, if not chosen correctly, can take on unjustified importance while at the same time inappropriately minimizing other, perhaps equally important factors. Because that potential for distortion exists, I will explain my research focus in some detail.

First, I chose to study serious inconsistencies because I consider them to be the most prevalent and pernicious testimonial deficiency challenging international criminal fact-finding.^[26] Why are serious inconsistencies so pernicious? Most obviously, it is because they call into question the accuracy of the testimony in which they appear.^[27] It goes without saying that witness testimony that sharply diverges from a witness's previous representations is testimony that is less reliable and probably less likely to be accurate than testimony that does not so diverge. Inconsistencies, therefore, introduce considerable uncertainty into fact-finding.

To be sure, serious inconsistencies are not the only evidentiary phenomena that create uncertainty. For instance, my prior research revealed that international witnesses often do not know the answers to key questions that fact-finders need to ask in order to determine with any sort of certainty the who, what, where, and when details of the crimes in question.^[28] It also highlighted numerous instances in which witnesses appeared to know answers to relevant questions but were unable or unwilling to convey those answers in a way that was comprehensible to their Western interlocutors.^[29] Serious inconsistencies, in my view, have a greater potential to impair accurate factfinding than some of these other deficiencies, for reasons I explain below. Yet upon closer examination, it becomes clear that the primary impediment challenging accurate fact-finding at the international tribunals is not the existence of one or another individual testimonial deficiency, but instead the very prevalence of witness testimony in international criminal trials. In short, witness testimony usually forms the exclusive basis for international criminal convictions,^[30] and that in itself is a problem.

It is a problem because eyewitness testimony is frequently unreliable,^[31] and indeed such testimony has been blamed for a large proportion of the wrongful convictions that have come to light in recent years.^[32] However problematic it is for the international tribunals to rely almost exclusively on witness testimony, the problem has had little remedy, at least historically, because little non-testimonial evidence of international crimes has typically been available to most international tribunals.^[33] Unlike Nazi war criminals who left carefully crafted, meticulous documentation of their atrocities, most modern-day mass killers leave few written records,^[34] and because trials of international crimes often take place many years, if not decades, after the crimes occurred, most international tribunals likewise receive little forensic evidence.^[35] Furthermore, most modern atrocities occur in

tribunals have. See, e.g., *Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment, para. 268 (May 29, 2013) (noting that the Chamber admitted a total of 9,756 items of documentary evidence); *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgment, para. 260 n.835 (June 10, 2010); *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, paras. 184, 278, 395, 489(b) & nn.226, 309, 510, 507 (Jan. 14, 2000). In addition, prosecutors in the ICC case against Laurent Gbagbo have promised not only to introduce the testimony of 138 witnesses but also certain government documents. See Tom Maliti, *Prosecutor: We Have Evidence to Prove Case against Gbagbo and Bl/Goudd*, INT'L JUST. MONITOR (Jan. 28, 2016), <http://www.ijmonitor.org/2016/01/prosecutor-we-have-evidence-to-prove-case-against-gbagbo-and-ble-goude/>.

By and large, however, facts are proven at the international tribunals through witness testimony and fact witness testimony: in each of the SCSL's first two trials, the prosecution presented only three expert witnesses out of seventy-five and fifty-nine prosecution witnesses, respectively. *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Judgment, Annex F, para. 21 (Aug. 2, 2007) [hereinafter CDF Judgment]; *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Judgment, paras. 10, 149 (June 20, 2007). Some early ICTR cases similarly featured a few expert witnesses, but many of the more recent cases have featured only one or none at all. As for the ICC, the prosecution called only three expert witnesses out of thirty-six in *Labanga*, see *Labanga Judgment*, supra note 5, 31 FACT-FINDING WITHOUT FACTS, supra note 7, at 14-15. More recent research has only confirmed the problems associated with eye-witness testimony. See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 46-83 (2011); Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769, 769-74 (2012).

32 See GARRETT, supra note 31, at 8-9, 48 (finding that eyewitnesses misidentified 76 percent of the 250 exonerates in the author's study); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 78-79 (2008); Eyewitness Misidentification, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/eyewitness-misidentification/> (reporting that 72 percent of wrongful convictions are caused by eyewitness misidentifications).

33 In a forthcoming empirical study, I document the way in which criminal evidence is changing, particularly in developing societies and particularly with respect to non-testimonial evidence. In short, prosecutors of mass atrocities in developing nations have begun gaining access to greater quantities of non-testimonial evidence, and as the forthcoming piece explains, access to this evidence is poised to transform international criminal fact-finding.

34 See *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, para. 65 (May 21, 1999) [hereinafter *Kayishema Judgment*]. As I explain in a forthcoming piece, *Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions*, the prevalence of non-testimonial evidence of international crimes is correlated with the development status of the location where the crimes took place. As a general matter, trials of international crimes occurring in developed nations feature more non-testimonial evidence than trials of international crimes occurring in developing nations. Because most recent international tribunal prosecutions of international crimes have centered on crimes occurring in developing nations, the bodies prosecuting these crimes have had little access to non-testimonial evidence.

35 ICTY Trial Chambers did receive non-trivial quantities of forensic evidence. It was unusual in that regard among international tribunals. Virtually the only forensic evidence submitted to ICTY Trial Chambers was introduced to prove that a genocide occurred: that is, it proved only that certain largescale massacres did take place and that the victims of those massacres were Tutsi. See, e.g., *Kayishema Judgment*, supra note 34, paras. 325-26, 432. But see *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Judgment and Sentence, paras. 245, 252, 259, 260 (Feb. 25, 2004) (noting testimony by eyewitnesses and medical examiners that several exhumed bodies were identifiable as the remains of specific individuals). Alison Des Forges and Timothy Longman maintain that, "investigators made no systematic effort to gather documentary and forensic evidence linking alleged suspects to specific crimes." Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE

²⁶ Serious inconsistencies also challenge domestic court prosecutions of international crimes. See Ruth A. Kok, *National Adjudication of International Crimes*, in PLURALISM IN INTERNATIONAL CRIMINAL LAW 211, 214-15 (Elies van Sliedregt & Sergey Vasiliev eds., 2014).

²⁷ See *Akayesu Judgment*, supra note 15, at para. 166; see also Stephen A. Saltzburg, *Prior Inconsistent Statements and Collateral Matters*, 19 CRIM. JUST. 45, 45 (2004).

²⁸ FACT-FINDING WITHOUT FACTS, supra note 7, at 21-44.

²⁹ Id. at 44-62.

³⁰ Id. at 11-14; see also THIERRY CRUVELLIER, COURT OF REMORSE: INSIDE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 20 (Chari Voss trans., 2010). There are some exceptions to this rule. For instance, the Khmer Rouge, like the Nazis, documented many of their atrocities, so the Extraordinary Chambers in the Courts of Cambodia (ECCC) did receive large quantities of documentary evidence in Case 001. *Prosecutor v. Kaing Guek Eav "Duch"*, Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 56 (July 26, 2010); HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, SCH. OF LAW, BEYOND REASONABLE DOUBT: USING SCIENTIFIC EVIDENCE TO ADVANCE PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT 5 (2012) ("[T]he Court has relied heavily on documentary evidence, including lists of prisoners who were executed, photographs, and annotations written on 'confessions' of prisoners by their torturers."). Moreover, the ICTY did make more use of some non-testimonial evidence than other current international

places that do not feature the widespread use of documentation or technology that can be so useful in proving a person's whereabouts or other basic facts. Indeed, alibis are wildly popular defenses at many international tribunals^[36] probably because they can be plausibly claimed through a few corroborating witnesses. That is, whereas a defendant in a Western criminal trial who put forth an alibi defense would be expected to present receipts, ATM statements, or similar documentation to prove his presence at the claimed location, no such expectations exist with respect to a Rwandan defendant claiming an alibi because the Rwandan defendant truly might have spent considerable time in a location without generating documentary evidence to prove that he was there.^[37] Even ascertaining who is who can prove problematic at an international criminal trial because international witnesses frequently do not have birth certificates or other probative forms of official identification.^[38]

This lack of non-testimonial evidence renders accurate fact-finding more difficult, and it also increases the distortive potential of all the testimonial deficiencies I have discussed, including and perhaps especially serious inconsistencies. To be sure, fact-finding is a holistic process during which factfinders take account of a host of relevant factors. The extent to which a witness's testimony diverges from her previous representations is certainly one of those factors, but it is not the only one, and it may not even be a particularly important one in a trial that features a substantial quantity of non-testimonial evidence. For instance,

although any criminal defense attorney would cross-examine a prosecution witness about inconsistencies between the witness's testimony and her previous representations,^[39] the availability of non-testimonial evidence, such as documents, surveillance videos, wiretaps, and electronic data, provide defense counsel with other avenues to undermine the witness's testimony. For example, it may not matter much that a witness's testimony sharply diverges from her pre-trial statement if her testimony is strongly corroborated by a surveillance video, or even more to the point-if the witness's testimony is flatly contradicted by the video. In those instances, serious inconsistencies may remain a component of the credibility/reliability assessment that the fact-finder must conduct, but the other, more probative evidence will render that component an insignificant one.

By contrast, in international tribunal proceedings-where witness testimony is often the only evidence presented^[40]-inconsistencies inevitably play a much more prominent role. Defense counsel seeking to undermine prosecution witness testimony but having no non-testimonial evidence by which to do so, frequently place inconsistencies at the center of their cross-examination.^[41] To be sure, defense counsel also advances their clients' cases in other important ways. They present their own witnesses, who often contradict prosecution witness testimony, and they seek to undermine prosecution witness testimony in ways unrelated to inconsistencies. For instance, defense counsel exposes prosecution witness testimony that seems improbable,^[42] they highlight incentives that might motivate witnesses to falsely inculcate the defendant,^[43] and they point out inconsistencies between witnesses.^[44] Despite the fact that international defense counsel

AFTERMATH OF MASS ATROCITY 49, 53 (Eric Stover & Harvey M. Weinstein eds., 2004). The SCSL likewise received virtually no forensic evidence. But see Transcript of Open Session at 39-47, *Prosecutor v. Norman* (June 20, 2005) (SCSL-04-14-T) (testimony of forensic anthropologist William Haglund who, after examining the remains of four victims, determined that they had died from injuries that were consistent with their relatives' descriptions of events).

³⁶ See FACT-FINDING WITHOUT FACTS, *supra* note 7, at 162-65 (reporting that, as of 2010, more than 81 percent of ICTR defendants proffered alibis and that two of three SCSL cases then decided featured alibis).

³⁷ In many countries like Rwanda, Sierra Leone, or the Democratic Republic of the Congo, commercial exchanges are carried out by means of cash or goods. Many transactions, particularly in rural areas, take the form of barter. See, e.g., Paul Cleary, It's the Economy Stupid, *WALL ST. J.* (May 23, 2007), <http://www.wsj.com/articles/SB117987369444611381>; Supporting Economic Growth in East Timor, THE ASIA FOUNDATION, <https://asiafoundation.org/resources/pdfs/EastTimorEconGrowth.pdf>; Stephanie Fahey, The Future of East Timor: Threats and Opportunities for Economic Development of a Small Island State, RES. INST. FOR ASIA AND THE PAC. (RIAP), U. of Sydney, <http://s3.amazonaws.com/zanran-storage/www.usyd.edu.au/ContentPages/25917341.pdf>. Cash exchanges are more prevalent in urban areas. See, e.g., Country Information: Sierra Leone, U.S. DEPT OF STATE, <http://travel.state.gov/content/passports/en/country/sierraleone.html> ("Sierra Leone is a cash economy."); Maurice K. Toroitich, Banking in Rwanda, *Worldfolio.com*, <http://www.theworldfolio.com/interviews/banking-in-rwanda/4147/> ("One of the biggest challenges that we have in Rwanda is that we are still a very cash-based economy."); Foreign Travel Advice: Central African Republic, Gov.UK, <https://www.gov.uk/foreign-travel-advice/central-african-republic/> (last updated Aug. 4, 2016); Foreign Travel Advice: Democratic Republic of Congo, GOV.UK, <https://www.gov.uk/foreign-travel-advice/democratic-republic-of-congo/> (last updated Oct. 21, 2016); Faridah Kulabako, Ugandan Credit Card Uptake Remains Low, *DAILY MONITOR* (Apr. 16, 2012), <http://www.monitor.co.ug/Business/Prosper/-/688616/1387624/-/view/printVersion/-18vsnl9/-lindex.html>; see also Jake Kendall & Jan Sonnenschein, Many Transactions in Sub-Saharan Africa Still in Cash, *GALLUP* (June 11, 2012), <http://www.gallup.com/poll/155126/transactions-sub-saharan-africa-cash.aspx>.

³⁸ For instance, in the Democratic Republic of the Congo, Central African Republic, and Sierra Leone-all locations forming the subject of international criminal trials-only 31 percent, 49 percent and 51 percent of births are registered, respectively. The registration rate for Rwandan births is 82 percent. See UNICEF, THE STATE OF THE WORLD'S CHILDREN 2016: A FAIR CHANCE FOR EVERY CHILD 150-52 tbl.9 (2016).

³⁹ See Kenneth J. Melilli, Examination of a Witness Based on a Prior Statement, 49 *Am.JUR. TRIALS* 501, § 2 (2015) ("There is perhaps nothing more potentially devastating on cross-examination than impeaching a witness with that witness's own prior statement.").

⁴⁰ Alex Whiting, In International Criminal Prosecutions, justice Delayed Can Be justice Delivered, 50 *HARV. INT'L L. J.* 323, 339 (2009).

⁴¹ Even in the prosecution of domestic crimes, it has been recognized that "[i]mpeachment by means of a prior inconsistent statement . . . is one of the most effective means of impeachment." Michael H. Graham, Impeachment of Witness-Prior Inconsistent Statements, 21 *AM. JUR. PROOF OF FACTS* 2D 101, § 1 (2015); see also ROBERTO ARON & JONATHAN L. ROSNER, *How TO PREPARE WITNESSES FOR TRIAL* (1985).

⁴² See, e.g., *Prosecutor v. Ndindabahizi*, Case No. ICTR-2001-71-I, Judgment and Sentence, para. 191 (July 15, 2004) (noting that the "Defence challenges the plausibility and consistency of Witness CGH's testimony that he was present in the room during the Accused's visit to Bourgmaster Karara's house," questioning why the witness would risk being seen by the Accused, who knew him to be a Tutsi, when he had a "room that was reserved for him as a hiding place"); *id.* at paras. 195, 241; *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Sesay Defense Final Trial Brief, paras. 276, 1068 (Aug. 7, 2008) [hereinafter Sesay Defense Final Trial Brief].

⁴³ For ICTR cases, see, e.g., *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Judgment and Sentence, para. 494, n.716 (Sept. 30, 2011) [hereinafter Bizimungu Judgment] (noting that defense counsel made allegations and presented witnesses to show that Witness GJQ had a pattern of lying in order to further his own self-interest and providing examples); *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-17, Judgment and Sentence, para. 167 & n.211 (Feb. 21, 2003) ("[T]he Defence suggested that the witness was testifying against the Accused in the expectation that he would gain an early release from the Rwandan authorities."). As for the SCSL, defense counsel in *Prosecutor v. Brima* [hereinafter AFRC case] alleged that insider witness Gibril Massaquoi had been informed by SCSL investigators that he was a suspect, and he agreed to testify in order to escape an indictment, see Kyra Sanin, U.C. Berkeley War Crimes Studies Center, Special Court Monitoring Program, Update No. 58, Oct. 10, 2005, at 4, and defense counsel in *Prosecutor v. Sesay* [hereinafter RUF case] made similar claims regarding insider witness John Tamue, Transcript of Trial at 10, *Prosecutor v. Sesay* (Oct. 7, 2004) (SCSL-04-15-T).

⁴⁴ See, e.g., Transcript of Continued Trial at 36-37, *Prosecutor v. Karemera* (Mar. 1, 2006) (ICTR-98-44-T) (Defense Counsel asked Trial Chamber to "appoint an

unquestionably employs a multipronged approach when challenging prosecution witness testimony, they also unquestionably focus considerable attention—perhaps the lion's share—on prosecution witness testimony that is inconsistent with previous statements/testimonies. Although I did not gather data on the proportion of cross-examination time that defense counsel devoted to probing inconsistencies, I can say with certainty that, in most cases, such probing occupied a substantial proportion of the cross-examination. Prosecutors likewise spend considerable time probing inconsistencies in the testimony of defense witnesses.

The parties focus so much attention on inconsistencies for three reasons. The first has already been discussed: the lack of non-testimonial evidence in international criminal trials leaves counsel with limited avenues for calling into doubt the credibility of witnesses and the reliability of their testimony. So, with few alternatives available, inconsistencies take center stage.^[45] Second, addressed more thoroughly in Part III, is the prevalence of inconsistencies. That is, counsel focus on inconsistencies because there are a lot of inconsistencies on which to focus—both at the ICTR and elsewhere.^[46] As Part III reveals, 67 percent of prosecution witnesses in the nineteen ICTR cases I studied presented testimony that was in some way inconsistent with their previous representations, and nearly 50 percent testified in a way that was seriously inconsistent. Third and finally, ICTR counsel in particular focus on inconsistencies because a great deal of ICTR testimony features mistakes or lies, and scrutinizing inconsistencies may help to separate the accurate from the inaccurate.^[47]

It is apparent that a great deal of ICTR testimony features mistakes or lies because ICTR trials are filled with witnesses who blatantly contradict one another.^[48] My previous research has shown that more than 90 percent of ICTR cases featured at least one blatant contradiction between witnesses for the defense and witnesses for the prosecution.^[49] Many cases featured far more

than one, and most multiple-defendant cases featured at least one contradiction relating to each defendant.^[50] I considered witness testimony to be blatantly contradictory only where the testimony of one witness was diametrically opposed to the testimony of another, such that both witnesses' allegations could not possibly be true. When witnesses contradict one another in this way, it becomes apparent that one or the other witness was necessarily testifying inaccurately, either on purpose or by mistake. As noted, ICTR cases virtually never featured any non-testimonial evidence to assist in determining which witness's testimony was inaccurate, so the parties naturally looked to inconsistencies. That is, when a prosecution witness testifies that the defendant led a massacre, and defense witnesses claim that the defendant was with them hundreds of miles from the massacre site, and no other evidence of the defendant's whereabouts during the massacre is available, then key differences between the prosecution witness's testimony and her previous representations understandably take on crucial significance.

In sum, inconsistencies play a central role in this study because they play a central role in international criminal trials. Inconsistencies stand as the most high-profile testimonial deficiency confronting international tribunals and the deficiency that provides particularly useful information when witnesses testify contradictorily. To understand international criminal trials, then, a deeper understanding of the inconsistencies that feature so prominently in these trials must be gained.

My focus on the Trial Chambers' assessments of witness testimony needs less explanation. The accuracy of a court's factual findings is of central concern to all court watchers and participants. Although it is impossible to determine whether a court's findings are accurate when the facts are contested, it is possible to evaluate the court's fact-finding methodology. What are the characteristics of the witnesses whom the Trial Chambers credit? How often and for what reasons do the Trial Chambers decline to rely on prosecution witness testimony? The answers to these and similar questions provide important insights into the court's fact-finding methodology, and that methodology helps us to assess the likely accuracy of the court's factual findings. Scholars of any criminal justice system desire the answers to those questions, but often they cannot get them. American scholars, for instance, can learn little about the credibility and reliability assessments made during a criminal trial because American criminal trials end with a jury verdict of guilty or not guilty, and no further information about the jury's assessment of the evidence is available. International tribunals, by contrast, issue extraordinarily long judgments that typically detail all of the evidence presented and the Trial Chamber's assessment of that evidence. Although many criticize the long length of tribunal judgments,^[51] one benefit of such

amicus curiae to investigate the false testimony of Ahmed Mbonkiza" after a second witness's testimony contradicted Mbonkiza's testimony); Bizimungu Judgment, supra note 43 at para. 224 ("The Mugiraneza Defence submits that the Prosecution witnesses allege two different rallies and that both accounts are unreliable."); id. at n.346; Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, paras. 277-278, 335, 3491, 4096 (May 18, 2012); Sesay Defense Final Trial Brief, supra note 42, paras. 833, 850, 873, 1075, 1116, 1256 (Aug. 7, 2008); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Morris Kallon Final Trial Brief, paras. 10, 222, 302, 322-23, 391-93, 435, 531, 535, 713, 740, 763, 807, 812-13, 817 (Sept. 10, 2008); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Gbao-Final Trial Brief, paras. 373, 1429, 1484 (July 31, 2008).

⁴⁵ See, e.g., Bagilishema Judgment, supra note 15, para. 549 ("In the absence of details, the Chamber has looked into the witness's previous written statements.").

⁴⁶ At the SCSL, for instance, 54 percent of witnesses in the AFRC case testified seriously inconsistently; so too did 53 percent of witnesses in the RUF case and 35 percent in Prosecutor v. Norman [hereinafter CDF case]. FACT-FINDING WITHOUT FACTS, SUPRA note 7, at 118-19.

⁴⁷ Some empirical research shows greater levels of inconsistencies among liars. One particularly notable study showed that liars were "significantly more likely than truth tellers to add details to later statements that they had not mentioned in earlier statements." Anneliese Vredeveldt, et al., *The Inconsistent Suspect: A Systematic Review of Different Types of Consistency in Truth Tellers and Liars*, in INVESTIGATIVE INTERVIEWING 183, 189-93 (Ray Bull, ed., 2014). However, other studies show liars to be equally or even more consistent than truth tellers. See id. at 193-94.

⁴⁸ Some ICTR judgments likewise contradict one another. See Mark A. Drumbl, *The Curious Criminality of Mass Atrocity: Diverse Actors, Multiple Truths, and Plural Responses*, in PLURALISM IN INTERNATIONAL CRIMINAL LAW 68, 78, 98 (Elies van Sliedregt & Sergey Vasiliev eds., 2014).

⁴⁹ Nancy Amoury Combs, *A New Look at Fact-Finding at the ICTR: Advances in Judicial Acknowledgement*, 26 CRIM. L.F. 387, 393-94 (2015).

⁵⁰ Id. at 394.

⁵¹ See, e.g., GIDEON BOAS ET AL., 3 INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY: INTERNATIONAL CRIMINAL PROCEDURE 376 (2013); Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 J. INT'L CRIM. JUST. 950, 956 (2005).

careful detailing of the evidence is that it provides scholars with a trove of data that can help us to better understand the way in which international tribunals carried out what may be their most important function: factfinding.

Finally, this section concludes by explaining why the Article centers on ICTR cases, rather than the cases of another international criminal tribunal. In order to have confidence in these findings, a reasonably large number of cases is needed. That need

immediately eliminates the ICC, the SCSL, and the Special Tribunal for Lebanon from consideration because they have decided, at most, only a few cases each. This leaves only the ICTR, the ICTY, and the Special Panels for Serious Crimes in East Timor (Special Panels). Although I have previously researched fact-finding at the Special Panels and found that research to reveal many important insights; for this empirical study, Special Panels

TABLE 1 Starting, ending, and judgments dates for each trial in chronological order

Trial	Starting Date of the Trial	Ending Date of the Chamber's Trial	Date of the Trial Chamber's Judgment
Rutaganda	Mar. 18, 1997	June 17, 1999	Dec. 6, 1999
Semanza	Oct. 16, 2000	June 19, 2002	May 15, 2003
Kajelijeli	Mar. 13, 2001	July 16, 2003	Dec. 1, 2003
Niyitegeka	June 17, 2002	Feb. 28, 2003	May 16, 2003
Gacumbitsi	July 28, 2003	Mar. 1, 2004	June 17, 2004
Muhimana	Mar. 29, 2004	Jan. 20, 2005	Apr. 28, 2005
Seromba	Sept. 20, 2004	June 27, 2006	Dec. 13, 2006
Karera	Jan. 9, 2006	Nov. 24, 2006	Dec. 7, 2007
Renzaho	Jan. 8, 2007	Feb. 15, 2008	July 14, 2009
Setako	Aug. 25, 2008	Nov. 6, 2009	Feb. 25, 2010
Hategekimana	Mar. 16, 2009	Apr. 28, 2010	Dec. 6, 2010
Munyakazi	Apr. 22, 2009	Jan. 28, 2010	July 5, 2010
Ntawukuliyayo	May 6, 2009	June 14, 2010	Aug. 3, 2010
Kanyarukiga	Aug. 31, 2009	May 24, 2010	Nov. 1, 2010
Ngirabatware	Sept. 23, 2009	July 25, 2012	Dec. 20, 2012
Gatete	Oct. 20, 2009	Nov. 8, 2010	Mar. 31, 2011
Nzabonimana	Nov. 9, 2009	Oct. 21, 2011	May 31, 2012
Nclahimana	Sept. 6, 2010	Sept. 22, 2011	Dec. 30, 2011
Nizeyimana	Jan. 17, 2011	Dec. 7, 2011	June 19, 2012

cases would not have been appropriate. Special Panels transcripts are not readily available, and Special Panels judgments, if they exist at all, are exceedingly short and undetailed. ICTY cases also would not have provided an optimal dataset. For one thing, ICTY witnesses are something of an outlier in international criminal trials because, on average, they are markedly better educated than witnesses appearing before other international tribunals, and they are more likely to have had life experiences that enable them to answer the kinds of questions typically posed in a criminal trial. For that reason, ICTY trials featured fewer testimonial deficiencies. Moreover, ICTY Trial Chambers received more non-testimonial evidence than most other international tribunals, ^[52] and this evidence served both to reduce the importance of witness testimony at the ICTY and concomitantly the deficiencies common to such testimony. Thus, I could have studied serious inconsistencies in ICTY witness testimony because there were in fact at least some

ICTY witness testimony that featured such inconsistencies. ^[53] However, the far lower incidence of inconsistencies at the ICTY and their reduced influence would likely have produced a distorted picture that would not have generalized to fact-finding in other, current tribunals, which unfortunately feature more problematic witness testimony and less non-testimonial evidence. The ICTR, by contrast, decided a sufficient number of cases that featured the kind of evidence that also appears in current tribunals, such as the ICC. The size of the dataset that I was able to create gives me confidence in my findings, and the evidentiary profile of the ICTR cases gives me confidence in their generalizability across many international tribunals.

B. Methodology

1. The Cases

As noted in the Introduction, my dataset comprises nineteen

⁵² See *supra* note 30.

⁵³ See Patricia M. Wald, *The Elusive Pursuit of Trust between Prosecutors and judges*, in *THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS* 193, 196 (Martha Minow et al. eds., 2015).

single-defendant cases from the ICTR. [Table 1](#) below shows the cases in chronological order along with the starting date of each trial, the ending date, and the date on which the Trial Chamber issued its judgment in that case.

To facilitate the exploration of any relevant time trends, the dataset includes cases from the beginning, middle, and end of the Tribunal's life. In addition, in order to ensure a representative sample, the dataset includes cases featuring defendants who had high-level, mid-level, and low-level positions and defendants who participated in the genocide in a variety of ways and across a variety of regions in Rwanda. ^[54] Seventy-four-year-old ^[55] businessman and farmer, Yussuf Munyakazi, for instance, was sufficiently low level that ICTR prosecutors sought (unsuccessfully) to refer his case to Rwanda before eventually trying him at the ICTR. ^[56] However, the dataset also features such high-ranking defendants as Elidzer Niyitegeka and Augustin Ndirabatswe, who were Ministers in the Interim Government of Rwanda during the genocide. ^[57] The remaining defendants held a host of other positions, some in the government, ^[58] some in the military, ^[59] and one in the Catholic Church. ^[60]

The cases were decided by a total of twenty-eight judges. ^[61]

⁵⁴ The nineteen cases in my dataset featured crimes in all but two of Rwanda's then-twelve prefectures (Gikongoru and Umutara). Crimes in about half of the prefectures (Butare, Gitarama, Kibungo, Kibuye, Kigali-Rural, Kigali-Ville, and Ruhengeri) were the subject of two or more cases.

⁵⁵ Specifically, Munyakazi was seventy-four years old at the time his judgment was pronounced in 2010. Prosecutor v. Munyakazi, Case No. ICTR-97-36-A-T, Judgment and Sentence, para. 29 (July 5, 2010) (hereinafter Munyakazi Judgment).

⁵⁶ Prosecutor v. Munyakazi, Case No. ICTR-97-36-RI Ibis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, paras. 13-14 (May 28, 2008). The ICTR also sought to refer other cases, see, e.g., Prosecutor v. Kanyarukiga, Case No. ICTR-02-78-1, Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule I Ibis of the Tribunal's Rules of Procedure and Evidence (Sept. 7, 2007); Prosecutor v. Hategekimana, Case No. ICTR-00-55B-R1 Ibis, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana Rwanda (June 19, 2008); Prosecutor v. Gatete, Case No. 2000-61-RIIbis-T, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (Nov. 17, 2008).

⁵⁷ Niyitegeka Judgment, supra note 15, at para. 5; Prosecutor v. Ndirabatswe, Case No. ICTR-99-54-T, Judgment and Sentence at para. 7 (Dec. 20, 2012) [hereinafter Ndirabatswe Judgment].

⁵⁸ Gacumbitsi Judgment, supra note 15, at para. 6 (bourgmestre); Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Judgment and Sentence, para. 1 (Mar. 31, 2011) (hereinafter Gatete Judgment) (bourgmestre); Kajelijeli Judgment, supra note 15 at para. 6 (bourgmestre); Karera Judgment, supra note 15 at para. 1 (prefect); Muhimana Judgment, supra note 15 at para. 4 (conseiller); Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, Judgment and Sentence, para. 1 (Dec. 30, 2011) [hereinafter Ndahimana Judgment] (bourgmestre); Prosecutor v. Ntawukulilyayo, Case No. ICTR-05-82-T, Judgment and Sentence, para. 1 (Aug. 3, 2010) [hereinafter Ntawukulilyayo Judgment] (sub-prefect); Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Judgment and Sentence, para. 5 (May. 31, 2012) [hereinafter Nzabonimana Judgment] (Rwandan Minister of Youth and Associative Movements).

⁵⁹ Prosecutor v. Hategekimana, Case No. ICTR-00-55B-T, Judgment and Sentence, para. 6 (Dec. 6, 2010) [hereinafter Hategekimana Judgment] (Lieutenant in the Forces Armies Rwandaises); Prosecutor v. Nizeyimana, Case No. ICTR-00-55C-T, Judgment and Sentence, para. 1 (June 19, 2012) (hereinafter Nizeyimana Judgment) (captain of military training school); Prosecutor v. Renzaho, Case No. ICTR-97-31-T, Judgment and Sentence, para. 1 (July 14, 2009) [hereinafter Renzaho Judgment] (Colonel in Rwandan army and prefect); Prosecutor v. Setako, Case No. ICTR-04-81-T, Judgment and Sentence, para. 1 (Feb. 25, 2010) [hereinafter Setako Judgment] (Lieutenant Colonel).

⁶⁰ Prosecutor v. Seromba, Case No. ICTR-01-66-I, Judgment, para. 6 (Dec. 13, 2006) [hereinafter Seromba Judgment].

⁶¹ The judges were Judges Aydin Sefa Akay, Florence Rita Arrey, Lennart Aspergen, Salomy Balungi Bossa, Pavel Dolenc, Sergei Aleckseievich Egorov, Robert Fremr, Taghrid Hikmet, Karin Hdkborg, Gberdao Gustave Kam, Lafty Kama, Khalida Rachid Khan, Winston Churchill Matanzima Magutu, Joseph Edward Chiondo Masanche, Erik Mose, Lee Gacugia Muthoga, Yakov Arkadiyevich Ostrovsky, Seon Ki Park, Navanethem Pillay, Mparany Mamy Richard Rajohnson, Arlette Ramarosan, Jai Ram Reddy, William Hussein Sekule, Emile Francis Short, Bakhtiyar Tuzmukhamedov, Andriisa Vaz, and Loyd G. Williams.

More particularly, all of the cases were tried before a panel of three judges, and sixteen of the judges participated in more than one trial in the dataset. ^[62] Each of the defendants in the dataset was convicted of at least one of the charges leveled against him. Cases in which defendants were acquitted of all charges were not included. This dataset involves only prosecution witness testimony, and prosecution witness testimony in trials ending in acquittals likely feature greater deficiencies than prosecution witness testimony in ICTR trials as a whole. Inclusion of these cases, therefore, could have biased the sample.

2. The Witnesses

The nineteen cases in the dataset featured 342 prosecution fact witnesses. The gender, ethnicity, and other relevant characteristics of the 342 witnesses are shown in [Tables 2 through 5](#).

TABLE 2 Gender composition of witnesses in the dataset

Gender	Number	%
Male	255	74.56%
Female	86	25.15%
Unable to Ascertain	1	.29%
Total	342	100%

TABLE 3 Ethnic composition of witnesses in the dataset

Ethnicity	Number	%
Hutu	133	38.89%
Tutsi	192	56.14%
Neither	11	3.22%
Unable to Ascertain	6	1.75%
Total	342	100%

TABLE 4 Accomplice status of witnesses in the dataset

Accomplice Status	Number	%
Accomplices of the Defendant	67	19.59%
Not Accomplices of the Defendant	266	77.78%
Unable to Ascertain	9	2.63%
Total	342	100%

TABLE 5 Imprisonment status of witnesses in the dataset

Imprisonment Status	Number	%
Never Imprisoned for Genocide	264	77.19%
Imprisoned for Genocide but Released before Trial	20	5.85%
Imprisoned for Genocide and Still Detained during Trial	52	15.20%
Unable to Ascertain	6	1.75%
Total	342	100%

⁶² The judges who participated in more than one trial were Judges Akay, Arrey, Bossa, Egorov, Hikmet, Khan, Masanche, Mose, Muthoga, Park, Pillay, Rajohnson, Ramarosan, Sekule, Tuzmukhamedov, and Vaz.

The 342 witnesses in the dataset comprise all of the prosecution fact witnesses who testified in the trials listed in [Table 1](#). The average number of prosecution fact witnesses per case was eighteen. Kanyarukiga had the lowest number, at ten, and Nizeyimana the highest, at forty-one. The vast majority of witnesses in the dataset, 97 percent, were Rwandan.

Why did I choose to study prosecution witnesses instead of defense witnesses or instead of all of the witnesses in a given case? The decision to focus on only one side's witnesses was driven by both practical and substantive concerns. As a practical matter, I had the time to assess the testimony of only a certain number of witnesses. If I had included in the database all of the witnesses in each of the cases, then I would have had to reduce the number of cases that I evaluated. I found that prospect undesirable because I considered it important to include cases that featured a variety of different kinds of defendants and cases that were tried during different periods in the Tribunal's life. Thus, I believed that including more cases would produce more certain results, even though that meant including a smaller number of witnesses per case. Having made the decision to include witnesses from only one side, I selected prosecution witnesses for two reasons. First, if we assume, as most commentators do, that wrongful convictions are a greater injustice than wrongful acquittals,^[63] then we have more reason to be concerned about problematic prosecution testimony than problematic defense testimony. Moreover, although I have not systematically analyzed defense witness testimony, my non-quantitative sense is that it features even more serious inconsistencies than prosecution witness testimony. If that is correct, then an exclusive focus on defense witness testimony would overstate the problematic features of international tribunal testimony. As it stands, my study potentially understates those problematic features, but I would prefer to err in understating than in exaggerating.

3. The Inconsistencies

a. Defining Inconsistencies

I defined an inconsistency as witness testimony that was inconsistent with the witness's pre-trial statements or previous testimony in other cases. International tribunal testimony features numerous inconsistencies, but a nontrivial proportion are minor or concern minor details in the trial. Thus, although I gathered some data on all inconsistencies, I focused my research on "serious" inconsistencies.

This study considers an "inconsistency or omission to be serious either if it pertained to a key issue in the trial or if it pertained to the kind of fact that one is unlikely to forget."^[64] The former category included inconsistencies or omissions "that directly related to the

defendant's actions or overall liability or to the witness's credibility or the weight the Trial Chamber should place on the witness's testimony." ^[65] So, for instance, if a witness's statement described the defendant as engaging in a different sort of criminal behavior than that to which the witness testified, I considered that a serious inconsistency. ^[66] One example would be a witness who testified that the defendant personally killed the victims when the statement reported that the defendant was merely present during the killings. I likewise deemed an inconsistency serious if it called into question the witness's ability to observe the events she described. So, if the witness's pre-trial statement reported that she was 100 meters from the crime site, but she testified that she was five meters away, I considered that a serious inconsistency. ^[67] Finally, I considered it a serious inconsistency when a witness failed to mention in his previous statements/testimonies a fact that was central to his testimony. The most common example of this phenomenon occurred when a witness provided detailed statements that contained no reference to the defendant's participation in the relevant crime, yet in later statements or sometimes only in testimony, the witness claimed that the defendant had played an integral role in the crime. ^[68]

The second category of inconsistencies that I deemed to be serious included those pertaining to the kind of facts that the witness was "unlikely to forget" even if such facts were not of crucial significance to the resolution of the case. So, for instance, I considered it serious "if a defendant testified inconsistently about where he hid because one would expect that he'd remember

⁶⁵ *Id.*

⁶⁶ See, e.g., *Gacumbitsi Judgment*, supra note 15, paras. 54, 192; *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-T, Judgment, para. 605 (Nov. 1, 2010) (hereinafter *Kanyarukiga Judgment*); *Ndahimana Judgment*, supra note 58, para. 464; *Transcript of Continued Trial* at 45, *Prosecutor v. Gacumbitsi* (Aug. 5, 2003) (ICTR-01-64-T) [hereinafter *Gacumbitsi Transcript*]; *Muhimana Transcript*, Apr. 15, 2004, supra note 18, at 60; *Muhimana Transcript*, Apr. 19, 2004, supra note 15, at 55; *Muhimana Transcript*, Apr. 30, 2004, supra note 18, at 68-69.

⁶⁷ For examples of inconsistencies in this category, see, e.g., *Kajelijeli Judgment*, supra note 15, at para. 680; *Karera Judgment*, supra note 15, at paras. 296, 299; *Transcript of Continued Trial* at 73, *Prosecutor v. Gacete* (Nov. 10, 2009) (ICTR-2000-61-T) [hereinafter *Gacete Transcript*].

⁶⁸ See, e.g., *Gacumbitsi Judgment*, supra note 15, at para. 54; *Gacete Judgment*, supra note 58, at para. 203 & n.222; *Kajelijeli Judgment*, supra note 15, at paras. 467, 522; *Kanyarukiga Judgment*, supra note 66, at paras. 257, 311, 496, 605, 609, 611; *Karera Judgment*, supra note 15, at para. 53; *Muhimana Judgment*, supra note 15, at para. 481; *Munyakazi Judgment*, supra note 55, at para. 117; *Ndahimana Judgment*, supra note 58, at paras. 219-231, 233, 235-237, 250-254, 316, 441-450, 454-458, 466-468, 473, 645-646; *Ngirabatware Judgment*, supra note 57, at paras. 196, 844; *Niyitegeka Judgment*, supra note 15, at paras. 101, 154, 158; *Nizeyimana Judgment*, supra note 59, at paras. 114, 369, 1089; *Ntawukulilyayo Judgment*, supra note 58, at paras. 211-213, 218, 273, 370-373, 386-387; *Nzabonimana Judgment*, supra note 58, at paras. 1038, 1071, 1421; *Renzaho Judgment*, supra note 59, at paras. 433, 652; *Prosecutor v. Rutaganda*, Case No. ICTR 96-3-T, Judgment, para. 186 (Dec. 6, 1999) [hereinafter *Rutaganda Judgment*]; *Seromba Judgment*, supra note 60, at para. 237; *Setako Judgment*, supra note 59, at paras. 110-116, 158-175, 178, 206, 271, 346-358, 372-378, 401, 425-429, 435, n.234; *Gacumbitsi Transcript*, Aug. 19, 2003, supra note 19, at 22; *Kajelijeli Transcript*, Dec. 5, 2001, supra note 19, at 72-96; *Kajelijeli Transcript*, Dec. 7, 2001, supra note 19, at 27-28; *Transcript of Continued Trial* at 13, 36-37, *Prosecutor v. Karera* (Jan. 9, 2006) (ICTR-01-74-T); *Karera Transcript*, Feb. 1, 2006, supra note 18, at 24; *Transcript of Continued Trial* at 25-30, 34-36, *Prosecutor v. Muhimana* (Apr. 7, 2004) (ICTR-95-1B-T); *Muhimana Transcript*, Apr. 29, 2004, supra note 19, at 22-24; *Transcript of Continued Trial* at 16-2 1, *Prosecutor v. Ngirabatware*, (Mar. 18, 2010) (ICTR-99-54-T); *Transcript of Continued Trial* at 24-25, *Prosecutor v. Niyitegeka* (Aug. 13, 2002) (ICTR-96-14-T); *Transcript of Continued Trial* at 35-47, *Prosecutor v. Rutaganda* (Oct. 8, 1997) (ICTR-96-3-T); *Transcript of Continued Trial* at 30-38, *Prosecutor v. Rutaganda* (Mar. 9, 1998) (ICTR-96-3-T); *Transcript of Continued Trial* at 33, *Prosecutor v. Setako* (Sept. 3, 1997) (ICTR-04-81-T); *Transcript of Continued Trial* at 12, *Prosecutor v. Setako* (Feb. 24, 2009) (ICTR-04-81-T).

⁶³ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1769); William O. Douglas, Foreword to JEROME FRANK & BARBARA FRANK, NOT GUILTY 11 (1957). As Thomas Starkie put it, the "maxim of the law is ... that it is better that ninety-nine . . . offenders shall escape than that one innocent man be condemned." 9 JOHN WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2497, 1650-51 (Chadbourne rev. 1981).

⁶⁴ FACT-FINDING WITHOUT FACTS, Supra note 7, at 121 (defining "serious inconsistency" in the same way).

whether he hid in the parish church, say, or in the bushes behind his house. Similarly, I considered it a serious inconsistency if a witness testified that she hid with one of her children when her statement reported that she hid with three of her children." ^[69]

b. Methodology for Identifying Inconsistencies

The best method for identifying inconsistencies would be to read each witness's statements/testimonies and then compare the allegations contained therein with the witness's ICTR testimony. Unfortunately, the ICTR, like other international tribunals, places exhibit such as pre-trial statements and testimony before Rwandan courts under seal, so they are not publicly available. Consequently, those seeking to identify inconsistencies at the international tribunals must rely on discussions of those inconsistencies that occur during trial or descriptions of the inconsistencies that appear in the Trial Chambers' judgments. This method of locating inconsistencies is apt to understate them for two reasons. First, as a general rule, inconsistencies in the testimony of prosecution witnesses are mentioned only by defense counsel, and defense counsel almost certainly do not mention all of them. Second, not all testimony is public, so inconsistencies that are discussed in closed testimony and that are not later described in the Trial Chambers' judgment will not become known. As I will discuss below, I cannot remedy the first source of potential understatement, but I have sought to remedy the second.

Relying on defense counsel to highlight serious inconsistencies is suboptimal for two reasons. First, the skill, diligence, and strategic intuitions that defense counsel bring to their representation vary considerably from attorney to attorney. ^[70] So, although the transcripts show that most defense counsel vigorously question prosecution witnesses on perceived inconsistencies, in at least one case in my dataset, defense counsel seemed to eschew this cross-examination technique entirely. ^[71] Second, ICTR trials are largely adversarial, so even when defense counsel are generally inclined to point out inconsistencies, they probably would mention only those whose identification would advance their clients' interests. To be sure, pointing out any inconsistency can serve to undermine a prosecution witness's credibility and reliability, so it may be that defense counsel bring to light most of the inconsistencies that they discover. However, it is reasonable to assume that defense counsel become aware of some inconsistencies that they choose not to point out. For instance, although we can be virtually certain that defense counsel will (enthusiastically) point

out an inconsistency in which the witness's testimony implicates the defendant in more criminal activity than does the pre-trial statement, we cannot be so sure about the reverse. When a witness's testimony is less inculpatory than his pre-trial statement, defense counsel may see good reason to refrain from mentioning the more inculpatory pre-trial statement. Thus, because I learned of inconsistencies only when defense counsel referred to them, I have probably under-counted them to some degree. At the same time, any under-counting may have been ameliorated by the fact that defense counsel has an incentive to exaggerate inconsistencies; thus, they may describe allegations as inconsistent when they are not in fact. Or, more plausibly, they might describe actual inconsistencies in a way that overstates the importance or the degree of the divergence. Cognizant of this possibility, I carefully considered the witnesses' responses to defense counsel allegations and any subsequent re-direct testimony that the prosecution elicited. Finally, the Trial Chambers mentioned a substantial proportion of serious inconsistencies, ^[72] so I cross-checked my assessment of the inconsistencies with that of the Trial Chambers.

The second reason that I likely under-counted inconsistencies stems from the fact that some transcripts are wholly unavailable and some testimony appearing in available transcripts is held in camera, or "closed session", so it does not appear in the publicly available transcripts. ^[73] Testimony that is not publicly available may feature serious inconsistencies, but we will not know unless the Trial Chamber mentions them in its judgment. In order to take account of serious inconsistencies that were "hidden" in this way, I used the following formula (which extrapolates from the publicly available information that we do have) to add an estimated percentage of serious inconsistencies.

$(P + .5Y\&N)C$, where

- P is the percentage of witnesses in the case in question whose serious inconsistencies the Trial Chamber did not mention
- Y&N is the percentage of witnesses in that case for whom the Trial Chamber mentioned some of their serious inconsistencies but not others
- C is the percentage of cross-examination testimony held in camera in that case

I applied the formula on a case-by-case basis, and I added the result reached by the formula to the number of witnesses in that case who testified seriously inconsistently.

As the formula shows, the primary factors in my calculation are the percentage of closed cross-examination testimony in a given case and the percentage of serious inconsistencies that the Trial Chamber in that case failed to mention in its judgment. The formula includes only cross-examination testimony held in camera because defense counsel virtually always raised inconsistencies

⁶⁹ FACT-FINDING WITHOUT FACTS, *supra* note 7, at 122. For a sampling of these sorts of inconsistencies, see, e.g., Gacumbitsi Judgment, *supra* note 15, at para. 192; Gatete Judgment, *supra* note 58, at paras. 96-97; Transcript of Continued Trial at 14-17, Prosecutor v. Gatete (Nov. 3, 2009) (ICTR-00-61-T); Transcript of Continued Trial at 53, Prosecutor v. Gatete (Nov. 5, 2009) (ICTR-00-61-T).

⁷⁰ As Cruvellier put it, "[t]he defense lawyers at the ICTR would always be as heterogeneous as they were individual ...". Up to the very end, there would always be a mix of those who were greedy, and those who had integrity, the mediocre and the inspired, the nitpickers and the parsimonious, the pompous and the first-rate cross-examiners, the brilliant litigants and the boring. Cruvellier, *supra* note 30, at 36.

⁷¹ In Munyakazi, defense counsel failed even to mention the statements of at least 70 percent of the prosecution witnesses. See generally Munyakazi Judgment, *supra* note 55.

⁷² See *infra* text accompanying notes 127 and 128.

⁷³ For the argument that excessive use of in camera testimony denies defendants the right to a public trial, see Transcript of Trial Hearing at 27, Prosecutor v. Ntaganda (Sept. 3, 2015) (ICC-01/04-02/06-T-24-ENG).

during cross-examination. Thus, in camera direct testimony was unlikely to have featured serious inconsistencies. The formula assumes that the larger the proportion of cross-examination held in camera, the more likely that serious inconsistencies have gone unidentified. However, Trial Chambers do mention some serious inconsistencies in their judgments, even when the inconsistencies are discussed only in in camera testimony, so the formula also takes account of the Trial Chambers' willingness to mention serious inconsistencies. In particular, the formula assumes that the larger the proportion of witnesses with serious inconsistencies whom the Trial Chambers mentioned, the less likely that a serious inconsistency discussed in closed testimony went unidentified. As it happens, Trial Chambers varied considerably in their willingness to mention serious inconsistencies, which is why I calculated the formula on a case-by-case basis. Finally, I added half the percentage of witnesses labeled Y&N in that case, estimating that Trial Chambers mentioned half of the serious inconsistencies of those labeled Y&N. Because few witnesses were labeled Y&N, and because I believe the rate of reference is about 50 percent for such witnesses, I did not calculate the percentage on a per-witness basis.

The following example will illustrate the operation of the formula. Assume that through a review of the publicly available testimony, I determined that ten out of twenty-five prosecution witnesses testified seriously inconsistently in a particular case. Assume also that, for three witnesses in this case, some or all of their testimony occurred in camera. In particular, assume that all of Witness A's testimony was held in camera, one-half of Witness B's testimony, and one-tenth of Witness C's testimony was held in camera. Assume also that the judgment in this case failed to reference the serious inconsistencies of 25 percent of the witnesses who we know (from reading the publicly available transcripts) in fact testified seriously inconsistently. Assume finally that for 4 percent of the witnesses in this case who testified seriously inconsistently, the Trial Chamber referenced some but not all of their serious inconsistencies. Assuming these facts, we would first aggregate the proportion of cross-examination testimony for each witness that was held in camera. The aggregation would look like this:

1 (Witness A)
+.5 (Witness B)
+.1 (Witness C)

Our sum is 1.6. We would also aggregate the percentage of witnesses whose serious inconsistencies were not mentioned (which is 25 percent) and one half of the percentage of Y&N witnesses (which is 2 percent) to reach 27 percent. Then we would multiply 1.6 by 27 percent to reach .432 and add .432 to the number of witnesses who we know testified seriously inconsistently in that case—here, ten. Adding .432 to ten leads to an adjusted estimate of 10.43 witnesses who testified seriously inconsistently. Finally, on these facts, the percentage of witnesses who testified seriously inconsistently would increase from 40

percent (10/25) to 41.7 percent (10.43/25). I label the former figure the "understated percentage of serious inconsistencies" and the latter figure the "adjusted percentage of serious inconsistencies."

I used the adjusted percentage of serious inconsistencies for only two calculations in my dataset. First, in reporting the percentage of witnesses who testified seriously inconsistently, I presented both the understated and the adjusted percentage of serious inconsistencies. Second, Graph I shows the percentage of witnesses who testified seriously inconsistently over time, and here, I also used the adjusted percentage of serious inconsistencies. For all other calculations, I used the understated percentage of serious inconsistencies. I did so primarily because virtually none of my other findings would have changed had I used the adjusted percentage of serious inconsistencies.

Most of my calculations relating to serious inconsistencies compared their incidence in different populations of witnesses. So, for instance, I compared the percentage of female and male witnesses who testified seriously inconsistently and the percentage of Hutu and Tutsi witnesses who did so. Adding an estimated percentage to account for the serious inconsistencies that likely appeared in unavailable transcripts obviously increases the overall percentage of witnesses who testified seriously inconsistently, but my calculations showed that that increase is distributed close to evenly across the different sub-populations.^[74] Even though the differences are not substantial, I would have preferred to run regressions on the adjusted data, but because the regressions require categorical data, not continuous data, I had to use the understated percentage of serious inconsistencies.^[75]

4. Details Concerning Statements/Testimonies

In order to determine their influence on the incidence of serious inconsistencies, I gathered data on the number and types of statements/testimonies that witnesses made prior to testifying in the subject trial. Because pre-trial statements are filed under seal, I was able to learn about them only by reading the relevant judgments and transcripts. Unfortunately, this method almost certainly understated the number of statements/testimonies made by witnesses because defense counsel typically mentioned them only when cross-examining the witness about a perceived inconsistency between a particular statement and witness's current testimony. Thus, I had no way to identify statements that defense counsel had no reason to mention. Based on the representations of a defense counsel whom I interviewed,^[76] I did, however, assume that each

⁷⁴ For example, I found the largest difference between the understated percentage of serious inconsistencies and the adjusted percentage in my comparison on the basis of gender. In particular, the difference between the understated percentage of serious inconsistencies and the adjusted percentage was .18 for men and .27 for women. The differences for the other subpopulations—comprising the two ethnicities, the accomplices/non-accomplices, and the imprisoned/non-imprisoned—were less than half the difference for the two genders.

⁷⁵ These regressions were trying to determine the effect of various factors, such as gender or ethnicity, on the probability of a witness's testimony containing a serious inconsistency. Thus, each observation involved one witness, and that witness either did or did not have a serious inconsistency. To make such calculations, the dependent variable must take on the value one for the existence of a serious inconsistency and zero if not. This approach does not allow for values of the dependent variables that are fractions between zero and one.

⁷⁶ Skype Interview with Peter Robinson, Defense Counsel (June 16, 2015).

witness made at least one pre-trial statement for the ICTR.

I categorized the witnesses' previous statements/testimonies into five groups: (1) pre-trial statements taken by ICTR investigators; (2) testimony in previous ICTR cases; (3) statements and testimony taken in genocide trials in Rwandan courts; (4) statements and testimony taken in genocide trials in foreign courts; and (5) statements and testimony taken in gacaca proceedings in Rwanda.^[77] Ideally, I would have subdivided categories (3), (4), and (5) and placed statements and testimony in each of these criminal justice systems into separate categories of their own. I was unable to do so, however, because the transcripts and judgments often did not provide sufficient detail. In a typical cross-examination, for instance, defense counsel might refer to some allegations the witness previously made during gacaca, but the discussion would be unclear as to whether the allegations were made during a gacaca trial or in some sort of pre-trial statement. I do not consider my inability to refine the data in this way to be problematic, however, because my primary goal in considering this set of data was to ascertain whether documents generated by some criminal justice systems were more likely to give rise to inconsistencies than documents generated in other criminal justice systems. The data answer that question, as I will describe in Part III.

5. The Trial Chambers' Assessments of Prosecution Witness Testimony

In considering the Trial Chambers' assessments of witness testimony, I focused on their findings of witness credibility and their willingness to rely on witness testimony. Although many scholars (and some judges) devote considerable attention to probing the nuances of the distinction between "credibility" and "reliability" and the relationship between those concepts and the admissibility and weight of evidence,^[78] I use the following basic definitions. "Credibility" is typically equated with truthfulness, such that a witness who is testifying honestly can be deemed "credible." "Reliability," by contrast, can include credibility, but also encompasses the witness's ability to observe the events about which he or she is testifying.^[79] Sometimes international tribunals appear to confuse credibility with reliability,^[80] but for purposes of

this Article, I took the Trial Chambers at their word. Thus, I classified a witness as credible if the Trial Chamber deemed the witness's testimony to be "credible," even if I suspected—based on the Trial Chamber's additional commentary—that it was, or should have been, referring to reliability.

For purposes of this study, I characterized the Trial Chamber as finding a witness credible or not credible when the Trial Chamber either expressly stated that it found the witness to be credible or not credible,^[81] or when it was absolutely clear from the context and Trial Chambers' other findings about the witness that it considered the witness credible or not credible. For nearly 6 percent of witnesses, I categorized the Trial Chambers' findings as "yes and no," because the Trial Chamber expressly found the witness credible in some respects or for some purposes but not credible in other respects or for other purposes. For instance, the Renzaho Trial Chamber generally treated the testimony of witness ALG with caution, finding that "his evidence may have been influenced by a wish to positively affect the proceedings against him in Rwanda."^[82] In part for that reason, no doubt, the Trial Chamber did not find witness ALG credible with respect to his allegations about the dismissal of Conseiller C61estin Sezibera.^[83] Yet, it did find him to be "consistent and credible" when it came to his testimony regarding Renzaho's meetings in late February and early March.^[84] Finally, I was forced to withhold a credibility assessment for 16 percent of witnesses because the Trial Chambers simply did not provide sufficient information for me to determine whether they found these witnesses credible or not.

Classifying the Trial Chambers' reliance on testimony was more complicated. First, for each witness, I identified all of the allegations that the prosecution sought to prove through a particular witness's testimony. Thus, if the witness testified that the defendant spoke at a rally on April 10th, and delivered weapons on April 11th, and participated in a massacre on April 12th, then I listed each of these three allegations, and I determined whether the Trial Chamber relied on the witness's testimony to prove each of the three allegations. Each allegation, therefore, generated a yes or "no" entry. For most allegations, the classification was straightforward because the Trial Chamber clearly relied on the witness's testimony in finding the allegation to be proved or rejected the witness's testimony in finding the allegation not proved. These allegations generated a "true" "yes" or "no" entry. In addition, however, some allegations generated a "yes"-because the Trial Chamber relied on the witness's testimony to prove the allegation—or a "no"-because

⁷⁷ Rwandan courts were unable to handle the prosecution of all of the offenders arrested following the genocide, so the Rwandan government adapted an indigenous dispute resolution process known as gacaca into a method for prosecuting genocide. PHIL CLARK, *THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA* 55-63 (2010).

⁷⁸ See, e.g., *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1, Decision on Motion for Acquittal, para. 7 (July 3, 2000); MARK KLAMBERG, *EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS: CONFRONTING LEGAL GAPS AND THE RECONSTRUCTION OF DISPUTED EVENTS* 351-57 (2013); Mark Klamberg, General Requirements for the Admission of Evidence, in *INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES* 1016, 1025-29 (Gbran Sluiter et al. eds., 2013); RICHARD MAY & MARIEKE WIERDA, *INTERNATIONAL CRIMINAL EVIDENCE* 107-11 (2002).

⁷⁹ See, e.g., *Prosecutor v. Brčkanin*, Case No. IT-99-36-T, Judgment, para. 25 (Sept. 1, 2004); CDF Judgment, supra note 30, at para. 257; *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgment, para. 487 (Mar. 2, 2009); KLAMBERG, *EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS*, supra note 78, at 174-77; Klamberg, General Requirements for the Admission of Evidence, in *INTERNATIONAL CRIMINAL PROCEDURE*, supra note 78, at 1025; Groome, supra note 13, at 19 n.49.

⁸⁰ See, e.g., *Seromba Judgment*, supra note 60, at para. 65 (finding that YAT's testimony "cannot be deemed credible" because "the information which was

disclosed to him [was] not supported by any other evidence"). Such confusion is not confined to ICTR Trial Chambers. See, e.g., *Prosecutor v. Naletelid Martinovid*, Case No. IT-98-34-A, Judgment, para. 402 (May 3, 2006); KLAMBERG, *EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS*, supra note 78, at 174 (providing additional examples); Klamberg, General Requirements for the Admission of Evidence, in *INTERNATIONAL CRIMINAL PROCEDURE*, supra note 78, at 1025 (providing additional examples).

⁸¹ See, e.g., *Gacumbitsi Judgment*, supra note 15, at para. 84; *Karera Judgment*, supra note 15, at para. 135; *Munyakazi Judgment*, supra note 55, at para. 416; *Secomba Judgment*, supra note 60, at paras. 240-42.

⁸² *Renzaho Judgment*, supra note 59, at para. 113 n.137.

⁸³ See *id.* at paras. 494, 496.

⁸⁴ *Id.* at para. 113.

the Trial Chamber did not-but the reasons underlying those findings undermined the technical classification. For instance, a Trial Chamber might find an allegation about which the witness testified not proven but only because the witness's testimony did not match the prosecution's allegation.^[85] That is, the witness testified as to X, and even though the Trial Chamber may have believed the witness as to X, it did not matter because the existence of X did not support allegation Y that the prosecution was seeking to prove. These allegations generated a "no" entry because, technically speaking, the Trial Chamber did not rely on the witness's testimony to prove the allegation, but I included explanatory notes to make clear that the Trial Chamber's failure to rely on the witness's testimony did not stem from concerns about the witness's credibility or the reliability of her testimony but rather stemmed from a mismatch between the testimony and the allegation. The converse situation also regularly arose with respect to "yes" entries. Here, most commonly, a Trial Chamber would find proven the allegation about which the witness testified, but it would make clear that it did so only because the witness's testimony was corroborated by other (ostensibly more credible or reliable) testimony.^[86] So, this allegation would generate a "yes" entry because, technically speaking, the Trial Chamber did rely on the witness's testimony to prove an allegation, but my comments would provide valuable contextual information about the nature of the yes.

The explanatory information was important because I next considered, as a whole, all of the entries for all of the allegations for a particular witness. Taking all of the entries and explanations into account, I categorized each witness with one of the following four labels: "yes," "no," "yes and no," and "?." I classified a witness as a "yes" if one of the following three situations existed: (1) the Trial Chamber relied on the witness's testimony to find proved all of the relevant allegations; (2) the Trial Chamber relied on the witness's testimony to prove the overwhelming majority of relevant allegations; or (3) some of the allegations relevant to the witness were classified as "no," but they were technical "no's" as described

above and did not reflect any Trial Chamber concerns about the witness's credibility or the reliability of her testimony. Similarly, I classified witnesses as a "no" if one of the following three situations existed: (1) the Trial Chamber did not rely on the witness's testimony and rejected all of the relevant allegations; (2) the Trial Chamber did not rely on the witness's testimony and rejected the overwhelming majority of relevant allegations; or (3) some of the allegations relevant to the witness were classified as "yes," but they were technical "yeses" as described above and did not reflect the Trial Chamber's positive assessment of the witness's credibility or the reliability of her testimony. I classified a witness as "yes and no" when the Trial Chambers relied on some but not all of the witness's testimony to prove allegations. Finally, and very rarely, I classified a witness as "?" when the Trial Chamber simply did not provide enough information for me to determine whether they had relied on the witness's testimony in proving or rejecting an allegation. I classified only two witnesses of the 342 in the dataset as "?"

6. Other Data

My remaining data-gathering needs little explanation. I gathered data about the witnesses' gender, ethnicity, imprisonment status, and accomplice status from the transcripts and judgments. I calculated the time between the subject testimony and the pre-trial statements/testimonies in months, and I rounded to the nearest month. Thus, I classified a statement dated between the first and fifteenth day of a month as occurring during that month, whereas I classified a statement occurring on the sixteenth day or later as occurring during the following month.

III. SERIOUS INCONSISTENCIES: THE WHO, WHAT, WHERE, AND WHEN OF TESTIMONY THAT DIVERGES FROM PREVIOUS REPRESENTATIONS

(To Be Continued)

POSTSCRIPT

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⁸⁵ See, e.g., *Hategekimana Judgment*, supra note 59, at para. 230 (finding that even though defendant provided witness with a laissez-passer, "the Chamber heard no evidence that the Accused also issued laissez-passer to soldiers, Interahamwe, armed civilians or any other members of an alleged joint criminal enterprise"); *Muhimana Judgment*, supra note 58, at paras. 60-61 (finding that the witness's testimony fell "outside the scope" of the Indictment); *Niyitegeka Judgment*, supra note 15, at paras. 273, 287 (finding that even though witness saw the Accused, heard a gunshot, and saw two people dead, the witness did not see who fired the gun or where the gunshot came from, so "there is insufficient evidence in support of the allegation that the Accused killed the man and woman"); *Setako Judgment*, supra note 59, at paras. 409-410 (finding that there was widespread looting in Kigali but there was no "admissible evidence of Setako ordering or encouraging militiamen or soldiers in Kigali who committed looting").

⁸⁶ See, e.g., *Gatere Judgment*, supra note 58, at para. 341 (finding testimony of Witnesses BBJ and BCS "consistent and compelling ... to the extent that they are corroborated"); *Kanyarukiga Judgment*, supra note 66, at para. 440 (noting that "Witnesses CBK, CBT, CDK and YAU are regarded with caution by the Chamber, particularly without corroboration" but their testimonies are corroborated by three other witnesses "regarded as credible"); *Munyakazi Judgment*, supra note 55, at para. 415 (finding testimony by Witnesses MM and MP identifying the Accused to be reliable though based on hearsay "because Munyakazi's role is corroborated by Witnesses LCQ and BWV").