

TRANSFORMING EVIDENCE AND INSTITUTIONS: THE CHANGING FACE AND PROSPECTS OF INTERNATIONAL CRIMINAL LAW

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International criminal law (ICL) is widely regarded as a field in crisis, and the International Criminal Court (ICC) now confronts unprecedented challenges. These struggles have unfolded against the backdrop of longstanding theoretical critiques, particularly those emerging from Third World and other radically critical perspectives. Yet the prevailing narrative of crisis has obscured a profound and consequential transformation within the practice of ICL: a revolution in evidentiary capacity that has significantly enhanced fact-finding accuracy in mass atrocity trials. The global proliferation of smartphones, the ubiquity of social media, and the rise of open-source intelligence have radically altered the evidentiary landscape. Scholars have begun commenting upon the legal aspects of these contemporary forms of evidence; however, what scholars have not yet addressed is the transformation this evidence has wrought to reducing fact-finding uncertainty and proving international crimes. This article's first contribution, then, is to fill that gap by detailing the way that modern forms of digital evidence have transformed ICL's fact-finding enterprise. By examining a host of cases decided in a host of courtrooms, this article shows that, thanks to open-source information and other forms of digital evidence, fact-finding in mass atrocity trials is now on a far firmer foundation.

At the same time, however, the institutional architecture of ICL has undergone a separate—and countervailing—transformation. Earlier tribunals concentrated on single conflicts and prosecuted hundreds of defendants, allowing them to develop deep expertise and cumulative evidentiary records. By

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contrast, today's ICC and domestic universal jurisdiction prosecutions spread limited resources across many conflicts, prosecuting only a handful of cases in each. This dispersal limits institutional knowledge and evidentiary depth, offsetting many of the evidentiary gains from technological change.

As a result of these two transformations, fact-finding in individual cases may be more empirically sound, but the broader system is less able to generate comprehensive historical records, impose accountability on a representative range of perpetrators, or integrate complex evidence across related cases. This article concludes by situating these developments within the larger conception of ICL. This analysis reveals a central irony: when ICL's fact-finding was most problematic, optimism about the field's potential was at its zenith; now, with factual determinations better grounded than ever, the ICL enterprise as a whole is teetering on the edge of collapse.

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I. INTRODUCTION

Although for years commentators have hyperbolically described international criminal law (ICL) as in a state of crisis,¹ the field now unquestionably faces unprecedented challenges. The International Criminal Court (ICC) has relatively few suspects in the dock² and even fewer prospects of gaining custody over high-profile indictees, such as Vladimir Putin and Benjamin Netanyahu.³ Long subject to theoretical

¹ See Joseph Powderly, *International Criminal Justice in an Age of Perpetual Crisis*, 32 LEIDEN J. INT'L L. 1 (2019); Sergey Vasiliev, *The Crisis and Critiques of International Criminal Justice*, in OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 626 (Kevin J. Heller et al. eds., 2020).

² See Franck Petit, *A Court's Chase in Bangui*, JUST. INFO. (Dec. 9, 2024), <https://www.justiceinfo.net/en/139237-court-chase-bangui.html> [<https://perma.cc/RDV8-W86M>] (reporting that in June 2024, the ICC "already knew that it would run out of trials in 2025"). Fortunately, two ICC suspects have been surrendered recently: former Philippine President Rodrigo Duterte and Khaled Mohamed Ali El Hishri of Libya. See Anthony Deutsch & Stephanie van den Berg, *ICC Takes Philippines' Duterte into Custody to Face Murder Charges for Drug War Killings*, REUTERS (Mar. 12, 2025), <https://www.reuters.com/world/asia-pacific/plane-carrying-philippine-ex-president-duterte-icc-delayed-flight-tracker-shows-2025-03-12/> [<https://perma.cc/SR5Z-LYRJ>]; *Statement of the ICC Office of the Prosecutor on the Arrest of a Suspect in the Situation in Libya*, INT'L CRIM. CT. (July 18, 2025), <https://www.icc-cpi.int/news/statement-icc-office-prosecutor-arrest-suspect-situation-libya> [<https://perma.cc/P7Z6-7PB9>].

³ *International Criminal Court Reports Mongolia to Its Oversight Body for Failing to Arrest Putin*, ASSOCIATED PRESS (Oct. 24, 2024), <https://apnews.com/article/putin-mongolia-icc-court-arrest-e0b583253a481b106092897a44c0c249> [<https://perma.cc/RXX9-XJSA>]; Ted Regencia et al., *Netanyahu Meets Trump as Israeli Attacks Continue in Gaza*, AL JAZEERA (Apr. 7, 2025), <https://www.aljazeera.com/news/liveblog/2025/4/7/live-israel-kills-43-in-gaza-orders-palestinians-in-deir-el-balah-to-flee?update=3627452> [<https://perma.cc/73LQ-LSJA>].

critiques from scholars who employ a “third-world” or “radically critical” lens,⁴ the ICC must now also contend with an unparalleled array of practical impediments that include onerous U.S. sanctions,⁵ stealth Israeli intimidation,⁶ and reduced cooperation even from historical supporters.⁷

Although these challenges are all too real and pose grave threats, they may have obscured an ICL transformation which has ameliorated one of the most pressing problems previously bedeviling the field; namely, unreliable fact-finding. Although this problem impacted certain tribunals more than others,⁸ it became clear during the first two decades of international criminal trials that judges in many cases had great difficulty ascertaining core facts with any level of confidence.⁹ This fact-finding uncertainty existed, not because prosecutors and judges were lazy or incompetent. It existed because the evidence available to prove international crimes in these early decades consisted almost entirely of witness testimony.¹⁰ Under the best of circumstances, witness testimony can be unreliable;¹¹ moreover, witnesses tend to have even greater difficulty providing consistent, credible, and reliable evidence of mass atrocities.¹²

Recently, however, both the quality and quantity of evidence available to prove international crimes have improved dramatically, as the technological and communications revolutions of the last decade have made their way to mass atrocity trials. With smart phones in the hands of a large proportion of the world’s citizens,¹³ atrocities—even those occurring in the most remote and impoverished locations—can be

⁴ See Vasiliev, *supra* note 1, at 633-34.

⁵ See Exec. Order No. 14203, 90 Fed. Reg. 9369 (Feb. 6, 2025). Executive Order 14203 imposes asset blocking and U.S. entry restrictions on ICC officials who investigate U.S. nationals or allied personnel without consent, creating a broad chilling effect on many civil society actors. See *Trump Administration’s Sanctions on the ICC Implicates NGOs*, CHARITY & SECURITY NETWORK (Apr. 4, 2025), <https://charityandsecurity.org/news/trump-administrations-sanctions-on-the-icc-implicates-ngos/> [<https://perma.cc/DA33-EMNA>]. For a discussion of the impact of the sanctions on ICC judges, see Stéphanie Maupas, *La vie de Nicolas Guillou, juge français de la CPI sous sanctions des Etats-Unis : « Vous êtes interdit bancaire sur une bonne partie de la planète »* [*The Life of Nicolas Guillou, French Judge at the ICC Under US Sanctions: “You Are Banned from Banking in a Large Part of the World”*], LE MONDE (Nov. 19, 2025), https://www.lemonde.fr/international/article/2025/11/19/nicolas-guillou-juge-francais-de-la-cpi-sanctionne-par-les-etats-unis-face-aux-attaques-les-magistrats-de-la-cour-tiendront_6654016_3210.html [<https://perma.cc/YKT5-GG42>].

⁶ See Harry Davies, *Revealed: Israeli Spy Chief ‘Threatened’ ICC Prosecutor over War Crimes Inquiry*, THE GUARDIAN (May 28, 2024), <https://www.theguardian.com/world/article/2024/may/28/israeli-spy-chief-icc-prosecutor-war-crimes-inquiry> [<https://perma.cc/8E4W-Q9GW>].

⁷ See Alessandra De Tommaso, *The Almasri Case, Italy’s Cooperation with the ICC, and the Request for an Investigation into the Italian Government: Critical Issues*, INT’L LAW BLOG (Mar. 12, 2025), <https://internationallaw.blog/2025/03/12/the-almasri-case-italys-cooperation-with-the-icc-and-the-request-for-an-investigation-into-the-italian-government-critical-issues/> [<https://perma.cc/G6XC-R2G3>].

⁸ As will be discussed more below, ICTY cases suffered from less factual uncertainty than other contemporaneous institutions.

⁹ See NANCY AMOURY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* 4 (2010).

¹⁰ See *id.* at 12.

¹¹ See, e.g., Lisa O’Neill Shermer et al., *Perceptions and Credibility: Understanding the Nuances of Eyewitness Testimony*, 27 J. CONTEMP. CRIM. JUST. 183, 184-87 (2011); Amina Memon et al., *Münsterberg’s Legacy: What Does Eyewitness Research Tell Us About the Reliability of Eyewitness Testimony?*, 22 APPL. COGNIT. PSYCHOL. 841, 842-44 (2008).

¹² See *infra* Part II.

¹³ See Nema Milaninia, *Using Mobile Phone Data to Investigate Mass Atrocities and the Human Rights Considerations*, 24 UCLA J. INT’L L. FOREIGN AFF. 273, 274 (2020) (reporting that “an estimated 5 billion individuals use mobile phones, of which approximately half use smartphones”).

videoed, uploaded, and shared across the globe, often within minutes of their occurrence.¹⁴ And victim-generated videos are only one form of non-testimonial evidence that now routinely appear in mass atrocity trials. Cell phone records, social media accounts, and chat exchanges additionally now provide prosecutors with crucial relevant evidence.¹⁵ It is fair to say that technological advances combined with the ready availability of so-called “open-source” evidence of international crimes have transformed the way in which those crimes are investigated, charged, and proved. The days of witness-only mass atrocity trials are behind us. Contemporary mass atrocity trials now feature copious, credible non-testimonial evidence.¹⁶

Scholars have begun commenting upon these contemporary forms of evidence, with some focusing on the way in which this new evidence interacts with traditional evidentiary rules.¹⁷ Others have explored a host of practical challenges relating to, among other things, authentication, security, bias, deep fakes, and continued access to social media accounts where much of this evidence resides.¹⁸ What scholars have not yet addressed, however, is the transformation this evidence has wrought to reducing fact-finding uncertainty and proving international crimes.¹⁹ This article’s first contribution, then, is to fill that gap. After Part II provides a brief summary of the bad old days of mass atrocity fact-finding, Part III details the way that modern forms of digital evidence have transformed that enterprise. By examining a host of cases decided in a host of courtrooms—including the three most recent ICC cases decided in July and October 2025—Part III shows that, thanks to open-source information and other forms of digital evidence, fact-finding in mass atrocity trials is now on a far firmer foundation. No criminal trial is perfect, but this analysis shows that we now can have much greater confidence in the factual findings that these trials make.

However, at the same time that this evidentiary transformation was taking place, another transformation—this one regarding the institutions that prosecute mass atrocities—has also been underway. As Part IV recounts, the first international criminal tribunals—established to prosecute atrocities occurring in the former Yugoslavia²⁰ and Rwanda²¹ (ICTY and ICTR)—focused sustained attention on one, geographically-confined conflict and held comparatively large numbers of trials.²² Although

¹⁴ For a more detailed discussion of this evidentiary transformation, see *infra* Part III.

¹⁵ See *infra* notes 104–188.

¹⁶ See *infra* Part III.

¹⁷ See *infra* text accompanying note 97.

¹⁸ See *infra* text at notes 96 to 100.

¹⁹ Previous commentators have, however, highlighted the increasing prevalence of open-source evidence in mass atrocity trials. See, e.g., Lindsay Freeman, *Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials*, 41 FORDHAM INT’L L.J. 283 (2018); Rebecca Hamilton, *User-Generated Evidence*, 57 COLUM. J. TRANSNAT’L L. 1 (2018); Federica D’Allesandra & Kirsty Sutherland, *The Promise and Challenges of New Actors and New Technologies in International Justice*, 19 J. INT’L CRIM. JUST. 9, 13 (2021).

²⁰ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 1, May 25, 1993, S.C. Res. 827, U.N. Doc. S/RES/827 (hereinafter ICTY Statute).

²¹ Statute of the International Criminal Tribunal for Rwanda, art. 1, Nov. 8, 1994, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (hereinafter ICTR Statute).

²² The ICTY led the pack, indicting 161 defendants. *Infographic: ICTY Facts and Figures*, UNITED NATIONS INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/content/infographic-icty-facts-figures> [https://perma.cc/6F5F-X9KK] (last visited Jan. 24, 2026). The ICTR indicted 93 defendants, and the Special Panels for Serious Crimes (SPSC) prosecuted 87 defendants. See *The ICTR in Brief*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://unictr.irmct.org/en/tribunal> [https://perma.cc/62JC-5C6C] (last visited Jan. 24, 2026); SPSC

often considered the ICL prototype, that model of international criminal justice has now been left behind. The ICTY and ICTR were followed by a series of *ad hoc* tribunals that, like their predecessors, centered on one geographically discrete conflict, but these newer tribunals prosecuted only a handful of defendants. Fast forwarding to today, mass atrocity trials are now pursued almost exclusively by the International Criminal Court (ICC) and domestic States utilizing nationality and universal jurisdiction.²³ As for the ICC, it is investigating thirteen conflict situations, located all over the globe,²⁴ but it will be exceedingly lucky if it can prosecute even three or four offenders from each conflict.²⁵ Domestic States, for their parts, are now prosecuting

Cases, STAN. LIBRARIES, <https://exhibits.stanford.edu/virtual-tribunals/feature/spsc-cases> [<https://perma.cc/5DV6-U7LD>] (last visited Jan. 24, 2026).

²³ Universal jurisdiction authorizes States to hold perpetrators of certain crimes accountable regardless of where the crime was committed or the nationality of the perpetrator or the victim. *Universal Jurisdiction*, THE CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/> [<https://perma.cc/2QAQ-2LEY>] (last visited July 7, 2026). Many States authorize their courts to exercise universal jurisdiction for crimes such as genocide, crimes against humanity, and war crimes. See, e.g., RESTATEMENT (FOURTH) FOREIGN REL. L. § 413 (AM. L. INST. 2018). States employing nationality jurisdiction typically prosecute their own nationals who have travelled to conflict zones, such as Syria, committed crimes there, and returned home. See, e.g., Oberlandesgericht München [OLG München] [Higher Regional Court of Munich] Apr. 29, 2020, 7 St 9/19 (4), BeckRS 2020, 28596 (Ger.).

²⁴ In addition to its 13 ongoing investigations, the ICC has concluded five investigations. See INTERNATIONAL CRIMINAL COURT, *Situations Under Investigation*, <https://www.icc-cpi.int/situations-under-investigations> [<https://perma.cc/93MY-5X84>] (last visited May 17, 2026). Many more conflicts are the subject of preliminary examinations.

²⁵ Thus far, the ICC has brought, at most, four individuals to trial in any one situation. Specifically, for crimes committed in the DRC, the ICC has prosecuted Thomas Lubanga, Germain Katanga, Bosco Ntaganda, and Mathieu Ngudjolo. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012) [hereinafter *Lubanga Trial Judgment*]; Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute (Mar. 7, 2014) [hereinafter *Katanga Trial Judgment*]; Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2359, Judgment Pursuant to Article 74 of the Statute (July 8, 2019) [hereinafter *Ntaganda Trial Judgment*]; Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute (Dec. 26, 2012) [hereinafter *Ngudjolo Trial Judgment*]. Likewise, for crimes committed in the Central African Republic (CAR), the ICC has prosecuted four defendants. First was Jean-Pierre Bemba Gombo. See Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Mar. 21, 2016) [hereinafter *Bemba Trial Judgment*]; Prosecutor v. Bemba, Case No. ICC-01/05-01/08 A, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" (June 8, 2018). Subsequently, the ICC concluded the trial of Alfred Yekatom and Patrice-Edouard Ngaïssona, see Prosecutor v. Yekatom, Case No. ICC-01/14-01/18, Judgment (July 24, 2025) [hereinafter *Yekatom & Ngaïssona Trial Judgment*]. The trial of one remaining CAR defendant is still underway. See Said Case, INT'L CRIM. CT., <https://www.icc-cpi.int/carII/said> [<https://perma.cc/YBQ4-PBLS>] (last visited July 7, 2026). The ICC has brought to trial only one or two defendants for each of the other situations that has thus far seen a trial or guilty plea. For example, the ICC brought to trial two defendants in the Mali situation, two defendants in the Ivory Coast situation, two defendants in the Kenya situation, one defendant in the Darfur situation, and one defendant in the Uganda situation. See Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Judgment Pursuant to Article 74 of the Statute (June 26, 2024) [hereinafter *Al Hassan Trial Judgment*] (Mali); Prosecutor v. al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016) (Mali); Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15-1400, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions (Mar. 31, 2021) (Ivory Coast); Press Release, Int'l Fed. Hum. Rts. Termination of Ruto and Sang case at the ICC: Witness Tampering Means Impunity Prevails over Justice Again (Apr. 5, 2016), <https://www.fidh.org/en/region/Africa/kenya/termination-of-ruto-and-sang-case-at-the-icc-witness-tampering-means> [<https://perma.cc/HU9T-TTY2>] (Kenya); Prosecutor v. Abd-Al-Rahman, ICC-02/05-01/20, Trial Judgment (Oct. 6, 2025) [hereinafter *Abd-Al-Rahman Trial Judgment*] (Darfur); Prosecutor v. Ongwen, ICC-02/04-01/15, Judgment pursuant to Article 74 of the Statute (Feb. 4, 2021) [hereinafter *Ongwen Trial Judgment*] (Uganda).

more offenders who commit their crimes in distant States,²⁶ but these domestic courts also prosecute only a small number of offenders from each conflict.²⁷

On the one hand, these two transformations have little in common. The evidentiary transformation is just one example of a global technological revolution that impacts every aspect of life as well as virtually every criminal trial, from those involving common domestic offenses²⁸ to those involving genocide. The institutional transformation, by contrast, reflects, at its core, the international community's current unwillingness to devote the resources necessary to prosecute large numbers of offenders per conflict situation. But where these two transformations interact—and not for the good—is in their countervailing impact on fact-finding certainty. Specifically, whereas the introduction of large quantities of non-testimonial evidence has enhanced judicial ability to accurately find facts, the institutional transformation has had the opposite effect. Indeed, because together they prosecuted more than 250 defendants, the ICTY and ICTR were able to develop linguistic competencies, cultural competencies, and a sophisticated geo-political understanding of the relevant conflict and its people. They were also able to prosecute a range of offenders, and their successful prosecutions of senior military and political leaders stemmed directly from evidence produced in earlier trials of lower-level direct perpetrators.²⁹ Institutions that prosecute only a handful of offenders per conflict can realize none of these benefits. Forced to stretch resources across multiple conflict zones, these institutions are unable to collect, translate, analyze, and digest the large quantities of information available to mass atrocity parties and judges. Contemporary institutions are therefore less able to build robust evidentiary records or develop nuanced understandings of the cultures involved.

Part V explores the implications of these two seismic shifts in ICL. On the surface, these two shifts are contrary and countervailing. The evidentiary transformation

²⁶ As Máximo Langer and Mackenzie Eason have compellingly shown, universal jurisdiction cases have been increasing in recent years, with a larger number of countries prosecuting defendants from a larger number of conflicts. Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779, 780-81 (2019).

²⁷ See *Universal Jurisdiction Interactive Map*, TRIAL INT'L, <https://trialinternational.org/universal-jurisdiction-tools/universal-jurisdiction-interactive-map/> [<https://perma.cc/P7BD-R78A>] (last visited Jan. 24, 2026). The Netherlands, for instance, has been comparatively active in prosecuting mass atrocities, and it has prosecuted crimes occurring in Rwanda, Syria, Afghanistan, and Ethiopia, among others. See, e.g., Rb. Den Hague 16 juli 2021, ECLI:NL:RBDHA:2021:10538 (Openbaar Ministerie/Abu Khuder) (Neth.) (Syrian defendant); Rb. Den Hague 22 januari 2024, ECLI:NL:RBDHA:2024:5142 (Openbaar Ministerie/Mustafa A.) (Neth.) (involving Syrian defendant); Rb. Den Hague 15 december 2017, ECLI:NL:RBDHA:2017:16383 (Openbaar Ministerie/Eshetu A.) (Neth.) (Ethiopian defendant) [hereinafter *Eshetu Judgment*]; Rb. Den Hague 15 december 2017, ECLI:NL:RBDHA:2022:4976 (Openbaar Ministerie/Arif) (Neth.) (Afghan defendant) [hereinafter *Arif Judgment*]; Rb.'s-Gravenhage 24 juli 2007, ECLI:NL:RBSGR:2007:BB8462 (Openbaar Ministerie/Mpambara) (Neth.) (involving Rwandan defendant). But it has prosecuted only a few offenders for each of these atrocities.

²⁸ See, e.g., Martin Novak, *Digital Evidence in Appeals of Criminal Cases Before the U.S. Courts of Appeal: A Review of Decisions and Examination of the Legal Landscape from 2016–2020*, 17 J. DIGIT. FORENSICS SEC. & L. art. 3 (2022); SEAN E. GOODISON ET AL., DIGITAL EVIDENCE AND THE U.S. CRIMINAL JUSTICE SYSTEM – IDENTIFYING TECHNOLOGY AND OTHER NEEDS TO MORE EFFECTIVELY ACQUIRE AND UTILIZE DIGITAL EVIDENCE (2015).

²⁹ See Milena Sterio, *The International Criminal Court: Current Challenges and Prospect of Future Success*, 52 CASE W. RES. J. INT'L L. 467, 475-76 (2020) (arguing that the ICTY “built a successful foundation by first prosecuting lower-level leaders before reaching for those at the top, and that the investigations, gathered evidence, and prosecutorial work accomplished during the prosecution of lower-level cases paved the way toward a successful prosecution of [high-level offenders] Karadzic and Mladic”).

has significantly increased the quantity and quality of evidence available in mass atrocity trials whereas the institutional transformation has had the opposite effect. But a more in-depth analysis reveals that these shifts both impact and reflect very different aspects of the ICL project. If ICL were all about pronouncing accurate and justifiable judgments against mass atrocity offenders, then we would have much to celebrate because the evidentiary transformation has immeasurably advanced our collective ability to achieve these ends. But pronouncing accurate and justifiable judgments against mass atrocity offenders has never been the sole or even the primary goal of ICL. At best, it is one building block—and at times a seemingly expendable building block—towards more ambitious goals that include peacebuilding, reconciliation, and the creation of historical records. As Part V explores, then, the institutional transformation does have a markedly negative impact on evidence collection and factual certainty in ICL trials. But it is far more significant for its reflection of the contemporary limits on the overall ICL project. At bottom, the institutional transformation signals the end of the short-lived post-Cold War global collaboration,³⁰ and it manifests the international community's current, growing disillusionment about the moral or instrumental value of international criminal justice.³¹ Indeed, the analysis appearing in Part V reveals a significant irony. Namely, when mass atrocity fact-finding was most problematic, optimism about the prospects of ICL was at an all-time high. Now, when contemporary ICL judgments are more accurate and better grounded than ever before, the field as a whole is verging on collapse.

II. WITNESSES WITH ALL THEIR MANY CHALLENGES: FACT-FINDING IN THE EARLY DECADES OF INTERNATIONAL CRIMINAL JUSTICE

In the early 1990s, after decades in which the idea of criminally prosecuting mass atrocities remained merely an idea, the United Nations Security Council created international tribunals to prosecute the international crimes occurring in the former Yugoslavia³² and Rwanda.³³ These tribunals captured the attention of the world,³⁴ and they were soon followed by additional, if less well-resourced, tribunals to prosecute international crimes occurring in Sierra Leone,³⁵ Cambodia,³⁶ and East Timor.³⁷ Together, these bodies prosecuted more than 300 defendants and did so almost exclusively on the basis of witness testimony. ICTY prosecutors were often able to

³⁰ See DAVID M. MALONE, *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 8-10 (2004).

³¹ See Powderly, *supra* note 1, at 5.

³² See ICTY Statute, *supra* note 20 (establishing the tribunal).

³³ See ICTR Statute, *supra* note 21 (establishing the tribunal).

³⁴ See Nancy Amoury Combs, *International Criminal Justice After Atrocities*, in *THE OXFORD HANDBOOK ON ATROCITY CRIMES* 617, 618-19 (Barbora Holá et al. eds., 2022) (“[A]cknowledged to be a niche field that impacts relatively few individuals, international criminal law has spawned a disproportionately large body of scholarship.”).

³⁵ Statute of the Special Court for Sierra Leone, U.N. Doc S/2002/21246 (Jan. 16, 2002).

³⁶ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Preah Reach Kram. No. NS/RKM/1004/006 (Oct. 27, 2004) (Cambodia).

³⁷ On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offenses, U.N. Doc UNTAET/REG/2000/15 (June 6, 2000).

introduce highly relevant documents and/or video recordings,³⁸ but even at the ICTY, witness testimony was considered crucial.³⁹ At the other contemporaneous tribunals, witness testimony routinely formed the exclusive basis for conviction.⁴⁰ A permanent International Criminal Court was established in 2002 in the midst of these early trials, but it did not hand down its first judgment until 2012.⁴¹

That most international criminal prosecutors of this early era were forced to rely solely on witness testimony did not initially seem problematic.⁴² During the Spring of 1994, approximately 800,000 Tutsi were massacred in plain sight in Rwanda,⁴³ so there were plenty of eyewitnesses to the killings. Brutal, public attacks on the civilians of Freetown, Sierra Leone,⁴⁴ along with widespread destruction in virtually every village in tiny East Timor,⁴⁵ likewise gave rise to thousands of Sierra Leonean and Timorese victims and eyewitnesses. Some of these early international criminal prosecutions targeted low-level defendants who themselves were accused of murder and rape,⁴⁶ and these trials often featured eyewitnesses who could identify offenders and provide crucial incriminating testimony.⁴⁷ In other cases, prosecutors indicted commanders or others in leadership positions.⁴⁸ In these latter cases, prosecutors continued to need the testimony of those who had witnessed the crimes on the ground, but they also needed the testimony of insiders who could connect those crimes to the

³⁸ See, e.g., *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, Appendix C (Int'l Crim. Tribunal for the Former Yugoslavia Sept. 27, 2006); see also Yvonne McDermott, *The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis*, 26 LEIDEN J. INT'L L. 971, 975 (2013); Vladimir Petrović, *A Crack in the Wall of Denial: The Scorpions Video In and Out of the Courtroom*, in NARRATIVES OF JUSTICE IN AND OUT OF THE COURTROOM: FORMER YUGOSLAVIA AND BEYOND 89 (Dubravka Zarkov & Marlies Glasius eds., 2014).

³⁹ See Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 219 (2002) (providing statistics about the massive numbers of ICTY witnesses and maintaining that "witnesses have been vital in establishing the occurrence of the crimes committed"); Gabriele Chlevickaite et al., *Thousands on the Stand: Exploring Trends and Patterns of International Witnesses*, 32 LEIDEN J. INT'L L. 819, 822-24 (2019).

⁴⁰ COMBS, *supra* note 9, at 11-14.

⁴¹ See *Lubanga Trial Judgment*, *supra* note 25.

⁴² Xabier Agirre, *The Role of Analysis Capacity*, in HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 37, 38 (Morten Bergsmo et al. eds., 2017) ("A war crime may create the impression that, being a 'big crime', it must be easy to investigate, because of its mere size and blatant manifestation.").

⁴³ Mark Drumbl, *Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide*, 5 CONTEMP. J. REV. 5, 9 (2002).

⁴⁴ See HUM. RTS. WATCH, GETTING AWAY WITH MURDER, MUTILATION AND RAPE: NEW TESTIMONY FROM SIERRA LEONE, Vol 11, No. 3A (July 1999).

⁴⁵ See Doug Struck, *E. Timor Villages Set Ablaze*, WASH. POST (Sept. 27, 1999), <https://www.washingtonpost.com/wp-srv/WPcap/1999-09/27/051r-092799-idx.html> [<https://perma.cc/VD4K-7CTN>] (discussing systematic destruction of East Timorese villages).

⁴⁶ See, e.g., *Prosecutor v. Kunarac*, Case No. IT-96-23-T, Opinion and Judgment, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) [hereinafter *Kunarac Judgment*]; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 194 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); see also *Deputy General Prosecutor v. Domingos Amati and Francisco Matos*, Case No. 12/2003, Judgment at 3-4 (Special Panel for Serious Crimes Mar. 5, 2005); *Prosecutor v. Agostinho da Costa*, Case No. 07/2000, Judgment, ¶ 30 (Special Panel for Serious Crimes Nov. 10, 2001).

⁴⁷ See, e.g., *Kunarac Judgment*, *supra* note 46, ¶¶ 64, 82, 237.

⁴⁸ See *Prosecutor v. Milošević*, Case No. IT-01-51-1, Indictment, ¶¶ 3-4 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2001); see also Case No. IT-00-39 & 40-PT, *Prosecutor v. Krajišnik & Plavšić*, Amended Consolidated Indictment, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 7, 2002).

high-level military or political defendants who were not direct perpetrators.⁴⁹ These insider witnesses were harder to come by, but a variety of factors motivated some co-conspirators to testify against their former associates.⁵⁰ And their testimony mattered:⁵¹ in early cases, tribunal judges were particularly inclined to credit the testimony of prosecution witnesses,⁵² and they consequently convicted virtually all of the tribunals' early defendants.⁵³

After the tribunals had been operating for several years, scholars began to notice some troubling features of witness testimony in these trials. I authored much of this early work, having immersed myself in trial transcripts that revealed a great deal more about witness testimony than international judges were able or willing to convey in their judgments.⁵⁴ These transcripts revealed three core problems. First, witnesses were often unable or unwilling to provide key details that were highly relevant to the trial's contested facts. These details often concerned dates, distances, numbers, and recognition of photographs, maps, or sketches.⁵⁵ Second, witnesses frequently provided testimony that was substantially inconsistent with their previous testimony or their pre-trial statements.⁵⁶ Finally, witnesses often contradicted each other.⁵⁷ Subsequent scholars examining witness testimony at these tribunals highlighted similar concerns.⁵⁸

⁴⁹ See Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L.J. 323, 348 (2009); Melanie O'Brien & Mark Kebbel, *Interview Techniques in International Criminal Court and Tribunals*, in INVESTIGATIVE INTERVIEWING 91, 92 (Ray Bull ed., 2014) (describing how insider witnesses "provide critical evidence" needed to prove international crimes).

⁵⁰ For instance, some Yugoslav insiders pled guilty and promised to provide evidence against other ICTY defendants in exchange for prosecutors recommending a reduced sentence. Prosecutor v. Deronjić, Case No. IT-02-61-S, Sentencing Judgement, ¶¶ 237, 241 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 30, 2004); Prosecutor v. Babić, Case No. IT-03-72-S, Sentencing Judgement, ¶¶ 71, 75 (Int'l Crim. Trib. for the Former Yugoslavia June 29, 2004). Insiders providing information to other international courts were promised relocation to Western European countries. See *Liberia War Crimes: Rebel Commander on Trial in Finland*, BBC NEWS (Feb. 3, 2021), <https://www.bbc.com/news/world-africa-55916994> [<https://perma.cc/9A26-ENPG>].

⁵¹ See NANCY AMOURY COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW* 193 (2007) (describing Milan Babić who "testified for a grueling eleven days in the *Milošević* case" and Miroslav Deronjić, "labeled by his attorney as a 'crown witness' for the prosecution, [who] testified in a record four cases, spending literally weeks on the ICTY stand").

⁵² See Nancy Amoury Combs, *Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law*, 58 HARV. INT'L L. REV. 47, 83-86 (2017) [hereinafter Combs, *Grave Crimes*].

⁵³ Without considering guilty pleas, the ICTR convicted 14 of its first 15 defendants and the ICTY 13 of its first 15 defendants. The one early ICTR acquittal was of Ignace Bagilishema, Prosecutor v. Bagilishema, Case No. ICTR 95-1A-T, Judgment (June 7, 2001), at 341. The two early ICTY acquittals were of Zejnil Delalić and Dragan Papić. See Prosecutor v. Mucić, Case No. IT-96-21-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) ¶ 1285; Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) ¶ 769.

⁵⁴ COMBS, *supra* note 9, at 179-85.

⁵⁵ *Id.* at 22-39.

⁵⁶ See *id.* at 106.

⁵⁷ See *id.* at 157-66.

⁵⁸ See, e.g., Martin Witteveen, *Closing the Gap in Truth Finding: From the Facts of the Field to the Judge's Chambers*, in COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE: AN INTERDISCIPLINARY APPROACH 383 (Alette Smeulers ed., 2010) (noting such fact-finding difficulties as cultural and linguistic barriers with victims of mass atrocities, among other issues); Mark Findlay & Sylvia Ngane, *Sham of the Moral Court? Testimony Sold as the Spoils of War*, 1 GLOBAL J. COMP. L. 73, 74 (2012) (analyzing the shortcomings of witness testimony in the ICC); Gerhard Anders, *Testifying About 'Uncivilized Events': Problematic Representations of Africa in the Trial Against Charles Taylor*,

These problematic features of witness testimony impaired fact-finding in a host of ways. A prosecution witness's failure to date the crime, for instance, prevents defendants from proving that they were somewhere else when the crime occurred. A witness's failure to estimate distances prevents fact-finders from knowing how far the witness was from the witnessed events and therefore how much weight to place on his testimony. And as I've said elsewhere, prosecution witness testimony that lacks detail is testimony that the defense cannot effectively challenge.⁵⁹

When a witness cannot name the make of the defendant's car, then the witness's account cannot be undermined by evidence showing that the defendant drove a car of a different make. When a witness is unable to say for how long the rebels occupied his village, then the witness's testimony cannot be inconsistent with that of another witness who might estimate a shorter or longer occupation. And when a witness professes not to understand maps or photographs, the witness renders the defense unable to prove that she was never even at the scene of the crime.⁶⁰

Inconsistencies between witnesses' testimony and their pretrial statements posed even greater fact-finding challenges at the early international criminal tribunals. On the one hand, inconsistent testimony is widely viewed as less credible than consistent testimony because inconsistencies are believed to reflect a witness's inaccurate memory or their deception.⁶¹ On the other hand, recent scientific research presents a more nuanced understanding of the relationship between inconsistencies and inaccuracies.⁶² What we know for certain, however, is that inconsistencies were extraordinarily prevalent in early international criminal trials, impacting virtually every witness, particularly the ICTR and the Special Court for Sierra Leone.⁶³ That minor inconsistencies should be so common is unsurprising because people often misremember peripheral details of an event even when they accurately recall its core aspects.⁶⁴ More troubling, however, is the large number of witnesses whose testimony featured serious or substantial divergences from pre-trial statements.⁶⁵ My research revealed, for instance, that approximately 50 percent of ICTR witnesses provided testimony that was seriously inconsistent with the witness's pretrial statements or

24 LEIDEN J. INT'L L. 937, 942 (2011) (describing a witness as "unable to provide dates for most of the events he testified about and [] very vague on specific locations"); see generally TIM KELSALL, *CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE* (2009) chs 6-7.

⁵⁹ COMBS, *supra* note 9, at 44.

⁶⁰ *Id.*

⁶¹ Ronald Fisher et al., *Does Testimonial Inconsistency Indicate Memory Inaccuracy and Deception? Beliefs, Empirical Research, and Theory*, in *APPLIED ISSUES IN INVESTIGATIVE INTERVIEWING, EYEWITNESS MEMORY, AND CREDIBILITY ASSESSMENT* 173, 173-74 (Barry S. Cooper et al. eds., 2013).

⁶² *Id.* at 177-78.

⁶³ COMBS, *supra* note 9, at 118.

⁶⁴ MARTIN A. CONWAY, *Introduction: What Are Memories?*, in *RECOVERED MEMORIES AND FALSE MEMORIES* 1, 11-12 (1997).

⁶⁵ On average, about 50% of ICTR/SCSL witnesses testified in a way that was seriously inconsistent with pre-trial statements. COMBS, *supra* note 9, at 118-20. For that study, I considered testimony to be seriously inconsistent "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." *Id.* at 121.

previous testimony.⁶⁶ Defense counsel relentlessly called attention to these inconsistencies,⁶⁷ and fact-finders were left without objective reference points for their credibility determinations. Although occasionally fact-finders found inconsistencies to fatally undermine witness credibility,⁶⁸ in most cases, they ignored even serious inconsistencies and credited the witness's testimony.⁶⁹ These judgment calls may have been correct—or they may not have been—but fact-finders could rely on little more than their gut intuition in making them.

Equally challenging for fact-finders, witness-only international criminal trials routinely featured witness testimony that diametrically contradicted other witness testimony. I found, for instance, that more than 90% of ICTR and SCSL cases featured witness testimony that was unalterably opposed to other witness testimony in the same case, such that one witness must have been testifying inaccurately.⁷⁰ Again, in order to decide their cases, fact-finders were forced to credit one witness's account over another's, but they usually had little or no objective basis for making that selection. Careful review of transcripts, therefore, revealed that

Prosecution testimony is frequently vague, lacking in detail, and contradicted by defense testimony. Fact finders are typically presented no documentary or forensic evidence on which they can anchor their findings, and they have little ability to assess the witnesses' demeanor because the witnesses speak a different language and adhere to different cultural norms than the fact finders.⁷¹

As a result, I concluded that early international criminal tribunals purported a fact-finding competence they did not possess. Part III, next, suggests that appearances and reality have merged: Contemporary international criminal tribunals have finally and happily gained that fact-finding competence.

III. THE TRANSFORMATION OF INTERNATIONAL CRIMINAL EVIDENCE

The fact-finding uncertainty just described stemmed largely from the two-fold fact that witness testimony predominated during international criminal law's first

⁶⁶ Combs, *Grave Crimes*, *supra* note 52, at 60.

⁶⁷ *Id.* at 59. This is a common strategy of defense lawyers in domestic trials as well. See JAMES LINDSAY GLISSAN, *CROSS-EXAMINATION PRACTICE AND PROCEDURE* 107-108 (2d ed. 1991).

⁶⁸ See, e.g., *Prosecutor v. Musema*, Case No. ICTR-96-13, Judgement ¶¶ 663-65 (Jan. 27, 2000) [hereinafter *Musema Judgment*]; see also *Prosecutor v. Paulino de Jesus*, Special Panels for East Timor, Case No. 6/2002, Judgment, at 9-11 (Jan. 28, 2004).

⁶⁹ See, e.g., *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgement, ¶¶ 592-94 (Mar. 2, 2009); *Prosecutor v. Brima*, Case No. SCSL-2004-16-T, Judgement, ¶ 366 (June 20, 2007); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶¶ 260-62 (Sept. 2, 1998); *Prosecution v. Simba*, Case No. ICTR-01-76-T, Judgement and Sentence, ¶¶ 164-168 (Dec. 13, 2005); *Prosecution v. Muhimana*, Case No. ICTR-95-1B-T, Judgement and Sentence, ¶¶ 27-29, 269-270, 272 (Apr. 28, 2005).

⁷⁰ COMBS, *supra* note 9, at 157-66; Nancy Amoury Combs, *A New Look at Fact-Finding at the ICTR: Advances in Judicial Acknowledgement*, 26 CRIM. L.F. 387, 393-94 (2015) [hereinafter Combs, *New Look*].

⁷¹ COMBS, *supra* note 9, at 7.

decades⁷² and that witness testimony in these trials often contained significant omissions and inconsistencies. As noted above, however, trials at the ICTY featured a non-trivial quantity of non-testimonial evidence, and even at other tribunals, occasional pieces of non-testimonial evidence appeared in occasional cases. When they did, they tended to be highly probative. Indeed, more than one of the rare acquittals at the ICTR appeared to stem directly from exculpatory documents,⁷³ and the ICC's very first conviction was based almost exclusively on short video clips.⁷⁴ However, these cases were rarities for their time. Most trials of this era rose and fell with witnesses.

In the last decade, however, mass atrocity investigations and evidence have undergone a revolution that has tracked the worldwide technological and communications revolutions. Whereas previously those seeking to investigate international crimes and grave human rights abuses needed to find and interview real people who had witnessed or experienced those abuses,⁷⁵ now investigators can access

⁷² See *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgement, ¶ 65 (May 21, 1999); COMBS, *supra* note 9, at 12. Even expert witness testimony was rare, and it almost never concerned the defendant's factual guilt. See *id.* Historically, the proportion of witness testimony varied from tribunal to tribunal. The very first international criminal tribunal, established at Nuremberg, saw few witnesses. Nazi genocidaires kept meticulous written records, enabling Nuremberg prosecutors to base their cases on these records. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 57 (1992); ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 97, 100-01 (1983). Thirty years later, Khmer Rouge offenders likewise reduced their misdeeds to writing, and prosecutors at the Extraordinary Chambers in the Courts of Cambodia relied on these inculpatory documents to convict defendants. Andrew Boyle, *A Long Time Coming: Understanding a Landmark Ruling in the Khmer Rouge Trials*, JUST SEC. (Nov. 19, 2018), <https://www.justsecurity.org/61514/long-time-coming-understanding-landmark-ruling-khmer-rouge-trials/> [https://perma.cc/A7MB-QQ5G] (reporting on the more than 10,000 documents submitted in one of the trials of the Extraordinary Chambers in the Courts of Cambodia).

⁷³ See, e.g., *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A, Judgement, ¶¶ 125, 323, 909 (June 7, 2001); *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Judgement and Sentence, ¶¶ 119-124 (Feb. 25, 2004); *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Judgement and Sentence, ¶¶ 1970, 1976, 1981, 1986 (Dec. 18, 2008); *Prosecutor v. Rwamakuba*, Case No. ICTR Case No. 98-44C-T, Judgement, ¶¶ 70-83 (Sept. 20, 2006) [hereinafter *Rwamakuba Judgment*]; COMBS, *supra* note 9, at 255-56 (discussing the importance of documents to the *Bagilishema* acquittal).

⁷⁴ On the surface, the ICC's first prosecution against Congolese defendant Thomas Lubanga resembled previous trials of African atrocities in that the prosecution presented a passel of witnesses to prove its case. See *Lubanga Trial Judgment*, *supra* note 25, ¶ 11. But the witness testimony in *Lubanga* was unusually problematic, even by international tribunal standards. Some *Lubanga* witnesses recanted their testimony, Caroline Buisman, *Delegating Investigations: Lessons to Be Learned from the Lubanga Judgment*, 11 NW. J. INT'L HUM. RTS. 30, 37 (2013), others testified inconsistently and were shown to have testified inaccurately as to the key factual question in the trial. *Id.* at 37-38. See also Aimée Comrie, *The Investigation of International Crimes Against or Affecting Children: Early Experience at the International Criminal Court*, in *INTERNATIONAL CRIMINAL INVESTIGATIONS: LAW AND PRACTICE* 135, 137 (Adejoké Babington-Ashaye et al. eds., 2018) (reporting that the Trial Chamber declined to rely on any of the 11 child victim witnesses); OPEN SOC'Y JUST. INITIATIVE, *WITNESS INTERFERENCE IN CASES BEFORE THE INTERNATIONAL CRIMINAL COURT* 4 (Nov. 2016), <https://www.justiceinitiative.org/uploads/8a5f5b90-7b75-44b6-ac31-2108a264fe97/factsheet-icc-witness-interference-20161116.pdf> [https://perma.cc/2DS2-TE5E] (describing witness interference in *Lubanga* which led the Trial Chamber to find numerous witnesses to lack credibility). Lubanga was eventually convicted despite prosecution witnesses, not because of them. The key piece of evidence inculpatory to Lubanga in the crime of enlisting and conscripting child soldiers was a video clip showing individuals in his security detail who were self-evidently under 15 years of age. *Lubanga Trial Judgment*, *supra* note 25, ¶ 1262. See also Milaninia, *supra* note 13, at 294 (reporting that "videos depicting children under the age of fifteen were heavily relied upon by the Trial Chamber in its determination that children under the age of fifteen were present within his units and that Lubanga was aware of that fact").

⁷⁵ See Rebecca Hamilton, *Future-Proofing U.S. Law for War Crimes Investigations in the Digital Era*, 57 GA. L. REV. 1505, 1512-13 (2023) ("Traditionally, the collection of war crimes evidence depended on professionals accessing the crime scene to obtain victim and witness testimony and collect physical evidence.").

tremendous quantities of information right on their computer screens. Large proportions of the population—even in relatively impoverished areas—now own cell phones⁷⁶ and can video-record atrocities as they are occurring and post them online mere minutes later. Thus, it is the unprecedented confluence of two technologies—the smartphone and social media—that has produced the “YouTube war.”⁷⁷

To be sure, investigators of old also made use of what we now call open-source information.⁷⁸ Alexa Koenig and her co-authors have detailed historical uses of open-source intelligence from the Crimean War until the 1980s.⁷⁹ But this historical open-source information was generated by journalists,⁸⁰ human rights advocates,⁸¹ and even governments.⁸² Those sources still exist, and public information—particularly deriving from governmental sources—continues to provide prosecutors with highly probative linkage evidence connecting senior mass-atrocity architects with direct perpetrators.⁸³ But information from those sources is now dwarfed by the enormous amounts of content provided by ordinary individuals who eyewitness the crimes in real time. The Arab Spring protests and their backlash brought this phenomenon to the fore,⁸⁴ and the war in Syria exemplified it. By 2017, there were “reportedly more hours of citizen footage documenting the Syrian war than had taken place during the war itself.”⁸⁵ And the amount of open-source information of all kinds has only increased since then. Whereas even in 2017, as many as 300 hours of video footage was uploaded to YouTube every minute,⁸⁶ that quantity had almost doubled a mere

⁷⁶ These changes have been particularly dramatic in locations that have recently seen mass atrocities. In 2000, for instance, only 1% of Africans used cellphones. Jocelyne Sambira, *Africa's Mobile Youth Drive Change*, AFRICA RENEWAL (May 2013). Just over 10 years later, that number stood at 54%. *Id.* And in 2022, a whopping 84% of Africans had cell phones. Libuseng Malephane, *Digital Divide: Who in Africa Is Connected and Who Is Not*, AFROBAROMETER 1, 2 (2022), <https://www.afrobarometer.org/wp-content/uploads/2022/12/AD582-PAP18-Digital-divide-Who-in-Africa-is-connected-and-who-is-not-Afrobarometer-Pan-Africa-Profile-12dec22.pdf> [<https://perma.cc/92FV-VLW5>].

⁷⁷ Stefano Trevisan, *Open-Source Information in Criminal Proceedings: Lessons from the International Criminal Court and the Berkeley Protocol*, 4 GIURISPRUDENZA PENAL WEB 1, 4 (2021).

⁷⁸ Commentators typically define open-source information as “data that is collected from publicly available sources.” See EUROJUST, PROSECUTING WAR CRIMES OF OUTRAGE UPON PERSONAL DIGNITY BASED ON EVIDENCE FROM OPEN SOURCES – LEGAL FRAMEWORK AND RECENT DEVELOPMENTS IN THE MEMBER STATES OF THE EUROPEAN UNION (Feb. 1, 2018).

⁷⁹ See Alexa Koenig et al., *Open Source Fact-Finding in Preliminary Examinations*, in 2 QUALITY CONTROL IN PRELIMINARY EXAMINATION 684-91 (Morten Bergsmo & Carsten Stahn eds., 2018).

⁸⁰ *Id.* at 685.

⁸¹ *Id.* at 689.

⁸² *Id.* at 686; see also Lindsay Freeman, *Prosecuting Atrocity Crimes with Open-Source Evidence: Lessons from the International Criminal Court*, in DIGITAL WITNESS: USING OPEN SOURCE INFORMATION FOR HUMAN RIGHTS INVESTIGATION, DOCUMENTATION, AND ACCOUNTABILITY 48, 48 (Sam Dubberley et al. eds., 2019) (“Pre-internet, the field of open sources was finite, primarily encompassing traditional broadcast and print media and public records that required a trip to the library, city hall, or another physical location for access.”) [hereinafter Freeman, *Prosecuting Atrocity Crimes*].

⁸³ See Daragh Murray et al., *Mapping the Use of Open Source Research in UN Human Rights Investigations*, 14 J. HUM. RTS. PRAC. 563 (2022) (“Interviewees also highlighted the importance of open source information released by governments, and how this can be a source of evidence that proves difficult to refute.”).

⁸⁴ Koenig et al., *supra* note 79, at 693 (observing that “citizen journalism and mobilization through networked public repositories was perhaps most visible during this Arab Spring period of democracy building”).

⁸⁵ *Id.* at 692.

⁸⁶ Danny Donchev, *36 Mindblowing YouTube Facts, Figures and Statistics 2017*, FORTUNE LORDS (July, 29, 2017), <https://web.archive.org/web/20171018105612/https://fortunelords.com/youtube-statistics/> [<https://perma.cc/4FNL-F7TW>].

four years later.⁸⁷ To be sure, mass atrocities represent only a tiny proportion of YouTube videos. But anywhere in the world where armed conflict is occurring, violent real-time images of that armed conflict are appearing on YouTube and other websites.

Open-source information is but one example of the many forms of digital evidence now available to those investigating mass atrocities. Public surveillance cameras, along with a defendant's cell phone records, now provide valuable information about the defendant's location before, during, and after the crimes.⁸⁸ The latter also contain call details showing whom he talked to and for how long.⁸⁹ Further, whereas investigators previously would consider themselves fortunate to find a physical letter containing incriminating evidence, prosecutors now can access a defendant's messaging apps, which often contain a treasure trove of "written" communications that can make or break a prosecution.⁹⁰

As a result of these advances, United Nations human rights fact-finders now rely heavily on non-testimonial evidence⁹¹ and employ a range of new technologies "such as crisis mapping, crowd sourcing, remote sensing, big data analytics and machine learning, video analysis, open-source data mining, forensic architecture, interactive data visualization, cryptographic hashing, and many others."⁹² Initially, international criminal lawyers were comparatively reluctant to dive into these new realms,⁹³ and reasonably so, given the far higher stakes and evidentiary requirements of a criminal trial.⁹⁴ But in recent years, international criminal law practitioners have also been making widespread use both of open-source information and other contemporary forms of non-testimonial evidence.⁹⁵ ICL scholars have commented on the current availability of open-source information and have opined about a wide range of relevant issues. Some have highlighted, for instance, the security risks posed to

⁸⁷ Trevisan, *supra* note 77, at 1 (2021). Also in 2021, 350,000 tweets were posted to Twitter each minute. *Id.*

⁸⁸ See Freeman, *Prosecuting Atrocity Crimes*, *supra* note 82, at 59.

⁸⁹ Milaninia, *supra* note 13, at 277; see also Prosecutor v. Kalite, Case No. CPS/CA/PSA/23-001, Judgement, ¶ 586 (Special Criminal Court of the Central African Republic Dec. 13, 2024).

⁹⁰ See, e.g., Oberlandesgericht [OLGSt] Frankfurt am Main [Higher Regional Court of Frankfurt] Nov. 30, 2021, 5-3 StE 1/20-4-1/20, UJIM, ¶¶ 181-198, 210, 232, 237, 265, 284, 317, 348-350 (Ger.), https://ujim.trialinternational.org/wp-content/uploads/2020/07/Taha-A-J_30.11.2021_1st-in-stance_ENG.pdf [<https://perma.cc/9RUP-RGM8>] [hereinafter *Taha Judgment*].

⁹¹ See, e.g., Murray et al., *supra* note 83; Jay D. Aronson, *The Utility of User-Generated Content in Human Rights Investigations*, in *NEW TECHNOLOGIES IN HUMAN RIGHTS LAW AND PRACTICE* 129, 147-48 (Molly K. Land & Jay D. Aronson eds., 2018).

⁹² See PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS* 762 (2025).

⁹³ See Trevisan, *supra* note 77, at 4 (noting that "until recently courts were generally skeptical of evidence derived from the Internet").

⁹⁴ Stephen Wilkinson, *Standards of Proof in Humanitarian and Human Rights Fact Finding and Inquiry Missions*, GENEVA ACAD. INT'L HUMAN. L. AND HUM. RTS. 49-50, 56 (2012), <https://geneva-academy.ch/wp-content/uploads/2025/11/Standards-of-Proof-in-Fact-Finding.pdf> [<https://perma.cc/646B-8FDJ>].

⁹⁵ See *infra* text at notes 101 to 180. See also Freeman, *Digital Evidence*, *supra* note 19, at 289-90 (noting that more recent ICC cases "have been significantly stronger from an evidentiary standpoint than the initial witness-focused cases" because "telecommunications data, such as call data records, cell site maps, and telephone intercepts, as well as emails, social media posts, and records of financial transactions have all been used to further investigations, corroborate witness testimony, and strengthen prosecutions").

investigators and victims who collect this evidence⁹⁶ and the investigative impediments created by social media companies that remove conflict-related information from their websites.⁹⁷ Other commentators have explored the ways in which traditional evidentiary and authentication rules interact with contemporary open-source evidence.⁹⁸ Finally, some commentators have raised concerns about content, including the bias that can infect this evidence⁹⁹ and the possibility of deep fakes.¹⁰⁰

What scholars have not done, however, is to explore the factual bases of contemporary mass atrocity convictions to see how these new forms of evidence have impacted fact-finding. This Part does just that, and it reveals a transformed fact-finding landscape. Gone are witness-only trials; now, most contemporary mass atrocity convictions fall into one of two categories: convictions that turn almost exclusively on non-testimonial evidence and convictions that are based on a combination of witness testimony and corroborating non-testimonial evidence. In both sets of cases, non-testimonial evidence is a crucial component of the trials' fact-finding and ultimate outcomes.

A prime example of the first category is the Special Tribunal for Lebanon's (STL) only mass atrocity judgment¹⁰¹ which turned almost entirely on cell-phone evidence.¹⁰² Approximately half of the STL's 2020 judgment is devoted to "an excruciatingly detailed analysis of triangulated network mobile phone calls" that preceded the crime.¹⁰³ Non-testimonial evidence also predominated in the ICC's prosecution of

⁹⁶ Alexa Koenig & Lindsay Freeman, *Open Source Investigations for Legal Accountability: Challenges and Best Practices*, in *DIGITAL WITNESS: USING OPEN SOURCE INFORMATION FOR HUMAN RIGHTS INVESTIGATION, DOCUMENTATION, AND ACCOUNTABILITY* 331, 333 (Sam Dubberley et al. eds., 2020); Alexa Koenig, *The New Forensics: Using Open Source Information to Investigate Grave Crimes*, U.C. BERKELEY HUM. RTS. CTR. 10 (2018), https://humanrights.berkeley.edu/wp-content/uploads/2019/02/bellagio_report_july2018_final_0.pdf [<https://perma.cc/R2TQ-YWA2>].

⁹⁷ See, e.g., Hamilton, *Future-Proofing*, *supra* note 75.

⁹⁸ See, e.g., INT'L NUREMBERG PRINCIPLES ACAD., *E-PROCEDURE THE IMPACT OF THE INCREASED USAGE OF DIGITAL EVIDENCE AND SOPHISTICATION OF TECHNOLOGY ON THE RULES AND PRACTICES OF THE INTERNATIONAL CRIMINAL COURT* (2023), https://www.nurembergacademy.org/fileadmin/publications_images/E-Procedure/E-Procedure_Final_Report.pdf [<https://perma.cc/XMF2-E547>]; Rafael Braga da Silva, *Updating the Authentication of Digital Evidence in the International Criminal Court*, 22 INT'L CRIM. L. REV. 941, 943 (2022) ("[T]here is still a gap in how the ICC judges treat digital evidence, especially regarding the issue of its authenticity"); Ricardo Vecellio Segate, *Cognitive Bias, Privacy Rights, and Digital Evidence in International Criminal Proceedings: Demystifying the Double-Edged AI Revolution*, 21 INTL. CRIM. L. REV. 242 (2021); Elizabeth White, *Closing Cases with Open-Source: Facilitating the Use of User-Generated Open-Source Evidence in International Criminal Investigations Through the Creation of a Standing Investigative Mechanism*, 37 LEIDEN J. INT'L L. 228, 229-230 (2024).

⁹⁹ See Yvonne McDermott et al., *Open Source Information's Blind Spot: Human and Machine Bias in International Criminal Investigations*, 19 J. INT'L CRIM. JUST. 85 (2021); Segate, *supra* note 98, at 255-60; HUM. RTS. CTR., *BERKELEY PROTOCOL ON DIGITAL OPEN-SOURCE INVESTIGATIONS*, ¶ 112 (2022).

¹⁰⁰ See Alexa Koenig, *"Half the Truth Is Often a Great Lie": Deep Fakes, Open Source Information, and International Criminal Law*, 113 AM. J. INT'L L. 250, 251 (2019); Trevisan, *supra* note 77, at 4-5; Nikita Mehandru & Alexa Koenig, *Icts, Social Media, and the Future of Human Rights*, 1 DUKE L. & TECH. REV. 129, 135 (2019).

¹⁰¹ Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Judgement (Aug. 18, 2020).

¹⁰² Michelle Burgis-Kasthala, *Time for Justice? Reflections on Narrative Absences and Presences in the Special Tribunal for Lebanon's Ayyash Decision*, 33 EUR. J. INT'L L. 1213, 1232, 1237 (2023) (noting that the prosecution led a "highly circumstantial case that largely relied upon cell site evidence").

¹⁰³ *Id.* at 1237.

Jean Gombo Bemba and his lawyers for witness intimidation.¹⁰⁴ There, the Trial Chamber heavily relied on Western Union records showing the defendants' money transfers to witnesses¹⁰⁵ as well as on call logs and audio recordings into and out of the ICC's Detention Center.¹⁰⁶ Non-testimonial evidence was similarly dispositive in ICC cases from Mali and Libya. Prosecutors charged Malian Ahmad Al Faqi al Mahdi with intentionally directing attacks against religious or historical property;¹⁰⁷ Al Mahdi pled guilty to that crime, no doubt because prosecutors had videos showing him using a pick axe to destroy the historical mausoleums of Timbuktu.¹⁰⁸ Similarly, ICC prosecutors obtained an arrest warrant against Libyan Mahmoud al-Werfalli exclusively on the basis of videos found on social media that appeared to show al-Werfalli participating in the execution of 33 captives.¹⁰⁹ Al-Werfalli died before he could be arrested,¹¹⁰ but if his case had gone to trial, his fate almost certainly would have been decided by those videos.

Finally, a number of domestic mass atrocity prosecutions have turned entirely on non-testimonial evidence. Among the most famous is the Dutch prosecution of four Russian separatists for the downing of Malaysian Airlines flight MH17.¹¹¹ The crash site could not be easily accessed,¹¹² but a team of remote investigators soon gathered conclusive evidence, including satellite images, television broadcasts, and social media accounts from a variety of open sources.¹¹³ Other, far simpler, domestic prosecutions of international crimes have likewise been supported exclusively by non-

¹⁰⁴ Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, ¶ 209 (Oct. 16, 2016) (observing that the case "involves a high number of items of non-oral evidence").

¹⁰⁵ *Id.* ¶ 210.

¹⁰⁶ *Id.* ¶ 215. For an example of the way that the Trial Chamber relied on this evidence, see *id.* ¶¶ 262-281. Indeed, Bemba prosecutors even introduced Facebook screenshots to prove the relationship between the members of the alleged bribery scheme. Trevisan, *supra* note 77, at 2. The defense objected to the admission of the Facebook material, but the Trial Chamber never expressly ruled on the objection. See LEIDEN UNIVERSITY, REPORT ON DIGITALLY DERIVED EVIDENCE IN INTERNATIONAL CRIMINAL LAW 27 (2019). The ICC's bribery trial against Kenyan Paul Gicheru, by contrast, heard the testimony of eight witnesses, see Janet Anderson, *Last Stabs in the Darkness at the ICC in the Kenyan Cases*, JUST. INFO. (June 28, 2022), <https://www.justiceinfo.net/en/102756-last-stabs-darkness-icc-kenyan-case.html> [https://perma.cc/P2C8-SBRN], but prosecutors also introduced recorded phone conversations to support and corroborate witness testimony, Prosecutor v. Gicheru, Case No. ICC-01/09-01/20, Transcript of Trial, at 13 (Feb. 15, 2022); Prosecutor v. Gicheru, Case No. ICC-01/09-01/20, Transcript of Trial, at 25, 82 (Feb. 23, 2022). Gicheru died before the ICC could issue its judgment, see Prosecutor v. Gicheru, Case No. ICC-01/09-01/20-337, Decision Terminating the Proceedings the against Paul Gicheru, Oct. 14, 2022, so we cannot know whether the Trial Chamber would have found the prosecution's allegations proved and, if so, on what evidence it would have relied.

¹⁰⁷ Prosecutor v. al Mahdi, ICC-01/12-01/15, Judgement and Sentence, ¶ 10 (Sept. 27, 2016).

¹⁰⁸ Witness, Field Note: *Capturing Multiple Elements of a Crime on Camera: International Criminal Court v. al Mahdi*, at 5, https://librarywebfiles.s3-us-west-2.amazonaws.com/Training+Materials/Training+PDFs/Video+as+Evidence+Guides/English/VAE_AIMahdi_FieldNote_v1_0_20210329.pdf [https://perma.cc/Q54U-YMXN]. See also Trevisan, *supra* note 77, at 2 (noting that "Online OSI such as satellite imagery, videos, and geolocation helped lead to" Al Mahdi's conviction).

¹⁰⁹ Prosecutor v. Al-Werfalli, Case No. ICC-01/11-01/17, Warrant of Arrest, ¶¶ 11-22 (Aug. 15, 2017).

¹¹⁰ See Prosecutor v. Al-Werfalli, Case No. ICC-01/11-01/17, Decision Terminating Proceedings Against Mr. Mahmoud Mustafa Busayf Al-Werfalli, ¶ 5 (June 15, 2022).

¹¹¹ See Michael Plachta, *Dutch Court Convicts Three for 2014 Downing of MH17 over Ukraine*, 38 INT'L ENF'T L. REP. 482, 482-85 (2022).

¹¹² See Erwin Vermeij et al., *The Outcome of the Forensic Triage Preceding Disaster Victim Identification in the Downing of Malaysia Airlines Flight 17*, 7 FORENSIC SCI. RSCH. 566, 566-67 (2022).

¹¹³ See BELLINGCAT, MH17 THE OPEN SOURCE INVESTIGATION THREE YEARS LATER 1 (2017).

testimonial evidence. Numerous convictions for the war crime of inflicting humiliating or degrading treatment, for instance, have been wholly based on social media posts featuring photos of defendants posing with dead (often decapitated) combatants.¹¹⁴ Convictions for more serious international crimes can have similar evidentiary profiles. Syrian rebels fighting against former President Assad's government forces seemed particularly inclined to video their violent crimes, and the courts of several European countries have relied on these videos to convict defendants for the executions and beatings that the videos depict.¹¹⁵ More recently, such "trophy videos" have also connected paramilitary commanders to war crimes in Sudan.¹¹⁶ Even Israeli soldiers, travelling for tourism, can be vulnerable to criminal proceedings based entirely on videos of their activities in the Gaza strip.¹¹⁷

Most recent mass atrocity prosecutions, however, do not rely exclusively on digital evidence, but rather fall into the second category discussed above: namely, trials that feature significant quantities of both witness testimony and non-testimonial evidence. Four recent ICC cases exemplify this phenomenon. In 2021, the ICC convicted Dominic Ongwen, a former Lord's Resistance Army (LRA) child soldier, of 61 war crimes and crimes against humanity.¹¹⁸ The *Ongwen* Trial Chamber heard the testimony of a whopping 179 witnesses,¹¹⁹ and most of the relevant events were described

¹¹⁴ See, e.g., *Prosecutor v. Saeed*, Göta Court of Appeal, Case No. B 939-19, Feb. 19, 2019 (Swed.), https://ujim.trialinternational.org/wp-content/uploads/2020/07/Saeed_24.09.2019_2nd-instance_ENG.pdf [<https://perma.cc/PZN4-E3FF>] (affirming District Court conviction of defendant for war crimes); *Prosecutor v. Jebbar Salman Ammar*, District Court of Pirkanmaa, Case No. R 16/1304, Mar. 18, 2016 (Fin.), https://ujim.trialinternational.org/wp-content/uploads/2023/04/Jebbar-Salman-Ammar_18.03.2016_1st-instance_ENG.pdf [<https://perma.cc/55Z3-SADL>]; *Prosecutor v. Hadi Habeeb Hilal*, District Court of Kanta-Häme, Case No. R 16/214, Mar. 8, 2016 (Fin.), https://ujim.trialinternational.org/wp-content/uploads/2023/04/Hadi-Habeeb-Hilal_22.03.2016_1st-instance_ENG.pdf [<https://perma.cc/7NKR-ZD3Z>]; *Prosecutor v. Ahmed Jabbar Hasan*, District Court of Helsinki, Case No. R 18/6593, Jan. 10, 2019 (Fin.), https://ujim.trialinternational.org/wp-content/uploads/2019/05/Jabbar_Hasan_10.01.2019_1st-instance_ENG.pdf [<https://perma.cc/REG2-9WGE>]; *Prosecutor v. Benoitzon, Blekinge TR* [Dist. Ct.] 2023 p. 16-17 B 2759-21 (Swed.) (discussing the photo and video evidence the trial court relied on for the conviction); *Prosecutor v. FI, Göteborgs TR* [Dist. Ct.] 2023 p. 18-19 B 7721-21 (Swed.) (discussing defendant's posts that depicted images of mutilated bodies displayed at Naem Square); TRIAL INTERNATIONAL, UNIVERSAL JURISDICTION ANNUAL REVIEW 2021, at 57 (2021) (reporting that defendant's mistreatment of the corpse of an enemy combatant was "captured on video").

¹¹⁵ See, e.g., *Prosecutor v. Al-Mandlawi, Hovrätt [HovR] [Court of Appeals]* 2016 p. B 5306-15 (Swed.) (basing convictions on films showing defendants' participation in murders); TRIAL INTERNATIONAL, MAKE WAY FOR JUSTICE #3: UNIVERSAL JURISDICTION ANNUAL REVIEW 2017, at 50-51 (2017), https://trialinternational.org/wp-content/uploads/2022/05/UJAR-MEP_A4_012.pdf [<https://perma.cc/3EAF-VKPG>] (discussing Mouhannad Droubi's conviction of "extremely gross assault" as violations of Common Article 3 and customary international law after a video was posted to the defendant's Facebook page which showed the defendant and others hitting and kicking the victim "with a truncheon, a whip, a pair of pliers and with bare hands").

¹¹⁶ See Sanjana Varghese et al., *How "Trophy" Videos Link Paramilitary Commanders to War Crimes in Sudan*, N.Y. TIMES (Dec. 31, 2024), <https://www.nytimes.com/video/world/af-rica/100000009893408/sudan-war-crimes-rsf.html?searchResultPosition=1> [<https://perma.cc/4JRG-BRVC>].

¹¹⁷ Amir Tibon, *How a War Crimes Arrest Warrant in Brazil Sent Israeli into Panic Mode*, HAARETZ (Jan. 5, 2025), <https://www.haaretz.com/israel-news/haaretz-today/2025-01-05/ty-article/highlight/how-a-war-crimes-arrest-warrant-in-brazil-sent-israel-into-panic-mode/00000194-36a8-ddaf-adb7-7fa880340000> [<https://perma.cc/45FJ-GUPL>].

¹¹⁸ See Press Release, Int'l Crim. Ct., Dominic Ongwen Sentenced to 25 Years of Imprisonment (May 6, 2021), <https://www.icc-cpi.int/news/dominic-ongwen-sentenced-25-years-imprisonment> [<https://perma.cc/Y5D5-5VTR>].

¹¹⁹ *Ongwen Trial Judgment*, *supra* note 25, ¶¶ 19, 22, 251.

by multiple witnesses.¹²⁰ However, most of these events were also discussed in LRA radio intercepts.¹²¹ Thus, for virtually all of its findings—from broad background facts¹²² to the very specific facts that supported each of the dozens of individual crimes for which Ongwen was convicted—the Trial Chamber detailed both the witness testimony supporting the finding as well as the relevant radio intercepts which confirmed those witness accounts.¹²³ Indeed, although prosecution witness testimony in Ongwen featured many of the same omissions and inconsistencies as witness testimony in previous cases,¹²⁴ the *Ongwen* defense nonetheless found itself unable to plausibly contest many of the prosecutor's claims precisely because Ongwen had incriminated himself so thoroughly on the radio communications.¹²⁵

¹²⁰ See, e.g., *id.* ¶ 1076 (“The Chamber notes that several witnesses testified about Dominic Ongwen’s promotion to the top of Sinia brigade . . .”); *id.* ¶ 1159 (“Several witnesses testified about an attack on Patongo in which Dominic Ongwen participated as commander of Oka Battalion.”); *id.* ¶¶ 1093-1104 (describing testimony of a number of witnesses).

¹²¹ The importance of these intercepts was already evidenced by Ongwen’s ardent objection to their admission, *id.* ¶ 615, and the sixty-two pages of the judgment that the Trial Chamber devoted to describing the intercepts, logbooks summarizing and translating the intercepts, and the testimony about the intercepts. See *id.* ¶¶ 614-810.

¹²² One such example is the “organisational features of the Sinia Brigade.” *Id.* ¶¶ 883-892.

¹²³ Many dozen examples of this phenomenon exist, but due to space constraints, this footnote will feature only a representative sample. See, e.g., *id.* ¶ 1107 (“Beyond witness evidence, there is ample evidence in the records of intercepted radio communications of orders having been given to LRA soldiers to direct violence against civilians, and that the reason given was collaboration with the Government of Uganda, or even mere absence of support for the LRA.”); *id.* ¶ 1160 (reporting on the LRA attack on the Lagile IDP Camp by describing the testimony of Witness P-0379 and reporting that “[a]ccording to both the ISO and UPDF logbooks, Dominic Ongwen reported to Joseph Kony after the attack, stating that he had burnt some houses in the camp, killed a number of civilians, and abducted others”); *id.* ¶ 884 (noting that the finding regarding Ongwen’s predecessor as Sinia brigade commander was confirmed both by “[w]itness evidence” and “ISO logbook entries of intercepted communications for 20 September 2002, 2 December 2002, and 17 September 2003,” which list the brigade commander); *id.* 303 n.1584 (citing witness testimony and radio intercepts to support factual finding about the organizational structure of the Sinia Brigade); *id.* ¶¶ 895-901 (describing the witness testimony and radio intercepts supporting the finding that the LRA “obtained new fighters through abductions of civilians”); *id.* ¶¶ 1014-1016 (citing witness testimony and radio intercepts to support factual findings about Ongwen’s command position in the Sinia Brigade); *id.* ¶ 1071 (“The records of intercepted radio communications indicate that, in the second half of 2003, Dominic Ongwen progressed within the LRA hierarchy twice, by order of Joseph Kony.”); *id.* ¶ 1128 (“In an intercepted communication of 10 October 2003, Vincent Otti reported to Joseph Kony that he had sent soldiers to attack Pajule trading centre, and Joseph Kony responded by instructing Vincent Otti to make civilians his main target, because they were the ones making the UPDF fight the LRA.”).

¹²⁴ As in cases of old, numerous witnesses gave testimony inconsistent with their pretrial statements. *Id.* ¶¶ 384, 392, 428-30, 483, 503. Other witnesses were unable to provide dates or other highly probative details. *Id.* ¶¶ 311, 327-28, 350-52. Finally, witnesses often provided testimony flatly contradicting the testimony of other witnesses. *Id.* ¶¶ 316, 365.

¹²⁵ For example, a crucial factual question concerned the impact of Ongwen’s injury and arrest. See *id.* ¶ 1018. Although the parties agreed that Ongwen had been arrested and had also spent some time in the sick bay following his injury, they disagreed about the amount of time and most importantly about Ongwen’s activities and continued authority while confined. *Id.* In particular, the defense maintained that Ongwen “‘spent the next one to one and a half years in sickbay’, did not retain command of his unit at the time, and, in the final instance, could not have participated in the LRA attack on Pajule in October 2003.” See *id.* However, the radio intercepts showed Ongwen’s heavy involvement in Sinia Brigade activities throughout this period, see *id.* ¶¶ 1028, 1044, 1046-1048, 1050, and the Trial Chamber relied on them along with witness testimony, see, e.g., *id.* ¶ 1052 (“There is a great amount of detail both in the record of the intercepted communication and in the testimony of P-0231, which leads the Chamber to conclude that both sources refer to the same event and complement each other.”) to conclude that “any disruption to Dominic Ongwen’s exercise of his powers as Oka battalion commander was limited in time” as a result of his injury, see *id.* ¶ 1037, and that his “arrest in April 2003 did not for any significant period interrupt the exercise of his authority as commander,” *id.* ¶ 1063; see also *id.* ¶ 1070 (“Importantly,

The ICC's 2024 conviction of Al Hassan Ag Abdoul Aziz also featured a blend of testimonial and non-testimonial evidence, but non-testimonial evidence was even more predominant. After Ansar Dine's takeover of Timbuktu in 2012, Al Hassan became a senior member of the Islamic police, and in that role, he also participated in the work of the Islamic court.¹²⁶ Like *Ongwen*, the *Al Hassan* Trial Chamber heard the testimony of a large number of witnesses,¹²⁷ but it also had before it a treasure trove of documents deriving from Ansar Dine, the Islamic Police, and the Islamic Court,¹²⁸ as well as videos showing Al Hassan's presence at and participation in various specific crimes.¹²⁹ For many of the relevant facts, therefore, the Trial Chamber relied exclusively on non-testimonial evidence.¹³⁰ The Trial Chamber supported other factual findings with both witness testimony and corroborating non-testimonial evidence.¹³¹ Finally, the large quantities of non-testimonial evidence prevented Al Hassan, like *Ongwen* before him, from credibly challenging many of the core facts that formed the basis for his convictions because those facts were also supported by contemporaneous documents or videos.¹³² Indeed, although the few charges for which Al Hassan was acquitted generated sharp criticism because they concerned crimes of sexual violence,¹³³ it is likely no coincidence that prosecutors sought to prove many

further analysis of the logbook evidence militates against allowing for the possibility that the consequences of the injury continued to affect the exercise of his authority as a senior LRA commander.”).

¹²⁶ Press Release, Int'l Crim. Ct., Situation in Mali: Mr Al Hassan Convicted of War Crimes and Crimes Against Humanity Committed in Timbuktu (June 26, 2024), <https://www.icc-cpi.int/news/situation-mali-mr-al-hassan-convicted-war-crimes-and-crimes-against-humanity-committed> [<https://perma.cc/FMV4-ZXY2>].

¹²⁷ The Trial Chamber heard the testimony of 107 witnesses. *See Al Hassan Trial Judgment*, *supra* note 25, ¶ 33.

¹²⁸ *See id.* ¶ 333-344.

¹²⁹ *See id.* ¶ 763-764 & n. 2340 (involving Al Hassan's participation in flogging two men); *id.* ¶ 769, 787 (describing Al Hassan's presence at the flogging of a couple who had an out-of-wedlock child).

¹³⁰ For instance, many of the crimes for which Al Hassan was convicted are based on police reports that Al Hassan drafted and signed and that formed the basis for the Islamic Court judgments against the victims. *See, e.g., id.* ¶¶ 981-998, 1075. Other facts were also proven solely by non-testimonial evidence. *See, e.g., id.* ¶ 767 (involving a police report that Al Hassan signed that stated that the victim “was ‘interrogated and tortured, but to no avail’”); *id.* ¶¶ 811, 816, 818 (relying on “written reports from the *Hesbah* and the Islamic Police . . . as well as photographs depicting the flogging” of three couples).

¹³¹ As with *Ongwen*, far more examples of this phenomenon exist than can be included here, so the following is but a representative sample. *See id.* ¶¶ 424-425 (reporting that for the factual findings concerning the 2012-2013 conflict in Northern Mali, the Trial Chamber relied on a series of named witnesses and a series of documents); *id.* ¶ 704 n.2097, ¶ 708 n.2109 (noting that for the factual findings concerning rules on tobacco, the Chamber relied on a series of witnesses and “video recordings relating to the burning of tobacco by members of Ansar Dine/AQIM in Timbuktu in 2012”); *id.* ¶ 742 & n. 2231 (reporting that for findings regarding the Crisis Committee, the Trial Chamber relied on a series of witnesses, one of whose testimony was corroborated by minutes of the Crisis Committee meetings); *id.* ¶ 761 (reporting that with respect to the flogging of two young men, the Trial Chamber relied on a witness along with “associated video evidence”); *id.* ¶ 819 (reporting that with respect to a victim's amputation, the Trial Chamber relied on a series of witnesses in addition to “photographic and video evidence of the amputation and its aftermath, as well as the Islamic Court's written judgment in the case”); *id.* ¶¶ 1030-1031 (describing the witness testimony and non-testimonial evidence on which the Trial Chamber relied for its conclusions about the demolition of the mausoleums); *id.* ¶ 1078 (finding, on the basis of witness testimony and videos, that “Al Hassan brought sentenced persons to the punishment site”).

¹³² *Id.* at n.2467 (defense unable to deny Al Hassan's presence at the flogging, encircling the victim along with other members of the Islamic police, but claimed that Al Hassan was “‘simply standing in the background’ . . . as ‘an irrelevant bystander,’” a claim the Trial Chamber rejected).

¹³³ *See, e.g.,* International Federation for Human Rights, *Al Hassan Case: A Welcomed Conviction that Falls Short of Justice for Victims of Gender-based Crimes*, June 26, 2024, <https://www.fidh.org/en/region/Africa/mali/al-hassan-case-a-welcome-conviction-that-falls-short-of-justice-for> [<https://perma.cc/66C9-SEFY>] (observing that the *Al Hassan* “verdict is tainted with the

of those allegations solely with witness testimony.¹³⁴ Although in years past, allegations supported only by witness testimony were both standard fare and more than sufficient to ground a conviction, they now are at substantial risk of being rejected.

The ICC convicted three defendants in 2025, issuing a judgment against Alfred Yekatom and Patrice-Edouard Ngaïssona of the Central African Republic in July 2025¹³⁵ and another against Abd-Al-Rahman of Sudan in October 2025.¹³⁶ The crimes at issue in *Abd-Al-Rahman* took place in 2003 and 2004,¹³⁷ so before many of the technological advances canvassed in this article had become so prevalent. Not surprisingly, then, witness testimony predominated in *Abd-Al-Rahman* and gave rise to just the sort of the factual uncertainties that also previously predominated. The Trial Chamber highlighted widespread inconsistencies between testimony and pretrial statements,¹³⁸ instances of lying,¹³⁹ interpretation difficulties,¹⁴⁰ and witnesses' inability to provide relevant details.¹⁴¹ Despite these concerning features, witness testimony nonetheless formed the basis for most of the court's factual findings¹⁴² because credible non-testimonial evidence was unavailable.¹⁴³

Yekatom and *Ngaïssona*, by contrast, concerned crimes in Central African Republic perpetrated a decade later—in 2013 and 2014—by so-called “anti-balaka” groups. The anti-balaka sought to wrest the country from the Seleka rebels who had ousted then-President François Bozizé. Yekatom was a military leader accused of actively leading anti-balaka fighters;¹⁴⁴ Ngaïssona was a former Minister of Youth, Sports, Arts and Culture in the Bozizé government¹⁴⁵ accused of providing financial and other forms of assistance to anti-balaka groups.¹⁴⁶ As in previous recent ICC trials, the *Yekatom* and *Ngaïssona* Trial Chamber heard testimony from a large number

disappointment that the ICC judges did not convict Al Hassan of any gender-based crimes”); Boubacar Sidiki Haidara, *Al Hassan Verdict Leaves Bitter Taste*, JUST. INFO. (June 27, 2024), <https://www.justiceinfo.net/en/133680-icc-mali-al-hassan-verdict-leaves-bitter-taste.html> [https://perma.cc/T72P-KXYB] (reporting that the head of a Malian victims' association stated that “the ICC has abandoned women”).

¹³⁴ *Al Hassan Trial Judgment*, *supra* note 25, ¶ 872 & n.2859 (finding unproved the “[c]ase of P-0609”); *id.* ¶ 910 (finding unproved the “[c]ase of P-1721”); *id.* ¶ 976 (finding unproved the “[c]ase of P-1460”); *id.* ¶ 977 (finding unproved the “[c]ase of P-0957”); *id.* ¶ 978-980 (finding witness testimony insufficient to establish that victim suffered sexual violence).

¹³⁵ See *Yekatom & Ngaïssona Trial Judgment*, *supra* note 25.

¹³⁶ See *Abd-Al-Rahman Trial Judgment*, *supra* note 25.

¹³⁷ *Id.* ¶ 1.

¹³⁸ See, e.g., *id.* ¶ 224. See also Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, Case No. ICC-02/05-01/20, Trial Judgment Annex B, Oct. 6, 2025, ¶¶ 2, 13, 15, 42-44, 90-93, 103, 131, 135, 196, 468, 682 [hereinafter *Abd-Al-Rahman Annex B*].

¹³⁹ See *Abd-Al-Rahman Trial Judgment*, *supra* note 25, ¶ 219; *Abd-Al-Rahman Annex B*, *supra* note 138, ¶¶ 104, 119, 841-843.

¹⁴⁰ See *Abd-Al-Rahman Trial Judgment*, *supra* note 25, ¶¶ 227-228; *Abd-Al-Rahman Annex B*, *supra* note 138, ¶¶ 55, 129, 204, 332-33, 380.

¹⁴¹ See *Abd-Al-Rahman Trial Judgment*, *supra* note 25, ¶ 140; *Abd-Al-Rahman Annex B*, *supra* note 138, ¶¶ 119, 125, 127, 556-58, 577, 836-39.

¹⁴² See, e.g., *Abd-Al-Rahman Trial Judgment*, *supra* note 25, ¶¶ 368, 457, 577.

¹⁴³ See *id.* ¶¶ 223-225, 269.

¹⁴⁴ *Yekatom & Ngaïssona Trial Judgment*, *supra* note 25, ¶ 63.

¹⁴⁵ *Id.* ¶ 28.

¹⁴⁶ Prosecution v. Yekatom, Case No. ICC-01/14-01/18, Public Redacted Version of “Document Containing the Charges,” ICC-01-14/01-18-282-Conf-AnxB1, 19 August 2019, ¶¶ 127-168 (Sept. 18, 2019).

of witnesses—174 to be exact.¹⁴⁷ But its “exceptionally complex trial”¹⁴⁸ also featured nearly 20,000 exhibits,¹⁴⁹ including videos,¹⁵⁰ call data records,¹⁵¹ emails,¹⁵² satellite images¹⁵³ and Facebook posts.¹⁵⁴ The trial judgment broke new ground in its treatment of the admissibility of Facebook posts, call data records and email messages,¹⁵⁵ which paves the way for increased use of such evidence.¹⁵⁶

But our focus here centers on the value of this non-testimonial evidence in proving the crimes charged. Unlike other ICC Trial Judgments, the Yekatom & Ngaïssona judgment does not contain a complete list of exhibits, so the full extent of the judgment’s reliance on non-testimonial evidence cannot be conclusively ascertained. But we do know that significant quantities of non-testimonial evidence supplemented heartrending witness testimony that described the crimes and their aftermath,¹⁵⁷ and more importantly, that it was particularly valuable in linking the defendants to the crimes on the ground. Indeed, the call data records and Facebook posts were so obviously incriminating that defense counsel strenuously opposed their admission¹⁵⁸ and urged the Trial Chamber to “ignore” them.¹⁵⁹ As noted, The Trial Chamber declined defense counsel’s invitation and did rely on this material, though occasionally noting that it was not the sole basis for a particular finding.¹⁶⁰ Nonetheless, the non-testimonial evidence provided vital support in proving the defendants’ involvement in planning and coordinating the attacks¹⁶¹ and their *mens rea*.¹⁶² Finally, reminiscent of *Al Hassan*, the Yekatom and Ngaïssona Trial Chamber acquitted Yekatom of charges—in this case relating to child soldiers—that were supported solely by witness testimony.¹⁶³ The Chamber was scathingly critical of much of this witness

¹⁴⁷ *Yekatom & Ngaïssona Trial Judgment*, *supra* note 25, ¶¶ 13-16.

¹⁴⁸ Alexander Heinze, *The Trial Judgment in Yekatom and Ngaïssona: A Judgment of Many Firsts Built on Case Management, Part II*, OPINIO JURIS (Aug. 8, 2025), <https://opiniojuris.org/2025/08/08/the-trial-judgment-in-yekatom-and-ngaissona-a-judgment-of-many-firsts-built-on-case-management-part-2/> [<https://perma.cc/79AA-56U4>].

¹⁴⁹ *Yekatom & Ngaïssona Trial Judgment*, *supra* note 25, ¶ 22.

¹⁵⁰ *See, e.g., id.* ¶¶ 319, 1141, 2899.

¹⁵¹ *See, e.g., id.* ¶¶ 158-163.

¹⁵² *See, e.g., id.* ¶¶ 865, 873-88; 1035-1036, 1538-1539.

¹⁵³ *See, e.g., id.* ¶¶ 2104, 2936 & n.7288.

¹⁵⁴ *See, e.g., id.* ¶¶ 1365, 1412-15.

¹⁵⁵ Heinze, *supra* note 148.

¹⁵⁶ Over the defense’s objection, the Trial Chamber accepted into evidence 943 Facebook items without requiring testimony by Facebook officials. *Yekatom & Ngaïssona Trial Judgment*, *supra* note 25, ¶¶ 144, 147, 149. For both Facebook material and call data records, the Trial Chamber presumed authenticity if the material was conveyed through the companies in question via ordinary and lawful processes. *See* Heinze, *supra* note 148.

¹⁵⁷ *See, e.g., Yekatom & Ngaïssona, Trial Judgment*, *supra* note 25, ¶ 1415 (discussing Facebook messages confirming an anti-Balaka attack on Bossangoa); *id.* ¶¶ 2881 & n.7128; 2921.

¹⁵⁸ *Id.* ¶¶ 147, 150, 152-53, 155-56, 167.

¹⁵⁹ Prosecutor v. Yekatom & Ngaïssona, Case No. ICC-01/19-01/18, Transcript of Trial, at 22-24, (Feb. 18, 2021).

¹⁶⁰ *See, e.g., Yekatom & Ngaïssona Trial Judgment*, *supra* note 25, ¶¶ 151, 1466, 1542.

¹⁶¹ *Id.* ¶ 1365 (describing Facebook messages that implicated the anti-Balaka and Ngaïssona in the attack on Bouca); *id.* ¶¶ 1466-67, 2211-12; *see also, id.* ¶ 2290.

¹⁶² *Id.* ¶¶ 2211-13.

¹⁶³ In addition to the testimony of nine fact witnesses, the Trial Chamber received some human rights and media reports discussing child soldiers in the anti-balaka movement generally, *id.* ¶ 3687, but the Trial Chamber did not rely on these documents because it had “little to no information about the criteria used by their authors in assessing the children’s ages and/or purported membership within the

testimony, finding several witnesses to be “wholly unreliable”¹⁶⁴ and reporting that “it did not hear one single child under the age of 15 at the relevant time and purportedly within Mr Yekatom’s group that it found credible.”¹⁶⁵

Ad hoc tribunals have lately fallen out of fashion, but two operate currently: The Kosovo Specialist Chambers (KSC) and the Central African Republic Special Criminal Court (SCC). Both tribunals were created in 2015¹⁶⁶ and both have concluded only a few trials.¹⁶⁷ A key difference between the courts, however, is in their temporal jurisdiction. Specifically, the KSC’s mandate is over crimes committed between 1998 and 2000¹⁶⁸—that is, before cell phones and digital information exploded in popularity. By contrast, the SCC’s jurisdiction extends to the present.¹⁶⁹ This difference has profoundly affected the evidence available to each tribunal.

The KSC’s two completed cases concerned two Kosovo Liberation Army officials charged with war crimes relating to the detention, mistreatment, and murder of civilians in 1999,¹⁷⁰ and for each and every finding, the Trial Chamber relied virtually exclusively on witness testimony. Whether it was conclusions about the victims’ injuries,¹⁷¹ the defendant’s whereabouts,¹⁷² or the defendant’s role in the KLA,¹⁷³ the Trial Chamber based its findings entirely on the testimony of witnesses. The three cases of the SCC, by contrast, concerned crimes occurring in 2019¹⁷⁴ and 2020.¹⁷⁵ The SCC’s first judgment failed to set forth its evidentiary foundations,¹⁷⁶ and the third judgment has not yet been issued,¹⁷⁷ but the second, involving the Ndélé attacks of

Anti-Balaka” and because the reports did not distinguish between soldiers under the age of 15 and 18. *Id.* ¶¶ 3735-36.

¹⁶⁴ *Id.* ¶ 3689.

¹⁶⁵ *Id.* ¶ 3690.

¹⁶⁶ Emanuele Cimiotta, *The Specialist Chambers and the Specialist Prosecutor’s Office in Kosovo: The ‘Regionalization’ of International Criminal Justice in Context*, 14 J. INT’L CRIM. JUST. 53, 53 (2016); Mia Swart, *Earning Its Keep: Assessing the Legitimacy of the Special Criminal Court for the Central African Republic*, 23 J. INT’L CRIM. JUST. 189, 195 (2025).

¹⁶⁷ See *infra* text at note 278.

¹⁶⁸ Law on Specialist Chambers and Specialist Prosecutor’s Office, art. 7 (Kos.).

¹⁶⁹ Patryk Labuda, *The Special Criminal Court in the Central African Republic*, AM. SOC’Y INT’L L. (Jan. 22, 2018), <https://www.asil.org/insights/volume/22/issue/2/special-criminal-court-central-african-republic> [<https://perma.cc/X7TZ-T3JX>] (reporting that “the SCC’s jurisdiction is temporally unbounded,” meaning that it extends over “ongoing violations in CAR”); see Swart, *supra* note 166, at 201.

¹⁷⁰ Prosecutor v. Mustafa, Case No. KSC-BC-2020-05, Judgment, Kosovo Specialist Chambers [KSC], ¶¶ 23-25 (Dec. 16, 2022) [hereinafter *Mustafa Judgment*]; Prosecutor v. Shala, Case No. KSC-BS-2020-04, Judgment, KSC, ¶¶ 15-19 (Jul. 16, 2024) [hereinafter *Shala Judgment*].

¹⁷¹ See, e.g., *Mustafa Judgment*, *supra* note 170, ¶¶ 619-34; *Shala Judgment*, *supra* note 170, ¶¶ 646-47.

¹⁷² *Shala Judgment*, *supra* note 170, ¶¶ 839-852.

¹⁷³ *Mustafa Judgment*, *supra* note 170, ¶¶ 338-341.

¹⁷⁴ Prosecutor v. Bozize, Arrêt no. 9 relatif aux appels interjetés contre le jugement no. 003-2022 du 31 octobre 2022 de la Première Section d’Assises [Judgment No. 9 Relating to the Appeals Lodged Against Judgment No. 003-2022 of October 31, 2022 of the First Assize Section], Cour Penale Speciale [CPS] [Special Criminal Court], ¶ 8 (Jul. 20, 2023) [hereinafter *Bozize Judgment*].

¹⁷⁵ Prosecutor v. Kalite, Case No. CPS/CA/PSA/23-001, Judgment, CPS, ¶ 22 (Dec. 13, 2024) [hereinafter *Kalite Judgment*]; Prosecutor v. Assan, Case No. CPS/CHASS/ISA/24-001, Judgment, CPS, at 3-4 (Jun. 19, 2025) [hereinafter *Assan Judgment*].

¹⁷⁶ *Bozize Judgment*, *supra* note 174, ¶¶ 77, 167.

¹⁷⁷ A summary of the judgment appears on the SCC website, but it does not provide information on the evidentiary bases for the convictions. See *Assan Judgment*, *supra* note 175, at 3-4.

Spring 2020, very much relied on non-testimonial evidence.¹⁷⁸ Specifically, in *Kalite et al.*, non-testimonial evidence helped to establish the occurrence of the attacks,¹⁷⁹ the contextual elements of the crimes,¹⁸⁰ and most importantly the defendants' involvement therein. Phone records, in particular, decisively pinpointed the defendants' locations during the attacks and discredited their claims to be elsewhere.¹⁸¹

Finally, almost all recent domestic prosecutions of international crimes feature a substantial blend of testimonial and non-testimonial evidence. International crimes require proof of certain contextual elements,¹⁸² and, at a minimum, domestic courts prosecuting mass atrocities routinely rely on non-testimonial evidence to prove these elements. Germany's highly-publicized convictions of former Syrian government officials Eyad Al Gharib and Anwar Raslan¹⁸³ was particularly noteworthy in this regard because the Koblenz Higher Court made lengthy, detailed factual findings about the pattern of crimes committed by the Syrian government after 2011.¹⁸⁴ These findings were based largely on Syrian government documents, including letters, circulars, and meeting minutes,¹⁸⁵ as well as digital photographs.¹⁸⁶ The photographs included

¹⁷⁸ A subsequent case involving the same crimes but defendants who were convicted *in absentia* did rely largely on witness testimony, see *Prosecutor v. Fache*, Case No. CPS/CA/PSA/23-001, Judgment, CPS (Jul. 28, 2025), but one would expect a less well-developed investigation for defendants who are not currently in custody and who will likely be re-tried if they are ever apprehended. See Special Criminal Court of the Central African Republic, Rules of Procedure and Evidence, art. 176(B)(b) (allowing defendants convicted *in absentia* to request a retrial).

¹⁷⁹ For instance, prosecutors used photographs of deceased victims to corroborate allegations surrounding their killings. See *Kalite Judgment*, *supra* note 175, ¶ 181. Similarly, a video recorded during the attack "illustrates both the violence and the scale of the fighting." *Id.* ¶ 238 (author's translation).

¹⁸⁰ Kalite's contention that the PRNC militant group "never existed" was decisively contradicted by a passel of open-source documents. See *id.* ¶¶ 382-388.

¹⁸¹ For instance, Kalite maintained "that he only arrived in Lemena/Kourbou at around 2 or 3 [pm] on April 29, 2020," but cell-phone records contradicted his story. *Id.* ¶ 586. Similarly, Wordjonodrogba contended that he did not take part in the fighting at Ndélé, but cell phone records located him in Ndélé during all the attacks and communicating (via calls and text messages) with co-defendant Kalite. *Id.* ¶¶ 733-740.

¹⁸² One element of crimes against humanity, for instance, is "a widespread or systematic attack directed against any civilian population," see Rome Statute of the International Criminal Court art. 7(1), July 17, 1998, 2187 U.N.T.S. 90. [hereinafter Rome Statute], whereas an element of war crimes is the existence of an armed conflict, see *id.* at art. 8(2)(b).

¹⁸³ Al Gharib was a Sergeant Major in the Syrian General Intelligence Service, whereas Raslan headed "the Investigations subdivision of Department 251 of the Syrian General Intelligence Service." See Oberlandesgericht [OLGST] Koblenz [Higher Regional Court of Koblenz] Feb. 24, 2021, 1 StE 3/21, 3 BJs 9/19-4, at 6 (English Translation) (Ger.) [hereinafter *Al Gharib Judgment*]; INTERNATIONAL NUREMBERG PRINCIPLES ACADEMY, CASE INFORMATION SHEET: ANWAR RASLAN, https://vstgb-datenbank.de/media/pdfs/CIS_Mustervorlage_AnwarRaslan_englisch_FH_KB.pdf [<https://perma.cc/X2GK-6F4Y>] (last visited July 6, 2026).

¹⁸⁴ See *Al Gharib Judgment*, *supra* note 183, at 8-41, 55-148; *Inside the Raslan Trial # 58: The Raslan Verdict in Detail*, SYRIAN JUST. AND ACCOUNTABILITY CTR. (Feb. 18, 2022), <https://syriaaccountability.org/inside-the-raslan-trial-the-raslan-verdict-in-detail/> [<https://perma.cc/7SWS-Z25Z>].

¹⁸⁵ See *Al Gharib Judgment*, *supra* note 183, at 94-96. The documents had been obtained by the Commission for International Justice and Accountability (CIJA), a non-governmental organization. See *id.* at 92-93 (reporting that CIJA staff were able to remove from Syria "more than 800,000 pages from a large number of original documents relating to the military and Syrian intelligence service"). See also Alexander Heinze, *Private Investigators Helped Germany Arrest Two Former Syrian Secret Service Officers*, EJIL TALK! (Feb. 26, 2019), <https://www.ejiltalk.org/private-investigators-helped-germany-arrest-two-former-syrian-secret-service-officers/> [<https://perma.cc/XH52-7GBA>].

¹⁸⁶ See *Al Gharib Judgment*, *supra* note 183, at 66 (stating that the court "attache[d] particular evidential value" to the Central Crisis Management Cell documents dating back to April 2011 and to the "Caesar Files" which corroborated "the number and condition of the people killed in the course of the conflict, their bureaucratic documentation and eventual burial in mass graves").

nearly 27,000 images, depicting the corpses of 6,821 people, the majority of whom “bore signs of emaciation and of injuries caused by torture.”¹⁸⁷ It was this evidence that the court cited when concluding that “the Syrian regime had large numbers of people killed.”¹⁸⁸

Even more than establishing contextual elements, non-testimonial evidence has been crucial in proving the specific acts and mindsets of defendants.¹⁸⁹ A Swedish court, for instance, convicted Syrian defendant Lina Ishaq as an accomplice to war crimes for failing to prevent her minor son from enlisting as an ISIS child soldier.¹⁹⁰ The defendant’s daughter was the only eyewitness willing to testify,¹⁹¹ and, given her close relationship to the defendant, the court felt compelled to treat her testimony “with caution.”¹⁹² The prosecution was able to prove the necessary facts, however, largely through chat messages between the defendant and her family.¹⁹³

The Dutch conviction of Mustafa A., a Syrian pro-regime militia leader for crimes against humanity and torture, featured more witness testimony, but it also relied heavily on non-testimonial evidence.¹⁹⁴ Mustafa A. admitted to being a member of the Liwa al-Quds militia, but he contended that his involvement was limited to providing security.¹⁹⁵ A number of witnesses testified to his far greater participation,¹⁹⁶ and their testimony was particularly useful in placing the defendant at the scene of the crime for which he was convicted.¹⁹⁷ However, the court also relied on a series of photographs and social media postings to corroborate prosecution witness testimony and to prove the defendant’s high-level role in Liwa al-Quds.¹⁹⁸ This latter finding was essential to the court’s conclusion that the defendant held a leadership position, as defined by the Dutch criminal code,¹⁹⁹ and to the court’s rejection of the defendant’s claim that he was simply providing security during the crime, rather than co-perpetrating it.²⁰⁰

¹⁸⁷ See *id.* at 97.

¹⁸⁸ *Id.* Photos of massacre victims in the Democratic Republic of the Congo also helped domestic prosecutors prove international crimes that took place there in 2012. Chiara Gabriele et al., *The Role of Mobile Technology in Documenting Int’l Crimes*, 19 J. INT’L CRIM. JUST. 107, 109 (2021) (describing “the landmark use of photo and video evidence in the [DRC case] *Affaire Castro et Kizito*”).

¹⁸⁹ See, e.g., Oberlandesgericht München [OLG München] [Higher Regional Court of Munich] Apr. 29, 2020, 7 St 9/19 (4), BeckRS 2020, 28596, ¶¶ 55, 59 (Ger.) (discussing defendant’s chat traffic which showed that she was aware of IS activities when she left Germany).

¹⁹⁰ Tingsrätt [TR] [District Court] 2022-03-04 B 20218-20, at 4 (Swed.), https://ujim.trialinternational.org/wp-content/uploads/2023/04/Ishaq_04.03.2022_1st-instance_ENG.pdf [<https://perma.cc/D364-694G>].

¹⁹¹ *Id.* at 12 (noting that “[m]any of the relevant persons in the case could not be heard because they were either killed in Syria, could not be located or are relatives who exercised their right not to participate in the main hearing”).

¹⁹² *Id.* (observing that the defendant’s daughter “is only 15 years old and has therefore heard a great deal about events that took place when she was a young child, that she has lived through what must be described as severely traumatic experiences in a relatively short period of time, and that it is only natural that she, as a close relative, may have an interest in protecting and helping her mother”).

¹⁹³ *Id.* at 13-14, 31-32.

¹⁹⁴ Rb. Den Hague 22 januari 2024, ECLI:NL:RBDHA:2024:5142 (Openbaar Ministerie/Mustafa A.), ¶ 6.4.2.1. (Neth.).

¹⁹⁵ *Id.* ¶ 6.4.2.

¹⁹⁶ *Id.* ¶ 6.4.2.1.

¹⁹⁷ *Id.* ¶ 6.4.3.

¹⁹⁸ *Id.* ¶ 6.4.2.1.

¹⁹⁹ *Id.* ¶ 6.4.2.2.

²⁰⁰ See, *id.* ¶ 6.4.3.2 (“If one holds such a position of authority, there is no need to keep watch.”).

Syrian defendants are not the only alleged offenders who have faced credible non-testimonial evidence corroborating prosecution witness testimony. A Dutch court heard “a large number” of witnesses in its trial of Ethiopian Derg official Eshetu Alemu for war crimes,²⁰¹ but it had concerns about the reliability of that testimony because it related to decades-old events.²⁰² Fortunately, photos and documents established the defendant’s “job description” in the Derg and his orders to inflict “revolutionary measures” and “punishments” on named persons.²⁰³ These documents crucially formed the basis for the specific charges in the indictment.²⁰⁴

Even cases that have relied more heavily on witness testimony have also featured non-testimonial evidence that proved vital to the conviction. For instance, the criminal activities of an Afghan Prison Commander were proven solely by witness testimony;²⁰⁵ however, the defendant went by a different name in The Netherlands, and he disputed that he was in fact the Prison Commander named in the Dutch indictment.²⁰⁶ The prosecution was able to establish the defendant’s identity by means of a driver’s license found in the defendant’s home as well as recordings of intercepted conversations.²⁰⁷ Similarly, in a German prosecution of an ISIS leader, a Yazidi witness testified that the defendant had murdered her child,²⁰⁸ but the defendant and his wife denied the witness’s account.²⁰⁹ The court nonetheless found it proven, thanks largely to chat messages and intercepted communications, which both proved the defendant’s leadership position in ISIS²¹⁰ and corroborated the prosecution witness testimony about the defendant’s role in the child’s death.²¹¹

Finally, although this Part is primarily concerned with the increasing importance of open-source and digital evidence in *prosecutions* of mass atrocities, we should also note that such evidence now also plays a prominent role in *investigations* designed to gather and preserve evidence for future prosecutions. Aware that some of the most brutal atrocity crimes have been committed by individuals who cannot yet be apprehended, the international community has launched a series of investigatory mechanisms, and these have prioritized the collection of open-source information²¹² in order

²⁰¹ *Eshetu Judgment*, *supra* note 27, ¶ 8.6.

²⁰² *See id.* ¶ 8.1. Consequently, the court developed a seven-factor “framework to assess the reliability of witness statements,” *id.* ¶ 8.4.1, and it carefully analyzed the testimony of each witness to ascertain whether all or part of it could be used as evidence, *id.* ¶¶ 8.1, 8.4.2.

²⁰³ *See id.* ¶ 9.4.1.

²⁰⁴ *See id.* ¶ 13.4.

²⁰⁵ *Arif Judgment*, *supra* note 27, § 14 (describing the defense claim of insufficient evidence “because about each incident only one witness testified”).

²⁰⁶ *See id.* § 11.

²⁰⁷ *See id.*

²⁰⁸ *Taha Judgment*, *supra* note 90, ¶ 319.

²⁰⁹ *Id.* ¶¶ 5, 225.

²¹⁰ *Id.* ¶¶ 165-203.

²¹¹ *Id.* ¶ 187.

²¹² *See, e.g.*, Human Rights Council, *Rep. of the Independent Investigative Mechanism for Myanmar on Its Forty-Eighth Session*, ¶¶ 16-17, U.N. Doc. A/HRC/48/18 (July 5, 2021); U.N. Secretary-General, *10th Rep. of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes Under International Law Committed in the Syrian Arab Republic Since March 2011*, U.N. Doc. A/74/699, ¶¶ 10, 31 (Feb. 13, 2020); White, *supra* note 98, at 236 (reporting that the U.N. investigative mechanism for Syria “cannot access Syrian territory and is therefore entirely reliant on digital evidence, accessible from outside of Syria”). White has called for a permanent investigatory mechanism to standardize practices. *Id.*

to preserve crucial evidence long after witnesses may have died or can no longer be found.

In sum, mass atrocity prosecutions have evolved significantly in the last few decades. Although we can expect such trials usually to feature some witness testimony, in recent years the quantity and significance of that testimony have sharply declined. Now, some cases feature only those witnesses who introduce and authenticate the non-testimonial evidence on which the court's decision will principally rely.²¹³ Other judgments do base their factual findings in part on eyewitness testimony, but that testimony is almost always corroborated by more objective non-testimonial evidence. This non-testimonial evidence has the dual effect, therefore, of reducing the potential importance of fact-witness testimony while simultaneously enhancing its accuracy.

IV. THE TRANSFORMATION OF INTERNATIONAL CRIMINAL INSTITUTIONS

Part III has detailed the recent evolution in the evidentiary foundations of international criminal convictions and has suggested that this evolution has brought significant fact-finding advantages. However, although the evidence available to prosecute international crimes has substantially evolved, so too have the institutions available to prosecute those crimes. In particular, this Part details the transformation in institutional capacity to prosecute offenders, a transformation that has undermined both institutional knowledge and available evidence.

This Part must begin with some core truths of international criminal justice. Namely, mass atrocities are committed by massive numbers of offenders; mass atrocity trials are massively expensive,²¹⁴ and resources are always limited. For these reasons, only a small proportion of mass atrocity offenders can ever be prosecuted in international or foreign courts.²¹⁵ That said, the first modern international criminal tribunals—the ICTY and ICTR—together prosecuted 254 defendants, 161 at the ICTY²¹⁶ and 93 at the ICTR.²¹⁷ To be sure, these defendants constituted only a small

²¹³ See, e.g., Ben Yumo Wang et al., *Problems from Hell, Solution in the Heavens?: Identifying Obstacles and Opportunities for Employing Geospatial Technologies to Document and Mitigate Mass Atrocities*, 2 INT'L J. SEC. & DEV. 1, 10 (2013); Chiara Ragni, *Digital Evidence in International Criminal Proceedings and Human Rights Challenges*, 7 E.U. & COMPAR. L. ISSUES AND CHALLENGES SERIES 1, 6 (2023); Freeman, *Digital Evidence*, *supra* note 19, at 283, 287, 297; Lindsay Freeman, *Hacked and Leaked: Legal Issues Arising from the Use of Unlawfully Obtained Digital Evidence in International Criminal Cases*, 25 UCLA J. INT'L L. & FOR. AFF. 45, 90 (2021).

²¹⁴ See, e.g., Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOB. STUD. L. REV. 1, 2-4, 21-24 (2017) [hereinafter Ford, *Investigative Resources*]; Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 3 (2014).

²¹⁵ See Nancy Amoury Combs, *Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions*, 75 WASH. & LEE L. REV. 233, 280-81 (2018). To be sure, the proportion of prosecuted offenders has varied from conflict to conflict and was comparatively high after World War II. Allied military courts prosecuted more than 50,000 alleged Nazi war criminals, Fritz Weinschenk, *Nazis Before German Courts: The West German War Crimes Trials*, 10 INT'L LAW. 515, 517 (1976), and German courts investigated more than 100,000 more and convicted approximately 6500. Fritz Weinschenk, "The Murderers Among Them" - German Justice and the Nazis, 3 HOFSTRA L. & POL'Y SYMP. 137, 153 (1999).

²¹⁶ *Infographic: ICTY Facts and Figures*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/content/infographic-icty-facts-figures> [https://perma.cc/RRJ9-AV36] (last visited July 6, 2026).

²¹⁷ *The ICTR in Brief*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://unictr.irmct.org/en/tribunal> [https://perma.cc/KT7Z-6Y6Q] (last visited July 6, 2026).

fraction of overall Yugoslav and Rwandan offenders, but 254 prosecutions centering on just two conflicts and occurring over more than two decades provided the ICTY and ICTR with a deep evidentiary reservoir and a robust base of knowledge about the conflicts, crimes, and peoples in question.²¹⁸

First, the ICTY and ICTR gained considerable general knowledge and specific evidence through teams of analysts tasked with collecting, digesting, and disseminating enormous amounts of information.²¹⁹ Some analysts focused on forensic or crime-base issues,²²⁰ whereas others gained a holistic and sophisticated understanding of the relevant civilian, military, and political leadership structures.²²¹ Although initially the ICTY acquired such information through external experts, it soon began relying almost exclusively on in-house analysts²²² because only full-time employees “could reasonably hope to digest and master” the vast quantities of relevant information.²²³ In the end, analysts supported the prosecution and defense teams by testing their theories,²²⁴ answering their questions,²²⁵ and producing a wide variety of internal work product that grounded and informed the parties’ investigations, charging decisions, trial strategies, and defenses.²²⁶ Analysts also assisted Trial Chambers by providing comprehensive expert reports,²²⁷ the contents of which often appeared in the

Admittedly, the overall number of ICTY and ICTR defendants constituted only a small proportion of the total number of Yugoslav and Rwandan offenders, given that there are an estimated 10,000 Yugoslav offenders, COUNCIL OF EUR.: COMMISSIONER FOR HUMAN RIGHTS, POST-WAR JUSTICE & DURABLE PEACE IN THE FORMER YUGOSLAVIA 15-18 (2012), and possibly close to 1 million Rwandan offenders. Andrei Popoviciu, *Where Rwanda’s Genocide Perpetrators and Survivors Live Side by Side*, AL JAZEERA (Apr. 9, 2024), <https://www.aljazeera.com/news/2024/4/8/where-rwandas-genocide-perpetrators-and-survivors-live-side-by-side> [<https://perma.cc/HJD9-EQS8>]. But see Hollie Nyseth Nzitaira et al., *Analyzing Participation in the 1994 Genocide in Rwanda*, 60 J. PEACE RSCH. 291, 298-302 (2022) (suggesting that conventional estimates of genocide participation may be somewhat overstated). A relatively large proportion of Rwandan offenders have faced criminal sanctions, however, thanks to the efforts of Rwandan domestic authorities who prioritized criminal prosecutions. See Hollie Nyseth Brehm & Christopher Uggen, *Lessons from Rwanda’s Quest for a Just Response to Genocide*, SCHOLARS STRATEGY NETWORK (Aug. 6, 2014), <https://scholars.org/contribution/lessons-rwandas-quest-just-response-genocide> [<https://perma.cc/FNF7-GLSK>] (reporting that Rwanda’s *gacaca* courts “processed an astounding 1,958,634 cases, 86% of which ended in a guilty verdict, prior to appeals”).

²¹⁸ See, e.g., Christian Axboe Nielsen, *Leadership Analysis in International Criminal Justice*, in INTERNATIONAL CRIMINAL INVESTIGATIONS: LAW AND PRACTICE 207, 207 (Adejoké Babington-Ashaye et al. ed., 2018) [hereinafter Nielsen, *Leadership Analysis*].

²¹⁹ See *id.* at 210. For general discussions about the role of analysts, see Patrick J. Treanor, *Research and Analysis in the Investigation, Prosecution and Adjudication of Crimes*, in HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW: VOLUME 5 137, 137 (Morten Bergsmo et al. ed., 2017).

²²⁰ Nielsen, *Leadership Analysis*, *supra* note 218, at 207.

²²¹ *Id.* at 207, 211-17; Agirre, *supra* note 42, at 84-85; Peter Nicholson, *The Function of Analysis and Analysts*, in HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW: VOLUME 5 121, 126-27 (Morten Bergsmo et al. ed., 2017). Leadership analysis is particularly valuable for international criminal courts, because these courts typically seek to prosecute the high-level architects of the violence, and because it can be difficult to connect these leaders to the crimes.

²²² Nielsen, *Leadership Analysis*, *supra* note 218, at 224.

²²³ *Id.*

²²⁴ *Id.* at 220 (noting that “the internal complexity and rivalries exhibited by Serbian and Bosnian Serb leadership figures” revealed by analysts belied the Greater Serbia narrative that ICTY prosecutors advanced in several cases).

²²⁵ *Id.* at 218.

²²⁶ Agirre, *supra* note 42, at 94 (“Analysts of the four categories (strategic, research officer, criminal and military) have contributed significantly to the investigations from the earliest stages of preliminary examination and target selection, to indictment drafting, trial support, testifying in trials themselves and even appeals.”).

²²⁷ Nielsen, *Leadership Analysis*, *supra* note 218, at 221-23.

Chambers' judgments.²²⁸ The work of these analysts was painstaking, time-consuming²²⁹ and considered "a long-term investment."²³⁰ Because the ICTY and ICTR had the time and cases to invest, their "investment" yielded valuable dividends.

In addition to the large cadre of special analysts, ICTY and ICTR judges and prosecutors also generated valuable evidence and learned valuable lessons through prosecuting a large body of cases. First, because there were so many defendants to indict, prosecutors were able to employ a "pyramidal" charging scheme whereby they prosecuted low-level direct perpetrators as a means of building cases against senior military and government officials.²³¹ The Tribunals' Prosecutors specifically selected initial defendants who could establish "the link between national authorities and perpetrators on the ground,"²³² reasoning that "the role of the commanders could be investigated through the cases against direct perpetrators."²³³ Indeed, during this period, the prosecution drafted Charging and Indictment Guidelines, that specifically endorsed targeting different tiers of perpetrators including low-level offenders "who were willing to appear as witnesses in cases against high-profile perpetrators" and mid-level defendants whose prosecution provided "a foundation for investigation of their superiors."²³⁴ Describing this strategy, Senior Analyst Christian Nielsen highlighted the gains the ICTY realized from its first prosecution, against Dusko Tadić. Although Tadić himself was

a rather randomly selected guard at a Bosnian concentration camp, the evidence and the prosecutions wound their way up to the mayor and governor of the area in which this and similar camps were located, and from there up to the 'national' level of *Republika Srpska* and ultimately to the leadership in Serbia . . . which had instigated and supported the criminal activities perpetrated by the Bosnian Serbs.²³⁵

In this way, the ICTY prosecution "recycled and reused" the *Tadić* work product to "build the base of knowledge" from which it constructed cases against senior leaders.²³⁶

Putting aside charging strategy, the sheer number of cases prosecuted at the *ad hoc* tribunals provided the parties and especially the judges with valuable

²²⁸ *Id.* at 224.

²²⁹ Nicholson, *supra* note 221, at 127 ("It is critically important to recognise that the military analyst needs time to produce a quality product.").

²³⁰ Nielsen, *Leadership Analysis*, *supra* note 218, at 218 (also noting that the process of international criminal investigation can "be compared to the academic writing process, where weeks or months of reading necessarily precede the writing phase").

²³¹ Frederiek de Vlaming, *Selection of Defendants*, in INTERNATIONAL PROSECUTORS 542, 550, 553-54 (Luc Reydam et al. eds., 2012); see also Claudia Angermaier, *Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia*, in CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASE 27, 29 (Morten Bergsmo ed., 2d ed. 2010).

²³² de Vlaming, *supra* note 231, at 554.

²³³ *Id.* at 555.

²³⁴ *Id.* at 556.

²³⁵ See Christian Axboe Nielsen, *Analysis of Organisational Structures and Quality Control of Case Development*, in QUALITY CONTROL IN CRIMINAL INVESTIGATION 273, 280 (Xabier Agirre et al. eds., 2020) [hereinafter Nielsen, *Analysis of Organisational Structures*].

²³⁶ *Id.*

information. The ICTR frequently had ten trials underway simultaneously, with each featuring an average of 135 witnesses and 654 exhibits,²³⁷ and all centering on the three-month-long genocide in Rwanda. Both ICTY and ICTR trials have been expansively credited with creating an “indisputable historical record” of their respective conflicts,²³⁸ but more prosaically they educated a cadre of long-serving Tribunal judges, many of whom served on multiple trials and appeals.²³⁹ Indeed, as time passed, ICTR judges were less inclined to admit expert testimony because they increasingly considered it redundant to the knowledge they themselves had gained through trials.²⁴⁰ In private conversations, ICTR judges acknowledged their initial need for expert testimony, but they found that its utility declined as the judges themselves “accumulated *personal* knowledge through trial experience” and “*archival* knowledge [from] expert reports, transcripts and judgments from previous trials.”²⁴¹ In fact, the body of evidence generated through ICTR trials was sufficiently well-supported and convincing that it routinely led historians, anthropologists, and other social scientists to change their professional views.²⁴² As one such historian explained: “When I wrote my book in 1996, proceedings at ICTR were still in their infancy. Today, 90 per cent of the documents on the basis of which we can have a contemporaneous vision of the situation are based on documents produced by the ICTR.”²⁴³

At the macro level, then, as just described, the large number of ICTY and ICTR cases educated and informed judges and scholars and produced relevant evidence for subsequent cases. Simultaneously, these cases also enabled the Tribunals, at the micro level, to identify troubling inconsistencies that, perhaps counter-intuitively, improved the accuracy of Tribunal fact-finding. For instance, insiders reported that in the separate trials of various members of an alleged conspiracy, the prosecution sometimes advanced contradictory narratives in different cases because they had a vested interest in portraying the accused in each particular case as primarily responsible for the relevant crimes.²⁴⁴ So, for example, in a case against a regional governor, prosecutors might portray the governor as practically omnipotent in his area of responsibility. Yet in a subsequent case against a higher-level official, prosecutors might downplay the regional governor’s role in order to increase the perception of

²³⁷ Nigel Eltringham, “*Illuminating the Broader Context*”: *Anthropological and Historical Knowledge at the International Criminal Tribunal for Rwanda*, 19 J. ROYAL ANTHROPOLOGICAL INST. 338, 346 (2013).

²³⁸ See Richard Ashby Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908, 940 (2005); U.N. GAOR, 63d Sess., 24th plen. mtg. at 2, U.N. Doc. A/63/PV.24 (Oct. 13, 2008).

²³⁹ See Leigh Swigart, *Linguistic and Cultural Diversity in International Criminal Justice: Toward Bridging the Divide*, 48 U. PAC. L. REV. 197, 205-06 (2017) [hereinafter Swigart, *Linguistic and Cultural Diversity*]; see also ELLEN ELIAS-BURSAC, TRANSLATING EVIDENCE AND INTERPRETING TESTIMONY AT A WAR CRIMES TRIBUNAL: WORKING IN A TUG-OF-WAR 242-243 (2015).

²⁴⁰ Eltringham, for instance, reports that the *Karemura* Trial Chamber excluded submissions by three experts, not because it questioned their competence or qualifications but because the information they would provide would be superfluous. See Eltringham, *supra* note 237, at 350-51.

²⁴¹ *Id.* at 351 (emphasis in original). As one judge put it, “When I arrived as a new judge, they [experts] were useful. But now I rely on my own experience.” *Id.*

²⁴² *Id.* at 346 (“Such [scholarly] changes in opinion are often due to information revealed in trials themselves.”).

²⁴³ *Id.* at 346-47.

²⁴⁴ See Nielsen, *Analysis of Organisational Structures*, *supra* note 235, at 278.

culpability of the senior official.²⁴⁵ The Tribunals discovered these inconsistent narratives only because the same court heard a series of interconnected cases.

Likewise, the ICTY and ICTR had a clearer window into similarly problematic witness testimony because some witnesses testified in multiple cases in the same Tribunal. Prosecution witness Omar Serushago, for instance, testified about the same incident in three separate ICTR trials, but his testimony changed so that in each trial he inculpated the defendant in that particular case.²⁴⁶ Likewise, in *Rwamakuba*, Witness GAB described defendant Rwamakuba's acts and behavior in the same way that he described defendant's Kamuhanda's acts when he testified in the *Kamuhanda* case. GAB even attributed much of the same words to each defendant.²⁴⁷ Finally, the fact that Rwandan genocide cases were also prosecuted in other venues afforded the ICTR greater insights into ICTR witnesses because some witnesses provided ICTR testimony that was sharply at odds with their testimony in other courts.²⁴⁸ *Rwamakuba* witness HF provided a stunning example of this phenomenon. HF testified that defendant Rwamakuba had selected her sister to be taken from Butare University Hospital to be killed, yet when testifying in the *Gatera* case in Rwandan courts, HF told the same story but had Dr. Gatera selecting her sister, not Rwamakuba.²⁴⁹ And in yet another Rwandan case, HF testified that her sister had been shot and killed by a man named Rurangirwa in an entirely different location.²⁵⁰ In each of these cases, the Trial Chambers had the good sense not to credit the witnesses' testimony,²⁵¹ but the testimony was shown to be suspect only because the Tribunal prosecuted a substantial number of cases involving the same conflict. Indeed, my empirical research on ICTR witness testimony showed that the Trial Chamber's treatment of witness credibility and reliability evolved significantly over time,²⁵² presumably because the Tribunal gained more experience and insight with each passing case.

²⁴⁵ *Id.*

²⁴⁶ Serushago had killed the Hutu sister of Colonel Ngungize, and Ngungize apparently wanted to take revenge on his sister's killers, including Serushago. In the *Nahimana* case, Serushago testified that Barayagwiza—a defendant in that case—protected him from Ngungize, saying: "Habyarimana is dead"; "It's not the sister of Ngungize who should be creating disorder by pitting the *Interahamwe* and members of the CDR against one another in Gisenyi town." Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Transcript of Trial, at 66 (Nov. 16, 2001). Serushago described the same incident in *Karempera*, but his testimony in that case put some of those same words in the mouth of *Karempera* defendant Joseph Nzirorera. Prosecutor v. Karempera et al., Case No. ICTR-98-44-T Transcript of Trial, at 42 (Nov. 27, 2003). Finally, in the *Military I* case involving defendant Anatole Nsengiyumva, Serushago was asked if Nsengiyumva was upset by the deaths of the people whom Serushago had killed. Serushago replied: "[Anatole Nsengiyumva] himself said that if [Ngungize's sister] was there, it was no problem, because, after all, Habyarimana was dead so we could continue performing our operations as usual." Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Transcript of Trial, at 6 (June 19, 2003).

²⁴⁷ *Rwamakuba Judgment*, *supra* note 73, ¶ 149.

²⁴⁸ See Combs, *New Look*, *supra* note 70, at 400.

²⁴⁹ *Rwamakuba Judgment*, *supra* note 73, ¶ 189.

²⁵⁰ *Id.* Witness RJ's testimony in *Rwamakuba* featured very similar and similarly substantial inconsistencies. *Id.* ¶¶ 191-192.

²⁵¹ *Id.* ¶¶ 149-150, 189-190. The *Nahimana* Trial Chamber accepted Serushago's testimony only to the extent it was corroborated by others. Prosecutor v. Nahimana, Case No. 99-52-T, Judgement and Sentence, ¶ 824 (Dec. 3, 2003).

²⁵² Initially, ICTR Trial Chambers were very inclined to accept prosecution witness testimony; early witnesses had a 97% chance of being found totally credible and a 99% chance of being found totally or partially credible. Over time, however, Trial Chambers' willingness to find witnesses credible declined by an average of 2.1% per year, with the likelihood of finding a witness totally credible dropping by 51% from the tribunal's first to last trials. Combs, *Grave Crimes*, *supra* note 52, at 85-86.

The *ad hoc* tribunals' substantial caseload enabled them to gain knowledge not only about the conflicts, the crimes, and the witnesses to those crimes, but also about relevant cultural attributes. This was particularly true at the ICTR, where many court personnel were not initially familiar with Rwandan cultural tendencies. Thanks to expert witness testimony, early ICTR Trial Chambers explored the impact of Rwandan culture on testimony pertaining to dates, times, distances and locations.²⁵³ ICTR court personnel also learned of various taboos and communication barriers that impacted witness testimony. For instance, Rwandan witnesses repeatedly refused to point to defendants in the courtroom, considering pointing to be impolite.²⁵⁴

Rwandan communication tendencies had even more significant impacts. One such inclination concerned directness in speech patterns. Whereas Westerners tend to report facts in a comparatively direct manner, many non-Westerners prize indirect speech.²⁵⁵ At the ICTR in particular, trial observers quickly noticed that Rwandan witnesses answered "short and direct questions" with "long and indirect answers."²⁵⁶ One ICTR prosecutor described this as the "'double-speak' which is unique to Rwandans."²⁵⁷ An expert witness in the ICTR's *Akayesu* trial confirmed that indirectness "is a particular feature of the Rwandan culture" especially when discussing delicate topics.²⁵⁸ The Trial Chamber itself recognized examples of this phenomenon²⁵⁹ as well as a reticence among witnesses to discuss sexual violence.²⁶⁰

Further, due to living in an oral culture, Rwandan witnesses sometimes described events as though the witness had personally perceived them, when in fact they were recounted to the witness by someone else.²⁶¹ An ICTR expert testified as to this

²⁵³ *Akayesu Judgment*, *supra* note 69, ¶ 156. See also Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L. J. 367, 386 (2003) (observing that in some societies dates "are not culturally important").

²⁵⁴ Swigart, *Linguistic and Cultural Diversity*, *supra* note 239, at 203; see also Prosecutor v. Semanza, Case No. ICTR-97-20-T, Transcript of Trial, at 112-13 (Oct. 8, 2001); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Transcript of Trial, at 42 (Oct. 4, 2001); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Transcript of Trial, at 89-90 (Feb. 7, 2002).

²⁵⁵ This phenomenon is also quite pronounced in Sierra Leone. Anthropologist Mariane Ferme reported that Sierra Leoneans view "a person who communicates directly what she or he desires or thinks . . . is considered an idiot or no better than a child." MARIANE FERME, *THE UNDERNEATH OF THINGS: VIOLENCE, HISTORY, AND THE EVERYDAY IN SIERRA LEONE* 6-7 (2001); see also KELSALL, *supra* note 58, at 174 (describing Sierra Leonean "emphasis on secrecy and concealment"); *id.* at 257 (describing Sierra Leonean culture as prizing ambivalence "which may have encouraged witnesses to tell only half truths").

²⁵⁶ Leigh Swigart, *African Languages in International Criminal Justice*, in PROMOTING ACCOUNTABILITY UNDER INTERNATIONAL LAW FOR GROSS HUMAN RIGHTS VIOLATIONS IN AFRICA: ESSAYS IN HONOUR OF PROSECUTOR HASSAN BUBACAR JALLOW 578, 584 (Charles Chemor Jalloh & Alhagi B.M. Marong eds., 2015) [hereinafter Swigart, *African Languages*].

²⁵⁷ Charles A. Adeogun-Phillips, *Challenges of International Criminal Investigations and Prosecutions: Perspectives of a Prosecutor*, in INTERNATIONAL CRIMINAL INVESTIGATIONS: LAW AND PRACTICE 1, 16 (Adejoké Babington-Ashaye et al. eds., 2018).

²⁵⁸ *Akayesu Judgment*, *supra* note 69, ¶ 156. The expert went on to report that with respect to such delicate issues, the witnesses' answers will often have to be "decoded" in order to be understood correctly, and they may require the listener to take account of a variety of factors including "the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question." *Id.*

²⁵⁹ The Trial Chamber noted that Rwandan witnesses were highly reluctant to define the term "Inyenzi," although all Rwandans knew it to mean "cockroach." *Id.*

²⁶⁰ *Id.* ¶¶ 152-154, 442; see also Prosecutor v. Gacumbitsi, Case No. ICTR-01-64-T, Transcript of Trial, at 9-10 (Aug. 6, 2003); Adeogun-Phillips, *supra* note 257, at 10-12.

²⁶¹ *Akayesu Judgment*, *supra* note 69, ¶ 155.

proclivity,²⁶² multiple Trial Chambers recognized it,²⁶³ and ICTR witnesses themselves described it: *Kamuhanda* witness GPC stated: “Traditionally in Rwanda we can know what is happening somewhere without going there . . . because in Rwanda when people witness something, they speak of it to other people, helping the other people to inform themselves . . . So everyone knows about events where they were not present.”²⁶⁴

All of these cultural impacts were recognized in multiple cases as well as by scholars.²⁶⁵ This recognition is important because the cultural tendencies just described had the potential to substantially impair fact-finding accuracy. Western fact-finders²⁶⁶ can easily mis-assess the credibility of a witness who does not make eye contact, who uses indirect speech patterns, or who avoids answering certain questions. Such witnesses might seem evasive and untrustworthy to Westerners who are unaware of the cultural norms at play or whose own culture correlates clear and direct answers with honesty.²⁶⁷ Likewise, divergences between cultures can undermine fact-finders’ reliability assessments. Fact-finders might inappropriately rely on witness testimony because they believe the witness to have personally viewed the events, when the witness only heard about them from others. On the other hand, fact-finders might discount a witness’s testimony because the witness was unable to report, in

²⁶² *Id.* This phenomenon has also been the subject of scholarly research. See, e.g., Annelies Vredeveldt et al., *Culture, Trauma, and Memory in Investigative Interviews*, 32 PSYCH. CRIME & L. 300, 310 (2026). For numerous other examples, see COMBS, *supra* note 9, at 94-98.

²⁶³ As the ICTR’s *Musema* Trial Chamber put it: Rwandans adhere to a “tradition that the perceived knowledge of one becomes the knowledge of all.” *Musema Judgment*, *supra* note 68, ¶ 103. For other examples, see COMBS, *supra* note 9, at 94-95.

²⁶⁴ *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Transcript of Trial, at 41 (Jan. 22, 2003).

²⁶⁵ For instance, although most Rwandan witnesses were likely familiar with the Gregorian calendar, some nonetheless measured time by more familiar events, such as the rainy or dry seasons. See, e.g., *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-17-T, Transcript of Trial, at 8, 29 (Sept. 24, 2001); see also *Prosecutor v. Brima*, Case No. SCSL-2004-16-T, Transcript of Trial, at 96 (June 27, 2005); *Prosecutor v. Sesay*, Case No. SCSL-2004-15-T, Transcript of Trial, at 80-81 (Oct. 4, 2004). For more examples, see COMBS, *supra* note 9, at 25; O’Brien & Kebbel, *supra* note 49, at 99 (reporting that “a person in the UK might recount an event as occurring on 7 April 2009, whereas an event in the Democratic Republic of Congo or Rwanda might be mentioned relative to the rains”). Cultural norms can also prevent witnesses from providing firm distance estimates, *Prosecutor v. Semanza*, Case No. ICTR 97-20-T, Transcript of Trial, at 46-48 (Nov. 14, 2000) (Rwandan witness instructing lawyer, “Do not ask me questions about distances. To give an approximate distance would not be to tell the truth.”), or even in estimating distances in ways that are understandable to Western lawyers and judges, COMBS, *supra* note 9, at 29-33, 81-82.

²⁶⁶ To be sure, not all international criminal tribunal fact-finders are Western. Indeed, about one-third of the ICTR judges who presided over trials hailed from African countries. Background Table (on file with author). But some of these were educated in Western countries, see, e.g., *Judge Gberdao Gustave Kam*, UNITED NATIONS INT’L RESIDUAL MECHANISM FOR CRIM. TRIBS., <https://www.irmct.org/en/about/judges/judge-gberdao-gustave-kam> [<https://perma.cc/PLF4-9LT7>] (last visited Jan. 25, 2026); Press Release, Int’l Crim. Trib. for Rwanda, Judge Emile Francis Short Sworn In (Mar. 23, 2004), <https://unictr.irmct.org/en/news/judge-emile-francis-short-sworn> [<https://perma.cc/9P8A-2ZV2>], and two-thirds of ICTR trial judges were not African.

²⁶⁷ See Rebecca Dowd et al., *Filling Gaps and Verifying Facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal*, 30 INT’L J. REFUGEE L. 71, 80 (2018) (finding that judges frequently assumed that an asylum “applicant who presented evidence in a clear and convincing manner was more reliable than one who was hesitant and confused”); Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. INT’L & COMP. L. 1, 25 (2005-2006); Tanja van Veldhuizen, *Fact Finding in Asylum Cases*, in THE FUTURE OF FORENSIC PSYCHOLOGY: CORE TOPICS AND EMERGING TRENDS 160, 167 (Sara Landström et al., eds., 2023) (observing that “decision-makers typically judge other people’s behaviours based on their own subjective views and cultural norms”).

terms familiar to Westerners, how close he was to the witnessed events. Finally, fact-finding is impaired when cultural proclivities discourage witnesses from answering questions or cause them to answer in ways that fact-finders do not understand. If the date of the crime is needed to assess the defendant's alibi, then not knowing that date undermines our confidence in the accuracy of the eventual fact-finding. That is, when the witness's testimony lacks detail or is not wholly intelligible to fact-finders,²⁶⁸ then their ultimate factual conclusions rest on weaker foundations.

Although misunderstandings undoubtedly remained, once aware of these cultural issues, ICTR court personnel took steps to ameliorate their negative impact. For instance, once they understood that witnesses might describe an event as though it was personally witnessed when it was not, lawyers²⁶⁹ and investigators began expressly asking witnesses whether they "had actually seen what they were talking about with their own eyes or whether somebody else had told them."²⁷⁰ ICTR prosecutors circumvented the taboo against pointing by asking witnesses to identify individuals by describing their clothing.²⁷¹ Finally, the tribunals undertook a series of measures to put victims of sexual violence at greater ease.²⁷² Although the Tribunal could have done more, its large caseload enabled it to gain appreciable cultural understanding. That understanding along with the knowledge gained through previously described means, almost certainly enhanced the accuracy of the Tribunals' fact-finding.

But however beneficial for fact-finding, the ICTY/ICTR model of international criminal justice—which featured dozens, if not hundreds of cases centering on a single mass atrocity—no longer exists. A number of other *ad hoc* tribunals were created after the ICTY and ICTR, including the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL). These subsequent institutions resembled the ICTY and ICTR in their focus on one geographically limited conflict; however, they differed in their substantially reduced capacity to prosecute offenders. These later tribunals had express jurisdictional restrictions that curbed the number of offenders they could

²⁶⁸ See, e.g., Prosecutor v. Pereira, Case No. 34/2003, Judgement, Special Panel for the Trial of Serious Crimes, at 25 (Apr. 27, 2005) (describing the witness as incapable of describing "intelligible concepts").

²⁶⁹ See, e.g., Prosecutor v. Karemera, Case No. ICTR-98-44-T, Transcript of Trial, at 16 (Dec. 3, 2003); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Transcript of Trial, at 53 (Dec. 8, 2003).

²⁷⁰ *Musema Judgment*, *supra* note 68, ¶ 104 (Trial Chamber reporting that in light of the Rwandan cultural tradition that "that the perceived knowledge of one becomes the knowledge of all," the Trial Chamber consistently sought to distinguish between that which the witnesses personally observed and that which they were told about).

²⁷¹ Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-T, Transcript of Trial, at 56 (Sept. 1, 2003); Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-T, Transcript of Trial, at 8 (Sept. 16, 2003).

²⁷² Greater efforts were made during pre-trial interviews, for instance, to have female employees present. Adeogun-Phillips, *supra* note 257, at 12. Further, the tribunals began allowing witnesses reporting sexual violence to take frequent breaks during testimony and to write down the answers to questions when the witness found the answers too sensitive to convey orally. See Valerie Oosterveld, *Procedural Steps Addressing Sexual and Gender-based Violence: The Legacy of the International Criminal Tribunal for Rwanda and Its Application in the Special Court for Sierra Leone*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS 1, 5-6 (2014), <https://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/ii-procedures-addressing-sexual-gender-violence-legacy-application-oosterveid.pdf> [<https://perma.cc/XW3H-29AP>]. The tribunals also permitted a support person to accompany victims of sexual violence into the courtroom; these support persons, among other things, informed the Trial Chamber when they thought the witness's questioning should end. *Id.* at 5.

target,²⁷³ and these restrictions were reinforced by severely limited budgets.²⁷⁴ Consequently, the *ad hoc* tribunals that followed the ICTY and ICTR prosecuted only a tiny number of offenders. The SCSL prosecuted ten,²⁷⁵ the ECCC three,²⁷⁶ and the STL held a single *in absentia* mass atrocity trial against four defendants who were never apprehended.²⁷⁷ Finally, the two most recent *ad hoc* additions to the international criminal justice landscape, the Kosovo Specialist Chambers (KSC) and the Central African Republic Special Criminal Court (SCC), have completed a few trials and have a few underway,²⁷⁸ but they also are unlikely to prosecute large numbers of defendants.²⁷⁹

²⁷³ The Special Court of Sierra Leone, for instance, had jurisdiction only over persons who bore “the greatest responsibility” over international crimes, Statute of the Special Court for Sierra Leone, art. 1, Apr. 12, 2002, 2178 U.N.T.S. 145, whereas the law creating Extraordinary Chambers in the Courts of Cambodia authorized them to prosecute only “senior leaders of Democratic Kampuchea and those who were most responsible” for the crimes in question. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 1, 2004 (NS/RKM/1004/006) (Cambodia), <https://www.legal-tools.org/doc/9b12f0/pdf/> [https://perma.cc/QQU2-3PTU]. The jurisdiction of the Special Tribunal for Lebanon, for its part, was limited to “persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons.” S.C. Res. 1757, ¶ 1, annex, Special Tribunal for Lebanon Statute, art. 1 (May 30, 2007).

²⁷⁴ See *infra* text accompanying notes 337-338 (discussing budget constraints of the SCSL and ECCC).

²⁷⁵ The SCSL held four trials. The CDF trial featured three defendants, though one died before judgment. See *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment, ¶ 1 (Aug. 2, 2007). The RUF trial also had three defendants, *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, ¶ 4 (Mar. 2, 2009), as did the AFRC trial, *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Judgment, ¶ 4 (June 20, 2007). Charles Taylor was prosecuted in the SCSL’s final trial. *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment, ¶ 2475 (May 18, 2012).

²⁷⁶ See *Prosecutor v. Kaing*, Case No. 001/18-07-2007/ECCC/TC, Judgment (July 26, 2010); *Prosecutor v. Nuon & Khieu*, Case No. 002/19-09-2007/ECCC/TC, Case 002/01, Judgment (Aug. 7, 2014); *Prosecutor v. Nuon & Khieu*, Case No. 002/19-09-2007/ECCC/TC, Case 002/02, Judgment (Nov. 16, 2018).

²⁷⁷ See *Prosecutor v. Ayyash*, Case No. STL-11-01/T/TC, Judgment (Aug. 18, 2020). The STL also prosecuted two individuals and two media companies for contempt of court. See *Prosecutor v. Al Jadeed*, Case No. STL-14-05/A/AP, Public Redacted Version of Judgment on Appeal (Mar. 8, 2016); *Prosecutor v. Akhbhar Beirut S.A.L.*, Case No. STL-14-06/T/CJ, Public Redacted Version of Judgment (July 15, 2016).

²⁷⁸ The KSC has completed two trials, involving two defendants, see *Shala Judgment*, *supra* note 170; *Mustafa Judgment*, *supra* note 170. It has one trial underway as of writing, involving four defendants, *Prosecutor v. Thaçi*, Case No. KSC-BC-2023-12, Indictment (Apr. 16, 2025). The SCC has completed three trials involving 10 defendants, *Bozize Judgment*, *supra* note 174; *Kalite Judgment*, *supra* note 175; *Assan Judgment*, *supra* note 175, at 2.

²⁷⁹ The SCC held only one trial against three defendants in its first seven years. See Franck Petit, *Central African Republic: Special Court “in the Starting Block”* (1/2), JUST. INFO. (Jan. 16, 2023), <https://www.justiceinfo.net/en/111183-central-african-republic-special-court-starting-block-1.html> [https://perma.cc/C6CK-8CAT]. Admittedly, the court picked up the pace and completed its second and third trials, involving four and three defendants, in November 2024 and June 2025, respectively. Rodrigue Le Roi Benga, *Central African Republic: The End of the Trial of the Four Rebels Who “Did Nothing,”* JUST. INFO. (Nov. 18, 2024), <https://www.justiceinfo.net/en/138405-central-african-republic-end-trial-four-rebels-who-did-nothing.html> [https://perma.cc/KAS5-CL2Z]; *Assan Case*, *supra* note 175, at 2. However, the SCC has a time-limited mandate, see *Central African Republic: First Trial at the Special Criminal Court*, HUM. RTS. WATCH (Apr. 12, 2022), <https://www.hrw.org/news/2022/04/12/central-african-republic-first-trial-special-criminal-court#whatisthe> [https://perma.cc/JKC5-XBBU] (noting that the court “has a mandate of five years, which can be renewed only once, for a maximum of 10 years”). It also operates on an extremely limited and tenuous funding stream, which has become even more limited since the United States has ceased providing support. See Chuka Arinze-Onyia, *The Special Criminal Court Must Fill the Justice Gap Left by the ICC in Central African Republic*, OPINIO JURIS (Oct. 23, 2023), <https://opiniojuris.org/2023/10/23/the-special-criminal-court-must-fill-the-justice-gap-left-by-the-icc-in-central-african-republic/> [https://perma.cc/4W7J-N8DU]; Rodrigue le Roi Benga, *CAR’s*

As for the ICC, it is a permanent court with prospective jurisdiction over international crimes occurring across the globe, but its budget and practice over the last two decades make clear that it has capacity to prosecute, at best, only a handful of offenders per conflict situation.²⁸⁰ Thus far, the ICC has brought to trial, at most, four offenders for any single conflict, and for most conflicts, it has prosecuted one or two.²⁸¹ Finally, rounding out the international criminal justice landscape are domestic courts that prosecute mass atrocities occurring in distant States. As noted above, courts throughout Europe in particular are increasingly prosecuting offenders who committed crimes in Syria, Iraq, Libya, and other conflict zones,²⁸² but each State generally prosecutes only a small number of offenders from each conflict.²⁸³ Moreover, these trials are often spread out among different domestic courts throughout the State. Thus, it may be that Finland prosecutes several crimes committed in Iraq, but any given Finnish court is likely to hear only one or two of those cases.²⁸⁴

That contemporary international criminal justice bodies can prosecute at most only a handful of cases per conflict means that many of the methods by which the ICTY and ICTR gained valuable information and evidence are no longer available.²⁸⁵ For one thing, the ICTY was able to gain a sophisticated understanding of the Yugoslav conflict and the military and political leadership structures of the various States and paramilitary groups, thanks to approximately 50 professional analysts on staff.²⁸⁶ By contrast, the ICC has comparatively few analysts²⁸⁷ and what analysts they

Special Court Wants to Live On, JUST. INFO. (Aug. 1, 2025), <https://www.justiceinfo.net/en/148599-car-special-court-wants-to-live-on.html> [<https://perma.cc/2TEM-QG57>]. These combine to make it unlikely that the court will be able to prosecute substantial numbers of defendants. Little public information exists about the prospects for the KSC, but that, plus the considerable challenges the court has already faced, see Sara Ochs & Kirbi Walters, *Forced Justice: The Kosovo Specialist Chambers*, 32 DUKE J. COMP. & INT'L L. 239, 274 (2022) (noting that “despite still being in the early stages of its work, the KSC has already fallen victim to political interference and witness intimidation”), suggests that it will not have the capacity to prosecute significant numbers of offenders.

²⁸⁰ See Marieke Wierda & Anthony Triolo, *Resources*, in INTERNATIONAL PROSECUTORS 113, 114, 135 (Luc Reydam et al. eds., 2012). See also *supra* text appearing in note 25; Kai Ambos, *Introductory Note to Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation (Int' Crim. Ct.)*, 57 INT'L LEGAL MATERIALS 1131, 1131 (2018).

²⁸¹ See *supra* text appearing in note 25.

²⁸² See Langer & Eason, *supra* note 26, at 780-81, 793 n.15.

²⁸³ See *supra* text appearing in note 27.

²⁸⁴ See, e.g., Prosecutor v. Ammar, Case No. R 16/1304, Judgment (Mar. 18, 2016) (Fin.), https://ujim.trialinternational.org/wp-content/uploads/2023/04/Jebbar-Salman-Ammar_18.03.2016_1st-instance_ENG.pdf [<https://perma.cc/55Z3-SADL>] (District Court of Pirkanmaa); Prosecutor v. Hilal, Case No. R 16/214, Judgment (Mar. 22, 2016) (Fin.), https://ujim.trialinternational.org/wp-content/uploads/2023/04/Hadi-Habeeb-Hilal_22.03.2016_1st-instance_ENG.pdf [<https://perma.cc/7NKR-ZD3Z>] (District Court of Kanta-Häme); Prosecutor v. Hasan, Case No. R 18/6593, Judgment (Jan. 10, 2019) (Fin.), https://ujim.trialinternational.org/wp-content/uploads/2019/05/Jabbar_Hasan_10.01.2019_1st-instance_ENG.pdf [<https://perma.cc/REG2-9WGE>] (District Court of Helsinki).

²⁸⁵ Yulia Nuzban, *Context Matters: The Use of Overview Expert Evidence in ICC Trials*, 21 J. INT'L CRIM. JUST. 931, 951 (2023) (contrasting the ICTY and ICTR, whose substantial number of cases enabled tribunal parties to develop “competent levels of individual and institutional knowledge” with the ICC, whose “institutional design and limited resources” do not so allow).

²⁸⁶ Xabier Agirre Aranburu, *The Contribution of Analysis to the Quality Control in Criminal Investigation*, in QUALITY CONTROL IN CRIMINAL INVESTIGATION 119-121 (Xabier Agirre et al. eds., 2020).

²⁸⁷ *Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report*, INT'L CRIM. CT. ¶ 742 (Sept. 30, 2020), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf [<https://perma.cc/9LZL-ACZ9>] [hereinafter IER Report]; Thijs B. Bouwknecht, *Investigating International Crimes: Pitfalls, Problems and Promises*, in QUALITY CONTROL IN CRIMINAL INVESTIGATION (Xabier Agirre et al. eds., 2020) 67, 111-112 (2020).

have must address a wide variety of countries and conflicts.²⁸⁸ Because ICC analysts are stretched across multiple conflicts, they often lack key capabilities. Indeed, many current ICC analysts began their careers as Yugoslavia experts and were hired by the ICTY precisely for this expertise. Through working at the ICC, they have developed proficiency in the African conflicts whose crimes the ICC has been prosecuting, but arguably not full “expertise.” For one thing, the Independent Expert Review, which scrutinized every aspect of the ICC’s functioning, sharply criticized the ICC for “the apparent lack of situation country knowledge on the part of analysts and investigators.”²⁸⁹ This shortcoming encompassed both “complex political, social, and cultural matters” as well as simple language competency.²⁹⁰ As for the latter, Christian Nielsen has detailed the significant challenges faced by analysts who are not fluent in local languages,²⁹¹ challenges that sometimes cause ICC prosecutors to misunderstand relevant evidence.²⁹² It is no surprise, then, that commentators have identified “analytical depth” as a persistent challenge for the ICC,²⁹³ and the Independent Expert Review highlighted the court’s insufficient analytical capacity for particular criticism.²⁹⁴ Even the ICC’s Assembly of States Parties has remarked that the court’s analytical ability stands in substantial comparative disadvantage to that of the ICTY.²⁹⁵

The ICC’s tiny caseload-per-conflict ratio also hampers its evidence gathering capabilities in other ways. For instance, the pyramidal charging structure that generated evidence and information for the ICTY is largely unavailable to a court that can prosecute only a few offenders per conflict. As noted above, Nielsen lauded the ICTY’s first prosecution of the otherwise-insignificant Dusko Tadić because the case created an evidentiary foundation for subsequent prosecutions of senior officials. He went on to contrast the ICC’s first prosecution against Thomas Lubanga, a similarly low-level defendant, whose case “suffered from the same flaws” as *Tadić*. But Nielsen reported that due to the ICC’s “structural problem” of needing to simultaneously

²⁸⁸ Nielsen, *Analysis of Organisational Structures*, *supra* note 235, at 287. Nielsen believes that “[b]uilding up a roster of expert analytical knowledge is crucial.” *Id.* at 288. Nuzban agrees that “developing, consulting and retaining in-house expertise — in the form of either regional historians, country experts or situation-specific staff — will remain essential” for the ICC. Nuzban, *supra* note 285, at 951. But Nielsen acknowledges that developing such robust analytical capacity may not be justifiable for a court like the ICC that “must deal with a wide array of situations.” Nielsen, *Analysis of Organisational Structures*, *supra* note 235, at 288.

²⁸⁹ IER Report, *supra* note 287, ¶ 743.

²⁹⁰ *Id.* ¶ 782.

²⁹¹ Nielsen, *Analysis of Organizational Structures*, *supra* note 235, at 287-88.

²⁹² See Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15, Opinion of Judge Tarfusser, ¶ 54 (July 16, 2019).

²⁹³ Nielsen, *Analysis of Organizational Structures*, *supra* note 235, at 287.

²⁹⁴ The Expert Group blamed some problems on “the comparatively small number of analysts in the ID and their junior rank in the integrated teams.” IER Report, *supra* note 287, ¶ 788. The resulting report also noted the “widespread concern” that the investigations division “does not have sufficient analysts to provide thorough and timely analytical products.” *Id.*

²⁹⁵ Bouwknecht, *supra* note 287, at 111-12. In 2018, the ASP reported that the ICC only had 61 investigators, 23 analysts, and 9 staff in its forensic science section. *Id.* (citing INTERNATIONAL CRIMINAL COURT, ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SEVENTEENTH SESSION: THE HAGUE, 5-12 DECEMBER 2018: OFFICIAL RECORDS, VOLUME II, pt. A, ¶¶ 299-301). Bouwknecht considers this “modest for a court that deals with no less than 21 situations across the globe,” and the ASP also observed that, by comparison, “the ICTY deployed between 20 and 30 investigators per case – excluding lawyers and other support functions,” *id.* (citing INTERNATIONAL CRIMINAL COURT, ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: TWELFTH SESSION: THE HAGUE, 20-28 NOVEMBER 2013: OFFICIAL RECORDS, VOLUME II 39, n. 45).

prosecute offenders from multiple conflicts, the court has “failed to achieve the types of increased returns to scale seen at the ICTY.”²⁹⁶

Indeed, given the diversity of its caseload, the ICC struggles even to provide adequate language interpretation. The ICTY’s and ICTR’s linguistic task was comparatively easy: although interpretation was necessary for virtually every witness, all of the witnesses spoke the same language,²⁹⁷ so the Tribunals could employ a passel of interchangeable interpreters, all of whom possessed the same useful language capabilities. Crimes prosecuted at the ICC, by contrast, have taken place in States where multiple languages are spoken.²⁹⁸ Kenyans may speak Swahili, Luhya or Kikuyu, while Ivorians speak a different group of languages.²⁹⁹ Indeed, witnesses in the ICC’s *Al Hassan* case, centering on Mali, gave testimony in seven different languages;³⁰⁰ moreover, many of the languages relevant to the ICC are “languages of lesser diffusion,” meaning that they are “neither habitually written nor widespread by territory or function.”³⁰¹ Numerous commentators have highlighted the delays and challenges that this linguistic complexity has posed for the ICC.³⁰² Even ICC judges have sometimes publicly criticized the parties’ handling of translation issues.³⁰³

Language is also an element of cultural competency. A court that can—at best—prosecute only a few cases arising out of each conflict may find it practically impossible to gain a sophisticated understanding of the relevant peoples and any cultural proclivities that might impede accurate fact-finding. ICC Trial Chambers have heard expert witness testimony about relevant cultural aspects,³⁰⁴ but there are disadvantages to using external experts.³⁰⁵ Moreover, insiders acknowledge that external experts are “no cure for insufficient understanding of context and background” among participants of international criminal proceedings.³⁰⁶

²⁹⁶ Nielsen, *Analysis of Organisational Structure*, *supra* note 235, at 281-82. Nielsen contrasts the ICC which “has faced tremendous pressure to deal with situations in several countries” with the ICTY which, “as a geographically defined *ad hoc* court enjoyed the relative luxury of being able to focus on crimes committed in one (former) country.” Because the ICC must “address numerous situations that may be completely detached from one another,” Nielsen considers it unlikely that the ICC will be able to generate “the kinds of investigative and prosecutorial returns to scale” which ICTY and ICTR could achieve. *Id.*

²⁹⁷ ICTR witnesses spoke Kinyarwanda whereas ICTY witnesses spoke Bosnian-Croatian-Serbian, a working language created by ICTY to enhance comprehension between speakers across the region. Swigart, *Linguistic and Cultural Diversity*, *supra* note 239, at 200-01.

²⁹⁸ Swigart notes that the ICC’s cases “necessitated communication—during investigations, in the courtroom, and for outreach activities—in over 30 ‘situation languages.’” Swigart, *Linguistic and Cultural Diversity*, *supra* note 239, at 207.

²⁹⁹ *Id.* at 206.

³⁰⁰ *Al Hassan Trial Judgment*, *supra* note 25, ¶ 42.

³⁰¹ Swigart, *Linguistic and Cultural Diversity*, *supra* note 239, at 207-08; Alexandra Tomić & Ana Beltrán Montoliu, *Translation at the International Criminal Court*, 4 LEGAL TRANSLATION CONTEXT 221, 233-35 (2013).

³⁰² See, e.g., Tomić & Montoliu, *supra* note 301, at 233; Swigart, *Linguistic and Cultural Diversity*, *supra* note 239, at 205-06 (recounting comments of Diederick Zanen, head of the ICC’s Field and Operational Interpretation Unit); IER Report, *supra* note 287, ¶ 182.

³⁰³ Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15, Opinion of Judge Tarfusser, ¶ 93 (July 16, 2019) (deeming it “troubling” that “staff with limited mastery of French was selected as responsible for carrying out interviews of critical importance for the case”).

³⁰⁴ See generally Nuzban, *supra* note 285.

³⁰⁵ Nielsen, *Analysis of Organizational Structures*, *supra* note 235, at 288 (detailing these disadvantages).

³⁰⁶ Nuzban, *supra* note 285, at 951.

It is for these reasons that Leigh Swigart contrasts the ICTY and ICTR, “which saw an accumulation of institutional knowledge and staff expertise about their respective geographic jurisdictions develop over time,” with the ICC, where each trial must essentially “start from zero.”³⁰⁷ Swigart points out that the ICC’s global reach renders it unable to foresee the locations of the next crimes it will be asked to investigate, so the court “cannot count upon having speakers of relevant languages or persons knowledgeable about relevant regions and cultures among its own large staff, much less sitting on its eighteen-person bench.”³⁰⁸ Indeed, ICC judges look to the parties for cultural education, sometimes fruitlessly. The ICC’s *Katanga* Trial Chamber pointedly chastised the prosecution for failing to elucidate the socio-cultural aspects of its evidence, observing that attention to these matters “would have permitted a more nuanced interpretation of certain facts; a more accurate interpretation of some of the testimonies and, hence, a fine-tuning of the criteria relied on by the Chamber in assessing the credibility of several witnesses.”³⁰⁹

To sum up, Part III traced a positive evidentiary trajectory, thanks to communication and technological advances. This Part, however, traces a negative evidentiary trajectory, thanks to institutional retrenchments. Part V, next, explores the long-term ramifications of these two opposing trajectories.

V. CONFLICTING TRAJECTORIES AND THEIR IMPACT ON THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE

The evidentiary transformation detailed in Part III has the potential to reduce factual uncertainty and thereby dramatically improve fact-finding accuracy in mass atrocity trials. To see why, let us go back 15 years to the following description that I authored about fact-finding at some prominent international criminal tribunals:

[T]he ICTR, SCSL, and Special Panels operate in a fact-finding fog of inconsistent, vague, and sometimes incoherent testimony that leaves them unable to say with any measure of certainty who did what to whom. Perhaps Jean de Dieu Kamuhanda led an attack against the Tutsi at the Gikomero Parish Church, as alleged by the prosecution, but the only evidence that he did comes from alleged eyewitnesses, and the defense has a passel of its own witnesses who claim that Kamuhanda was with them, far from the massacre site. Perhaps Alex Tamba Brima was commander of the AFRC troops in the Kono district in May 1998, as the prosecution claims, but he and defense witnesses maintain that he was in RUF custody at that time. No forensic evidence is available to inform these questions, and the traditional means that judges employ to evaluate the credibility of witness testimony are unilluminating because they presuppose similarities in language and culture between judges and witnesses that simply do not exist in the international context. Witnesses fail to answer questions, and we cannot know whether it is

³⁰⁷ Swigart, *Linguistic and Cultural Diversity*, *supra* note 239, at 206.

³⁰⁸ *Id.*

³⁰⁹ *Katanga Trial Judgment*, *supra* note 25, ¶ 67; *see also Ngudjolo Trial Judgment*, *supra* note 25, ¶ 123.

because they do not know the answers or because they do not wish to provide them. Witnesses testify haltingly and dance around relevant topics, and we cannot know whether they do so because that is their normal pattern of speech, because they do not understand the questions they have been asked, because they have in fact answered directly but a mistranslation has created a seeming divergence between the question and answer, or because the witness purposely wishes to evade the question. And Lord only knows what to make of the many inconsistencies between witness testimony and pre-trial statements that pervade international criminal proceedings. Witnesses attribute these inconsistencies to investigators' errors. Defense counsel attribute them to witness mendacity. And each explanation, along with a host of others, is plausible. The Trial Chambers' inability to ascertain the causes of testimonial deficiencies stands as only one of their fact-finding problems, moreover, for even . . . when the witness's imprecision and nonresponsiveness stem from "innocent" causes, at the end of the day, the Trial Chamber is left with only imprecise, nonresponsive eyewitness testimony on which to base its determination of whether the defendant is guilty of an international crime.³¹⁰

To be fair, this bleak assessment did not extend to the ICTY, whose trials featured more non-testimonial evidence and less cultural complexity. But it did indict the other then-existing international criminal tribunals, and it suggested that acquittals would have been appropriate for many trials in those tribunals. That is, in the face of such extreme factual uncertainty, one might have expected that judges would be unable to find prosecutorial allegations proven beyond a reasonable doubt. They did find them proved, however. My research showed that judges overlooked and/or failed to mention many testimonial deficiencies, and they explained away a great number of those they did acknowledge.³¹¹ Acquittals, therefore, were rare at these tribunals, and I accused them of manifesting a "pro-conviction bias."³¹²

Early ICC cases exhibited similar testimonial deficiencies and concomitant factual uncertainty, but ICC judges responded in a seemingly more principled way. From the ICC's outset, its judges have carefully scrutinized witness testimony and have been willing to reject that testimony when it featured many of the same inadequacies that previous tribunal judges overlooked. In the ICC's very first trial—against Thomas Lubanga—the Trial Chamber declined to credit or rely upon the testimony of virtually any of the prosecution witnesses,³¹³ and prosecution witnesses in the next two cases—against Matthieu Ngudjolo and Germain Katanga—did not fare much better.³¹⁴ Some commentators claimed that this rigorous scrutiny constituted an over-

³¹⁰ COMBS, *supra* note 9, at 174-75.

³¹¹ *Id.* at 189-203, 220-21.

³¹² *Id.* at 222.

³¹³ *Lubanga Trial Judgment*, *supra* note 25, ¶¶ 479-480; Comrie, *supra* note 74, at 137 (reporting that the Trial Chamber refused to rely on any of the 11 child victim witnesses).

³¹⁴ The *Ngudjolo* Trial Chamber wholly declined to credit or rely on a passel of prosecution witnesses. See *Ngudjolo Trial Judgment*, *supra* note 25, ¶¶ 144, 177-78, 206, 252, 272, 313. The *Katanga* Trial Chamber also carefully parsed and scrutinized prosecution witness testimony, detailing inconsistencies and other problematic features. See, e.g., *Katanga Trial Judgment*, *supra* note 25, ¶¶ 168, 171, 176, 196, 222. The Trial Chamber rejected some witness testimony in its entirety, *id.* ¶¶ 292, 319, and

correction, particularly when applied at the confirmation of charges phase.³¹⁵ Whether or not that is a fair criticism, no one can deny that ICC judges have been exceptionally willing to reject prosecution evidence and—more extremely—to acquit defendants. Indeed, ICC judges acquitted six of the first nine mass atrocity defendants³¹⁶ brought to trial;³¹⁷ that is, by 2019, a full two-thirds of ICC mass atrocity defendants had been acquitted.

ICC judges should be applauded for their willingness to critique prosecutorial evidence and to acquit when that evidence does not satisfy the rigorous beyond-a-reasonable-doubt standard. However, mass atrocity acquittals, even justifiable acquittals, create their own problems. Although in domestic criminal justice systems acquittals are widely viewed as the mark of an independent and mature judicial system,³¹⁸ they are just as widely viewed as the mark of a floundering, incompetent international criminal justice system. To see why, we need only recall our core international criminal justice truths: mass atrocities are committed by massive numbers of offenders; mass atrocity trials are massively expensive, and resources are always limited. Domestic prosecutors seek to prosecute every violent crime, and virtually all of those crimes are committed by small numbers of individuals. Under these circumstances, it is to be expected that prosecutors occasionally accuse the wrong individual, and when they do, a mature and independent judiciary will acquit. By contrast, a criminal justice system that can, at most, prosecute three or four individuals for crimes that were committed by hundreds or thousands stands in an entirely different position. That is, when prosecutors have so many alleged offenders to choose from, their failure to build a satisfactory case against the precious few they choose to target is understandably viewed as an abject failure. For this reason, even one international criminal law acquittal is decried;³¹⁹ it is no wonder, then, that the ICC's shockingly high acquittal rate generated widespread criticism.³²⁰

for other witnesses, it declined to rely on large portions of their testimony, *id.*, ¶¶ 117-179, 197, 212, 227, 229, 260-261.

³¹⁵ Alex Whiting, *Investigations and Institutional Imperatives at the International Criminal Court*, in *THE FIRST GLOBAL PROSECUTOR: PROMISES AND CONSTRAINTS* 128, 137-141 (Martha Minow et al., eds 2015).

³¹⁶ I specify mass atrocity defendants because the ICC also charged several defendants for offenses against the administration of justice. See *Prosecutor v. Bemba*, Case No. ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute (Oct. 16, 2016); *Prosecutor v. Gicheru*, Case No. ICC-01/09-01/20, Public Redacted Decision on the Confirmation of Charges Against Paul Gicheru (July 15, 2021). However, those crimes have different evidentiary profiles, and their prosecution is tangential to the ICC's core mission.

³¹⁷ The six acquitted defendants are Ngudjolo, *Ngudjolo Trial Judgment*, *supra* note 25, ¶ 516; Bemba, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶¶ 196-198 (June 8, 2018); *Prosecutor v. Ruto*, Case No. ICC-01/09-01/11, Public Redacted Version of Decision on Defence Applications for Judgements of Acquittal, at 1 (Apr. 5, 2016); and Gbagbo and Blé Goudé, *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/15, Reasons for Oral Decision of 15 Jan. 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, ¶ 28 (July 16, 2019).

³¹⁸ See, e.g., DARRYL ROBINSON ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 159-60 (5th ed. 2024).

³¹⁹ *Kigali Denounces Acquittals at UN Tribunal*, *THE NEW HUMANITARIAN* (Feb. 26, 2004), <https://www.thenewhumanitarian.org/news/2004/02/26/kigali-denounces-acquittals-un-tribunal> [<https://perma.cc/6QR9-CMR4>].

³²⁰ Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis*, 20 MELB. J. INT'L L. 401, 409 (2019); Douglas Guilfoyle, *Part I- This Is Not*

This discussion shows, therefore, the significant deleterious consequences of factual uncertainty in mass atrocity trials. Early international criminal judges were too cavalier about the uncertainty and thereby arguably undermined defendants' rights. More recent ICC judges avoided that trap by carefully attending to the uncertainty, but in a way that may undermine the ICL field as a whole.

For these reasons, then, it is all to the good that international criminal trials now feature significant quantities of non-testimonial evidence. To be sure, non-testimonial evidence can contain inaccurate information or be just as vague or unintelligible as witness testimony. But non-testimonial evidence "is not vulnerable to pressure, faulty recollection and other human frailties."³²¹ So, unlike a witness who "may constantly alter his or her account," the content of non-testimonial evidence remains the same over time.³²² This contrast between the two forms of evidence is particularly salient in the context of mass-atrocity prosecutions because it is in that realm that witness testimony has so often proven variable and vulnerable. It is no wonder, indeed, that when a seasoned ICTY prosecutor was asked to describe the priorities of a successful war crimes investigation, he responded: "Priority 1: documents. Priority 2: documents. Priority 3: documents."³²³

Part III's description of recent cases confirms this pithy advice by showing the significant and beneficial impact of non-testimonial evidence in corroborating witness testimony and placing trial outcomes on firmer foundations. It is no coincidence that ICC prosecutors have now obtained convictions in their last six cases³²⁴ and that all but one of those convictions were based on a blend of testimonial and corroborating non-testimonial evidence. Of course, it is possible that witness testimony alone would have convinced judges beyond a reasonable doubt of the guilt of these recent ICC defendants, but that seems highly unlikely. As noted, historically ICC judges have held witness testimony to high standards, and they have been just as willing to reject that testimony in recent cases as in earlier ones, as the failed rape charges against Al Hassan and the failed child soldier charges against Yekatom demonstrate. Moreover, even if ICC judges had been willing to convict solely on the basis of witness testimony, these convictions would have been subject to greater contestation and criticism. For instance, although the ICC convicted an early defendant, Germain Katanga, in his witness-heavy trial, the prosecution was widely criticized by the judges³²⁵

Fine: The International Criminal Court in Trouble, EJIL: TALK! (Mar. 21, 2019), <https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/> [<https://perma.cc/ZA65-PQZA>]; Richard Goldstone, *Acquittals by the International Criminal Court*, EJIL: TALK! (Jan. 18, 2019), <https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/> [<https://perma.cc/9ZHS-6KD4>] (noting that "[c]ritics of the ICC claim that [its] track record constitutes an indictment of the Court"); James A. Goldston, *Don't Give Up on the ICC*, FOREIGN POL'Y (Aug. 8, 2019, 4:18 AM), <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/> [<https://perma.cc/CKE9-W7VX>].

³²¹ Agirre, *supra* note 42, at 65.

³²² Nielsen, *Analysis of Organisational Structures*, *supra* note 235.

³²³ Agirre, *supra* note 42, at 65.

³²⁴ These six defendants are Bosco Ntaganda convicted in July 2019, *Ntaganda Trial Judgment*, *supra* note 25, ¶ 1199; Dominic Ongwen, convicted in February 2021, *Ongwen Trial Judgment*, *supra* note 25, ¶ 3116; Al Hassan, convicted in June 2024, *Al Hassan Trial Judgment*, *supra* note 25, ¶ 1785; Alfred Yekatom and Patrice-Edouard Ngaïssona, convicted in July 2025, *Yekatom & Ngaïssona Trial Judgment*, *supra* note 25, ¶ 4846, and Abd-Al-Rahman, convicted in October 2025, *Abd-Al-Rahman Trial Judgment*, *supra* note 25, ¶ 1013.

³²⁵ *Katanga Trial Judgment*, *supra* note 25, ¶¶ 59-67.

as well as commentators, for failing to advance a strong evidentiary case.³²⁶ Some maintain, indeed, that it was only the judges' controversial re-characterization of charges that saved the *Katanga* prosecution from yet another acquittal.³²⁷

Domestic prosecutions have also gained from the recent influx of non-testimonial evidence. To see how much, one need only compare domestic prosecutions of more recent crimes, described in Part III, with Finland's recent prosecution of Gibril Massaquoi for crimes committed between 1999 and 2003 in Liberia.³²⁸ Non-testimonial evidence of 25-year-old crimes was hard to come in Liberia, so Finnish prosecutors had to rely exclusively on witness testimony.³²⁹ That testimony featured many of the challenges common to mass atrocity witnesses; indeed, testimony in *Massaquoi* was particularly problematic because a large proportion of witnesses contradicted their pretrial statements about key dates.³³⁰ As a consequence, Finnish judges (both trial and appellate) acquitted Massaquoi,³³¹ but only after a year-long trial³³² with a €3.9 million price tag.³³³ As Part III detailed, similar crimes committed today would have generated far more non-testimonial evidence; such evidence either provides prosecutors crucial support for well-founded allegations or alerts them to the need to abandon charges or otherwise change course.

The institutional transformation, by contrast, appears to undermine many of the fact-finding gains just described. For the reasons identified in Part IV, contemporary international criminal justice bodies know less about the crimes and conflicts they are prosecuting than previous institutions. They also know less about the people who stand as witnesses, including any cultural proclivities that may impact witness testimony and the way that testimony is understood. Some have gone so far as to suggest that the ICC's initial disastrous case outcomes were at least partly attributable to its

³²⁶ Kevin Jon Heller, *Another Terrible Day for the OTP*, OPINIO JURIS (Mar. 8, 2014), <https://opiniojuris.org/2014/03/08/another-terrible-day-otp/> [https://perma.cc/QY78-J9K2] (noting that although the ICC convicted Katanga, "the verdict nevertheless represents the Trial Chamber's complete rejection of the OTP's case").

³²⁷ Dov Jacobs, *The ICC Katanga Judgment: A Commentary (Part I): Investigation, Interpretation and the Crimes*, SPREADING THE JAM (Mar. 10, 2014), <https://dovjacobs.com/2014/03/10/the-icc-katanga-judgment-a-commentary-part-1-investigation-interpretation-and-the-crimes/> [https://perma.cc/VD86-AL6T] (opining that "the Prosecutor essentially did not prove any of his allegations and the case was only saved by the legal recharacterization of the charges done by the Majority").

³²⁸ Thierry Cruvellier, *Liberia: Massaquoi Trial Closes in Finland*, JUST. INFO. (Jan. 27, 2022), <https://www.justiceinfo.net/en/87010-liberia-massaquoi-trial-closes-in-finland.html> [https://perma.cc/9XYE-C7FM].

³²⁹ Fifty-five witnesses testified. Thierry Cruvellier, *Massaquoi Trial: The Appearance of Angel Gabriel*, JUST. INFO. (Apr. 13, 2021), <https://www.justiceinfo.net/en/75988-massaquoi-trial-appearance-angel-gabriel.html> [https://perma.cc/4K3P-XCC6].

³³⁰ Thierry Cruvellier, *The Massaquoi Trial: Double or Quits Before a Finnish Court*, JUST. INFO. (Mar. 5, 2021), <https://www.justiceinfo.net/en/74574-massaquoi-trial-double-or-quits-before-finnish-court.html> [https://perma.cc/Z93R-6Z37].

³³¹ Thierry Cruvellier, *Massaquoi Affair: Epilogue to a Fiasco*, JUST. INFO. (Feb. 2, 2024), <https://www.justiceinfo.net/en/128015-massaquoi-affair-epilogue-fiasco.html> [https://perma.cc/9DYD-TLF3].

³³² Cruvellier, *supra* note 328. Four months of that trial took place in Liberia. *Id.*; see also *Trial Monitoring: Gibril Massaquoi*, CIVITAS MAXIMA, <https://civitas-maxima.org/trial-monitoring-gibril-massaquoi/> [https://perma.cc/BT89-GWRQ] (last visited July 7, 2026).

³³³ Thierry Cruvellier, *Gibril Massaquoi Tries for the Jackpot*, JUST. INFO. (June 28, 2024), <https://www.justiceinfo.net/en/133749-gibril-massaquoi-tries-for-the-jackpot.html> [https://perma.cc/P5RF-WSG6].

inability to prosecute more than a few defendants per conflict and the analytical deficiencies that resulted from that incapacity.³³⁴

On the surface, then, Parts III and IV tell two countervailing stories—one about an increase and the other about a decrease in factual certainty in mass atrocity trials. However, although these stories are accurate, they are incomplete. A closer look reveals significant divergences in both the causes of the factual uncertainty at the heart of the two transformations, and their ultimate significance for the future of ICL.

Consider first the causes of the various forms of factual uncertainty that have bedeviled international criminal trials. Specifically, the factual uncertainty that plagued the witness-only trials of the 1990s and early 2000s stemmed largely from circumstances beyond anyone's control. Non-testimonial evidence simply did not exist to prove many of the crimes taking place at this time. Perhaps prosecutors could have done more to present internally consistent witness testimony, but in many cases, judges would still have faced a passel of prosecution witnesses who told one story facing off against a different passel of defense witnesses who told a completely contradictory story. That is, in many of the trials of this era, judges were required to select one opposing narrative, but they had little objective basis for their selection.

The factual uncertainty more recently introduced by the institutional transformation, by contrast, does not stem from irremediable circumstances but rather from deliberate policy choices. These choices most obviously concern money, as will be discussed next, but they also concern the appropriate scope of international criminal justice and its foundational principles.

Turning first to money, the halcyon days of international criminal justice featuring the ICTY and ICTR and their hundreds of prosecutions also featured budget busting expenses. At their heights, the combined ICTY and ICTR yearly budgets totaled nearly \$350 million,³³⁵ which constituted nearly 15% of the total UN budget.³³⁶ Long term expenditures of this magnitude for international criminal trials was never a tenable prospect, and the contours of subsequent *ad hoc* tribunals, such as the SCSL and ECCC, were designed specifically to sharply limit funders' financial obligations.³³⁷ The work of these tribunals was undermined by intermittent budget crises,³³⁸ but it is at the ICC where resource constraints have had their greatest impact.

³³⁴ For instance, Thijs Bouwknecht praised the investigative units at the *ad hoc* tribunals and national war crimes units for including historians and social scientists with valuable expertise. Bouwknecht contrasts the ICC, where no such specialized unit was established, Bouwknecht, *supra* note 287, at 76, and he connected the ICC's analytical deficiencies to its stunning failure in the *Gbagbo* case, *id.* Highlighting the other side of that coin, the International Expert Report linked the ICC's positive results with its ability to employ sufficient investigative staff who possess appropriate technical skills. IER Report, *supra* note 287, ¶ 762 (praising the ICC for hiring an analyst with specific telecommunications analysis skills and observing that when the Investigations Division "has staff with technical skills, they can both acquire the necessary evidence, and be able to use it subject to the highest standards of proof").

³³⁵ See G.A. Res. 64/240, pt. 1, ¶ 3 (Dec. 24, 2009); G.A. Res. 64/239, pt. 1, ¶ 3 (Dec. 24, 2009). See also Stuart Ford, *How Leadership in International Criminal Law Is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L.J. 952, 971, 973 (2011) (discussing high-spending years for the ICTY and ICTR).

³³⁶ See G.A. Res. 64/242 A–B, pt. A, ¶ 2(a) (Dec. 24, 2009).

³³⁷ See Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, 80 INT'L AFFS. 311, 311, 318–19 (2004); Sean Morrison, *Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal*, 37 CAP. U. L. REV. 583, 587–590 (2009).

³³⁸ See Giorgia Tortora, *The Financing of the Special Tribunals for Sierra Leone, Cambodia and Lebanon*, 13 INT'L CRIM. L. REV. 93, 102, 109–112 (2013).

The ICC is funded by the Assembly of States Parties, which is composed of ICC member states.³³⁹ At its outset, ICC funding seemed well matched to its workload,³⁴⁰ but as the years passed, its workload markedly increased, when it took on new conflict situations, but its funding remained stagnant.³⁴¹ Indeed, a number of particularly influential states sought to impose zero-growth budgets on the ICC despite significant increases in workload.³⁴² Finances became so tight that the ICC made what have been described as “fateful personnel choices.”³⁴³ Investigators were forced to rotate on and off investigations based on need.³⁴⁴ Concomitantly, preliminary examinations were conducted on a “stop-go” basis in which they were carried forward as far as possible and then paused while staff were shifted to other situations.³⁴⁵ Some commentators blame these budget shortfalls for contributing to ICC’s early failed cases.³⁴⁶ Moreover, two additional datapoints underscore the ICC’s resource deficiencies. First, Stuart Ford’s empirical study shows that domestic states have been willing to devote “vastly more resources” to domestic mass atrocity investigations—on the order of “dozens to hundreds of times more resources”—than the ICC has had for its investigations.³⁴⁷ In addition, as of 2015, the ICC Office of the Prosecutor’s (OTP’s) budget—designed to address conflicts worldwide—was 8 million euro *less* than the ICTY prosecution’s budget at its peak.³⁴⁸

But underfunding is not solely to blame for the ICC’s low case-to-conflict ratio. Rather, that ratio reflects contemporary conceptions and goals of international criminal justice. International criminal justice in general and the ICC in particular have always aspired to be universal. Indeed, international criminal law is often described as rooted in liberal notions of universality and equality, premised on the idea that all individuals—regardless of nationality, status, or official position—are equally

³³⁹ Jonathan O’Donohue, *The ICC and the ASP*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 105, 106-07 (Carsten Stahn ed., 2015).

³⁴⁰ Indeed, commentators pointed out that in its early years, the ICC did not spend all the money that had been allocated to it. Jonathan O’Donohue, *Financing the International Criminal Court*, 13 INT’L CRIM. L. REV. 269, 277-78 (2013).

³⁴¹ See Stuart Ford, *How Much Money Does the ICC Need?*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 84, 87 (Carsten Stahn ed., 2015).

³⁴² Elizabeth Evenson & Jonathan O’Donohue, *Still Falling Short—The ICC’s Capacity Crisis*, OPENDEMOCRACY (Nov. 3, 2015), <https://www.opendemocracy.net/en/openglobalrights-openpage/still-falling-short-icc-s-capacity-crisis/> [<https://perma.cc/3UW4-KLPF>].

³⁴³ Eric Wiebelhaus-Brahm & Kirsten Ainley, *The Evolution of Funding for the International Criminal Court: Budgets, Donors and Gender Justice*, 22 J. HUM. RTS. 31, 33 (2023).

³⁴⁴ See Christian M. De Vos, *Investigating from Afar: The ICC’s Evidence Problem*, 26 LEIDEN J. INT’L L. 1009, 1015-1016 (2013).

³⁴⁵ Wiebelhaus-Brahm & Ainley, *supra* note 343; Jonathan O’Donohue, *ICC Prosecutor Symposium: Wanted—International Prosecutor to Deliver Justice Successfully Across Multiple Complex Situations with Inadequate Resources*, OPINIO JURIS (Apr. 14, 2020), <https://opiniojuris.org/2020/04/14/icc-prosecutor-symposium-wanted-international-prosecutor-to-deliver-justice-successfully-across-multiple-complex-situations-with-inadequate-resources/> [<https://perma.cc/B2UQ-L4BB>].

³⁴⁶ O’Donohue, *supra* note 345; Ford, *What Investigative Resources*, *supra* note 214, at 4; Bouwknecht, *supra* note 287, at 112.

³⁴⁷ Ford, *What Investigative Resources*, *supra* note 214, at 3-4.

³⁴⁸ Evenson & O’Donohue, *supra* note 342 (noting that “the ICTY dealt with one set of interconnected cases and conflicts, while the ICC is already working across nine distinct situations in eight countries”). See also Bouwknecht, *supra* note 287, at 111-112 (comparing meager ICC investigative staff with that of the ICTY).

subject to legal accountability for grave crimes.³⁴⁹ These notions underlie some of ICL's core doctrines such as those rejecting sovereign immunity or official capacity as defenses to international crimes.³⁵⁰ And the very creation of the ICC was intended to remedy the selectivity of *ad hoc* tribunals such as the ICTY and ICTR that focused retrospectively and selectively on just one conflict.³⁵¹ This universality is not only foundational to the ICL project, but it is considered key to promoting the ends the project can achieve. Virtually all of the penological goals to which ICL pursues (including most notably deterrence and retribution) are better advanced through an international criminal justice that is universal in scope.³⁵² It is for that reason that the ICC considers its mission to be global and requires it to play a role world-wide, and particularly in high-profile conflicts.³⁵³

Although the ICC's global aspirations are entirely justified, they combine with the court's anemic finances to create a low case-to-conflict ratio³⁵⁴ that increases factual uncertainty in the trials that are eventually held. The ICC's early acquittals called attention to some of these problems, and commentators responded with band-aid quality suggestions regarding incremental increases to funding and revisions to investigative or charging priorities.³⁵⁵ But these will not address the fundamental problem that this article has identified: that a global court will never be able to prosecute more than a handful of mass atrocity cases per conflict, and that such low case-to-conflict ratios substantially impair accurate fact-finding. It has long been noted that international criminal justice faces insurmountable challenges in part because it pursues multiple, but often conflicting, aims.³⁵⁶ This article has identified another unfortunate example of that phenomenon: the goal of advancing worldwide, universal justice is in substantial conflict with the equally important goal of accurate fact-finding in individual cases; that is, of convicting the right defendants for the right crimes.

³⁴⁹ See David S. Koller, *The Faith in the International Criminal Lawyer*, 40 N.Y.U. J. INT'L L. & POL. 1019, 1050-52 (2008).

³⁵⁰ See, e.g., Rome Statute, *supra* note 182, at art. 27.

³⁵¹ See *Establishment of an International Criminal Court – Overview*, UNITED NATIONS, <https://legal.un.org/icc/general/overview.htm> [<https://perma.cc/3R9V-BDCT>] (last visited Aug. 8, 2025).

³⁵² Jonathan O'Donohue, *Financing the International Criminal Court*, 13 INT'L CRIM. L. REV. 269, 289 (2013) ("To have an impact in the fight against impunity, the ICC must be more than a boutique court that only has the resources and capacity to respond to a limited number of situations. It must be able to respond to impunity wherever it exists . . .").

³⁵³ Patryk I. Labuda, *The ICC's 'Evidence Problem': The Future of International Criminal Investigations After the Gbagbo Acquittal*, VÖLKERRECHTSBLOG (Jan. 18, 2019), <https://voelkerrechtsblog.org/the-iccs-evidence-problem/> [<https://perma.cc/KQL5-SGNM>].

³⁵⁴ See Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 267 (2012) ("States created the ICC to adjudicate 'the most serious crimes of concern to the international community as a whole,' but they gave it a budget that enables only a handful of prosecutions per year.").

³⁵⁵ See, e.g., *id.*; Carsten Stahn, *From Preliminary Examination to Investigation: Rethinking the Connection*, in QUALITY CONTROL IN CRIMINAL INVESTIGATION 37, 58, 64 (Xabier Agirre et al. eds., 2020).

³⁵⁶ See Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 330-31 (2008).

VI. CONCLUSION

Mass atrocity fact-finding is in the process of transformation. New apps, such as eyeWitness to Atrocities,³⁵⁷ now allow victims of international crimes to contemporaneously and securely upload video evidence of their victimization with features designed to establish the videos' core details and authenticity. Although witness testimony still features heavily in mass-atrocity trials, its influence is waning. Indeed, contemporary investigators are apt to be more concerned with date stamps and digital security as with witness memory and demeanor.

Given the rapid pace of technological change, we may have reason to hope that the fact-finding advances created by new forms of evidence will more than counterbalance the factual uncertainties introduced by current institutional arrangements. But that highlights a significant irony: In the early years of ICL, when the factual findings of many judgments could not withstand careful scrutiny, optimism about the field reigned supreme.³⁵⁸ Despite the questionable outcomes of many trials, ICL was credited with advancing a host of praiseworthy goals³⁵⁹ and was seen as ushering in a new age of accountability and equality. So focused on the forest, we ICL scholars had lost sight of the trees. Two decades later, when ICL judgments are far better grounded and more justifiable than ever before, the field is in the grip of despair. Unquestionably, the concerns are justified. Adherence to international law in general seems at a historic low.³⁶⁰ And as grievous international crimes expand and multiply in Gaza, Ukraine, Sudan and dozens of other locations, optimistic expectations for ICL seem almost quaint in their naivete. But again, ICL scholars are so focused on the forest that we have lost sight of the trees. The optimism that previously characterized the field was likely as reflexive as the incessant catastrophizing is now. Whatever other goals it may reasonably seek, reaching factually defensible outcomes for mass atrocity defendants should be a core and foundational goal of ICL. Concededly, other ICL goals are languishing, if not being actively thwarted, but we should at least recognize that the core foundational goal of accurate fact-finding in mass atrocity trials is better served today than ever before.

³⁵⁷ See EYEWITNESS TO ATROCITIES, <https://www.eyewitness.global/> [<https://perma.cc/VCR5-SBGA>] (last visited July 7, 2026).

³⁵⁸ Payam Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 AM. J. INT'L L. 712, 720 (2003) ("In the judicial dawn of the ICC, much of the literature is approving, if not celebratory, in tone . . .").

³⁵⁹ See, e.g., MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 25 (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE 55-56 (2000); Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6-9 (1998).

³⁶⁰ Sylvia Hui, *World Seeing Near Breakdown of International Law amid Wars in Gaza and Ukraine*, *Amnesty Says*, ASSOCIATED PRESS (Apr. 23, 2024), <https://apnews.com/article/amnesty-international-annual-report-human-rights-b0f436e3037145d2ba2e3e755898eb54> [<https://perma.cc/Q2D8-TQGL>].