

Grave Crimes and Weak Evidence: A Fact-finding Evolution in International Criminal Law

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

I. INTRODUCTION

International courts that prosecute crimes such as genocide, war crimes, and crimes against humanity have provided human rights advocates with a novel and potentially powerful enforcement tool. These courts have achieved many notable successes in the twenty years since the first modern tribunal was created.¹ The International Criminal Tribunal for Rwanda (ICTR), for instance, has played a vital role in developing the law of genocide² and the prohibition of sexual violence in international criminal law.³ The Interna-

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

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

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

tional Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), for their parts, made history by indicting sitting heads of state,⁴ whereas the SCSL and the International Criminal Court (ICC) have issued ground-breaking decisions involving the enlistment and conscription of child soldiers.⁵ In addition to these successes, however, international criminal courts and tribunals have also faced a multitude of challenges. International criminal tribunals must contend with obstructionist defendants who seek to delay and distort proceedings,⁶ insufficient budgets that require them to pit fairness against efficiency,⁷ and recalcitrant governments that refuse to surrender indictees,⁸ evidence,⁹ and witnesses.¹⁰

Additionally, and equally pressingly, international criminal tribunals must contend with a host of factors that impede their ability to find accurate facts. Many of these factors have been on embarrassing display lately at the

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

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

6. For a description of the disruptive tactics perpetrated by two of the most notorious obstructionist defendants, Slobodan Milošević and Vojislav Šešelj, see Nancy A. Combs, *Legitimizing International Criminal Justice: The Importance of Process Control*, 35 MICH. J. INT'L L. 321, 348–53 (2012). See also Devon Whittle, *Frivolous Motions and Abuses of Process at the Ad Hoc International Criminal Tribunals*, 22 CARDOZO J. INT'L & COMP. L. 1, 16–19, 27 (2013) (describing defense motions that were intended to delay proceedings or disturb “the fair and expeditious conduct of the trial”); Press Release, ICC, Bemba Case: Four Suspects Arrested for Corruptly Influencing Witnesses; Same Charges Served on Jean-Pierre Bemba Gombo (Nov. 24, 2013), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr962.aspx (describing charges of offenses against the administration of justice brought against the defendant and his lawyers for allegedly “corruptly influencing witnesses before the ICC and presenting evidence that they knew to be false or forged”).

7. See, e.g., Sara Kendall, *Marketing Accountability at the Special Court for Sierra Leone*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY* 387, 403–05 (Charles C. Jalloh ed., 2014); AARON FICHTELBERG, *HYBRID TRIBUNALS: A COMPARATIVE EXAMINATION* 44 (2015); *Georgia/Russia: ICC Judges OK Investigation*, HUM. RTS. WATCH (Jan. 27, 2016), <https://www.hrw.org/news/2016/01/27/georgia/russia-icc-judges-ok-investigation>; *Public Hearing on Serbia's Non-Compliance Slated for Next Week*, SENSE NEWS AGENCY (Feb. 5, 2016), http://www.sense-agency.com/icty/public-hearing-on-serbia's-non-compliance-slated-for-next-week.29.html?news_id=16952; David Cohen, *Seeking Justice on the Cbeap: Is the East Timor Tribunal Really a Model for the Future?*, 61 ASIA PACIFIC ISSUES 1, 3, 5 (2002), <http://www.eastwestcenter.org/fileadmin/stored/pdfs/api061.pdf>; NANCY A. COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* 274 n.1176 (2010) [hereinafter *FACT-FINDING WITHOUT FACTS*] (providing sources discussing the ICTY's and ICTR's underfunding).

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

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

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

ICC. There, judges have already refused to confirm charges against several suspects,¹¹ have acquitted one of the court's first four defendants,¹² and have sharply scolded prosecutors for the evidentiary deficiencies in their cases.¹³ Fact-finding impediments have never been a more serious problem in international criminal law.

In previous works, I brought to light a wide range of deficiencies common to eyewitness testimony in international criminal tribunals.¹⁴ This Article dramatically expands that previous research and breaks new ground by providing quantitative assessments of two phenomena that are vitally important to accurate fact-finding. First, this Article presents a quantitative analysis of the testimonial deficiency in international criminal trials that is both most prevalent and that has the greatest potential to impair accurate fact-finding: inconsistencies between witnesses' current testimony and their previous representations. Second, because testimonial deficiencies tell only part of the story of international criminal fact-finding, this Article quantitatively explores another, even more crucial part: the Trial Chambers' treatment of witness testimony. I explore these issues through an empirical analysis of 342 prosecution witnesses who testified before the ICTR over the course of that Tribunal's life.

Part II explains my research focus and my methodology. Part III details my findings on inconsistencies. To set the stage, I explain here what these inconsistencies are and how they arise. Before persons appear at an international criminal tribunal to testify for the prosecution, they tell their story at least once and often multiple times. At the very least, a prospective witness tells her story to a tribunal investigator who drafts a written statement, ostensibly containing the information that the prospective witness conveyed. Some prospective witnesses are interviewed multiple times and give multiple pre-trial statements. Additionally, some witnesses testify in multiple

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

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

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

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

cases about the same set of events, so, by the time these witnesses testify for the prosecution, they have already testified under oath either before another Trial Chamber or before another court entirely. Inconsistencies arise when a witness's testimony diverges from the representations that appear in the witness's pre-trial statements or previous testimonies.

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

15. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, para. 236 (June 1, 2001) [hereinafter Akayesu Judgment]; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment paras. 403, 412–13 (June 7, 2001); Prosecutor v. Gacumbitsi, Case No. ICTR-01-64-T, Judgment, para. 123 (June 17, 2004) [hereinafter Gacumbitsi Judgment]; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment, para. 680 (Dec. 1, 2003) [hereinafter Kajelijeli Judgment]; Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment, paras. 327, 339 (Jan. 22, 2004); Prosecutor v. Karera, Case No. ICTR-01-74-T, Judgment, paras. 116, 164, 226–28, 299 (Dec. 7, 2007) [hereinafter Karera Judgment]; Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment, paras. 269–270 (Apr. 28, 2005) [hereinafter Muhimana Judgment]; Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment, paras. 385–87 (Jan. 27, 2000) [hereinafter Musema Judgment]; Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgment, para. 171 (Sept. 12, 2006) [hereinafter Muvunyi Judgment]; Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment, paras. 59–60, 65, 99, 102, 167, 277–78, 306 (May 16, 2003) [hereinafter Niyitegeka Judgment]; Prosecutor v. de Jesus, Case No. 06/2002, Judgment, at 10–11 (Jan. 28, 2004) [hereinafter Paulino de Jesus Judgment]; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, para. 171 (May 15, 2003); Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment, paras. 167, 169, 382 (Dec. 13, 2005) [hereinafter Simba Judgment]; Transcript of Continued Trial at 56, 59–60, Prosecutor v. Bagosora (July 3, 2003) (ICTR-98-41-T); Transcript of Continued Trial at 9, 22, 30, Prosecutor v. Bagosora (July 2, 2003) (ICTR-98-41-T) [hereinafter Military I Transcript, July 2, 2003]; Transcript of Continued Trial at 43, 44, 46, Prosecutor v. Gacumbitsi (Aug. 6, 2003) (ICTR 01-64-T); Transcript of Continued Trial at 62–65, Prosecutor v. Kamuhanda (Sept. 19, 2001) (ICTR-99-54A-T) [hereinafter Kamuhanda Transcript, Sept. 19, 2001]; Transcript of Continued Trial at 29–31, Prosecutor v. Kamuhanda (Sept. 4, 2002) (ICTR-99-54A-T); Transcript of Continued Trial at 17–18, 20, Prosecutor v. Karemera (Dec. 5, 2003) (ICTR-98-44-T); Transcript of Continued Trial at 9–10, Prosecutor v. Karera (Jan. 31, 2006) (ICTR-01-74-T); Transcript of Continued Trial at 43–45, Prosecutor v. Muhimana (Apr. 19, 2004) (ICTR-95-1B-T) [hereinafter Muhimana Transcript, Apr. 19, 2004]; Transcript of Continued Trial at 4, 18–19, Prosecutor v. Muhimana (Mar. 31, 2004) (ICTR-95-1B-T); Transcript of Continued Trial at 12, 22–23, Prosecutor v. Ndindabahizi (Sept. 22, 2003) (ICTR-01-71-T); Transcript of Continued Trial at 25–35, 60–61, Prosecutor v. Nyiramasuhuko (Mar. 20, 2003) (ICTR-98-42-T); Transcript of Trial at 45–46, Prosecutor v. Brima (Sept. 19, 2005) (SCSL-04-16-T); Transcript of Trial at 96, Prosecutor v. Brima (July 26, 2005) (SCSL-04-16-T) [hereinafter AFRC Transcript, July 26, 2005]; Transcript of Trial at 82–83, 96, Prosecutor v. Brima (July 21, 2005) (SCSL-04-16-T) [hereinafter AFRC Transcript, July 21, 2005]; Transcript of Trial at 85, Prosecutor v. Brima (July 12, 2005) (SCSL-04-16-T); Transcript of Trial at 151–52, Prosecutor v. Brima (July 11, 2005) (SCSL-04-16-T) [hereinafter AFRC Transcript, July 11, 2005]; Transcript of Trial at 122–23, Prosecutor v. Brima (June 30, 2005) (SCSL-04-16-T); Transcript of Trial at 132–35, Prosecutor v. Brima (June 23, 2005) (SCSL-04-16-T) [hereinafter AFRC Transcript, June 23, 2005]; Transcript of Trial at 26–27, 47–48, Prosecutor v. Brima (June 22, 2005) (SCSL-04-16-T); Transcript of Trial at 53–64, Prosecutor v. Brima (June 21, 2005) (SCSL-04-16-T); Transcript of Trial at 21–25, Prosecutor v. Brima (Apr. 20, 2005) (SCSL-04-16-T); Transcript of Trial at 52–59, Prosecutor v. Brima (Apr. 19, 2005) (SCSL-04-16-T); Transcript of Trial at 34–38, 38–39, 53–60, 63–65, 67–69, Prosecutor v. Brima (Apr. 12, 2005) (SCSL-04-16-T); Transcript of Trial at 79, Prosecutor v. Brima (Apr. 8, 2005) (SCSL-04-16-T); Transcript of Trial at 24–27, Prosecutor v. Brima (Apr. 6, 2005) (SCSL-04-16-T); Transcript of Trial at 45, Prosecutor v. Norman (Mar. 8, 2005) (SCSL-04-14-T); Transcript of Trial 14–19, 24–28, Prosecutor v. Norman (Mar. 4, 2005) (SCSL-

aspects of the crime¹⁶ and/or the defendant's involvement in the crime.¹⁷ Sometimes, a witness's statement will inculpate the defendant when her testimony does not, and sometimes it is the witness's testimony that inculpates when her statement does not.¹⁸ Finally, some witnesses testify about the

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

16. *See, e.g.*, Transcript of Trial at 75-81, Prosecutor v. Ntakirutimana (Sept. 20, 2001) (ICTR 96-17-T) [hereinafter Ntakirutimana Transcript, Sept. 20, 2011]; Transcript of Continued Trial at 31-40, Prosecutor v. Kamuhanda (Feb. 14, 2002) (ICTR-99-54A-T); Transcript of Continued Trial at 48, Prosecutor v. Ndindabahizi (Sept. 29, 2003) (ICTR-01-71-T); AFRC Transcript, June 23, 2005, *supra* note 15, at 103-04; Transcript of Trial at 111-14, Prosecutor v. Brima (June 24, 2005) (SCSL-04-16-T); Transcript of Trial at 50, Prosecutor v. Brima (July 7, 2005) (SCSL-04-16-T); AFRC Transcript, July 26, 2005, *supra* note 15, at 97-98; Transcript of Trial at 63-72, Prosecutor v. Norman (Sept. 27, 2004) (SCSL-04-14-T); CDF Transcript, Feb. 9, 2005, *supra* note 15, at 28; Transcript of Trial at 7-9, Prosecutor v. Norman (Feb. 25, 2005) (SCSL-04-14-T); RUF Transcript, May 12, 2005, *supra* note 15, at 61-66; Transcript of Trial at 1089-91, Prosecutor v. Taylor (Jan. 11, 2008) (SCSL-03-01-T). *See generally* FACT-FINDING WITHOUT FACTS, *supra* note 7, at 108-09.

17. *See, e.g.*, Akayesu Judgment, *supra* note 15, paras. 185, 237; Prosecutor v. Brima, Case No. SCSL-04-16-A, Judgment, para. 907 (Feb. 22, 2008); Military I Transcript, July 2, 2003, *supra* note 15, at 32-35; Transcript of Trial at 108-11, Prosecutor v. Ntakirutimana (Sept. 26, 2001) (ICTR 96-17-T); Case Notes of Judicial System Monitoring Programme at 158, Prosecutor v. Marques (Aug. 14, 2001) (Case No. 09/2000) [hereinafter Los Palos Case Notes, Aug. 14, 2001]; AFRC Transcript, July 11, 2005, *supra* note 15, at 145-46; Transcript of Trial at 35-47, Prosecutor v. Norman (June 3, 2005) (SCSL-04-14-T); Transcript of Trial at 91-93, 109-17, Prosecutor v. Sesay (Apr. 7, 2005) (SCSL-04-15-T); Decision on Sesay Defense Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness TF1-366, paras. 45-48, Prosecutor v. Sesay (July 26, 2006) (SCSL-04-15-T); Taylor Transcript, Jan. 8, 2008, *supra* note 15, at 755-58; Transcript of Trial at 3348-51, Prosecutor v. Taylor (Feb. 7, 2008) (SCSL-03-01-T); Taylor Transcript, Mar. 13, 2008, *supra* note 15, at 5974-76. *See generally* FACT-FINDING WITHOUT FACTS, *supra* note 7, at 110-11.

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

defendant's key involvement in the crime, even though the witness's pre-trial statement, or series of statements, fails even to mention the defendant.¹⁹

For my past research, I did make some limited efforts to quantify inconsistencies to get a rough idea of the scope of the problem,²⁰ but for this research, I dramatically expanded those quantification efforts by creating a large and rich dataset and by considering a host of explanatory factors. Part II conveys my findings in considerable depth, so it suffices to note here some of the myriad issues that I explore. My research reveals the percentage of

Prosecutor v. Muhimana (Apr. 30, 2004) (ICTR-95-1B-T) [hereinafter Muhimana Transcript, Apr. 30, 2004]; Transcript of Trial at 109–19, Prosecutor v. Brima (Mar. 8, 2005) (SCSL-04-16-T); Brima Transcript, July 21, 2005, *supra* note 15, at 43–51; Transcript of Trial at 6–7, Prosecutor v. Brima (Mar. 9, 2005) (SCSL-04-16-T); CDF Transcript, June 21, 2004, *supra* note 15, at 48–50; Transcript of Trial at 78–79, Prosecutor v. Norman (Feb. 11, 2005) (SCSL-04-14-T); Transcript of Trial at 90–91, Prosecutor v. Norman (Feb. 24, 2005) (SCSL-04-14-T); Transcript of Trial at 18–27, Prosecutor v. Sesay (Mar. 23, 2006) (SCSL-04-15-T); Transcript of Trial at 18–27, Prosecutor v. Sesay (Jan. 25, 2005) (SCSL-04-15-T); Transcript of Trial at 32–35, 80, 99–101, 104–06, Prosecutor v. Sesay (Apr. 8, 2005) (SCSL-04-15-T); Transcript of Trial at 17–18, Prosecutor v. Sesay (Nov. 7, 2005) (SCSL-04-15-T); Case Notes of Judicial System Monitoring Programme at 103, Prosecutor v. Marques (July 31, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 129, Prosecutor v. Marques (Aug. 7, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 141, Prosecutor v. Marques (Aug. 8, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 164, 167, Prosecutor v. Marques (Aug. 16, 2001) (Case No. 9/2000); Los Palos Case Notes, Aug. 14, 2001, *supra* note 17, at 158; Los Palos Case Notes, Aug. 21, 2001, *supra* note 15, at 177; Case Notes of Judicial System Monitoring Programme at 223, Prosecutor v. Marques (Sept. 20, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 265–66, Prosecutor v. Marques (Sept. 24, 2001) (Case No. 9/2000); Case Notes of Judicial System Monitoring Programme at 272, Prosecutor v. Marques (Sept. 25, 2001) (Case No. 9/2000). See generally FACT-FINDING WITHOUT FACTS, *supra* note 7, at 111–12.

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

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

prosecution witnesses who testified inconsistently with their previous statements/testimonies, and more importantly, the percentage whose inconsistencies are sufficiently worrisome that we would call them “serious,” a term I will subsequently define.²¹ In addition, I considered a variety of explanatory variables such as the witness’s gender, ethnicity, accomplice status, and imprisonment status. Thus, for instance, Part II presents tabular data showing whether male witnesses were more likely to testify seriously inconsistently than female witnesses; whether Hutu witnesses were more likely to testify seriously inconsistently than Tutsi witnesses; and whether witnesses who were imprisoned for genocide crimes were more likely to testify seriously inconsistently than witnesses who were not. In addition to witness characteristics, I considered various factors regarding the type, number, and timing of the witness’s previous representations. Consequently, Part II details correlations between seriously inconsistent testimony and (1) the number of previous statements/testimonies a witness provided; (2) the judicial system in which those statements/testimonies were provided; and (3) the time that elapsed between the statements/testimonies and the later inconsistent testimony. Finally, Part II considers time trends and presents the results of several regressions²² that took into account a comprehensive set of explanatory variables. These regressions reveal which factors are statistically significant predictors of serious inconsistencies.

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

21. See *infra* text at note 64.

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

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

tions.²⁴ As for serious inconsistencies in particular, I concluded that Trial Chambers often “explain these away as products of the passage of time, the frailty of memory, and errors introduced by investigators and interpreters. The Trial Chambers thus give the prosecution witnesses the benefit of the doubt, and they explain away problematic features of their testimony on the basis of innocent factors that are beyond the witnesses’ control.”²⁵ In sum, although my prior research was not comprehensive or quantitative, it suggested that many Trial Chambers adopted a cavalier attitude toward testimonial deficiencies in general and serious inconsistencies in particular.

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

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

24. *Id.* at 190.

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

ICTR but that extends far beyond it. Indeed, the research presented here has particularly broad implications for the international criminal justice project as a whole, many of which are explored in this Article's conclusion.

II: EXPLANATIONS AND METHODOLOGY

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

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

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

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

To be sure, serious inconsistencies are not the only evidentiary phenomena that create uncertainty. For instance, my prior research revealed that international witnesses often do not know the answers to key questions that fact-finders need to ask in order to determine with any sort of certainty the who, what, where, and when details of the crimes in question.²⁸ It also highlighted numerous instances in which witnesses appeared to know answers to relevant questions but were unable or unwilling to convey those answers in a

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

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

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

way that was comprehensible to their Western interlocutors.²⁹ Serious inconsistencies, in my view, have a greater potential to impair accurate fact-finding than some of these other deficiencies, for reasons I explain below. Yet upon closer examination, it becomes clear that the primary impediment challenging accurate fact-finding at the international tribunals is not the existence of one or another individual testimonial deficiencies, but instead the very prevalence of witness testimony in international criminal trials. In short, witness testimony usually forms the exclusive basis for international criminal convictions,³⁰ and that in itself is a problem.

It is a problem because eyewitness testimony is frequently unreliable,³¹ and indeed such testimony has been blamed for a large proportion of the wrongful convictions that have come to light in recent years.³² However problematic it is for the international tribunals to rely almost exclusively on witness testimony, the problem has had little remedy, at least historically, because little non-testimonial evidence of international crimes has typically

29. *Id.* at 44–62.

30. *Id.* at 11–14; see also THIERRY CRUVELLIER, COURT OF REMORSE: INSIDE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 20 (Chari Voss trans., 2010). There are some exceptions to this rule. For instance, the Khmer Rouge, like the Nazis, documented many of their atrocities, so the Extraordinary Chambers in the Courts of Cambodia (ECCC) did receive large quantities of documentary evidence in Case 001. Prosecutor v. Kaing Guek Eav “Duch,” Case No. 001/18-07-2007/ECCC/TC, Judgment, para. 56 (July 26, 2010); HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, SCH. OF LAW, BEYOND REASONABLE DOUBT: USING SCIENTIFIC EVIDENCE TO ADVANCE PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT 5 (2012) (“[T]he Court has relied heavily on documentary evidence, including lists of prisoners who were executed, photographs, and annotations written on ‘confessions’ of prisoners by their torturers.”). Moreover, the ICTY did make more use of some non-testimonial evidence than other current international tribunals have. See, e.g., Prosecutor v. Prlić, Case No. IT-04-74-T, Judgment, para. 268 (May 29, 2013) (noting that the Chamber admitted a total of 9,756 items of documentary evidence); Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, para. 260 n.835 (June 10, 2010); Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, paras. 184, 278, 395, 489(b) & nn.226, 309, 510, 507 (Jan. 14, 2000). In addition, prosecutors in the ICC case against Laurent Gbagbo have promised not only to introduce the testimony of 138 witnesses but also certain government documents. See Tom Maliti, *Prosecutor: We Have Evidence to Prove Case against Gbagbo and Blé Goudé*, INT’L JUST. MONITOR (Jan. 28, 2016), <http://www.ijmonitor.org/2016/01/prosecutor-we-have-evidence-to-prove-case-against-gbagbo-and-ble-goude/>. By and large, however, facts are proven at the international tribunals through witness testimony and fact witness testimony: in each of the SCSL’s first two trials, the prosecution presented only three expert witnesses out of seventy-five and fifty-nine prosecution witnesses, respectively. Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgment, Annex F, para. 21 (Aug. 2, 2007) [hereinafter CDF Judgment]; Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Judgment, paras. 10, 149 (June 20, 2007). Some early ICTR cases similarly featured a few expert witnesses, but many of the more recent cases have featured only one or none at all. As for the ICC, the prosecution called only three expert witnesses out of thirty-six in *Lubanga*, see *Lubanga Judgment*, *supra* note 5, para. 11, and it called no expert witnesses in *Katanga*, see *Katanga Judgment*, *supra* note 12, para. 21.

31. FACT-FINDING WITHOUT FACTS, *supra* note 7, at 14–15. More recent research has only confirmed the problems associated with eye-witness testimony. See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 46–83 (2011); Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769, 769–74 (2012).

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

been available to most international tribunals.³³ Unlike Nazi war criminals who left carefully crafted, meticulous documentation of their atrocities, most modern day mass killers leave few written records,³⁴ and because trials of international crimes often take place many years, if not decades, after the crimes occurred, most international tribunals likewise receive little forensic evidence.³⁵ Furthermore, most modern atrocities occur in places that do not feature the widespread use of documentation or technology that can be so useful in proving a person's whereabouts or other basic facts. Indeed, alibis are wildly popular defenses at many international tribunals³⁶ probably because they can be plausibly claimed through a few corroborating witnesses. That is, whereas a defendant in a Western criminal trial who put forth an alibi defense would be expected to present receipts, ATM statements, or similar documentation to prove his presence at the claimed location, no such expectations exist with respect to a Rwandan defendant claiming an alibi because the Rwandan defendant truly might have spent considerable time in a location without generating documentary evidence to prove that he was there.³⁷ Even ascertaining who is who can prove problematic at an interna-

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

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

35. ICTY Trial Chambers did receive non-trivial quantities of forensic evidence. It was unusual in that regard among international tribunals. Virtually the only forensic evidence submitted to ICTR Trial Chambers was introduced to prove that a genocide occurred: that is, it proved only that certain large-scale massacres did take place and that the victims of those massacres were Tutsi. See, e.g., *Kayishema Judgment*, *supra* note 34, paras. 325–26, 432. *But see Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Judgment and Sentence, paras. 245, 252, 259, 260 (Feb. 25, 2004) (noting testimony by eyewitnesses and medical examiners that several exhumed bodies were identifiable as the remains of specific individuals). Alison Des Forges and Timothy Longman maintain that, “investigators made no systematic effort to gather documentary and forensic evidence linking alleged suspects to specific crimes.” Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 49, 53 (Eric Stover & Harvey M. Weinstein eds., 2004). The SCSL likewise received virtually no forensic evidence. *But see Transcript of Open Session at 39–47, Prosecutor v. Norman* (June 20, 2005) (SCSL-04-14-T) (testimony of forensic anthropologist William Haglund who, after examining the remains of four victims, determined that they had died from injuries that were consistent with their relatives’ descriptions of events).

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

37. In many countries like Rwanda, Sierra Leone, or the Democratic Republic of the Congo, commercial exchanges are carried out by means of cash or goods. Many transactions, particularly in rural areas, take the form of barter. See, e.g., Paul Cleary, *It's the Economy Stupid*, WALL ST. J. (May 23, 2007), <http://www.wsj.com/articles/SB117987369444611381>; *Supporting Economic Growth in East Timor*, THE ASIA

tional criminal trial because international witnesses frequently do not have birth certificates or other probative forms of official identification.³⁸

This lack of non-testimonial evidence renders accurate fact-finding more difficult, and it also increases the distortive potential of all the testimonial deficiencies I have discussed, including and perhaps especially serious inconsistencies. To be sure, fact-finding is a holistic process during which fact-finders take account of a host of relevant factors. The extent to which a witness's testimony diverges from her previous representations is certainly one of those factors, but it is not the only one, and it may not even be a particularly important one in a trial that features a substantial quantity of non-testimonial evidence. For instance, although any criminal defense attorney would cross-examine a prosecution witness about inconsistencies between the witness's testimony and her previous representations,³⁹ the availability of non-testimonial evidence, such as documents, surveillance videos, wiretaps, and electronic data, provide defense counsel with other avenues to undermine the witness's testimony. For example, it may not matter much that a witness's testimony sharply diverges from her pre-trial statement if her testimony is strongly corroborated by a surveillance video, or—even more to the point—if the witness's testimony is flatly contradicted by the video. In those instances, serious inconsistencies may remain a component of the credibility/reliability assessment that the fact-finder must conduct, but the other, more probative evidence will render that component an insignificant one.

FOUNDATION, <https://asiafoundation.org/resources/pdfs/EastTimorEconGrowth.pdf>; Stephanie Fahey, *The Future of East Timor: Threats and Opportunities for Economic Development of a Small Island State*, RES. INSTR. FOR ASIA AND THE PAC. (RIAP), U. of Sydney, http://s3.amazonaws.com/zanran_storage/www.usyd.edu.au/ContentPages/25917341.pdf. Cash exchanges are more prevalent in urban areas. See, e.g., *Country Information: Sierra Leone*, U.S. DEP'T OF STATE, <http://travel.state.gov/content/passports/en/country/sierraleone.html> ("Sierra Leone is a cash economy."); Maurice K. Toroitich, *Banking in Rwanda*, Worldfolio.com, <http://www.theworldfolio.com/interviews/banking-in-rwanda/4147/> ("One of the biggest challenges that we have in Rwanda is that we are still a very cash-based economy."); *Foreign Travel Advice: Central African Republic*, GOV.UK, <https://www.gov.uk/foreign-travel-advice/central-african-republic/> (last updated Aug. 4, 2016); *Foreign Travel Advice: Democratic Republic of Congo*, GOV.UK, <https://www.gov.uk/foreign-travel-advice/democratic-republic-of-congo/> (last updated Oct. 21, 2016); Faridah Kulabako, *Ugandan Credit Card Uptake Remains Low*, DAILY MONITOR (Apr. 16, 2012), <http://www.monitor.co.ug/Business/Prosper/-/688616/1387624/-/view/printVersion/-/8vsnl9/-/index.html>; see also Jake Kendall & Jan Sonnenschein, *Many Transactions in Sub-Saharan Africa Still in Cash*, GALLUP (June 11, 2012), <http://www.gallup.com/poll/155126/transactions-sub-saharan-africa-cash.aspx>.

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

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

By contrast, in international tribunal proceedings—where witness testimony is often the only evidence presented⁴⁰—inconsistencies inevitably play a much more prominent role. Defense counsel seeking to undermine prosecution witness testimony but having no non-testimonial evidence by which to do so, frequently place inconsistencies at the center of their cross-examination.⁴¹ To be sure, defense counsel also advance their clients' cases in other important ways. They present their own witnesses, who often contradict prosecution witness testimony, and they seek to undermine prosecution witness testimony in ways unrelated to inconsistencies. For instance, defense counsel expose prosecution witness testimony that seems improbable,⁴² they highlight incentives that might motivate witnesses to falsely inculpate the defendant,⁴³ and they point out inconsistencies between witnesses.⁴⁴ Despite the fact that international defense counsel unquestionably employ a multi-pronged approach when challenging prosecution witness testimony, they also unquestionably focus considerable attention—perhaps the lion's share—on prosecution witness testimony that is inconsistent with previous

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

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

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

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

44. See, e.g., Transcript of Continued Trial at 36–37, Prosecutor v. Karemera (Mar. 1, 2006) (ICTR-98-44-T) (Defense Motion asked Trial Chamber to “appoint an *amicus curiae* to investigate the false testimony of Ahmed Mbonyunkiza” after a second witness’s testimony contradicted Mbonyunkiza’s testimony); Bizimungu Judgment, *supra* note 43 at para. 224 (“The Mugiraneza Defence submits that the Prosecution witnesses allege two different rallies and that both accounts are unreliable.”); *id.* at n.346; Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, paras. 277–278, 335, 3491, 4096 (May 18, 2012); Sesay Defense Final Trial Brief, *supra* note 42, paras. 833, 850, 873, 1075, 1116, 1256 (Aug. 7, 2008); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Morris Kallon Final Trial Brief, paras. 10, 222, 302, 322–23, 391–93, 435, 531, 535, 713, 740, 763, 807, 812–13, 817 (Sept. 10, 2008); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Gbao—Final Trial Brief, paras. 373, 1429, 1484 (July 31, 2008).

statements/testimonies. Although I did not gather data on the proportion of cross-examination time that defense counsel devoted to probing inconsistencies, I can say with certainty that, in most cases, such probing occupied a substantial proportion of the cross-examination. Prosecutors likewise spend considerable time probing inconsistencies in the testimony of defense witnesses.

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

It is apparent that a great deal of ICTR testimony features mistakes or lies because ICTR trials are filled with witnesses who blatantly contradict one another.⁴⁸ My previous research has shown that more than 90 percent of ICTR cases featured at least one blatant contradiction between witnesses for the defense and witnesses for the prosecution.⁴⁹ Many cases featured far more than one, and most multiple-defendant cases featured at least one contradiction relating to each defendant.⁵⁰ I considered witness testimony to be blatantly contradictory only where the testimony of one witness was diametrically opposed to the testimony of another, such that both witnesses'

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

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

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

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

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

50. *Id.* at 394.

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

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

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

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

Finally, this section concludes by explaining why the Article centers on ICTR cases, rather than the cases of another international criminal tribunal. In order to have confidence in these findings, a reasonably large number of cases is needed. That need immediately eliminates the ICC, the SCSL, and the Special Tribunal for Lebanon from consideration because they have decided, at most, only a few cases each. This leaves only the ICTR, the ICTY, and the Special Panels for Serious Crimes in East Timor (Special Panels). Although I have previously researched fact-finding at the Special Panels, and found that research to reveal many important insights; for this empirical study, Special Panels cases would not have been appropriate. Special Panels transcripts are not readily available, and Special Panels judgments, if they exist at all, are exceedingly short and undetailed. ICTY cases also would not have provided an optimal dataset. For one thing, ICTY witnesses are something of an outlier in international criminal trials because, on average, they are markedly better educated than witnesses appearing before other international tribunals, and they are more likely to have had life experiences that enable them to answer the kinds of questions typically posed in a criminal trial. For that reason, ICTY trials featured fewer testimonial deficiencies. Moreover, ICTY Trial Chambers received more non-testimonial evidence than most other international tribunals,⁵² and this evidence served both to reduce the importance of witness testimony at the ICTY and concomitantly the deficiencies common to such testimony. Thus, I could have studied serious inconsistencies in ICTY witness testimony because there were in fact at least some ICTY witness testimony that featured such inconsistencies.⁵³ However, the far lower incidence of inconsistencies at the ICTY and their reduced influence would likely have produced a distorted picture that would not have generalized to fact-finding in other, current tribunals, which unfortunately feature more problematic witness testimony and less non-testimonial evidence. The ICTR, by contrast, decided a sufficient number of cases that featured the kind of evidence that also appears in current tribunals, such as the ICC. The size of the dataset that I was able to create gives me confidence in my findings, and the evidentiary profile of the ICTR cases gives me confidence in their generalizability across many international tribunals.

B. Methodology

1. *The Cases*

As noted in the Introduction, my dataset comprises nineteen single-defendant cases from the ICTR. Table 1 below shows the cases in chronologi-

52. See *supra* note 30.

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

cal order along with the starting date of each trial, the ending date, and the date on which the Trial Chamber issued its judgment in that case.

TABLE 1: STARTING, ENDING, AND JUDGMENTS DATES FOR EACH TRIAL IN CHRONOLOGICAL ORDER

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

To facilitate the exploration of any relevant time trends, the dataset includes cases from the beginning, middle, and end of the Tribunal's life. In addition, in order to ensure a representative sample, the dataset includes cases featuring defendants who had high-level, mid-level, and low-level positions and defendants who participated in the genocide in a variety of ways and across a variety of regions in Rwanda.⁵⁴ Seventy-four-year-old⁵⁵ busi-

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

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

nessman and farmer, Yussuf Munyakazi, for instance, was sufficiently low-level that ICTR prosecutors sought (unsuccessfully) to refer his case to Rwanda before eventually trying him at the ICTR.⁵⁶ However, the dataset also features such high-ranking defendants as Eliézer Niyitegeka and Augustin Ndirabatware, who were Ministers in the Interim Government of Rwanda during the genocide.⁵⁷ The remaining defendants held a host of other positions, some in the government,⁵⁸ some in the military,⁵⁹ and one in the Catholic Church.⁶⁰

The cases were decided by a total of twenty-eight judges.⁶¹ More particularly, all of the cases were tried before a panel of three judges, and sixteen of the judges participated in more than one trial in the dataset.⁶² Each of the defendants in the dataset was convicted of at least one of the charges leveled against him. Cases in which defendants were acquitted of all charges were not included. This dataset involves only prosecution witness testimony, and prosecution witness testimony in trials ending in acquittals likely feature

56. Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, paras. 13–14 (May 28, 2008). The ICTR also sought to refer other cases, *see, e.g.*, Prosecutor v. Kanyarukiga, Case No. ICTR-02-78-1, Prosecutor's Request for the Referral of the Case of *Gaspard Kanyarukiga* to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence (Sept. 7, 2007); Prosecutor v. Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana Rwanda (June 19, 2008); Prosecutor v. Gatete, Case No. 2000-61-R11bis-T, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (Nov. 17, 2008).

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

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

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

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

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

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

greater deficiencies than prosecution witness testimony in ICTR trials as a whole. Inclusion of these cases, therefore, could have biased the sample.

2. *The Witnesses*

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

TABLE 2: GENDER COMPOSITION OF WITNESSES IN THE DATASET

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

TABLE 3: ETHNIC COMPOSITION OF WITNESSES IN THE DATASET

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

TABLE 4: ACCOMPLICE STATUS OF WITNESSES IN THE DATASET

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

TABLE 5: IMPRISONMENT STATUS OF WITNESSES IN THE DATASET

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

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

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

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

study potentially understates those problematic features, but I would prefer to err in understating than in exaggerating.

3. *The Inconsistencies*

a. *Defining Inconsistencies*

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

This study considers an "inconsistency or omission to be serious either if it pertained to a key issue in the trial or if it pertained to the kind of fact that one is unlikely to forget."⁶⁴ The former category included inconsistencies or omissions "that directly related to the defendant's actions or overall liability or to the witness's credibility or the weight the Trial Chamber should place on the witness's testimony."⁶⁵ So, for instance, if a witness's statement described the defendant as engaging in a different sort of criminal behavior than that to which the witness testified, I considered that a serious inconsistency.⁶⁶ One example would be a witness who testified that the defendant personally killed the victims when the statement reported that the defendant was merely present during the killings. I likewise deemed an inconsistency serious if it called into question the witness's ability to observe the events she described. So, if the witness's pre-trial statement reported that she was 100 meters from the crime site, but she testified that she was five meters away, I considered that a serious inconsistency.⁶⁷ Finally, I considered it a serious inconsistency when a witness failed to mention in his previous statements/testimonies a fact that was central to his testimony. The most common example of this phenomenon occurred when a witness provided detailed statements that contained no reference to the defendant's participation in the relevant crime, yet in later statements or sometimes only in

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

65. *Id.*

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

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

testimony, the witness claimed that the defendant had played an integral role in the crime.⁶⁸

The second category of inconsistencies that I deemed to be serious included those pertaining to the kind of facts that the witness was “unlikely to forget” even if such facts were not of crucial significance to the resolution of the case. So, for instance, I considered it serious “if a defendant testified inconsistently about where he hid because one would expect that he’d remember whether he hid in the parish church, say, or in the bushes behind his house. Similarly, I considered it a serious inconsistency if a witness testified that she hid with one of her children when her statement reported that she hid with three of her children.”⁶⁹

b. Methodology for Identifying Inconsistencies

The best method for identifying inconsistencies would be to read each witness’s statements/testimonies and then compare the allegations contained therein with the witness’s ICTR testimony. Unfortunately, the ICTR, like other international tribunals, places exhibits such as pre-trial statements and testimony before Rwandan courts under seal, so they are not publicly available. Consequently, those seeking to identify inconsistencies at the international tribunals must rely on discussions of those inconsistencies that occur during trial or descriptions of the inconsistencies that appear in the Trial Chambers’ judgments. This method of locating inconsistencies is apt to understate them for two reasons. First, as a general rule, inconsistencies in the

68. See, e.g., Gacumbitsi Judgment, *supra* note 15, at para. 54; Gatete Judgment, *supra* note 58, at para. 203 & n.222; Kajelijeli Judgment, *supra* note 15, at paras. 467, 522; Kanyarukiga Judgment, *supra* note 66, at paras. 257, 311, 496, 605, 609, 611; Karera Judgment, *supra* note 15, at para. 53; Muhimana Judgment, *supra* note 15, at para. 481; Munyakazi Judgment, *supra* note 55, at para. 117; Ndahimana Judgment, *supra* note 58, at paras. 219–231, 233, 235–237, 250–254, 316, 441–450, 454–458, 466–468, 473, 645–646; Ngirabware Judgment, *supra* note 57, at paras. 196, 844; Niyitegeka Judgment, *supra* note 15, at paras. 101, 154, 158; Nizeyimana Judgment, *supra* note 59, at paras. 114, 369, 1089; Ntawukulilyayo Judgment, *supra* note 58, at paras. 211–213, 218, 273, 370–373, 386–387; Nzabonimana Judgment, *supra* note 58, at paras. 1038, 1071, 1421; Renzaho Judgment, *supra* note 59, at paras. 433, 652; Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Judgment, para. 186 (Dec. 6, 1999) [hereinafter Rutaganda Judgment]; Seromba Judgment, *supra* note 60, at para. 237; Setako Judgment, *supra* note 59, at paras. 110–116, 158–175, 178, 206, 271, 346–358, 372–378, 401, 425–429, 435, n.234; Gacumbitsi Transcript, Aug. 19, 2003, *supra* note 19, at 22; Kajelijeli Transcript, Dec. 5, 2001, *supra* note 19, at 72–96; Kajelijeli Transcript, Dec. 7, 2001, *supra* note 19, at 27–28; Transcript of Continued Trial at 13, 36–37, Prosecutor v. Karera (Jan. 9, 2006) (ICTR-01-74-T); Karera Transcript, Feb. 1, 2006, *supra* note 18, at 24; Transcript of Continued Trial at 25–30, 34–36, Prosecutor v. Muhimana (Apr. 7, 2004) (ICTR-95-1B-T); Muhimana Transcript, Apr. 29, 2004, *supra* note 19, at 22–24; Transcript of Continued Trial at 16–21, Prosecutor v. Ngirabware, (Mar. 18, 2010) (ICTR-99-54-T); Transcript of Continued Trial at 24–25, Prosecutor v. Niyitegeka (Aug. 13, 2002) (ICTR-96-14-T); Transcript of Continued Trial at 35–47, Prosecutor v. Rutaganda (Oct. 8, 1997) (ICTR-96-3-T); Transcript of Continued Trial at 30–38, Prosecutor v. Rutaganda (Mar. 9, 1998) (ICTR-96-3-T); Transcript of Continued Trial at 33, Prosecutor v. Setako (Sept. 3, 1997) (ICTR-04-81-T); Transcript of Continued Trial at 12, Prosecutor v. Setako (Feb. 24, 2009) (ICTR-04-81-T).

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

testimony of prosecution witnesses are mentioned only by defense counsel, and defense counsel almost certainly do not mention all of them. Second, not all testimony is public, so inconsistencies that are discussed in closed testimony and that are not later described in the Trial Chambers' judgment will not become known. As I will discuss below, I cannot remedy the first source of potential understatement, but I have sought to remedy the second.

Relying on defense counsel to highlight serious inconsistencies is sub-optimal for two reasons. First, the skill, diligence, and strategic intuitions that defense counsel bring to their representation vary considerably from attorney to attorney.⁷⁰ So, although the transcripts show that most defense counsel vigorously question prosecution witnesses on perceived inconsistencies, in at least one case in my dataset, defense counsel seemed to eschew this cross-examination technique entirely.⁷¹ Second, ICTR trials are largely adversarial, so even when defense counsel are generally inclined to point out inconsistencies, they probably would mention only those whose identification would advance their clients' interests. To be sure, pointing out any inconsistency can serve to undermine a prosecution witness's credibility and reliability, so it may be that defense counsel bring to light most of the inconsistencies that they discover. However, it is reasonable to assume that defense counsel become aware of some inconsistencies that they choose not to point out. For instance, although we can be virtually certain that defense counsel will (enthusiastically) point out an inconsistency in which the witness's testimony implicates the defendant in more criminal activity than does the pre-trial statement, we cannot be so sure about the reverse. When a witness's testimony is less inculpatory than his pre-trial statement, defense counsel may see good reason to refrain from mentioning the more inculpatory pre-trial statement. Thus, because I learned of inconsistencies only when defense counsel referred to them, I have probably under-counted them to some degree. At the same time, any under-counting may have been ameliorated by the fact that defense counsel have an incentive to exaggerate inconsistencies; thus, they may describe allegations as inconsistent when they are not in fact. Or, more plausibly, they might describe actual inconsistencies in a way that overstates the importance or the degree of the divergence. Cognizant of this possibility, I carefully considered the witnesses' responses to defense counsel allegations and any subsequent re-direct testimony that the prosecution elicited. Finally, the Trial Chambers mentioned a

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

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

substantial proportion of serious inconsistencies,⁷² so I cross-checked my assessment of the inconsistencies with that of the Trial Chambers.

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

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

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

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

As the formula shows, the primary factors in my calculation are the percentage of closed cross-examination testimony in a given case and the percentage of serious inconsistencies that the Trial Chamber in that case failed to mention in its judgment. The formula includes only cross-examination testimony held *in camera* because defense counsel virtually always raised inconsistencies during cross-examination. Thus, *in camera* direct testimony was unlikely to have featured serious inconsistencies. The formula assumes that the larger the proportion of cross-examination held *in camera*, the more likely that serious inconsistencies have gone unidentified. However, Trial Chambers do mention some serious inconsistencies in their judgments, even when the inconsistencies are discussed only in *in camera* testimony, so the formula also takes account of the Trial Chambers’ willingness to mention serious inconsistencies. In particular, the formula assumes that the larger the proportion of witnesses with serious inconsistencies whom the Trial Chambers mentioned, the less likely that a serious inconsistency discussed in closed testimony went unidentified. As it happens, Trial Chambers varied considerably in their willingness to mention serious inconsistencies, which is

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

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

why I calculated the formula on a case-by-case basis. Finally, I added half the percentage of witnesses labeled Y&N in that case, estimating that Trial Chambers mentioned half of the serious inconsistencies of those labeled Y&N. Because few witnesses were labeled Y&N, and because I believe the rate of reference is about 50 percent for such witnesses, I did not calculate the percentage on a per-witness basis.

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

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

Our sum is 1.6. We would also aggregate the percentage of witnesses whose serious inconsistencies were not mentioned (which is 25 percent) and one half of the percentage of Y&N witnesses (which is 2 percent) to reach 27 percent. Then we would multiply 1.6 by 27 percent to reach .432 and add .432 to the number of witnesses who we know testified seriously inconsistently in that case—here, ten. Adding .432 to ten leads to an adjusted estimate of 10.43 witnesses who testified seriously inconsistently. Finally, on these facts, the percentage of witnesses who testified seriously inconsistently would increase from 40 percent (10/25) to 41.7 percent (10.43/25). I label the former figure the “understated percentage of serious inconsistencies” and the latter figure the “adjusted percentage of serious inconsistencies.”

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

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

4. *Details Concerning Statements/Testimonies*

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

I categorized the witnesses' previous statements/testimonies into five groups: (1) pre-trial statements taken by ICTR investigators; (2) testimony in previous ICTR cases; (3) statements and testimony taken in genocide trials in Rwandan courts; (4) statements and testimony taken in genocide trials in foreign courts; and (5) statements and testimony taken in *gacaca*

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

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

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

proceedings in Rwanda.⁷⁷ Ideally, I would have subdivided categories (3), (4), and (5) and placed statements and testimony in each of these criminal justice systems into separate categories of their own. I was unable to do so, however, because the transcripts and judgments often did not provide sufficient detail. In a typical cross-examination, for instance, defense counsel might make reference to some allegations the witness previously made during *gacaca*, but the discussion would be unclear as to whether the allegations were made during a *gacaca* trial or in some sort of pre-trial statement. I do not consider my inability to refine the data in this way to be problematic, however, because my primary goal in considering this set of data was to ascertain whether documents generated by some criminal justice systems were more likely to give rise to inconsistencies than documents generated in other criminal justice systems. The data answer that question, as I will describe in Part III.

5. *The Trial Chambers' Assessments of Prosecution Witness Testimony*

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

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

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

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

80. See, e.g., *Seromba Judgment*, *supra* note 60, at para. 65 (finding that YAT's testimony "cannot be deemed credible" because "the information which was disclosed to him [was] not supported by any other evidence"). Such confusion is not confined to ICTR Trial Chambers. See, e.g., *Prosecutor v. Naletelić & Martinović*, Case No. IT-98-34-A, Judgment, para. 402 (May 3, 2006); KLAMBERG, *EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS*, *supra* note 78, at 174 (providing additional examples); Klamberg, *Gen-*

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

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

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

eral Requirements for the Admission of Evidence, in INTERNATIONAL CRIMINAL PROCEDURE, *supra* note 78, at 1025 (providing additional examples).

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

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

83. *See id.* at paras. 494, 496.

84. *Id.* at para. 113.

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

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

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

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

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

6. *Other Data*

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

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

A. *The Incidence of Serious Inconsistencies*

Inconsistencies appearing in ICTR testimony pertain to a wide range of topics including facts about the crime itself, facts about the defendant’s participation in the crime, and facts relating to the witness’s observation of the events in question.⁸⁷ Part II.A explained the significance of inconsistencies in international criminal fact-finding. Part III will provide a comprehensive picture of those inconsistencies, starting with their incidence. The data reveal that 67 percent of witnesses in the dataset testified in a way that was inconsistent to some degree with the witnesses’ previous statements/testimo-

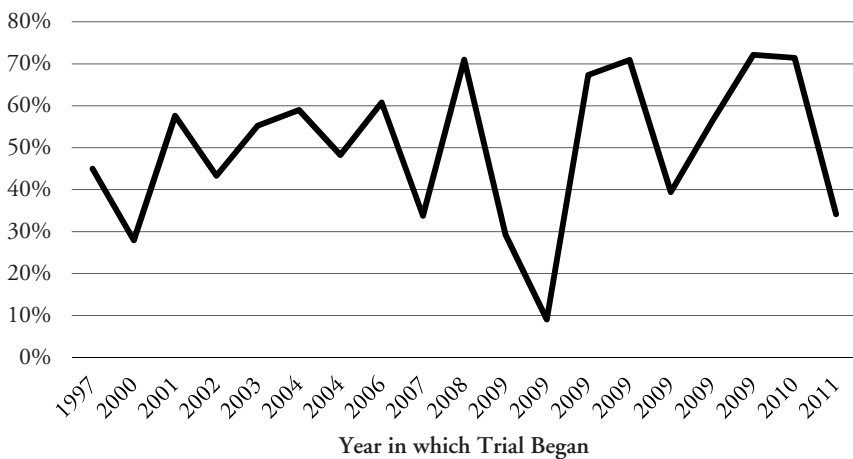
87. See FACT-FINDING WITHOUT FACTS, *supra* note 7, at 106–18.

nies. When we consider only inconsistencies that are serious, the percentage declines, though not dramatically so. The available transcripts and judgments show that 42 percent of witnesses testify in a way that is seriously inconsistent with their pre-trial statements/testimonies. When I adjusted the data to account for testimony held *in camera*,⁸⁸ the percentage of witnesses who testified seriously inconsistently rose to 48 percent.

B. Variation in Serious Inconsistencies Over Time

Graph 1 depicts the incidence of serious inconsistencies over time. Both the graph and a logit regression showed no statistically significant time trend, so we must assume that the incidence of serious inconsistencies remained constant throughout the ICTR’s life.⁸⁹

GRAPH 1: SHOWING CHRONOLOGICAL INCIDENCE OF SERIOUS INCONSISTENCIES



C. Serious Inconsistencies by Gender and Ethnicity

In order to isolate factors that might predict serious inconsistencies, I gathered a large quantity of data about the 342 witnesses in my dataset.⁹⁰ I coded witnesses by gender, for instance, and learned that roughly equal proportions of men and women testify seriously inconsistently (38 percent for women and 44 percent for men). There is a slightly greater difference in the incidence of serious inconsistencies between the two ethnic groups (41 per-

88. For an explanation of that adjustment, see *supra* Part II.B.3.(b).

89. See Logit Regression 1: Explaining Serious Inconsistencies by Comprehensive Set of Explanatory Variables, *infra* app. 1.

90. As noted in Part II.B.3.b., all of the findings discussed henceforth in this Part are derived from the understated percentage of serious inconsistencies.

cent for Tutsi and 48 percent for Hutu), but it is not as substantial a difference as one might expect. Combining gender and ethnicity, however, did reveal an interesting disparity. In particular, whereas the incidence of serious inconsistencies among male Hutu witnesses was roughly equal to that of male Tutsi witnesses (47 percent for male Hutu compared to 44 percent for male Tutsi), a far greater proportion of female Hutu witnesses testified seriously inconsistently (71 percent) than female Tutsi witnesses (36 percent).

When we take additional factors in account, however, some of the differences I have just described disappear. A logit regression seeking to explain variation in serious inconsistencies that included not only gender and ethnicity but also a series of other potentially relevant factors,⁹¹ shows no statistically significant relationship between gender and serious inconsistencies or between ethnicity and serious inconsistencies. However, the regression does confirm that Hutu women are substantially more likely to testify seriously inconsistently than witnesses of any other gender-ethnic combination, and this result is statistically significant. The sample size of Hutu women witnesses is quite small,⁹² however, so this finding may be somewhat imprecise.

D. Serious Inconsistencies by Imprisonment and Accomplice Status

The tabular data suggests a correlation between a witness's accomplice or imprisonment status and his likelihood of testifying seriously inconsistently. Specifically, whereas 60 percent of accomplices testified seriously inconsistently, only 40 percent of non-accomplices did so. However, the logit regression,⁹³ which factored in a comprehensive set of explanatory variables, showed that accomplice status had no effect on the probability of a witness testifying seriously inconsistently. The tabular data shows even greater apparent divergences among witnesses based on their imprisonment status. I classified witnesses into three groups: (1) witnesses who had never been imprisoned for genocide crimes; (2) witnesses who had been imprisoned for genocide crimes but had been released; and (3) witnesses who had been imprisoned for genocide crimes and were still in prison at the time they testified. The data showed that only 38 percent of witnesses who were never imprisoned testified seriously inconsistently whereas 52 percent of witnesses imprisoned during trial did. Moreover, a whopping 75 percent of witnesses who were imprisoned but released before trial testified seriously inconsis-

91. These additional factors are the witnesses' accomplice status, imprisonment status, the number of pretrial statements/testimonies provided by each witness, and the starting date of the trial.

92. Of 342 witnesses, only seven were Hutu women.

93. Logit regressions differ from linear regressions because in a logit regression the dependent variable that a modeler is trying to explain is a percentage between zero and one. Regular linear regression ("ordinary least squares," or OLS) cannot guarantee that the predicted value of the dependent variable will fall between zero and one for all values of the explanatory variables. Logit regressions use a special, non-linear function form to achieve this end, and must be estimated with maximum likelihood methods instead of OLS.

tently. Again, however, the logit regression showed that when we include other relevant explanatory variables, a witness's imprisonment status had no statistically significant effect on the likelihood of finding a serious inconsistency in his testimony.⁹⁴

E. Serious Inconsistencies by Number and Type of Pretrial Statement/Testimony

Table 6 shows the relationship between the number of statements/testimonies witnesses provided and the percentage of serious inconsistencies in the population of witnesses who provided that number of statements/testimonies.

TABLE 6: PROBABILITY OF SERIOUS INCONSISTENCIES BASED ON THE NUMBER OF PRE-TRIAL STATEMENTS/TESTIMONIES PROVIDED BY A WITNESS

Number of Pre-trial Statements/ Testimonies Provided by a Witness	% of Witnesses with that Number of Statements/ Testimonies who Testified Seriously Inconsistently	Number of Witnesses in the Dataset who Provided that Number of Statements/ Testimonies
1	24%	172
2	48%	77
3	62%	38
4	67%	18
5	75%	8
6	79%	14
7	100%	6
8	33%	3
9	100%	3
10	100%	1
16	100%	1

As Table 6 indicates, an increased number of pretrial statements/testimonies is correlated with a dramatically increased incidence of serious inconsistencies. Indeed, merely increasing pretrial statements/testimonies from one to two doubles the proportion of witnesses who testify seriously inconsistently. Admittedly, the number of witnesses who provided more than six statements/testimonies is small, so that could reduce our confidence in that

⁹⁴. See Logit Regression 1: Explaining Serious Inconsistencies by Comprehensive Set of Explanatory Variables, *infra* app. 1.

particular result, but the logit regression shows a highly statistically significant effect for the number of documents. In particular, the regression shows that for each of the first four statements or testimonies, adding a statement/testimony raises the probability of a serious inconsistency by approximately 11 percent. Adding more statements/testimonies continues to increase the probability of serious inconsistencies, but to a lesser degree as the number of statements/testimonies increases.⁹⁵

Overall, 33 percent of statements/testimonies gave rise to serious inconsistencies, but these were not evenly distributed across the different kinds of statements/testimonies. For instance, statements/testimonies submitted to foreign courts generated the smallest proportion of serious inconsistencies whereas statements/testimonies submitted to Rwandan courts generated the largest. The specific percentages are shown in Table 7 below.

TABLE 7: SERIOUS INCONSISTENCIES BY DOCUMENT TYPE

Type of Document	Percentage of those Documents Found Seriously Inconsistent with ICTR Testimony in the Subject Trial
Rwandan Court Statements/Testimonies	42%
<i>Gacaca</i> Statements/Testimonies	35%
ICTR Pre-Trial Statements	31%
Testimony in Previous ICTR Cases	30%
Foreign court Statements/Testimonies ⁹⁶	22%
All Documents Combined	33%

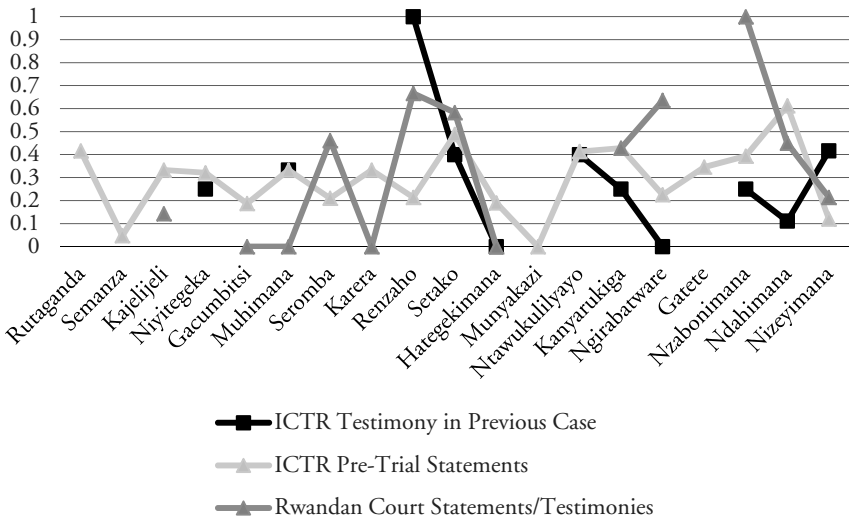
I next considered whether the incidence of serious inconsistencies in the different types of statements/testimonies had changed during the lifespan of the ICTR. I did not consider potential time trends for foreign court statements/testimonies—because the sample size was too small—or for *gacaca* statements/testimonies—because *gacaca* proceedings were not fully underway until many of the trials in my dataset had already concluded. However, Graph 2 shows the chronological incidence of serious inconsistencies with ICTR pre-trial statements, ICTR previous testimony, and Rwandan court statements/testimonies. A simple regression of serious inconsistency by document type over time suggested no statistically significant time trend for

95. In particular, adding a fifth document for a witness who already has four raises the probability of a serious inconsistency by 9 percent. Adding a sixth raises the probability by 7 percent; adding a seventh raises the probability by 5 percent, and adding an eighth raises the probability by 3 percent. According to the tabular data, witnesses who have provided nine or more statements or testimonies are 100 percent likely to testify seriously inconsistently with one of them. See Marginal Effects Calculation 1: Effects of the Number of Statements/Testimonies on Serious Inconsistencies as Estimated by Logit Regression 1, *infra* app. 1.

96. The dataset included only nine pre-trial statements/testimonies from foreign courts, so this finding is less precise than the others.

testimony that was seriously inconsistent with ICTR pre-trial statements.⁹⁷ However, the regression did suggest a statistically significant downward trend for testimony that was seriously inconsistent with previous ICTR testimony and a statistically significant upward trend for testimony that was seriously inconsistent with Rwandan court statements/testimonies. Specifically, the regressions suggested that the percentage of serious inconsistencies in previous ICTR testimony decreased by an average of 2.6 percent per year while the percentage of serious inconsistencies in Rwandan court statements/testimonies increased by an average of 4 percent per year.⁹⁸ As already noted, the data shows no statistically significant time trend for serious inconsistencies across the whole dataset, but it does reveal subcategory trends that offset one another.

GRAPH 2: SHOWING THE PERCENTAGE OF SERIOUS INCONSISTENCIES IN DIFFERENT TYPES OF STATEMENTS/TESTIMONIES OVER TIME⁹⁹



F. *Serious Inconsistencies by Length of Time between Statements/Testimonies and the Subject Testimony*

Finally, I considered whether the length of time between the pretrial statement/testimony and the subject testimony predicted serious inconsistencies. I expected that witnesses were more likely to testify seriously incon-

97. See Simple Regression 1: Serious Inconsistencies Over Time, by Document Types, *infra* app. 1.
98. *Id.*

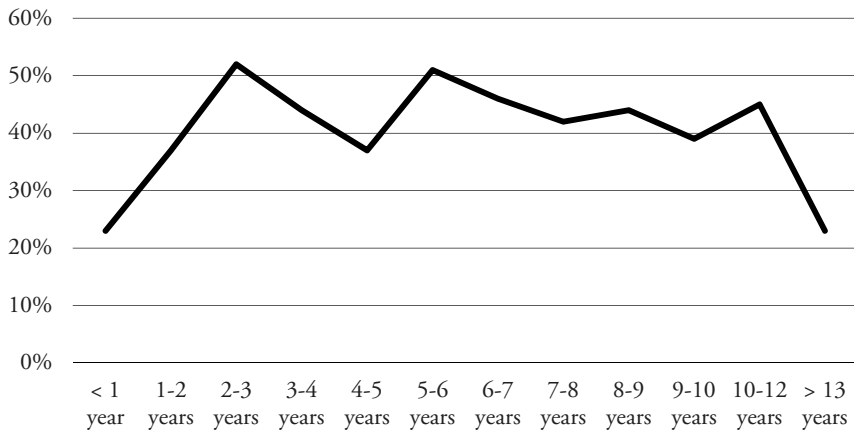
99. Note that there is missing data for some document types at some trials. For example, in Graph 2, we can see that for many trials there were no witnesses who had previously testified in an ICTR case. Such missing data is the reason that a number of the graphs in the remainder of this Article have missing stretches and isolated markers.

sistently with old statements/testimonies than with more recent ones. The data does not bear out that expectation, however. Table 8 and Graph 3 show the probability of serious inconsistencies for statements/testimonies that were provided over various time periods. The data shows that ICTR testimony is less likely to seriously diverge from very recent statements/testimony, but after that, the probability of serious inconsistencies does not increase as more time elapses between statements/testimonies and the subject testimony.

TABLE 8: RELATIONSHIP BETWEEN SERIOUS INCONSISTENCIES AND THE LENGTH OF TIME BETWEEN THE STATEMENT/TESTIMONY AND THE SUBJECT TESTIMONY

Length of Time Between Subject Testimony and Pre-Trial Statement/ Testimony	Number of Statements/ Testimonies in this Time Period with which Subject Testimony Is Seriously Inconsistent	Total Number of Statements/ Testimonies in this Time Period	% of Statements/ Testimonies in this Time Period with which Subject Testimony Is Seriously Inconsistent
Less than one year	11	47	23%
1-2 years	20	54	37%
2-3 years	25	48	52%
3-4 years	17	39	44%
4-5 years	22	60	37%
5-6 years	23	45	51%
6-7 years	21	46	46%
7-8 years	16	38	42%
8-9 years	17	39	44%
9-10 years	38	97	39%
10-12 years	20	44	45%
13+ years	11	47	23%

GRAPH 3: SHOWING RELATIONSHIP BETWEEN SERIOUS INCONSISTENCIES AND LENGTH OF TIME BETWEEN THE STATEMENT/TESTIMONY AND THE SUBJECT TESTIMONY



IV. ASSESSING TESTIMONY: A COMPREHENSIVE EXAMINATION OF THE ICTR’S CREDIBILITY AND RELIABILITY DETERMINATIONS

Reading numerous ICTR judgments has led me to expect that certain factors would be statistically significant predictors of Trial Chambers’ credibility and reliability findings. As this section reveals, the data supports some of my expectations but by no means all. Table 9 begins the discussion by displaying the percentages of witnesses across the entire dataset whom the Trial Chambers found wholly or partially credible and on whose testimony the Trial Chambers wholly or partially relied.

TABLE 9: TRIAL CHAMBERS’ CREDIBILITY AND RELIABILITY ASSESSMENTS

Credibility		Relied Upon	
% of Witnesses Found Totally Credible	% of Witnesses Found Totally or Partially Credible	% of Witnesses Whose Testimony was Totally Relied Upon	% of Witnesses Whose Testimony was Totally or Partially Relied Upon
55%	61%	37%	57%

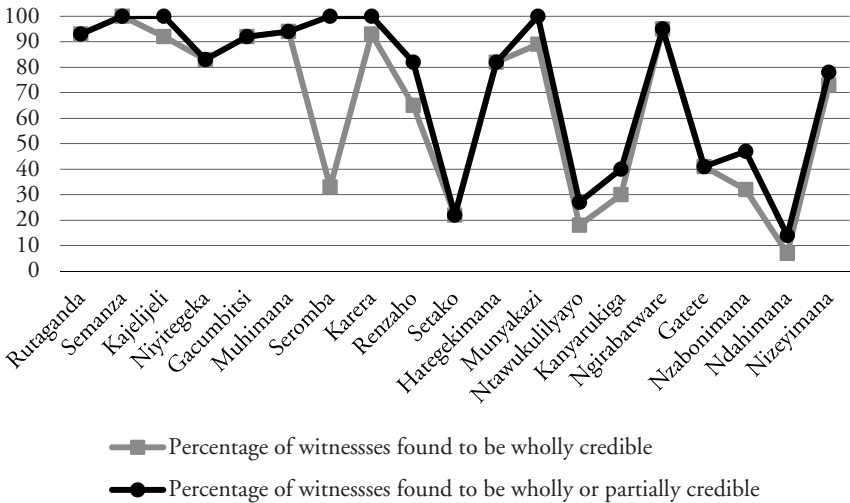
A. *The Trial Chambers’ Assessments of Witness Testimony over Time*

This section reports one of this Article’s most notable findings: that the Trial Chambers’ willingness to find prosecution witnesses credible and to rely on their testimony declined significantly over time. This finding comes

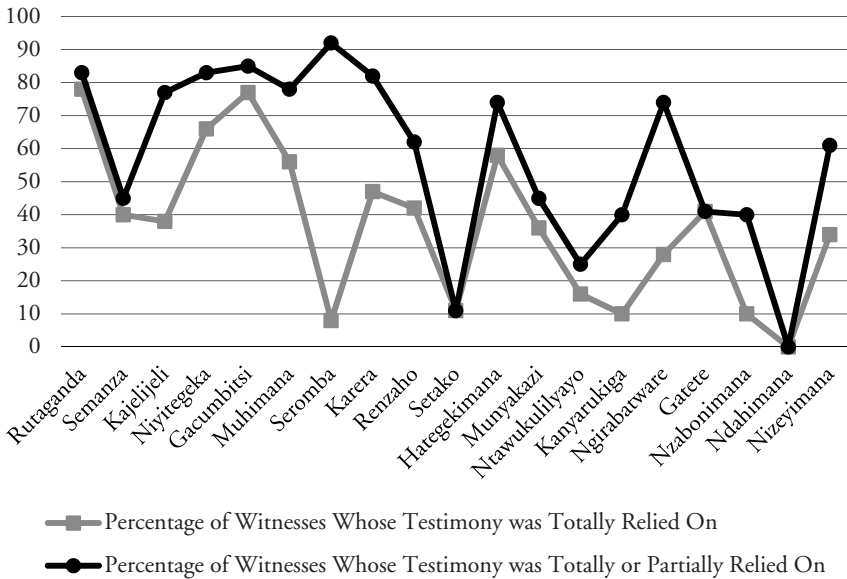
as no surprise to anyone who has read many ICTR judgments. Early judgments feature fewer discussions of witness credibility and reliability than later judgments, and what discussions there are in the early judgments are less detailed and in-depth. In addition, in early cases, Trial Chambers seemed more likely to explain away serious inconsistencies and other testimonial deficiencies than they did in later cases. The data confirms my impressionistic sense that Trial Chambers treated prosecution witness testimony more skeptically as time passed.

Graph 4 depicts the Trial Chambers' positive total and partial credibility findings over time, and Graph 5 depicts the Trial Chambers' willingness to totally and partially rely on prosecution testimony over time.

GRAPH 4: CHRONOLOGICALLY SHOWING PERCENTAGE OF WITNESSES TRIAL CHAMBERS FOUND WHOLLY OR PARTIALLY CREDIBLE



GRAPH 5: CHRONOLOGICALLY SHOWING PERCENTAGE OF WITNESSES WHOSE TESTIMONY TRIAL CHAMBERS RELIED ON IN WHOLE OR IN PART



A simple regression of credibility on time confirms a statistically significant downward time trend. In particular, simple regressions suggest that the Trial Chambers’ positive total credibility findings declined on average by 2.1 percent per year,¹⁰⁰ and their positive total or partial credibility findings declined on average by 2.0 percent per year.¹⁰¹ Similarly, the simple regressions suggest that the Trial Chambers’ willingness to totally rely on a prosecution witness’s testimony declined by an average of 2.4 percent per year,¹⁰² whereas their willingness to totally or partially rely on a prosecution witness’s testimony declined by an average of 2.1 percent per year.¹⁰³ In an effort to account for the effect of other factors, I included a timing variable in a logit regression featuring a comprehensive set of other explanatory variables. It confirms the statistically significant negative time trend, showing that if we fix other variables at their average values, the passage of time, isolated, reduced by 51 percent the likelihood that a Trial Chamber would

100. See Simple Regression 2: Trial Chambers’ Findings of Total Credibility Over Time, *infra* app. 2. For all of the simple regressions, the calculations are based on the mean value of independent variables.

101. See Simple Regression 3: Trial Chambers’ Findings of Total and Partial Credibility Over Time, *infra* app. 2.

102. See Simple Regression 4: Trial Chambers’ Total Reliance on Testimony Over Time, *infra* app. 2.

103. See Simple Regression 5: Trial Chambers’ Total and Partial Reliance on Testimony Over Time, *infra* app. 2.

find a witness totally credible,¹⁰⁴ and it reduced by 46 percent the likelihood that a Trial Chamber would find a witness totally or partially credible.¹⁰⁵ Put another way, during the first trial in the dataset, a witness, who was average in every other respect, had a 97 percent chance of being found totally credible and a 99 percent chance of being found totally or partially credible. By the last trial in the dataset, that same witness had only a 46 percent chance of being found totally credible and a 53 percent chance of being found totally or partially credible. The logit regression produced similar findings regarding the Trial Chambers' willingness to rely on prosecution witness testimony. That is, if we fix all other variables at their average values, the passage of time, isolated, reduced the Trial Chambers' willingness to wholly rely on a witness's testimony by 58 percent¹⁰⁶ and to wholly or partially rely on the witness's testimony by 51 percent.¹⁰⁷ That is, during the first trial in the dataset, a witness, who was average in every other respect, had an 81 percent chance of having her testimony wholly relied upon, and a 97 percent chance of having her testimony totally or partially relied upon. By the last trial in the dataset, that same witness had only a 23 percent chance of having her testimony totally relied upon and a 46 percent chance of having her testimony totally or partially relied upon.

B. The Trial Chambers' Assessment of Witness Testimony by Gender and Ethnicity

The tabular data shows that Trial Chambers found a higher proportion of female witnesses credible than male, and that they were slightly more willing to rely on the testimony of female witnesses. Table 10 shows the comparable proportions. The divergence between the genders is greatest when we consider those witnesses whom the Trial Chamber found wholly credible or whose testimony the Trial Chamber wholly relied upon. Indeed, when we include witnesses who are found partially credible or whose testimony is partially relied upon, the divergence in the Trial Chambers' treatment of the two genders narrows substantially, in the case of credibility, and disappears entirely, in the case of reliance.

104. See Logit Regression 2: Trial Chambers' Total Credibility Findings by Comprehensive Set of Explanatory Variables, *infra* app. 3.

105. See Logit Regression 3: Trial Chambers' Total and Partial Credibility Findings by Comprehensive Set of Explanatory Variables, *infra* app. 3.

106. See Logit Regression 4: Trial Chambers' Total Reliance on Testimony by Comprehensive Set of Explanatory Variables, *infra* apps. 3-4.

107. See Logit Regression 5: Trial Chambers' Total and Partial Reliance on Testimony by Comprehensive Set of Explanatory Variables, *infra* app. 5.

TABLE 10: TRIAL CHAMBERS' CREDIBILITY AND RELIANCE FINDINGS BY GENDER

Gender	Credibility		Relied Upon	
	% of Witnesses Found Wholly Credible	% of Witnesses Found Wholly or Partially Credible	% of Witnesses Whose Testimony was Wholly Relied Upon	% of Witnesses Whose Testimony was Wholly or Partially Relied Upon
Female	64%	66%	43%	58%
Male	52%	59%	35%	57%

Turning next to ethnicity, tabular data suggests that Trial Chambers regarded Tutsi witnesses as more credible and that Trial Chambers were more likely to rely on their testimony, as Table 11 shows. As with gender, the ostensible disparities decreased when findings of partial credibility and partial reliance were included, but some disparity remained.

TABLE 11: TRIAL CHAMBERS' CREDIBILITY AND RELIANCE FINDINGS BY ETHNICITY

Ethnicity	Credibility		Relied Upon	
	% of Witnesses Found Wholly Credible	% of Witnesses Found Wholly or Partially Credible	% of Witnesses Whose Testimony was Wholly Relied Upon	% of Witnesses Whose Testimony was Wholly or Partially Relied Upon
Hutu	45%	53%	29%	53%
Tutsi	60%	65%	43%	61%

Combining gender and ethnicity compounded whatever divergence appeared when we compared the characteristics separately. That is, the tabular data above indicates that Trial Chambers were slightly more likely to find female witnesses credible and to rely on their testimony than male witnesses; it likewise indicated that Trial Chambers were slightly more likely to find Tutsi witnesses credible and to rely on their testimony than Hutu witnesses. Therefore, Table 12 unsurprisingly shows that Trial Chambers are most likely to find credible and to rely on the testimony of Tutsi female witnesses and least likely to find credible and to rely on the testimony of Hutu male witnesses. That said, the differences are relatively small. Moreover, when I factored in other relevant explanatory variables in a logit regression, the

effect disappeared. The regression revealed no statistically significant effect for gender, ethnicity, or the gender-ethnic combination.¹⁰⁸

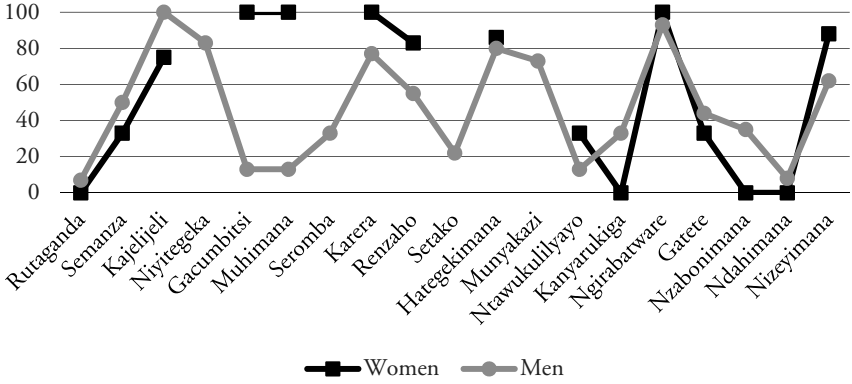
TABLE 12: TRIAL CHAMBERS' CREDIBILITY AND RELIANCE FINDINGS BY GENDER-ETHNIC COMBINATIONS

Gender-Ethnic Combinations	Credibility		Relied Upon	
	% of Witnesses Found Wholly Credible	% of Witnesses Found Wholly or Partially Credible	% of Witnesses Whose Testimony was Wholly Relied Upon	% of Witnesses Whose Testimony was Wholly or Partially Relied Upon
Hutu Female	57%	57%	29%	57%
Tutsi Female	64%	67%	45%	59%
Hutu Male	44%	53%	29%	52%
Tutsi Male	58%	64%	41%	62%

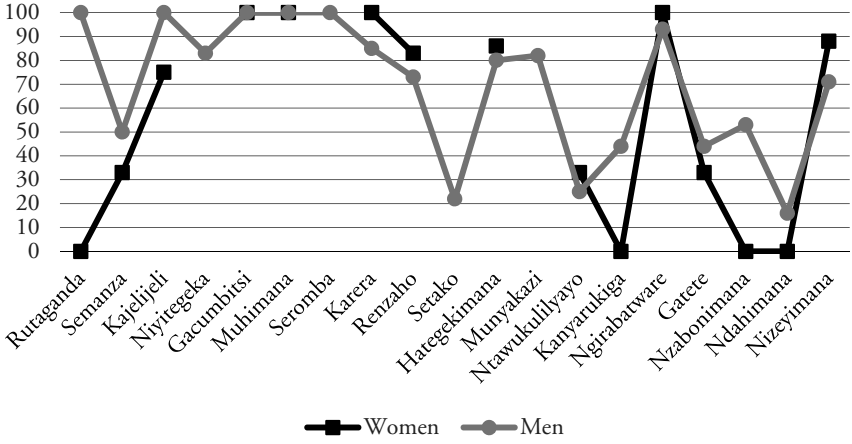
Finally, I considered what role, if any, gender or ethnicity played in the Trial Chambers' credibility or reliability determinations over time. We know that the Trial Chambers' positive credibility and reliability findings declined over time for the whole population of witnesses in the dataset, but here I sought to determine if that decline varied by gender or ethnicity. Graphs 6 through 13 provide a chronological depiction of the Trial Chambers' credibility and reliability findings by gender and ethnicity. Graphs 6 through 9 show the Trial Chambers' total and partial credibility findings by gender followed by the Trial Chambers' total and partial reliability findings by gender. Graphs 10 through 13 show the same variables by ethnicity.

108. See Logit Regressions 2, 3, 4, and 5, *infra* apps. 3-5.

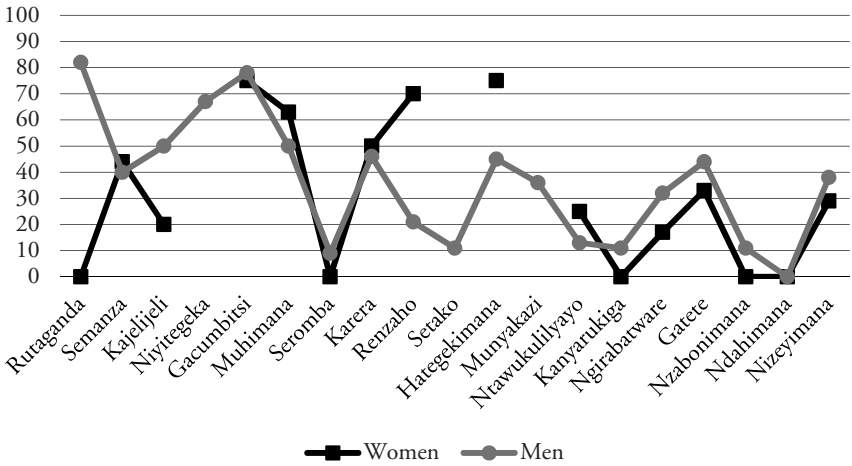
GRAPH 6: SHOWING TRIAL CHAMBERS' TOTAL CREDIBILITY FINDINGS BY GENDER OVER TIME



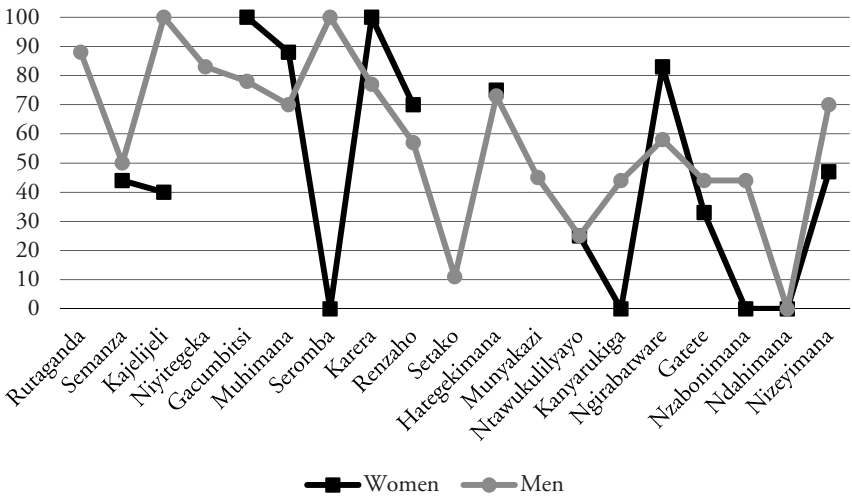
GRAPH 7: SHOWING TRIAL CHAMBERS' TOTAL AND PARTIAL CREDIBILITY FINDINGS BY GENDER OVER TIME



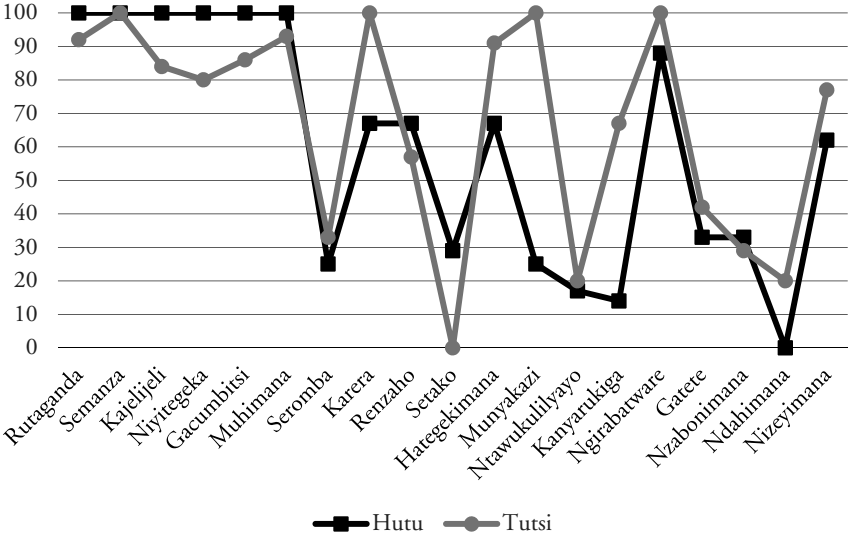
GRAPH 8: SHOWING TRIAL CHAMBERS' TOTAL RELIANCE ON WITNESS TESTIMONY BY GENDER OVER TIME



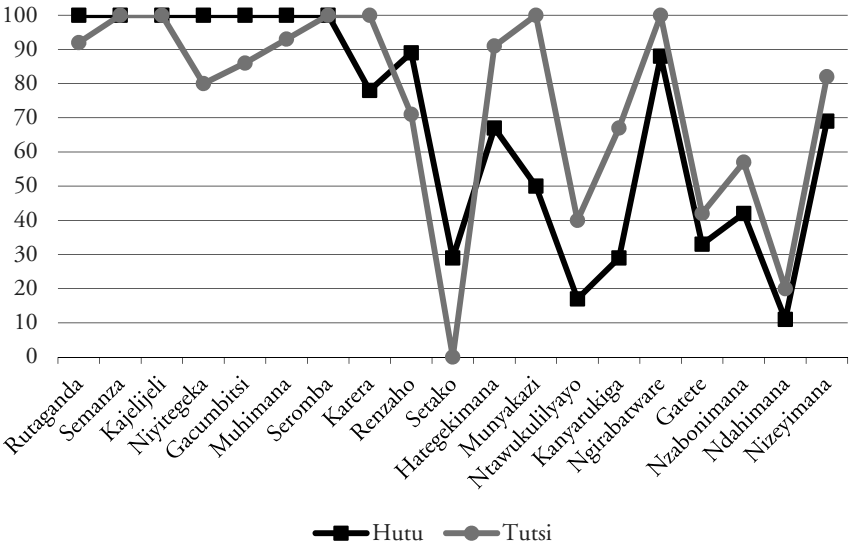
GRAPH 9: SHOWING TRIAL CHAMBERS' TOTAL OR PARTIAL RELIANCE ON WITNESS TESTIMONY BY GENDER OVER TIME



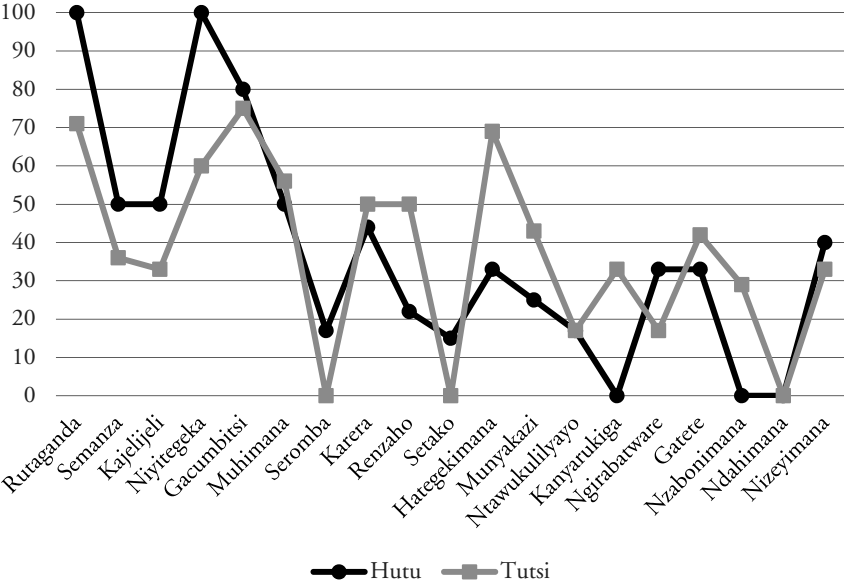
GRAPH 10: SHOWING TRIAL CHAMBERS' TOTAL CREDIBILITY FINDINGS BY ETHNICITY OVER TIME



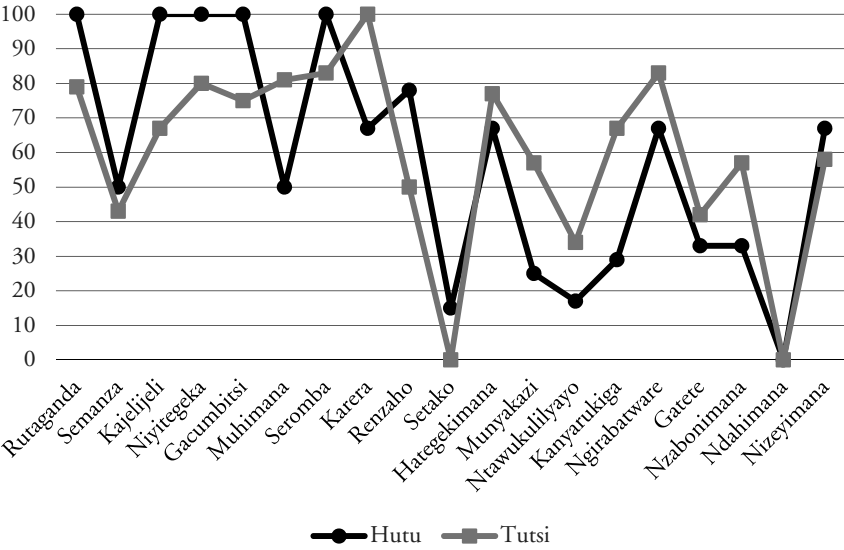
GRAPH 11: SHOWING TRIAL CHAMBERS' TOTAL OR PARTIAL CREDIBILITY FINDINGS BY ETHNICITY OVER TIME



GRAPH 12: SHOWING TRIAL CHAMBERS' TOTAL RELIANCE ON WITNESS TESTIMONY BY ETHNICITY OVER TIME



GRAPH 13: SHOWING TRIAL CHAMBERS' TOTAL AND PARTIAL RELIANCE ON WITNESS TESTIMONY BY ETHNICITY OVER TIME



The graphs show what appears to be unexplained variation in the sample, but some simple regressions suggest several interesting time trends. In particular, the regressions examined the effect of gender on the four different categories of Trial Chambers' findings over time (that also appear in the graphs):

- (1) Witnesses found totally credible;
- (2) Witnesses found totally or partially credible;
- (3) Witnesses whose testimony was totally relied upon; and
- (4) Witnesses whose testimony was totally or partially relied upon.

The most interesting results relate to witnesses in category 1, those found totally credible. There, I found a substantial—and statistically significant—difference in the Trial Chambers' findings over time by gender. In particular, the simple regression suggested that, although the Trial Chambers' willingness to find male witnesses totally credible declined by an average of 2.8 percent per year, it stayed virtually the same for female witnesses.¹⁰⁹ Simple regressions on the other three categories also suggested a similar—though smaller—divergence between male and female witnesses; this conclusion is less certain, as the findings for the female witnesses are not statistically significant. With respect to male witnesses, the regression showed a statistically significant decline in the Trial Chambers' willingness to find them totally or partially credible and to rely on their testimony in whole or in part. The average decline is fairly similar across each of the three categories: between 2.3 and 2.5 percent per year.¹¹⁰ With respect to female witnesses, there appeared to be no decline in the Trial Chambers' willingness to find witnesses totally or partially credible, whereas the regression suggested that the Trial Chambers' categories 3 and 4 findings for female witnesses declined by 1.7 percent and 1.3 percent per year, respectively.¹¹¹ As noted, however, the findings of categories 2, 3, and 4 for female witnesses were not statistically significant.

The regressions also showed divergences in the Trial Chambers' treatment of the testimony of the two ethnic groups over time. In particular, the Trial Chambers' willingness to credit Hutu witnesses and to rely on their testimony declined much more substantially than the concomitant decline for Tutsi witnesses. The regressions showed the greatest divergence in the Trial Chambers' credibility findings. In particular, the Trial Chambers' positive total credibility findings and their positive total and partial credibility findings declined by an average of 4.4 percent and 4.5 percent per year, respectively, for Hutu witnesses whereas they declined by an average of only 1.1

109. Summary 1: Simple Regression Statistics for Credibility Findings Over Time by Gender, *infra* app. 6.

110. *Id.*; Summary 2: Simple Regression Statistics for Reliance Findings Over Time by Gender, *infra* app. 6.

111. Summary 1, *supra* note 109; Summary 2, *supra* note 110.

percent and 1 percent per year, respectively, for Tutsi witnesses.¹¹² The Trial Chambers' reliance on witness testimony also declined over time at a greater rate for Hutu witnesses, but these divergences were not as substantial or as certain.¹¹³

C. The Trial Chambers' Assessment of Witness Testimony by Accomplice Status and Imprisonment Status

One gets the impression from ICTR judgments that Trial Chambers cast a skeptical eye on the testimony of witnesses who were accomplices and witnesses who have been imprisoned for genocide crimes. Trial Chambers frequently note the various motivations that accomplice or imprisoned witnesses have to falsely inculcate defendants,¹¹⁴ and they frequently claim to treat such witnesses' testimony "with caution."¹¹⁵ These sorts of comments could lead a reader to believe that Trial Chambers were less likely to find accomplices and imprisoned witnesses credible and less likely to rely on their testimony. The tabular data is in keeping with that assumption. As Table 13 shows, when it comes to witnesses who were never imprisoned for genocide crimes, the Trial Chambers found them credible and relied on their testimony in much higher proportions than they did witnesses who have been imprisoned for genocide crimes. Indeed, Trial Chambers totally relied on the testimony of witnesses who have never been imprisoned at approximately twice the rate that they did for imprisoned witnesses, though the divergence narrowed when witnesses whom the Trial Chambers found partially credible or whose testimony they relied on in part were included.

The tabular data for the Trial Chambers' treatment of accomplice witnesses shows a similar pattern. This is not surprising, as the population of witnesses who are accomplices overlaps substantially with the population of

112. Summary 3: Simple Regression Statistics for Credibility Findings Over Time by Ethnicity, *infra* app. 6.

113. Summary 4: Simple Regression Statistics for Reliance Findings Over Time by Ethnicity, *infra* app. 6. Specifically, the Trial Chambers' total reliance on the testimony of Hutu witnesses and its total or partial reliance on their testimony declined by a statistically significant average of 2.7 percent and 3.4 percent per year, respectively. The corresponding declines for Tutsi witnesses appeared to be 1.4 percent and 1.1 percent per year, though these were not statistically significant. *Id.*

114. See, e.g., Nizeyimana Judgment, *supra* note 59, at paras. 111, 413, 441, 504, 559–560, 607, 820–821, 836–837, 1110, 1138–1139; Nzabonimana Judgment, *supra* note 58, at paras. 1276, 1344, 1348, 1480; Kanyarukiga Judgment, *supra* note 66, at paras. 468, 576, 578.

115. See, e.g., Gacumbitsi Judgment, *supra* note 15, at para. 86; Gatete Judgment, *supra* note 58, at para. 405; Hategekimana Judgment, *supra* note 59, at paras. 278, 449, 547, 552; Kanyarukiga Judgment, *supra* note 66, at paras. 181, 198, 306, 440–441, 452–453, 487, 576, 591; Karera Judgment, *supra* note 15, at paras. 52, 165, 189, 215; Munyakazi Judgment, *supra* note 55, at paras. 10, 119, 199, 206, 255, 366, 417; Ndahimana Judgment, *supra* note 58, at paras. 48–49, 248–249, 443, 454, 459–61, 631, 687; Ngirabatware Judgment, *supra* note 57, at paras. 66, 193, 201, 283, 311, 479; Nizeyimana Judgment, *supra* note 59, at paras. 113, 504, 560, 608, 621, 811, 820, 836–838, 1107; Ntawukulilyayo Judgment, *supra* note 58, at paras. 199, 219, 233, 266, 434; Nzabonimana Judgment, *supra* note 58, at paras. 226, 1064, 1142, 1210, 1276, 1348, 1447, 1480; Renzaho Judgment, *supra* note 59, at paras. 166, 240, 312, 321, 410, 487, 557, 569, 594, 652, 734; Setako Judgment, *supra* note 59, at paras. 50, 72, 167, 200, 203, 250, 264, 339, 348, 367, 424.

witnesses imprisoned for genocide crimes. In particular, Trial Chambers are approximately twice as likely to find non-accomplice witnesses credible and to rely on their testimony as they are accomplice witnesses. Again, however, the disparity narrowed when witnesses found to be partially credible or whose testimony is partially relied upon were included.

TABLE 13: TRIAL CHAMBERS’ CREDIBILITY AND RELIANCE FINDINGS BY IMPRISONMENT STATUS AND ACCOMPLICE STATUS

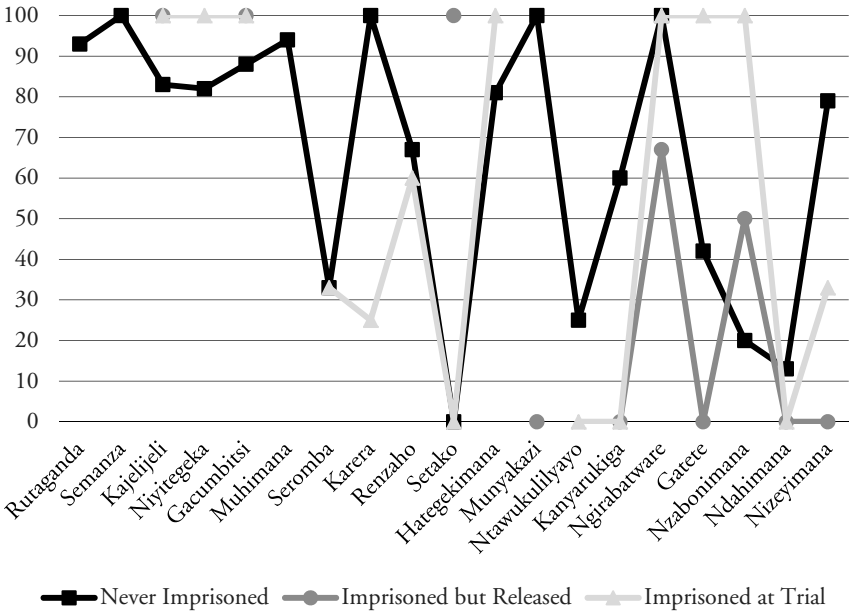
Imprisonment Status and Accomplice Status	Credibility		Relied Upon	
	% of Witnesses Found Wholly Credible	% of Witnesses Found Wholly or Partially Credible	% of Witnesses Whose Testimony was Wholly Relied Upon	% of Witnesses Whose Testimony was Wholly or Partially Relied Upon
Never Imprisoned for Genocide	60%	65%	41%	60%
Imprisoned for Genocide but Released Before Trial	35%	40%	20%	30%
Imprisoned for Genocide and Still Detained at Trial	39%	50%	23%	56%
Not an Accomplice to the Defendant	61%	65%	42%	60%
Accomplice to the Defendant	34%	46%	18%	48%

Given this tabular data, along with the Trial Chambers’ skeptical comments about the testimony of accomplice and imprisoned witnesses, I expected that a regression would confirm that these two characteristics had a statistically significant effect on the Trial Chambers’ findings. However, the logit regression took account of a comprehensive set of variables and did not show a statistically significant effect either for accomplice status or imprisonment status.¹¹⁶

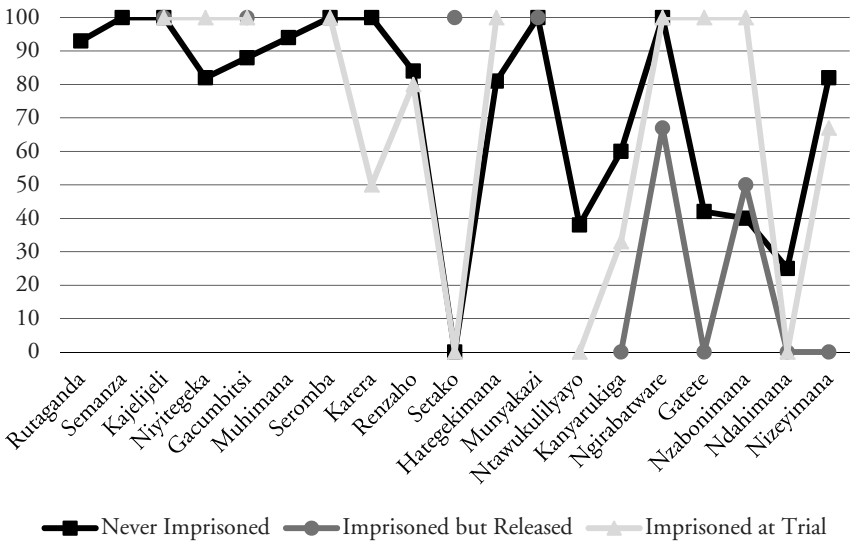
116. See Logit Regressions 2, 3, 4, and 5, *infra* apps. 3–5.

I next sought to ascertain whether imprisonment status may have influenced the Trial Chambers' credibility and reliability decisions over time. Graphs 14 through 17 chronologically depict the tabular data on that question.

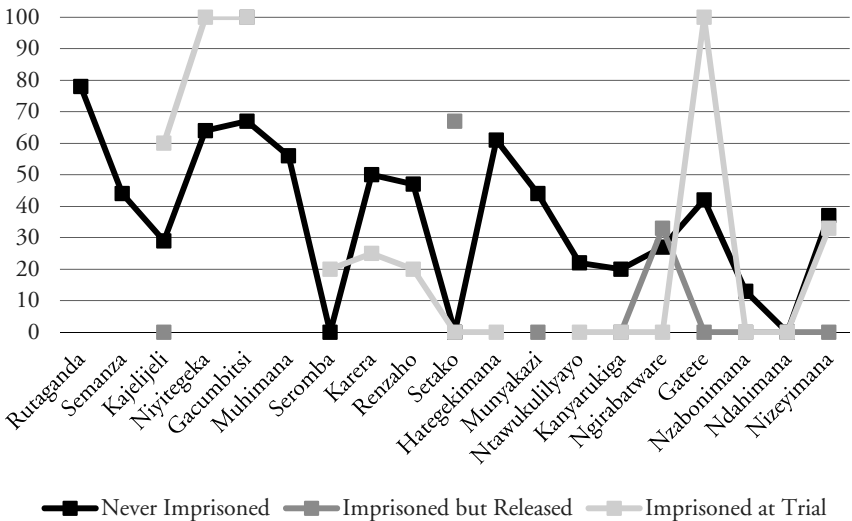
GRAPH 14: CHRONOLOGICALLY SHOWING TRIAL CHAMBERS' TOTAL CREDIBILITY FINDINGS BY IMPRISONMENT STATUS



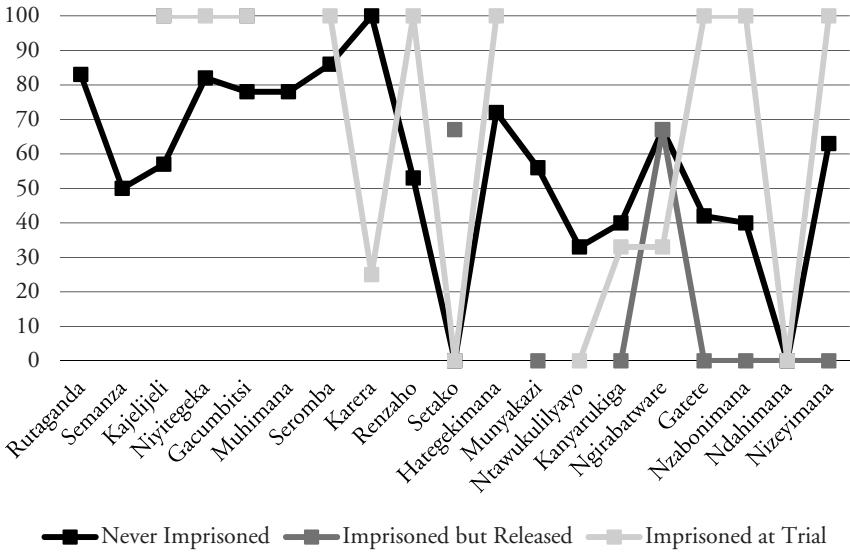
GRAPH 15: SHOWING TRIAL CHAMBERS' TOTAL AND PARTIAL CREDIBILITY FINDINGS BY IMPRISONMENT STATUS OVER TIME



GRAPH 16: SHOWING TRIAL CHAMBERS' TOTAL RELIANCE ON WITNESS TESTIMONY BY IMPRISONMENT STATUS OVER TIME



GRAPH 17: SHOWING TRIAL CHAMBERS' TOTAL OR PARTIAL RELIANCE ON WITNESS TESTIMONY BY IMPRISONMENT STATUS OVER TIME



Simple regressions reveal some interesting time trends. I categorized the Trial Chambers' findings into the same four categories discussed above in subsection B, namely:

- (1) Witnesses found totally credible;
- (2) Witnesses found totally or partially credible;
- (3) Witnesses whose testimony was totally relied upon; and
- (4) Witnesses whose testimony was totally or partially relied upon.

I considered those findings with respect to the following three classes of witnesses:

- A. Witnesses never imprisoned for genocide;
- B. Witnesses imprisoned for genocide but released before trial; and
- C. Witnesses imprisoned for genocide and still detained at trial.

Table 14 presents the results of the simple regressions. It shows an overall decline in the Trial Chambers' positive credibility and reliability findings over time for all three categories of witnesses. However, declines for the two groups of imprisoned witnesses were much more substantial than for the never-imprisoned witnesses. We cannot be as certain about the findings regarding the never-imprisoned witnesses because some of them were not statistically significant, but the data does clearly show (1) that the Trial Chambers' confidence in the testimony of imprisoned witnesses declined dramatically during the course of the ICTR's life; and (2) that its confidence in the testimony of never-imprisoned witnesses did not change nearly as

much.¹¹⁷ Finally, the most notable finding, perhaps, stems from a comparison of the Trial Chambers' treatment of those who were imprisoned but released and those who remained imprisoned at the time of their testimony. That comparison shows that the decline in the Trial Chambers' positive credibility and reliance findings was—counterintuitively—much steeper for the witnesses who were imprisoned but released before trial than for witnesses who were still detained at trial. Part V will discuss this surprising result in more detail.

117. Although some of the findings with respect to never-imprisoned witnesses were not statistically significant, they were close. More importantly, the 95 percent confidence intervals surrounding these findings provide assurance that the Trial Chambers' treatment of the testimony of never-imprisoned witnesses did not change at the rate that it did for imprisoned witnesses.

TABLE 14: RESULTS OF SIMPLE REGRESSIONS OF IMPRISONMENT STATUS ON TRIAL CHAMBER CREDIBILITY AND RELIANCE FINDINGS OVER TIME

Imprisonment Status	Average Decline per Year in Trial Chambers' Willingness to Find Witnesses Totally Credible	Statistical Significance of the Totally Credible Finding	Average Decline per Year in Trial Chambers' Willingness to Find Witnesses Totally or Partially Credible	Statistical Significance of the Totally or Partially Credible Finding	Average Decline per Year in Trial Chambers' Willingness to Totally Rely on Witnesses' Testimony	Statistical Significance of the Total Reliance Finding	Average Decline per Year in Trial Chambers' Willingness to Totally or Partially Rely on Witnesses' Testimony	Statistical Significance of the Total or Partial Reliance Finding
Never Imprisoned for Genocide	-1%	Not Statistically Significant (<i>t</i> : -1.45)	-1%	Not Statistically Significant (<i>t</i> : -1.23)	-1.6%	Statistically Significant (<i>t</i> : -2.23)	-1%	Not Statistically Significant (<i>t</i> : -1.43)
Imprisoned for Genocide but Released before Trial	-10.7%	Statistically Significant (<i>t</i> : -2.12)	-10.6%	Statistically Significant (<i>t</i> : -2.14)	-5%	Not Statistically Significant (<i>t</i> : -0.7)	-11.3%	Statistically Significant (<i>t</i> : -2.1)
Imprisoned for Genocide and Still Detained at Trial	-7.7%	Statistically Significant (<i>t</i> : -2.91)	-8%	Statistically Significant (<i>t</i> : -3.12)	-6.9%	Statistically Significant (<i>t</i> : -2.18)	-8%	Statistically Significant (<i>t</i> : -2.8)

D. The Interaction Between Credibility, Reliability, and Serious Inconsistencies

Because there is reason to believe that the testimonial deficiency most likely to impair accurate fact-finding is serious inconsistency, it is particularly important to probe the way in which the Trial Chambers’ actual fact-finding is influenced by serious inconsistency. Subsection 1 considers the same question that we have been exploring in all of the sections in this Part, namely, the Trial Chambers’ positive credibility and reliability findings. However, instead of categorizing our population of witnesses by gender or ethnicity, for example, subsection 1 categorizes the witnesses by whether their testimony contains a serious inconsistency or not. Next, subsection 2 asks a more targeted question: when are Trial Chambers willing to rely specifically on testimony that was seriously inconsistent with previous statements/testimonies in order to find a fact beyond a reasonable doubt? Finally, subsection 3 explores the public representation of the Trial Chambers’ treatment of serious inconsistencies by examining their willingness to mention such inconsistencies in their judgments.

1. *The Trial Chambers’ Assessments of Witness Testimony with Serious Inconsistencies*

Table 15 shows that a much higher proportion of witnesses without serious inconsistencies are found credible and reliable than witnesses with serious inconsistencies.

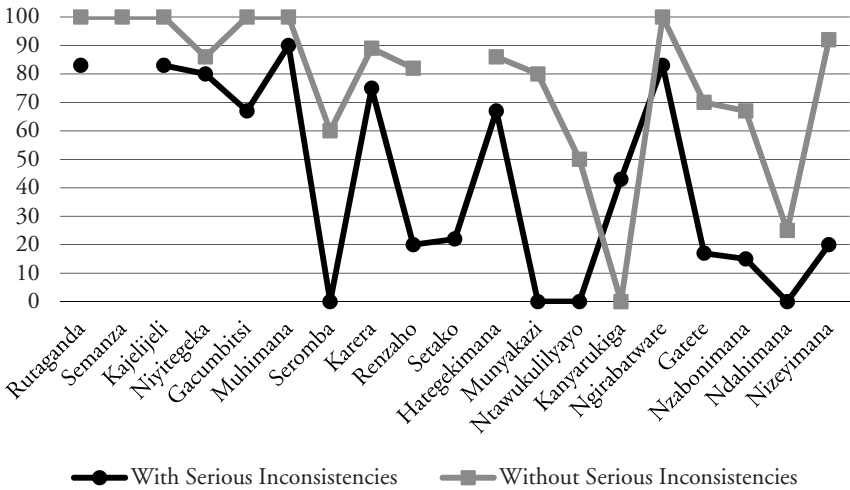
TABLE 15: TRIAL CHAMBERS’ CREDIBILITY AND RELIANCE FINDINGS BY PRESENCE OF A SERIOUS INCONSISTENCY

Presence of Serious Inconsistency	Credibility		Relied Upon	
	% of Witnesses Found Wholly Credible	% of Witnesses Found Wholly or Partially Credible	% of Witnesses Whose Testimony was Wholly Relied Upon	% of Witnesses Whose Testimony was Wholly or Partially Relied Upon
Witnesses with Serious Inconsistencies	41%	50%	20%	45%
Witnesses without Serious Inconsistencies	84%	89%	50%	68%

The results of the tabular data are confirmed by a logit regression that includes serious inconsistencies as one of a comprehensive set of explanatory variables. In particular, the regression revealed that, if all other variables are fixed at their average levels, witnesses who testify seriously inconsistently are 44 percent less likely to be found totally credible¹¹⁸ and 35 percent less likely to be found totally or partially credible than witnesses who do not testify seriously inconsistently.¹¹⁹ Similarly, Trial Chambers were 33 percent less likely to totally rely on the testimony of a witness with a serious inconsistency¹²⁰ and 35 percent less likely to totally or partially rely on the testimony of a witness with a serious inconsistency.¹²¹

Graphs 18 through 21 depict the Trial Chambers' credibility and reliability assessments over time for witnesses with and without serious inconsistencies.

GRAPH 18: SHOWING TRIAL CHAMBERS' TOTAL CREDIBILITY FINDINGS BY SERIOUS INCONSISTENCIES OVER TIME



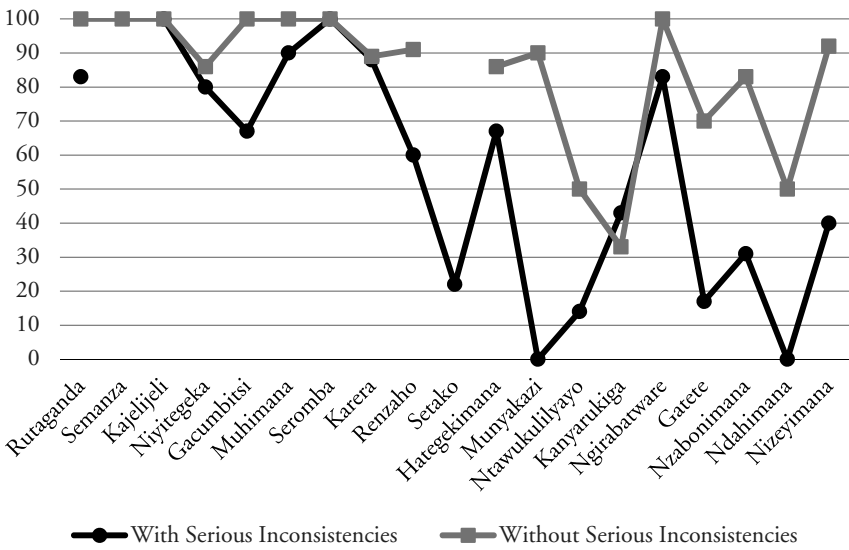
118. See Marginal Effects of Serious Inconsistencies on the Trial Chambers' Total Credibility Findings, *infra* app. 3.

119. See Marginal Effects of Serious Inconsistencies on the Trial Chambers' Total and Partial Credibility Findings, *infra* app. 4.

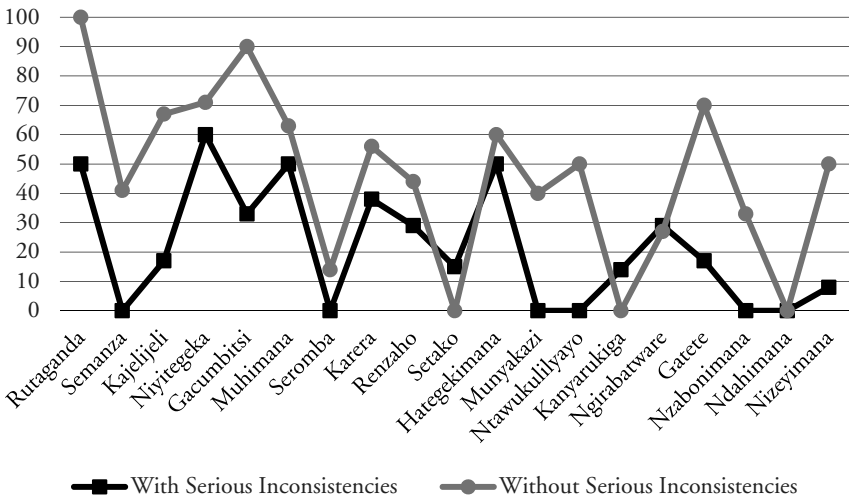
120. See Marginal Effects of Serious Inconsistencies on the Trial Chambers' Total Reliance Findings, *infra* app. 5.

121. See Marginal Effects of Serious Inconsistencies on the Trial Chambers' Total and Partial Reliance Findings, *infra* app. 5.

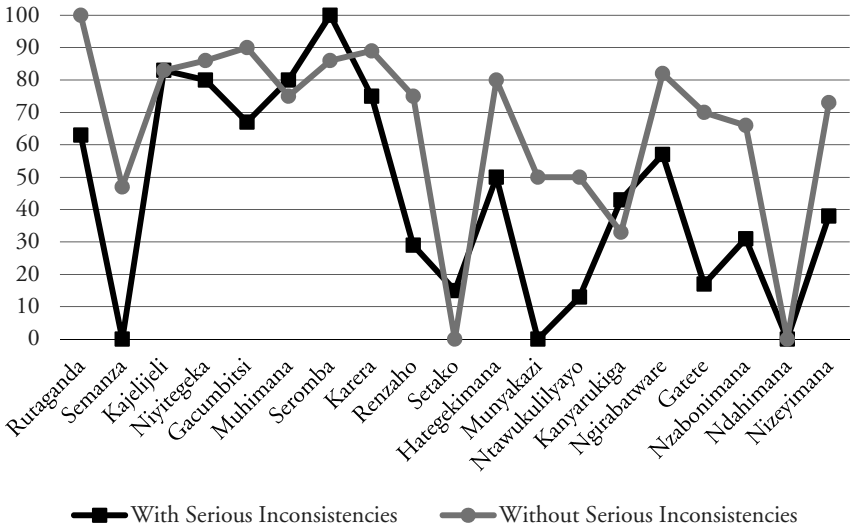
GRAPH 19: SHOWING CHAMBERS' TOTAL AND PARTIAL CREDIBILITY FINDINGS BY SERIOUS INCONSISTENCY OVER TIME



GRAPH 20: SHOWING TRIAL CHAMBERS' TOTAL RELIANCE ON WITNESS TESTIMONY BY SERIOUS INCONSISTENCY OVER TIME



GRAPH 21: SHOWING TRIAL CHAMBERS' TOTAL OR PARTIAL RELIANCE ON WITNESS TESTIMONY BY SERIOUS INCONSISTENCY OVER TIME



Running some simple regressions allows us to compare the Trial Chambers' treatment of these two groups of witnesses over time, and they show dramatic differences when it comes to credibility findings. In particular, the regression suggests that the Trial Chambers' positive credibility findings for witnesses without serious inconsistencies stayed virtually the same through the course of the cases in the dataset, though that result is not statistically significant. At the same time, the regressions show a marked decline over time in the Trial Chambers' positive credibility findings for witnesses with serious inconsistencies. Specifically, the Trial Chambers' positive credibility findings, both total and partial, for witnesses with serious inconsistencies declined by an average of just under 5 percent per year.¹²²

The regressions examining the Trial Chambers' reliability findings for witnesses with and without serious inconsistencies present a murkier picture. For instance, the Trial Chambers' willingness to totally rely on witness testimony appeared to decline at an equal average rate of 1.9 percent per year for both sets of witnesses; however, that result is statistically significant only for witnesses without serious inconsistencies. When it comes to the Trial Chambers' willingness to rely in whole or in part on witness testimony, the same divergence seen in the Trial Chambers' credibility findings is again present. That is, the Trial Chambers' willingness to rely in whole or

122. Simple Regression Statistics for Credibility and Reliance Findings Over Time by Serious Inconsistencies in Testimony, *infra* app. 6.

part on witnesses with serious inconsistencies declined at a much greater rate, namely an average of 3.4 percent per year compared with an average of only 0.6 percent per year for witnesses without serious inconsistencies. However, only the result for witnesses with serious inconsistencies was statistically significant.¹²³

2. *Trial Chambers' Specific Reliance on Seriously Inconsistent Testimony*

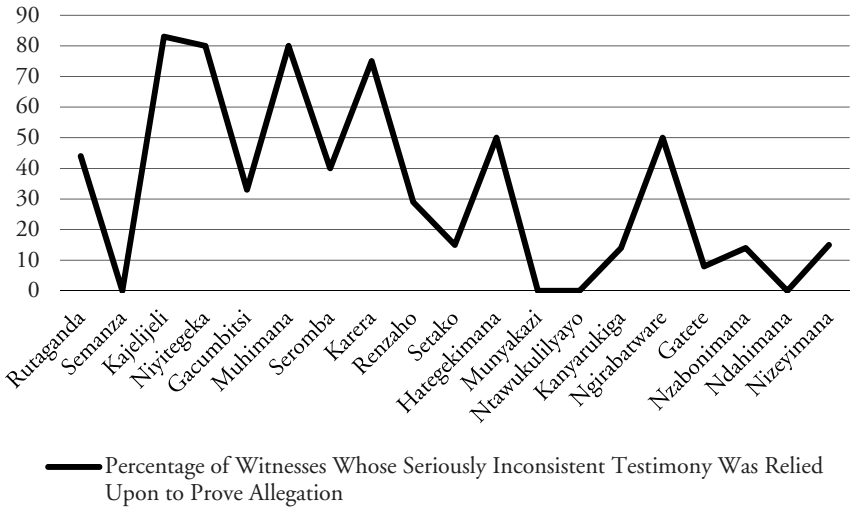
Throughout this Article, I have presented data on the Trial Chambers' reliance on witness testimony, but until now, when assessing a Trial Chamber's willingness to rely on a particular witness's testimony, I took account of the Trial Chamber's treatment of all of the witness's testimony. This section also examines the Trial Chambers' reliance on witness testimony, but it asks a more targeted question. For this section, I considered only witnesses whose testimony contained serious inconsistencies, and I asked: for what percentage of such witnesses did the Trial Chambers rely specifically on the seriously inconsistent testimony in order to find the relevant fact? Tabular data shows the answer to that question to be 33 percent.

Graph 22 below shows how the Trial Chambers' reliance on seriously inconsistent testimony has changed over time. The graph shows a clear decline in the Trial Chambers' willingness to rely on seriously inconsistent testimony, and a simple regression confirms that decline. In particular, the Trial Chambers' reliance on seriously inconsistent testimony declined by a statistically significant average of 1.4 percent per year.¹²⁴

123. *Id.*

124. Simple Regression 6: Trial Chamber's Reliance on Testimony with Serious Inconsistency to Find Facts, *infra* app. 2.

GRAPH 22: CHRONOLOGICALLY SHOWING TRIAL CHAMBERS' RELIANCE ON SERIOUSLY INCONSISTENT TESTIMONY



3. Trial Chambers' References to Serious Inconsistencies in their Judgments

Although ICTR judgments are very lengthy and typically include a detailed description of each witness's testimony,¹²⁵ they do not always mention serious inconsistencies.¹²⁶ In particular, my dataset reveals that Trial Chambers mention about 75 percent of serious inconsistencies in their judgments.¹²⁷ Again, however, the data shows a fascinating time trend. As Graph 23 clearly shows, Trial Chambers' references to serious inconsistencies increased over time. Indeed, a simple regression produced the statistically significant finding that references to serious inconsistencies increased an average of 1.6 percent per year.¹²⁸

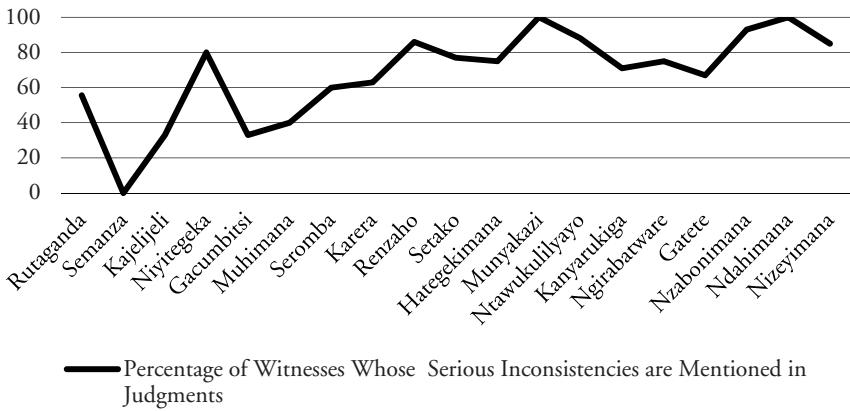
125. ICTR judgments in single-defendant cases typically run at least 100 pages and often run several hundred pages.

126. FACT-FINDING WITHOUT FACTS, *supra* note 7, at 180 & n.796 (containing examples).

127. Specifically, Trial Chambers mentioned 72.22 percent of serious inconsistencies and failed to mention 21.53 percent. For the remaining 5.56 percent of witnesses with serious inconsistencies, the Trial Chamber mentioned at least one of the inconsistencies but failed to mention at least one.

128. Simple Regression 7: Trial Chamber's References to Serious Inconsistencies in Judgments Over Time, *infra* app. 3.

GRAPH 23: CHRONOLOGICALLY SHOWING TRIAL CHAMBERS' REFERENCES TO SERIOUS INCONSISTENCIES IN JUDGMENTS



V. SUMMARIZING AND EXPLAINING THE FINDINGS

The findings detailed in Parts III and IV provide interesting insights into international criminal fact-finding that I will explore here. Section A summarizes those findings and section B explains them.

A. *Summarizing the Findings*

I begin with the findings on serious inconsistencies. Although, as a general matter, I did very little quantifying in *Fact-Finding Without Facts*, I did make some effort to quantify serious inconsistencies. In particular, I examined six ICTR cases and three SCSL cases,¹²⁹ and I found that, on average, approximately 50 percent of witnesses in those cases testified seriously inconsistently with their previous statements/testimonies.¹³⁰ For this study, I constructed a far larger database. Yet, interestingly, it produced very similar results: 48 percent of prosecution witnesses testified seriously inconsistently. The incidence of serious inconsistencies varied, sometimes dramatically, with the case. Defense counsel in *Munyakazi*, for instance, failed even to mention witness statements for more than 70 percent of the prosecution witnesses; therefore, it came as no surprise that I identified serious inconsistencies in the testimony of only 9 percent of prosecution witnesses. By contrast, in *Setako*, *Nzabonimana*, and *Ndahimana* nearly three-quarters of prosecution witnesses' testimony contained serious inconsistencies. Although the case-by-case incidence of serious inconsistencies did vary, that

129. The three SCSL cases were the only SCSL cases in trial at the time I did my research, so my findings with respect to those cases encompassed all of the SCSL data then in existence.

130. *FACT-FINDING WITHOUT FACTS*, *supra* note 7, at 118–22.

variation did not produce a statistically significant increase or decrease in the incidence of serious inconsistencies over the course of the ICTR's life. However, the data does show time trends for some subcategories. For instance, as time passed, the incidence of serious inconsistencies with previous ICTR testimony decreased while the incidence of serious inconsistencies with Rwandan court statements/testimonies increased. The incidence of serious inconsistencies with ICTR pre-trial statements remained constant.

The data also shows that a host of witness characteristics had no statistically significant effect on the likelihood that the witness would testify seriously inconsistently. For instance, although tabular data showed that a higher proportion of male witness testimony contained serious inconsistencies than did female witness testimony and that a higher proportion of Hutu witness testimony contained serious inconsistencies than did Tutsi witness testimony, those effects disappeared in a regression that took account of other relevant factors. When it came to the intersection of gender, ethnicity, and serious inconsistencies, the only statistically significant finding was that Hutu women were more likely to testify seriously inconsistently than any other gender-ethnic combination. The fact that a witness had been an accomplice of the defendant or had been imprisoned for a genocide crime also had no statistically significant effect on the likelihood of serious inconsistencies in that witness's testimony. By contrast, some details surrounding the previous statements/testimonies themselves did prove statistically significant. In particular, the number of statements/testimonies that a witness provided was a very strong predictor of serious inconsistencies, though the length of time between the statement/testimony and the subject testimony was not. Finally, the data showed that witnesses were more likely to testify seriously inconsistently with statements/testimonies that had been submitted to Rwandan courts, and to a lesser extent *gacaca* courts, than with other statements/testimonies.

When it comes to the Trial Chambers' assessments of witness testimony, my research reveals two particularly notable, and heartening, findings. The first is that Trial Chambers became less likely to find prosecution witnesses credible or to rely on their testimony over the course of the ICTR's life. The second is that Trial Chambers were considerably less likely to find witnesses credible or to rely on their testimony when the testimony of those witnesses contained serious inconsistencies. This latter finding is notable because no other witness characteristic proved a statistically significant predictor of Trial Chamber credibility and reliability determinations. Specifically, the data showed no statistically significant effect for gender, ethnicity, gender and ethnicity in combination, accomplice status, or imprisonment status. By contrast, a witness whose testimony had a serious inconsistency was 44 percent less likely to be found totally credible and 33 percent less likely to have all of his testimony relied upon than was a witness with all the same characteristics whose testimony did not contain a serious inconsistency. Although

these findings clearly suggest that Trial Chambers' assessments of witness testimony are appropriately influenced by the presence of serious inconsistencies, the data also showed that for about one-third of witnesses with serious inconsistencies, the Trial Chambers nonetheless relied on the seriously inconsistent testimony to find the fact in question. In addition, for about one-quarter of the witnesses with serious inconsistencies, the Trial Chambers never even mentioned the inconsistencies in their judgments.

A decline in the Trial Chambers' willingness to credit witnesses or rely on their testimony occurred across virtually all subpopulations of witnesses in the dataset. However, that decline was far more dramatic for some populations than others. These included male witnesses, Hutu witnesses, witnesses imprisoned for genocide, and witnesses with serious inconsistencies in their testimony. Finally, the data shows a decline over time in the Trial Chambers' willingness to rely on seriously inconsistent testimony to find facts. Relatedly, the data shows an increase over time in the Trial Chambers' willingness to mention serious inconsistencies in their judgments.

B. Understanding the Findings

International criminal law has its share of critics, and my previous fact-finding work placed me among them. However, the data resulting from this larger-scale and more rigorous empirical study tells a more nuanced and a more heartening story. The data depicts an international criminal justice system that, throughout its life, confronted a constant stream of serious testimonial deficiencies. There was once reason to believe that the incidence of these deficiencies would decline over time, and the fact that they did not provides clues as to their causes. What did decline, however, was the Trial Chambers' willingness to credit prosecution witnesses and rely on their testimony. Indeed, the data arguably depicts an international criminal justice system that, over time, strengthened its commitment to factual accuracy and, more broadly, to the beyond-a-reasonable-doubt standard for convictions.

1. Understanding Serious Inconsistencies

Because serious inconsistencies stand as the most challenging testimonial deficiency in international criminal law—a realm featuring no shortage of challenging testimonial deficiencies—it is important to learn what we can about the factors that predict them. What my data suggests, however, is that not a lot of factors do predict them. Certainly, the one statistically significant finding—that witnesses who provide more pretrial statements/testimonies are more likely to testify seriously inconsistently—is one that common sense might lead us to expect. However, other expectations, which might seem equally grounded in common sense, were not supported by the data. For instance, although I was not surprised to learn that neither ethnic-

ity nor gender predicted serious inconsistencies, I did expect that imprisonment status and accomplice status would. My expectation stemmed from the fact that Rwandan courts and *gacaca* courts offer leniency to defendants who confess their crimes, but in order for a confession to “count,” as it were, the defendant must inculcate other offenders.¹³¹ Thus, because Rwandan and *gacaca* courts provide significant incentives for naming other offenders, many commentators believe that imprisoned defendants falsely accuse others of genocide.¹³² Assuming that is true, and reasoning that false testimony is more likely to contain serious inconsistencies than truthful testimony, I expected the rate of serious inconsistencies to be higher among witnesses imprisoned for genocide than among witnesses who were not. However, the logit regression did not support my expectation. One possible explanation for this finding is that imprisoned witnesses on average submitted nearly twice the number of statements/testimonies as non-imprisoned witnesses did.¹³³ Because the number of documents submitted is a statistically significant predictor of serious inconsistencies, perhaps the effect of imprisonment status is felt indirectly through the number of documents submitted.

That said, even some of the tabular data regarding the relationship between serious inconsistencies and imprisonment status proved surprising. The tabular data did show that non-accomplice and non-imprisoned witnesses had lower rates of serious inconsistencies than accomplice and imprisoned witnesses, as expected, but it also showed that witnesses who were imprisoned at the time of trial had lower rates of serious inconsistencies than did witnesses who had been imprisoned but released before trial. Those statistics are counterintuitive if we assume that false testimony is more likely to contain serious inconsistencies. That assumption leads us to expect that a greater proportion of witnesses who were imprisoned at trial would testify falsely than would witnesses who were already released, because currently imprisoned witnesses would seek leniency through false accusations, whereas witnesses who had already been released would have nothing to gain.

Given that the data does not support my expectations, we need to unpack and more carefully scrutinize the assumptions underlying my expectations. For instance, I assumed that witnesses who were imprisoned at trial were

131. CARINA TERTSAKIAN, *LE CHÂTEAU: THE LIVES OF PRISONERS IN RWANDA* 396–405 (2008); JUSTICE COMPROMISED: THE LEGACY OF RWANDA’S COMMUNITY BASED GACACA COURTS, HUMAN RIGHTS WATCH 47–48 (2011), <https://www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf>.

132. See, e.g., TERTSAKIAN, *supra* note 131, at 412–13; Stacey M. Mitchell, *Restorative Justice, RPF Rule and the Success of Gacaca*, in TRIALS AND TRIBULATIONS OF INTERNATIONAL PROSECUTION 255, 263 (Henry F. Carey & Stacey M. Mitchell eds., 2013); Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMPLE L. REV. 1, 72–73 (2006); Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENVER J. INT’L L. & POL’Y, 125, 137 (2008).

133. Witnesses who were not imprisoned provided an average of 1.44 statements per witness, whereas witnesses who were currently imprisoned or imprisoned but released provided averages of 3.44 and 3.7 statements/testimonies per witness, respectively.

more likely to testify falsely than other witnesses, but that may not be true. Certainly, some imprisoned witnesses had powerful incentives to falsely inculpate ICTR defendants, but some Tutsi victims did as well. Indeed, many of the most well known allegations of perjury at the ICTR have centered on Tutsi victims groups whose members allegedly encouraged other members to falsely accuse ICTR defendants.¹³⁴ Moreover, even if it is true that imprisoned witnesses were more likely to testify falsely than non-imprisoned witnesses, that does not necessarily mean that their false testimony was more likely to contain serious inconsistencies. Although the presence of a serious inconsistency may be a predictor of false testimony, the reverse may not be true. Indeed, it is possible that perjuring witnesses—and particularly perjuring witnesses who are lying in order to receive tangible and substantial benefits—take greater care than truthful witnesses to keep their representations consistent.¹³⁵ Finally, at least with respect to the tabular data, the counter-intuitive statistics may stem from the small sample size of witnesses who were imprisoned but released before trial. Whereas the dataset included 264 witnesses who had never been imprisoned and fifty-two witnesses who were imprisoned at trial, it included only twenty witnesses who had been imprisoned but released before trial.

Although witness characteristics are not generally predictive of serious inconsistencies, certain characteristics of pre-trial statements/testimonies are. I explored three: (1) the number of statements/testimonies that a witness submitted; (2) the length of time between the statements/testimonies and the subject ICTR testimony; and (3) the type of statements/testimonies that a witness submitted. As for the number of witness statements/testimonies, the logit regression showed that the more statements/testimonies a witness provided, the greater the likelihood that the witness's subject testimony would be seriously inconsistent with at least one of the statements/testimonies. As for the length of time between pretrial statements/testimonies and subject testimony, the data shows no correlation. Indeed, tabular results suggest that ICTR testimony is just as likely to be seriously inconsistent with a statement that is more than thirteen years old as with a statement

134. See, e.g., Transcript of Continued Trial at 34, *Prosecutor v. Nahimana et al.*, (Mar. 13, 2003) (ICTR-99-52-T) (describing IBUKA as “a tiny group of Tutsis responsible for bringing false accusations, fabricated accusations against people”); Transcript of Continued Trial at 93–96, *Prosecutor v. Nahimana et al.*, (Sept. 11, 2001) (ICTR-99-52-T); Transcript of Continued Trial at 15–19, *Prosecutor v. Nahimana et al.*, (Jan. 20, 2003) (ICTR-99-52-T) (witness RM10 maintaining that members of IBUKA promised her more than \$2000 plus benefits in the criminal case pending against her in exchange for false testimony against the defendant). Indeed, Filip Reyntjens, a Belgian professor who has repeatedly testified before the ICTR, described the victims' group IBUKA as a blackmailing syndicate. Transcript of Continued Trial at 135–36, *Prosecutor v. Rutaganda* (Nov. 24, 1997) (ICTR-96-3-T).

135. Certain research suggests this possibility. See Vredeveldt, et al., *supra* note 47, at 184. See also *Prosecutor v. Muvunyi*, Case No. ICTR 00-55A-T, Judgment, para. 14 (Feb. 11, 2010) [hereinafter *Muvunyi Judgment*] (observing that “[w]hen an accomplice witness testifies in accordance with a prior statement implicating the accused, a Trial Chamber must be mindful that the witness may have had a motive or incentive to implicate the accused when he gave the prior statement, even if he has already been sentenced or has served his sentence”).

that is less than one year old.¹³⁶ Turning finally to the type of statements/testimonies that witnesses submitted, the data shows that Rwandan court statements/testimonies were most likely to give rise to a serious inconsistency, followed in descending order by *gacaca* statements/testimonies, ICTR statements, ICTR testimony, and finally foreign court statements/testimonies. In some cases, the differences were dramatic. For instance, nearly twice the percentage of Rwandan court statements/testimonies (42 percent) gave rise to serious inconsistencies as foreign court statements/testimonies (22 percent), and Rwandan court statements/testimonies were also considerably more likely to give rise to serious inconsistencies than ICTR pre-trial statements (31 percent).

At first glance, the latter two findings might appear counterintuitive. We might expect testimony to be more likely to be seriously inconsistent with older statements/testimonies than with newer ones because empirical studies of witness testimony show that memories of events fade over time.¹³⁷ Moreover, we might expect ICTR statements to give rise to a larger percentage of serious inconsistencies than Rwandan court or *gacaca* statements/testimonies because the former are apt to contain more errors than the latter. ICTR investigators were almost certainly less informed than their Rwandan counterparts about the subjects of their investigations.¹³⁸ Interviews conducted by John Jackson and Yassin Brunger, for instance, revealed that early ICTR statements, in particular, were apt to feature inaccuracies because investigators did not understand the information they were being provided.¹³⁹ For example, Jackson and Brunger reported that ICTR investigators “often failed to be culturally sensitive . . . ‘blundering in’, as one respondent described it, by asking a series of inappropriate questions that could upset people.”¹⁴⁰ Because Rwandan investigators understood the culture and the context, we might expect their statements to feature fewer inaccuracies. Another reason to expect fewer mistakes in Rwandan court and *gacaca* statements/testimonies is because they are taken in the witnesses’ native language; ICTR interviews, by contrast, went through at least two rounds of

136. See Table 8.

137. See JOHN W. SHEPHERD ET AL., IDENTIFICATION EVIDENCE: A PSYCHOLOGICAL EVALUATION 80–86 (1982) (describing authors’ study, which showed that memory remained relatively constant for a few months after an event but declined sharply after eleven months); HADYN D. ELLIS, *Practical Aspects of Face Memory*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 12, 23–25 (Gary L. Wells & Elizabeth F. Loftus eds., 1984) (summarizing research).

138. NICOLA PALMER, COURTS IN CONFLICT: INTERPRETING THE LAYERS OF JUSTICE IN POST-GENOCIDE RWANDA 70–71 (2015) (observing that “sets of [ICTR] investigators unfamiliar with the Rwandan context and heavily dependent on translation were operating in the harrowing reality of post-genocide Rwanda”).

139. John D. Jackson & Yassin M. Brunger, *Fragmentation and Harmonization in the Development of Evidentiary Practices in International Criminal Tribunals*, in PLURALISM IN INTERNATIONAL CRIMINAL LAW 159, 173–74 (Elies van Sliedregt & Sergey Vasiliev eds., 2014).

140. *Id.* at 174.

language translations.¹⁴¹ Indeed, ICTR statements were drafted in English or French, so witnesses could not read the original versions before signing off on them.

These findings are counterintuitive, however, only if one assumes that serious inconsistencies result from innocent causes such as memory lapses or investigatory errors. Certainly, if a sizeable proportion of serious inconsistencies stemmed from witnesses' failure at the time of trial to remember the details that they knew at the time they gave their statements, then the incidence of serious inconsistencies would rise as the length of time between the statements/testimonies and the subject testimony grew. Similarly, if a sizeable proportion of serious inconsistencies was caused by investigators, who made mistakes when drafting witness statements, then ICTR statements would generate the largest proportion of serious inconsistencies, not Rwandan court statements/testimonies. To be sure, these innocent explanations can and almost certainly do cause some inconsistencies, but the findings described suggest that they do not drive a large percentage of them.

This is an important insight because the most pressing question concerning serious inconsistencies is not the who, the what, the where, or the when, but the why. Certainly, it is interesting to learn whether male witnesses testify seriously inconsistently at a greater rate than female witnesses, or whether early ICTR cases featured more serious inconsistencies than later cases. But what is truly valuable is to learn *why* witnesses testify seriously inconsistently. To be sure, serious inconsistencies present serious challenges to accurate fact-finding whatever their cause, but different causes give rise to different remedies and more importantly, different Trial Chamber responses. For instance, if we believe that most serious inconsistencies result from investigatory errors, as so many witnesses claim,¹⁴² then Trial Chambers should typically credit witnesses' in-court testimony, and prosecutors should take steps to improve the statement-taking process, perhaps by training investigators more thoroughly and ensuring better translation during the interviews. Those responses are not so appropriate, however, if we think that most inconsistencies arise because witnesses purposely tell different stories at different times.

141. Typically investigators ask questions in English or French, and the questions are interpreted into Kinyarwanda. The witness's answers—in Kinyarwanda—then must be interpreted back to English or French. See, e.g., Akayesu Judgment, *supra* note 15, at para. 145; Alexander Zahar, *The ICTR's Media Judgment and the Reinvention of Direct and Public Incitement to Genocide*, 16 CRIM. L. FORUM 33, 41 n.26 (2005).

142. See, e.g., Niyitegeka Judgment, *supra* note 15, at paras. 59, 165; Gacumbitsi Judgment, *supra* note 58, at para. 160; Transcript of Continued Trial at 33–35, Prosecutor v. Kajelijeli (July 19, 2001) (ICTR-98-44A-T); Transcript of Continued Trial at 24–25, Prosecutor v. Seromba (Oct. 6, 2004) (ICTR-01-66-T); Transcript of Continued Trial at 24–25, Prosecutor v. Seromba (Oct. 6, 2004) (ICTR-01-66-T); Transcript of Continued Trial at 3, Prosecutor v. Seromba (Oct. 11, 2004) (ICTR-01-66-T); Transcript of Continued Trial at 11, Prosecutor v. Seromba (Oct. 13, 2004) (ICTR-01-66-T); Transcript of Continued Trial at 55, Prosecutor v. Muhimana (Apr. 19, 2004) (ICTR-95-1B-T).

Indeed, if we assume that the majority of serious inconsistencies is caused by witnesses purposely telling different stories at different times, then my findings are not counterintuitive at all. For instance, we might suppose that translation errors and investigator errors do cause some inconsistencies, but because those errors are apt to be somewhat random, the inconsistencies they cause are not so likely to be deemed “serious.” In addition, a far greater proportion of witnesses who provided Rwandan court statements had been imprisoned for genocide than the witnesses who provided ICTR statements.¹⁴³ As noted, a witness’s imprisonment status is not by itself predictive of serious inconsistencies, but combining that status with the criminal justice system in which the statement was taken could tell a different story. In particular, witnesses accused of genocide in Rwandan courts not only had incentives to falsely accuse ICTR defendants, but also to craft their stories so as to minimize their own responsibility. Trial Chambers regularly suspected imprisoned witnesses of engaging in such manipulations,¹⁴⁴ and if their suspicions were correct, the testimony of these witnesses could easily diverge from their previous representations.

Finally, one of the study’s most notable—and counterintuitive—findings is also consistent with the hypothesis that a large proportion of serious inconsistencies reflect purposefully false testimony. The notable finding is that the incidence of serious inconsistencies remained constant throughout the ICTR’s life. The finding is counterintuitive because, by all accounts, investigatory practices improved over time,¹⁴⁵ so those improvements would be

143. Twenty-one percent of witnesses who provided ICTR pre-trial statements had been imprisoned for genocide crimes, whereas 55 percent of witnesses who provided Rwandan courts statements/testimonies had.

144. See, e.g., Kanyarukiga Judgment, *supra* note 66, at para. 578 & n.1607 (“Given that Witness CDL is still serving time in Rwanda for crimes related to the events of 1994, he could have personal motivations to implicate the Accused while minimising his own role in the attacks.”); Ndahimana Judgment, *supra* note 58, at para. 244 (“As shown by the evidence in this case, the witness may have tried to minimise his own role in events.”); Setako Judgment, *supra* note 59, at para. 156 (“The potential, therefore, exists that the witness’s testimony may be influenced by a desire to positively impact his circumstances in Rwanda or to shift blame to Setako either to minimize his own involvement or based on the belief that Setako was behind his increased sentence.”); Munyakazi Judgment, *supra* note 55, at para. 119 (“[A]t earlier stages of the proceedings in Rwanda, the witness may have attempted to minimise his involvement in the genocide.”); *id.* at paras. 131, 309, 371, 420, 421; Prosecutor v. Muvunyi, Case No. ICTR 2000-55A-T, Judgment and Sentence, para. 156 (Sept. 12, 2006).

145. Report on the Conference on International Criminal Justice, Assembly of States Parties, ICC-ASP/6/INF-2, 42, 43 (Oct. 19, 2007); Jackson & Brunger, *supra* note 139, at 173–77. When the ICTY and ICTR were created, no international crimes had been investigated for fifty years. Thus, at that time, a cadre of competent professionals experienced in the investigation of mass atrocities did not exist. See Hassan B. Jallow, *Challenges of International Criminal Justice: The ICTR Experience*, OBSERVATIONS AT THE COLLOQUIUM OF PROSECUTORS OF INTERNATIONAL CRIMINAL TRIBUNALS (Nov. 25–27, 2004), <http://ict-r-archiv09.library.cornell.edu/ENGLISH/colloquium04/jallow.html> (noting that the ICTR “did not have the advantage of investigators with specialized capacity to investigate genocide, crimes against humanity or war crimes as no such tribunals previously existed”); Jackson & Brunger, *supra* note 139, at 169 (noting that when the ICTY and ICTR were created, “the United Nations was an organization with no previous experience in running criminal justice activities”). That cadre developed over the course of the ICTR’s life. Investigations practices probably improved, in addition, in response to the Trial Chambers’ increasing willingness to reject prosecution witness testimony that featured serious inconsistencies.

expected to produce a decrease in serious inconsistencies. But again, such a decrease would appear only if a large proportion of serious inconsistencies resulted from investigator errors. That the incidence of serious inconsistencies remained constant is yet another indication that investigatory errors did not play a primary causal role in serious inconsistencies.

It goes without saying, first, that there is no one set of causes for all inconsistencies, and second, that we will be unable to determine the causes for most inconsistencies at an individual level. But it is possible that some causes explain a sizeable proportion of serious inconsistencies, and I believe that my data provides support for the view—frequently advanced by defense counsel—that witness mendacity is a primary driver of serious inconsistencies. Indeed, the findings discussed in the next section suggest that the Trial Chambers came to largely the same conclusion.

2. *Understanding the Trial Chambers' Assessments*

Just as witness characteristics were not predictive of serious inconsistencies, they likewise were not predictive of the Trial Chambers' credibility and reliability findings. Neither gender nor ethnicity was predictive, and neither accomplice nor imprisonment status was predictive. The latter finding was unexpected because the Trial Chambers repeated—in judgment after judgment—their recognition that accomplice and imprisoned witnesses had incentives to lie,¹⁴⁶ and their practice of viewing the testimony of accomplice and imprisoned witnesses “with caution.”¹⁴⁷ My findings might suggest, then, that the Trial Chambers' actions did not match their words. Indeed, the testimony of accomplices was often crucial to the charges against the defendant,¹⁴⁸ so, to the extent that the Trial Chambers did not want to acquit large numbers of defendants, they could have been motivated to rely on the testimony of accomplice witnesses even though they ostensibly viewed it with caution. At the same time, it is possible that the Trial Chambers *did* in fact view the testimony of accomplice and imprisoned witnesses

146. See, e.g., Prosecutor v. Nchamihigo, Case No. ICTR 01-63-T, Judgment and Sentence para. 17 (Nov. 12, 2008); Renzaho Judgment, *supra* note 59, para. 166; Muvunyi Judgment, *supra* note 135, para. 14. The Appeals Chamber repeatedly highlighted the same concern. See, e.g., Prosecutor v. Niyitegeka, Case No. ICTR 96-14-A, Judgment, para. 98 (July 9, 2004) [hereinafter Niyitegeka Appeal Judgment]; Prosecutor v. Nchamihigo, Case No. ICTR 01-63-A, Judgment para. 305 (Mar. 18, 2010) [hereinafter Nchamihigo Appeal Judgment]; Prosecutor v. Kanyarukiga, Case No. ICTR 02-78-A, Judgment para. 181 (May 8, 2012).

147. For examples of judgments that use this phrase, see note 115.

148. See, e.g., Nzabonimana Judgment, *supra* note 58, at paras. 1224–1225 (relying on accomplice witness CNA to find that the defendant accused *bourgmestres* of not supporting the killings of Tutsis and warned that they would be replaced by *Interabamwe*); Kanyarukiga Judgment, *supra* note 66, at para. 183 (relying on accomplice witness CBR); *id.* at para. 472 (relying on accomplice witness CBR to find that defendant was with Ndahimana when he asked the attackers to “start working”); Renzaho Judgment, *supra* note 59, at para. 251 (relying on accomplice witnesses AWE and GIJ to find that the defendant had ordered individuals to collect and distribute weapons); *id.* at para. 652 (relying on accomplice witness BUO to conclude that the defendant ordered the *Interabamwe* to attack, and later, to stop the killings at Sainte Famille on June 17).

more skeptically, but that the testimony withstood the additional scrutiny. Accomplice witness testimony may have seemed particularly reliable, for instance, because accomplice witnesses often knew more than non-accomplice witnesses about the events in question, and specifically about the defendant's conduct. For this reason, their testimony may have been given greater weight. At the same time, accomplice witness testimony may have seemed particularly reliable because accomplices had the time to create that perception. For instance, some witnesses who were imprisoned together colluded to concoct false but consistent allegations.¹⁴⁹ Trial Chambers frequently sought corroboration for accomplice witness testimony,¹⁵⁰ but allegations generated through collusion did corroborate one another, and they thereby may have generated more positive credibility and reliability findings than one would expect after a cautious review of the testimony.

The study's two most notable findings are also the two most heartening. First, Trial Chambers were appreciably less likely to credit a witness or rely on his testimony if that testimony contained a serious inconsistency. That finding suggests that Chambers appropriately recognized that serious inconsistencies usually reflect unreliability and often mendacity. Second, the fact that Trial Chambers became less willing to find witnesses credible and to rely on their testimony as time passed reflects the same recognition.

When Trial Chambers manifest a statistically significant change in their treatment of testimony, two explanations are possible. First, the change might reflect a change in the quality of the testimony. Second, the change might reflect a change in the Trial Chambers' assessment methods.¹⁵¹ Turning to the first explanation, we can certainly point to changes that occurred over the course of the ICTR's life that could have reduced the quality of witness testimony. For example, my data shows that the ethnic composition of witnesses changed over time.¹⁵² In addition, in 2005, Rwanda began conducting *gacaca* trials¹⁵³ that often addressed the same crimes at issue in ICTR cases.¹⁵⁴ Although these changes had the potential to reduce the quality of witness testimony, the data suggests that they did not. As already reported, witness characteristics such as ethnicity were not statistically significant predictors of serious inconsistencies or the Trial Chambers' testimo-

149. See, e.g., Prosecutor v. Ntagerura, Case No. ICTR 99-46-T, Judgment and Sentence para. 131 (Feb. 25, 2004); Transcript of Continued Trial at 57–58, Prosecutor v. Karemera, (Apr. 10, 2008) (ICTR 98-44-T); see also Renzaho Judgment, *supra* note 59, at para. 166.

150. Prosecutor v. Muvunyi, Case No. ICTR 00-55A-A, Judgment, para. 131 (Aug. 29, 2008); Nchamihigo Appeals Judgment, *supra* note 146, para. 47.

151. It is also possible that both explanations combined to produce the change; however, in this case, this possibility is unlikely, as explained in the text.

152. The proportion of Tutsi witnesses declined by an average of approximately 2.2 percent per year.

153. Between 2002 and 2004, Rwanda conducted a pilot phase for *gacaca*. It began trials nationwide in 2005. *Justice Compromised*, *supra* note 131, at 21–22.

154. Nicola Palmer reported that “since the nationwide implementation of *gacaca* in 2005, forty-seven out of forty-nine ICTR cases have discussed evidence gathered by the *gacaca* courts.” Palmer, *supra* note 138, at 83.

nial assessments, so there is no reason to think that a change in the ethnic composition of witnesses would produce a change in the Trial Chambers' credibility or reliability findings. As for *gacaca* proceedings, their most likely effect would have been to increase the incidence of serious inconsistencies. To be sure, the introduction of *gacaca* almost certainly increased the average number of statements/testimonies that witnesses provided, and that factor did correlate with an increased incidence in serious inconsistencies. But the overall incidence of serious inconsistencies remained constant over time, as did the proportion of imprisoned witnesses. So we have no basis for believing that the introduction of *gacaca* led to a decline in the quality of witness testimony.

Finding no evidence of a decline in the quality of witness testimony, we must assume that testimonial quality remained relatively constant, but that the Trial Chambers' attitude toward that testimony changed over time. What might account for that attitude change? I believe it stemmed from a combination of two forces, one largely external and the other largely internal. First, the change reflects the Trial Chambers' increasing awareness of the problems associated with prosecution witness testimony. Second, the change reflects a maturation process that included the ICTR but extended to international criminal justice more broadly.

The first explanation posits that Trial Chambers became less willing to rely on prosecution witness testimony as time passed because, as time passed, Trial Chambers became increasingly aware that a non-trivial proportion of prosecution witness testimony contained inaccuracies as well as lies. During the earliest cases in my dataset, defense counsel were unable even to set foot in Rwanda,¹⁵⁵ so their ability to collect evidence that would cast doubt on prosecution witness testimony was highly constrained. It should come as no surprise, then, that Trial Chambers found virtually every prosecution witness in those early cases credible. As time went on, however, defense counsel became better able to conduct investigations that called prosecution witness testimony into serious question. At this same time that ICTR defense investigations were producing more evidence of witness mendacity, the reports of genocide trials in Rwanda were telling a similar story. Scholars and human rights organizations covering the trials reported a high incidence of perjury,¹⁵⁶ and the subsequent introduction of *gacaca* and the extraordinary attention it generated¹⁵⁷ only increased awareness of false accu-

155. Thierry Cruvellier, *Grass-Roots Justice*, INT'L JUST. TRIB., Mar. 29, 1999.

156. See Des Forges & Longman, *supra* note 35, at 66 n.37; Transcript of Continued Trial at 134, Prosecutor v. Rutaganda (Nov. 24, 1997) (ICTR-96-3-T); see also Paul Willis, *No Lawyers but Rwanda's Village Courts Could Pass Death Sentence*, DAILY TELEGRAPH (London), Apr. 9, 2006, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/rwanda/1515255/No-lawyers-but-Rwandas-village-courts-could-pass-death-sentence.html>.

157. For a small sampling of the literature on *gacaca*, see, e.g., CLARK, *supra* note 77; PAUL CHRISTOPH BORNKAMM, RWANDA'S GACACA COURTS (2012); TERTSAKIAN, *supra* note 131; Waldorf, *supra* note 132; Sosnov, *supra* note 132.

sations.¹⁵⁸ The very fact that Rwandan courts, which were widely believed to manifest a pro-conviction bias,¹⁵⁹ acquitted more than 25 percent of defendants¹⁶⁰ was itself compelling evidence that many Rwandans falsely accused their compatriots. Finally, the publication of my book *Fact-Finding Without Facts* also publicized testimonial deficiencies in general and false testimony in particular.¹⁶¹

Therefore, as time passed, Trial Chambers could not help but become aware that at least some prosecution witnesses testified falsely.¹⁶² Awareness does not always lead to action, but in this case, a variety of forces combined to motivate Trial Chambers to alter their treatment of witness testimony in light of their newfound awareness. One source of particularly compelling motivation derived from the ICTR Appeals Chamber, which occasionally overturned Trial Chamber factual findings that it considered insufficiently supported¹⁶³ or insufficiently defended,¹⁶⁴ and which issued judgments that sought to guide Trial Chamber assessments of evidence. For instance, the Appeals Chamber delineated factors that Trial Chambers should consider when assessing accomplice witness testimony¹⁶⁵ and testimony containing serious inconsistencies.¹⁶⁶ The Appeals Chamber also admonished the Trial Chambers to *describe* their consideration. As the Appeals Chamber stated in *Renzaho*, “Trial Chambers cannot merely state that they exercised caution when assessing the evidence of an accomplice witness, but must establish that they in fact did so.”¹⁶⁷

These admonitions, and in particular their focus on accused and imprisoned witnesses and witnesses with serious inconsistencies, may help to explain the more granular time trends revealed by my data. Recall that, over time, Trial Chambers became less willing to rely on the testimony of all subcategories of prosecution witnesses, but the trend was far more dramatic for accomplice and imprisoned witnesses and witnesses with serious inconsistencies than for other groups. These trends are in keeping with the Ap-

158. See *supra* note 132.

159. Des Forges & Longman, *supra* note 35, at 60–62.

160. *Id.* at 59.

161. *FACT-FINDING WITHOUT FACTS*, *supra* note 7, at 130–66.

162. See, e.g., Transcript of Continued Trial at 18–60, Prosecutor v. Karemera (Apr. 10, 2008) (ICTR-98-44-T) (witness BTH recants inculpatory testimony that he provided in four cases); Thijs Bouwknecht, *Rwanda's Genocide Tribunal's Witness Hiding*, RADIO NETHERLANDS WORLDWIDE, Oct. 2, 2008 (Government II Witness GFA admitting that he falsely testified against ICTR defendants in exchange for release from Rwandan prison); Prosecutor v. Kamuhanda, Case No. ICTR 95-54A-T, paras. 330–332 (Jan. 22, 2004).

163. Muvunyi Judgment, *supra* note 15, paras. 125–133; Nchamihigo Appeal Judgment, *supra* note 146, at paras. 77, 314, 322, 326, 344, 355.

164. Nchamihigo Appeal Judgment, *supra* note 146, at para. 143.

165. *Id.* at para. 47.

166. Prosecutor v. Niyitegeka, Case No. ICTR 96-14-A, Judgment, at para. 96 (July 9, 2004).

167. Prosecutor v. Renzaho, Case No. ICTR 97-31-A, Judgment, at para. 420 (Apr. 1, 2011); see also Nchamihigo Appeal Judgment, *supra* note 146, at para. 47.

peals Chamber's dicta as well as with the Trial Chambers' increasing awareness of the prevalence of false testimony.

Finally, *Finding Without Facts* may also have played a role in motivating Trial Chambers to take testimonial deficiencies more seriously. It was the first publication to provide an in-depth look at the problematic features of international criminal testimony and, more importantly, at the Trial Chamber's treatment of that testimony. By criticizing the Trial Chambers for adopting "a cavalier attitude toward testimonial deficiencies" and for frequently basing "their convictions on deeply flawed testimony,"¹⁶⁸ my book may have hit a nerve and encouraged greater scrutiny of prosecution witness testimony in the future.

Although I have little doubt that the ICTR's fact-finding evolution was driven in large measure by the facts on the ground that I have just described, I likewise have little doubt that the evolution also reflects the natural, and promising, maturation process of international criminal justice in general and the ICTR in particular.¹⁶⁹ The ICTR and ICTY began their lives as weak and vulnerable institutions whose long-term survival was in grave doubt.¹⁷⁰ In those days, international criminal justice was an experiment that many expected to fail.¹⁷¹ And no wonder. Initially, the Tribunals were provided inadequate funding,¹⁷² inadequate enforcement tools, and inadequate political support.¹⁷³ The ICTR was particularly dependent on Rwanda for access to crime sites and witnesses,¹⁷⁴ so it generally took care to stay in the country's good graces.¹⁷⁵ At the same time, the Tribunals bore all

168. FACT-FINDING WITHOUT FACTS, *supra* note 7, at 189. In addition, I argued, "Trial Chambers routinely discount the significance and potentially distortive effect of many testimonial deficiencies." *Id.* at 199.

169. For an empirically grounded contention that the ICTR has sought to legitimate its work, see Palmer, *supra* note 138, at 160–63.

170. See Ralph Zacklin, *The Failings of the Ad Hoc Tribunals*, 2 J. INT'L CRIM. JUST. 541, 541 (2004) (describing the "doubts and skepticism that greeted the . . . ICTY in 1993").

171. PIERRE HAZAN, JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 43–52 (James Thomas Snyder trans., 2004); Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 501–02 (1994).

172. Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: A Lawyers Committee Report on the ICTR and National Trials*, at V(B) (1997).

173. See, e.g., Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PENN. L. REV. 1, 66–69 (2002).

174. Bernard A. Muna, *The Early Challenges of Conducting Investigations and Prosecutions Before International Criminal Tribunals*, OBSERVATIONS AT THE COLLOQUIUM OF PROSECUTORS OF INTERNATIONAL CRIMINAL TRIBUNALS (Nov. 25–27, 2004), <http://www.ictcr.org/ENGLISH/colloquium04/muna.htm>.

175. See VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS 151–231; CRUVELLIER, *supra* note 30, at 10–13; Jackson & Brunger, *supra* note 139, at 170. The ICTR's high level of dependence on Rwanda became especially clear in 1999, after the Appeals Chamber dismissed with prejudice the indictment of Jean-Bosco Barayagwiza and ordered him released after concluding that the prosecution had violated Barayagwiza's right to be brought promptly before a judge following arrest. *Prosecutor v. Barayagwiza*, Case No. ICTR 97-17-AR72, Decision (Nov. 3, 1999). The Appeals Chamber's decision outraged Rwanda to such a degree that it suspended all dealings with the ICTR and refused to issue a visa to the Tribunal's Chief Prosecutor, Carla Del Ponte. PESKIN, *supra* at 177–85; Franck Petit, *Cameroonian Intrigues*, INT'L JUST. TRIB., Mar. 5, 2001. Del Ponte asked the Appeals Chamber to reconsider its decision, and she candidly acknowledged Rwanda's power over the Tribunal, when

the hopes and dreams of human rights advocates who saw international criminal justice as the new frontier in preventing mass atrocities.¹⁷⁶

I have argued previously that the vulnerability that characterized the Tribunals' early years influenced many of its early decisions, including its procedural choices and defense counsel regulations.¹⁷⁷ I suspect that early vulnerability also played a role in the Trial Chambers' kindly treatment of prosecution witness testimony. With significant hurdles to overcome and even more significant expectations to fulfill, the early ICTR could not afford to reject large quantities of prosecution witness testimony. Elsewhere, I have explored the high costs of international criminal acquittals,¹⁷⁸ but during the ICTR's early years, even the rejection of a substantial quantity of prosecution witness testimony would have proven extraordinarily costly. When established courts reject large quantities of prosecution witness testimony, the courts are lauded for their judicial independence. Had the early ICTY and ICTR rejected large quantities of prosecution witness testimony, they would have provoked a storm of criticism. It was bad enough that both Tribunals were delivering slow and expensive justice.¹⁷⁹ At least they were delivering justice. If, following a genocide that killed more than half a million people, prosecutors showed themselves unable to collect evidence of a sufficient quality to withstand Trial Chamber scrutiny, then commentators likely would have called for the experiment in international criminal justice to come to an end.

Not surprisingly, then, ICTR Trial Chambers' scrutiny became easy to withstand. Commentators have observed that early ICTY and ICTR cases

she told the Chamber: "If I don't get cooperation from Rwanda, . . . I can first open the door at the detention center and set them all free and then second I can close the door to my office because without them I cannot do anything all." J. Coll Metcalf, *An Interview with United Nations' Chief War Crimes Prosecutor, Carla del Ponte*, INTERNEWS, Feb. 15, 2000. In response, the Appeals Chamber reinstated Barayagwiza's indictment, and relations between the ICTR and Rwanda returned to normal. Prosecutor v. Barayagwiza, Case No. ICTR 97-17-AR72, Decision on Prosecutor's Request for Review or Reconsideration (Mar. 31, 2000). For an insider's account of the case, see MOGHALU, *supra* note 10, at 101-23.

176. The Tribunals were considered the testing ground for a permanent international criminal court, then under negotiation, see Geoffrey R. Watson, *The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 871, 872 (2003), and the promise of international justice was proclaimed by scholars and practitioners alike, see, e.g., Richard Goldstone, *Conference Luncheon Address*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1, 2 (1997); Richard May & Marieke Wierda, *Evidence Before the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 249, 252-53 (Richard May et al. eds., 2001); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 56 (2000); Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 9-10 (1998); Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 6-9 (1998); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81, 83 (1996).

177. Combs, *supra* note 6, at 377-80.

178. See FACT-FINDING WITHOUT FACTS, *supra* note 7, at 228-34.

179. See, e.g., John E. Ackerman, *Assignment of Defence Counsel at the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 167, 170 (Richard May et al. eds., 2001) ("One of the major criticisms levelled at the Tribunal is the length of trials."); Combs, *supra* note 173, at 90-94.

often were “thinly investigated”¹⁸⁰ and likely to be based on “weak evidence.”¹⁸¹ Professor and former prosecutor Alex Whiting has described the way in which ICTY judges, who joined with prosecutors in desiring the tribunals’ success, provided prosecutors tremendous latitude to amend charges and add evidence long after a defendant’s arrest.¹⁸² ICTR judges were likewise lenient in that regard,¹⁸³ and, as this study shows, in their assessments of witness testimony. In early cases, deficiencies in prosecution witness testimony were largely ignored.

In the intervening years, international criminal justice came a long way. The ICTY and ICTR not only carried out their own mandates, but they also paved the way for a host of new ad hoc tribunals as well as for a permanent international criminal court.¹⁸⁴ And as the tribunals themselves grew—from novel and vulnerable institutions to the foundational bodies of the global international criminal justice system—something very positive happened to fact-finding at the ICTR. No longer confronting the threat of closure, ICTR judges began to more carefully scrutinize prosecution witness testimony, highlight its deficiencies, and reject substantial quantities of it. The judges’ increased awareness of false testimony combined with the enhanced credibility and legitimacy of their tribunal to enable ICTR judges to engage in more scrupulous, defensible fact-finding.

VI. CONCLUSION

As Rosemary Byrne has observed, “Empirical research on international criminal trials can lead to a recalibrating of assumptions about the international criminal trial process, and in turn offer an informed basis upon which to improve international trial practice.”¹⁸⁵ The empirical study described here, though centering on the ICTR, has broad implications for international criminal justice as a whole. For one thing, the current international tribunals struggle with the same fact-finding impediments that made truth so elusive at the ICTR. In particular, serious inconsistencies appear with

180. Whiting, *supra* note 13, at 137. Former ICTR Special Counsel and Spokesman Kingsley Moghalu diplomatically conceded that the ICTR’s prosecution “was frequently not ‘trial-ready’ before obtaining arrest warrants” MOGHALU, *supra* note 10, at 193; *see also* Jallow, *supra* note 145 (noting that “in the early years arrests and detention of suspects frequently preceded investigations”).

181. Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT’L L. 529, 588 (2007–08).

182. Whiting, *supra* note 13, at 138.

183. *See, e.g.*, Prosecutor v. Kabiligi & Ntabakuze, Case Nos. ICTR-97-34-I & ICTR-97-30-I, Decision on the Prosecutor’s Motion to Amend the Indictment (Oct. 8, 1999); Prosecutor v. Simba, Case No. ICTR-01-76-I, Decision on Motion to Amend Indictment (Jan. 26, 2004); Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-I, Decision on Prosecutor’s Request for Leave to Amend Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor’s Motion for Leave to Amend the Indictment (Oct. 15, 2003).

184. *See* PALMER, *supra* note 138, at 60–61.

185. Rosemary Byrne, *Drawing the Missing Map: What Socio-legal Research Can Offer to International Criminal Trial Practice*, 26 LEIDEN J. INT’L L. 991, 1006 (2013).

alarming frequency in the transcripts of ICC¹⁸⁶ and the Extraordinary Chambers in the Courts of Cambodia.¹⁸⁷ Moreover, the fact that the incidence of serious inconsistencies remained constant throughout the ICTR's life, despite an increasing budget and a decreasing willingness on the part of Trial Chambers to rely on such testimony, should motivate prosecutors at the current tribunals to redouble their efforts to improve the quality of prosecution witness testimony. Even simple reforms to statement-taking could have considerable impact. For instance, at present, many witness statements are summaries of the information that the witness conveyed to the investigator. Consequently, when a statement fails to contain an allegation that is central to the witness's testimony, the witness can plausibly, but perhaps inaccurately, explain the omission by claiming that he was never asked about the allegation. At the very least, then, witness statements should be drafted in transcript format so as to include both the investigator's questions as well as the witness's responses. The *Niyitegeka* Appeals Chamber recommended this very reform back in 2004,¹⁸⁸ though it never became a consistent practice at the ICTR. Indeed, this is the most minor of the measures that should be

186. Transcript of Trial Hearing at 32–34, Prosecutor v. Bemba (Feb. 24, 2011) (ICC-01/05-01/08-T-73-Red-ENG); Transcript of Trial Hearing at 47–50, Prosecutor v. Bemba (Dec. 1, 2011) (ICC-01/05-01/08-T-195-Red-ENG); Transcript of Trial Hearing at 23–24, Prosecutor v. Bemba (May 2, 2012) (ICC-01/05-01/08-T-221-ENG); Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11, Decision on Defence Application for Judgments of Acquittal, paras. 53, 58 (Apr. 5, 2016); Antoine Panaïte, *Second Gbagbo Witness: "They Aimed at the Mosque,"* INT'L JUST. MONITOR Feb. 10, 2016, <http://www.ijmonitor.org/2016/02/second-gbagbo-trial-witness-they-aimed-at-the-mosque/>; Transcript of Trial Hearing at 67–68, Prosecutor v. Ntaganda (Nov. 12, 2015) (ICC-01/04-02/06-T-48-Red-ENG); Wairagala Wakabi, *Ntaganda's Lawyers Cross-Examine Witness P790 in Closed Session,* INT'L JUST. MONITOR Jan. 26, 2016, <http://www.ijmonitor.org/2016/01/ntagandas-lawyers-cross-examine-witness-p790-in-closed-session/>; Tom Maliti, *Witness Says Promise of "Good Life" Induced False Claims,* INT'L JUST. MONITOR Sept. 24, 2014, <http://www.ijmonitor.org/2014/09/witness-says-promise-of-good-life-induced-false-claims/>; Jennifer Easterday, *Katanga and Ngudjolo are Responsible for Attack on Bogoro, Victims Claim,* INT'L JUST. MONITOR Apr. 4, 2011, <http://www.ijmonitor.org/2011/04/katanga-and-ngudjolo-are-responsible-for-attack-on-bogoro-victims-claim/>.

187. Transcript of Trial Proceedings at 79–81, Prosecutor v. Kaing Guek Eav "Duch" (July 7, 2009) (001/18-07-2007-ECCC/TC); Transcript of Trial Proceedings at 35–39, Prosecutor v. Kaing Guek Eav "Duch" (July 8, 2009) (001/18-07-2007-ECCC/TC); *id.* at 2–3, 61–62, 73–75; Transcript of Trial Proceedings at 49, Prosecutor v. Kaing Guek Eav "Duch" (Aug. 4, 2009) (001/18-07-2007-ECCC/TC); Transcript of Trial Proceedings at 9–10, Prosecutor v. Kaing Guek Eav "Duch" (Aug. 11, 2009) (001/18-07-2007-ECCC/TC); Transcript of Trial Proceedings at 87–89, Prosecutor v. Chea (Dec. 8, 2011) (002/19-09-2007-ECCC/TC); Transcript of Trial Proceedings at 8–10, 26–27, 62–64, Prosecutor v. Chea (Apr. 10, 2012) (002/19-09-2007-ECCC/TC); Transcript of Trial Proceedings at 40–41, Prosecutor v. Chea (Apr. 19, 2012) (002/19-09-2007-ECCC/TC); Transcript of Trial Proceedings at 63, Prosecutor v. Chea (Feb. 3, 2016) (002/19-09-2007-ECCC/TC). *See also* Seth Mydans, *Torture and Death Recounted at Cambodian Trial,* N.Y. TIMES, July 14, 2009.

188. The Appeals Chamber stated that an "ideal" record of a witness interview would include "all the questions that were put to a witness and all the answers given by the witness" along with "[t]he time of the beginning and the end of an interview, specific events such as requests for breaks, offering and accepting of cigarettes, coffee, and other events that could have an impact on the statement or its assessment." *Niyitegeka* Appeal Judgment, *supra* note 146, at para. 31. The Appeals Chamber concluded that it was "necessary to disclose the questions put to the witness in order to make the statement intelligible" and to enable the defense "to prepare for cross-examination properly." *Id.* at para. 33. Indeed, the Chamber went so far as to maintain that "it may be impossible to assess the probative value of the witness's answer without juxtaposing it with the relevant question." *Id.*

considered.¹⁸⁹ The ICTR's inability to reduce serious inconsistencies stands as a warning to today's international tribunals to take testimonial deficiencies seriously.

The warning should be particularly ominous for the ICC because that court faces far more profound fact-finding challenges than those the ICTR confronted. The ICTR had twenty years to investigate one set of crimes in one small nation that occurred over the course of 100 days. The ICC, by contrast, must simultaneously investigate a series of crimes committed as part of a series of long-term conflicts occurring in locations all over the globe. ICC investigators will never have the luxury of familiarizing themselves with their subjects to the degree or depth that ICTR investigators were able to. Further, the conditions greeting ICTR investigators were far more secure and hospitable than ICC investigators can hope to enjoy. By the time the ICTR was created, the conflict in Rwanda had ended, so ICTR investigators could conduct their investigations without fear of violence.¹⁹⁰ To be sure, Rwanda and the ICTR have had their disagreements over the years,¹⁹¹ but as a general matter, Rwanda approved of the ICTR's prosecutions, and welcomed ICTR investigators into the country.¹⁹² By contrast, ICC investigators are unable even to enter some of the states where they should be investigating crimes,¹⁹³ and when they are able to conduct in-state investigations, they, and prospective witnesses, frequently face such serious security risks that they must work through intermediaries¹⁹⁴ and rely excessively on reports drafted by the United Nations or non-governmental organizations.¹⁹⁵ Finally, although ICTR prosecutors regularly presented witnesses whose testimonies diverged from their previous representations, at least ICTR prosecutors could have confidence that their witnesses would show up and would inculpate the defendants. Many ICC witnesses, by contrast, have been intimidated into recanting their allegations and refusing to testify.¹⁹⁶ Indeed, the prosecution's failure to submit credible and reliable

189. For other suggested reforms, see *FACT-FINDING WITHOUT FACTS*, *supra* note 7, at 274–321.

190. The Rwandan conflict ended in July 1994, see 1 VIRGINIA MORRIS & MICHAEL SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 58 (1997), and the ICTR was created in November 1994, see *id.* at 72.

191. As a member of the Security Council, Rwanda voted against the creation of the ICTR, see *id.* at 72, and it completely obstructed the Tribunal's efforts to prosecute members of the ruling Rwandan Patriotic Front, see Victor Peskin, *Victor's Justice Revisited: Rwandan Patriotic Front Crimes and the Prosecutorial Endgame at the ICTR*, in *REMAKING RWANDA: STATE BUILDING AND HUMAN RIGHTS AFTER MASS VIOLENCE* 173, 173 (Scott Strauss & Lars Waldorf eds., 2011). Rwanda also believed the Tribunal cost too much for the number of offenders it prosecuted. CLARK, *supra* note 77, at 136.

192. See ALISON DES FORGES, HUMAN RIGHTS WATCH, "LEAVE NONE TO TELL THE STORY": GENOCIDE IN RWANDA 1132 (1999).

193. Jackson & Brunger, *supra* note 139, at 171; Caroline Buisman, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, 11 *NW. J. INT'L HUM. RTS.* 30, 50 (2013).

194. *Id.* at 70.

195. See *id.* at 54–56.

196. See, e.g., Public Redacted Version of "Prosecution's Request for the Admission of Prior Recorded Testimony of [REDACTED] witnesses" para. 2, *Prosecutor v. Ruto & Sang* (May 21, 2015) (Case No. ICC-01/09-01/11); Tom Maliti, *Prosecutor Withdraws Seven Witnesses in Kenyatta Case in Past Year*, *INT'L*

evidence has already emerged as a crucial early challenge for the ICC. ICC prosecutors have been the target of blistering criticism, most notably from ICC judges,¹⁹⁷ but also from commentators who have questioned the prosecution's "small team" approach to investigations,¹⁹⁸ criticized its failure to conduct more in-state investigations,¹⁹⁹ and urged it to adopt a more informed approach to investigations.²⁰⁰ This study, then, provides additional and concrete support for those views. The very fact that serious inconsistencies appeared in the testimony of approximately one-half of ICTR prosecution witnesses—throughout the ICTR's life, when ICTR prosecutors labored under dramatically more favorable conditions—should serve as a wake-up call to the ICC.

And a loud wake-up call it should be. ICC judges have already shown unparalleled willingness to reject the prosecution's evidentiary offerings. Unlike ICTR judges who initially called most doubts in favor of prosecution witnesses, ICC judges have, from the court's very inception, required prosecutors to meet stringent evidentiary standards. In addition, they have backed up those standards with real consequences. Not only have ICC judges rejected large quantities of prosecution evidence in the two cases that resulted in conviction,²⁰¹ they have refused to confirm charges in approximately one-third of the prosecution's cases,²⁰² and they have acquitted one out of three defendants.²⁰³ Some have suggested that the judges' evidentiary requirements might be too exacting,²⁰⁴ but what is clear is that ICC prosecutors have no choice but to devote considerable attention to the sorts of testimonial deficiencies that ICTR prosecutors initially had the luxury to ignore.

In fact, whereas the ICC prosecution should take to heart this study's findings on testimonial deficiencies, the ICC judges need no lessons from the ICTR on the treatment of witness testimony. I have argued that international criminal justice matured tremendously during the years the ICTR conducted trials, and the careful judicial scrutiny now on display at the ICC

JUST. MONITOR (Jan. 16, 2014), <http://www.ijmonitor.org/2014/01/prosecutor-withdraws-seven-witnesses-in-kenyatta-case-in-past-year/>.

197. See, e.g., Ngudjolo Judgment, *supra* note 12, at paras. 115–123.

198. See WAR CRIMES RESEARCH OFFICE, AM. UNIV. WASH. COLL. OF LAW, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT'S OFFICE OF THE PROSECUTOR 4–5, 24–30 (2012) [hereinafter INVESTIGATIVE MANAGEMENT]. But see Alex Whiting, *Dynamic Investigative Practice at the International Criminal Court*, 76 L. & CONTEMP. PROBS. 163, 175 (2014) (arguing that the War Crimes Research Office "has the cause and effect precisely backwards").

199. Buisman, *supra* note 193, at 45–54.

200. Groome, *supra* note 13, at 5–28.

201. Whiting, *supra* note 13, at 139–40.

202. INVESTIGATIVE MANAGEMENT, *supra* note 198, at 15.

203. Ngudjolo Judgment, *supra* note 12, at paras. 115–123.

204. See Whiting, *supra* note 13, at 140; Avocats Sans Frontières, *Crimes of Bogoro: International Criminal Court's First Acquittal Upheld* (Feb. 27, 2015), [http://www.asf.be/blog/2015/02/27/crimes-of-bogoro-international-criminal-courts-first-acquittal-upheld/?utm_source=CICC+Newsletters&utm_campaign=60a8c23c5d-3_6_15_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-60a8c23c5d-408856465&ct=t\(3_6_15_GlobalJustice_Weekly\)](http://www.asf.be/blog/2015/02/27/crimes-of-bogoro-international-criminal-courts-first-acquittal-upheld/?utm_source=CICC+Newsletters&utm_campaign=60a8c23c5d-3_6_15_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-60a8c23c5d-408856465&ct=t(3_6_15_GlobalJustice_Weekly)).

stands as a compelling testament to the newfound legitimacy and credibility of the current international criminal justice system. As Julie O'Sullivan wrote about the ICC, "[f]ar from being a kangaroo court where verdicts of 'guilty' can be counted upon, the court is an entity where the prosecution is viewed with a skeptical and sometimes even jaundiced eye."²⁰⁵ Though difficult for the prosecution in the short run, O'Sullivan maintains that "[a]ny augmentation of the Court's perceived impartiality has the power to enhance the credibility of each prosecutorial victory."²⁰⁶

Back in 1994, the ICTY asserted that, "the success of the Tribunal as a whole depends very much on the caliber of [the Prosecution's] investigative staff."²⁰⁷ That statement was not really true for the ICTR in its early years, but it became true. By the end of its life, the ICTR's fact-finding had undergone a dramatic evolution, an evolution whose legacy the ICC is carrying on.

205. Julie Rose O'Sullivan, *The Relationship Between the Office of the Prosecutor and the Judicial Organ*, in *THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS* 153, 156 (Martha Minow et al. eds., 2015).

206. *Id.* at 157.

207. Annual Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, transmitted by Letter Dated 17 August 1994 from the President of the ICTY Addressed to the Secretary-General and the President of the Security Council para. 144, U.N. Doc. A/49/342-S/1994/1007 (Aug. 29, 1994).

