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

Most international law scholars warmly greeted the establishment of these tribunals. Although large-scale atrocities have been committed since the dawn of humanity, for most of human history these atrocities have not elicited
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criminal sanctions. So, the move to impose accountability on brutal dictators who were responsible for widespread death, suffering, and destruction was considered a tremendous advance, and early commentators credited international criminal prosecutions with promoting a host of praiseworthy purposes. International criminal prosecutions were said to affirm the rule of law in previously lawless societies, to promote peace building and transition to democracy in war-torn lands, to assist in reconciling former enemies, to deter future mega-łomaniacs from committing similar crimes, to create a historical record of the conflict, and to diminish the victims' propensity to blame collectively all those in the offenders' group. International criminal justice was, in sum, the subject of a great deal of soaring and inspirational rhetoric.

In recent years, the glow surrounding international criminal justice has begun to fade. The scandalous length and cost of international criminal trials have driven some critiques, while inadequate outreach efforts have formed

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

These are impressive studies because they scrutinize many of the foundational beliefs that drove the establishment of the international criminal tribunals, but, as impressive as they are, they assume the question that forms the introduction of international criminal law.


See generally Larry May, Crimes Against Humanity: A Normative Account (2005); Larry May, War Crimes and Just War (2007); Larry May, Aggression and Crimes against Peace (2008).


Drumbl, note 1, at 149–80.
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basis for this work. The scholars I have mentioned might question whether the prosecution of certain international crimes can be justified given their infringement on state sovereignty, or they might conclude that international criminal trials impair the prospects for reconciliation rather than advance them, but their critiques presuppose that international trials – even if they can do nothing else – can determine with some measure of certainty whether a defendant engaged in the acts alleged in the indictment. That is, even if international trials have uncertain philosophical foundations, even if they regularly fail to deter, rehabilitate, or reconcile, international criminal trials have at least been considered useful mechanisms for determining who did what to whom during a mass atrocity.

It is that assumption that I will challenge. My study will reveal that international criminal trials confront severe impediments to accurate fact-finding, impediments that should give rise to serious doubts about the accuracy of the Trial Chambers’ factual determinations. The basis for my study is a large-scale review of transcripts from the ICTR, the SCSL, and the Special Panels. From this review, I conclude that much eyewitness testimony at the international tribunals is of highly questionable reliability. In particular, many international witnesses are unable to convey the information that court personnel expect – and need – to receive, if they are to have confidence in the factual determinations they make. Sometimes witnesses claim not to know the sought-after information, whereas in other cases the communication breaks down as a result of the questioning process. Chapter 2 details these testimonial deficiencies while Chapter 3 considers some of their causes. Chapter 3 reports, for instance, that many witnesses lack the education and life experiences to be able to read maps, tell time, or answer questions concerning distances and dates. Cultural norms and taboos create additional communication difficulties, as some witnesses are reluctant to speak directly or at all about certain events and as international judges inappropriately assess witnesses’ demeanor and willingness to answer questions by Western norms. The need for language interpretation for virtually every fact witness – sometimes through multiple interpreters – and the unfamiliarity of most witnesses with the predominantly

See, e.g., May, Crimes Against Humanity, note 11, at 83 (contending that “international prosecutions require a showing that harm that is group-based has occurred”).

See, e.g., Stover, note 13, at 15.

When Larry May, for instance, proposed a series of reforms designed to reduce the appearance of political influence over international trials, he acknowledged that accepting his proposals would make “the pursuit of the truth of the causes of the larger atrocity harder to ascertain by means of trials.” He consoled readers, however, that “There will be truths nonetheless that will emerge . . . namely that truth concerning whether a given defendant did participate in an atrocity and to what extent.” May, Aggression, note 11, at 337.
adversarial trial procedures used at the international tribunals only compound these problems.

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

As a consequence of the fact-finding impediments that I will describe, the testimony of international witnesses often is vague, unclear, and lacking in the information necessary for fact finders to make reasoned factual assessments. Moreover, what clear information witnesses do provide in court often conflicts with the information that the witnesses previously provided in their pre-trial statements. Chapter 4 canvases such inconsistencies and reveals that they both pervade international criminal testimony and frequently pertain to core features of that testimony. In particular, my review of all of the completed SCSL cases and a handful of ICTR cases shows that more than 50 percent of the prosecution witnesses appearing in these trials testified in a way that was seriously inconsistent with their pretrial statements. Sometimes the inconsistencies related to such details as the date, time, or place of the crime, but as frequently they related to such fundamental matters as the nature of the crime and the nature of the defendant’s involvement in the crime.

The inconsistencies that pervade international criminal transcripts can be explained by the educational, cultural, and linguistic factors described in Chapter 3, but they, along with other problematic features of witness testimony, also can be explained by witness mendacity. Indeed, many of the other testimonial difficulties chronicled in Chapter 2 – from the failure to answer date, time, and distance questions to the circuitous responses that so lengthen and complicate communication – could also stem from a witness’s desire to evade. Although every criminal justice system in the world has its share of lying witnesses, Chapter 5 suggests that some international tribunals have more than their share. The group-based loyalty and ethnic divisions that gave rise to the international crimes in the first place can create powerful incentives to put
enemies in prison, whether they belong there or not, and the international tribunals offer additional incentives – perhaps unwittingly – through the financial assistance that they provide to testifying witnesses. Whatever the causes of the false testimony, Chapter 5 reveals that some international criminal tribunals hear a lot of it. Indeed, my review of ICTR cases shows that more than 90 percent of them featured an alibi or another example of diametrically opposing testimony from defense and prosecution witnesses. Although some of these witnesses may be honestly mistaken, the use of alibis and the incidence of contradictory testimony so vastly exceeds that which is common to domestic trials that it would be naïve to dismiss a substantial portion of it as arising from honest mistakes.

These fact-finding impediments might not be worthy of significant concern if most convictions were supported by a substantial quantity of documentary or forensic evidence, but that simply is not the case for today’s international trials. Whereas prosecutors at the Nuremberg Tribunal could rely on a colossal cache of documents to establish the guilt of the Nazi defendants before them, today’s international criminals no longer leave a clear paper trail of their offenses. Orders are issued orally, and lines of command are blurred through the use of parallel structures of authority. Even forensic proof that a particular massacre took place is often lacking. As a consequence, prosecutors at today’s international tribunals rely almost exclusively on eyewitness testimony. The substantial reliance on eyewitness testimony in itself would be worrisome because recent psychological research, as well as advances in DNA testing, has shown eyewitness testimony to be unreliable in numerous regards. The fact-finding impediments detailed in Chapters 2 through 5 serve only to increase the uncertainty of international criminal fact-finding based on such eyewitness testimony.

Although the factors just described should raise grave concerns about the reliability and credibility of the testimony presented to the international tribunals and the concomitant accuracy of the judgments that are based on that testimony, these problems heretofore have received virtually no publicity, let alone scholarly treatment or remedial legislation. Although occasional non-governmental organization (NGO) reports have commented on a dearth of interpreters at one tribunal or judicial insensitivity at another, no comprehensive efforts have been undertaken to examine the significant impediments to accurate fact-finding that exist at the international tribunals. Such an examination is vitally important to the legitimacy of the international criminal justice project. Concededly, trials involve multiple layers of knowing. They encompass a normative spectrum that, in Robert Burns’ words, features at one end “‘[d]id he do it?’ kinds of questions (brutally elementary data) to questions involving the interpretation of the meaning of circumstantial evidence and then to the
provisional acceptance of morally and politically charged narratives.”\textsuperscript{18} I focus here only on the “brutally elementary data” question of “[d]id he do it?,” but that is a crucial question, for it is arguably the question on which all other questions are based.

In considering that question, I conclude that international criminal trials purport a fact-finding competence that they do not possess. International criminal trials are conducted as Western-style proceedings, which embody certain fact-finding expectations. Chapter 6 considers these expectations and assesses the capacity of international criminal trials to meet them. As a result of this assessment, I conclude that, by using the Western trial form, international criminal proceedings cloak themselves in a garb of fact-finding competence, but it is only a cloak, for many of the key expectations and assumptions that underlie the Western trial form do not exist in the international context. Chapter 6 also highlights the ways in which international tribunals obscure the uncertain foundations of their factual determinations.

That international criminal trials are less reliable adjudicatory mechanisms than they appear does not mean that the judgments reached after those trials are of questionable legal accuracy. Certainly, the fact-finding impediments that I will describe render assessing prosecutorial allegations a challenging task. Prosecution testimony is frequently vague, lacking in detail, and contradicted by defense testimony. Fact finders are typically presented no documentary or forensic evidence on which they can anchor their findings, and they have little ability to assess the witnesses’ demeanor because the witnesses speak a different language and adhere to different cultural norms than the fact finders. Consequently, if the tribunals were asked to determine the defendant’s guilt on a preponderance-of-the-evidence standard, we might expect them to reach inaccurate conclusions a substantial proportion of the time. But the tribunals are not asked whether it is more likely than not that the defendant committed the crime; they are asked whether the prosecution has proven beyond a reasonable doubt that the defendant committed the crime. That is a much easier question to answer correctly, and while I cannot say whether the tribunals do answer it correctly in any particular case – let alone in a whole body of them – I can assess whether their treatment of fact-finding impediments generally comports with the beyond-a-reasonable-doubt standard that ostensibly applies to international criminal prosecutions.

This assessment takes place in Chapter 7. Through a comparison between witness testimony and the Trial Chambers’ description and treatment of that testimony, I discovered that, as a general matter, the tribunals take a cavalier

approach to fact-finding impediments. Many testimonial deficiencies are never
mentioned in the Trial Chambers’ judgments, and most of those that are, are
reflexively attributed to innocent causes that do not impact the witnesses’ cred-
ibility. Even severe inconsistencies between a witness’s testimony and pre-trial
statement are sometimes overlooked, though a particularly large number of
particularly substantial inconsistencies typically does garner judicial attention.
Chapter 7 begins by describing the Trial Chambers’ general approach to fact-
finding impediments, and then it illustrates those general conclusions with a
comprehensive and careful examination of the CDF case at the SCSL. The two
sections together show that the Trial Chambers frequently are willing to base
their factual findings on deeply flawed witness testimony. Indeed, considering
that vague, inconsistent testimony is the standard fare of the international
criminal trials, that perjury is prevalent, and that even the most basic facts can-
not be verified, one might have thought that Trial Chambers would rarely be
able to find that the prosecution has proven its allegations beyond a reasonable
doubt. But as a result of the lackadaisical attitude that most Trial Chambers
bring to fact-finding impediments, the very opposite is true: The international
tribunals under study convict the vast majority of defendants who come before
them of at least one of the crimes for which they are charged.

So, why do the Trial Chambers seem so unconcerned about fact-finding
impediments? Chapter 8 considers this question, beginning with a discussion
of politics. International criminal tribunals are intensely political institutions,
and although we have no reason to believe that political considerations directly
influence the disposition of particular cases, they may well operate indirectly
to bias the Trial Chambers in favor of conviction. Next, the chapter briefly
considers the backgrounds of the judges as a factor that might also incline
them toward conviction. Whereas these factors may play a small role in the
Trial Chambers’ cavalier treatment of testimonial deficiencies, I believe that the
attitude derives more directly and fundamentally from principles of organiza-
tional liability that appeared in the Nuremberg Charter. These organizational
liability principles were ostensibly discredited during the Nuremberg Trial, but
I maintain that they continue to exert a powerful influence over fact-finding
at today’s international tribunals.

I argue indeed that, if the Trial Chambers appear largely unconcerned about
testimonial deficiencies, it is because the testimony itself is not the exclusive
basis for the Trial Chambers’ factual determinations. Although the Trial Cham-
bers appear to be convicting defendants on the basis of the acts charged in the
indictments and basing their factual findings about those acts solely on the
testimony that has been presented to them, I contend that the Trial Chambers
in fact supplement that testimony with inferences that they draw from the
defendants’ official position or institutional affiliation in the context of the
international crimes that have been committed. Chapter 8 carefully examines these inferences and shows why they can prove particularly compelling and how they can explain and justify both the Trial Chambers’ casual treatment of most fact-finding impediments as well as certain otherwise inexplicable acquittals. I suggest in particular that, because objective or reliable evidence is so difficult to come by in the international realm, Trial Chambers rely on official position or institutional affiliation as a proxy of sorts for the defendant’s involvement in the crimes. Prosecutors must still present some evidence to support the specific allegations appearing in the indictment; however, the stronger the inferences that can reasonably be drawn from official position, the more that Trial Chambers are willing to overlook problematic features of prosecution witness testimony or attribute those problems to innocent causes. Further, just as a defendant’s official position or institutional affiliation can point to a defendant’s involvement in the atrocities and thereby encourage a Trial Chamber to disregard testimonial deficiencies, other proxies can suggest the defendant’s innocence and thereby incline a Trial Chamber to scrutinize testimonial deficiencies more carefully. These I discuss through an analysis of the ICTR’s six acquittals.

The conclusions reached in the first eight chapters of the book give rise to a series of normative questions that I address in Chapters 9 and 10. The most obvious explores improvements that might be made to enhance the accuracy of international criminal fact-finding. Two paths present themselves. The more attractive of the two seeks to improve testimonial quality so that it will provide a more solid foundation for the judgments that the Trial Chambers will eventually reach. To that end, I begin Chapter 9 by advocating various adaptations to the pretrial, trial, and posttrial processes that currently exist at the international tribunals. I go on, in section B of Chapter 9, to explore more radical reforms; in particular, I consider whether international trial procedures should be fundamentally reformulated, as a means of improving testimonial quality. The second, less desirable, path to improving fact-finding accuracy focuses not on improving the quality of the testimony offered in support of the Trial Chambers’ judgments but rather on adapting the charges that the prosecution alleges so that they better fit the (problematic) evidence that the Trial Chambers will receive. The second approach, then, assumes suboptimal testimony and considers how we might use certain existing but controversial liability doctrines to create a better alignment between the evidence that is received and the convictions that are entered. Improving that alignment, I argue, requires prosecutors to focus less on an individual defendant’s particular actions and more on the defendant’s role in the group criminality that characterized the atrocity as a whole.

Finally, Chapter 10 addresses the broadest and most pressing normative question: Will the fact-finding impediments that I have identified, if they
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persist, fatally undermine the work of the international tribunals? To explore that question, I first consider the adequacy of drawing inferences from official position and institutional affiliation. Although these proxies can provide useful information in many cases, they do so only when prosecutors target the “right” individuals and when the Trial Chambers have a sophisticated and nuanced understanding of the way the violence was carried out in the region in question. Assuming that these requirements are not always met, I evaluate the fact-finding approach adopted by the SCSL’s Appeals Chamber in the AFRC case because it would reduce the impact of the testimonial deficiencies. Concluding that this approach is also deficient in some regards, I consider in the book’s final chapter the way in which the evidence presented at the international tribunals interacts with the applicable standard of proof. In particular, I explore the views of modern scholars and researchers who view the beyond-a-reasonable-doubt standard as variable standard that signifies (and should signify) different levels of certainty in different cases. This understanding of the standard of proof in international criminal cases not only affords us an alternative explanation for international criminal fact-finding but it provides us a solid and satisfying justification for it.