The Tribunals' Fact-Finding Legacy

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Over the course of their lifetimes, the ICTY and ICTR issued judgments deciding on the culpability or innocence of 185 defendants.[1] In reaching these judgments, judges assessed the evidence of hundreds of live witnesses and millions of pages of written evidence. In addition, Trial Chambers considered video evidence, maps, sketches, photographs, and judicially noticed facts from other trials admitted into their evidentiary records. From this 'mosaic of evidence',[2] the Tribunals attempted to elucidate what had happened in the former Yugoslavia and Rwanda years, sometimes decades, earlier, and to determine who bore responsibility for those atrocities.

Matters of evidence and proof were at the very core of the Tribunals' *raison d'être*, and were central to many of the established goals of international criminal law, such as contributing to lasting peace and security; fostering the rule of law and the protection of human rights; establishing accountability, and setting a historical record.[3] Whilst 'evidence and proof' are often mentioned together, a distinction can be drawn between the two interrelated concepts. According to

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[1] *Key Figures of the Cases*, International Criminal Tribunal for the former Yugoslavia, online at http://www.icty.org/en/cases/key-figures-cases (last accessed 2 January 2018) (90 defendants sentenced; 19 acquitted); *The ICTR in Brief*, International Criminal Tribunal for Rwanda, online at http://unictr.unmict.org/en/tribunal (last accessed 2 January 2018) (14 defendants acquitted; 62 sentenced).

[2] *Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001, para. 4.

[3] The goals of the Tribunals were set out in their founding documents: UN Security Council Resolution 827 (1993) 25 May 1993, UN Doc. S/RES/827 (1993), particularly preambular paras 5–7; UN Security Council Resolution 955 (1994) 8 November 1994, UN Doc. S/RES/955 (1994), particularly preambular paras 6–8. Whether these goals are achievable has been questioned in the literature – e.g. Kate Cronin-Furman and Amanda Taub, 'Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice', in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds) *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, Aldershot, 2013), 435; Immi Tallgren, 'The Sense and Sensibility of International Criminal Law' (2002) 13 *EJIL* 561; Mirjan R. Damaška, 'What is the Point of International Criminal Justice? (2008) 83 *Chicago Kent LR* 329.

Ludes and Gilbert, 'Proof is the *result* or *effect* of evidence, while "evidence" is the medium or means by which a fact is proved or disproved'.[4]

It is fair to say that the 'evidence' component of evidence and proof in the ICTY and ICTR received the majority of scholarly attention, with a particular emphasis on the admissibility of evidence before these Tribunals.[5] This is not unusual; the 'law of evidence', as conceived in most Law Schools' curricula and domestic criminal law textbooks worldwide, focuses disproportionately on admissibility rules and related issues of procedure.[6] Much to the chagrin of some of the world's leading Evidence scholars, the means of reasoning on and drawing conclusions from that evidence, once admitted, has been traditionally been excluded from teaching and scholarly analysis.[7]

Encouragingly, towards the end of the *ad hoc* Tribunals' tenures, a number of scholarly works began to examine such issues as the inconsistencies in witnesses' accounts,[8] the link between judgments' legal and factual findings,[9] and the potential use of argumentation schemes[10] in analysing international criminal judgments. Policy briefs also began to examine issues of evidence and proof in

[4] FJ Ludes and HJ Gilbert (eds), *Corpus Juris Secundum: A Complete Restatement of the Entire American Law, Vol 31A: Evidence* (St. Paul: West Publishing, 1964), 820.
[5] E.g. Peter Murphy, 'No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials' (2010) 8(2) *JICJ* 539-573; Steven Kay, 'The Move from Oral Evidence to Written Evidence: 'The Law Is Always Too Short and Too Tight for Growing Humankind' (2004) 2(2) *JICJ* 495-502; Eugene O'Sullivan and Deirdre Montgomery, 'The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY' (2010) 8(2) *JICJ* 511-538.
[6] Paul Roberts, 'The Priority of Procedure and the Neglect of Evidence and Proof: Facing Facts in International Criminal Law' (2015) 13(3) *JICJ* 479-506, 481.
[7] Roberts, *id.*; William Twining, 'Taking Facts Seriously' in William Twining, *Rethinking Evidence* (Cambridge University Press, Cambridge, 2006), p. 14; Terence Anderson, David Schum and William Twining, *Analysis of Evidence* (2nd edn, Cambridge University Press, Cambridge, 2005), p. xvii.
[8] Nancy Combs, *Fact-Finding Without Facts* (Cambridge University Press, Cambridge, 2010).
[9] Marjolein Cupido, 'Facing Facts in International Criminal Law: A Casuistic Model of Judicial Reasoning' (2016) 14(1) *JICJ* 1-20.
[10] Mark Klamberg, 'The Alternative Hypothesis Approach, Robustness and International Criminal Justice: A Plea for a "Combined Approach" to Evaluation of Evidence' (2015) 13(3) *JICJ* 535-553; Roberts (n 6); Yvonne McDermott, 'Inferential Reasoning and Proof in International Criminal Trials' (2015) 13(3) *JICJ* 507-533; Yvonne McDermott and Colin Aitken, 'Analysis of Evidence in International Criminal Trials using Bayesian Belief Networks' (2017) 16 *Law, Probability and Risk*, 111-129; Simon De Smet, 'Justified Belief in the Unbelievable' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkal Opsahl Academic EPublisher, Florence, 2013) 77-98.

greater detail.[11] For example, in 2017, the Case Matrix Network produced a report entitled, 'Means of Proof for Sexual and Gender-Based Violence Crimes', which outlines the various types of evidence that have been used to prove particular crimes in 20 key cases on sexual and gender-based violence.[12] These examples illustrate that international criminal law scholarship and practice is at the forefront of legal inquiry, and show that the work of the Tribunals has given rise to a growing interdisciplinary scholarship on fact-finding.[13]

In light of this burgeoning literature on proof in international criminal trials, this chapter's modest aim is to elucidate some of the key fact-finding legacies of the ICTY and ICTR. Part I examines the Tribunals' approaches to evaluating the evidence and elucidating the standard of proof. Part II analyses how the Tribunals approached issues of witness testimony, with particular reference to credibility issues. Part III makes some observations on the structure and accessibility of the Tribunals' judgments.

I. The Standard of Proof and the Evaluation of Evidence

The ICTY and ICTR Statutes reflected the well-established principle that accused persons are entitled to the presumption of innocence.[14] As a corollary of that principle, the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt.[15] The Rules of Procedure and Evidence explicitly state that a conviction can be entered only when a majority of the Trial Chamber is satisfied that guilt has been proven beyond reasonable doubt.[16]

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[11] International Bar Association, *Evidence Matters in ICC Trials* (IBA, The Hague, 2016); Human Rights Center, *Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court* (Human Rights Center, Berkeley, 2014).
[12] Case Matrix Network, *Means of Proof: Sexual and Gender-Based Violence Crimes* (Centre for International Law Research and Policy, Belgium, 2017)
[13] Roberts (n 6) 481 (referring to ICL's 'holistic disciplinary vision'.)
[14] Article 21(3), ICTY Statute; Article 20(3), ICTR Statute.
[15] *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-A, 1 June 2001, para. 107; *Prosecutor v. Milošević*, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, Dissenting Opinion of Judge David Hunt, para. 14 (noting that the prosecution 'carries the onus of proof… A basic right of the accused enshrined in the Tribunal's Statute is that he or she is innocent until proven guilty by the prosecution.')
[16] Rules 87(A), ICTY RPE and ICTR RPE.

Whilst the standard of proof beyond reasonable doubt is notoriously difficult to define,[17] some Chambers of the Tribunals have attempted to provide some clarity as to its meaning. In *Delalić*, for example, the ICTY Trial Chamber drew heavily on common law jurisprudence, quoting Lord Denning's definition that proof beyond reasonable doubt 'need not reach certainty but it must carry a high degree of probability… [it] does not mean proof beyond the shadow of a doubt'.[18] The Chamber also recalled Australian Chief Justice Barwick's particularized notion of the reasonable doubt standard, which defined a reasonable doubt as any doubt that the jury entertains, which the jury members themselves deem to be reasonable in the circumstances.[19] The Chamber added little commentary to these quotes, simply noting that they clearly showed that the burden of proof rested with the prosecution.[20] In *Rutaganda*, the ICTR Appeals Chamber emphasized the need for any doubts, in order to be reasonable, to be founded on solid evidentiary and logical bases, noting that:

> The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.[21]

The ICTR Appeals Chamber in *Ngirabatware* and the ICTY Appeals Chamber in *Mrkšić* took what could be described as the 'alternative hypothesis' approach to the standard of proof.[22] Both noted that the standard of proof required the Chamber to be satisfied that there is no alternative reasonable explanation of the evidence (other than the guilt of the accused) before it can enter a conviction.[23]

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[17] In England and Wales, judges have tried to refrain, insofar as possible, from providing instructions to jury its definition: e.g. *R v. Yap Chuan Ching* (1976) 63 Cr App Rep 7, para. 11. See also Federico Picinali, 'The Threshold Lies in the Method: Instructing Jurors about Reasoning Beyond Reasonable Doubt' (2015) 19(3) *Int. J. of Evidence & Proof* 139-153.

[18] *Prosecutor v. Delalić et al.*, Judgment, Case No. IT-96-21-T, 16 November 1998, para. 600, citing *Miller v. Minister of Pensions* [1947] 1 All ER 372, 373-4.

[19] *Delalić et al.* Trial Judgment, *ibid*, para. 600, citing *Green v. R* (1972) 46 AJLR 545.

[20] *Delalić et al.* Trial Judgment, *ibid*, para. 601. The Chamber further noted that these principles they established would be borne in mind when examining the culpability of the accused: *ibid*, para. 604.

[21] *Prosecutor v. Rutaganda*, Judgment, Case No. ICTR-96-3-A, 26 May 2003, para. 488.

[22] Peter Lipton, *Inference to the Best Explanation* (Routledge, London, 1991), at 32–38; De Smet (n 10), 89–91; Klamberg (n 10), 535.

[23] *Ngirabatware v. Prosecutor*, Judgment, Case No. MICT-12-29-A, 18 December 2014, para. 20; *Prosecutor v. Mrkšić and Šljivančanin,* Judgment, Case No. IT-95-13/1-A, 5 May 2009, para. 220.

Thus, a number of principles on the meaning of the standard of proof can be derived from the case law of the tribunals. First, proof beyond reasonable doubt requires a high degree of probability, although precisely what level of probability is required seems to differ between judges. Judge Antonetti in *Seselj* opined that proof beyond reasonable doubt requires 'virtual certainty',[24] an approach apparently at odds with that of the Appeals Chamber in *Delalić*, cited above.[25]

Second, if there is an alternative reasonable explanation of the evidence that suggests innocence, the Chamber must acquit the defendant. It need not be convinced of the innocence of the accused beyond reasonable doubt; [26] all that is required is that the judges themselves deem their doubt to be reasonable,[27] and that doubt should be based on common sense, logic, and be linked to the evidence on the record, or the absence thereof.[28]

In addition, the Tribunals have confirmed that the standard of proof beyond reasonable doubt applies not just to the ultimate issue of the culpability of the accused, but also to 'each and every element of the offences charged'.[29] In *Kupreškić*, the prosecution argued that the Trial Chamber had erred by applying the standard of proof to a particular witness's testimony.[30] The Appeals Chamber dismissed this argument, noting that the conviction of the defendants for persecution hinged on this witness's account, and thus the Trial Chamber was correct in assessing their testimony to the standard of proof beyond reasonable doubt.[31]

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[24] *Prosecutor v. Šešelj*, Judgment, Case No. IT-03-67-T, 31 March 2016, Concurring Opinion of Presiding Judge Jean-Claude Antonetti Attached to the Judgment, p. 149. The majority in *Šešelj* (of which Judge Antonetti was a member), appeared to take such an approach at para. 192 of the Judgment, where it noted that it had not received 'sufficient evidence to irrefutably establish the existence of a widespread and systematic attack against the civilian population'. To 'irrefutably establish' a matter is arguably a higher standard of proof than that of proving it 'beyond reasonable doubt'.

[25] See above, text to n. 18.

[26] This point is made, in the context of appeals on questions of fact, in *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-A, 1 June 2001, para. 178.

[27] *Delalić et al* Trial Judgment (n 18), para. 600

[28] *Rutaganda* Judgment (n 23), para. 488.

[29] *Prosecutor v. Gotovina*, Judgment, Case No. IT-06-90-T, 15 April 2011, para. 14.

[30] *Prosecutor v. Kupreškić et al.*, Judgment, Case No. IT-95-16-A, 23 October 2001, para. 226

[31] *Id.*

Similarly, the ICTR Appeals Chamber dismissed a prosecution argument that the Trial Chamber committed an error of law in employing the standard of proof to assess individual items of testimony.[32] In that case, a witness had testified that he had attended a meeting, where he heard the accused Ntagerura say that 'the fate of the Tutsi will be sealed'.[33] In light of the fact that there were issues with this witness's credibility, and his allegations were uncorroborated, the Trial Chamber concluded that it could not be satisfied beyond reasonable doubt that Ntagerura had taken part in the meeting.[34] The Appeals Chamber found no error in this approach.[35] While it noted that to apply the criminal standard of proof to each piece of evidence would be an error,[36] it drew a distinction between pieces of evidence and the elements of the crimes that those pieces of evidence purport to prove.[37] The standard of proof applies to each fact upon which a conviction is based.[38] Therefore, if there is only one piece of evidence to support a relevant fact, as was the case in *Kupreškić*,[39] the Chamber must assess whether it is convinced of the existence of that fact beyond reasonable doubt.

I have written elsewhere on the two approaches to the evaluation of the evidence – namely, the 'holistic' and 'atomistic' approaches – that judges may choose from in assessing the evidence.[40] An early decision in *Tadić* appeared to argue against a purely atomistic assessment of each piece of evidence:

> [A] tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at

[32] *Prosecutor v. Ntagerura et al.*, Judgment, Case No. ICTR-99-46-A, 7 July 2006, para. 168.
[33] *Prosecutor v. Ntagerura*, Judgment and Sentence, Case No. ICTR-99-46-T, 25 February 2004, para. 114.
[34] *Ibid*., para. 118.
[35] *Ntagerura* Appeal Judgment (n 32), para. 173
[36] *Ibid.*, para. 174.
[37] *Ibid*., para. 175.
[38] *Id.* Similar findings were made at paras. 195-197, *ibid.*
[39] See above, text to n 30 and n 31.
[40] Yvonne McDermott, 'Strengthening the Evaluation of Evidence in International Criminal Trials' (2017) 17 *Int'l Crim. L. Rev.* 682-702, 687-692. This distinction borrows heavily from US Evidence scholarship, e.g. Michael S. Pardo, 'Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism' 95 *Nw. U. L. Rev.* (2000-2001) 399.

> first to be of poor quality, but it may gain strength from other evidence in the case. The converse also holds true.[41]

On the other hand, a number of appeals, where one party asserts that the Trial Chamber has taken an insufficiently holistic approach to the evidence 'as a whole', have been unsuccessful.[42] In *Bizimungu*, where defence argued that the Trial Chamber had failed to make the requisite findings to underpin his convictions, the prosecution countered that such findings could be read holistically from the judgment as a whole.[43] The prosecution argument was rejected by the Appeals Chamber, which found that the Trial Chamber's failure to set out its findings amounted 'to a manifest failure to provide a reasoned opinion'.[44]

Both the atomistic and holistic approaches have their critics,[45] and it is clear that neither a purely atomistic evaluation of each piece of evidence, nor a purely holistic approach, is preferable. Thus, a combined approach is needed. To this end, Mark Klamberg has argued that international criminal judges take the following steps in reaching their conclusions: first, they evaluate a single piece of evidence; then, they weigh the totality of evidence in favour of or against the proposition asserted, and then, they make the final determination of whether the combined evidential value is sufficient to establish the proposition.[46]

This may be a rather optimistic view of how evidence is evaluated in practice in international criminal trials. Indeed, one of the very few judicial statements on how the evaluation of evidence works in practice suggests otherwise.[47] The *Ntagerura* Appeals Chamber set out the following three stages that are taken in the evaluation of the evidence.[48] Firstly, an assessment of the credibility of the evidence is undertaken, but the Chamber explicitly said that 'this cannot be

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[41] *Prosecutor v. Tadić*, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-R77, 31 January 2000, para. 92.
[42] E.g. *Ntagerura* and *Kupreškić*, discussed above, text to n 30 – n 39.
[43] *Prosecutor v. Bizimungu*, Judgment, Case No. ICTR-99-50-A, 4 February 2013, paras. 14-15.
[44] *Ibid.*, para. 29.
[45] Outlined in detail in McDermott (n 40), pp. 687-689.
[46] Klamberg (n 10), 546-547.
[47] *Ntagerura* Appeal Judgment (n 32), para. 174.
[48] *Id.*

undertaken by a piecemeal approach'. Secondly, the Chamber assesses whether the evidence presented by the prosecution 'should be accepted as supporting the existence of the facts alleged', notwithstanding the defence evidence.[49] Thirdly, the Chamber will analyse whether all of the elements of the crimes and modes of liability charged have been proven.[50]

The *Ntagerura* approach differs from Klamberg's proposed approach in two important respects. First, in relation to the first limb, the Chamber's insistence that individual pieces of evidence should only be assessed in light of the rest of the evidentiary record, while broadly correct, misses an important role of the Chamber in analysing the reliability and relevance of each piece of evidence on its own merits. If a piece of evidence is patently lacking in reliability, the fact that another (perhaps equally unreliable) piece of evidence corroborates that evidence is irrelevant. Thus, there is clearly an important need for the 'piecemeal approach' maligned by the Appeals Chamber's exposition of the first stage to be taken, followed by a contextual evaluation of that evidence in the light of other evidence on the record. In the ICTR's stated approach, Klamberg's first two proposed stages are condensed and reduced to a single step of analysing the evidence as a whole. Second, the Chamber's adds an important step to Klamberg's approach in its third limb, which sees the application of facts (or, in Klamberg's terms, propositions) to the elements of the crimes and modes of liability charged.

Optimistic though it may be, Klamberg's approach illustrates a good model of how the process of evaluation of evidence *should* work. Combining the differing tests outlined above might lead us to a new, four stage, test for the evaluation of evidence:

1. The examination of a single piece of evidence on a particular fact;
2. The evaluation of that evidence in the context of other evidence on the record;

[49] *Id.*
[50] *Id.*

3. The weighing of the totality of the evidence to determine whether the fact is established. If that fact is an element of the crime or the mode of liability charged, then it must be established beyond reasonable doubt;[51]
4. An examination of whether the fact proven, and other relevant facts established, ensure that all of the elements of the crimes and modes of liability charged have been proven beyond reasonable doubt.

These guidelines on the assessment of evidence, whilst perhaps incomplete, provide a starting point for future international criminal trials in approaching how they weigh the evidence before them. This would certainly be preferable to the position of the ICTY and ICTR, where it has been argued that 'the absence of clear guidelines on the weighing of evidence… furthers the freedom of assessment; but it achieves this objective at the expense of legal certainty.'[52] The approach proposed above would enable Chambers to incorporate both a thorough scrutiny of each piece of evidence, and an evaluation of that evidence in the context of the record as a whole.

II. Evaluating Witness Credibility

While the above suggested framework stresses the importance of carrying out an individualised assessment of the evidence presented, the Tribunals' judgments often emphasised a rather more holistic approach. A common statement made in judgments was that the Trial Chamber considered all of the evidence presented before it, and that even if a piece of evidence was not cited in the judgment, the parties could be assured that it had been duly considered and given weight to by the Chamber.[53] This type of statement can give rise to uncertainty as to the precise evidentiary basis of some of the Chamber's conclusions.

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[51] *Id.* Some judgments have used the term 'material fact' to describe those facts that must be proven beyond reasonable doubt: *Delalic et al.* Trial Judgment (n 18), para. 109; *Prosecutor v. Halilović*, Judgment, Case No. IT-01-48-A, 16 October 2007, para. 109; *Prosecutor v. Martić*, Judgment, Case No. IT-95-11-A, 8 October 2008, para. 55; *Prosecutor v. Milošević (Dragomir)*, Judgment, Case No. IT-98-29/1-A, 12 November 2009, para. 20; *Prosecutor v. Mladić*, Judgment, Case No. IT-09-92-T, 22 November 2017, para. 5250.

[52] Paul Behrens, 'Assessment of International Criminal Evidence: The Case of the Unpredictable Génocidaire' (2011) 71(4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 661-689.

[53] This statement is found in, *inter alia*, *Prosecutor v. Perišić*, Judgment, Case No. IT-04-81-T, 6 September 2011, para. 23; *Gotovina* Trial Judgment (n 29), para. 47; *Prosecutor v. Bikindi*, Judgment,

Similarly, the manner in which witnesses' credibility or reliability was assessed was not always explicit. On occasion, the Tribunals noted that they adjudged certain witnesses to be unreliable on some points, but reliable on others.[54] For example, in *Gotovina*, the ICTY Trial Chamber noted:

> Some of the witnesses… were evasive or not entirely truthful… Although aware of this, the Trial Chamber nevertheless sometimes relied on some aspects of these witnesses' testimonies... While the Trial Chamber may not always have explicitly stated whether it found a witness's testimony or portions of his or her testimony credible, it consistently took the factors [of credibility, reliability, and demeanour] into account in making findings on the evidence.[55]

In other words, even where the Chamber has not explicitly stated whether or why it found a witness's testimony, or part of that testimony, credible or reliable, it will have made that determination and based its overall judgment on that undisclosed assessment. These 'catch all' provisions made it almost impossible for one of the parties to appeal on the basis that the Trial Chamber made an error of fact.[56]

Nevertheless, while the Tribunals were given the freedom to assess the evidence without constraint to any approach derived from national rules of evidence,[57] a number of preferences and reasonably consistent principles on issues such as corroboration, credibility, and reliability emerged in practice. For example, despite the increase over time in rules of evidence that allowed for a greater use of written witness statements *in lieu* of oral testimony,[58] Trial Chambers

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Case No. ICTR-01-72-T, 2 December 2008, para. 29; *Prosecutor v. Stanišić and Simatović*, Judgment, Case No. IT-03-69, 30 May 2013, para. 34.

[54] *Perišić* Trial Judgment, *ibid.*, para. 10; *Prosecutor v. Đorđević*, Judgment, Case No. IT-05-87/1-T, 23 February 2011, para. 18; *Prosecutor v. Strugar*, Judgment, Case No. IT-01-42-T, 31 January 2005, para. 10.

[55] *Gotovina* Trial Judgment (n 29), para. 31.

[56] Discussed further in Yvonne McDermott, 'The ICTR's Fact-Finding Legacy: Lessons for the Future of Proof in International Criminal Trials' (2015) 20(3) *Criminal Law Forum* 351-372, where it is argued that apparent alleged errors of fact are often framed as alleged errors of law to further their chance of success on appeal.

[57] Rule 89, ICTR RPE; Rule 89, ICTY RPE.

[58] See the references cited above (n 5) for further discussion.

continued to express a preference that important evidence be elicited orally from witnesses in court.[59]

In assessing the credibility of witnesses, both the ICTY and ICTR have borne in mind that witnesses' memories may be affected by the passage of time[60] and the trauma suffered.[61] In addition, some Chambers have quite frankly acknowledged that the witnesses who have appeared before them may not have been entirely truthful in their accounts.[62] This may be because of the witness's own involvement in the events at issue, and their attempts to downplay their own culpability.[63] Such 'insider witnesses' are frequently used in international criminal trials; at the Special Court for Sierra Leone, for example, 31% of witnesses were classified as insider witnesses.[64] Other witnesses may have had other underlying motives or affiliations that cast doubt on their credibility or reliability;[65] a number of Chambers noted that issues such as the witnesses' connections with the accused, the prosecution, national governments, or survivors' groups would be noted in the evaluation of their testimony.[66]

The ICTR Trial Chamber in *Akayesu* established some guidelines on assessing the credibility of witnesses. It noted that cultural factors may lead to some

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[59] E.g. *Gotovina* Trial Judgment (n 29), para. 16; *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 137.

[60] *Strugar* Trial Judgment (n 54), para. 7; *Mladić* Trial Judgment (n 51), para. 5279; *Prosecutor v. Bagilishema*, Judgment, Case No. ICTR-95-1A-T, 7 June 2001, para. 24, and *ibid.*, Separate and Dissenting Opinion of Judge Mehmet Güney, para. 29; *Prosecutor v. Bagilishema*, Judgment, Case No. ICTR-95-1A-A, 3 July 2002.

[61] *Akayesu* Trial Judgment (n 59), paras. 142-143; *Bagilishema* Trial Judgment, *ibid.*, Separate and Dissenting Opinion of Judge Güney, para. 30; *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para. 113; *Prosecutor v. Delalić et al.*, Judgment, Case No. IT-96-21-A, 20 February 2001, para. 497; *Prosecutor v. Kunarac*, Judgment, Case No. IT-96-23-A, 12 June 2002, para. 324. For further analysis on this point, see Robert Cryer, 'A Message from Elsewhere: Witnesses before International Criminal Tribunals' in Paul Roberts and Mike Redmayne (eds), *Innovations in Evidence and Proof* (Hart, Oxford, 2007) 381-400 and Robert Cryer, 'Witness Evidence Before International Criminal Tribunals' (2003) 3 *Law and Practice of International Tribunals* 411-439.

[62] *Strugar* Trial Judgment (n 54), para. 7; *Prosecutor v. Bizimungu et al.*, Judgment, Case No. ICTR-99-50-T, 30 September 2011, para. 109; *Perišić* Trial Judgment (n 53), para. 34.

[63] *Mladić* Trial Judgment (n 51), para. 5280; *Gotovina* Trial Judgment (n 29), para. 31.

[64] Special Court for Sierra Leone, *Best Practice Recommendations for the Protection and Support of Witnesses* (SCSL, Freetown, 2008), p. 11. A study of ICTY witnesses, *Echoes of Testimonies*, was published in October 2016, but despite gathering information on the ethnicity, age, and gender of witnesses surveyed, the study did not classify the witnesses by background and role in the matters on which they testified.

[65] *Mladić* Trial Judgment (n 51), para. 5279; *Prosecutor v. Limaj*, Judgment, Case No. IT-03-66-T, 30 November 2005, para. 15.

[66] *Bizimungu* Trial Judgment (n 62), para. 109.

witnesses' difficulty in providing specific details on issues such as distances, times, and locations, and that the Chamber did not draw adverse inferences from witnesses' 'reticence and their circuitous responses to questions'.[67] The Chamber stated that challenges on the credibility of the witness must be individualized to the particular witness – it was insufficient to merely assert that other witnesses for the party had been found to have lied – and that such challenges must be put to the witness themselves, giving them the chance to respond.[68]

In spite of this extrapolation of some of the factors that Chambers will take into account in assessing witness credibility, whether and why a Chamber will deem a witness credible still remains quite uncertain. At times, the ICTY and ICTR Chambers appear to have based these assessments on the judges' own beliefs on how people should normally behave, albeit in the extraordinary circumstances that witnesses have found themselves in. In *Nzabonimana*, for example, the ICTR noted that it was 'unlikely that a group of Tutsis fleeing a violent attack at their place of refuge … would choose to disguise themselves as Hutus and join a group of people gathered in a trading centre for a brief time before continuing on their journey.'[69] In *Gatete*, the fact that a witness 'moved to only metres away from the Accused at the roadblock when *Interahamwe*, who according to her testimony had killed persons with "bladed weapons", were present' led the Chamber to have concerns about the merits of the witness's evidence.[70] These assessments suggest that the ICTR Chambers believed they could accurately predict how people ought to behave when fleeing genocidal attackers, and that any derogation from that norm was to be viewed with suspicion.

This importation of the judges' own expectations of human behavior in the face attack of seems curious, given the exceptional nature of the atrocities upon which the ICTR adjudged. The ICTY was not immune from making similar

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[67] *Akayesu* Trial Judgment (n 59), para. 156. See also *Bagilishema* Trial Judgment (n 60), Separate and Dissenting Opinion of Judge Güney, para. 28.
[68] *Akayesu* Trial Judgment (n 59), para. 46.
[69] *Prosecutor v. Nzabonimana*, Judgment and Sentence, Case No. ICTR-98-44D-T, 31 May 2012, para. 718.
[70] *Prosecutor v. Gatete*, Judgment and Sentence, Case No. ICTR-2000-61-T, 31 March 2011, para. 232.

cultural transplantations. In *Tadić*, the defence argued that the Trial Chamber had erred by relying on the testimony of a witness who claimed to have seen the events when he returned to his home to check on his pet pigeons.[71] The Prosecution had responded by likening his actions to the pet owner who returns to a burning building to rescue their beloved companion.[72] The Appeals Chamber seemingly accepted this argument, noting:

> The Appeals Chamber does not accept as inherently implausible the witness' claim that the reason why he returned to the town where the Serbian paramilitary forces had been attacking, and from which he had escaped, was to feed his pet pigeons. It is conceivable that a person may do such a thing, even though one might think such action to be an irrational risk.[73]

However, as Paul Roberts has noted, the transcripts reveal that the witness was motivated by other factors than the welfare of his pigeons, including his need to get food and clothes, and to locate his brother.[74] Roberts questions whether the parties, and the Chamber in turn, projected their (perhaps particularly Western) view of the relationship between pets and their owners in evaluating this issue.[75]

The extent to which a witness's account is corroborated is clearly a relevant factor in the Chamber's decision on whether to base its findings on that account. That being said, the Tribunals were not bound by the '*unus testis, nullus testis*' rule – in other words, there was no legal requirement of corroboration for the testimony of a single witness to be accepted as evidence.[76] However, the ICTY and ICTR consistently emphasized that uncorroborated accounts would be treated with caution.[77] Corroboration is particularly important where a witness's

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[71] *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 58.
[72] *Prosecutor v. Tadić*, Transcript, 20 April 1999, p. 419.
[73] *Tadić* Appeals Judgment (n 71), para. 66.
[74] Paul Roberts, 'Why International Criminal Evidence?' in Paul Roberts and Mike Redmayne (eds.) *Innovations in Evidence and Proof* (Hart, Oxford, 2007) 347, 376.
[75] *Ibid.*, 377-378.
[76] *Akayesu* Trial Judgment (n 59), para. 135; *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1-A, 24 March 2000, para. 62; *Prosecutor v. Seromba*, Judgment, Case No. ICTR-2001-66-A, 12 March 2008, paras. 91-92; *Delalić et al.* Appeal Judgment (n 61), para. 506; *Prosecutor v. Karadžić*, Judgment, Case No. IT-95-5/18-T, 24 March 2016, para. 12.
[77] *Karadžić* Judgment, *ibid.*, para. 24; *Strugar* Trial Judgment (n 54), para. 9; *Mladić* Trial Judgment (n 51), para. 5281; *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T, 21 May 1999, para. 80. For an illustration of such caution in practice, see *Bizimungu* Trial Judgment (n 62),

statement has been entered in written form in lieu of oral testimony.[78] In *Popović*, the ICTY Appeals Chamber emphasized that findings on material facts could not be based solely or decisively on untested written statements, and that such accounts must be corroborated.[79] Conversely, the fact that many witnesses may corroborate one another does not necessarily prove the credibility of their accounts.[80]

The weight to be placed on the witness's identification of the accused was a contentious issue in both the ICTY and ICTR. In *Tadić*, a distinction was drawn between so-called 'identification witnesses', to whom the accused was previously unknown by sight, and 'recognition witnesses', who knew the accused prior to the relevant events and recognised them as a result.[81] A stricter standard of assessment will apply to the evidence of the former category of witness.[82] However, the distinction between identification witnesses and recognition witnesses can be difficult to draw – in *Lukić*, the ICTY Trial Chamber held that prior knowledge of the accused before the commission of a crime was not a prerequisite to being classified as a recognition witness; the fact that the witness got to know what the accused looked like over the period of the commission of that crime was sufficient for them to be considered recognition witnesses.[83]

While in-court identification of the accused is generally permissible,[84] little weight should be placed on such evidence; the fact that the defendant will be sitting next to guards in the courtroom will necessarily suggest to the witness

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paras. 203; 207; 229; 233; 248; 252; 259; 306; 493; 544; 549; 555; 658; 712; 764; 779; 1018; 1180; 1181; 1373; 1405; 1406; 1415; 1443; 1450; 1463; 1472, and 1552.

[78] Under Rules 92*bis*, 92*ter*, 92*quater*, or 92*quinquies* ICTY RPE; The ICTR RPE only adopted Rule 92*bis* of these amended Rules on proof of facts other than by means of oral evidence.

[79] *Prosecutor v. Popović et al.*, Judgment, Case No. IT-05-88-A, 30 January 2015, para. 1222. See also *Karadžić* Trial Judgment (n 76), para. 24.

[80] *Prosecutor v. Musema*, Judgment and Sentence, Case No. ICTR-96-13-A, 27 January 2000, para. 46.

[81] *Prosecutor v. Tadić*, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 545.

[82] *Tadić* Trial Judgment, *ibid.*, paras. 546-552; *Bagilishema* Trial Judgment (n 60), Separate and Dissenting Opinion of Judge Güney, para. 27

[83] *Prosecutor v. Lukić and Lukić*, Judgment, Case No. IT-98-32/1-T, 20 July 2009, para. 34. Upheld in *Prosecutor v. Lukić and Lukić*, Judgment, Case No. IT-98-32/1-A, 4 December 2012, para. 119.

[84] *Prosecutor v. Kalimanzira*, Judgment, Case No. ICTR-05-88-T, 22 June 2009, para. 96; *Prosecutor v. Kamuhanda*, Judgment, Case No. ICTR-99-54A-A, 19 September 2005, para. 243; *Prosecutor v. Limaj et al.*, Judgment, Case No. IT-03-66-A, 27 September 2007, para. 120.

that this is the person on trial.[85] However, a witness's inability to identify the accused in court may be relevant in refusing to rely on that witness's identification evidence.[86] In *Kupreškić*, the Trial Chamber placed particular weight on the fact that a witness's 'evidence concerning the identification of the accused was unshaken.'[87] The Appeals Chamber, recalling that a confident demeanour is often a character trait, rather than an indication of truthfulness,[88] found that the Trial Chamber had erred in relying so heavily on this witness's account.[89]

The above analysis shows that the Tribunals' approach to the evaluation of witness testimony was still evolving by the end of their tenures. Whilst some general principles and themes have been identified, practice was generally quite inconsistent on the weight to be given to different types of evidence and the extent to which some Chambers accepted or declined to accept fallibilities in witnesses' accounts.[90] The common statements to be found in Trial Judgments that all evidence, even where not cited, was considered often obfuscated the precise impact of testimonial deficiencies or issues of credibility that the Chambers identified. This observation leads us to examine the structure and layout of judgments and whether they detract from those judgments' clarity and accessibility.

III. The Structure of Judgments

It is a truism that international criminal judgments are exceptionally lengthy, and that is particularly true for the judgments of the *ad hoc* tribunals.[91] Some of the last judgments issued by the ICTY and ICTR before they ceased operations demonstrate this fact; the *Mladić* Trial Judgment, issued in November 2017,

[85] *Kunarac* Appeal Judgment (n 61), para. 226; *Kamuhanda* Appeal Judgment, *ibid.*, para. 27; *Limaj et al.* Appeal Judgment, *ibid.*, para. 27; *Lukić and Lukić* Trial Judgment (n 83), para. 32.
[86] *Limaj et al.* Appeal Judgment, *ibid.*, para. 120; *Prosecutor v. Kvočka et al.*, Judgment, Case No. IT-98-30/1-A, 28 February 2005, para. 473.
[87] *Prosecutor v. Kupreškić et al.*, Judgment, Case No. IT-95-16-T, 14 January 2000, para. 425.
[88] *Kupreškić et al* Apeeal Judgment (n 30), para. 138.
[89] *Ibid.*, para. 154.
[90] Combs (n 8), Chapter 7.
[91] This was also true, to some extent, for the Special Court for Sierra Leone – the judgment in *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, 18 May 2012, was 2,539 pages long.

spans five volumes and is over 2,500 pages long, plus a confidential annex.[92] Similarly, the *Karadzić* trial judgment is over 2,600 pages.[93] Even Appeals Chamber judgments can span over 1,000 pages.[94] This length of judgment was not always common; the ICTY's Trial Chamber 1999 judgment in *Aleksovski* was just 90 pages long, although that judgment concerned the accused's responsibility for just three crimes alleged to have been committed over a period of less than six months.[95]

The length of judgments does raise concerns for the accessibility of the Tribunals' findings to the communities affected by the atrocities on trial, as well as to the international and legal community. Assuming an ability to read 200 pages per day of the often highly complex and technical legal language used in judgments, it would take the average reader close to two weeks to read the *Karadžić* judgment alone. The ability to absorb 200 pages in a day would require most people to dedicate themselves solely to the task of reading the judgment, a luxury that many would be unable to afford.

Ironically, perhaps, the huge scope of the judgments could be attributed, at least in part, to the expectation of setting an historical record, or, in the words of Judge Nsereko, establishing 'undisputable findings regarding the atrocities committed'.[96] For example, in reading the *Karadžić* judgment, one aspect that really stands out is the shocking consequences of DutchBat's loss of control, and their role in actually enabling the genocide in Srebrenica.[97] The extensive treatment of this issue is in a sense understandable, given that it forms an important part of the record of how this genocide happened. On the other hand, one could strongly argue that the failings of DutchBat have precisely nothing to do with Karadžić's criminal liability. Given that the DutchBat findings do not

[92] *Mladić* Trial Judgment (n 51).
[93] *Karadžić* Trial Judgment (n 76).
[94] The Appeals Chamber judgment in *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, 29 November 2017, spanned over 1400 pages.
[95] *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1-T, 25 June 1999, para. 2.
[96] Daniel David Ntanda Nsereko, 'Foreword' in Karim A. A. Khan, Caroline Buisman and Christopher Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (Oxford University Press, Oxford, 2010) pp. v-vi, v.
[97] *Karadžić* Trial Judgment (n 76), paras. 4977-5100.

appear until 2000 pages in to the judgment, one might wonder about the accessibility of these important factual findings. It could be more useful for all concerned if the Chamber released a separate document on 'context of the crimes' for these important factual findings, with the judgment itself limited to the specific elements of the crimes and modes of liability charged, and how the evidence supported those elements.

A more focused judgment may also lead to less repetition; again, in Karadžić, one of the key aspects of the case was a phone conversation that the accused had with Deronjić, which was crucial in proving the accused's knowledge that the detainees would be killed. The Trial Chamber judgment includes a full transcript of this conversation at paragraphs 5311, 5710, and 5772, and it is quoted at length again at paragraph 5805 and 5806.

These issues of accessibility and clarity came to the fore when I wrote, together with a Computer Scientist colleague with expertise in argumentation theory,[98] an *amicus curiae* brief submitted to the MICT Appeals Chamber in *Karadžić*.[99] As part of a wider project, which examines the potential applicability of argumentation schemes to international criminal judging, we took the Trial Chamber's findings on Karadžić's genocidal intent as a case study.[100] These findings were the subject of an extensive and rather unprecedented level of academic scrutiny.[101] In order to construct a relatively straightforward four-page timeline of relevant events, findings spanning over 600 paragraphs had to be drawn upon.[102] It occurred to us that the inclusion of a timeline or timelines,

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[98] Dr. Federico Cerutti, Lecturer, School of Computer Sciences, Cardiff University. This research was funded by CHERISH-DE, the UK's Digital Economy Crucible (http://cherish-de.uk), to which we are very grateful.

[99] *Prosecutor v. Karadžić*, Proposed *Amicus Curiae* submissions, Case No. MICT-13-55-A, submitted February 2018.

[100] *Karadžić* Trial Judgment (n 76), paras. 5746-5831.

[101] E.g. Milena Sterio, 'The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide' (2017) 31 *Emory International Law Review* 271; Marko Milanovic, 'ICTY Convicts Radovan Karadzic', *EJIL: Talk!*, 25 March 2016, available online at https://www.ejiltalk.org/icty-convicts-radovan-karadzic (last accessed 1 February 2018); Kai Ambos, 'Karadzic's Genocidal Intent as the "Only Reasonable Inference"?', *EJIL: Talk!*, 1 April 2016, available online at https://www.ejiltalk.org/karadzics-genocidal-intent-as-the-only-reasonable-inference (last accessed 1 February 2018).

[102] *Amicus Curiae* Brief (n 99), Appendix A, referring to paras. 5157-5772. Not all of these 615 paragraphs referred to relevant events, of course, but relevant findings were found in paragraphs within

maps, and an index would make international criminal judgments much more navigable.

More generally, as alluded to in part II above, it might also be useful if judgments could indicate more clearly the probative value of witnesses' testimony and other evidence. One interesting aspect of Judge Antonetti's separate opinion in *Šešelj* was the inclusion of a table on the probative value of witness's evidence and on the exhibits admitted to the record. In these tables, Judge Antonetti assigned levels of probative value on a seven-point scale.[103] The scale adopted bears some similarities to scales familiar in the science of logic – such as the admiralty scale, or 'NATO system', for the evaluation of particular intelligence sources and the level of confidence in the information.[104] Even if this kind of evaluation of evidence using scales and metrics were not included in judgments, they may be useful in the judgment drafting process. Such analyses could in turn feed into charts or tables setting out the elements of each crime and whether they had been proven or not. While some judges would almost certainly object to a more atomistic overview of why the Chamber was brought to its final conclusion, it would clearly be preferable to the Tribunals' approach whereby readers are assured that the decisions were based on the evidentiary records as a whole, and that even where evidence was not explicitly cited, it will have been considered.[105] As one author has argued, 'The courts' judgments do not consistently clarify which facts underlie the decisions, what weight is attached to these facts and how this factual evaluation relates to the legal framework of rules, elements, criteria and precedents.'[106]

A final structural element of the Tribunals' judgments that is worthy of consideration is the not uncommon practice of judges in the majority appending

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this range, interspersed with other findings that were less relevant to questions of the accused's culpability.

[103] *Šešelj* Trial Judgment (n 24), Concurring Opinion of Judge Antonetti, p. 55. The scale placed probative value in one of seven categories: Absolute; very strong; strong; fair; poor; very poor; none.

[104] See further, *inter alia*, Jérôme Besombes, Vincent Nimier and Laurence Cholvy, 'Information Evaluation in Fusion using Information Correlation', paper presented at the *12th International Conference on Information Fusion*, Seattle, USA, 6-9 July 2009, 264-269.

[105] See above, part I.

[106] Cupido (n 9), 1.

joint concurring opinions or separate opinions to judgments. In other words, the judgment sees two of the three judges (or three out of five judges, for Appeals Chamber decisions) form a majority, with a dissenting opinion from the remaining judge or judges. In addition to that dissenting opinion and majority judgment, one or more of the judges from the majority appends a separate, often lengthy, concurring opinion, emphasizing precisely why they agree with the majority (i.e. their own) judgment.

For example, in *Bagilishema*, Judge Asoka de Z. Gunawardana, who was in the majority, issued a separate opinion that began with the words 'I agree with the Judgment of Judge Møse…'.[107] This type of wording may give the impression that the majority judgment was not truly a reflection of the views of the majority, but of one of the judges in that majority. Similarly, in *Šešelj*, as well as the 110-page long judgment,[108] Judge Niang, who was in the majority, appended a six-page long 'individual statement',[109] whilst Judge Antonetti, who was also in the majority, issued a 'concurring opinion' spanning almost 500 pages in length.[110] Judge Lattanzi's 'partially dissenting' opinion (although she noted that she disagreed with her colleagues in the majority on 'almost everything'[111]) was 49 pages long.[112] This practice of separate majority opinions highlights discord amongst judges, adds further conceptual confusion on the precise basis for the majority judgment, and has the potential to dilute the normative force of the judgment, which is supposed to be the definitive statement of the majority's conclusions. Nevertheless, it is a practice that has permeated into other international criminal jurisdictions, including, most notably, the International Criminal Court.[113]

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[107] *Bagilishema* Trial Judgment (n 60), Separate Opinion of Judge Asoka de Z. Gunawardana, para. 1. Judge Guney appended a dissenting opinion to this judgment: *Bagilishema* Trial Judgment (n 60), Separate and Dissenting Opinion of Judge Güney.
[108] Plus annexes totaling 26 pages.
[109] *Šešelj* Trial Judgment (n 24), Individual Statement of Judge Mandiaye Niang.
[110] *Šešelj* Trial Judgment (n 24), Concurring Opinion of Judge Antonetti.
[111] *Šešelj* Trial Judgment (n 24), Partially Dissenting Opinion of Judge Flavia Lattanzi – Amended Version, para. 1
[112] *Ibid.*
[113] *Prosecutor* v. *Katanga*, Jugement rendu en application de l'article 74 du Statut, Case No. ICC-01/04-01/07, 7 March 2014, Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte.

IV. Conclusion

This chapter drew on the rich and varied jurisprudence of the ICTY and ICTR in enunciating some of the key themes that underpinned their fact-finding practices. It provided some suggestions on how the standard of proof could be more clearly articulated, how the evaluation of evidence could be made more explicit, and how international criminal judgments could be made more accessible, drawing on the experience of the ICTY and ICTR. The increased accessibility and clarity that would result would in turn enhance the legal and sociological legitimacy of future international criminal trials.

On the meaning of the standard of proof, Part I concluded that the standard of proof beyond reasonable doubt applies not just to the Chamber's ultimate conclusion, but also to key facts underpinning the elements of crimes or modes of liability, and that if an alternative reasonable explanation of the evidence exists, the Chamber must acquit the accused. Part I also noted that there was some uncertainty or apparent differences of opinion between judges on the precise level of certainty required to reach the standard of proof. It also compared the atomistic and holistic approaches to the evaluation of the evidence, and proposed a model of evaluation that would combine both approaches.

Relatedly, Part II criticised the Chambers' often overly holistic approach to the evaluation of evidence, as illustrated by the common statement found in judgments that says that all of the evidence, even if it was not referred to in the judgment, was duly weighed and considered in reaching judgment. Part II also extrapolated principles on some of the more contentious issues that arose on the assessment of evidence in practice, such as the role of corroboration; the weight to be given to in-court identifications of the accused, and the factors to be taken into account in deciding whether a witness should be considered credible. Nevertheless, it was noted that the level of credibility a Chamber would attach to a witness's account was rather unpredictable, and the factors relied upon by

Chambers in this regard appeared to vary quite significantly between differently-constituted Chambers.

Lastly, Part III discussed the structure of international criminal judgments. It noted that the extreme length of the ICTY and ICTR's judgments could have an impact on their accessibility to the local, international, and legal communities that they serve. It made some suggestions for minor improvements that could have made the Tribunals' judgments much more focused and navigable. Part III also suggested that the practice of judges appending joint concurring opinions to the majority judgment might detract from the normative force of the original judgment.

Of course, it could be argued, from the point of view of sociological legitimacy, that victims in affected regions are more interested in the outcome of international criminal trials and the sentences given to convicted persons than they are in reading the full judgments and determining the evidentiary underpinnings of the Tribunals' findings. That argument would suggest that judgments only serve prosecution and defence legal teams and the occasional interested academic, and that there is no need for the Tribunals to make their findings more broadly accessible. I would respectfully disagree with such an argument for two reasons. First, practice shows us that affected communities do care about the Tribunals' reasoned judgments. We can see this, for example, by the fact that in some parts of the former Yugoslavia, the *Milošević* Rule 98*bis* decision was published and sold in bookshops.[114] Moreover, even if we were to partially accept the argument that judgments principally serve the parties, and not the affected communities, we might argue, given the preponderance of appeals raised on allegations that the Trial Chamber failed to take relevant evidence into account or gave undue weight to some evidence or facts, that the current structure of judgments does not even live up to that limited promise.

[114] Muharam Kreso (ed.), *Milošević Guilty of Genocide: Decision on Motion of the Hague Tribunal of 16 June 2004* (in Bosnian as: *Miloševiću Dokazan Genocid u Bosni: Međupresuda Haškog Tribunala od 16 Juna 2004*) (Institute for Research of Crimes against Humanity and International Law, University of Sarajevo, Sarajevo, 2007).

Perhaps one of the more striking conclusions that can be drawn from the above analysis is that proof in international criminal trials is an area that remains beset by uncertainty. In many ways, this is surprising; one might have expected that, by the end of the Tribunals' lifetimes, we would be able to identify reasonably consistent approaches to the evaluation of evidence; a more or less shared understanding of the standard of proof and what it requires, and clear structures for judgments and their scope. However, as illustrated above, these issues were still subject to debate and development, even in the twilight years of the Tribunals.