



Cultural competence amidst evidentiary transformations: Why culture still matters

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Abstract

International criminal trials confront many impediments to accurate fact-finding. Some impediments stem from cultural divergences between witnesses, who often hail from the Global South, and courtroom personnel, many of whom hail from the West. Courtroom personnel developed strategies to address these cultural divergences while legal psychologists, sociologists, and anthropologists have also focused on these issues. Indeed, academics and researchers have lately generated a wide body of literature that interrogates, explores, and explains divergences between different cultural groups. This sophisticated research is welcome, and many scholars recommend continued study to further elucidate and to gain greater understanding of the cultural components of witness testimony in ICL trials. At the same time, changes in the evidentiary profile of many mass atrocity trials have made witness testimony less influential and could make cultural understanding concomitantly less significant. This study however recommends continued focus on cultural competence as a means of increasing the accuracy and legitimacy of mass atrocity verdicts.

Key words

Evidence; fact-finding; culture; mass atrocities

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Resumen

Los juicios penales internacionales han enfrentado diversos obstáculos a la hora de determinar los hechos con precisión. Algunos de estos obstáculos se derivan de diferencias culturales entre los testigos, que a menudo proceden del Sur Global, y el personal de los tribunales, muchos de los cuales proceden de Occidente. El personal de los tribunales desarrolló estrategias para esclarecer las diferencias culturales; asimismo, los psicólogos, sociólogos y antropólogos del ámbito jurídico se han centrado en estas cuestiones. De hecho, académicos e investigadores han generado una amplia bibliografía que plantea interrogantes, explora y explica las divergencias entre diferentes grupos culturales. Esta sofisticada investigación es bienvenida, y muchos estudiosos de estos campos recomiendan continuar con el estudio para esclarecer y comprender aún más los componentes culturales del testimonio de los testigos en los juicios de derecho penal internacional. Al mismo tiempo, los cambios en el perfil probatorio de muchos juicios por atrocidades masivas han restado influencia al testimonio de los testigos, lo que podría hacer que la comprensión cultural cobrara, en consecuencia, menor relevancia. Sin embargo, en este estudio se defiende que se siga prestando atención a la competencia cultural como medio para aumentar la precisión y la legitimidad de las sentencias dictadas en casos de atrocidades masivas.

Palabras clave

Prueba; comprobación de hechos; cultura; atrocidades en masa

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1. Introduction

The end of the Cold War led to unprecedented consensus in a variety of realms (Hageboutros 2016, 10, Jones and Stedman 2017, 33-34), and some of that consensus centered on the value of criminal accountability for international crimes. The first mass atrocity prosecutions were greeted with tremendous enthusiasm (Powderly 2019, 4), and no one was sweating the details. In particular, accurate fact-finding seemed among the least of our worries, especially considering the scale of the crimes prosecuted. With tens of thousands of victims and witnesses, how could it be difficult for international prosecutors to prove their cases? And when it came specifically to cultural differences between witnesses and victims on the one hand, and courtroom personnel on the other, everyone was aware of them, but they did not seem especially relevant. Certainly, we appreciated that different cultures have different views on, say, marital relations, hospitality, and gender interactions, but the questions at the heart of a mass atrocity trial are more likely to be, “did you see the person who killed your brother, and if so, what uniform was he wearing?” Those sorts of questions and answers seemed to transcend cultural divergences and be quasi-universal.

Time has proven the post-Cold War optimism to be naïve at best across a variety of international criminal law realms,¹ with fact-finding unquestionably one of them. Impediments to accurate fact-finding have now been showcased in a variety of works, including mine (Combs 2009, 2010, 2017). Indeed, recent years have shown those impediments to extend beyond international criminal tribunals, which were the subject of early research, and likewise to bedevil national prosecutions of international crimes pursuant to universal jurisdiction (Cruvellier 2024). These fact-finding challenges will be described in more detail in Part I, but they can be briefly summarized as follows: in mass atrocity trials, it is hard to obtain the kind of information that fact-finders need to ascertain with any measure of confidence who did what to whom.

Cultural divergences in particular made their appearance in early international tribunal trials involving atrocities in Rwanda, Sierra Leone, and East Timor. Some of these cultural divergences involved relatively discrete issues, such as a reticence to discuss sexual and gender-based crimes, but others were broader-based and created confusion and misimpressions among lawyers and judges. However, courtroom personnel soon developed strategies to shed light on these cultural differences. Although those efforts were well-intentioned and helpful, they may have had improved matters only slightly. First, although some courtroom personnel were diligent in seeking to remedy the cultural divergences they became aware of, not all did; second, there were likely many more divergences about which courtroom personnel did not become aware. These continued to sow unrecognized misunderstandings. Finally, cultural divergences gave

¹ Indeed, that optimism is perhaps more accurately labeled “woefully misguided.” From ability to apprehend suspects to ability to finance its operations, the field of international criminal law has faced nearly insurmountable challenges (Powderly 2019, 1). In addition, the field has been subjected to scathing criticism from scholars who adopt a critical lens and who scrutinize the field’s core assumptions in light of unspoken ideologies and discriminatory commitments (Schwöbel 2014, 1, Krever 2014, 117, Sander 2015, 753). These critiques have some relevance to the issues of culture that this article addresses in that many of these cultural differences correspond to the kinds of power imbalances that animate much critical scholarship. However, this article does not delve into that literature because it considers culture in the more isolated context of fact-finding accuracy.

rise to additional fact-finding challenges as witnesses invoked culture to explain away troubling aspects of their testimony. Because many of these cultural explanations were themselves idiosyncratic and difficult to verify, they ended up muddying the already dirty water.

It was at this point that the legal psychologists, sociologists, and anthropologists came on the scene. Although cultural divergences of the sort just described had for years impeded fact-finding in domestic criminal trials that concerned members of immigrant groups, little research elucidated these matters,² probably because trials involving immigrants represented only a tiny proportion of domestic criminal trials. Not so for mass atrocity trials, which are routinely held in the Global North but feature witnesses and defendants from the Global South. Each of these latter trials, therefore, feature significant cultural divergences between a large proportion of court personnel and virtually every witness (Almqvist 2006, 746). Understandably, then, scholars paid attention. The last ten years alone have seen academics and researchers generate a wide body of literature that interrogates, explores, and explains divergences between different cultural groups. These divergences appear in realms as diverse as depth perception and trauma experience. This sophisticated research is welcome for a host of reasons. The most obvious is its potential to enhance fact-finding accuracy in mass atrocity trials. But greater inter-cultural understanding also can increase the respect with which courtroom personnel treat victims and witnesses from different parts of the world.

This brief but generally cheerful history might be summarized something like this: (1) mass atrocity offenders are frequently prosecuted in courts far from home; (2) consequently, these mass atrocity trials often feature courtroom personnel who hail from one culture, along with victims, witnesses, and alleged offenders who hail from another; (3) the differences in cultural outlook between these various participants can create confusion and misunderstandings and thereby can impede the ability of courtroom fact-finders to find accurate facts; however, (4) once those divergences began to emerge, researchers launched sustained efforts to understand and publicize the differences, particularly as they might impact courtroom fact-finding. Not surprisingly, then, (5) this research has illuminated a variety of interesting cultural divergences, and it has highlighted additional questions to be explored (Swigart 2017, 216-217; 2020, 35-36, Skrifvars *et al.* 2024, 55). The seemingly incontrovertible conclusion to this story, then, is that (6) this additional research should be undertaken because greater understanding of cultural divergences in mass atrocity trials is unquestionably beneficial to the international criminal justice project (Mauček 2020, 193).

On the one hand, this conclusion appears straightforward and uncontroversial. Although efforts have been made to broaden the targets of international criminal justice so that they extend beyond the Global South (International Criminal Court 2020, para. 3; 2024), contemporary international criminal trials continue to feature (largely Western) court personnel whose cultural attributes diverge sharply from those of (largely non-Western) witnesses and accused. For this reason, continued cultural research and education seem valuable on their face. However, as this paper will discuss, the factual premises underlying the conclusion are now significantly altered. In particular, at the

² Some books, such as *Immigrants in Courts* (Moore and Fisher 1999), made a start at theorizing some relevant issues.

same time that the cultural divergences story just recounted was unfolding, another story—this one about evidentiary transformation—was also underway. Mass atrocity trials have had a relatively short history, and the evidence presented to prove the defendants' guilt has varied from place to place and time to time. Some historical atrocities, such as the Nazi crimes against the Jews (Tusa and Tusa 1983, 100-101) or the Khmer Rouge crimes in Cambodia (Boyle 2018), have featured large quantities of documents and other non-testimonial evidence. However, the prosecutions occurring during the 1990s and 2000s—that is, at the dawn of the modern international criminal justice resurgence—featured little to no non-testimonial evidence (Combs 2010, 12). These prosecutions, therefore, rose and fell almost exclusively with witness testimony.

It is in such witness-heavy trials that fact-finding impediments prove most problematic. And, likewise, it is in this setting that cultural understanding is most crucial. But in the last decade, the evidence featured in international criminal trials itself has evolved, and now a far greater proportion of that evidence is non-testimonial. Smart phones are now ubiquitous and international crimes across the globe can be recorded and shared almost instantaneously. Additionally, other forms of non-testimonial evidence, including social media posts, cell phone records and chat exchanges are now available to help establish a defendant's liability for international crimes. These transformative evidentiary changes have the potential also to transform our views on the value of cultural understanding and education.

This piece utilizes a qualitative methodology that centers on bibliographic and doctrinal analyses. It begins by outlining the fact-finding challenges posed by witness testimony and the role that cultural divergences can play in exacerbating those challenges and undermining our confidence in the accuracy of facts derived from that testimony. Next, Section 2 of this chapter considers the practical steps that courts have undertaken to address these challenges. It then details the large quantity of sophisticated, recent research that now illuminates cultural divergences and their impact on legal fact-finding. This research has provided significant insights, but it has also laid bare the vulnerabilities of witness testimony in general and the particular challenges posed by testimony in cross-cultural settings. Indeed, although this literature has answered many questions, it has identified many more. Not surprisingly, then, scholars in this field routinely call for additional research to further elucidate these issues and to help courtroom personnel better understand the victims, witnesses, and defendants with whom they interact.

Section 3, then, summarizes on-the-ground evidentiary changes that, on their face, sharply reduce the value of cultural understanding in the context of a criminal trial. Namely, it highlights the transformation in the kinds of evidence now used to prove international crimes. It shows that although witnesses remain a constant feature of mass-atrocity trials, the practical importance of their testimony is now increasingly diminished.

With witnesses playing a reduced and less significant role in contemporary international criminal fact-finding, we might reasonably conclude that cultural research and education should be concomitantly de-emphasized. I reach the opposite conclusion, however, for reasons detailed in Section 3. International criminal law is currently facing an existential crisis that is as concerning as it is well-known. International criminal law

scholars and practitioners have little ability to impact the global attitudes and events that have given rise to the grave challenges the field now confronts. But they can make their best efforts to ground their factual findings on a sophisticated and nuanced understanding of local populations. Doing so will not save international criminal law in general or the International Criminal Court in particular from the forces aligned against it. But it will help us produce accurate trial outcomes, which are—and always have been—the foundation for a legitimate and defensible international criminal justice system.

2. Fact-finding challenges and cultural interactions

In the early international criminal trials of the 1990s and early 2000s, witnesses predominated. ICTY trials saw the introduction of some non-testimonial evidence, such as documents and video recordings (*Prosecutor v. Krajišnik* 2006, Appendix C; Petrović 2014, 89), but even at the ICTY, witness testimony was a crucial component of most convictions, and at the other contemporaneous tribunals, such as the ICTR and SCSL, witness testimony formed the exclusive basis for conviction in virtually every case (Combs 2010, 11-14).

After the tribunals had been operating for several years, I and other scholars began to identify concerns about witness testimony. Most of these concerns fell into two broad categories: First, witnesses frequently failed to provide the court with crucial details that were highly relevant to the trial's contested facts. In particular, witnesses often had difficulty dating events, estimating distances and recognizing two-dimensional representations of key locations (such as the crime site) (Combs 2010, 22-39). Second, witness testimony was often inconsistent—in important ways—with the witnesses' pre-trial statements or their testimony in previous cases (Combs 2010, 106; 2017, 60).

Cultural divergences between court personnel on the one hand, and defendants and witnesses on the other, compounded these fact-finding challenges. Admittedly, this is not a new problem. Domestic criminal trials featuring members of immigrant groups have long required both language interpretation and cultural interpretation, as it were. (DeMuniz 1999, Chin 2005, 659, d'Hondt *et al.* 2024, 3-5). But the need for cultural understanding is especially pressing in mass atrocity trials because virtually all of the witnesses, victims, and defendants hail from one cultural tradition whereas many courtroom personnel hail from others (Bostian 2005, 12, Almqvist 2006, 751). To be sure, the cultural attributes of any given society are multi-faceted and always evolving.³ Cultural attributes also manifest differently across different identity characteristics, such as gender, age, and religion among others (Cohen and Varnum 2016, 5). Finally, although many mass atrocity prosecutions involve conflicts occurring in the Global South, these locations and the cultural proclivities of the people therein can differ significantly. That said, this Section will consider the ways in which cultural divergences appeared across multiple mass atrocity trials, and it will explore the ways in which those divergences have complicated fact-finding.

³ As Tri puts it, "culture is not a monolithic entity but a dynamic amalgamation of myriad components, practices, and ideologies. These elements are not static but continually evolving, shaped by the interactions and exchanges within discourse communities." (Tri 2024, 121).-

Some cultural divergences in mass atrocity trials concern clashes of legal culture (Kelsall 2010, 2). For instance, cross-examination is not a common feature of civil law criminal justice systems (Pinsolle 2023), so it can be unfamiliar and disturbing to witnesses from civil law countries. Indeed, although the cross-examination at the ICTR would have seemed perfectly ordinary to American witnesses, it generated strident objections from Rwandan witnesses who complained that defense counsel were making them out to be “liars, cheats, mentally disturbed or fools” (International Federation for Human Rights – FIDH – 2002, Report no. 329/2). No witness enjoys cross-examination, but it is likely that Rwandan witnesses’ cultural unfamiliarity with the practice exacerbated their distress (Almqvist 2006, 757).

The cultural divergences that appear most likely to impair factfinding in mass atrocity trials, however, relate not to unfamiliar legal practices but to the style or content of witness testimony. One salient style divergence, for instance, concerns the directness in speech patterns. Again no hard, fast rules apply, but whereas Western witnesses tend generally to describe events in a fairly direct manner, many individuals from non-Western cultures prize indirect speech.⁴ Indeed, an expert witness at the ICTR testified that “it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate.”⁵ Anthropologist Mariane Ferme was even more blunt when reporting that Sierra Leoneans view “a person who communicates directly what she or he desires or thinks (...) to be an idiot or no better than a child.” (Ferme 2001, 6-7). Other modes and styles of communication can likewise differ between cultures; making eye contact, for instance, is considered polite in some cultures and extremely rude in others, and the same is true for certain hand gestures and facial expressions (Yuille *et al.* 1999, 330-331). The practice of pointing, in particular, became contentious at the ICTR when Rwandan witnesses repeatedly refused to identify the defendant in the courtroom by pointing, maintaining that to do so would be rude (*Prosecutor v. Semanza*, Transcripts, Oct. 8, 2001, 112-113, Oct. 4, 2001, 42, Mar. 7, 2001, 90-91, Swigart 2017, 203).

Finally, some of the content of testimony at the international tribunals has covert cultural overtones. A reticence to discuss sex in general and sexual violence in particular is especially prevalent and was identified in the very first ICTR trial (*Prosecutor v. Akayesu* 1998, para. 152-154). Even now, many current ICC witnesses struggle to provide clear, explicit testimony about their rapes (Swigart 2020, 22). However, Western court personnel may not anticipate other, less well-known taboos that can motivate witnesses to avoid subjects. Congolese witnesses in the ICC’s *Katanga* case, for instance, were disinclined to answer the judges’ questions about *fetishes*,⁶ fearing that doing so would subject them to supernatural danger (*Prosecutor v. Katanga* 2014, para. 272, Schot 2020, 180). Another Congolese witness in a different ICC case caused similar “cultural confusion” with his reluctance to testify when called. It turned out that the witness wanted his father to testify first due to the latter’s age and authority (Swigart 2015, 608).

⁴ Swigart observed, for instance, that “[l]ong and indirect answers to short and direct questions were frequent” among Rwandan witnesses (Swigart 2015, 584).

⁵ *Prosecutor v. Akayesu* 1998, para. 156. Dr. Ruzindana went on to testify: “In such cases, the answers given will very often have to be ‘decoded’ in order to be understood correctly.” *Id.* The *Akayesu* Trial Chamber provided several examples of this phenomenon that had occurred during the proceedings.

⁶ Fetishes are understood to be objects that have magical or spiritual powers (Schot 2020, 178).

And an East Timorese witness at the Special Panels for Serious Crimes appeared highly evasive and uncooperative when he refused to provide clear answers to questions concerning a certain person who had died (Combs 2010, 89). Only later did the Timorese cultural tradition discouraging conversations about dead people come to light (Combs 2010, 89). Indeed, the taboos in these cases were identified only because certain lawyers or judges in the courtroom happened to be aware of them and educated other courtroom participants.⁷ We can assume, therefore, that numerous cultural misunderstandings go undetected when there is no knowledgeable person in the courtroom to identify them.

That many witnesses to mass atrocities live in an oral tradition also impacts the content of their testimony because such witnesses may be inclined to testify about events as though they witnessed them personally when in fact they were recounted to them.⁸ In other instances, cultural divergences complicate questioning and create misunderstandings. Some witnesses drew conclusions or assumed causal relationships that were surprising and/or confusing to courtroom personnel because the latter did not understand the belief systems on which those conclusions were based (Combs 2010, 90). In other cases, witnesses used terms that had one meaning in many Western cultures but another meaning in the witness's culture. For instance, numerous witnesses described others as their "brother," "sister," or "cousin," when the relationships in question would not meet the Western definitions of the terms (*Prosecutor v. Fofana & Kondewa*, Transcript, Nov. 8, 2004, 28; Combs 2010, 84-86). And, in some trials, witness testimony was infused with solemn references to witchcraft (*Prosecutor v. Carlos Soares Carmona* 2001, Special Panel for Serious Crimes, *Prosecutor v. Brima et al.*, Transcript, Sept. 27, 2005, 31-35, *Prosecutor v. Ongwen*, Transcript, June 19, 2017, 38), omens (*Prosecutor v. Sesay et al.*, Transcript, July 19, 2004, 77, 80), magical potions (Combs 2010, 90-91), spirits (*Prosecutor v. Katanga*, Transcript, Nov. 16, 2010, 51-54, *Prosecutor v. Ongwen*, Transcripts, Nov. 2, 2017, 32-33, Nov. 6, 2017, 15, Nov. 12, 2017, 24, Oct. 1, 2018, 43, Nov. 9, 2018, 35), and supernatural protection mechanisms (Combs 2010, 90-91, *Prosecutor v. Fofana & Kondewa*, Transcripts, June 1, 2006, 45-46, Jan. 27, 2006, 46). Finally, a witness's cultural norms can impact their ability to answer certain detail-oriented questions that are frequently relevant in a criminal trial. Lawyers often ask witnesses to date the events they are describing and to estimate their distance from those events. But different cultures have different relationships to time and space (Littlejohn 1963, 4, Kagan 2003, 386). Consequently, although most international witnesses are familiar with the Gregorian calendar, many nonetheless measure time by more familiar events, such as the crops that were growing at the time of the crime (Bishay 2021, 138), or the prevailing weather (*Prosecutor v. Ntakirutimana*, Transcript, Sept. 24, 2001, 8, 29, *Prosecutor v. Sesay et al.*, Transcript, Oct. 4, 2004, 80-81, *Prosecutor v. Brima et al.*, Transcript, June 27, 2005, 96, Combs 2010, 25). Cultural norms can also prevent witnesses from estimating distances

⁷ In *Katanga*, Judge Diarra explained that the witness's fear was not ameliorated by his relocation from the DRC because "[i]n Africa, when one is talking about fetishist rituals, it is not the distance of oceans or the protection unit that can protect you. The objective of fetishism is that fetishism can reach you, can travel over oceans, and it can get to you in your hiding spots" (*Prosecutor v. Katanga*, Transcript, Nov. 16, 2010, 53-54). Combs discusses East Timorese mystical beliefs (Combs 2010, 89).

⁸ The ICTR heard expert testimony about this cultural proclivity (*Prosecutor v. Akayesu* 1998, para. 156), and it has also been the subject of scholarly research (Vredeveltdt *et al.* 2026, 10). Combs also details numerous examples of this phenomenon (Combs 2010, 94-98).

in ways that are understandable to Western lawyers and judges (Combs 2010, 29-33, 81-82).

The above-described cultural divergences can impact mass atrocity fact-finding in a variety of ways. Western fact-finders may deem a witness to be not credible when that witness fails to make eye contact, speaks indirectly, or evades certain questions. Such witnesses might seem untrustworthy to fact-finders who are not schooled in the relevant cultural norms.⁹ Likewise, cultural divergences can undermine fact-finders' ability to assess a witness's reliability. To make appropriate assessments, fact-finders need to know the witness's approximate distance from the events in question, and they certainly need to know that the witness was actually there and not merely recounting a narrative told to him by someone else. And it goes without saying that witnesses who—for cultural reasons or otherwise—fail to provide the court key details undermine the court's ability to find accurate facts.

Finally, as discussed above, perhaps the most common and generally problematic feature of international witness testimony is its tendency to diverge from the witnesses' pretrial statements, but culture also stands as a plausible explanation for many of these inconsistencies. To be sure, most witnesses did not invoke culture when confronted with their inconsistencies but rather blamed investigators for asking the wrong questions or interpreters for recording the wrong answers (Combs 2010, 125). But some witnesses did appeal to their culture, arguing that what seemed inconsistent to court personnel was not inconsistent to members of the witness's cultural group (Combs 2010, 123-124). Culture also stands as a viable explanation for some inconsistencies because the salience of certain facts varies from culture to culture. Specifically, some details that seem crucial to one cultural group may be less important to those from other cultures. So, for instance, witnesses from cultures that measure time less precisely than Westerners may provide one date estimate on one occasion and a different date estimate later without considering the divergence overly troublesome. Likewise, a witness whose familial understandings are broader and not aligned with Western standards may describe an individual as a "sister" in a pretrial statement but in some other way at trial (Schot 2020, 180). At the same time, the potential exists for witnesses to strategically deploy cultural divergences. Some witnesses invoked seemingly implausible cultural phenomena to explain substantial inconsistencies between their pretrial statements and testimony (Combs 2010, 123-124). And, witnesses who are not able—or not wanting—to answer certain questions might point to their culture to justify their failure to provide the requested information (*Prosecutor v. Ndindabahizi*, Transcript, Sept. 15, 2003, 29-30, Combs 2010, 82, 102-104, Johannesson 2012, 81-82).

3. Part II: Steps taken and information gained

3.1. *The tribunals' efforts to gain cultural understanding*

To their credit, the international criminal tribunals took steps almost immediately to enhance their understanding of any relevant cultural divergences and to minimize their impact on fact-finding. First off, courtroom personnel adapted certain practices and lines

⁹ van Veldhuizen notes that "decision-makers typically judge other people's behaviours based on their own subjective views and cultural norms" (van Veldhuizen 2023, 167, Bostian 2005, 25).

of questioning. For instance, lawyers and investigators began asking witnesses whether they “had actually seen what they were talking about with their own eyes or whether somebody else had told them.”¹⁰ Further, after realizing that familial terms carry different meanings across different cultures, lawyers began clarifying family relationships instead of just accepting that the witness was referring to a “sister,” for instance, in the Western sense of the word.¹¹ Finally, the tribunals took a series of measures to put victims of sexual violence at greater ease.¹² These efforts presumably helped witnesses provide clearer and more probative testimony.

In addition to addressing specific cultural issues, the Trial Chambers also sought to gain a broader perspective on the relevant cultures by obtaining expert testimony. In the ICTR’s very first trial, the Trial Chamber heard from Dr. Mathias Ruzindana who testified about the indirect speech patterns that are characteristic of Rwandan culture (*Prosecutor v. Akayesu* 1998, para. 155) and the cultural proclivity to recount events as though “they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else” (*Prosecutor v. Akayesu* 1998, para. 156). Other early ICTR Trial Chambers relied on these findings (*Prosecutor v. Musema* 2000, para. 103), and other experts appearing before the ICTR elucidated the socio-linguistic aspects of speech alleged to have incited genocide (*Prosecutor v. Muvunyi* 2006, paras. 6, 98, *Prosecutor v. Bikindi* 2008, para. 197).

Some ICC Trial Chambers later sought similar illumination, with an expert in the Ali Kushayb case asked to provide information on the cultural aspects of the case because it was feared that lawyers and judges would manifest “an insufficient appreciation” for cultural attributes that influence the witness’s demeanor or language choice (*Prosecutor v. Abd-Al-Rahman*, Transcript, Feb. 7, 2022, 49-51). In *Ntaganda*, the ICC Trial Chamber relied on expert testimony to understand the “cultural or communal stigmatisation” as well as the “shame and fear” that helped to explain rape victims’ delayed reporting of their crimes (*Prosecutor v. Ntaganda* 2019, para. 88, nn. 192, 195). Moreover, in *Ongwen*, the defendant explicitly invoked culture when raising the defense of duress, maintaining that he was coerced to commit the crimes due to the spiritual hold that Lord’s Resistance Army leader Joseph Kony had over him.¹³ Expert witnesses in *Ongwen*, consequently, explained the way that Western psychological diagnoses would manifest and be

¹⁰ *Prosecutor v. Fofana & Kondewa*, Transcript, Mar. 2, 2005, 9. In *Musema*, the Trial Chamber reported that in light of the Rwandan cultural tradition that “the perceived knowledge of one becomes the knowledge of all,” the Trial Chamber had to consistently distinguish between that which the witnesses personally observed and that which they were told about (*Prosecutor v. Musema*, para. 104, *Prosecutor v. Karemera*, Transcript, Dec. 3, 2003, 16, Transcript, Dec. 8, 2003, 53).

¹¹ Schot 2020, 182. In *Prosecutor v. Katanga*, Transcript, Aug. 19, 2011, 48, a witness reported that the term “sister” does not have the same meaning in Africa as in the West. In *Prosecutor v. Fofana & Kondewa*, Transcript, Nov. 11, 2004, 110, an SCSL judge noted, in response to a confusing exchange with witness about familial relationships, that “when you marry a woman in Africa, you marry the whole village”.

¹² For instance, the tribunals began allowing witnesses reporting sexual violence to take frequent breaks during testimony and to write down the answers to questions when the witness found the answers too sensitive to convey orally (Oosterveld 2014, 5-6). The tribunals also permitted a support person to accompany victims of sexual violence in the courtroom; these support persons, among other things, informed the Trial Chamber when they thought the witness’s questioning should end (Oosterveld 2014, 5).

¹³ *Prosecutor v. Ongwen*, Transcript, Sept. 18, 2018, 27-30. The Trial Chamber, therefore, heard testimony about the various spirits that Joseph Kony would commune with, and the various powers associated with them (*Prosecutor v. Ongwen*, Transcript, Oct. 25, 2018, 19-20).

understood in the defendant's culture (*Prosecutor v. Ongwen*, Transcript, Nov. 21, 2019, 67-70). Finally, ICC Trial Chambers have not been content to rely on expert testimony solely when considering the impact of culture on the witnesses' testimony and the case as a whole. One of the *Katanga* judges proactively hired a sociologist to help him ask the right kinds of questions so that he could better understand the cultural aspects of the case (Seroussi 2018, 976). This sociologist's input was described as "instrumental in assisting the judges to appreciate the cultural context in Bogoro, DRC" (Bishay 2021, 135-136). Indeed, the *Katanga* judges were particularly active in questioning witnesses about their cultural understandings.¹⁴

3.2. The scholars' efforts to gain cultural understanding

Soon after the tribunals became alive to the cultural divergences impeding fact-finding in their courtrooms, scholars and academics began turning their own attention to the phenomenon. Although some of this research predates the advent of modern international criminal law institutions (Ruppel 1992, 1, Moore and Fisher 1999) scholars picked up their pace once the fact-finding challenges of the tribunals began to be publicized. Such scholarly research has also centered on asylum proceedings, which likewise typically feature witnesses/applicants whose cultural norms differ substantially from those of courtroom personnel (Herlihy *et al.* 2010, 354, Keselman *et al.* 2010, 325, de Bruïne *et al.* 2026, 2).

To begin, it is worth acknowledging the vast body of scholarship calling into question the accuracy of witness testimony even when there are no cultural divergences to provide additional challenges. As early as the 1970s, Elizabeth Loftus pioneered the field of memory research with her studies that evidenced the fallibility of eyewitness testimony (2011). Loftus's findings established that witnesses can be intentionally or unintentionally led to remember "something in a way that the questioner wants or expects" and that a questioner's methods can alter a witness's memory of events when the witness is asked about those events in the future (Loftus 2011, 2019, 501). Additional, more recent research has shown that eyewitness testimony in mass atrocity trials features a number of attributes that make it particularly prone to inaccuracies. Mass atrocity trials frequently occur years or even decades after the crimes, and it is well-established that time degrades the accuracy of memory (Shepherd *et al.* 1982, 80-86). Further, mass atrocity witnesses are often subject to repeated investigatory interviews during the time between the crimes and the prosecutions (Buzo 2020), and witnesses themselves discuss the crimes with other members of the affected communities. These interviews and discussions increase the risk of inaccurate testimony because research shows that post-crime interviews¹⁵ and conversations often lead witnesses to incorporate new information into their existing memories (Eltringham 2013, 348, de Bruïne *et al.* 2026, 11). Finally, mass atrocity witnesses often have viewed scenes of unimaginable barbarity;

¹⁴ Schot reports that "out of the total 54 witnesses, 25 witnesses were questioned by the Trial Chamber judges in relation to sociocultural aspects" (Schot 2020, 178).

¹⁵ Loftus found that a witness's in-court testimony may be altered by prior police interviews during which a witness re-creates their experience "based both on information acquired during the original experience and external information acquired subsequently" (Loftus 1975, 571); Stanley and Benjamin (2016, 1, 9) similarly showed that repeated police questioning about a particular event may distort memory and lead to testimonial inconsistencies.

unfortunately, studies indicate that an individual's ability to accurately perceive declines when the individual is experiencing stress.¹⁶ These and other factors should combine to put us on guard about the accuracy of eyewitness testimony of mass atrocities, even if everyone in the courtroom hailed from the same culture.

But, as discussed, mass atrocity trials are much more commonly held far from the crime scenes, and they are conducted by lawyers and judges whose cultural norms may diverge sharply from those of victims and witnesses. Part I briefly highlighted the kinds of fact-finding impediments often wrought by these cultural divergences, and this Section will summarily canvass the plethora of recent scholarship that has dramatically increased our understanding of the scope, depth, and relevance of these divergences. Although by no means a comprehensive summary of the literature, this discussion easily establishes that that culture impacts the way that we perceive events, the way that we remember events, the way that we convey those memories to others, and the way that our recounted memories are understood, especially by listeners of different cultures. As Vredeveldt *et al.* put it, "[n]egative life events are not only experienced differently across cultures but also remembered and reported in different ways" (Vredeveldt *et al.* 2026, 6).

Research shows, for instance, that an individual's culture influences their perception and memory of events. Many studies contrast societies that tend to value collectivist norms and societies that tend to value autonomy norms.¹⁷ Research as far back as the 1970s revealed that, on average, persons from collectivist societies focus greater attention on the environmental and contextual elements of a scene or event whereas persons from individualistic societies focus greater attention on isolated elements of the scene or event (Witkin and Berry 1975, 46-47). More recent research has shown these perceptual differences to have a neurological component (Gutchess *et al.* 2006, 102); some hypothesize, moreover, that they are also enhanced both by the ancient philosophies that underlie the differing perspectives (Nisbett *et al.* 2001, 291) as well as the actual perceptual environments that prevail in the relevant societies.¹⁸

Witnesses at mass atrocity trials not only need to accurately perceive and remember the relevant events, they also need to accurately convey their memories to fact-finders. Not surprisingly, studies now show that culture influences witness reporting. Research reveals, for instance, that people from individualistic societies are generally more likely to remember past events where they are at the center whereas people from collectivist societies are more likely to remember collective activities.¹⁹ In addition, and as

¹⁶ Vredeveldt *et al.* reported that "those who have been exposed to ongoing negative life events typically present with less specific or 'overgeneral' memories" (Vredeveldt *et al.* 2026, 6, Brigham *et al.* 1983, 291, Christianson and Loftus 1987, 227).

¹⁷ "Understood as one of the primary dimensions by which cultures and their members can be differentiated, individualism-collectivism refers to the extent to which the characteristic values and norms of a society emphasize individuality and autonomy, or interdependence and connectedness" (Taylor *et al.* 2017, 2).

¹⁸ Yuri Miyamoto *et al.*, for instance, found that scenes from cities in Japan were more ambiguous and contained more elements than scenes from cities in the United States (Miyamoto *et al.* 2006, 113).

¹⁹ Jobson and O'Kearney 2006, 90-91, de Bruïne *et al.* 2026, 7. Studies show that memories of Chinese study participants "had interdependent self-focus (i.e., were of events with a group or social orientation), whereas the memory content of the U.S. group showed an independent self-focus (i.e., were of events oriented to the individual" (Conway *et al.* 2005, 739). These differences extend to memories of self: "Americans' autobiographical memories focused more on the self (successes, dreams, frustrations, while Chinese focused on relationships and contexts" (Vredeveldt *et al.* 2026, 10).

particularly relevant to witness testimony, on average, people from individualist societies provide lengthier, more detailed (Anakwah *et al.* 2020, 504, de Bruïne *et al.* 2026, 7), more emotionally charged reports of past events than people from collectivist societies (Vredeveltdt and De Bruïne 2022, 465, Vredeveltdt *et al.* 2026, 7). Finally, even if we were able counterfactually to assume similar memories and reporting tendencies, cultural attributes can impede accurate and forthright reporting. Research suggests, for instance, that “people from Sub-Saharan Africa have more difficulty transforming a 2D representation into a 3D representation” (de Bruïne *et al.* 2018, 470). This difficulty can impair the ability of witnesses from those locations to recognize a photograph or other two-dimensional depiction of a place or object that they are describing from the witness stand.²⁰

Cultural differences can also create powerful barriers to clear and accurate communication. Taboos, discussed earlier, are one obvious example of such a communication impediment, as is shame, which is well known to deter victims of sexual violence from testifying clearly and forthrightly about the crimes they endured (Vredeveltdt *et al.* 2026, 10). Other culturally-driven communication barriers are less well-known outside of scholarly circles but can be just as distortive. One such impediment relates to so-called “power distance,” which is understood as the extent to which people in a society endorse hierarchy and unequal power distribution (Hofstede 1983, 336, Oyserman 2006, 353, Anakwah *et al.* 2020, 512, de Bruïne *et al.* 2026, 8) and defer to authority figures (de Bruïne *et al.* 2026, 8). Cultures differ dramatically in power distance, with Western societies typically considered to feature relatively low power distance (Vredeveltdt *et al.* 2026, 8) compared to many sub-Saharan African societies, which are considered to have much higher power distance (Hofstede 1983, 342, 353, Anakwah *et al.* 2020, 512).

Differences in power distance have been shown to impact both the quantity and the quality of witness reporting. Research reveals, for instance, that people from high power distance cultures are less likely to express their views²¹ or report facts to or about authority figures than people from low power distance cultures.²² Power distance also influences the accuracy of reporting. Studies show that persons from high power distance cultures are more likely than persons from low power distance cultures to claim that they recognize an object when they actually do not (de Bruïne *et al.* 2018, 470-472). These studies led Annelies Vredeveltdt to conclude that “[i]n societies with high power distance, the desire to agree with a person in authority may outweigh the desire to provide an accurate description” (Vredeveltdt *et al.* 2026, 9). Specifically, “interviewees from high power distance cultures may be more prone to reporting what they believe the interviewer wants to hear, rather than what they remember” (Vredeveltdt *et al.* 2026, 9). This research confirms impressionistic observations that I made about international

²⁰ This difficulty was on display in many international criminal trials (Combs 2010, 36-38).

²¹ As Ghosh puts it: “Power distance renders a large communication gap between superiors and their subordinates because it is hard for the subordinates to air their views” (Ghosh 2011, 89).

²² Anakwah and her co-authors conducted a controlled eyewitness experiment comparing mock witnesses from Holland (low power distance) and Ghana (high power distance). The study revealed that the mock witnesses from low power distance societies provided more details than those from high power distance societies (Anakwah *et al.* 2020, 507-508).

criminal tribunal testimony more than a decade ago (Combs 2010, 131, Buisman 2012, 209-210).

As some scholars have researched differences in the experience and reporting of mass atrocity crimes and other traumatic events, others have focused on the way that such reporting is understood by members of different cultures. Research has shown that it is exceedingly difficult even in monocultural settings to accurately assess credibility based on speech patterns and non-linguistic cues, and it is all the harder to do so across cultures (Vredeveltdt *et al.* 2026, 6). As just one example, studies have shown that negative events are experienced and expressed differently across cultures,²³ but these differences can “influence how individuals come across in interviews (...) a recipe for misunderstandings and miscommunication” (Vredeveltdt *et al.* 2026, 1). Indeed, even tendencies that seem to transcend cultural differences have cultural implications. For instance, some studies find that, in every culture, truth tellers provide more detailed accounts than liars (Leal *et al.* 2018, 201), yet individuals from some cultures are inclined to provide considerably more details than individuals from other cultures (de Bruïne *et al.* 2026, 9). Moreover, a number of studies have showed not only that deception cues are culturally derived²⁴ but, more worryingly, that the cues typically associated with deceit amongst Westerners are associated with truthful accounts amongst individuals from other cultures (Taylor *et al.* 2015, 176). Given that individuals from different cultures often present different cues when they are lying, it is unsurprising that other studies show that “people’s subjective judgements about deception deteriorate when they are made across cultures” (Taylor *et al.* 2015, 176).

This section has only briefly canvassed recent scholarship highlighting the role that cultural divergences play in confounding communication in legal proceedings, but it suffices to show that obtaining accurate testimony about mass atrocities is difficult under the best of circumstances, and cultural divergences complicate those circumstances considerably. Indeed, given the likely and significant impact of these divergences, it comes as no surprise that scholars frequently end their papers by advocating more

²³ Matthew J. Friedman *et al.* identified cultural values of accepting one’s fate and enduring suffering as helping to prevent PTSD in individuals who subscribe to those cultural values (Friedman *et al.* 2004, 43). Vredeveltdt *et al.* summarized: “Experiences likely to result in traumatisation in one culture may not have lasting mental health effects in other cultures” (Vredeveltdt *et al.* 2026, 3).

²⁴ Leal *et al.*’s study involved British, Arab, and Chinese participants (2018, 192); Taylor *et al.*’s research involved Black African, South Asian, White European, and White British participants and found “that linguistic cues to deception do not appear consistently across cultures” (2017, 8). Taylor *et al.* further concluded that “liars deceive in ways that are congruent with their cultural values and norms, and that this may result in opposing changes in behaviour” (2017, 1).

research into cultural differences²⁵ and more cultural training for legal professionals.²⁶ However, the following Section explores recent evidentiary changes in mass atrocity trials; these changes have the potential to cast cultural evidence in a new light and thereby calls into question those seemingly reasonable recommendations.

4. Changing evidence and its impact on cultural understanding

As noted in Part I, many mass atrocity trials of the 1990s and 2000s featured grave fact-finding challenges that resulted largely from the fact that witness testimony predominated in those trials. Because some of these challenges seemed to stem from cultural divergences between witnesses and court personnel, cultural knowledge appeared to ameliorate certain challenges. Specifically, when a witness's description of the defendant's acts is crucial to the fact-finder's ultimate determination of that issue, then it is equally crucial for fact-finders to accurately assess the witness's credibility and reliability. So, for instance, should the fact-finder overlook significant divergences between a witness's pretrial statement and his testimony, or do those divergences fatally undermine the story the witness told at trial? Does a witness's failure to provide key details about the witnessed event render her remaining testimony wholly suspect, or can that failure be plausibly explained? Cultural knowledge provides no certain answers to these sorts of questions, but it can offer valuable guidance.

But the value of cultural knowledge is greatest when most of the facts in a mass atrocity trial are proven through witness testimony. Yet, just as legal psychologists and anthropologists were training their sights on the impact of cultural divergences on courtroom proceedings, the evidentiary bases for many international criminal convictions underwent substantial changes. I have recently detailed these changes more thoroughly in another publication (Combs 2026); suffice it to summarize here that technological advances have transformed mass atrocity investigations and concomitantly the evidence used to prove international crimes.

In particular, the prevalence of cell phone ownership²⁷ and social media usage have combined to provide investigators access to large quantities of non-testimonial evidence

²⁵ de Bruïne *et al.*, for instance, make “an urgent call for researchers to investigate the influence of culture on memory statements more precisely by moving beyond the simple comparison of collectivistic and individualistic societies toward a detailed mapping of systematic and idiosyncratic aspects of the region under study” (2026, 15). McKay similarly observes that because current research provides “only glimpses into how cultural considerations impact victims’ views on their role in ICC proceedings, more contemporary and comprehensive empirical studies are necessary” (2020, 304). Anakwah *et al.*, for their parts, advocate future research “to (a) determine whether in an interview context, the presence of an authority figure plays a culture-related role in the amount of information reported by witnesses and (b) explore how such differences might be attenuated.” (2020, 512).

²⁶ Maučec calls for more use of experts and maintaining that “greater awareness of cultural dimensions and cultural sensitivity of the ICC judges can contribute to perceived higher legitimate value of their decisions and thus enhance social trust in their decision-making” (Maučec 2020, 199). Vredeveltdt *et al.* recommend that research on culture, trauma and memory be incorporated into the Méndez Principles on Effective Interviewing for Investigations (Vredeveltdt *et al.* 2026, 12-14). And Swigart opines that a “better appreciation and active exploration of different aspects of culture — be it expressed through beliefs, behaviour, practices, language phenomena, notions core to the ICC itself, or anything else — can only improve the regular interactions, proceedings and ultimate outputs of the Court” (Swigart 2020, 35-36).

²⁷ For instance, whereas in 2000, only 1% of Africans used cellphones, a little more than a decade later, 54% did (Sambira 2013). And in 2022, a whopping 84% of Africans had cell phones (Malephane 2022, 2).

that can usefully corroborate—or contradict—witness testimony. ICC cases have exemplified this phenomenon, with recent cases featuring significant quantities of radio intercepts (*Prosecutor v. Ongwen* 2021, paras. 614-810), cell phone evidence and Facebook postings (*Prosecutor v. Yekatom & Ngaissona* 2025, paras. 144-193). Large numbers of witnesses also appeared in these cases,²⁸ but the significance of their testimony was reduced. For one thing, the non-testimonial evidence described above was sufficient to prove certain facts without any reference to witness testimony (*Prosecution v. Al Hassan* 2024, paras. 767, 811, 816, 818, 981-998, 1075). Second, the non-testimonial evidence eliminated certain lines of defense that the accused might otherwise have pursued. A defendant cannot claim that he was unaware of plans to conduct an attack, for instance, if there are radio intercepts featuring the defendant actively planning the attack.²⁹ Finally and most importantly, although witness testimony was advanced to prove many charges, that testimony was frequently corroborated—or undermined—by the kinds of non-testimonial evidence just described.³⁰ Domestic cases prosecuting mass atrocities pursuant to universal jurisdiction have even more commonly and effectively employed non-testimonial evidence. Some recent convictions have turned entirely on video evidence—typically posted to social media sites—that showed the defendant committing the charged crimes (Trial International 2017, 50-51; 2021, 57; *Prosecutor v. Jebbar Salman Ammar* 2016, *Prosecutor v. Hadi Habeeb Hilal* 2016, *Prosecutor v. Saeed* 2019, *Prosecutor v. Ahmed Jabbar Hasan* 2019). Other domestic convictions, as at the ICC, have been grounded on a combination of testimonial and non-testimonial evidence, but even in the latter cases, non-testimonial evidence has proven crucial to many convictions. (*Prosecutor v. Taha A.J.* 2021, paras. 165-203, *Prosecutor v. Ishaq* 2022, 13-14, 31-32).

So, cultural education is particularly valuable to those who must assess witness testimony, but the significance of witness testimony in mass atrocity trials is on the decline. The question arises, then, whether we should reduce efforts to enhance cultural understanding of the participants in these trials. Scarce resources provide one obvious justification for such a reduction. The ICC's current funding challenges and their deleterious consequences have been the subject of voluminous commentary (FIDH 2012, 20, Ford 2015, Cannock and O'Donohue 2018, Wiebelhaus-Brahm and Ainley 2023, 31) and some contemporary *ad hoc* tribunals, such as the Central African Republic's Special

²⁸ The *Ongwen* Trial Chamber heard 179 witnesses (*Prosecutor v. Ongwen* 2021, paras. 19, 22, 251), whereas the *Yekatom & Ngaissona* Trial Chamber heard 174 witnesses (*Prosecutor v. Yekatom & Ngaissona* 2025, paras. 13-15).

²⁹ For example, although the parties agreed that Ongwen had been arrested and was confined to a sick bay following an injury, they disagreed about Ongwen's activities and continued authority during his confinement. The defense contended that Ongwen spent a year to a year and a half in the sickbay, did not retain command of his unit during this period, and could not have participated in the LRA attack on Pajule in Oct. 2003 (*Prosecutor v. Ongwen* 2021, para. 1018). However, because the radio intercepts showed Ongwen's heavy involvement in Sinia Brigade activities throughout this period (*Prosecutor v. Ongwen* 2021, paras. 1028, 1044, 1046-1048, 1050), the Trial Chamber relied on them along with witness testimony (*Prosecutor v. Ongwen* 2021, para. 1052), to conclude that "any disruption to Dominic Ongwen's exercise of his powers as Oka battalion commander was limited in time" as a result of his injury (*Prosecutor v. Ongwen* 2021, para. 1037), and that his "arrest in April 2003 did not for any significant period interrupt the exercise of his authority as commander" (*Prosecutor v. Ongwen* 2021, paras. 1063, 1070).

³⁰ A few examples can be found in the *Ongwen* and *Al Hassan* Trial Judgments (*Prosecutor v. Ongwen* 2021, paras. 884, 895-901, 1014-16, 1107, 1160; *Prosecution v. Al Hassan* 2024, paras. 424-425, 704 & nns. 2097 & 2109; 742 & n. 2231, 761, 819, 1030-1031, 1078).

Criminal Court, are also severely under-resourced,³¹ and all the more so recently with the United States' decision to suspend funding to the Court. Given ever-present financial pressures and the diminishing significance of witness testimony, sophisticated cultural knowledge could be considered a luxury that international criminal justice can now ill afford.³²

Even if limited resources posed no impediment, we might reasonably wonder about the ability of international criminal justice institutions to gain cultural understanding that actually proves useful. A criminal trial is not a scientific experiment, let alone a field placement, and for this reason, some commentators question whether cultural reports drafted by scholars or other experts in fact provide helpful information for judges. Certainly, some past efforts to gain cultural understanding during trial were unsuccessful (Combs 2010, 84-85). But their disappointing results may have stemmed primarily from lackluster efforts. Tim Kelsall, for instance, criticized Special Court for Sierra Leone judges for being "insufficiently sensitive to cultural context" when applying the doctrine of superior responsibility (Kelsall 2009, 260), and the *Katanga* Trial Chamber similarly chastised the ICC prosecution for failing to elucidate the socio-cultural aspects of its evidence. Doing so, according to the Trial Chamber, would have "permitted a more nuanced interpretation of certain facts; a more accurate interpretation of some of the testimonies and, hence, a fine-tuning of the criteria relied on by the Chamber in assessing the credibility of several witnesses" (*Prosecutor v. Ngudjolo* 2012, para. 123, *Prosecutor v. Katanga* 2014, para. 67). That said, when some tribunals did hire experts to educate investigators on the conflict and the people involved including their culture, some intended beneficiaries failed to take advantage of the resources provided. (Combs 2010, 279). Indeed, not everyone agrees that they *should* seek to gain cultural understanding. Although some judges recognize the value of cultural education,³³ Leigh Swigart interviewed an ICC judge who, when asked to describe their approach to

³¹ Describing the court's funding difficulties, Petit notes that out of "its 14 million Euro operating budget, the SCC received only half of it in 2022" (2023, Part 2; Onyia reports that the court "continues to struggle" with inadequate financial support (Onyia 2023). Indeed, the SCC's prospects have become especially bleak since the United States suspended its funding (Amnesty International 2025). Even domestic mass atrocity prosecutions brought pursuant to universal jurisdiction must be cost conscious given that universal jurisdiction trials routinely cost taxpayers millions of dollars each. "The four-year [Massaquoi proceedings] cost the Finnish taxpayer between \$US2-3million" (Stephens 2024). Similarly, the costs of prosecuting Rwandan Francois Bazaramba have been at 5 million euros (MTV Uutiset 2017). For more discussion see Laville 2005.

³² To be sure, open-source investigations may reduce some costs of mass atrocity trials, particularly those involved in identifying and interviewing witnesses. Langer and Eason, for instance, maintain that "technological changes have reduced the logistical and economic costs of gathering the evidence needed for international criminal cases" (Langer and Eason 2019, 794). Counterbalancing those savings, however, are certain very expensive technologies that have been used in lieu of witnesses. As Freeman reports, "the amount of resources and manpower dedicated [explosion reconstruction evidence at the STL] is unprecedented" (Freeman 2018, 302). Moreover, open-source investigations expend tremendous resources to store relevant evidence, and "[s]torage of content comes at significant financial cost" (White 2024, 242). Indeed, Hubley observes that "the process of preserving content is a costly and time-consuming one, particularly because it requires resources to store" (2022, 1006), while Murray *et al.* and Wang *et al.* concur, noting additionally the need to deploy highly-trained individuals capable of locating, analyzing, and authenticating the information they receive (Wang *et al.* 2013, 5, Murray *et al.* 2022, 572).

³³ These judges acknowledge that they "need" cultural experts because they "don't belong to the community" (Eltringham 2013, 350).

unfamiliar cultural elements in a case, opined that “judges do not need to understand culture. [T]hey just need to look at the evidence. If they do not understand something, they need *more* evidence.”³⁴

Concerns about judicial ability to gain useful cultural understanding are exacerbated in the context of an adversarial criminal trial, given that advocates generally feel at liberty (if not professionally compelled) to use all relevant information, including cultural information, in ways that serve their clients’ best interests, whether or not they advance accurate understanding in some objective sense of the term.³⁵ Further, even if we were not worried about such purposeful distortions, many commentators highlight the good-faith misunderstandings that can result from efforts to gain cultural understanding. Joshua Bishay, for instance, argues that “successfully transmitted cultural knowledge is often ‘amputated’, ‘manipulated’, ‘mutilated’ or possibly subjected to racial stereotypes of those on the legal team who may be unfamiliar with the reality of the affected communities” (Bishay 2021, 141). And Adina Loredana Nistor *et al.* make a similar point when considering ICC efforts to understand Acholi spiritual beliefs in the *Ongwen* case. Calling such cross-cultural translation “marred by difficulties and uneasiness,” they observe that

[i]n trying to translate local spiritual practices to cultural constructs from other cultures or to ‘western derived categories of mental disorder’ the cultural significance of these practices gets lost. When local concepts are translated into the Court’s working languages for the audience in the courtroom, it remains uncertain whether and how such linguistic and conceptual approximations really assist the ICC in making determinations on Ongwen’s guilt or innocence. Translation therefore often turns into *mutilation* during the course of legal argumentation. (Nistor *et al.* 2020, 174)

Advancing this same theme, Gregor Maučec identifies several discrete challenges of employing cultural expert testimonies in legal proceedings. Maučec echoes previous scholars in pointing to the epistemological challenge of reconciling anthropological and cultural disciplines with international legal proceedings (Maučec 2020, 204). However, he also highlights the way in which participation in legal proceedings can influence an expert’s research agenda “in a way that will skew the outcome of future proceedings” (Maučec 2020, 205). Finally, Maučec considers that an expert’s “empathy and self-identification” with the studied community might impair “the credibility and impartiality of the expert testimony” (Maučec 2020, 205).

Further complicating the picture are other culture-adjacent challenges, including the difficulty of providing adequate language interpretation in mass atrocity trials. In the international criminal justice bodies of old, including the ICTY and ICTR, the linguistic task was comparatively easy: interpretation was necessary for virtually every witness,

³⁴ Swigart 2020, 21. Similarly, over time ICTR judges found anthropological and other expert evidence to have reduced value (Eltringham 2013, 350-51).

³⁵ Many commentators have highlighted this phenomenon. Eltringham observes that “counsel for the parties do not maintain a consistent attitude with other epistemes, but will happily embrace or reject historical or anthropological knowledge as it strategically suits them” (2013, 347). Nuzban agrees (2023, 935). In a similar though arguably less cynical vein, Sagiv recognizes that “culture-dependent facts can be highly contextual and maybe subject to competing interpretations by those involved in the case” but advocated the use of experts (2015, 235).

but all of the witnesses spoke the same language,³⁶ so the tribunals could employ a passel of interchangeable interpreters, all of whom possessed the same useful language capabilities. Crimes prosecuted at the ICC, by contrast, not only occur all over the globe but often center on States where citizens speak a variety of different languages.³⁷ Kenyans may speak Swahili, Luhya or Kikuyu, while Ivorians speak a different group of languages (Swigart 2017, 206). Indeed, witnesses in the ICC's *Al Hassan* case, centering on Mali, gave testimony in seven different languages (*Prosecution v. Al Hassan* 2024, para. 42). Moreover, many of the languages in need of translation at the ICC are "languages of lesser diffusion," meaning that they are "neither habitually written nor widespread by territory or function" (Tomić and Beltrán 2013, 233-235, Swigart 2017, 205-206). Numerous commentators have highlighted the challenges that this linguistic complexity has posed for the ICC (Tomić and Beltrán 2013, 233, Swigart 2017, 205-206).

Of course, language is but one element of cultural understanding, but it is one that necessarily must be addressed. At the same time, given its global reach, the ICC is unable to foresee the locations of the next crimes it will be asked to investigate, so it "cannot count upon having speakers of relevant languages or persons knowledgeable about relevant regions and cultures among its own large staff, much less sitting on its eighteen-person bench." So, unlike the ICTY and ICTR, "which saw an accumulation of institutional knowledge and staff expertise about their respective geographic jurisdictions develop over time," each ICC trial must essentially "start from zero" (Swigart 2017, 206).

In light of this litany of challenges, it is reasonable to question whether continued efforts to enhance cultural understanding among trial participants are worth pursuing. Although by no means underestimating the difficulties, I remained convinced that they are.

To be sure, witness testimony is not as influential as it used to be, but most mass atrocity trials feature some (if not a lot) of witnesses, and some charges rise and fall on the testimony of these witnesses. Although cultural information, like any other kind of information, can be ignored, misunderstood, or strategically deployed, those possibilities do not provide a compelling reason to abandon efforts for edification, especially given that cultural education is a crucial component of accurate fact-finding whenever witnesses testify. As Jessica Almqvist put it, "[w]ithout understanding the local culture, i.e. the specific norms regulating the transmission and dissemination of knowledge as well as culture-specific taboos and inhibitions, interrogators and international judges face a serious risk of making erroneous assessments of points of evidence" (2006, 758). Gregor Maučec goes further. Although recognizing the challenges inherent in cultural education, Maučec describes fact-finding as a "profoundly cultural exercise" and maintains that "[t]he manner in which the facts are described more often than not arises from interactions that may include cultural elements." Decision-makers must, therefore, possess "adequate cultural knowledge (...) to properly understand how

³⁶ ICTR witnesses spoke Kinyarwanda whereas ICTY witnesses spoke BCS (Swigart 2017, 200-201).

³⁷ Swigart notes that the ICC's cases "necessitated communication-during investigations, in the courtroom, and for outreach activities-in over 30 "situation languages" (Swigart 2017, 205).

the fact is relayed, who relays it and in what context.”³⁸ Other scholars and practitioners agree.³⁹ Further supporting these views, research shows that reports submitted to courts by socio-cultural anthropologists have had a measurable and positive impact on judicial decision-making in mass atrocity trials (Wilson 2016, 731). This impact has been particularly noteworthy in cases involving speech crimes (Wilson 2016, 734), but it is not limited to them.⁴⁰ Cultural education may be especially valuable for victims seeking to hold offenders accountable since cultural education typically makes judges aware that people of different cultures experience, remember, and recount events differently. The practical effect of that awareness is to encourage judges to rely on witness testimony (and usually prosecution witness testimony) that they might otherwise deem suspect (*Prosecutor v. Akayesu* 1998, para. 156). Scholars recognize this impact,⁴¹ as do defendants.⁴² Indeed, some commentators have blamed some of the ICC’s unsuccessful investigations and prosecutions on its failure to gain “deep knowledge” of local phenomena and culture.⁴³ Finally, the ICC’s mission encompasses meaningful victim participation (Rome Statute, Art. 68). Those who work in the ICC’s Victims, Participation and Reparations Section contend that “the Court will not have the impact expected of it unless victims are able to relate its work to their own cultural context” (McKay 2020, 302).

Further, it is not only the assessment of witness testimony that benefits from cultural knowledge. Rather, our understanding of the non-testimonial evidence that has displaced so much witness testimony likewise is enhanced when viewed through an informed cultural lens. At its most obvious, cultural knowledge may be necessary to understand the way in which a video (or other piece of digital evidence) relates to the elements of charged crimes. For instance, numerous European prosecutions of the war crime of inflicting humiliating or degrading treatment have relied on videos of non-

³⁸ Maučec 2020, 198. Kidane notes that “[t]he same set of facts can be attributed different meanings because of the cultural backgrounds of fact finders” (2017).

³⁹ Swigart maintains that “[i]t is time for the ICC to accept that prioritising legal knowledge over other types of expertise, and in particular the understanding of how culture functions across all human endeavour, is bound to result in flawed justice” (2020, 36). Likewise, Schot asserts that to “achieve a more nuanced interpretation of facts and testimonies, and thus to reach a more accurate account of what happened, sociocultural concepts and aspects of testimonial evidence must be understood by the judges” (2020, 185). Maučec, for his part, advises judges to gain cultural understanding because “the lack of cultural proximity between the international judges as decision-makers and those involved in criminal trials may eventually lead to wrongful judicial decisions” (2020, 198).

⁴⁰ Schot describes the positive impact of cultural training and evidence in the ICC’s *Katanga* case (2020).

⁴¹ That is, scholars praising international judges for taking account of culture when assessing witness testimony typically highlight instances where judges invoked cultural divergences to explain their decision to overlook flaws in prosecution witness testimony (Bostian 2005, 24-28, Sander 2019, 1037-1038).

⁴² For instance, although scholars praised the *Rutaganda* Trial Chamber’s cultural sensitivity, defendant Georges Rutaganda himself excoriated the Trial Chamber’s “consideration various social and cultural factors in assessing” some witness testimony, maintaining that the judges relied on “generalizations” and “facts” that the judges believed to be matters of common knowledge but were “in reality only matters of personal knowledge and stereotypes that the various members of the Chamber may have had on the Rwandan people” (*Prosecutor v. Rutaganda* 2003, paras. 222-223).

⁴³ Swigart 2020, 35. In a similar vein, one international judge at the UNMIK Regulation 64 Panels in Kosovo described an interaction where he insulted a witness as a result of his cultural ignorance. The witness immediately left the courtroom and refused to testify (Amnesty International 2008, 26). Such failed prosecutions, if unjustified, are costly not just for victims but for the international criminal justice project as a whole, given the time, resources, and political capital spent on the typical mass atrocity prosecution.

European defendants posing with decapitated heads or otherwise desecrated corpses in Middle Eastern war zones. Some of these defendants have appealed to cultural norms to argue that the violent images depicted in the videos are understood differently by individuals in conflict zones than by Europeans in peacetime (*Prosecutor v. Hadi Habeeb Hilal* 2016, 2). The testimony of cultural experts helped to contextualize this evidence and the parties' argumentation in these and other cases, and it offered valuable insights into a culturally appropriate interpretation of the crime's legal elements (Andersson 2020, 272-277, Aksamitowska 2021, 204-206).

Cultural factors also impact the quantity of certain forms of digital evidence as well as the way in which that evidence is interpreted. As an example of the former, McDermott *et al.* point to the Independent International Commission of Inquiry on the 2018 Protests in the Occupied Palestinian Territory which relied on a great deal of open-source information documenting the protests. The Commission recognized, however, that Palestinian women were less likely to participate in the protests, so the harms they suffered were less visible in digital evidence and had to be elucidated through other means (McDermott *et al.* 2021, 100-101). McDermott *et al.* also highlight research showing that "peoples' identities influence and thus bias their interpretation of (...) visual data, such as the photographs and videos common to digital open source investigations" (McDermott *et al.* 2021, 102-103). To counteract this bias, they suggest methods for including "diverse investigators with different cultural schema and individual perspectives." Freeman and Vázquez Llorente similarly point to changing forms of internet communications that differ between peoples and recommend guidance from "experts who can interpret online communications within a cultural context" (Freeman and Vázquez Llorente 2021, 172-173).

Finally, the benefits of cultural knowledge also can extend beyond factual accuracy and can enhance other less tangible aspects of the international criminal justice project. Even the most accurate fact-finding needs to be perceived as accurate—and as legitimate. The ICC, for instance, is frequently alleged to manifest a Western bias (Fyfe 2018, 989), and some believe that cultural ignorance on the part of ICC judges could exacerbate these criticisms and thereby undermine the court's overall legitimacy (Maučec 2020, 193). Indeed, local stakeholders sometimes opine that the ICC simply cannot be successful if it does not understand "the local context" and specifically the "dynamics of the society where investigations are to take place" (Ogora 2019, McKay 2020, 289, Davidson 2021, 406). Finally, in addition to providing instrumental benefits, cultural understanding conveys respect, which is an important end in itself, not least because international witnesses have not always felt respected. (ICTR 2001).

5. Conclusion

Although international criminal law remains a nascent field, it has evolved considerably in the last few decades. Whereas the early ICL trials of the 1990s appeared to pay scant attention to issues of culture—despite considerable cultural distance between witnesses and most court personnel—recent years have seen sustained and sophisticated attention devoted to increasing cultural knowledge, especially as it pertains to witnesses and their modes of communication. This focus has shed light on previously under-explored issues, and it has enhanced our understanding of witness testimony and our ability to find accurate facts from that testimony.

But a different, recent change has enhanced our ability to find accurate facts even more: namely, the move in recent years from witness-only trials to trials that feature significant quantities of non-testimonial evidence. The new-found prevalence of non-testimonial evidence such as videos, text messages and social media posts, has reduced the number of contested issues in the average ICL trial and has served usefully to corroborate or contradict the kind of witness testimony that previously would have stood alone as the basis for a defendant's conviction or acquittal. We therefore can have greater confidence in the justifiability of today's ICL convictions.

Given these changes one could conclude that legal psychologists and anthropologists should turn their attention elsewhere, as efforts to understand the cultural proclivities of witnesses are less valuable than they used to be simply because witness testimony itself is less significant to the typical contemporary ICL trial. Such a conclusion is by no means ridiculous, given the various costs of enhancing cultural understanding and the challenges inherent in gaining useful information that does not distort as much as it elucidates. Nonetheless, this article concludes that cultural understanding remains crucial to the accurate understanding of witness testimony and additionally enhances the perceived legitimacy of ICL trials.

ICL as a field currently faces grave global, political challenges; accurate, culturally sensitive understanding of witness testimony will do little to ameliorate those challenges. But it will enhance the likelihood of accurate trial outcomes and thereby place ICL convictions on firmer factual foundations. Prosecutors, defense counsel and judges in ICL trials have little influence over the geo-political winds that currently blow so threateningly, but they can make every effort to understand those who bear witness to mass atrocities and a means of enhancing trial accuracy and showing respect both to witnesses and defendants.

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