

# Testimonial Injustice in International Criminal Law<sup>1</sup>

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**Abstract:** In this article, I consider the possibilities and limitations for testimonial justice in an international criminal courtroom. I begin by exploring the relationship between epistemology and criminal law, and consider how testimony contributes to the goals of truth and justice. I then assess the susceptibility of international criminal courts to the two harms of testimonial injustice: epistemic harm to the speaker, and harm to the truth-seeking process. I conclude that international criminal courtrooms are particularly susceptible to perpetrating testimonial injustice. Hearers in the international criminal courtroom should practice testimonial justice, but the institution is not structured in a way that can prevent every instance of testimonial injustice.

**Keywords:** epistemic injustice, testimonial injustice, legal epistemology, criminal law, international criminal law.

## I. Introduction

International criminal courts rely on the best evidence principle, which requires fact-finders to produce the best evidence available in order to reconstruct the truth about relevant events. In situations where crimes were not well-documented, witness testimony is the most crucial aspect of obtaining evidence. In any criminal court, fact-finders must balance goals of presenting the most relevant, truth-apt testimonies, with the goal of obtaining justice for all concerned parties. International criminal courts share these goals, but they face additional language and cultural barriers that can frustrate the aims of ensuring accurate fact-finding and voicing the experiences of witnesses to and survivors of violence. Social epistemology can help explain why international criminal courts may improperly exclude or discount these witnesses' testimonies, which both frustrates the truth-seeking mission and perpetrates further harms on victims.

In this article, I begin with a brief introduction to testimonial injustice. I go on to explore the epistemological foundations of truth and testimony in criminal law, and consider how testimony contributes to the goals of truth and justice within the social system of the criminal court. I then assess the susceptibility of

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international criminal courts and tribunals to the two harms of testimonial injustice. I argue that the overwhelming variety of social identities in international criminal courtrooms renders them particularly susceptible to perpetrating testimonial injustice, but fact-finders and other actors can mitigate the harms to victims and the truth-seeking mission by practicing testimonial justice. I conclude that the scope of international criminal trials, however, may render testimonial justice impossible, and thus we must balance truth and justice with other goals of international criminal law if we are to justify the institutions' existence in lieu of alternative justice mechanisms.

## II. Testimonial Injustice

Testimony is evidence that we acquire from other people, rather than our own mental processes of perception, remembering, and reasoning. As a source of justification, testimony involves the kind of reliance on other people that Aristotle considers part of what allows us to live as human beings in societies (Aristotle 1962, 1253a2). Testimony is our primary source of social evidence, and we rely on testimony as social evidence from many doxastic agents (Audi 2011, 150-151). Some speakers will be insincere or have relied on poor evidence themselves, thus testimony may or may not be a reliable source of justification for beliefs.

Epistemic injustice is a phenomenon that occurs when one's knowledge (in the form of testimony or otherwise) is not seen as reliable when it should be, especially due to social, cultural, or historical prejudice (See Fricker 2007). Miranda Fricker acknowledges that this phenomenon exists when there is a "mismatch between rational authority and credibility – so that the powerful tend to be given *mere* credibility and/or the powerless tend to be wrongly denied credibility." (Fricker 2006) When we recognize this imbalance of social power, we can see how individuals with less power (often women) are excluded "from the class of those who fully function as knowers." (Langton 2006, 132) Elizabeth Anderson asserts that we should be required to use of all of society's epistemic resources, ensuring epistemic diversity and not ignoring any voices for prejudicial reasons (Anderson 2006, 11). She sees this as a requirement of democracy, but it also seems necessary for accurate truth-seeking.

*Testimonial injustice* is a form of epistemic injustice that "occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word." (Fricker 2007, 1) The speaker is treated unjustly when she receives this deflated credibility from the hearer, based on what Fricker calls "identity prejudice." (Fricker 2007, 4) Identity prejudice results from the power imbalance between social agents, and arises when an agent maintains a prejudice due to a feature (or features) of social identity of the other agent (Fricker 2007, 28). The prejudice leads to stereotyping, which in turn results in the hearer making unwarranted assumptions about the speaker based on her social identity (Fricker 2007, 30). Much of the work on testimonial injustice

centers around social identities of race and gender, but identity prejudice occurs with respect to many other aspects of one's social identity, including culture, social class, language, and age.

The views of Fricker and Anderson reveal that instances of testimonial injustice result in at least two harms. First, there is a direct harm to the individual whose testimony is discounted. But there is also a harm to the truth-seeking endeavor as a whole, when a relevant, reliable piece of social evidence is excluded from the set of evidence that serves as justification for a particular belief. Fricker claims that the identity prejudice "presents an obstacle to truth, either directly by causing the hearer to miss out on a particular truth, or indirectly by creating blockages in the circulation of critical ideas." (Fricker 2007, 43) Broadly, we don't want to engage in practices that harm members of our social community, nor do we want to prevent our communities from accessing all of the epistemic resources possible in service of gaining knowledge. We will see in Section III and Section IV how concerns about the harm of epistemic injustice function in criminal law settings.

Fricker argues that we should not permit social pressure to force our norms of credibility to mirror the social distribution of power (Fricker 2006, 62). She suggests that the virtue of *testimonial justice* can only occur in light of testimonial responsibility on the part of the hearer of testimony (Fricker 2007, 91). For Fricker, testimonial responsibility demands a "distinctly *reflexive* critical social awareness" on the part of the hearer (Fricker 2007, 91). This requires the hearer to assess the credibility judgment she might be inclined to make, and then factor the identity power imbalance into the final credibility judgment (Fricker 2007, 91). As Fricker notes, "[i]n testimonial exchanges, for hearers and speakers alike, no party is neutral; everybody has a race, everybody has a gender." (Fricker 2007, 91) But it is the responsibility of the hearer with the relative social power, not the speaker, to practice the virtue of testimonial justice.

It is also in the hearer's interest to avoid testimonial injustice, in terms of her own epistemic interest in obtaining the truth. Failing to neutralize identity prejudice makes a hearer more likely to fail to obtain truths (Fricker 2007, 122). The upshot of the virtue of testimonial justice, then, is that it furthers our goal of achieving both justice *and* truth at the same time (Fricker 2007, 120). It is plausible, then that a hearer in search of justice and/or truth should be motivated to assess a speaker's credibility with an awareness of social power relations and the potential for prejudice (Fricker 2007, 127). In the next section, I turn to the subset of social epistemology that specifically focuses on truth, social power, and the law.

### III. Truth and Testimony in Criminal Trials

As a form of applied epistemology, legal epistemology studies whether legal systems of investigation that claim to be seeking the truth are actually structured in such a way as to lead to justified, true beliefs (Laudan 2011, 272). I limit my

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inquiry to legal epistemology in the context of criminal adjudication, and I focus on criminal law as a social system. In what follows, I explore the application of our epistemological concepts of truth and testimony within the realm of criminal law.

### Theories of Truth and Criminal Law

Most theorists of epistemology and the law argue that it is not necessary to consider anything more than a common sense definition of the concept of truth in order to analyze a legal system's ability to seek the truth (Ho 2006, 56; Haack 2003, 19). I agree that it is not necessary to choose one appropriate theory of truth to the exclusion of the others, but I also do not simply presume a basic, universally-accepted concept of truth. The first cut to make regarding truth in criminal law is between the concepts of objective and subjective truth. We might think there is one accurate account that can be given with respect to an event or series of events, and this means the court's role is to determine that one account (Damaška 1998). This objective view of truth will often correspond with a realist or correspondence conception of truth, in which the truth is determined by the way things are in the world. Alternatively, we might adopt a subjective view of truth, in which there are multiple accounts that could each accurately explain an event or series of events. We could also adopt a skeptical view like that of Jeremy Bentham, that historical truth is a fictitious entity in the law, and we can only hope to determine "*legal* truth on the facts of the matter," which is determined by the "outcome of reasonable legal procedures." (Kaptein 2009, 17)

Legal systems do focus on facts, and thus the correspondence theory of truth will often be the most useful tool. This sort of Aristotelian view is, in fact, largely what theorists have in mind when they imagine a straightforward theory of truth. Ho Hock Lai accepts this sort of view, but goes on to qualify that the "verification of correspondence" can hardly be the general criterion we should use for whether something should be accepted in a court as fact (Ho 2006, 57). Rather, he notes that many different theories are compatible with the correspondence theory of truth and can thus be useful with respect to trial deliberation. Mirjan Damaška suggests that the correspondence theory may be insufficient for truth-seeking in adjudication because "most facts we seek to establish in adjudication are 'social' facts rather than phenomena intrinsic to nature." (Damaška 1998, 291)

Coherence theory can be used to assess whether the explanations of an event or series of events is plausible, based on the coherence of witness statements and other evidence (Allen 1997). Amalia Amaya defends a coherence theory of law, arguing that "[a] hypothesis about the events being litigated is justified only if it coheres with a body of background beliefs and the evidence at trial." (Amaya 2008, 307) But if we accept the concept of objective truth,

coherence theories present a problem. As Damaška notes, “for any adjudicative event, there may be several coherent sets of statements, or several consistent theories. That a set of statements cohere in adjudicative practice is not a sufficient reason to believe that these statements are true.” (Damaška 1998, 291-292)

Susan Haack advocates for a pragmatist theory of truth in the law. (See Haack 2014; Haack 1976) Her view is that truth is not relative, but that legal inquiry cannot proceed in the same way as scientific inquiry (Haack 2014). The American (adversarial) legal system, at least, is not aimed at trying to find the “truth” but rather is explicitly trying to meet a standard of proof in establishing a pre-determined conclusion<sup>2</sup> (Haack 2014).

### Truth and Testimony as Evidence

A legal trial uses testimony as part of an attempt to find the truth of what occurred, but it cannot “provide an exact reproduction of what is alleged to have occurred.” (Greer 1971, 140) Thus not all testimony that is available to the parties to a legal trial will be appropriate as actual testimonial evidence. If we assume that a criminal trial seeks to establish both that a crime was committed and the defendant committed the crime, then according to Larry Laudan, the only relevant evidence is “testimony or physical evidence that would make a reasonable person either more inclined or less inclined to accept either of these hypotheses.” (Laudan 2006, 17-18) Testimony should be both reliable and relevant for it to play a role in helping the fact-finder of a given trial determine the truth. In an adversarial trial, testimony can be excluded, even when it is both reliable and relevant, if it might be prejudicial to the defendant to admit the evidence.

Thus would-be testifiers can be prevented from speaking in a trial if their testimony is deemed irrelevant, unreliable, or prejudicial. Even when they are permitted to testify, their testimony may be discounted if it is deemed unreliable, confusing, or vague. There will certainly be cases in which testimony would detract from the ability of the fact-finder to seek the truth. But there are significant drawbacks to the exclusion of evidence. With respect to testimonial evidence in particular, it can be said that “[n]either complainants nor the accused necessarily benefit from each other’s misfortune when testimonial voices are silenced.” (Roberts and Hunter 2012, 21)

This quotation captures the danger of the two harms, discussed in Section II, that can result from testimonial injustice. First, the exclusion or discounting of testimony can constitute an individual harm to a testifier. We will need a better

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<sup>2</sup> In an adversarial system, in which lawyers each aim to establish an account of the truth that is most favorable to their respective clients, procedural rules limit the court’s ability to seek an objective truth. In an inquisitorial system, the procedures presume that there is one account of objectively true facts, and the trial is aimed at establishing those facts.

understanding of what a criminal trial owes individuals other than the accused in order to properly assess the responsibility of the criminal legal system with respect to testifiers. But second, the exclusion or discounting of testimony risks threatening the accuracy of the truth-seeking process, and this harm certainly falls within the purview of the criminal legal system. Accordingly, we need a better conception of how to understand and balance the competing concerns we have identified so far in this Section.

### Truth and Justice in Criminal Legal Systems

Our next step, then, is to ask what the goal of a criminal legal system should be. If the only goal is to seek the truth, then it seems that an inquisitorial system is better suited for the task. Ho sees this goal as obvious, arguing that “the ‘basic purpose of a trial is the determination of truth’.” (Ho 2006, 52) For Laudan, we assess whether our criminal trial procedures are “genuinely truth-conducive,” because a criminal trial is “first and foremost an epistemic engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators.” (Laudan 2006, 2)

But we also care about *justice* in a criminal legal system. Bentham uses the metaphor of “Injustice, and her handmaid Falsehood” (Bentham 1978) to make the point that application of the law demands both truth and justice. Laudan notes that “[w]ithout ascertaining the facts about a crime, it is impossible to achieve justice, since a just resolution crucially depends on correctly figuring out who did what to whom. Truth, while no guarantee of justice, is an essential precondition for it.” (Laudan 2006, 2) Haack claims that “substantive justice requires not only just laws, and just administration of those laws, but also factual truth – objective factual truth; and that in consequence the very possibility of a just legal system requires that there be objective indications of truth, i.e., objective standards of better or worse evidence.” (Haack 2014, 27)

Damaška acknowledges that “the criminal process also serves a variety of needs and values that are independent from and potentially in conflict with the drive toward fact-finding accuracy.” (Damaška 1977, 305) In large part, the other objectives of the criminal process are related to social forces that influence the criminal legal system, such as the need to protect human rights from abuses of power, social peace, or cost (Damaška 1977, 305; Damaška 2003, 118). When we think about these so-called ‘justice’ considerations, and recognize that they are related to social goods, the role of social epistemology in legal systems becomes more distinct. We cannot evaluate testimony or truth without identifying the influence of social processes within the courtroom, nor can we properly balance the goals of truth and justice in criminal proceedings.

The precise balance of these goals will vary depending on the criminal legal system in question, which will become clear in Section IV. This will occur by system, rather than by individual case, because a criminal legal system cannot boast of unfairness in order to achieve either truth or justice. But, as H.L.A. Hart

and J.T. McNaughton explain, a legal system “deliberately sacrifices some aids to the ascertainment of truth which might be useful in particular cases in order partly to satisfy the practical exigencies of the needs for an immediate and definite decision and partly to serve what are deemed to be more nearly ultimate social values.” (Hart and McNaughton 1958, 50-51)

#### **IV. Truth and Testimonial [In]Justice in International Criminal Law**

In this final arc of the argument, I reach the crux of my argument and apply the concepts previously outlined to the international criminal legal system. I begin by considering the unique goals and structures of the international criminal legal system, before analyzing the tension between truth and testimonial justice in the international criminal courtroom. I end with a brief discussion of less formal justice mechanisms like truth and reconciliation commissions, and assess whether these institutions might be more responsive to concerns about testimonial injustice. Ultimately, I conclude that international criminal courts and tribunals are better suited to serve range of goals of international criminal law.

##### Goals of International Criminal Law

There are many goals of international criminal law, several of which necessarily conflict with one another, leading some to argue that there are too many goals to ensure consistency in the legal system (Stover 2007, 14; Damaška 2008, 329). Seeking justice and seeking the truth are clearly two of these goals. The Rome Statute of the International Criminal Court (‘ICC Statute’) states that it has been created in order to “put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes,” and to “guarantee lasting respect for and the enforcement of international justice.” (ICC Statute, Preamble) The ICC Pre-Trial Chamber has also explicitly indicated that “the search for truth is the principal goal of the Court as a whole.” (*Prosecutor v. Bemba*, Decision on the Evidence Disclosure System, para. 11) There is, however, “a tension between all the boxes that international criminal procedure seek to tick: they want to do justice for the victims, and to do so in an expedient manner, whilst ensuring the safety of the witnesses and respect for the interests of the international community in the outcomes of their trials.” (McDermott 2016, 126) The aim of this section is to more precisely identify the locations of this conflict as it pertains to truth and testimonial justice, and to establish that testimonial justice may not be possible in an international criminal courtroom.

##### Structure of International Criminal Procedure

International criminal courts and tribunals are mostly constructed based on the adversarial system model, although there are some aspects of the trial processes

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that include elements of the inquisitorial system model, such as the duty of the Prosecutor to seek the truth through the investigation of “incriminating and exonerating circumstances equally.” (Caianiello 2011; ICC Statute, art. 54(1)(a)) International criminal judges can also be thought of as utilizing managerial powers, thus maintaining the general adversarial system but permitting judges to insert themselves at times in order to speed up the trial process (Langer and Doherty 2011, 241). Judges serve many purposes when they take on a managerial role: “cleaning up the record; clarifying testimony; supplementing, eliciting, and testing testimony, as well as challenging the credibility of witnesses.” (Byrne 2013, 1002)

### Truth and Testimony in International Criminal Law

While all criminal legal systems aim at least somewhat at seeking the truth, international criminal legal systems that have been established to respond to mass atrocity have a special responsibility with respect to the truth. Not only are they trying to establish the truth of the proposition about whether a defendant committed the crimes with which he has been charged, but international criminal courts and tribunals are charged with establishing an accurate historical record (Parmentier 2002, 203; Ohlin 2009, 96). Witness testimony is the most crucial aspect of obtaining evidence that helps establish the truth, especially when crimes have not been well-documented. As Nancy Combs argues, “[e]yewitnesses have a story to tell about certain events relevant to the defendant’s criminal culpability, and, through counsel’s questioning, they are able to tell that story in a way that not only is comprehensible to the fact finder but that provides the fact finder sufficient information to draw reasonable conclusions about the defendant’s liability.” (Combs 2010, 21)

International criminal courts and tribunals have a general preference for live testimony by witnesses rather than written statements. ICC Statute Article 69(2) “provides for the testimony of witnesses to be given in person at the seat of the Court, which is imperative for the examination and cross examination of witnesses.” The ad hoc tribunals have also expressed a preference for live testimony where possible (See Klamberg 2013, 365). Live testimony permits the accused to face her accuser, and it also allows for the judges to better assess witness credibility (Ngane 2009, 433). Recall that testimony should be both reliable and relevant for it to play a role in helping the fact-finder of a given trial determine the truth. I now turn to some of the ways in which testimony is either discounted or excluded altogether in international criminal legal systems. I draw heavily on the empirical work of Combs, who has done extensive work in documenting problems in fact-finding in international criminal law.

### Excluded Testimony



While evidence is not often excluded in international criminal law, live testimony can be excluded for several reasons. First, situations can arise in which the “personal safety and security of the witness, or other costs to the tribunal or the witness,” are weighed as more important than the right of the accused to in-person cross-examination, or the value of the live testimony for obtaining the truth (May and Fyfe 2017, 154). Testimony can also be excluded based on relevance. In this case, if testimony will not serve to make the guilt of the accused more or less likely to be true, it may be excluded. Combs claims that international witnesses are “frequently unable to provide the court with details that *are* relevant to their testimony.” (Combs 2010, 38) It may be that a witness is expected to produce relevant information during her testimony, but the witness testifies about something completely outside the scope of the trial’s inquiry. Sometimes counsel is clearly trying to obtain relevant information from a witness, and is nonetheless unable to do so (Combs 2010, 56). However, it seems that international criminal courts and tribunals will often err on the side of deeming evidence relevant to the truth-seeking endeavor, and admit the evidence (Murphy 2010, 540).

Testimony can also be excluded in international criminal law based on a determination that the witness is not credible, and thus the testimony lacks probative value. Again, this is not common, as the courts seem to want to give witnesses the benefit of the doubt, and often assume that the appearance of credibility issues can be explained by cultural, educational, or language differences (Combs 2010, 177-178). Trial Chambers, according to Combs, will admit that there are plenty of issues with testimony, but “they often unquestioningly attribute those problems to innocent causes that do not impact the witness’s credibility.” (Combs 2010, 189) Cases of clearly perjured testimony are likely to be excluded, but these cases are rare, despite the fact that there is a serious problem with lying at some international criminal tribunals (Combs 2010, 130).

### Discounted Testimony

Although international courts are often willing to give international witnesses the benefit of the doubt with respect to meeting relevance and credibility requirements, these witnesses are much more likely to have their testimony discounted for reasons *other than* that the evidence can be reasonably deemed irrelevant or not credible. The social dynamics in international criminal law are conducive to misunderstandings that result in discounted testimony. Nearly every international criminal trial proceeds in several languages simultaneously, requiring the participation of multiple translators. Not only does this make the trial process incredibly slow, it introduces numerous possibilities for poor translations, resulting in the likelihood that a witness will be misunderstood and the probative value of evidence will be compromised. Sometimes misunderstandings are not identified, while in other cases a frustrated counsel

decides to stop a line of questioning before a satisfying reply is obtained, and in both scenarios the fact-finding mission is impaired (Combs 2010, 62).

Differences in culture can also create misinterpretations, such as what occurred during the ICTR's *Akayesu* trial with respect to the term "rape." (*Prosecutor v. Akayesu*, Judgement, paras. 152-154) In this case, interpreters translated several words as "rape" that did not seem to convey the "force" inherent in rape, yet the Trial Chamber determined that this was correctly done given the cultural taboos that may have prevented witnesses from testifying more clearly about a private and delicate issue (*Prosecutor v. Akayesu*, Judgement, paras. 152-154). This is also an instance where gender dynamics may have played a role in obscuring the testimony (Buss 2014), since even in communities with a shared culture, "men and women communicate differently, as do people of higher and lower social standing." (Combs 2010, 79-80)

There are other cultural differences in communication practices that can result in confusion and subsequent discounting of testimony. Witnesses who come from communities that rely on oral traditions "frequently report events that were recounted to them as though they personally saw them." (Combs 2010, 94) In an adversarial system, such reports would likely be discounted or excluded as hearsay. Yet many international witnesses consider the fact that an event was recounted to them by someone who witnessed the event in person as warranting their own testimony about the event (Combs 2010, 94). Thus witnesses will share information with the rest of the community, and then the information is seen as shared knowledge (*Prosecutor v. Kamuhanda*, January Transcript, para. 41). The ICTR's *Musema* Trial Chamber explained that in Rwanda, there is a "tradition that the perceived knowledge of one becomes the knowledge of all." (*Prosecutor v. Musema*, Judgement and Sentence, para. 103) In another ICTR case, *Ndindabahizi*, a witness asserted that "when someone asserts that [an incident] is a true fact, you yourself will take it to be the truth." (*Prosecutor v. Ndindabahizi*, Transcript, paras. 19-20)

There are also often discrepancies between the witnesses and the courtroom staff in terms of education that can contribute to the discounting of testimony. Illiteracy and lack of education can impair the ability of international witnesses to answer questions. Witnesses who do not have significant formal schooling and are not in the habit of estimating distance or time with numbers will likely be unable to provide certain important details in their testimony, and this may come across to well-educated courtroom staff as an indication that the testimony is not beneficial (Combs 2010, chap. 2). Combs recounts that those witnesses who can provide numerical details are sometimes "obviously inaccurate," which is what happened when the ICTR's *Kamuhanda* Trial Chamber discredited witness GEM's testimony in part because she estimated that there were one million Tutsis taking refuge at the Gikomero Parish, while other witnesses placed the number of Tutsi refugees in the thousands (*Prosecutor v. Kamuhanda*, February Transcript, para. 106).

### Testimonial Injustice in International Criminal Law

Imagine that you are a prosecutor asking questions of your own witness, who claims to have witnessed a mass atrocity crime in her small village. Let's call her Maria. You want to establish how far away Maria was from the atrocity when it occurred, but she does not use numbers to describe very much in her everyday life. She cannot tell you how many kilometers away the site is. She cannot tell you in minutes how long it takes her to walk there from her house. She cannot estimate the distance in meters between herself and the judges. Maria can tell you, however, how many cigarettes she would normally be able to smoke during the time it takes her to walk between point A and point B. This witness is at risk of having her testimony discounted by other hearers in the courtroom solely on the basis of her method of explaining distance. This witness, whether or not she has something credible and relevant to say, is at risk of testimonial injustice.

As I already noted with respect to Fricker's work on testimonial injustice, much of it centers around social identities of race and gender, but identity prejudice occurs with respect to many other aspects of one's social identity, including culture, social class, language, education level, and age. There are so many language, culture, economic, and other social differences, but we must recognize that they are not just differences. They are *imbalances*, and thus they imply a social imbalance in which our witness may not appear to be a credible witness. The Prosecutor and judges are all likely people who use numbers to measure distance, and that she does not is likely to result in testimonial injustice.

Not all of these cases will be as clear as our number-averse witness. Female witnesses in general can have their testimony discounted based solely on their communication style. Combs notes the following in a footnote:

Research indicates, for instance, that female witnesses and witnesses of low social status more frequently engage in what has been termed 'powerless' speech. That is, they use more 'hedges,' such as 'I think' or 'it seems as though;' they use more modifiers, such as 'kind of' or 'sort of,' and they use more appended phrases such as 'you know.' They also use more hesitation forms, such as 'well' and 'um,' and they more frequently state their declarations with a rising inflection, which makes the declarations sound more like questions. Research indicates that fact finders are less favorably disposed to witnesses who use a 'powerless' style of testimony. (Combs 2010, 80)

As international witnesses, poor women who have survived violence might possess multiple social liabilities that could result in their testimony being heard as 'powerless.' Of course, I identified various other social imbalances that might result in testimony being heard as 'powerless' or 'weak,' and thus the danger of epistemic injustice is clearly not limited to female witnesses.

There is a distinct harm that occurs when a witness's testimony is discounted based on the way in which it is provided, and the examples listed above suggest that international criminal law introduces significantly more opportunities for these kinds of testimonial injustice than a domestic criminal

trial. When an international witness like Maria is not respected as someone with knowledge, as someone who has something to contribute to the fact-finding mission, she experiences testimonial injustice. We might think that this harm is not within the purview of the court, that they are only responsible for caring about the truth-seeking process, and they have no particular obligations to victims. This claim seems wrong to me, both normatively and empirically. We should not be constructing or sustaining justice institutions that do not care about their relationship with direct victims of a mass atrocity. But it is also clear that these institutions do care. Victims and witnesses have their own representation in many of these courtrooms. There is an entire administrative branch of these courts dedicated to victim protection and outreach. By identifying the risk of testimonial injustice, I have simply given these institutions another tool for increasing victim participation and protection.

My claim is not that judges, investigators, and other hearers in the international criminal courtroom have failed to exhibit the virtue of testimonial justice. There are, in fact, quite a few examples of judges who have engaged in activism to try to salvage the testimony of speakers with relatively low social capital (Combs 2010, chap. 7). Rather, my claim is that the virtue must be intentionally pursued, and it must be grounded in respect for the speaker, not in feelings of pity. Hearers must be in a position to responsibly assess testimony by recognizing the potential for prejudice in a credibility judgment. So my claim is that judges and other hearers in the international criminal courtroom should actively pursue testimonial justice in furtherance of the aims of both justice and truth.

I noted in the previous sub-section that there are instances in which testimony is properly excluded or discounted, as the testimony does not aid the fact-finder in establishing the truth, or the testimony will put the testifier at risk of harm. Arguably, there is no testimonial injustice when testimony is given adequate and fair consideration, and it is nonetheless determined that it is not suitable for influencing the fact-finding objective. A witness who commits perjury or who does not have any knowledge (personal or secondhand) about a relevant incident is not wronged. We must also distinguish testimonial injustice from victim's rights with respect to participation in the trial, as a possible goal of international criminal justice. The exclusion of live testimony, in favor of written testimony, may result in harm to the witness if she feels very strongly about testifying in person. But we can distinguish this harm from the harm she might experience if her testimony is excluded altogether, or discounted on an unreasonable basis. We might think that testimonial justice does not guarantee a particular method of having your voice heard – it just means your voice and your knowledge can't be discounted based on your social position. So a witness who is permitted to provide written testimony, which is then assigned probative value, has not necessarily experienced testimonial injustice.

On the other hand, one goal of international criminal courtrooms is to give victims of violence some measure of control over their assailants, or at least the historical narrative. If a court fails with respect to this goal, a victim might experience harm, and it might in fact be an epistemic harm. In the context of a criminal trial, particularly an international criminal trial, it may be that it is impossible to practice testimonial justice. The structure of a criminal trial is such that the institution sets the terms and the parameters of the truth-seeking inquiry. The easy questions are what to do in the extremes of perjury and someone who doesn't use numbers to measure distance. Epistemic harm on the latter end, but not on the former. A harder question is what happens when someone is told that their testimony must cease because it is not 'relevant' to the proceedings. The scope of any trial is limited to the charges and defendants in the docket, and international criminal law is further limited. The ICTR, for instance, only had within its mandate the ability to investigate and prosecute crimes committed by Hutus against the Tutsis. I do not agree with the claim that the Rwandan genocide was a civil war, but I do think there were atrocities committed by the RPF, and these are not within the scope of the Court's mandate. Thus a witness who experienced extreme violence, and was a relevant, credible witness with respect to that violence, may be told her testimony is irrelevant based on the previously-determined scope of the proceedings. In such a case, the Court may be precluded from practicing testimonial justice, despite its best efforts, and the harm experienced by the witness may in fact be an epistemic harm.

### Alternative Justice Mechanisms

Given all of the issues that can arise with excluded and discounted testimony in international criminal trials, we should be inclined to consider whether alternative justice mechanisms might better serve the goals of international criminal justice, particularly those of truth and justice. Often, alternative justice mechanisms are more focused on giving a voice to victims and establishing a historical record. Mechanisms that are more focused on restorative justice, societal healing and reconciliation are able to provide a more accurate historical narrative of mass atrocity (Henkin 1995, 184-186; Weinstein and Stover 2004, 13-14; Jain 2010, 267). If we think that victims have a 'right to know the truth,' then taking the possibility of punishment off the table can be useful in encouraging the forthright testimony of perpetrators. Arguably, they also can provide a less structured opportunity for truth-telling on the part of victims, where testimony is encouraged as part of constructing a narrative, rather than supporting a previously-determined narrative about an accused individual.

However, although I have not focused on the other goals of international criminal justice in this article, it is perhaps time to acknowledge their importance. Establishing the truth is important for generating a historical record, but also because we do not want to have a practice of reaching erroneous

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verdicts in a criminal trial. And we *do* want to reach verdicts in criminal trials. We care about desert, and while alternative justice mechanisms may be well-suited for some communities, and perhaps for restorative justice, they do not necessarily result in everyone receiving what they deserve. Accordingly, we care about truth as a way of ensuring that victims and defendants get what they deserve, in the form of accurate criminal verdicts, and appropriate punishment for defendants who have been found guilty. An assessment of the value of punishment in international criminal law is far outside the scope of this article, but retributive justice is seen by many as a crucial goal of international criminal institutions. A shift away from this understanding of international criminal law would require much more than the foregoing analysis. What I have done, I hope, is shown the need for the international criminal legal system to continue to identify potential locations for testimonial justice to occur, and take responsibility for pursuing testimonial justice where at all possible within the limited scope of a criminal trial.

## V. Conclusion

I have argued that because we rely on each other epistemically for the truth of our beliefs, particularly in the case of criminal trials, we need to engage in practices that ensure proper assessment of the credibility of speakers. We cannot evaluate testimony, inside or outside the courtroom, without identifying the influence of our social identities on our assessments. The influence of prejudice on our assessment of testimony risks testimonial injustice, which harms individuals by discounting them as epistemic agents, and also the quality of our search for the truth. International criminal courts and tribunals represent a unique site for social inequalities, and thus the testimony of international witnesses is likely to be discounted (or privileged) based on social identities, rather than on credibility. Judges and other hearers in the international criminal courtroom should practice testimonial justice in order to best seek the goals of truth and justice. But we must also recognize the limitations of a criminal courtroom, and acknowledge that while they may be preferable to alternative justice mechanisms, they are not structured in a way that can prevent every instance of testimonial injustice.

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