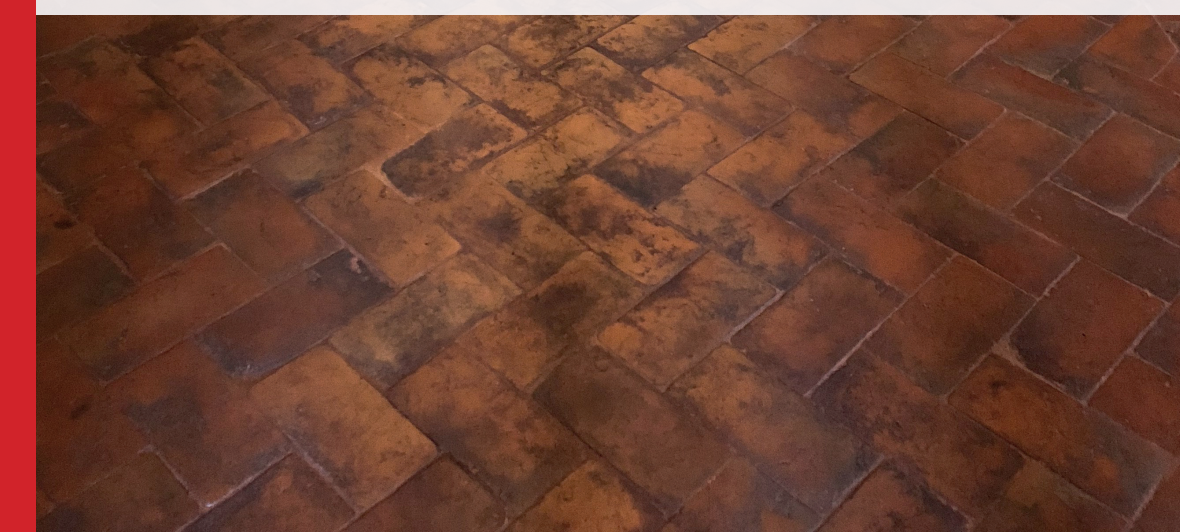




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## **Philosophical Foundations of International Criminal Law: Foundational Concepts**

Morten Bergsmo and Emiliano J. Buis (editors)



## E-Offprint:

Shannon E. Fyfe, “Truth, Testimony, and Epistemic Injustice in International Criminal Law”, in Morten Bergsmo and Emiliano J. Buis (editors), *Philosophical Foundations of International Criminal Law: Foundational Concepts*, Torkel Opsahl Academic EPublisher, Brussels, 2019 (ISBNs: 978-82-8348-119-8 (print) and 978-82-8348-120-4 (e-book)). This publication was first published on 21 February 2019. This e-offprint was released with a new copyright page on 16 December 2022.

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**Front cover:** *The old library in San Marco Convent in Florence which served as an important library for the development of Renaissance thought from the mid-1400s. The city leadership systematically acquired original Greek and Latin texts and made them available in the library, which offered unusually open access for the time. They became part of the foundations of the Renaissance.*

**Back cover:** *Detail of the floor in the old library of the San Marco Convent in Florence, showing terracotta tiles and a pietra serena column. The clay and stone were taken from just outside the city, faith-ful to the tradition in central Italy that a town should be built in local stone and other materials. The foundational building blocks were known by all in the community, and centuries of use have made the buildings and towns of Tuscany more beautiful than ever. Similarly, it is important to nourish detailed awareness of the foundational building blocks of the discipline of international criminal law.*

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# Truth, Testimony, and Epistemic Injustice in International Criminal Law

Shannon E. Fyfe\*

## 8.1. 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 the relevant events. When a fact-finder asserts that a defendant is guilty or innocent, we assume that the fact-finder ‘knows’ the truth about whether the defendant is guilty or innocent. But the epistemic position of the fact-finder depends on the quality of the evidence presented, and fact-finders must rely on the testimony of others in seeking the truth.

Epistemology can help us ground the relationship between truth and testimony in international criminal law, and also understand the danger of perpetrating further injustices on survivors of mass atrocities. 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 the goals of presenting the most relevant, truth-apt testimonies, with the goal of obtaining justice for all of the relevant 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. For instance, the

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preference for live testimony in international criminal courts is supported by the epistemological assertion that in-person testimony will allow fact-finders better access to the truth. Yet social epistemology can help explain why international criminal institutions are at risk of perpetrating testimonial injustice on international witnesses, which both frustrates the truth-seeking mission and perpetrates further harms on victims.

I begin the chapter by exploring the epistemological foundations of truth and testimony in criminal law. I analyse the concept of knowledge, focusing on the different accounts of truth and the credibility of testimony. I then introduce the concepts of epistemic and testimonial injustice, and present a plausible account of how hearers can avoid perpetrating these injustices on speakers. Next, I turn to criminal law and consider how truth and testimony function under different procedural systems and contribute to the legal goals of truth and justice. In the final section, I assess the susceptibility of 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 practising testimonial justice. I conclude that while truth and justice are crucial goals of international criminal law, they are not the only goals, and thus we should not abandon international criminal law in favour of alternative justice mechanisms.

## 8.2. Truth and Knowledge

Aristotle observes, in the *Metaphysics*, that all human beings desire to know.<sup>1</sup> As an empirical matter, this is likely untrue. Alternatively, a modest interpretation of this claim is that we take ourselves to know a lot, and we do not want to be wrong about the things we claim to know.<sup>2</sup> In other words, we want to have *true beliefs*. Aristotle also observes that we are

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<sup>1</sup> Aristotle, *Metaphysics*, in Richard McKeon ed. and W. D. Ross trans., *The Basic Works of Aristotle*, New York, Random House, 1941, Book I.1, 980a22.

<sup>2</sup> There are several different types of knowledge, including *propositional knowledge*, that is, knowing that a statement is true; *acquaintance knowledge*, that is, being familiar with a topic or things through personal experience; and *how-to knowledge*, that is, knowing how to perform a particular action or task. Because we are concerned about knowledge insofar as we care about truth, we will be focused only on propositional knowledge.

naturally political creatures, and that we rely on one another in order to live in community with one another.<sup>3</sup> We also rely on each other epistemically, in that we cannot possibly independently verify everything we claim to know. Thus, our beliefs are informed by data and testimony<sup>4</sup> we receive from other people, and we depend on the quality of this information to ensure that our beliefs are true beliefs. In this section, I consider the broad conceptual foundations of truth and knowledge in general.

### 8.2.1. Knowledge

One definition of knowledge that has been generally accepted<sup>5</sup> is a justified, true belief. In Plato's *Theaetetus*, Socrates considers several different possibilities for the definition of knowledge.<sup>6</sup> He rejects the idea of knowledge as examples in geometry or astronomy,<sup>7</sup> noting that we are looking for characteristics that help us explain the concept of knowledge, not *instances* of knowledge.<sup>8</sup> Next, Socrates rejects the idea of knowledge as perception.<sup>9</sup> Perception can provide evidence for true beliefs, but it would be absurd to think that our perceptions are always accurate, and there are also instances of knowledge that cannot be captured by perception.<sup>10</sup> The next definition Socrates considers is the idea of knowledge as "true belief".<sup>11</sup> He rejects this on the basis that while someone may have true beliefs, if they are for the wrong reasons, we reject the true beliefs as instances of knowledge.<sup>12</sup> Accidentally true beliefs cannot be

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<sup>3</sup> Aristotle, *Politics*, J.A. Sinclair trans., Harmondsworth, Penguin, 1962, 1253a2.

<sup>4</sup> I use the term 'testimony' in two senses. First, to refer to the general practice of a speaker saying, telling, or asserting something. See John Searle, *Speech Acts*, Cambridge, Cambridge University Press, 1969. When I refer to testimony in the legal context, the general definition still applies, but I intend to refer more specifically to the practice of a speaker saying, telling, or asserting something as evidence in a criminal trial.

<sup>5</sup> For criticism of this definition, see Edmund L. Gettier, "Is Justified True Belief Knowledge?", in *Analysis*, 1963, vol. 23, no. 121. See also Alvin I. Goldman, *Epistemology and Cognition*, Harvard University Press, Cambridge, 1986.

<sup>6</sup> Plato, *Theaetetus*, in Paul Moser and Arnold vander Nat (eds.), *Human Knowledge: Classical and Contemporary Approaches*, Oxford University Press, New York, 2003.

<sup>7</sup> *Ibid.*, 146a–c.

<sup>8</sup> *Ibid.*, 146d–147e.

<sup>9</sup> *Ibid.*, 151e–187a.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, 200e.

<sup>12</sup> *Ibid.*, 200d5–201c7.

knowledge.<sup>13</sup> Finally, Socrates settles on the definition of knowledge as “true belief with an account of the reason why the true belief is true”.<sup>14</sup> In other words, a true belief that is justified. I consider each of these three elements in turn.

### 8.2.1.1. Beliefs

With respect to propositional knowledge, most contemporary philosophers characterise a belief as a “propositional attitude”, or “a mental state of someone with a proposition for its object”.<sup>15</sup> A propositional attitude is a relationship that holds between a person and a thing that she asserts.<sup>16</sup> Someone who seriously doubts whether a given proposition is true, or who has not even considered or entertained the proposition, could not be said to have knowledge of the proposition. Thus, the belief aspect of knowledge excludes ignorance.<sup>17</sup> A belief is generally thought to be “relatively unrestricted acceptance” of a proposition, which is more than just an opinion or an acceptance of a proposition merely for the sake of argument.<sup>18</sup>

### 8.2.1.2. Justification

Justification matters because we do not want to have beliefs that are merely true by luck. We already saw this in Plato’s *Theaetetus*, but he makes the point more explicitly in the *Meno*.<sup>19</sup> There, Socrates distinguishes between true beliefs and knowledge by revealing justification as what makes

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, 207c.

<sup>15</sup> Ernest Sosa, “The Raft and the Pyramid”, in Ernest Sosa *et al.* (eds.), *Epistemology: An Anthology*, Blackwell, 2008, p. 147. See also W.V. Quine, “Quantifiers and Propositional Attitudes”, in *The Journal of Philosophy*, 1956, vol. 53, no. 5, p. 187: “Now of all examples of propositional attitudes, the first and foremost is belief [...]”.

<sup>16</sup> See Saul A. Kripke, *Naming and Necessity*, Harvard University Press, Cambridge, 1980; see also Scott Soames, “The Necessary Aposteriori”, in *Philosophical Analysis in the Twentieth Century, Volume 2: The Age of Meaning*, Princeton University Press, Princeton, p. 373.

<sup>17</sup> Michael Williams, *Problems of Knowledge: A Critical Introduction to Epistemology*, Oxford University Press, Oxford, 2001, p. 18.

<sup>18</sup> *Ibid.*

<sup>19</sup> Plato, *Meno*, in John M. Cooper ed. and G.M.A. Grube trans., *Plato: Five Dialogues*, 2d. ed., Hackett Publishing, 2002.

knowledge more valuable than merely true beliefs.<sup>20</sup> He acknowledges that we might be inclined to think that true beliefs are of as much practical use as knowledge, that is, both will get us to Larissa (or wherever we are going).<sup>21</sup> However, as Socrates tells Meno, “true opinions, as long as they remain, are a fine thing and all they do is good, but they are not willing to remain long, and they escape from a man’s mind, so that they are not worth much until one ties them down by (giving) an account of the reason why”.<sup>22</sup> He goes on to conclude that true beliefs are “tied down” when they become knowledge, and that this is why we value knowledge more than correct opinion.<sup>23</sup> The way that we “tie down” truth is through the giving of reasons.

There are different ways to think about the relationship between evidence and the proposition it supports. If we adhere to infallibilism, the strength of justification required for a true belief to constitute knowledge is incredibly high. The potential knower must be in an optimal epistemic position in order to have justification sufficient for knowledge, such that she could not go wrong in her belief.<sup>24</sup> Descartes subscribes to a form of infallibilism, in which knowledge must involve belief in an “indubitable truth”.<sup>25</sup> Infallibilism lends itself toward scepticism about the possibility of acquiring knowledge about almost anything.<sup>26</sup> If we want to avoid scepticism, as we should, we must weaken the justification condition. Thus, fallibilism does not require that one be in an optimal epistemic posi-

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<sup>20</sup> *Ibid.*, 98a.

<sup>21</sup> *Ibid.*, 97a–c.

<sup>22</sup> *Ibid.*, 98a–b.

<sup>23</sup> *Ibid.*, 98a–b.

<sup>24</sup> See René Descartes, “Meditations on First Philosophy”, in John Cottingham *et al.* eds. and trans., *Descartes: Selected Philosophical Writings*, rev. ed., Cambridge University Press, New York, 1988.

<sup>25</sup> René Descartes, “To Regius 24 May 1640”, in John Cottingham *et al.* (eds.), *The Philosophical Writings of Descartes: Volume 3, The Correspondence*, Cambridge University Press, 1984, p. 147: “[K]nowledge is conviction based on a reason so strong that it can never be shaken by any stronger reason”. That is, “a conviction so firm that it is quite incapable of being destroyed; and such a conviction is clearly the same as the most perfect certainty”.

<sup>26</sup> *Ibid.* Cartesian Knowledge, given the Infallible Justification Condition, is demanding. Indeed, it is hard to think of any beliefs about physical objects that Descartes could claim to know. All our evidence concerning the external world is, it seems, defeasible. For example, you might be dreaming, or you might be a brain in a vat.

tion. Instead, the potential knower could be wrong in her belief without being excluded from the possibility of having knowledge.<sup>27</sup> Locke, for instance, adopts a form of fallibilism because he recognises the value of knowledge and he wants to be able to utilise the concept in the real world.<sup>28</sup> A fallible justification involves defeasible evidence, thus it could be undermined by later evidence, but it is necessary to accept fallible justification at some point in order to avoid collapsing into scepticism.

The evidence that supports true beliefs can come through several sources, including perception, reasoning, memory, and testimony. A perceptual belief is one that has been justified through personal sensation, as well as an understanding of the relationship between the object being perceived and the sensory experience of the perceiver.<sup>29</sup> Reasoning is a form of self-evidence, in that it corresponds with:

truths such that (1) if one (adequately) understands them, then by virtue of that understanding one is justified in (hence has justification for) believing them, and (2) if one believes them on the basis of (adequately) understanding them, then one thereby knows them.<sup>30</sup>

Analytic propositions, which Kant and others claim can be known by reason alone, are one example of self-evidence.<sup>31</sup> Memory builds on the justification provided by perception by preserving “important infor-

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<sup>27</sup> See John Locke and P.H. Nidditch, *An Essay Concerning Human Understanding*, in *The Clarendon Edition of the Works of John Locke*, Oxford University Press, New York, 1979, Bk. 4:2:14:

The certainty of things existing [in the nature of things] when we have the testimony of our senses for it is not only as great as our frame can attain to, but as our condition needs. For, our faculties being suited no to the full extent of being, nor to a perfect, clear, comprehensive knowledge of things free from all doubt and scruple; but to the preservation of us, in whom they are; and accommodated to the use of life: they serve to our purpose well enough, if they will but give us certain notice of those things, which are convenient or inconvenient to us.

<sup>28</sup> *Ibid.*

<sup>29</sup> See Robert Audi, *Epistemology – A Contemporary Introduction to the Theory of Knowledge*, 3d ed., Routledge, New York, 2011, pp. 16–17.

<sup>30</sup> *Ibid.*, p. 106; see also Robert Audi, “Self-Evidence”, in *Philosophical Perspectives*, 1999, vol. 13, pp. 205–28.

<sup>31</sup> See Immanuel Kant, *Critique of Pure Reason*, in Paul Guyer and Allen W. Wood eds. and trans., *The Cambridge Edition of the Works of Immanuel Kant*, Cambridge University Press, Cambridge, 1998.



mation we acquire through the senses”, but also information about our mental states and attitudes.<sup>32</sup> Testimony, on the other hand, 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.<sup>33</sup> Testimony is our primary source of “social” evidence.<sup>34</sup> We return to more specific questions about the reliability of evidence in Section 8.3., but for now, I note that all of these sources of justification can be more or less reliable, and all can be fallible.

We turn to the most important element of knowledge for our purposes, truth, in the next sub-section.

### **8.2.2. Truth**

Recall that for a justified belief to count as knowledge, it must be true. The concept of ‘truth’ is a challenge to define, as many attempts to do so inevitably collapse into circularity.<sup>35</sup> As Frege said, “it is probable that the content of the word ‘true’ is unique and indefinable”, which would make it impossible to analyse.<sup>36</sup> Donald Davidson sees truth as a “primitive concept”, “beautifully transparent compared to belief and coherence”.<sup>37</sup> Nonetheless, in this sub-section, I consider three of the most prominent attempts to theorise about truth. Since the purpose of this chapter is to explore issues about truth and testimony in a real-world setting, the courtroom, I consider both epistemological and metaphysical issues.

#### **8.2.2.1. Theories of Truth**

The most significant theories of truth today, correspondence, coherence, and pragmatist theories assume that there are truths and attempt to explain their nature. I describe each in turn.

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<sup>32</sup> Audi, 2011, see *supra* note 29, p. 62.

<sup>33</sup> Aristotle, 1962, see *supra* note 3.

<sup>34</sup> See Audi, 2011, see *supra* note 29, pp. 150–151.

<sup>35</sup> Gottlob Frege, “The Thought – A Logical Inquiry”, in *Mind*, 1956, vol. 65, no. 259, p. 291.

<sup>36</sup> *Ibid.*

<sup>37</sup> Donald Davidson, “A Coherence Theory of Truth and Knowledge”, in *Subjective, Inter-subjective, Objective*, Oxford University Press, Oxford, 2001, p. 139.

### 8.2.2.1.1. Correspondence Theories

The traditional view about truth, that a proposition is true when reality corresponds with what the proposition says, is a view known as a *correspondence theory*. Haig Khatchadourian defines the “traditional” correspondence theory as one that “claims that (a) the nature or definition of truth, and (b) the criterion of contingent truth, lies in or consists of ‘correspondence’ or ‘agreement’ of a contingent or factual statement or proposition with reality or fact”.<sup>38</sup> Aristotle’s claim that “[o]n the one hand, the false is to say that what is, is not or that what is not, is; on the other hand, the true is to say that what is, is and what is not, is not, so that the one saying that it is or is not is either speaking the truth or is false”<sup>39</sup> is emblematic of a correspondence theory of truth. Correspondence theories can also be thought of as realist views. A realist view locates truth in the world, and not in the individuals who hold beliefs.<sup>40</sup> Thus for the realist, truth is objective, and it does not rely on what anyone believes.<sup>41</sup>

I consider three metaphysical aspects of correspondence theories in turn. The first aspect of a correspondence theory is the truth-bearer, or the thing that has the property of obtaining truth. Some correspondence theorists, such as Bertrand Russell, see beliefs as the primary bearers of truth.<sup>42</sup> Russell claims that beliefs are truth-bearers, and facts are what make beliefs either true or false.<sup>43</sup> Other versions of correspondence theories consider propositions<sup>44</sup> or sentences<sup>45</sup> to be the primary bearers of truth. All correspondence theories see the role of truth-bearer as a meaningful one, because they rely on the realist view that the truth-bearers say something about reality.

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<sup>38</sup> Haig Khatchadourian, *Truth: Its Nature, Criteria and Conditions*, Ontos Verlag, Frankfurt, 2011, p. 1.

<sup>39</sup> Aristotle, 1941, see *supra* note 1, Book IV.7, 1011b25–29.

<sup>40</sup> Michael Lynch, “Realism and the Nature of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 10.

<sup>41</sup> *Ibid.*

<sup>42</sup> Bertrand Russell, “Truth and Falsehood”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 17.

<sup>43</sup> *Ibid.*

<sup>44</sup> Scott Soames, *Understanding Truth*, Oxford University Press, Oxford, 1999, Ch. 1.

<sup>45</sup> J.L. Austin, “Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, pp. 25–26.

The second aspect of a correspondence theory is the truth relation (or correspondence) between the proposition and reality. Russell explains this relationship as one of congruence. Objects with this truth relation form what he calls a “complex unity”, where a belief is a uniting relation between a subject and object, and the subject and object are “arranged in a certain order by the ‘sense’ of the relation of believing”.<sup>46</sup> A belief is true, according to Russell’s view, when it corresponds to a certain complex unity, or a fact, and the belief is false when it does not.<sup>47</sup> Russell has also described this truth relation as follows: “[T]he difference between a true belief and a false belief is like that between a wife and a spinster”.<sup>48</sup> J.L. Austin, on the other hand, adopts a truth relation of correlation.<sup>49</sup> For Austin, a statement or interpreted sentence is true when it correlates with facts or “particular states of affairs”.<sup>50</sup> Other correspondence theories see the truth relation as a causal relation, where an interpreted sentence truthfully represents reality if and only if the component parts of the sentence stand in an appropriate causal relation with certain objects in the world.<sup>51</sup>

Finally, the last aspect of correspondence theory is the truth-maker, or the reality to which the proposition is meant to correspond. Facts, or states of affairs that actually obtain, are the truth-makers for most correspondence theories.<sup>52</sup>

#### 8.2.2.1.2. Coherence Theories

The *coherence theory* provides one alternative view of truth. These kinds of theories claim that a true proposition is one that “coheres with the most

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<sup>46</sup> Russell, 2001, p. 23, see *supra* note 42.

<sup>47</sup> *Ibid.*

<sup>48</sup> Bertrand Russell, *Human Knowledge: Its Scope and Limits*, Allen and Unwin, London, 1948, p. 165.

<sup>49</sup> Austin, 2001, pp. 27–28, see *supra* note 45.

<sup>50</sup> *Ibid.*, pp. 28, 36.

<sup>51</sup> See Hartry Field, “Tarski’s Theory of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001; see also Michael Devitt, “The Metaphysics of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001.

<sup>52</sup> See Russell, 2001, p. 33, see *supra* note 42; see also Michael Pendlebury, “Facts as Truth-makers”, in *Monist*, 1986, vol. 69, pp. 177–188.

comprehensive system of beliefs whose members imply each other”.<sup>53</sup> The early versions of coherence theory were associated with German and then British idealists.<sup>54</sup> Idealism lends itself to the idea that reality is just the realisation of a system of judgments, rather than facts about the world.<sup>55</sup> For a coherence theorist, truth comes in degrees, rather than as a binary judgment about truth or falsity, because the assessment of truth is about the degree of realisation of a system.<sup>56</sup> H.H. Joachim noted that truth is about “the systematic coherence which characterized a significant whole”,<sup>57</sup> as distinguished from the correspondence theory view of truth as a relation between a proposition and reality. It is the coherence itself that is the truth-bearer, not the proposition, even assuming the proposition coheres with the system as a whole.<sup>58</sup> Accordingly, the truth conditions of propositions consist in the other propositions in a given system.

The standard for what constitutes ‘coherence’ varies between different versions of coherence theory. R.C.S. Walker notes that for some it is simple consistency, while for others it involves “mutual entailment by all the propositions in question”,<sup>59</sup> and still others do not even attempt to define a standard for the term.<sup>60</sup> Coherence is generally thought to be more than “mere consistency”,<sup>61</sup> but it does not require perfection. Brand Blanshard argues that we judge the truth of particular propositions “by the amount of coherence which in that particular subject-matter it seems reasonable to expect”.<sup>62</sup> Because the systems of judgments will change, what coheres with a system “at one time may not cohere with it at another; thus

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<sup>53</sup> Richard L. Kirkham, *Theories of Truth: A Critical Introduction*, The MIT Press, Cambridge, 2001, p. 114.

<sup>54</sup> Michael Lynch, “Coherence Theories: Introduction”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 10.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*; see also F.H. Bradley, *Essays on Truth and Reality*, Clarendon Press, Oxford, 1914.

<sup>57</sup> H.H. Joachim, *The Nature of Truth*, Clarendon Press, Oxford, 1906, p. 79.

<sup>58</sup> Ralph C.S. Walker, “The Coherence Theory”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 124.

<sup>59</sup> *Ibid.*, p. 127.

<sup>60</sup> *Ibid.*

<sup>61</sup> Brand Blanshard, “Coherence as the Nature of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 107.

<sup>62</sup> *Ibid.*, p. 108.

in practice we shall be justified in accepting at one time what later we must reject”.<sup>63</sup> This does not result in any inconsistency, according to Blanshard, because the truth itself is not changing, just our systems of beliefs.<sup>64</sup> Walker claims that “the system will itself determine what coherence with it amounts to”.<sup>65</sup>

Coherence theorists do not rely on realism, as their concept of truth is not dependent upon facts about the world. Rather, as argued by Blanshard, “the degree of truth of a particular proposition is to be judged in the first instance by its coherence with experience as a whole, ultimately by its coherence with that further whole, all-comprehensive and fully articulated, in which thought can come to rest”.<sup>66</sup> However, Linda Martin Alcoff argues that coherence theories have “the potential to explain how realism can coexist with a political self-consciousness about human claims to know”,<sup>67</sup> and thus are not necessarily anti-realist, while Davidson actually argues that any acceptable coherence theory of truth must be consistent with correspondence theory about the way things are in the world.<sup>68</sup>

### 8.2.2.1.3. Pragmatist Theories

The *pragmatist theories* of truth are focused on inquiry. C.S. Peirce defined truth as “the opinion which is fated to be ultimately agreed to by all who investigate”.<sup>69</sup> Scientists, according to Peirce, “are fully persuaded that the processes of investigation, if only pushed far enough, will give one certain solution to every question to which they can be applied”.<sup>70</sup> As Peirce admits, this definition of truth relies on humans insofar as it can only be determined through investigation, and humans make decisions

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<sup>63</sup> *Ibid.*, p. 114.

<sup>64</sup> *Ibid.*, p. 114

<sup>65</sup> Walker, 2001, p. 127, see *supra* note 40.

<sup>66</sup> Blanshard, 2001, p. 107, see *supra* note 61.

<sup>67</sup> Linda Martín Alcoff, “The Case for Coherence”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 160.

<sup>68</sup> Davidson, 2001, see *supra* note 37, pp. 139–140.

<sup>69</sup> C.S. Peirce, “How to Make Our Ideas Clear”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, p. 206.

<sup>70</sup> *Ibid.*

about what to investigate.<sup>71</sup> William James understands truth as ideas “that we can assimilate, validate, corroborate and verify”, while “[f]alse ideas are those that we can not”.<sup>72</sup> Thus for both James and Peirce, truth is not a “stagnant property”, but instead occurs as part of a process of verification.<sup>73</sup>

On Peirce’s understanding of this process of verification, truth is determined via consensus when scientific inquiry has been completed.<sup>74</sup> His view is that “investigation is destined to lead, at last, if continued long enough, to a belief in it”.<sup>75</sup> Peirce defends the scientific method as the only way to ensure that all truth-seekers will reach a consensus about truth, in line with reality, because it is the only method that can avoid the influence of our individual beliefs.<sup>76</sup> James does not share Peirce’s view about the necessity of consensus for truth. He notes that “true is the name of whatever proves itself to be good in the way of belief, and good, too, for definite assignable reasons”.<sup>77</sup> This allows James to defend different kinds of truth, outside the realm of scientific truths, and it allows him to include the experiences of individuals in what is sufficient for verification.<sup>78</sup>

I return to aspects of these three theories about truth in Sections 8.3. and 8.4., and consider how they play out in terms of truth and the law.

### 8.2.3. Social Epistemology

Now that we have an understanding of the foundations of truth and knowledge, I want to address a specific branch of epistemology that will prove helpful in analysing some challenges that we face in light of our

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<sup>71</sup> *Ibid.*, p. 207.

<sup>72</sup> William James, “Pragmatism’s Conception of Truth”, in Michael Lynch (ed.), *The Nature of Truth: Classic and Contemporary Perspectives*, The MIT Press, Cambridge, 2001, pp. 212–213.

<sup>73</sup> *Ibid.*, p. 213.

<sup>74</sup> Peirce, 2001, p. 207, see *supra* note 69; see also Susan Haack, “The Pragmatist Theory of Truth”, in *The British Journal for the Philosophy of Science*, 1976, vol. 27, no. 3, pp. 232–233.

<sup>75</sup> Peirce, 2001, p. 207, see *supra* note 69.

<sup>76</sup> Haack, 1976, p. 233, see *supra* note 74.

<sup>77</sup> William James, *Pragmatism: A New Name for some Old Ways of Thinking*, Harvard University Press, Cambridge, 1975, p. 42.

<sup>78</sup> James, 2001, pp. 215–216, see *supra* note 72.

practical reliance on other people in order to obtain the truth. Social epistemology, for our purposes, refers to “the norms governing the social mechanisms and practices that inculcate belief”.<sup>79</sup> While the field initially sprang up in opposition to traditional epistemology,<sup>80</sup> much of contemporary social epistemology seeks the truth, like traditional epistemology, but arguably with an expanded set of resources.<sup>81</sup> There are three main branches of social epistemology: *revisionism*, *preservationism*, and *expansionism*.<sup>82</sup> I begin this section by distinguishing between these three branches as a way of explaining the relationship between social epistemology and truth. I go on to discuss testimony as a crucial feature of social epistemology, and the concept of epistemic injustice, which occurs when someone is wronged in her capacity as a source of knowledge.

### 8.2.3.1. Branches of Social Epistemology and Truth

As already mentioned, the field of social epistemology initially emerged in opposition to traditional epistemology.<sup>83</sup> The first branch of social epistemology, *revisionism*, reflects the views of some of the field’s early proponents, but contemporary revisionists rarely employ the label of ‘social epistemology’ to describe their work.<sup>84</sup> Revisionists “reject the existence of objective norms of rationality, and reject truth as the goal of our intellectual and scientific activities”.<sup>85</sup> Their study of social phenomena prompt revisionists to reject truth and norms of rationality.<sup>86</sup> Revisionists often use the term ‘knowledge’, but they “don’t understand it to be a truth-entailing, or factive, state. In their lexicon knowledge is simply

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<sup>79</sup> Ronald J. Allen and Brian Leiter, “Naturalized Epistemology and the Law of Evidence”, in *Virginia Law Review*, 2001, vol. 87, no. 8, p. 1498.

<sup>80</sup> See, for example, Thomas Kuhn, *The Structure of Scientific Revolutions*, University of Chicago Press, Chicago, 1962.

<sup>81</sup> See Alvin I. Goldman, “Introduction”, in Adrian Haddock *et al.* (eds.), *Social Epistemology*, Oxford University Press, New York, 2010.

<sup>82</sup> *Ibid.*, pp. 1–5.

<sup>83</sup> See Goldman, 2010, see *supra* note 81.

<sup>84</sup> *Ibid.*, p. 3.

<sup>85</sup> Matthias Steup, “Epistemology in the Twentieth Century”, in Dermot Moran (ed.), *The Routledge Companion to Twentieth Century Philosophy*, Routledge, New York, 2008, pp. 508–509.

<sup>86</sup> Goldman, 2010, p. 3, see *supra* note 81.

whatever is believed, or perhaps ‘institutionalised’ belief’.<sup>87</sup> Richard Rorty argues that our goal should be to “keep the conversation going rather than to find objective truth”.<sup>88</sup> Other theorists in this camp adopt the view of truth as a social construction.<sup>89</sup>

The second field of social epistemology is *preservationism*. This branch studies doxastic decision-making, in light of social evidence, by individual agents, as well as the gathering of social evidence and certain kinds of speech and communication.<sup>90</sup> Social evidence is evidence possessed by a doxastic agent that “concerns acts of communication by others”, or “other people’s doxastic states that become known to the agent”.<sup>91</sup> Testimony is, therefore, a central feature of preservationism, as we will see in Section 8.2.3.2. Notably, preservationists retain norms of objectivity and rationality, and many see truth as the goal of epistemic endeavours.<sup>92</sup>

The final branch of social epistemology is *expansionism*, which studies collective doxastic agents and social systems.<sup>93</sup> It seeks to expand the application of social epistemology without straying too far from traditional epistemology.<sup>94</sup> For our purposes, the most important feature of expansionism is how it has been used to study legal adjudication systems, with an aim of understanding which trial systems are able to generate the

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<sup>87</sup> *Ibid.*

<sup>88</sup> Richard Rorty, *Philosophy and the Mirror of Nature*, Princeton University Press, Princeton, 1979, p. 377.

<sup>89</sup> Goldman, 2010, p. 3, see *supra* note 81; see also Bruno Latour and Steve Woolgar, *Laboratory Life: The Construction of Scientific Facts*, Princeton University Press, Princeton, 1986; Steven Shapin, *A Social History of Truth*, The University of Chicago Press, Chicago, 1994, p. 6.

<sup>90</sup> Goldman, 2010, pp. 5–6, see *supra* note 81.

<sup>91</sup> Alvin I. Goldman, “A Guide to Social Epistemology”, in Alvin I. Goldman and Dennis Whitcomb (eds.), *Social Epistemology: Essential Readings*, Oxford University Press, New York, 2011, pp. 14–15.

<sup>92</sup> See Alvin I. Goldman, “Foundations of Social Epistemics”, in *Synthese*, 1987, vol. 73, no. 1.

<sup>93</sup> Goldman, 2010, pp. 15–25, see *supra* note 81.

<sup>94</sup> *Ibid.*, p. 1.



most accurate outcomes and verdicts.<sup>95</sup> Section 8.3. of this chapter will focus on this part of expansionism in social epistemology.

### 8.2.3.2. Testimony

Testimony is a crucial source of social evidence for preservationists and expansionists. Austin claims that a “statement of an authority makes me aware of something, enables me to know something, which I shouldn’t otherwise have known. It is a source of knowledge”.<sup>96</sup> Austin’s statement is about an authority, someone who we may not see as infallible, but someone in whom we likely put a lot of trust as someone whose testimony will help us in a truth-seeking endeavour. However, we rely on testimony as social evidence from many doxastic agents, and some of these 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.

Reductionists argue that testimony cannot stand alone as a source of epistemic authority, but that hearers “must have sufficiently good positive reasons for accepting a given report, reasons that are not themselves ineliminably based on the testimony of others”.<sup>97</sup> These reasons involve inductive reasoning about the reliability of a source of testimony based on the observation of a “general conformity between facts and reports” of a speaker.<sup>98</sup> Reductionists like David Hume recognise the practical necessity of testimony, as he notes that “there is no species of reasoning more common, more useful, and even necessary to human life, than that which is derived from the testimony of men, and the reports of eye-witnesses and spectators”.<sup>99</sup> Yet the value of testimony can only be established by our own assessment “of the veracity of human testimony, and of the usual conformity of facts to the reports of witnesses”.<sup>100</sup>

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<sup>95</sup> *Ibid.*

<sup>96</sup> J.L. Austin, *Philosophical Papers*, 3rd ed., Oxford University Press, Oxford, 1979, pp. 81–82.

<sup>97</sup> Jennifer Lackey, “Introduction”, in Jennifer Lackey and Ernest Sosa (eds.), *The Epistemology of Testimony*, Oxford University Press, New York, 2006, p. 5.

<sup>98</sup> *Ibid.*

<sup>99</sup> David Hume, *An Enquiry Concerning Human Understanding and Other Writings*, Stephen Buckle ed., Cambridge University Press, New York, 2007, Bk. 10 (“Of miracles”), 10.5, p. 98.

<sup>100</sup> *Ibid.*

Anti-reductionists, on the other hand, see testimony as a source of justification, just like the other sources (discussion in Section 8.2.1.2.). They claim that “one is *prima facie* justified in trusting someone’s testimony even without prior knowledge or justified belief about the testifier’s competence and sincerity, and without prior knowledge of the competence and sincerity of people in general”.<sup>101</sup> The reliability of testimony can be challenged if there are defeaters, or evidence that a speaker’s belief is “either false or unreliably formed or sustained” due to the presence of “an experience, doubt, or belief” that the speaker has or should have, given the available evidence.<sup>102</sup> Thomas Reid advocates for anti-reductionism, as he claims that “in the matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself when there is nothing put into the opposite scale”.<sup>103</sup>

Thus, the debate with respect to testimony is whether speakers should be seen as *prima facie* reliable, absent specific evidence to the contrary, or whether we need to establish the reliability of a speaker through the weighing of other evidence before we can trust the substance of the speech. I return to issues of testimony in the context of a criminal trial in Section 8.3.

### 8.2.3.3. Epistemic Injustice

A final point about social epistemology concerns the concept of epistemic injustice. Epistemic injustice is a phenomenon that occurs when one’s knowledge is not seen as reliable when it should be, especially due to social, cultural, or historical prejudice.<sup>104</sup> 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* cred-

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<sup>101</sup> Goldman, 2011, pp. 14–15, see *supra* note 91.

<sup>102</sup> Lackey, 2006, p. 4, see *supra* note 97.

<sup>103</sup> Ronald Beanblossom and Keith Lehrer, *Thomas Reid’s Inquiry and Essays*, Hackett, Indianapolis, 1983, p. 95.

<sup>104</sup> The most well-known account of the concept of epistemic injustice is: Miranda Fricker, *Epistemic Injustice: Power and Ethics in Knowing*, Oxford University Press, Oxford, 2007. I take a somewhat broader view of the term in this chapter, since the social dynamics in an international criminal law courtroom are even more complex than in a domestic community.

ibility and/or the powerless tend to be wrongly denied credibility”.<sup>105</sup> When we recognise 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”.<sup>106</sup> Elizabeth Anderson asserts that we should be required to use all of society’s epistemic resources, ensuring epistemic diversity and not ignoring any voices for prejudicial reasons.<sup>107</sup> She sees this as a requirement of democracy,<sup>108</sup> 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”.<sup>109</sup> The speaker is treated unjustly when she receives this deflated credibility from the hearer, based on what Fricker calls “identity prejudice”.<sup>110</sup> Identity prejudice results from the power imbalance between social agents, and an agent maintains a prejudice due to a feature (or features) of social identity of the other agent.<sup>111</sup> The prejudice leads to stereotyping, which in turn results in the hearer making unwarranted assumptions about the speaker based on her social identity.<sup>112</sup> Much of the work on testimonial injustice centres 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.

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<sup>105</sup> Miranda Fricker, “Rational Authority and Social Power: Towards a Truly Social Epistemology”, in Miranda Fricker and Jennifer Hornsby (eds.), *The Cambridge Companion to Feminism in Philosophy*, Cambridge University Press, Cambridge, 2006, p. 62.

<sup>106</sup> Rae Langton, “Feminism in Epistemology: Exclusion and Objectification”, in Miranda Fricker and Jennifer Hornsby (eds.), *The Cambridge Companion to Feminism in Philosophy*, Cambridge University Press, Cambridge, 2006, p. 132, citing Fricker, “Rational Authority and Social Power: Towards a Truly Social Epistemology”, in *Proceedings of the Aristotelian Society*, 1998, vol. 98, 159–77.

<sup>107</sup> Elizabeth Anderson, “The Epistemology of Democracy”, in *Episteme*, 2006, vol. 3, p. 11.

<sup>108</sup> *Ibid.*

<sup>109</sup> Fricker, 2007, p. 1, see *supra* note 104.

<sup>110</sup> *Ibid.*, p. 4.

<sup>111</sup> *Ibid.*, p. 28. Fricker also discusses the positive form of identity prejudice, in which social agents are given “excess credibility”, which is unwarranted because it is based merely on their relative social power. See *ibid.*, pp. 17–20, 28. I focus here only on the negative form of identity prejudice.

<sup>112</sup> *Ibid.*, p. 30.

The views of Fricker and Anderson reveal that instances of epistemic 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 endeavour 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”.<sup>113</sup> As Gaile Pohlhaus explains, “epistemic practices and institutions may be deployed and structured in ways that are simultaneously infelicitous toward certain epistemic values (such as truth, aptness, and understanding) and unjust with regard to particular knowers”.<sup>114</sup> Broadly, we do not 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 Sections 8.3 and 8.4. 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.<sup>115</sup> She suggests that the virtue of *testimonial justice* can only occur in light of testimonial responsibility on the part of the hearer of testimony.<sup>116</sup> For Fricker, testimonial responsibility demands a “distinctly *reflexive* critical social awareness” on the part of the hearer.<sup>117</sup> 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.<sup>118</sup> Such a recognition does not require that the hearer cease to assess credibility. It does require that the hearer “respect [the speaker], respect his word, so long as he merits it, and only so long as he merits it”.<sup>119</sup> As Fricker notes, “[i]n testimonial exchanges, for hearers and speakers alike, no party is

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<sup>113</sup> *Ibid.*, p. 43.

<sup>114</sup> Gaile Pohlhaus, Jr., “Varieties of Epistemic Injustice”, in Ian James Kidd *et al.* (eds.), *The Routledge Handbook of Epistemic Injustice*, Routledge, New York, 2017, p. 13.

<sup>115</sup> Fricker, 2006, p. 62, see *supra* note 104.

<sup>116</sup> Fricker, 2007, p. 91, see *supra* note 104.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, p. 123.

neutral; everybody has a race, everybody has a gender”.<sup>120</sup> 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.<sup>121</sup> Failing to neutralise identity prejudice makes a hearer more likely to fail to obtain truths.<sup>122</sup> 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.<sup>123</sup> A hearer who possesses testimonial justice “reliably avoids epistemically undermining others, and she avoids missing out on truths offered too”.<sup>124</sup> 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.<sup>125</sup>

In the next section, I turn to the subset of social epistemology that specifically focuses on truth and the law.

### 8.3. Truth and Legal Epistemology

When we turn to the realm of law, specifically criminal law, we understand the abstract concepts of truth and knowledge in a slightly different way. First, there are three locations for truth. The first is in discrete propositional statements given by witnesses or defendants as testimonial evidence at the trial. Some of these propositional statements may not be truth-apt, but others will have a truth value of ‘true’ or ‘false’. The second location for truth is broader and speaks to whether or not someone is guilty of the crimes with which she has been charged. Yet this question also seems like something that could be formulated as a truth-apt propositional statement. The third location is broader still, involving questions about what happened during a given event (or non-event) of criminal behaviour. It is the second location, and possibly the third, that are the focus of our inquiry.

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<sup>120</sup> *Ibid.*, p. 91.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, p. 122.

<sup>123</sup> *Ibid.*, p. 120.

<sup>124</sup> *Ibid.*, p. 120.

<sup>125</sup> *Ibid.*, p. 127.

The broad field of legal epistemology, or “epistemological work relevant to issues that arise in the law”,<sup>126</sup> includes a wide range of investigations into knowledge and the law. 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.<sup>127</sup> I limit my inquiry to legal epistemology in the context of criminal adjudication, and I focus on criminal law as a social system. In this section, I explore the application of our epistemological concepts of truth and testimony within the realm of criminal law.

### **8.3.1. Issues of Criminal Law and Truth**

#### **8.3.1.1. 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 analyse a legal system’s ability to seek the truth.<sup>128</sup> While I agree that it is not necessary to choose one appropriate theory of truth to the exclusion of the others (and thus I do not defend one view), the various theories considered in Section 8.2.2.1. can each play a role with respect to different aspects of legal systems. I do not simply presume a basic, universally-accepted concept of truth, and I consider where these influences might appear in the courtroom.

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.<sup>129</sup> This objective view of truth will likely correspond with a realist or correspondence conception of truth, in which the truth is determined by the way things are in the world, but this is not necessary. Alternatively, we

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<sup>126</sup> Susan Haack, *Evidence Matters: Science, Proof, and Truth in the Law*, Cambridge University Press, New York, 2014, p. 6.

<sup>127</sup> Larry Laudan, “Thinking About Error in the Law”, in Goldman, 2011, p. 272, see *supra* note 91.

<sup>128</sup> See, for example, HO Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth*, Oxford University Press, New York, 2006, p. 56; Susan Haack, “Truth, Truths, “Truth” and “Truths” in the Law”, in *Harvard Journal of Law and Public Policy*, 2003, vol. 26, p. 19.

<sup>129</sup> See Mirjan Damaška, “Truth in Adjudication”, in *Hastings Law Journal*, 1998, vol. 49.

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 sceptical 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”.<sup>130</sup>

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. A proposition is true “if and only if it corresponds to reality, has objective existence in the external world, independently of what we say or believe”.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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”.<sup>134</sup>

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.<sup>135</sup> 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

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<sup>130</sup> Henrik Kaptein, “Burdens of Evidence and Proof: Why Bear Them? A Plea for Principled Opportunism in (Leaving) Legal Fact-Finding (Alone)”, in Henrik Kaptein *et al.* (eds.), *Legal Evidence and Proof: Statistics, Stories, Logic*, Ashgate, Farnham, 2009, p. 17 (emphasis added); see Damaška, 1998, see *supra* note 129, for responses to these sceptical views.

<sup>131</sup> HO, 2006, pp. 56–57, see *supra* note 128.

<sup>132</sup> *Ibid.*, p. 57.

<sup>133</sup> *Ibid.*

<sup>134</sup> Damaška, 1998, p. 291, see *supra* note 129.

<sup>135</sup> See Ronald Allen, “Rationality, Algorithms, and Juridical Proof”, in *International Journal of Evidence and Proof*, 1997, vol. 1.

evidence at trial”.<sup>136</sup> 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”.<sup>137</sup>

Susan Haack advocates for a pragmatist theory of truth in the law.<sup>138</sup> Her view is that truth is not relative, but that legal inquiry cannot proceed in the same way as scientific inquiry.<sup>139</sup> 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>140</sup> I return to Haack’s discussion of the adversarial legal system and its limitations in Section 8.3.1.2.

### 8.3.1.2. Adversarial v. Inquisitorial Systems and Truth

Inquisitorial legal systems place the main responsibility for fact-finding and evidence introduction on professional judges, while the lawyers “guide and limit the judicial inquiry in important ways”.<sup>141</sup> In the German criminal courts, for instance, the Code of Criminal Procedure states that “In order to establish the truth, the court must, ex officio, extend the taking of evidence to all facts and means of proof relevant to the decision”.<sup>142</sup> The “quintessential goal of inquisitorial justice”, therefore, is to “ascertain the truth”.<sup>143</sup> The procedures in the inquisitorial system presume that there

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<sup>136</sup> Amalia Amaya, “Justification, Coherence, and Epistemic Responsibility in Legal Fact-Finding”, in *Episteme*, 2008, vol. 5, no. 3, p. 307.

<sup>137</sup> Damaška, 1998, pp. 291–292, see *supra* note 129.

<sup>138</sup> See, for example, Haack, 2014, see *supra* note 126; Haack, 1976, see *supra* note 74.

<sup>139</sup> Haack, 2014, ch. 4, see *supra* note 126.

<sup>140</sup> *Ibid.*, ch. 2.

<sup>141</sup> John H. Langbein, “Historical foundations of the law of evidence: A view from the Ryder sources”, in *Columbia Law Review*, 1996, vol. 96, no. 5, p. 1168; see also John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3d ed., 1940, § 1364, p. 11.

<sup>142</sup> See German Code of Criminal Procedure, 1950, sec. 244, para. 2 ([www.legal-tools.org/doc/19df38/](http://www.legal-tools.org/doc/19df38/)), cited in Markus D. Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach*, Oxford University Press, Oxford 2014, p. 511.

<sup>143</sup> Stephen C. Thaman, “Two Faces of Justice in the Post-Soviet Legal Sphere”, in John Jackson *et al.* (eds.), *Crime, Procedure and Evidence in a Comparative and International Context - Essays in Honour of Professor Mirjan Damaška*, Hart Publishing, Oxford, 2008, p. 101; see also Alexander Heinze, *International Criminal Procedure and Disclosure*,



is one account of objectively true facts, and that it is possible for a third party to obtain this truth.<sup>144</sup> The trial is then aimed at establishing those facts through inquiry,<sup>145</sup> and the professional judge or judges play the role of determining what constitutes the true account of facts.

In adversarial systems, the procedural rules can arguably serve to limit the ability to seek an objective truth. In these systems, the roles of fact-finding are shared between the professional judge, the lawyers for the parties, and the jurors.<sup>146</sup> The lawyers in adversarial systems take on the greatest burden in “gathering, sifting, and presenting evidence of the facts”,<sup>147</sup> but the lawyers each aim to establish the truth of their respective side’s account of the truth. Haack, Bentham, and Peirce all criticise the exclusionary rules of adversarial system. Peirce challenges the adversarial model on the basis that it is more focused on “victory rather than truth”,<sup>148</sup> and that in this system, “the truth for him is that for which he fights”.<sup>149</sup> Bentham claims that the adversarial system prevents relevant evidence from being presented, and thus can prevent the fact-finders from reaching the objective truth.<sup>150</sup> Haack gives a more nuanced criticism of the adversarial system, defending it as “a reasonable substitute for the ideal”, where the ideal would be a legal inquiry that could be conducted like a scientific inquiry.<sup>151</sup> However, she argues that:

the adversarial process will enable thorough evidential search and scrutiny only if, for example, the resources available to each side for seeking out and scrutinizing evidence

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Duncker and Humblot, Berlin, 2014, p. 107; Thomas Weigend, “Should We Search for the Truth, and Who Should Do It”, in *North Carolina Journal of International Law and Commercial Regulation*, 2011, vol. 36, no. 2, pp. 389–415.

<sup>144</sup> Kaptein, 2009, p. 124, see *supra* note 129; see also Mirjan Damaška, *Evidence Law Adrift*, Yale University Press, New Haven, 1977.

<sup>145</sup> Kaptein, 2009, p. 124, see *supra* note 129; see also Damaška, 1977, see *supra* note 144.

<sup>146</sup> Langbein, 1996, p. 1168, see *supra* note 141; see also Heinze, 2014, pp. 117 ff., see *supra* note 143.

<sup>147</sup> Langbein, 1996, p. 1168, see *supra* note 141.

<sup>148</sup> Haack, 2014, p. xvii, see *supra* note 126.

<sup>149</sup> C.S. Peirce, *Collected Papers*, Charles Hartshorne, Paul Weiss, and Arthur Burks eds., Harvard University Press, Cambridge, 1878.

<sup>150</sup> See Haack, 2014, see *supra* note 126, citing Jeremy Bentham, *Rationale of Judicial Evidence*, vol. 1, Garland, New York, 1978, p. 22.

<sup>151</sup> See Haack, 2014, p. 35, see *supra* note 126.

are adequate and comparable, if juries are willing and able to decide cases on the basis of the evidence, etc.<sup>152</sup>

Thus, for Haack, an adversarial system will not work if it is not actually an efficient way of legal truth-seeking.

### 8.3.1.3. Truth and Testimony as Evidence

We can now go a bit further into the relationship between testimonial evidence and the truth. I consider testimonial reliability and relevance, as well as the exclusion of testimonial evidence. A legal trial uses testimony as part of an attempt to find the truth of what occurred, but it is “not expected to provide an exact reproduction of what is alleged to have occurred”.<sup>153</sup> 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”.<sup>154</sup> Further, a piece of evidence is thought to be reliable “when there is reason to believe it to be true or at least plausible”.<sup>155</sup> 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 may be excluded, even when it is both reliable and relevant, for reasons other than truth-seeking. Hearsay and spousal privilege, for example, leave certain testimonies out of information amassed by the fact-finder.

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 the testimony would detract from the ability of the fact-finder to

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<sup>152</sup> *Ibid.*, pp. 35–36.

<sup>153</sup> D.S. Greer, “Anything But the Truth? The Reliability of Testimony in Criminal Trials”, in *The British Journal of Criminology*, 1971, vol. 11, no. 2, p. 140.

<sup>154</sup> Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*, Cambridge University Press, New York, 2006, pp. 17–18.

<sup>155</sup> *Ibid.*

seek the truth, especially in cases where these assessments are objectively accurate. But as Bentham and Peirce argue, there are significant drawbacks to the exclusion of evidence.<sup>156</sup> 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”.<sup>157</sup>

This quotation captures the danger of the two harms, discussed in Section 8.2.3.3., that can result from epistemic injustice. First, the exclusion or discounting of testimony can constitute an individual harm to a testifier. We will need a better understanding of what a criminal trial owes individuals other than the accused in order to properly assess the responsibility of the criminal justice 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 justice system. Accordingly, we need a better conception of how to understand and balance the competing concerns we have identified so far in this section.

#### **8.3.1.4. Truth and Justice in Criminal Legal Systems**

In order to understand the foregoing sub-sections, we must complicate the picture thus far presented, and ask what the goal of a criminal justice system should be. If the only goal is to seek the truth, then it seems that the inquisitorial system is superior. HO sees this goal as obvious, stating that “it cannot be gainsaid that the ‘basic purpose of a trial is the determination of truth’”.<sup>158</sup> According to Larry 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”.<sup>159</sup>

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<sup>156</sup> See Haack, 2014, see *supra* note 126.

<sup>157</sup> Paul Roberts and Jill Hunter, “Introduction—The Human Rights Revolution in Criminal Evidence and Procedure”, in Paul Roberts and Jill Hunter (eds.), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*, Hart Publishing, Oxford, 2012, p. 21.

<sup>158</sup> HO, 2006, p. 52, see *supra* note 128, quoting *Tehan v. United States ex rel Shott*, 1966, 382 US 406, 416.

<sup>159</sup> Laudan, 2006, p. 2, see *supra* note 154.

But we also care about *justice* in a criminal legal system. Bentham uses the metaphor of “Injustice, and her handmaid Falsehood”<sup>160</sup> 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”.<sup>161</sup> 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.<sup>162</sup>

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”.<sup>163</sup> In large part, the other objectives of the criminal process are related to social forces that influence the criminal justice system, such as the need to protect human rights from abuses of power, social peace, or cost.<sup>164</sup> When we think about these so-called ‘justice’ considerations, and recognise 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.

For the accused, the alleged victims, and any other interested parties, it is important to think about the status we attach to a ‘truth’ determination made by a fact-finder during a trial. A verdict could either be seen as a statement about what happened (or did not happen), or it could be seen

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<sup>160</sup> See Bentham, 1978, see *supra* note 150.

<sup>161</sup> Laudan, 2006, p. 2, see *supra* note 154.

<sup>162</sup> Haack, 2014, p. 27, see *supra* note 126.

<sup>163</sup> Damaška, 1977, p. 305, see *supra* note 144; Mirjan Damaška, “Epistemology and Legal Regulation of Proof”, in *Law, Probability and Risk*, 2003, vol. 2, p. 118.

<sup>164</sup> Damaška, 1977, p. 305, see *supra* note 144; Damaška, 2003, p. 118, see *supra* note 163.

only as a statement about the evidence presented at trial.<sup>165</sup> There are social interests that run in both directions. If the verdict is presented as being about what happened, then fact-finding will be seen as an accurate endeavour and the public will be more inclined to follow the law.<sup>166</sup> However, if the verdict is presented as being about the evidence presented at trial, this serves a social good as well, by reflecting the limitations of legal truth and not further entrenching those affected by the verdict in unequal power dynamics with the State. Henry Chambers argues for this view, that “what is true is what the [trial] evidence indicates is true”,<sup>167</sup> while Laudan accepts the former.<sup>168</sup> Laudan claims that “nothing that a judge or jury later determines to be the case changes any facts about the crime”, and that “evidence does not define what is true and false about the crime”.<sup>169</sup> Yet Laudan acknowledges that verdicts can be false, based on unrepresentative evidence.<sup>170</sup>

Along these lines, we can distinguish between the “reliability” of a verdict and its “accuracy”.<sup>171</sup> The accuracy view is linked with truth-seeking as a goal, but it presumes that truth exists on a spectrum, and that a verdict can be more or less true.<sup>172</sup> The term “reliability” presumes that truth is an all-or-nothing sort of enterprise, which better reflects the idea that a verdict is capturing the likelihood of its truth, but then it might seem that a trial is about probabilities rather than facts.<sup>173</sup> HO claims that the recognition of justice considerations does not defeat the goal of truth-seeking: “Since the claim is that the pursuit of truth is the main goal, and

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<sup>165</sup> HO, 2006, p. 58, see *supra* note 128, citing Charles Nesson, “The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts”, in *Harvard Law Review*, 1958, vol. 98.

<sup>166</sup> *Ibid.*

<sup>167</sup> Laudan, 2006, p. 12, see *supra* note 154, citing Henry Chambers, “Reasonable Certainty and Reasonable Doubt”, in *Marquette Law Review*, 1998, vol. 81, p. 668.

<sup>168</sup> Laudan, 2006, p. 12, see *supra* note 154.

<sup>169</sup> *Ibid.*, pp. 12–13.

<sup>170</sup> *Ibid.*

<sup>171</sup> HO, 2006, p. 66, see *supra* note 128.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

not that it is the absolute or all-overriding end, it involves no contradiction to admit to the legitimacy of ‘side-constraints’ on that enterprise”.<sup>174</sup>

The precise balance between seeking truth and justice will vary depending on the criminal legal system in question, which will become clear in Section 8.4., when we finally reach international criminal law. 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. The upshot of this section has been to acknowledge social influence on a criminal legal trial, and the corresponding need for social epistemology to help mitigate the harms that can occur as a result. Thus, 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.<sup>175</sup>

#### **8.4. Truth and Epistemic Justice in International Criminal Law**

In this final section, I reach the crux of my argument about truth and epistemic justice, 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 analysing the tension between truth and epistemic 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 truth-seeking and epistemic injustice. Ultimately, I conclude that international criminal courts and tribunals are better suited to serve range of goals of international criminal law.

##### **8.4.1. Goals of International Criminal Law**

There is an abundance of goals of international criminal law, several of which necessarily conflict with one another, leading some to argue that

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<sup>174</sup> *Ibid.*, p. 70.

<sup>175</sup> Greer, 1971, p. 142, see *supra* note 153, citing H.M. Hart, and J.T. McNaughton, “Evidence and Inference in the Law”, in *Daedalus*, 1958, vol. 87, p. 67.

there are too many goals to ensure consistency in the legal system.<sup>176</sup> Seeking justice and seeking the truth are clearly two of these goals.<sup>177</sup> 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".<sup>178</sup> The ICC Statute also contains provisions ensuring protection of defendants and witnesses, and an explicit charge for the Prosecutor to "establish the truth" in her investigations.<sup>179</sup> The International Criminal Court ('ICC') Pre-Trial Chamber has also explicitly indicated that "the search for truth is the principal goal of the Court as a whole".<sup>180</sup> 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.<sup>181</sup>

The aim of this section is to more precisely identify the locations of this conflict as it pertains to truth and epistemic justice, and to establish that the conflict is not pernicious.

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<sup>176</sup> See Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, University of Pennsylvania Press, Philadelphia, 2007, p. 14; see also Mirjan R. Damaška, "What is the Point of International Criminal Justice?", in *Chicago Kent Law Review*, 2008, vol. 83, p. 329.

<sup>177</sup> I do not address the prominent goals of international criminal justice with respect to punishment here, although I note here that the imposition of punishment is related to the goals of seeking justice and seeking the truth.

<sup>178</sup> Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002 ('ICC Statute') ([www.legal-tools.org/doc/7b9af9/](http://www.legal-tools.org/doc/7b9af9/)).

<sup>179</sup> ICC Statute, Articles 54(1)(a), 68.

<sup>180</sup> International Criminal Court ('ICC'), Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55, para. 11 ([www.legal-tools.org/doc/15c802/](http://www.legal-tools.org/doc/15c802/)).

<sup>181</sup> Yvonne McDermott, *Fairness in International Criminal Trials*, Oxford University Press, New York, 2016, p. 126.

#### 8.4.2. 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 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”.<sup>182</sup> It has been argued by some that the international criminal courts and tribunals should adopt a more realistic model of admitted evidence, and that the so-called adversarial/inquisitorial distinction is not the most useful way to model their procedural systems.<sup>183</sup> Rather, the important question should be whether a procedural system “assists the Tribunals in accomplishing their tasks and whether it complies with fundamental fair trial standards”.<sup>184</sup> Another view is that international criminal judges utilise managerial powers, thus maintaining the general adversarial system but giving judges the power to insert themselves at times in order to speed up the trial process.<sup>185</sup> 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”.<sup>186</sup> For the purposes of this chapter, I retain the distinction between adversarial and inquisitorial models as a shorthand for the general practices of each system with respect to truth and justice, as outlined in Section 8.3.1.2., but I acknowledge that these models do not represent the only ways of thinking about international criminal procedure.

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<sup>182</sup> See Michele Caianiello, “Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models”, in *North Carolina Journal of International Law and Commercial Regulation*, 2011, vol. 36; ICC Statute, Article 54(1)(a), see *supra* note 178.

<sup>183</sup> Kai Ambos, “International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or Mixed?”, in *International Criminal Law Review*, 2003, vol. 3, p. 1; Heinze, 2014, p. 193, see *supra* note 143.

<sup>184</sup> Ambos, 2003, p. 1, see *supra* note 183.

<sup>185</sup> See Máximo Langer and Joseph Doherty, “Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms”, in *Yale Journal of International Law*, 2011, vol. 36, p. 241; see also Heinze, 2014, p. 124, see *supra* note 143.

<sup>186</sup> Rosemary Byrne, “Drawing the Missing Map: What Socio-Legal Research Can Offer to International Criminal Trial Practice”, in *Leiden Journal of International Law*, 2013, vol. 26, no. 4, p. 1002.



### 8.4.3. 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.<sup>187</sup> When we take the multiple aims of truth in international criminal courts and tribunals into account, we can see how the correspondence, coherence, and pragmatist theories might each contribute something useful to establishing the truth. The focus on “fact-finding” in international criminal law is a straightforward endorsement for correspondence theories of truth, and the judges’ interest in obtaining evidence that corresponds with reality. Yet the idea of establishing a historical record, as a story about the atrocities that were committed against a group of people, suggests that coherence theories could play a role in constructing a coherent narrative. And pragmatist theories support the idea that the corroboration of accounts through multiple pieces of evidence will lend itself to a truthful verdict, and also a truthful narrative for the historical record.<sup>188</sup>

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<sup>187</sup> Statement of Judge Claude Jorda, United Nations Security Council, 4161st meeting, U.N. Doc. S/PV.4161, 20 June 2000, p. 3 ([www.legal-tools.org/doc/365c3f/](http://www.legal-tools.org/doc/365c3f/)); Emmanouela Mylonaki, “The relevance and application of empirical research methods to the study of international crimes”, in Ilias Bantekas and Emmanouela Mylonaki (eds.), *Criminological Approaches to International Criminal Law*, Cambridge University Press, Cambridge, 2014, p. 55; Stephan Parmentier, “Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court in Dealing with Political Crimes”, in *International Annals of Criminology*, 2003, vol. 41, p. 203; Jens David Ohlin, “Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law”, in *UCLA Journal of International Law and Foreign Affairs*, 2009, vol. 14, p. 96; Mirjan Damaška, “Negotiated Justice in International Courts”, in *Journal of International Criminal Justice*, 2004, vol. 2, p. 1031; Heinze, 2014, p. 218, see *supra* note 143.

<sup>188</sup> John Jackson, for example, argues in favour of the possibility that “procedures that maximize the volume of relevant evidence and provide opportunities for testing its probative value are likely to achieve higher levels of accuracy than procedures which limit the flow of relevant information and do not provide opportunities for testing it”. J.D. Jackson, “Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial–Inquisitorial Dichotomy”, in *Journal of International Criminal Justice*, 2009, vol. 7, no. 1, p. 23.

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:

Eyewitnesses 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.<sup>189</sup>

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".<sup>190</sup> The ad hoc tribunals have also expressed a preference for live testimony where possible.<sup>191</sup> Live testimony permits the accused to face her accuser, and it also allows the judges to better assess witness credibility.<sup>192</sup> Recall from Section 8.3.1.3. that testimony should be both reliable and relevant for it to play a role in helping

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<sup>189</sup> Nancy Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press, Cambridge, 2010, p. 21.

<sup>190</sup> ICC Statute, Article 69(2), see *supra* note 178.

<sup>191</sup> Extraordinary Chambers in the Courts of Cambodia ('ECCC'), Internal Rules, adopted 12 July 2007, Rule 26 ([www.legal-tools.org/doc/a95fce/](http://www.legal-tools.org/doc/a95fce/)) provides that "[t]he testimony of a witness or expert during a judicial investigation or at trial shall be given in person, whenever possible". In *Kupreškic et al.* the International Criminal Tribunal for former Yugoslavia ('ICTY') Appeals Chamber described as a "fundamental principle" that "witnesses shall as a general rule be heard directly by the Judges of the trial Chambers", ICTY, *Prosecutor v. Kupreškic et al.*, Appeals Chamber, Decision on Appeal Against Ruling to Proceed by Deposition, 15 July 1999, IT-95-16, para. 18 ([www.legal-tools.org/doc/ab8371/](http://www.legal-tools.org/doc/ab8371/)); see also Mark Klamberg, *Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Martinus Nijhoff Publishers, Leiden, 2013, p. 365.

<sup>192</sup> Sylvia Ntube Ngane, "Witnesses Before the International Criminal Court", in *The Law and Practice of International Courts and Tribunals*, 2009, vol. 8, p. 433, citing ICTY, *Prosecutor v. Zejnir Delalic et al.*, Trial Chamber, Decision on the Motion to Allow Witnesses K, L, and M to give their testimony by Means of Video-Link Conference, 28 May 1997, IT-96-21, para. 15 ([www.legal-tools.org/doc/c362a7/](http://www.legal-tools.org/doc/c362a7/)); ICTY, *Prosecutor v. Tadic*, Trial Chamber, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996, IT-94-1-T, para. 19 ([www.legal-tools.org/doc/adfc52/](http://www.legal-tools.org/doc/adfc52/)); see also Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense*, Cambridge University Press, Cambridge, 2017, p. 154.

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 work of Combs, who has done extensive work in documenting problems in fact-finding in international criminal law.

#### 8.4.3.1. 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.<sup>193</sup> The International Criminal Tribunal for former Yugoslavia, for instance, provides for the admission of written witness statements in such situations, when the evidence in question speaks to the “proof of a matter other than the acts and conduct of the accused as charged in the indictment”, and when “other witnesses will give or have given oral testimony of similar facts”.<sup>194</sup>

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”.<sup>195</sup> 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 the counsel is clearly trying to obtain relevant information from a witness and is nonetheless unable to do so.<sup>196</sup> A Special Panel for Serious Crimes, East Timor prosecutor complained about this problem to the judge, stating: “Your Honor, this witness does not want to answer ques-

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<sup>193</sup> May and Fyfe, p. 154, 2017, see *supra* note 192.

<sup>194</sup> ICTY, Rules of Procedure and Evidence, revision 50, adopted 11 February 1994, amended 8 July 2015, Rule 92 *bis* ([www.legal-tools.org/doc/30df50/](http://www.legal-tools.org/doc/30df50/)).

<sup>195</sup> Combs, 2010, p. 38, see *supra* note 189.

<sup>196</sup> *Ibid.*, p. 56.

tions, he just wants to tell a story”.<sup>197</sup> However, it seems that international criminal courts and tribunals will often err on the side of deeming evidence relevant to the truth-seeking endeavour, and admit the evidence.<sup>198</sup>

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.<sup>199</sup> 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”.<sup>200</sup> Cases of clearly perjured testimony are likely to be excluded, but these cases are rare, despite the fact that “there is a great deal of lying taking place at (some) international tribunals”.<sup>201</sup>

#### 8.4.3.2. Discounted Testimony

Despite the willingness of the courts 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 transla-

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<sup>197</sup> *Ibid.*, p. 98, citing Special Panel for Serious Crimes, East Timor, *Prosecutor v. Joao Franca da Silva et al.*, Judicial System Monitoring Programme, Case Notes, 24 March 2003, p. 7–8.

<sup>198</sup> Peter Murphy argues that international criminal law is too permissive in admitting evidence that is likely irrelevant: “The indiscriminate admission of any and all material the parties claim to be evidence, far from being the only means of promoting a successful search for the truth, buries the genuinely probative evidence in a vast accumulation of evidential debris, frustrating rather than facilitating the task of judges trying to establish the truth”. Peter Murphy, “No Free Lunch, No Free Proof. The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Courts”, in *Journal of International Criminal Justice*, 2010, vol. 8, p. 540.

<sup>199</sup> Combs, 2010, pp. 177–178, see *supra* note 189.

<sup>200</sup> *Ibid.*, p. 189.

<sup>201</sup> *Ibid.*, p. 130.

tors. The result is that “every statement made by anyone in the room, be it witness, defendant, judge, or attorney, must be simultaneously translated into the other languages”.<sup>202</sup> Not only does this make the trial process incredibly slow, but it also introduces numerous possibilities for poor translations, and the likelihood that a witness will be misunderstood, and the probative value of evidence will be compromised. Sometimes misunderstandings are not identified, or a frustrated counsel decides to “abandon a line of questioning without having received a responsive reply”, and in both scenarios, the fact-finding mission is impaired.<sup>203</sup>

Differences in culture can also create misinterpretations, such as what occurred during the International Criminal Tribunal for Rwanda’s (‘ICTR’) *Akayesu* trial with respect to the term “rape”.<sup>204</sup> 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.<sup>205</sup> This is also an instance where gender dynamics may have played a role in obscuring the testimony,<sup>206</sup> since even in communities with a shared culture, “men and women communicate differently, as do people of higher and lower social standing”.<sup>207</sup>

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, they “frequently report events that were recounted to them as though they personally saw them”.<sup>208</sup> 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 wit-

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<sup>202</sup> May and Fyfe, p. 155, 2017, see *supra* note 192.

<sup>203</sup> Combs, 2010, p. 62, see *supra* note 189.

<sup>204</sup> *Ibid.*, p. 74, citing International Criminal Tribunal for Rwanda (‘ICTR’), *Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, paras. 152–154 ([www.legal-tools.org/doc/b8d7bd/](http://www.legal-tools.org/doc/b8d7bd/)).

<sup>205</sup> *Ibid.*

<sup>206</sup> See generally Doris E. Buss, “Knowing Women: Translating Patriarchy in International Criminal Law”, in *Social and Legal Studies*, 2014, vol. 23, no. 1.

<sup>207</sup> Combs, 2010, p. 79–80, see *supra* note 189.

<sup>208</sup> *Ibid.*, p. 94.

nessed the event in person as warranting their own testimony about the event.<sup>209</sup> Thus witnesses will share information with the rest of the community, and then the information is seen as shared knowledge.<sup>210</sup> 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".<sup>211</sup> In another ICTR case, *Ndindabahizi*, a witness asserted that "[w]hen someone asserts that [an incident] is a true fact, you yourself will take it to be the truth".<sup>212</sup> Fact-finders from different traditions (and probably Aristotle, as well) would likely see this absolute acceptance of the testimony of others as going too far in terms of epistemic reliance.

There are also often discrepancies between the witnesses and the courtroom staff in terms of education that can contribute to the discounting of testimony.<sup>213</sup> Illiteracy and lack of education can impair the ability of international witnesses to answer questions.<sup>214</sup> 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.<sup>215</sup> 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 Tutsi

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<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*; see also ICTR, *Prosecutor v. Kamuhanda*, Trial Chamber II, Transcript of 22 January 2003, ICTR-99-54A-T, p. 41 ([www.legal-tools.org/doc/05a34c/](http://www.legal-tools.org/doc/05a34c/)).

<sup>211</sup> Combs, 2010, p. 94, see *supra* note 189, citing ICTR, *Prosecutor v. Musema*, Trial Chamber, Judgement and Sentence, 27 January 2000, ICTR-96-13-A, para. 103 ([www.legal-tools.org/doc/1fc6ed/](http://www.legal-tools.org/doc/1fc6ed/)).

<sup>212</sup> Combs, 2010, p. 95, see *supra* note 189, citing ICTR, *Prosecutor v. Ndindabahizi*, Trial Chamber, Transcript of 22 September 2003, Case No. ICTR-01-71-T, p. 19–20 ([www.legal-tools.org/doc/b26b96/](http://www.legal-tools.org/doc/b26b96/)).

<sup>213</sup> Combs, 2010, p. 5, see *supra* note 189.

<sup>214</sup> *Ibid.*, p. 64.

<sup>215</sup> *Ibid.*, ch. 2.

taking refuge at the Gikomero Parish, while other witnesses placed the number of Tutsi refugees in the thousands.<sup>216</sup>

#### 8.4.4. Epistemic Injustice in International Criminal Law

The previous sub-section reveals that there are multiple opportunities for the unwarranted discounting of testimony to occur in international criminal law. As already noted, many of these instances in which testimony is excluded or discounted are proper, as the testimony does not aid the fact-finder in establishing the truth, or the testimony will put the testifier at risk of harm. There is no epistemic injustice<sup>217</sup> 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 second-hand) about a relevant incident is not wronged. We must also distinguish epistemic 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 favour 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. Epistemic justice does not guarantee a particular method of having your voice heard – it just means your voice and your knowledge cannot 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 epistemic injustice.

Yet the examples listed above suggest that international criminal law introduces significantly more opportunities for epistemic injustice than a domestic criminal trial. In the *Akayesu* case, when witnesses avoided the term “rape”, the women could have been completely misunderstood if their words had been translated literally. Female witnesses, in general, can have their testimony discounted based on their communication style. Combs notes the following in a footnote:

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<sup>216</sup> *Ibid.*, p. 35, citing ICTR, *Prosecutor v. Kamuhanda*, Trial Chamber, Transcript of 11 February 2002, ICTR-99-54A-T, para. 106 ([www.legal-tools.org/doc/288c7f/](http://www.legal-tools.org/doc/288c7f/)).

<sup>217</sup> There may be epistemic *harm* that occurs, even where there is no injustice, but this inquiry is beyond the scope of the chapter.

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.<sup>218</sup>

In Section 8.2.3.3., I showed how epistemic injustice occurs in the face of social inequality, and thus women are often the victims of the phenomenon. 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.

We might think that one goal of international criminal courtrooms is to give victims of violence some measure of power over their assailants, or at least the historical narrative. If a court fails with respect to this goal, a victim might experience harm. But this is distinct from the harm that occurs when a witness’s testimony is discounted based on the way in which it is provided. When an international witness is not respected as someone with knowledge, as someone who has something to contribute to the fact-finding mission, she experiences epistemic injustice. And as I demonstrated in Section 8.2.3.3., the virtue of testimonial justice on the part of hearers is a plausible way to mitigate the effects of epistemic injustice.

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<sup>218</sup> Combs, 2010, p. 80, see *supra* note 189; see Robin Tolmach Lakoff, “Women’s Language”, in *Language and Style*, 1977, vol. 10, pp. 222, 225–28; Robin Lakoff, *Language and Women’s Place*, Oxford University Press, Oxford, 1975, pp. 14–17; John M. Conley *et al.*, “The Power of Language: Presentation Style in the Courtroom”, in *Duke Law Journal*, 1978, pp. 1375, 1380, 1385–86; see generally, Monica Hersh Khetarpal Sholar, “Jurors’ Perceptions of Gender-Based Linguistic Differences”, in *William and Mary Journal of Women and the Law*, 2003, vol. 10, p. 91.



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.<sup>219</sup> 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 recognising 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.

#### **8.4.5. Alternative Justice Mechanisms**

Given all of the issues that can arise with 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 the two I have focused on in this chapter. 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.<sup>220</sup> If we think that victims have a “right to know the truth”,<sup>221</sup> 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 encour-

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<sup>219</sup> See generally, Combs, 2010, ch. 7, see *supra* note 189.

<sup>220</sup> See Alice H. Henkin, “State Crimes: Punishment or Pardon (Conference Report)”, in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace Press, Washington D.C., 1995, pp. 184, 186; Harvey M. Weinstein and Eric Stover, “Introduction: Conflict, Justice and Reclamation”, in Harvey M. Weinstein and Eric Stover (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, pp. 1, 13–14; see also Neha Jain, “Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice”, in *Duke Journal of Comparative and International Law*, 2010, vol. 20, p. 267.

<sup>221</sup> See Laudan, 2006, see *supra* note 154; see also Edgar R. Aguilera, “Truth and Victims’ Rights - Towards a Legal Epistemology of International Criminal Justice”, in *Mexican Law Review*, 2013, vol. 6, no. 1, p. 124.

aged 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 chapter, it is perhaps time to acknowledge their importance. Establishing the truth is important for establishing a historical record, but also because we do not want to have a practice of reaching erroneous verdicts in a criminal trial. But 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 paper, 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 epistemic justice to occur, and take responsibility for pursuing epistemic justice.

## **8.5. Conclusion**

I have argued that because we rely on each other epistemically for the truth of our beliefs, and 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.

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