

## TESTIMONIAL MODES:

### WITNESSING, EVIDENCE, AND TESTIMONY BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA<sup>1</sup>

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Every criminal trial involves two issues: first, that the crimes charged have been committed and, second, that an accused is responsible for those crimes.<sup>2</sup>

At the international level, criminal trials have been characterised as having two important – and sometimes conflicting – adjudicative functions.<sup>3</sup> First, international proceedings are characterised as mechanisms for finding fact and determining criminal responsibility, and so have a similar function to national criminal trials. Second, unlike national criminal trials, international trials are also perceived as having broader ‘transitional’ functions. The adjudicative functions range from establishing ‘historical facts’ of conflict to providing ‘rule of law’ principles for adjudicating conflict.<sup>4</sup> What role, then, does testimony play in establishing the ‘truth’ of international crimes? And how do international criminal trials adjudicate the testimonial proof or disproof of such crimes?

It is commonly claimed that international criminal law is now developing a *sui generis* legal culture, which reflects ‘the specificity of international criminal proceedings [and] the unique traits of such proceedings’.<sup>5</sup> As the ICTY Trial Chamber in *The Prosecutor v. Stanisić and Zupljanin* noted, ‘the legal system that applies before this Tribunal is not common law or civil law. It is a hybrid, and it is a system that applies and develops on its own premises and its own terms’.<sup>6</sup> Whether ‘inquisitorial, adversarial, or mixed’, it is clear that international criminal

law is developing a common set of epistemic norms and practices to determine legal facts, even if their specific detail remains contentious.<sup>7</sup> These emergent epistemic norms and practices shape how international criminal trials adjudicate the evidence before them, and thereby establish the legal facts of international crimes. If evidence is that which establishes a legal fact, then the evidence of testimony is crucial to the determination of the legal truth of international crimes in contemporary international criminal trials.<sup>8</sup> For this reason, it is crucial to understand the evidential role of testimony in international criminal trials, and the modes of testimony that they use to prove or disprove the ‘truth’ of these crimes of war.

To explore these modes of testimony, I examine testimonial evidence in two sexual violence cases of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *The Prosecutor v Furundzija* and *The Prosecutor v Brđanin*. The chapter first examines the different models of the testimony of the victim-witness in *Furundzija*. This case exemplifies the earlier Tribunal cases, which predominantly focus upon lower-level direct perpetrators and victim-witnesses. In such cases, the victim-witness is central to establishing the facts of the event. How is the testimonial evidence of the victim-witness evaluated and judged? The chapter then examines the different models of testimonial evidence in *Brđanin*. One of the first leadership and documentary cases, *Brđanin* is typical of later Tribunal cases. These generally try higher-level perpetrators who are not physically involved in the commission of the crime, which instead is carried out by their subordinates. Such cases involve multiple witnesses and forms of testimonial evidence, such that documentary rather than eyewitness testimony becomes central to these cases. What form, then, does testimonial evidence take in such cases of multiple witnessing, and how is it evaluated and judged?

## 5.1 *Furundzija* and the Testimony of Memory

In 1995, Anto Furundzija, a local commander of Croatian armed forces, was charged with violations of the laws or customs of war, namely, torture and outrages upon personal dignity. The charges arose from the rape and sexual assault of a Muslim woman, Witness A, by another soldier, Accused B, during her interrogation by Furundzija in 1993. Furundzija was Accused B's commanding officer. Furundzija was tried for his individual responsibility for these crimes, rather than under the principle of 'command responsibility'.<sup>9</sup> The *Furundzija* proceedings ran from 8 to 22 June 1998. Testimonial evidence predominantly took the form of direct oral testimony, with evidential issues focusing upon victim-witness testimony. As Dembour and Haslam point out, the figure and person of the victim-witness is central to the international criminal trial.<sup>10</sup> *Furundzija* is typical of early cases heard by the ICTY, which generally prosecuted 'lower-level' accused, such as camp guards, that directly perpetrated crimes. The case involves an extensive consideration of victim-witness testimony, particularly in relation to issues of reliability and credibility.

In the *Furundzija* trial, the evidential value of the testimony of Witness A was a central and contentious issue. There was no argument that assaults on Witness A had not occurred. However, the Defence brought into question the accuracy of the memory of Witness A concerning the role of the Accused in those assaults. The Defence alleged that the Prosecution had provided inadequate identification of the Accused,<sup>11</sup> and insufficient evidence of his presence during the assaults on Witness A,<sup>12</sup> on the ground that Witness A's memory of the injurious event was unreliable.

Two key evidentiary issues concerning the testimony of Witness A were raised during the course of the trial. The first issue concerned the admission of medical and psychological reports of treatment and diagnosis of Witness A by the Medica Women's Therapy Centre.<sup>13</sup> The Trial Chamber permitted a reopening of the trial over the "medical, psychological or psychiatric treatment or counselling received by Witness A",<sup>14</sup> on the grounds that the issue "clearly had the potential to affect the *credibility of the prosecution evidence*" (original emphasis).<sup>15</sup> The second was the possible diagnosis, and implications of, post-traumatic stress disorder ('PTSD') of Witness A. The relevance of the Medica Report did not concern a new disclosure of PTSD. Rather, prior to the disclosure of the Medica report, the Defence had already argued that Witness A's identification of the defendant and recall of events was unreliable on the grounds that she was psychologically unstable and suggestible, and that she was influenced in her recollections by post-war politics and investigators.<sup>16</sup> For this reason, the admissibility of the Medica Report and its diagnosis of PTSD become a central issue in the trial.<sup>17</sup> The nexus between these two issues was the Defence's argument that the memory of the witness was unreliable.<sup>18</sup>

### 5.1.1 *The Witness*

Witness A did not accept this argument concerning her apparent diagnosis and its alleged implications: 'Witness A gave a different account . . . She maintained that she accurately remembered the events that form the subject of this case'.<sup>19</sup> For Witness A, her memory of the injurious event was reliable and accurate. She did not suffer from PTSD, nor had she received psychological treatment. Because of the danger of possible identification of Witness A, her testimony on this point is redacted (or deleted) from the transcripts of the trial. Her testimony

does not appear in the trial transcripts, but is re-presented by the Trial Chamber in its judgment.<sup>20</sup>

### 5.1.2 *The Defence*

In its closing statement to the Trial Chamber, the Defence argued that the testimony of Witness A was unreliable for four key reasons. First, she was in a state of psychological and physical distress. Second, there was no corroborating evidence. Third, her recall of events and identification were reconstructions for post-war political activists and investigators. Fourth, these reconstructions were inconsistent.<sup>21</sup>

The Defence presented two limbs for these arguments. The first limb concerned the diagnosis of PTSD, and the second concerned the implications of that diagnosis for reliability of evidence. As to the first limb, the Defence's expert witness suggested that Witness A suffered PTSD, and her rejection of the diagnosis and 'denial' of the symptoms of PTSD were typical of sufferers of the disorder.<sup>22</sup> As to the second limb of the argument, the Defence contended that because of Witness A's alleged PTSD, her memory was unreliable for two reasons, one neurobiological and the second psychological. The neurological claim of unreliability relies on the contention that people with PTSD suffer from hippocampus damage, which allegedly results in memory disorders, such as the poor and inconsistent recall of events.<sup>23</sup> The psychological argument for unreliability relied on claims concerning the psychological *sequelae* of PTSD, contending that 'the more trauma, the worse the memory'.<sup>24</sup> The expert witness claimed that this unreliability was compounded by both the inadequacy of treatment and the so-called 'mixed mission' of Medica of both providing treatment for trauma patients and campaigning for the prosecution of war criminals.<sup>25</sup>

### 5.1.3 *The Prosecution*

The Prosecution did not argue against the diagnosis of Witness A as a PTSD sufferer. Rather, its case rested on the veracity of Witness A's statements and corroborating evidence.<sup>26</sup> The Prosecution presented two arguments on the question of the reliability of her testimony. The first concerned the credibility of the witness. The Prosecution contended 'that any arguments that Witness A's credibility was diminished due to therapeutic interference with her memory or because of biological damage to her brain were pure speculation', since expert witnesses had pointed out that there was no evidence for either claim in relation to Witness A.<sup>27</sup> The second Prosecution argument addressed the claims of PTSD and unreliability of memory. The Prosecution, again relying on expert evidence, argued that 'PTSD does not render a person's memory of traumatic events unworthy of belief. [Rather,] intense experiences such as the events in this case are often remembered accurately despite some inconsistencies'. Moreover, 'inconsistency does not necessarily mean inaccuracy'.<sup>28</sup>

### 5.1.4 *The Tribunal*

Problematically, the Trial Chamber accepted 'the diagnosis that it is likely that Witness A had PTSD' on the inadequate basis of the Medica Report, which was made some years before, and the evidence of expert witnesses of the Prosecution and Defence, who had not examined Witness A.<sup>29</sup> However, the Trial Chamber found that 'Witness A's memory regarding material aspects of the events through which she suffered was not affected by any disorder she may have had' nor is 'there any evidence of any form of brain damage or that her memory was in any way contaminated by any treatment that she may have had'. The Chamber rejected the

argument that a diagnosis of PTSD necessarily entailed that the evidence given by a witness was inaccurate because '[t]here is no reason why a person with PTSD cannot be a perfectly reliable witness'.<sup>30</sup>

However, the Trial Chamber did not resolve the question of the relevance of the psychological state of the witness to issues of reliability of testimony. Rather, since the Chamber framed its remarks on PTSD in this way, that question remained central to its findings. The Chamber insisted that the reopening of the proceedings were predicated not on this issue (as argued in the *amicus curiae* brief), but rather on its 'duty to uphold the fairness and [the] presumption of innocence'.<sup>31</sup> Nevertheless, the assumption that the psychological condition and treatment of the witness is relevant to the issue of reliability appears to trigger the duty of the Chamber to the Accused.<sup>32</sup> The judgement suggests that the psychological state of the witness is relevant to reliability, but the specific diagnosis of PTSD does not necessarily entail that the witness is unreliable.

## 5.2 Tropes of testimony

The court of law is often characterized as utilizing a realist model of testimony as the mirror of 'reality' in memory. For example, Michael Lambek describes the court as holding a 'literalist view of memory . . . which neglects the fact that . . . representation can never be identical reproduction'.<sup>33</sup> However, these models of testimony of the witness, the prosecution, the defence, and the Tribunal are not 'literalist', in that they do not contend that testimony provides an identical reproduction of an event. Rather, they share a concern with the evidential value of the victim's testimony; with the nature of the re-presentation of an event in the testimony of

the victim-witness and of its value as evidence of that event. However, each model understands the testimony of the witness in a different way, and so gives it different evidential meaning.

### 5.2.1 *The Victim-Witness*

For the victim-witness, testimony both evidences the injurious act and testifies to the wrong. Her testimony both describes the traumatic injury and makes the claim of a wrong. For example, Witness A explicitly rejects the claim that her experiences create a psychological syndrome or psychiatric damage. For Witness A, her memory may be traumatic, but it is not psychopathological. Rather, her evidence is a testimonial to the injurious event since ‘the evidence she gave was the way she, as the person who endured these events, saw them happen’.<sup>34</sup> She acts as ‘a witness to the truth of what happens during an event’.<sup>35</sup> The witness offers ‘testimony’, an act of attesting to the truth of an event that offers ‘one’s own speech as material evidence for the truth’.<sup>36</sup> Her testimony expresses both the wrong of the crime and the truth of the event, and therefore exists in a necessary relation to the event of the wrong.

Giorgio Agamben argues that in Latin, ‘there are two words for “witness”’. The first, ‘*testis*, from which our word testimony derives, etymologically signifies the person who, in a trial or lawsuit between two rival parties, is in the position of a third party’. The second word, ‘*superstes*, designates a person who has lived through an event from beginning to end and can therefore bear witness to it’.<sup>37</sup> The complexity of the position of the complainant as witness arises from the fact that her memory is a testimonial to the wrong – she is a complainant and a witness. Because she is a complainant, she is not a ‘neutral’ third party witness in a trial. Her testimony is a description not just of an event, but also of a wrongful event. For this reason, in this model of testimony, ‘a non-judicial element of truth exists, such that the *quaestio facti* can never be reduced to the *quaestio iuris*’.<sup>38</sup> The testimony of the victim-witness evidences



the fact of the event that is not reducible to the legal determination. The nonjuridical element of truth in this model is that the complainant testifies not to a wrongful act against another, but a wrong to her person. Unlike the *testis*, she is not simply a witness to an event. Rather, her testimony materializes the wrong to her person. For the victim-witness, the fact of the event and the claim of the wrong are not separable, for her testimony to the event is also testimony to the wrong done to her. She is living proof of the wrong, which her testimony evidences. As a victim-witness, she embodies the wrong brought before the court.

Victim-witness testimony is therefore more than a descriptive claim of ‘reality’; it is also testimony to a social wrong to the victim. In cases of sexual assault, that wrong is the traumatic injury to the victim as a social subject. The wrong concerns not only the traumatic rupture of the integrity of the body (the act of assault) but also the assault on the integrity of the ‘self’ of the victim.<sup>39</sup> In the context of this harm to the social subject, testimony is invoked ‘in order to *address* another, to impress upon a listener, to *appeal* to a community’.<sup>40</sup> That appeal is an address to justice.

### 5.2.2 *The Defence*

A second model of testimony circulates throughout the Defence case. This model severs testimony from any necessary relation to the event, and hence to the wrong. Rather, it understands testimony as a labile mental representation, a re-presentation of an image of the event in narrative. The Defence argued that the testimonial narrative of events ‘is actually an opinion or belief as to what occurred’.<sup>41</sup> Its content expresses psychological or neurobiological states, rather than the reality of the event. This model might be called testimony as mentality, in the sense that the model posits a causal relation between the claimed psychological or

neurological ‘state of mind’ of the person, and the content of her or his memory of events re-presented in their testimony. As the Prosecutor noted in its submission to the Appeals Chamber, the essence of the Defence case in *Furundzija* was that Witness A’s memory of her assault is flawed because of her ‘mental health or psychological state’.<sup>42</sup>

The model of testimony put forward by the Defence assumes that the testimony of Witness A is unreliable because she suffers from a psychopathology, whether defined as a psychological state or neurological damage. The Defence claims that her psychopathology results from her traumatic experience of rape. In this model, the rupture of bodily integrity results in a rupture of psychic integrity, and consequently a rupture of the integrity of memory. That reading of trauma implies both that she is suggestible and therefore susceptible to a reworking of her memory by others and that she is psychologically unstable and therefore inherently unreliable in her recollections. In this way, the Defence’s model of memory seeks to establish a nexus between the experience of rape, psychopathology, and the unreliability of memory.

### 5.2.3 *The Prosecution*

By contrast, the Prosecution presents to the Trial Chamber a model of testimony that assumes that there is a truthful relationship between the recollection of the complainant and the event. It does not characterize that relationship as a reproduction of ‘reality’, but rather as an accurate account of the event. The Prosecution argued that ‘intense experiences such as the events in this case are often remembered accurately despite some inconsistencies’ and that Witness A recalled the ‘core’ events of this experience.<sup>43</sup> For the prosecution, the complainant is a *testis*, a third-party witness to the occurrence of the event. The veracity of the memory of the complainant derives from her position as a witness to the event. Her testimony evidences the

wrongful act, attesting to the fact of the wrong. This model assumes that the memory of the witness re-presents the wrongful act in testimony. It is strikingly similar to the psychoanalytic model of memory proposed by Laub, where the fallibility and incompleteness of the memory of a witness do not call into question ‘the validity of her whole testimony’. Rather, that testimony re-presents the ‘meaningful truth’ of the event.<sup>44</sup> In this model, testimony does not function as a photographic image or reproduction of reality. Rather, it captures the experience of the event, to which and for which the Prosecutor (like the psychoanalyst) listens. The Prosecutor listens for the truthful account of the legal wrong as factual event.

#### 5.2.4 *The Tribunal*

The Trial Chamber utilizes all three elements of experience, mental state, and meaningfulness to understand testimony as the re-presentation of the event. The Trial Chamber assesses this re-presentation ‘[h]aving seen and heard all the witnesses and considered the evidence’.<sup>45</sup> The Chamber first establishes itself as the arbiter of testimony, using the evidence of an expert witness - “‘I know of no way of measuring what people actually remember’” - to establish that science cannot offer the law definitive answers on the nature of memory.<sup>46</sup> Rather, the Chamber looks to its own judgment of witnesses and other evidence to assess testimony. In effect, the Chamber assesses the accuracy of the testimonial re-presentation of the event.

To make that assessment, the Trial Chamber deploys notions of reliability, or the accuracy of the witness’s testimony, and credibility, or the perceived truthfulness of the witness.<sup>47</sup> It looks to the material internal consistency of the testimony of the complainant. While under the Tribunal’s statute there is no legal requirement of corroboration, the Trial Chamber also looks to other testimony and evidence to confirm the veracity of testimony. For example, it accepted

the testimony of Witness A because she was reliable and credible in her ‘honest and confident’ presentation of her testimony, and because her testimony was coherent and corroborated.<sup>48</sup> This is an evidential assessment of the re-presentation of the event in testimony.

The Trial Chamber therefore utilizes an evidential model of testimony, where testimony is understood as the re-presentation of an event that is proved or disproved. In this sense, it is an empiricist model that relies on a ‘cognitivist, empirical epistemology’.<sup>49</sup> Proving testimony involves issues of probability and fallibility. Victim-witness testimony re-represents the event, which the Trial Chamber adjudicates in terms of the ‘reliability and credibility of the evidence’.<sup>50</sup> The Trial Chamber uses these models of evidence to judge whether the event that testimony attests to amounts to a legal fact. These concepts of ‘accuracy’, ‘truthfulness’, ‘evidence’, and ‘fact’ are themselves both constituted and constitutive. This constitutive dimension of judgment on testimony is recognized by the court, both in terms of the legal principles and rules that govern evidence (such as Section 3 of the Rules) and in terms of a right to appeal (such as Article 25 of the Statute). Further, the judgment of the evidence of testimony to a wrong is undertaken according to a legal standard of proof of ‘beyond reasonable doubt’.

In sexual assault cases, the court fundamentally assesses that proof in relation to the complainant as witness. In particular, it assesses the testimony of the complainant in relation to her reliability and credibility. For this reason, the Trial Chamber accepts that the psychological state of the witness is relevant to the issue of reliability. This becomes central to the trial. The complainant’s testimony is also assessed in relation to other witnesses and evidential material, namely corroboration. The court of law thus constitutes facts through these notions of credibility, reliability, and corroboration. These concepts do not represent

‘objective’ criteria of judgment and judgement. Rather, they are conceptual models of testimonial evidence that construct the determination of juridical facts. As I discuss below, this fact-finding is not a neutral process, but is diffracted through an integral relationship to gendered conceptions of the testifying witness.

### 5.3 Gendered Testimony

The ICTY claims that its ‘innovative procedures’ in sexual violence cases have now become ‘part and parcel of modern international criminal justice’.<sup>51</sup> The ICTY Rules of Procedure and Evidence (‘RPE’) removes corroboration requirements, disallows the defence of consent in certain circumstances, prohibits the admission of evidence of prior sexual conduct, and provides for particular witness protective measures in sexual violence cases (see Rule 96). These provisions were intended to recognize the specific circumstances of victims of sexual violence in war.<sup>52</sup> However, if the ICTY aspired to offer a different form of procedural justice to sexual violence witnesses, this was not the case in trial proceedings. Instead, there was a re-emergence of corroboration in practice, if not in principle (*Furundzija*), the refusal of full protective measures on ‘fair trial’ grounds (*Tadic*), and the consideration of evidence concerning consent and prior sexual conduct of the victim-witness (*Kunarac*). As in many national jurisdictions, there was still an unfair evidential evaluation of the testimony of sexual violence victim-witnesses.

My analysis of testimonial evidence in *Furundzija* shows why this is the case. In the trial process, the complainant makes the claim of a wrong. Her testimony *materializes* the wrong, because it both articulates the wrong and evidences it. In the trial, it will be *her* testimony, above all others, that is called into question. It will be *her* memory that will be most stringently

judged according to notions of reliability, credibility, consistency, and corroboration. It will be *her* witnessing that will be most subjected to an ‘evidential’ assessment of its re-presentation of the event.

The evidential model requires proof of the complainant’s testimony to the wrong. If testimony is evidence, it must also be evidenced. In the courtroom, testimony is cast as both truth and falsehood. In memory against memory, there must be another ground of adjudication. Because of the legal model of testimony, the issue of evidential corroboration returns. This is possibly the reason why the Tribunal comments in *Furundzija*: ‘although her testimony, in accordance with Rule 96 of the Rules, requires no corroboration, the Trial Chamber notes that the evidence of Witness D does confirm the evidence of Witness A in this regard’.<sup>53</sup> As a matter of law, the testimony of the complainant does not require corroboration.<sup>54</sup> As a matter of evidence, its proof entails the corroborative confirmation of further evidence. In this sense, the testimony of the complainant of the wrong does not adequately evidence the wrong for the Chamber. The complainant is thus subject to an additional (and hence unequal) assessment of her testimony to the injurious wrong compared to other witnesses.

If one ground of judgment on testimony is corroboration, another is credibility. For example, the *amicus curiae* brief points out that the issue of psychological and neurological credibility was only raised in relation to Witness A, and to no other witness: ‘defence counsel has sought to impeach only Witness A on the basis of her credibility in relation to her medical, psychological and psychiatric treatment and counselling records’.<sup>55</sup> The Defence did not seek to discredit another prosecution witness on these grounds, despite evidence that he had received psychiatric treatment. Nor was this line of argument pursued in relation to the Accused, who like other combatants could reasonably have been expected to suffer from PTSD. *Furundzija*

is the first trial at which this issue was raised, despite the likelihood that '[m]any, if not all, victims appearing before this Tribunal have suffered severe trauma and, therefore, may also be suffering from PTSD'.<sup>56</sup> The issue here is not whether PTSD impacts on the reliability of memory. Rather, the issue concerns the deployment of a diagnosis of PTSD as a means of *discrediting* the witness only in relation to Witness A as the complainant in a sexual assault case. As the *Furundzija* case reveals, the complainant will be subjected to unequal testing because of the structure of the legal testing of her testimony.

This unequal testing finds itself on the predication of a relationship between testimony and the complainant as witness. In cases of sexual assault, issues of reliability and credibility 'are focused on very strongly'.<sup>57</sup> In such cases, the court subjects the reliability and credibility of the complainant to greater scrutiny. The distinction between these two evidential issues is not maintained. For example, in *Furundzija* the distinction between reliability and credibility is not maintained in relation to Witness A. Rather, the accuracy of the testimony, characterised as its reliability, becomes predicated on the credibility of the complainant. This model presumes that there is a relationship between the reliability of testimony and the credibility of the complainant. For this reason, in *Furundzija* it becomes legitimate to challenge the reliability of the complainant's testimony by calling her credibility into question. Issues of reliability – the 'accuracy' of testimony – thus devolve into issues of credibility – the 'trustworthiness' of the witness. The credibility of the complainant thus becomes an essential part of the assessment of her testimony. Credibility is figured as the ground of testimony, and so the truth of testimony becomes linked to the truth of the person of the witness.

Critically, this legal 'witness' becomes a gendered subject. It is gendered because it is more likely that women in armed conflict will suffer sexual assault than men.<sup>58</sup> It is also gendered

because notions of sexual difference underlie the legal conception of the complainant as witness. The sexual assault trial turns, like no other, on the question of the embodied ontological status of the witness, that is, the capacity of the complainant *to be* a trustworthy witness.<sup>59</sup> This myth of the inherently uncreditworthy complainant whose testimony cannot be trusted reappears in *Furundzija*. Untrustworthy because she is a ‘feminine’ witness, she must demonstrate that she is not subjective, irrational, passive, and emotional.<sup>60</sup>

However, this ontological conception of the witness instantiates sexual difference in the process of adjudication. The presumption of a relationship between testimony and witness entails that the complainant cannot simply be a neutral third party giving evidence on behalf of the prosecutor. Rather, she will be assessed as a witness in terms of an ontological conception of the ‘nature’ of sexed subjectivity. Because of this conception of the sexed identity of the witness, the credibility of the complainant is not presumed; instead, she must establish that credibility. It thereby imposes a higher standard of proof of reliable memory upon a complainant in sexual violence cases because of the assumption of inherent uncreditworthiness, as we see in the process of evidential adjudication in *Furundzija*.<sup>61</sup>

This ontological and gendered conception of the witness re-emerges in arguments concerning the relationship between the psychological or neurological state of the witness and the reliability of her memory. As Fiona Raitt and Suzanne Zeedyk argue, ‘a diagnosis of this sort renders it more possible for defence lawyers to attack the reliability of a woman victim’s credibility on the ground that she is suffering from a mental illness’.<sup>62</sup> By allowing the issue of reliability to be linked to that of psychological state (credibility), the Trial Chamber allowed this defence argument to be made. Further, in *Furundzija* the Trial Chamber accepted the contention that there was a link between the psychological state and the credibility of the



complainant. This link took two forms: first, between her past psychiatric history and her ‘truthfulness’, and second, between her current psychiatric state of PTSD and the reliability of her memory. The Trial Chamber did not accept that a diagnosis of PTSD entailed unreliability of memory. Nevertheless, it allowed a nexus between the psychological state of the witness and her credibility to be made, thereby linking the credibility of the witness to the reliability of her memory.

This nexus relies on an assumption that there is a relationship between bodily and psychic integrity and the integrity of memory. A conception of the witness as a ‘masculine’ subject underpins this model of bodily and psychic integrity. Kaja Silverman describes the normative masculine subject as projecting an ‘unimpaired masculinity’ of coherent identity and bodily integrity.<sup>63</sup> For the masculine subject, the ‘coherence and ideality of the corporeal ego’ rests on ‘an unimpaired bodily “envelope”’.<sup>64</sup> Coherence of the masculine self rests on the integrity of its body. The model of the witness that possesses a coherent identity and a bodily integrity rests on a model of masculine subjectivity. However, if the masculine subject supposes its corporeal and subjective coherence, the ‘feminine’ subject is imagined to suffer the lack or loss he does not. ‘The feminine’ thus ‘represents the site at which the male subject deposits his lack’.<sup>65</sup> For this reason, the position of the “feminine” witness is that of a subject that lacks bodily integrity, and therefore the stable identity of a ‘bounded self’.<sup>66</sup>

The victim of sexual assault testifies to the rupture of psychic and bodily integrity. In articulating the wrong of sexual assault, the witness must testify to a trauma to bodily and subjective unity. In this position, the sexual assault victim becomes a ‘feminine’ witness. Adler argues that the rape victim “occupies a unique position in the legal system which treats her with unparalleled suspicion”.<sup>67</sup> This position arises in part because the victim of sexual

violence is placed in the position of the feminine witness, and hence rendered an inherently untrustworthy witness. Both male and female victims of sexual violence may occupy that position. Indeed, as Sue Lees points out, the male victim of rape is often perceived as being ‘feminised’ by the assault itself.<sup>68</sup> To testify to a breach of self and corporeal integrity places the witness in a ‘feminine’ position of subjective and bodily lack, and so in the position of the ‘feminine’ witness whose credibility is in doubt.

The ‘unique position’ of the complainant also arises because of the relationship between the legal conception of the witness as subject and the nature of sexual assault itself. The model of the masculine witness assumes that there is a relationship between bodily and psychic integrity. A breach of bodily integrity consequently also ruptures psychic integrity. The witness who testifies to sexual violence thus becomes subject to a presumption of uncreditworthiness. This model further assumes that there is a relationship between bodily and psychic integrity and the integrity of memory. Accordingly, a breach of bodily integrity entails a rupture of the integrity of memory. In this way, the witness who testifies to sexual violence also becomes subject to the presumption of unreliability of memory. This model presumes that the trauma of sexual assault entails an injury to coherent and integrated memory.<sup>69</sup> In *Furundzija*, the argument by the Defence that the trauma of Witness A’s experience of rape produced a neurological trauma, which literally writes bodily damage on the brain and hence on memory, is an attempt at a ‘scientific’ rendering of these presumptions.

All parties to the hearing, with the exception of Witness A, restate these presumptions. In the trial hearing, the parties did not contest the traumatic nature of the sexual assaults on Witness A, or the diagnosis of PTSD as a consequence of that trauma. What was contested was the relationship between that psychological trauma and the subsequent reliability of memory.<sup>70</sup>

The Trial Chamber accepted the testimony of Witness A because of her “honest and confident” presentation of her memory and her coherent account of the events.<sup>71</sup> She was able to demonstrate that the trauma to her body and her person did not entail a trauma to her memory. Paradoxically, she was able to meet the higher standard of credibility because her trauma did not appear to have a material effect on the coherence and integrity of her memory. The paradoxical position of the complainant derives from the fact that she must demonstrate the breach to her bodily integrity, while also demonstrating that her ‘self’ and hence her memory remain ‘intact’. Her testimony must attest to the harm of the assault on the integrity of her ‘self’, while also establishing that her ‘self’ is coherent and stable.

The production of the evidence of testimony by law is not sexually indifferent. Rather, juridical fact-finding constitutes witness-testimony as evidence in a relation to sexual difference because of the structure of the trial process, the evidential model of testimony, the sexed subjectivity, and the sexed position of the witness testifying to sexual assault. The trial is not a neutral procedure for evaluating evidence. Rather, its adjudicative processes produce both the subjective ‘integrity’ of the witness, and its destruction, as the ground of evidential evaluation.

#### **5.4 *Brđanin* and the Evidence of Testimony**

The *Brđanin* proceedings ran from January 2002 to April 2004. In contrast to the *Furundzija* case, which involved a low-level commander who was a physical participant in a limited crime scene involving one victim, the accused in the case of *Brđanin* was a senior political leader who was not a physical participant in the crimes. Rather, he was charged with participation in a joint criminal enterprise - namely, the ethnic cleansing of thousands of people in the Bosnian region in which he held high-levels of political and military responsibility.<sup>72</sup> *Brđanin* was

charged with multiple charges of genocide, crimes against humanity, violations of laws or customs of war, and grave breaches of the Geneva Conventions on the basis of individual and superior criminal responsibility (that is, command responsibility). These charges included multiple allegations of sexual violence during ‘ethnic cleansing’ in the region, as well as in camps and other detention centres.<sup>73</sup>

The *Brđanin* proceedings also took place in a different legal context to *Furundzija*. That changing context primarily derives from the implementation of the ICTY completion strategy, with its focus upon the prosecution of senior leaders,<sup>74</sup> and related changes to the Rules that allowed a shift from oral to documentary evidence to increase the efficiency of trial proceedings.<sup>75</sup> The impact of this changing legal context can be seen in the extensive use of documentary evidence in *Brđanin* (which both the Trial Chamber and counsel characterised as the first major documentary trial), and the way in which the pressures of expediting the trial explicitly shaped the proceedings.<sup>76</sup>

The different scale and nature of the *Brđanin* proceedings reveal an amplification of the problematics of testimonial evidence in *Furundzija*. The *Furundzija* trial ran for ten days, with eight witnesses called by the Prosecution and six by the Defence. The Prosecution submitted fifteen exhibits and the Defence submitted twenty-two. In contrast, *Brđanin* ran for 284 trial days, with 202 witnesses called by the Prosecution, and nineteen witnesses called by the Defence. There were 2736 Prosecution exhibits, and 350 submitted by the Defence. The trial ran for over two years. *Brđanin* was a long and complex case in which the notion of evidence itself was contested at trial, and adjudicated in the trial and appeal decisions. Reflecting the greater complexity of this type of proceeding, the case involves an extensive consideration of issues of admission, and assessment, of testimonial evidence more generally. If ‘the object of

evidence is to ascertain the truth of the facts', then the epistemological status of evidence became highly contentious in *Brđanin*.<sup>77</sup>

#### 5.4.1 *Testimony as Evidence*

In *Brđanin*, the Trial Chamber drew extensively upon a wide range of evidence, from documents to real evidence. However, the evidence submitted in the trial predominantly took the form of witness testimony and documents. Documentary evidence was of particular importance, and the admission and evaluation of documents was highly contested.<sup>78</sup> Witness testimony took two forms: the oral testimony of the witness before the court, and the documentary testimony of the written witness statement or transcript of evidence submitted under Rule 92*bis*, which permits the proof of facts other than by oral evidence.<sup>79</sup>

While the judgement of the Trial Chamber reiterates the traditional distinction between testimonial and non-testimonial evidence, this distinction is not clearly sustained in the use and evaluation of evidence in the case.<sup>80</sup> In *Brđanin*, this distinction is blurred by the different evidential functions of information:

[e]verything depends upon the primary *purpose or purposes* for which the evidence is adduced or employed in the trial. Documentary evidence is the prime instance, because documents are both things in themselves which can be adduced as real evidence, and written communications with a content and meaning that can be used *testimonially*, as proof of a fact in issue.<sup>81</sup>

Where the content and meaning of a document, rather than its status as a material object, are used to prove a fact, then they are used as testimonial evidence. This testimonial function of documentary evidence becomes particularly important in prosecutions of higher-level accused for systematic crimes. As Taylor Telford describes in the Nuremburg trials:

Few of the defendants committed atrocities with their own hands, and in fact they were rarely visible at or within many miles of the scene of their worst crimes. They made plans and transmitted orders, and the most compelling witnesses against them were the documents which they had drafted, signed, initialled, or distributed.<sup>82</sup>

The content and meaning of these texts testifies to the participation of high-level accused in system criminality. Like eyewitnesses to the physical perpetration of the crime by their subordinates, these textual witnesses testify to the actions and intentions of senior civilian and military leaders.

While there is currently considerable debate concerning the shifting balance between oral and documentary evidence in ICTY proceedings,<sup>83</sup> in *Brđanin* there is an emphasis upon the function rather than the form of evidence. For example, the Prosecution sought to admit two witness statements by victims of sexual violence under Rule 92, despite the fact that these witnesses were unavailable to testify before the court. The defence counsel did not require the testing of that evidence, as they had not previously. The Trial Chamber noted that the purpose behind the Prosecution's request 'is to have some evidence on rapes' in that municipality,<sup>84</sup> and it subsequently accepted the witness statements as evidence of the rape of the two victims.<sup>85</sup> In this context, all parties appear to share a model of testimony as evidence. Testimony – whether in written or oral form - was regarded as sufficient in itself to establish the occurrence of sexual violence in the conflict. It provided sufficient epistemic justification for the belief that the event occurred, and consequently for its existence as legal fact.

However, under Rule 92*bis*(A), written rather than oral testimony is admissible only where it goes to proof of matters other than the acts or conduct of the accused.<sup>86</sup> Rule 92 distinguishes between admissibility of written witness statements to prove that crimes happened (the commission of the crimes charged), and the inadmissibility of documentary testimony to

establish the specific criminal responsibility of the accused for those crimes (namely, the acts or conduct of the accused).<sup>87</sup> Where testimony is used to establish the criminal responsibility of the accused, then that shared acceptance of the evidential value of testimony shifts, and four different models of testimony as evidence emerge. All parties to the proceedings draw on these models at various times, and the use of all four models by the different parties is particularly evident in a case in which the notion of ‘evidence’ is as contested as in *Brđanin*. However, the structure of the trial and the burden of proof combine to produce the dominant trope of testimony as evidence that each party deploys. The first model is testimony as experience of the witness, the second is testimony as truth of the Prosecution, the third is testimony as fallibility of the Defence, and the fourth is testimony as evidence of the Trial Chamber.

#### 5.4.2 *Testimony as Experience: The Witness*

All witnesses are witnesses of truth for the Tribunal rather than for the parties.<sup>88</sup> Their epistemological position is that of the neutral third party, the *testis*. As in *Furundzija*, the witnesses founded the veracity of their testimony upon their experience of the event, deriving from their epistemological status as ‘a person who has lived through an event from beginning to end and can therefore bear witness to it’.<sup>89</sup> This is a classical empiricist model of testimony as evidence. In this model, the witness’s sense experience of the event provides them with their knowledge of it. The witness is the person who can attest to the event because they experienced it ‘from beginning to end’. It is this sensory evidence that the witness relates in their testimony. The paradigmatic example of this form of witnessing is ‘eyewitness testimony’: the first-hand observation and experience of the witness. It produces ‘direct’ evidence, namely evidence directly perceived by the senses of the witness.

However, these witnesses are typically called to testify to the criminal harm. The Prosecution calls the majority of witnesses in order to discharge the burden of proof. In meeting that burden, the majority of its witnesses will be victims of crimes or witnesses to crimes. For example, in *Brđanin* the Prosecution called 202 witnesses (compared to the Defence's 19), and of those Prosecution witnesses, 179 were in this category.<sup>90</sup> This category of witnesses is called to testify to establish the fact of the criminal event, and the majority of witnesses fall into this category.

Unlike *Furundzija*, in which the prosecutrix testified to the harm to her self, in *Brđanin*, witnesses testified to harms to others. In *Brđanin*, the witnesses testified to multiple harms against multiple persons. The witnesses attested not only to the harm of the self, but rather to wrongs to many persons. The nature of system criminality is that witnesses do not testify to their experience of a single event, such as assault, that constitutes the criminal act against themselves. Rather, they testify to their experience of the multiple events that constitute the system criminality, such as the multiple sexual assaults upon others during the 'ethnic cleansing' of a village or while imprisoned in a detention camp. The experiential position of the witness is refracted through multiple experiences and relations to others. If the word 'evidence' derives from the Latin *videre* – 'to see' - then these multiple acts of seeing testify to a multiplicity of acts.

The testimony of Witness BT-94, a local journalist and Prosecution witness, typifies this model of testimony. BT-94 provided extensive evidence of the 'ethnic cleansing' of his local region. During cross-examination on how to interpret *Brđanin*'s public statements during the conflict, Witness BT-94 insisted on the epistemic privilege of his experience of being in that place and time, which included witnessing the rape of women by Serbian soldiers or police in his home



town.<sup>91</sup> For BT-94, his experiences of acts and relations to others provide the epistemic foundation of his testimony, and hence evidence the criminal harms to his community.

#### 5.4.3 *Testimony as Truth: The Prosecution*

In this model, the testimony of witnesses and documents evidence the facts that the Prosecution seeks to establish, and thus functions as proof of them. For this reason, the Prosecution contends in its Closing Statement that ‘[i]f facts are introduced into evidence through witness testimony or documents which are not disproved through other evidence . . . then the Trial Chamber is entitled to say, “We find that fact proved”’.<sup>92</sup> Testimony functions as a demonstration of a fact, that fact in turn establishing the ‘reality’ of the event. Similarly to the *Furundzija* case, the Prosecution uses a veridical model of testimony, for it presents testimony as a truthful description of the event. In this model, testimonies function as true descriptions of the world.

However, the Prosecution does not understand testimony as a straightforward reflection of reality. It does not conceive testimonial evidence, whether oral or documentary, as the mirror of an external reality. Rather, as in *Furundzija*, the Prosecution in *Brđanin* utilised a model of testimony as the re-presentation of the event to the court. In the case of witnesses, that re-presentation may be ‘honest, truthful, and accurate’ because the witness will never forget those events; or honest but ‘because of the length of time and the nature of the events the witness has to describe, possibly inaccurate on some matters [. . .] but still essentially reliable on the major events described’.<sup>93</sup> In the case of documents, eye or expert witnesses may be required to re-present the content or meaning of the text.<sup>94</sup> Testimony does not reproduce reality. Rather, it re-presents the meaningful truth of an event.

*Brđanin* reveals the complex nature of the use of testimonial evidence by the Prosecution to reconstruct an event for the ICTY. First, the event is in the past, and can only be recreated for the court in the present. This epistemological problem marks ICTY trials such as *Brđanin*, in which the trial takes place some ten years after the alleged crimes. Second, testimony is not a single mirror of a single event. Rather, the Prosecution uses many testimonies to establish the multiple facts of an event. In cases of system criminality, multiple events generally require multiple testimonies to establish them as facts. The Prosecution uses these multiple testimonies to re-create that world of facts, or, in more traditional legal terms, to ‘build’ their case.

#### 5.4.4 *Testimony as Fallibility: The Defence*

If the role of the Prosecution is to prove the guilt of the Accused, then the role of the Defence is to raise reasonable doubt as to that case. For this reason, the Defence has a different structural relationship to the model of testimony as evidence of the harm. The Defence seeks to test the Prosecution’s case: to refute its arguments and to impugn its proofs. If the Prosecution adduces testimony as the demonstration of an event, then the Defence can seek to challenge that evidence. So, for example, in *Brđanin*, the Defence repeatedly sought to impugn the evidence of witnesses, including arguing that the testimony of BT-94 could not be relied upon because of his ethnic bias.<sup>95</sup> Similarly, it sought to have the right to call and examine victim-witnesses providing crime-base evidence in affidavit format, including sexual violence witnesses who had previously testified before the ICTY.<sup>96</sup>

The Defence, then, does not assume that testimony is a truthful re-presentation of the event, even if it has previously been tested and affirmed at trial. Rather, it presumes that testimony -

including the Defence's own positive evidence that is introduced to challenge the Prosecution's case - is fallible and open to challenge. The model of testimony that the Defence uses is 'fallibilistic' in epistemological terms. The Defence tests testimony by seeking to falsify it. The Defence does this by raising questions of whether testimony is internally consistent, empirically justified, and most commonly, provided by a reliable observer. Like all good sceptics, the Defence begins from a position of doubt, rather than belief, in the evidential value of testimony as to the criminal conduct alleged.

#### 5.4.5 *Testimony as Evidence: The Trial Chamber*

The Trial Chamber adjudicates upon these different models of the evidential value of testimony. The Chamber evaluates witness testimony according to 'internal' indices that enable adjudication. These indices are not set out in the Rules of Evidence and Procedure. Instead, they have been developed in the ICTY jurisprudence, of which *Brđanin* was to become a leading case on the evaluation of evidence. It evaluates the probative value of this evidence according to particular criteria, such as granting live testimony greater probative value than hearsay or secondary statements.<sup>97</sup> If the Chamber accords greater weight to testimony than other kinds of evidence, nevertheless it assesses that testimony in turn according to criteria such as:

demeanour, conduct and character [and] the probability, consistency and other features of their evidence . . . their knowledge of the facts upon which they give evidence, their disinterestedness, their integrity, their veracity and the fact that they are bound to speak the truth in terms of the solemn declaration taken by them [and] whether the evidence of a witness is honest; it is also whether the evidence is objectively reliable.<sup>98</sup>

However, a central part of the evaluation of witness testimony also involves an assessment of 'the corroboration which may be forthcoming from other evidence and the circumstances of

the case'.<sup>99</sup> Similarly, testimonial documents are assessed for their 'authenticity and reliability', including 'their source and custody and other documentary evidence and witness testimony'.<sup>100</sup> Finally, the Trial Chamber considers 'circumstantial evidence as being such evidence of circumstances surrounding an event or offence from which a fact at issue may be reasonably inferred'. The Chamber noted that circumstantial evidence may be a 'critical ingredient' of a case, particularly in those types of cases heard by the ICTY, where:

the possibility of establishing the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is problematic or unavailable [ . . . ] The individual items of such evidence may by themselves be insufficient to establish a fact, but, taken together, their collective and cumulative effect may be very revealing and sometimes decisive.<sup>101</sup>

The Chamber thus assessed the case against the Accused 'on the evidence before it' as a whole, such that testimony becomes part of an evidential totality.<sup>102</sup> It is this 'evidential totality' to which the Trial Chamber refers in its factual finding that the Accused was guilty of persecutions as crimes against humanity, through aiding and abetting the commission of acts of sexual violence.<sup>103</sup>

## **5.5 Adjudication and the Culture of Fact**

This evaluation of evidence by the Trial Chamber is an epistemic evaluation. For this reason, the 'criminal trial is first and foremost an *epistemic* engine' for determining facts.<sup>104</sup> This determination of facts necessarily draws upon particular models of knowledge, because it involves issues of appropriate procedures and methods of enquiry and grounds for the justification of belief.<sup>105</sup> Knowledge-claims involve epistemic practices that are produced by communities of knowers. Those practices reflect the values of the epistemic community concerning the most appropriate methods of inquiry and justification of knowledge. Such

epistemic judgements (what and how we know) also involve normative judgements (what and how we should know). This set of regulative standards includes not only the so-called epistemological ‘theoretical virtues’ but also axiological ‘ethical’ or political’ virtues that reflect the normative values of these epistemic communities.<sup>106</sup>

The fact-finding practices of the ICTY are examples of these regulatory standards. They comprise the normative criteria of members of a particular epistemic community – participants in the legal field of the ICTY - concerning appropriate mechanisms for producing and justifying knowledge. Accordingly, the criteria by which the Trial Chamber (the epistemic community) determines fact (knowledge of the event) are epistemic norms (those practices that the epistemic community uses to produce knowledge). Following Barbara Shapiro, this is a ‘culture of fact’, which relies on fact-finding practices.<sup>107</sup> The ICTY judges have developed these evaluative practices over time in the jurisprudence, and draw (often problematically) from both common and civil law traditions.<sup>108</sup> These function as epistemic norms and serve as the epistemic foundation of the legal determination of ‘fact’.

William Twining suggests that Anglo-American evidence scholarship rests upon a certain set of assumptions concerning legal fact-finding, which he describes as the ‘Rationalist Tradition’.<sup>109</sup> Twining argues that theories of evidence in this tradition use a correspondence model of truth, namely, a model in which true statements are statements that correspond with real events, and these events exist independently of human observation. Twining contrasts this with a coherence model of truth, in which beliefs are justified by their coherence with a background set of beliefs. At first glance, it appears that the evidential norms and practices of the ICTY conform to this model of judicial fact-finding. In Twining’s terms, this discourse on evidence assumes that the Trial Chamber uses rational modes of decision-making, including

inductive reasoning, to come to warranted beliefs about the external world. These warranted beliefs enable the Chamber to make statements of fact that correspond to real events. However, if we examine the actual practices of fact-determination by the Trial Chamber, then the epistemological model becomes more complicated.

In *Brđanin*, the Trial Chamber evaluates the body of evidence as a *whole*: '[t]he approach taken by the Trial Chamber has been to determine whether the ultimate result of the whole evidence is weighty and convincing enough to establish beyond reasonable doubt the facts alleged'.<sup>110</sup> In this approach, each piece of evidence is given evidential value and meaning by its relation to other evidence. Crucially, the Trial Chamber evaluates evidence in terms of relational epistemic criteria, such as 'corroboration with other evidence', the 'circumstances of the case', and the 'overall context of the evidence received'. It evaluates testimony not simply in its own terms, but also in terms of other evidence and the context of the case. In this way, testimony is assessed in terms of its place within the body of evidence as a whole. In this sense, the Trial Chamber assesses each piece of evidence in terms of its relational value to other pieces of evidence, whereby the body of evidence as a whole is understood as a differential system composed of elements or units of evidence. It assigns meaning or value to each piece of evidence according to its place within this differential system. This is a 'structuralist' approach in the sense that each element derives its meaning from its relation to other elements in the evidential structure.

Nevertheless, this understanding of the meaning of evidence retains a referential emphasis upon the existence of an external world of real events. The Trial Chamber assumes that its determination of the facts captures an event, such that its fact-finding will conform to reality. Its decisions, therefore, require a link to the world of facts. The Trial Chamber requires more

than justified belief, since that justified belief cannot be severed simply from the empirical world of events. How, then, does the Trial Chamber link judgement and world? Testimony functions as the ‘*epistemic link* between a subject, the hearer, and the state of affairs whose obtaining he comes to believe in as a result of the exercising of this link’.<sup>111</sup> As a form of social knowledge, testimony permits us to have knowledge of experiences that are not our own. Testimony plays a crucial role as *epistemic link* between the knowledge of the hearer – those sitting on the bench – and the external world – the fact of the event. In this context, testimony functions as a representation by a witness of a world of facts not known to the judicial fact-finder.

For this reason, the witness becomes crucial to the ‘culture of fact’. Their testimony demonstrates the world of fact not as a world of things, but as a world of persons. Testimony re-presents a social world to the finder of fact by providing knowledge of the social connections that make ‘the totality’ of the facts of the case. Testimony, then, describes not a visible world of facts, but rather reveals an invisible world of social relations. The totality of the event consists of the network of social relations and acts that remake those relations through violence. Conflict both requires relations between persons – associative and disassociative – and reorders those relations. Testimony re-presents the multiplicity of acts and relations between persons that constitute the totality of the event to the legal finder of fact. The eyewitness thus functions as a primary epistemic link, with their testimony re-presenting their experience of those social connections. The documentary witnesses - those documents that ‘speak for themselves’ - provide textual testimony to worlds of meaning.<sup>112</sup> Where those objects, texts, or relations do not speak for themselves, the expert witness provides an interpretative account.

Testimony as a legal practice thus assumes a community of witnesses and a community of

judgement. If testimony is the address of one social subject to another, then that address presumes a shared social world.<sup>113</sup> If testimony demonstrates the world of social relations by revealing the connections between events and persons that constitute the context of the case, then the witness testifies to shared social relations. Testimony assumes that its witnesses live within a shared social world, for it is that shared social world that gives the testimony its epistemic value. Testimony thereby presumes a community of witnesses, which expands from the victim-witness to include the accused, prosecution and defence, counsel, judges, and beyond them the wider social world.

However, the ICTY regularly confronts cases that disrupt this presumption. What if witnesses do not exist in a shared social world? The Yugoslavian conflict itself destroyed notions of a community in common, which was replaced by membership in particular communities, and rejected even notions of a shared language. All parties before the ICTY commonly understand the evidential value of testimony in terms of the particular post-conflict community of the witness. Witnesses are regarded as testifying within (and against) separate communities, rather than a shared community. Because there is no longer a shared community of witnessing, witnesses are thereby figured through their particular community, each attributed with distinctive perspectives and experiences. As a consequence, it is structurally difficult for witnesses from the region to take up the position of the *testis*, that is, the impartial or neutral witness. A typical example of this problem can be found in *Brđanin*, in an exchange between Defence Counsel and Witness BT-94, in which Counsel suggested that the Witness was biased because of his experiences as a Croat during the ‘ethnic cleansing’ of the Serb-run ‘Autonomous Region of Krajina’.<sup>114</sup>

What if there are no witnesses alive to testify to the event? In circumstances where there are



no survivors of crimes, then there are no witnesses to testify. This is a common evidential problem in cases before the ICTY. For example, Rule 92 *quarter* allows for the admission of written statements or transcripts of ‘unavailable persons’, including those who have subsequently died after giving their statements. However, where that evidence goes towards proof of the acts and conduct of the accused, it may be inadmissible. In *Brđanin*, this evidential problem appears in the form of the admission of hearsay, in which the source of the hearsay is dead. It also appears in the form of absent witnesses: the missing persons, families, and villages that continually appear like ghosts throughout the case transcripts.<sup>115</sup>

To adjudicate upon testimony as a legal practice also implies a community of judgement. If testimony is a social practice that involves the communication of knowledge from one speaking subject to another, then that model implies that both witness and judge must belong to a shared epistemic community in order for that testimony to be understood and judged. Jennifer Nedelsky points out that ‘[w]hat enables one to judge is membership in a community of other judging subjects who share a common sense that makes their judgements, and their inherent claims of validity for the community, possible’.<sup>116</sup> However, in cases such as *Brđanin*, witnessing and judging subjects do not share epistemic communities. The model of testimony as a transfer of knowledge implies that the testimony is readily interpreted and understood. However, persons, objects, and texts can only ‘speak for themselves’ in a shared social world. There are a number of specific difficulties for the evaluation of testimony posed by the lack of a shared social world between judge and witness in international criminal trials, which include language interpretation and translation, conflict-particular language, and the ‘role of culture in witness evaluation’.<sup>117</sup> However, as the Trial Chamber acknowledges, there is also the broader hermeneutic problem of the interpretation of evidence in its relevant historical and cultural context by judges who do not share that social context.<sup>118</sup>

The *Brđanin* proceedings, which are typical of the so-called leadership or higher level cases, clearly reveal this epistemological problematic of testimonial evidence. Unlike *Furundzija*, there is no single victim-witness testifying to their harm by a direct perpetrator, such that the victim-witness becomes the single testifying link between the community of witnessing and judging. If the testimony of the victim-witness in *Furundzija* is an appeal to a community for justice, *Brđanin* reveals the collective nature of the witnessing community and the collective nature of the community of judgment. The collective nature of this violence produces many witnesses to multiple harms done by numerous perpetrators, which require regulatory epistemic norms to link the actions of the defendant to the fact of the event. Because of their collective nature and large scale, these cases reveal that while ordinarily testimony serves to link communities of witnessing and judging, in the context of war crimes trials this link is disrupted and rebuilt in law.

If the culture of fact relies upon testimony as evidence to tie together the legal determination of facts and the occurrence of an event, then it also relies upon a community of witnessing and judging. The difficulty in international criminal trials is that their determinations of fact rely upon testimonial evidence, which in turn finds its veracity upon social bonds. In ordinary circumstances, the social ties of communities warrant the truth of testimony. These social ties permit an acknowledgement of harm to the person as social subject, but are not sustained in the context of the destruction of the society itself. This nature of this testimonial destruction is twofold, in that it involves the destruction not only of the social world of persons living together, but also of a community that can judge that destruction (both literally and metaphorically). In the context of armed conflict, these are the very communities that have been destroyed. It is this destruction of national communities of judgment that commonly

instigates international criminal trials. However, it also leads to the paradoxical position in which testimony in such international trials describes and relies upon shared communities, while also demonstrating the broken social relations of conflict. It thus relies upon social bonds to warrant its truth while also revealing the destruction of those social bonds. Despite this problematic foundation of international adjudication, the totality of the event of violence persists in the international criminal trial. The totality of the event – a violent reconstitution of social relations – insists in the international trial through the mechanism and materiality of testimony. It re-emerges in each element of witness and documentary testimony, which reveals this invisible world of the social relations of violence.

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<sup>2</sup> *Brđanin*, Case No. IT-99-36, Judgement, Trial Chamber, 2004, para. 21.

<sup>3</sup> See, for example, Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

<sup>4</sup> See, for example, ‘The Tribunal’s Core Achievements: Establishing the Facts’, <http://www.un.org/icty/glance-e/index.htm>, accessed 3 January 2012.

<sup>5</sup> *Furundzija*, Case No. IT-95-17/1, Judgement, Trial Chamber, 1998, para. 178.

<sup>6</sup> ICTY Case No. IT-08-91-T, 15 October 2009, transcript, p.1508.

<sup>7</sup> Kai Ambos, ‘The Structure of International Criminal Procedure’, in Michael Bohlander (ed.) *International Criminal Justice* (London: Cameron May, 2007), pp.429-503.

<sup>8</sup> Robert Cryer, ‘Witness Evidence before International Criminal Tribunals’, *The Law and Practice of International Courts and Tribunals* 3 (2003), 411-439.

<sup>9</sup> See *Furundzija*, Case No. IT-95-17/1-T, Judgement, Trial Chamber, 1998 (‘*Furundzija* Trial Judgement’).

<sup>10</sup> Marie-Bénédicte Dembour and Emily Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’, *European Journal of International Law*, 15:1 (2004), 151-177.

<sup>11</sup> *Furundzija*, Case No. IT-95-17/1-A, Judgment, Appeals Chamber, 2000 (‘*Furundzija* Appeal Judgement’), para. 103.

<sup>12</sup> *Furundzija*, Trial Judgement, para. 68.

<sup>13</sup> This was an organization specifically set up to treat female survivors of the Yugoslavian conflict. See Cynthia Cockburn, *The Space between Us* (London and New York: Zed, 1998), pp.174-85.

<sup>14</sup> *Furundzija*, Trial Judgement, para. 92.

<sup>15</sup> *Furundzija*, Appeal Judgment, para. 75.

<sup>16</sup> *Furundzija*, Trial Transcript, 22 June 1998, paras. 676-85.

<sup>17</sup> *Furundzija*, Trial Judgement, para. 95.

<sup>18</sup> *Furundzija*, Appeal Judgment, para. 56.

<sup>19</sup> *Furundzija*, Trial Judgement, para. 97.

<sup>20</sup> *Furundzija*, Trial Transcript, 9 November 1998, paras. 812-68.

<sup>21</sup> *Furundzija*, Trial Transcript, 22 June 1998, paras. 676-85.

<sup>22</sup> *Furundzija*, Trial Judgement, para. 101.

- <sup>23</sup> *Furundzija*, Trial Judgement, para. 102.
- <sup>24</sup> *Furundzija*, Trial Judgement, para. 103. In the transcript of the trial proceedings, the expert witness makes this claim specifically in relation to victims of rape: *Furundzija*, Trial Transcript, 9 November 1998, paras. 895-6.
- <sup>25</sup> *Furundzija*, Trial Judgement, para. 103. The implication is made clearer in the transcript of the trial proceedings, namely, that Medica's aim of campaigning for international war crimes courts to prosecute war criminals was an illegitimate political goal that influenced Witness A's (allegedly inaccurate) recollection of events: *Furundzija*, Trial Transcript, 9 November 1998, paras. 893-5.
- <sup>26</sup> *Furundzija*, Trial Judgement, paras. 104-5.
- <sup>27</sup> *Furundzija*, Trial Judgement, para. 105.
- <sup>28</sup> *Furundzija*, Trial Judgement, para. 105.
- <sup>29</sup> *Furundzija*, Trial Judgement, para. 101.
- <sup>30</sup> *Furundzija*, Trial Judgement, para. 106.
- <sup>31</sup> *Furundzija*, Trial Judgement, para. 107.
- <sup>32</sup> *Furundzija*, Trial Judgement, para. 107.
- <sup>33</sup> Michael Lambek, 'The Past Imperfect', in Paul Antze and Michael Lambek (eds.), *Tense Past: Cultural Essays in Trauma and Memory* (London and New York: Routledge, 1996), p. 242.
- <sup>34</sup> *Furundzija*, Trial Judgement, para. 116.
- <sup>35</sup> Dori Laub, 'An Event without Witness', in Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (New York and London: Routledge, 1992), p.80.
- <sup>36</sup> Shoshana Felman, 'Education and Crisis, or the Vicissitudes of Teaching', in Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (New York and London: Routledge, 1992), p.5.
- <sup>37</sup> Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive*, trans. Daniel Heller-Roazen (New York: Zone, 1999), p.17.
- <sup>38</sup> Agamben, p.17.
- <sup>39</sup> Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex, and Equality* (Princeton, N.J.: Princeton University Press, 1998), pp. 36-7.
- <sup>40</sup> Shoshana Felman, 'The Return of the Voice' in *Testimony*, p.204.
- <sup>41</sup> Defence's Opening Statement, *Furundzija*, Trial Transcript, 8 June 1998, para. 86.
- <sup>42</sup> *Furundzija*, Appeal Judgment, para. 56.
- <sup>43</sup> *Furundzija*, Trial Judgement, para. 105.
- <sup>44</sup> D. Laub, 'Bearing Witness', pp. 60-63.
- <sup>45</sup> *Furundzija*, Trial Judgement, para. 108.
- <sup>46</sup> *Furundzija*, Trial Judgement, para. 110.
- <sup>47</sup> 'Credibility depends upon whether the witness should be believed. Reliability depends upon whether the evidence, if accepted, proves the fact to which it is directed': *Kunarac, Raomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T and No. IT-96-23-1T, Decision on Motion for Acquittal, Trial Chamber II, 3 July 2000, para. 7.
- <sup>48</sup> *Furundzija*, Trial Judgement, para. 116.
- <sup>49</sup> John Jackson and Sean Doran, 'Evidence', in Dennis Patterson (ed.) *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), p.173.
- <sup>50</sup> *Furundzija*, Appeal Judgment, para. 37.
- <sup>51</sup> ICTY, 'Innovative Procedures', <http://www.icty.org/sid/10313>, accessed 3 November 2012.
- <sup>52</sup> Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (Antwerp: Intersentia, 2005), pp. 260-261.
- <sup>53</sup> *Furundzija*, Trial Judgement, para. 116.
- <sup>54</sup> *Aleksovski*, Case No. IT-95-14/1-T, Judgment, Appeals Chamber, 2000, paras. 62-3.
- <sup>55</sup> *Furundzija*, Trial Proceeding, Case No. IT-95-17/1-T, 1998, *Amicus Curiae* Brief, para. 23.
- <sup>56</sup> *Furundzija Amicus Curiae* Brief, para. 23.
- <sup>57</sup> Beverley Brown, Michèle Burman and Lynn Jamieson, *Sex Crimes on Trial* (Edinburgh: Edinburgh University Press, 1993), p. 21.
- <sup>58</sup> See Kirsten Campbell, 'The Gender of Transitional Justice', *International Journal of Transitional Justice*, 1:3 (2007), 411-432.
- <sup>59</sup> *Furundzija Amicus Curiae* Brief, para. 31.
- <sup>60</sup> Fiona E. Raitt and Mary Suzanne Zeedyk, *The Implicit Relation of Psychology and the Law: Women and Syndrome Evidence* (London and New York: Routledge, 2000), p.43.
- <sup>61</sup> *Furundzija Amicus Curiae* Brief, para. 21.
- <sup>62</sup> Raitt and Zeedyk, *The Implicit Relation of Psychology and the Law*, p.103.
- <sup>63</sup> Kaja Silverman, *Male Subjectivity at the Margins* (London and New York: Routledge, 1992), p.42.

64 Kaja Silverman, *The Threshold of the Visible World* (London and New York: Routledge, 1996), p.25.  
65 Silverman, p.46.  
66 See Jennifer Nedelsky, *Law's Relations* (Oxford: Oxford University Press, 2011), p.215.  
67 Brown, *et al*, p.17.  
68 Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (Buckingham: Open University Press, 1997), p. 106.  
69 *Furundzija Amicus Curiae* Brief, para. 16.  
70 *Furundzija*, Trial Judgement, para. 95.  
71 *Furundzija*, Trial Judgement, para. 116.  
72 *Brđanin*, Case No. IT-99-36, Judgement, Trial Chamber, 2004 ('Trial Judgement'), para. 286.  
73 *Brđanin*, Case No. IT-99-36, Sixth Amended Indictment, 9 December 2003.  
74 Theodor Meron, ICTY Completion Strategy Report, 21 May 2004, S/2004/420.  
75 See Steven Kay, 'The Move from Oral to Written Evidence', *Journal of International Criminal Justice*, 2 (2004), 495-502.  
76 Such that the Presiding Trial Judge, Judge Agius, comments that having 'a fair trial in the shortest time possible' is his first priority: *Brđanin*, Case No. IT-99-36, Transcript of Trial Proceedings, Trial Chamber II, 10 December 2001, para. 386.  
77 *Brđanin*, Trial Judgement, para. 21.  
78 *Brđanin*, Trial Judgement, paras. 29-34.  
79 Following four motions by the Prosecution, the Trial Chamber agreed to admit into evidence 82 witness statements. The remaining 140 witnesses testified *viva voce*.  
80 Terence Anderson, David Schum, and William L. Twining, *Analysis of Evidence* (Cambridge: Cambridge University Press, 2005), p.64.  
81 Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2004), pp.184-5.  
82 Richard May and Marieke Wierda, 'Trends in International Criminal Evidence' *Columbia Journal of Transnational Law* 37 (1998-1999), 725-765, p.744.  
83 Kai Ambos, 'International Criminal Procedure' *International Criminal Law Review* 3(2003), 1-27, p.29.  
84 *Brđanin*, Case No. IT-99-36, Transcript of Trial Proceedings, Trial Chamber II, 25 June 2003, paras. 18175-18179.  
85 *Brđanin*, Trial Judgement, para. 835.  
86 See Rule 92bis(A)(i), which sets out five evidential roles that favour the admission of written witness statements.  
87 *Brđanin*, Trial Judgement, para. 21.  
88 Cryer, p.414.  
89 Agamben, p.17.  
90 *Brđanin*, Case No. IT-99-36, Prosecutor's Closing Statement, Transcript of Trial Proceedings, Trial Chamber II, 19 April 2004, para. 25135.  
91 *Brđanin*, Trial Transcript, para. 18086.  
92 *Brđanin*, Prosecutor's Closing Statement, para. 25131.  
93 *Brđanin*, Prosecutor's Closing Statement, para. 25136.  
94 *Brđanin*, Case No. IT-99-36, Evidence of Patrick Treanor, Transcript of Trial Proceedings, Trial Chamber II, 2 July 2003, para. 18688.  
95 For example, see *Brđanin*, Case No. IT-99-36, Transcript of Trial Proceedings, Trial Chamber II, 24 June 2004, para. 18147-8.  
96 Decision on Prosecution's Eleventh Motion for Protective Measures for Victims and Witnesses, *Brđanin*, Case No. IT-99-36, 10 October 2002.  
97 *Brđanin*, Trial Judgement, paras. 22-4.  
98 *Brđanin*, Trial Judgement, paras. 25.  
99 *Brđanin*, Trial Judgement, paras. 30-31.  
100 *Brđanin*, Trial Judgement, para. 25.  
101 *Brđanin*, Trial Judgement, para. 35.  
102 *Brđanin*, Trial Judgement, paras. 42-43.  
103 *Brđanin*, Trial Judgement, para, 1061.  
104 Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006), p.2.  
105 See William Twining for this characterization of epistemology: *Globalisation and Legal Theory* (London: Butterworths, 2000), p.204.  
106 Helen E. Longino, 'Feminist Epistemology as a Local Epistemology', *The Aristotelian Society* 71 (1997), 19-35, pp. 33-4. See also her *The Fate of Knowledge* (Princeton, NJ: Princeton University Press, 2002).

- <sup>107</sup> Barbara J. Shapiro, *A Culture of Fact* (Ithaca, NJ: Cornell University Press, 2003), p.12.
- <sup>108</sup> Interviews, sixteen judges and legal advisors, ICTY Chambers and Registry, The Hague, 2005, 2006, 2008.
- <sup>109</sup> Twining, p.78.
- <sup>110</sup> *Brđanin*, Trial Judgement, para. 22.
- <sup>111</sup> Elizabeth Fricker, 'The Epistemology of Testimony', *The Aristotelian Society* 61 (1987), 57-83, p.58.
- <sup>112</sup> Kai Ambos, 'International Criminal Procedure', *International Criminal Law Review* 3 (2003), 1-27, pp.24-5.
- <sup>113</sup> Alvin I. Goldman, *Knowledge in a Social World* (Oxford: Clarendon, 1999), pp.103-4.
- <sup>114</sup> See also *Limaj*, Case No. IT, Judgement, Trial Chamber, 2005, para. 15, on the difficulty of evaluating the testimony of victim-witnesses.
- <sup>115</sup> See, for example, *Brđanin*, Case No. IT-99-36, Transcript of Trial Proceedings, Trial Chamber II, 6 December 2002, para. 12512, and 11 December 2002, para. 12609.
- <sup>116</sup> Jennifer Nedelsky, 'Communities of Judgment and Human Rights', *Theoretical Inquiries in Law* 1 (2000), 245-282, p.262.
- <sup>117</sup> Cryer, p.428.
- <sup>118</sup> *Brđanin*, Trial Judgement, para. 45.