The Indeterminacy of Precedent:
Negotiating the Admissibility of Victim Participant Testimony before the International Criminal Court

Sigurd D'hondt
Juan Pablo Pérez-León-Acevedo
Elena Barrett

Department of languages and communication studies, University of Jyväskylä
PO Box 35, FI-40014 University of Jyväskylä, Finland.
sigurd.a.dhondt@jyu.fi
juan.p.perez-leon-acevedo@jyu.fi
elena.c.barrett@jyu.fi

Abstract:

The ICC represents a legal laboratory that is still consolidating itself, with multiple unclarities in evidence and procedural law requiring resolution through jurisprudence. Our paper draws on interaction analysis to unpack this process, focusing on the jurisprudential construction of 'dual status' victim participant testimony. To elucidate how this evidentiary/procedural element is locally negotiated, we examine an excerpt from the *Ongwen* hearing transcripts, in which the defense objects against the testimony by a dual status witness called by the victim participants' legal representative. The analysis traces how the defense counsel's objection is anchored in a trajectory of prior decisions, and demonstrates that the implementation of the criteria drawn from these decisions is mediated by deep-rooted common-sense assumptions about the 'ownership' of testimony. These unspoken assumptions open up a discursive space in which trial actors can discuss the interactional quality of testimony, which adds an element of contingency to the final decision.

Key words:

International Criminal Court, Dual Status Victim Participants, Testimony, Objections, Intertextuality, Text Trajectories, Precedent

Acknowledgments:

Research for this article was funded by the Academy of Finland (Negotiating international criminal law: A courtroom ethnography of trial performance at the International Criminal Court, project number 325535, 2019-2023). Earlier drafts were commented on by Fabio Ferraz de Almeida and Sari Pietikäinen.

The Indeterminacy of Precedent:
Negotiating the Admissibility of Victim Participant Testimony before the International Criminal Court

1. Introduction[1]

It does not happen often that one gets the chance to witness the nascence of a new legal system. The International Criminal Court (ICC) in The Hague (Netherlands) presents us with such a rare opportunity. It was established in 1998 with the adoption of the Rome Statute, which entered into force on 1 July 2002. The challenges that the ICC faces are manifold. As the expression of a globalizing legal paradigm still in development, it is characterized by 'a geopolitical and institutional fragility … relative to the continued salience and power of nation-states'.[2] Requiring the support of states and other actors in the international community for enforcing arrest warrants and collecting evidence, the Court's Office of the Prosecutor (OTP) repeatedly had to enter into opportunistic alliances and pursue 'weak targets', which in turn fueled accusations of the ICC being a 'political' or 'neocolonial' court.[3] For Clarke and Koulen, the ICC still bears the imprint of the political gesture of its institution, and the disarticulation of law and politics characterizing domestic legal systems is still a faraway illusion.[4] Internally as well, the Court has all the features of a legal laboratory. Hence, it is

> characterized by an uncertainty and unpredictability in fundamental law and procedure that can undermine [its] legitimacy. The conventional model in which a national justice system slowly accumulates legitimacy over centuries does not apply to international courts, which

[1] Insert here the acknowledgments.
[2] Richard Ashby Wilson, 'Expert Evidence on Trial: Social Researchers in the International Criminal Courtroom', 43 *Am. Ethn.* (2016) 730-744, p. 742, https://doi.org/10.1111/amet.12387.
[3] Adam Branch, 'Dominic Ongwen on Trial: The ICC's African Dilemmas', 11 *Int. J. Trans. Just.* (2017) 30-49, https://doi.org/10.1093/ijtj/ijw027.
[4] Kamari Maxine Clarke and Sarah-Jane Koulen, 'The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise', 7 *Afr. J. Leg. Studies* (2014) 297-319, https://doi.org/10.1163/17087384-12342049.

> have had to hastily patch together an unstable amalgam of Anglo-American common law and Continental civil-law traditions …[5]

This article is primarily concerned with the second set of challenges. We explore how the ICC incrementally 'consolidates' itself and how it navigates the procedural uncertainties it faces, in particular the tensions between its accusatorial and inquisitorial inheritance. In doing so, we make a case for investigating the jurisprudential construction of trial procedure from an interactional angle that is strongly influenced by micro-sociological and linguistic-anthropological traditions. Hence, we are opening up the 'black box' of what goes on inside the ICC trial courtroom to examine how trial actors attend to procedural uncertainty *in situ*, as the trial unfolds. The specific procedural item that we are interested in relates to how victim participants, who are allowed by the ICC to 'express their views and concerns' before the Court when their personal interests are affected (ICC Statute, Article 68(3)), can also submit sworn testimonial evidence in the same trial.[6]

2. Jurisprudential Construction: an Interactional Perspective

The distinction between the victim participant and the witness roles is a crucial one, and each has specific legal consequences. When victim participants orally present their views and concerns, their statements are not considered evidence and they cannot be examined by the parties; however, if they participate in the witness role, their contributions are considered sworn testimony (evidence) and hence they may be cross-examined.[7] Victim participants can

[5] Wilson, *supra* note 2, p. 348.

[6] Earlier work on the ICC's consolidation-in-action focused on how trial actors behaviorally navigate the Court's external challenges. Hence, it elucidated how members of the OTP and defense negotiate the Court's legitimacy by projecting imaginary dialogues and dialogical networks extending beyond the spatiotemporal framework of the hearing and including external, abstract constituencies. *See* Sigurd D'hondt, 'Humanity and its Beneficiaries: Footing and Stance-taking in an International Criminal Trial', 7 *Signs & Society* (2019) 427-453, https://doi.org/10.1086/705279; Sigurd D'hondt, 'One Confession, Multiple Chronotopes: The Authentification of an Apology in an International Criminal Trial', 25 *J. Socioling.* (2021) 62–80, https://doi.org/10.1111/josl.12447; Sigurd D'hondt, Baudouin Dupret and Jonas Bens, 'Weaving the Threads of International Criminal Justice: The Double Dialogicity of Law and Politics in the ICC al-Mahdi Case', forthcoming.

[7] *See* Brianne McGonigle-Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, Cambridge, 2011), pp. 238 and 312; Juan Pablo Perez-Leon-Acevedo, *Victims' Status at International and Hybrid Criminal Courts: Victims as Witnesses, Victim Participants/Civil Parties and Reparations Claimants* (Abo Akademi University Press, Turku, 2014), pp. 136–137; Sergey Vasiliev, 'Victim Participation Revisited-What the ICC is Learning about Itself', in Carsten Stahn (ed.), *The Law and Practice of*

be called as witnesses by the Prosecution to testify on the criminal liability of the accused, or by the Legal Representative of Victims (LRV) to give evidence on harm inflicted on victims. It is in the latter role that normative considerations pertaining to the admissibility of evidence led by victim participants poses itself most sharply. Interestingly, the ICC legal instruments themselves are silent on whether victim participants can also be witnesses in the same trial. Victim participation as defined in the Rome Statute (Article 68(3)) and the ICC Rules of Procedure and Evidence (Rules 89–93) does not explicitly state that LRVs can also submit evidence, or that victim participants may be allowed to testify under oath as witnesses. In the early years of the ICC, this led to fierce debates over the status of these so-called dual status victim participants, namely, victim participants who also testify as witnesses in the same case (henceforth DSV).[8] Over time, however, the ICC gradually developed a robust victim participation jurisprudence (starting in the first case that went to trial, *Prosecutor* v. *Lubanga*), which established that an ICC Chamber may allow LRVs to submit testimonial evidence and call victim participants to testify, subject to certain conditions such as respect for the accused person's rights and contribution to the truth.[9] Upon authorization of the respective Trial Chamber,[10] victim participants have been called as witnesses by their LRVs to testify in the same trial, and in that role they have given oral evidence on the harm they suffered because of the crimes charged against the defendant. In fact, the large majority of Trial Chambers have systematically preferred such DSV testimony on harm over victim participants' oral presentations of their views and concerns during trial. Indeed, it seems that

the International Criminal Court (Oxford University Press, Oxford, 2015), pp. 1133–1202, pp. 1164–1168; Tatiana Bachvarova, *The Standing of Victims in the Procedural Design of the International Criminal Court* (Brill/Nijhoff, Leiden, 2017), pp. 169–171. *Concerning jurisprudence*, see, e.g., ICC, *Prosecutor* v. *Lubanga*, Case No. ICC-01/04-01/06-2032-Anx, Trial Chamber I, Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence During the Trial, 26 June 2009, para. 19; ICC, *Prosecutor* v. *Bemba*, Case No. ICC-01/05-01/08-2220, Trial Chamber III, Decision on the Presentation of Views and Concerns by Victims a/0542/08, a/0394/08 and a/0511/08, 24 May 2012, para. 7.

[8] Claude Jorda and Jerôme de Hemptinne, 'The Status and the Role of the Victim', in Antonio Cassese, Paolo Gaeta and John R.W.D Jones (eds.), *The Rome Statute of the International Criminal Court, Vol. II* (Oxford University Press, Oxford, 2002), pp. 1387–1419, p. 1409.

[9] *E.g.*, ICC, *Prosecutor* v. *Lubanga*, Case No. ICC-01/04-01/06-1119, Trial Chamber I, Decision on Victims' Participation , 18 January 2008, para. 134; ICC, *Prosecutor* v. *Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-1788-tENG, Trial Chamber II, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, paras. 88–92; ICC, *Prosecutor* v. *Bemba*, Case No. ICC-01/05-01/08-2138, Trial Chamber III, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, 22 February 2012, paras. 20, 23.

[10] *See, e.g.*, *Lubanga*, *supra* note 9, paras. 132-134; *Bemba*, *supra* note 9, paras. 23-25.

only Trial Chamber III in *Bemba* allowed victim participants to directly and orally present their views and concerns in person before the Court.[11]

Nevertheless, certain procedural and practical aspects of testimonial evidence submitted by LRVs still require further clarification,[12] and each ICC trial Chamber has to take its own decisions on how DSV testimony will be implemented in the course of the trial. In this paper, we take a closer look at one 'procedural moment' in which such decision-making occurs taken from the trial of Dominic Ongwen, a high-ranking commander of the Ugandan Lord's Resistance Army (LRA) who was charged with war crimes and crimes against humanity, and was eventually found guilty on 4 February 2021. More specifically, we will examine how the Court handles an objection raised by the defense during the LRV's submission, while the LRV was examining a former LRA child soldier testifying about the trauma and psychological harm he suffered as a consequence of his abduction. In between 1–24 May 2018, the LRVs called three DSV and four expert witnesses, and the incident reported here occurred in the beginning of the examination of the first DSV.

Objections play a crucial role during the testimony-taking, but received relatively little attention in the literature on courtroom interaction. According to Danet and Bogoch, they are an interactional device that enables legal professionals to monitor each other's conformity with the rules for questioning witnesses and to make potential violations visible to the judge.[13] In this particular case, the objection resulted in a lengthy exchange between the objecting defense counsel, the Presiding Judge, and the LRV, and hence we are dealing with a true objection *conference*, that is, a multi-party debate in which each party is allowed to express its views on the nature of the violation.[14] In this article, we draw on the toolkits of micro-sociology and linguistic anthropology to present a turn-by-turn analysis of how this objection conference develops, in order to reconstruct the discursive processes by which the trial actors negotiate the admissibility of the DSV testimony submitted by the LRV. After briefly elaborating the theoretical background to our analysis (section three), we trace how the objection and its subsequent resolution are anchored in a trajectory of prior decisions, extending beyond *Ongwen* and also including earlier ICC trials (section four). In sections five

[11] *See* ICC, *Prosecutor* v. *Bemba*, Case No. ICC-01/05-01/08-T-227-Red-ENG, Trial Chamber III, Transcripts, 25 June 2012; ICC, *Prosecutor* v. *Bemba*, Case No. ICC-01/05-01/08-T-228-Red-ENG, Trial Chamber III, Transcripts, 26 June 2012.
[12] Bachvarova, *supra* note 7, pp. 160-198.
[13] Bryna Danet and Brenda Bogoch, 'Fixed Fight of Free-for-all? An Empirical Study of Combativeness in the Adversary System of Justice', 7 *Brit J. Law & Soc.* (1980) 36-60.
[14] Gregory Matoesian, 'This is Not a Course in Trial Practice: Multimodal Participation in Objections', 129 *J. Pragmatics* (2018) 199-219, https://doi.org/10.1016/j.pragma.2018.03.022.

and six, we demonstrate how the implementation of the criteria drawn from these decisions is, in turn, negotiated by a set of tacit common-sense assumptions about the 'ownership' of testimony. We argue that these unspoken assumptions open up a discursive space that allows trial actors to bring up detailed metapragmatic considerations of the quality of the witness's contribution, which inevitably adds an element of contingency to the final decision.

It is because of indeterminacies like these, which arise (and are resolved) 'locally' and mobilize discursive resources that escape legal definition, that an account of how the ICC navigates procedural uncertainties and incrementally 'consolidates' itself cannot restrict itself to a legal-doctrinal analysis of the accumulating body of decisions by the various ICC Chambers. To grasp the direction in which the legal framework for submitting testimonial evidence led by DSV develops, formal analysis of the ICC legal instruments (particularly the ICC Statute) and the ICC's jurisprudence must be complemented with ethnographic accounts of emergent courtroom practice, in which trial actors engage with the law 'in action'. Through this shift from 'finished product' to process, our article offers a distinctly micro-perspective on the transformation of evidence and proof at international criminal trials. Our focus on the local negotiation of trial procedure and evidence law also squarely situates us within the approach to legal discourse that Richland characterized as *juris-diction*:[15] It connects the moment-by-moment negation of legal outcomes to broader questions concerning the conditions of possibility undergirding this emergent form of globalized criminal adjudication and, ultimately, to how the Court enunciates the sovereignty in which it is grounded.

3. Objections, Intertextuality, Precedent

Objection conferences are instances of what the micro-sociologist Erving Goffman identified as *byplay*, stretches of subordinate activity in which the focal activity (the LRV's examination of the DSV witness) is temporarily suspended.[16] Instead, otherwise sidelined participants, the defense counsel and the Presiding Judge, step forward to evaluate the quality of the focal activity.[17] As such, what goes on in these momentary sidesteps illustrates a

[15] Justin Richland, 'Jurisdiction: Grounding Law in Language', 42 *Ann. Rev. Anthr.* (2013) 209-226, https://doi.org/10.1146/annurev-anthro-092412-155526.
[16] Erving Goffman, *Forms of Talk* (University of Pennsylvania Press, Philadelphia, 1981), p. 133.
[17] As such, their sidestep illustrates that testimony-taking also involves various forms of overhearing and possesses an interactional structure far more complex than a simple dyadic exchange.

phenomenon that linguistic anthropologists call (explicit) *metapragmatic regimentation*.[18] They involve forms of 'talk about talk' in which language users reflexively 'provide coherence to a stretch of communicative activity by segmenting and rendering it as a socially recognizable event'.[19] In the conference investigated here, this metapragmatic regimentation happens *intertextually*, by establishing connections with older, prior texts with which the ongoing event is somehow historically connected.[20] Hence, the trial actors participating in the conference are negotiating the nature and the appropriateness of the evidence given by the DSV by examining it through the lens of a plethora of older documents, which presumably set a standard to which DSV testimony must adhere. These include written notifications exchanged by the parties in preparation for the testimony, earlier decisions by the Trial Chamber on the admissibility of DSV testimony, as well as ICC case law and older rulings on the issue by other Trial Chambers in earlier trials. This process of quoting, paraphrasing, or otherwise referring to these documents is far from unidirectional or unequivocal, and therefore deserves close scrutiny.

Sociolinguistic and linguistic-anthropological scholarship on language in the legal process has extensively documented the role intertextuality plays in negotiating legal realities. There is a huge literature elucidating how 'texts travels' from one trial stage to the next,[21] how speech is transformed into writing (e.g., during a police interview) and the resulting records are in turn reenacted in speech,[22] and how such processes eventually affect legal outcomes. Testimony-taking is an example par excellence of an interactional activity that reflexively forms part of such an ongoing *text trajectory*:[23] In their questioning, attorneys routinely refer to statements that witnesses made pre-trial or at earlier trial stages, and the

[18] Michael Silverstein, 'Metapragmatic Discourse and Metapragmatic Function', in John Lucy (ed.) *Reflexive Language* (Cambridge University Press, New York, 1993), pp. 33-58.
[19]Angela Reyes, ''Racist!': Metapragmatic Regimentation of Racist Discourse by Asian American Youth', 22 *Discourse & Society* (2011) 458-473, p. 459, https://doi.org/10.1177/0957926510395836.
[20] For an overview of the literature on intertextuality, *see* Michael Prentice and Meghanne Barker, 'Intertextuality and Interdiscursivity', in *Oxford Bibliographies in Anthropology* (Oxford University Press, Oxford, 2017), https://dx.doi.org/10.1093/obo/9780199766567-0171. There is lively debate on how *intertextuality* relates to the umbrella notion of *interdiscursivity*, which also comprises links to spatiotemporally remote discursive events not mediated by written text. *See* Michael Silverstein, 'Axes of Evals', 15 *J. Ling. Anthr.* (2005) 6-22, https://doi.org/10.1525/jlin.2005.15.1.6. In this particular case, however, textually mediated connections predominate and therefore the qualification intertextual seems more apt (*but see* D'hondt, *supra* note 6 (2021), for examples of interdiscursive links in ICC trials).
[21] Chris Heffer, Frances Rock, and John Conley (eds.), *Legal-Lay Communication* (Oxford University Press, Oxford, 2013); Sigurd D'hondt and Fleur van der Houwen (eds.), *Quoting from the Case File* (Special Issue), 36 *Lang. & Comm*.
[22] Martha Komter, *The Suspect's Statement* (Cambridge University Press, Cambridge, 2019).
[23] Jan Blommaert, *Discourse* (Cambridge University Press, Cambridge, 2005); Susan Ehrlich, 'Text Trajectories, Legal Discourse and Gendered Inequalities', 3 *Appl. Ling. Rev.* (2012) 47-73, https://doi.org/10.1515/applirev-2012-0003.

whole purpose of the event is to elicit witness statements that the examining attorney can later on quote in the closing submissions. The unique contribution of sociolinguistics and linguistic anthropological approaches is that they draw attention to the 'instability' of the traveling text.[24] As discourse is de- and recontextualized across contexts and modalities,[25] it is regularly also imbued with new, context-bound meanings. These subtle transformations, however, remain invisible because of the referentialist-textualist ideology underpinning the legal process, which assumes meaning to be encapsulated 'in the words' and hence immutable.[26] In the hands of a skillful attorney, therefore, quoting can become a powerful tool for 'shifting' evidence and for tacitly importing hegemonic masculinity or colonial hierarchy into the courtroom.[27]

Revealing as this line of work may be, the objection conference vividly illustrates that this de- and recontextualization of evidence unidirectionally 'moving up' across trial stages (with the verdict as its teleological endpoint) is by no means the only form of intertextuality that characterizes the legal process. Instead, text and discourse travel in multiple directions at the same time, and lateral trajectories are established as trial actors negotiate intertextual connections with prior trials. The conference underscores the undecided nature of such negotiations–a powerful reminder that legal text trajectories, both the 'unidirectional' movement of evidence and the lateral connections with prior trials, are always (re)produced locally and established *in situ*. Text trajectories are constantly in emergence, and hence they carry the imprint of the local contextual assemblage (or 'nexus') in which they are (re)articulated, comprising historical actors, institutionally established materialities and communicative practices, as well as other available discourses.[28]

It is this fundamental 'openness' of text trajectories that provides the topic for our article. To unpack this undecidedness, we start from the observation that the objection conference exhibits a highly specific form of intertextuality, as it involves metapragmatic regimentation mediated by *precedent*. Herein, we draw on legal anthropologist Elizabeth Mertz's seminal work on how US law students are socialized into a distinct textual tradition, consisting of law-specific metapragmatic reading skills and associated de- and

[24] Heffer *et al.*, *supra* note 21, p. 8.
[25] Richard Bauman and Charles Briggs, 'Poetics and Performance as Critical Perspectives on Language and Social Life', 19 *Ann. Rev. Anthr.* (1990) 59–88, https://doi.org/10.1146/annurev.an.19.100190.000423.
[26] Elizabeth Mertz, *The Language of Law School* (Oxford University Press, Oxford, 2007).
[27] Ehrlich, *supra* note 23; Gregory Matoesian, *Law and the Language of Identity* (Oxford University Press, Oxford, 2001); Diana Eades, *Courtroom Talk and Neocolonial Control* (De Gruyter, Berlin, 2008).
[28] Ron Scollon and Suzie Wong Scollon, *Nexus Analysis* (Routledge, London, 2004).

recontextualization practices.[29] To invoke a prior decision as precedent, a law practitioner must first distill the applicable 'doctrine' from the contextual particulars of the case, which requires detecting the various layers of authority entextualized in the decision and determining how the decision's structure might act as template for the current case. Establishing such an intertextual link to a prior ruling, however, also retrospectively opens up that ruling for interpretation:

> the U.S. case law tradition depends on a conception of texts as subject to changing interpretation, as fundamentally reconstitutable through the process of recontextualization in subsequent cases. This is not to say that cases are not also given authoritative, determinist readings. But the cultural constitution of cases as precedent has a double-edged quality … What a case means emerges only as it is interpreted as precedent in subsequent cases … In terms of meaning and authority, these legal texts are mutually constitutive.[30]

Metapragmatic regimentation mediated by precedent is thus always a *bidirectional* process, in which the present determines the past as much as the past determines the present. Prior decisions are invoked as a standard for making sense of the ongoing case, but it is in and through the ongoing case that that prior ruling is elevated to the status of precedent.

The implementation of precedent at the ICC is of course highly specific, and prior decisions do not have the same force as in the US legal system covered in Mertz's work. Article 21(2) of the Rome Statute establishes that '[t]he Court may apply principles and rules of law as interpreted in its previous decisions', but ICC judges are not under the obligation to follow the doctrine of binding precedent (*stare decisis*).[31] As legal scholars have remarked, Article 21(2) is drafted in a permissive rather than authoritative manner, and precedent at the ICC is therefore 'persuasive' ('non-binding', 'discretionary'), rather than binding.[32] This is also the position of various ICC Chambers.[33] In practice, however, many ICC Chambers

[29] *See* Mertz, *supra* note 26; Elizabeth Mertz, 'Recontextualization as Socialization: Text and Pragmatics in the Law School Classroom', in Michael Silverstein and Greg Urban (eds.) *Natural Histories of Discourse* (University of Chicago Press, Chicago, 1996), pp. 229-252.
[30] Mertz, *supra* note 26, p. 63.
[31] *See* Margaret McAuliffe de Guzman, 'Article 21: Applicable Law', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court (Third edition)* (Nomos, Beck, Hart Munich, Oxford, Baden-Baden, 2016), p. 945; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute (Second edition)* (Oxford University Press, Oxford, 2016), p. 527.
[32] *See* Stewart Manley, 'Referencing patterns at the International Criminal Court', 27 *Eur. J. Int. Law* (2016) 191–214; De Guzman, *supra* note 31, p. 945; Schabas, *supra* note 31, p. 526.
[33] *See, e.g.*, ICC, *Prosecutor* v. *Lubanga*, Case No. ICC-/04-01/06-1049, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, 30 November 2007, para. 44.

regularly invoke the authority of earlier rulings, and in general they follow the Court's earlier jurisprudence.[34] This enhances the coherence and consistency of jurisprudential development and is therefore considered preferable.[35] According to Schabas, the ICC's practice also provides no examples of an explicit refusal on the part of ICC Chambers to follow the ICC Appeals Chamber, or expressions of defiance that would indicate that the latter's decisions are not binding.[36] Yet, this deference for Appeals Chamber decisions is not unanimous, and there have been occasions where the Court departed from existing jurisprudence.[37] One such area where different Chambers have partially adopted diverse approaches is precisely the criteria for victim participation admissibility and certain procedural rights of victim participants.[38]

In spite of the fact that precedent at the ICC is implemented in a different way, the key points of Mertz's observations remain valid. The fact that different Chambers have adopted diverse approaches with respect to admissibility of victim participant testimony makes research into the bidirectionality of precedent actually all the more relevant. Hence, in the remainder of this paper we will elucidate the impact of the local trial context on the establishment of intertextual links with prior rulings related to victim participant testimony, and demonstrate the contingency of the resulting emergent text trajectories. Here too, the recontextualization of the 'found doctrine' distilled from prior decisions is not a matter of blind implementation.[39] Instead, trial actors negotiate its relevance by enlisting common-sense assumptions about the 'ownership' of testimony. Contextual elements like these are intricately intertwined with the local circumstances mediating action, and therefore they cannot be factored into an analysis that restricts itself to the purely doctrinal. Tracing their impact on jurisprudential development requires redirecting attention from product to process, and for this the analysis of hearing transcripts is indispensable.

---

[34] *See, e.g.*, ICC, *Prosecutor* v. *Kony et al*., Case No. ICC-02/04-01/05, Pre-trial Chamber II, Decision on Victims' Applications for Participation a/0010/06, a/006406 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, para. 5; ICC, *Prosecutor* v. *Katanga et al.*, Case No. ICC-01/04-01/07-357, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 2 April 2008.
[35] *See* De Guzman, *supra* note 31, p. 946.
[36] *See* Schabas, *supra* note 31, p. 528.
[37] *See* De Guzman, *supra* note 31, pp. 945–946; Gilbert Bitti, 'Article 21 and the Hierarchy of Sources of Law Before the ICC', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, Oxford, 2015), pp. 422-425; Schabas, *supra* note 31, pp. 526-527.
[38] *See* Bitti, *supra* note 37, p. 424.
[39] Annelise Riles, 'Property as legal knowledge: Means and ends', 10 *J. Roy. Anthr. Inst.* (2004) 775-795, https://doi.org/10.1111/j.1467-9655.2004.00211.x.

4. Intertextually Anchoring the Objection

As indicated in section 2, the objection conference comes very early on in the LRVs' submissions, on the first day of testimony (1 May 2018), about ten minutes into the examination of the first DSV. The latter, a former LRA child soldier, is recounting how he was abducted during the LRA attack on the internally displaced persons (IDP) camp in Abok of 8 June 2004. The excerpt below starts in the middle of an extended turn by the witness, after the LRV had asked him where he was when the rebels found him. The witness first specifies the requested location, and then continues with an unsolicited narrative of the kidnapping. When his account arrives at a point where the rebels slaughtered a female co-abductee, defense counsel Taku objects:

> When they came back to us, they started telling us to leave, to leave very fast and move. They herded us, and we were half running, half walking while they were beating us. One of the women was crying, talking about her child which had remained behind. They asked the woman, "Do you want to rest?" Then they got the woman and cut her neck and she died. They told us that whoever starts misbehaving will die that like woman.
> PRESIDING JUDGE SCHMITT: [9:50:50] Mr Taku.
> MR TAKU: [9:50:51] May it please your Honours. In a prior decision you had determined that he was a victim, participating victim on the basis of the material that was before you. And I think the purpose of this testimony, as you've already said in your decision and again here is to say what happened to him, what he feels, not to provide again additional evidence about what may have happened, the attacks and all of the things which are completely irrelevant to this process.
> And, your Honours, my colleague has given sufficient background as to what happened to him, but when he's now started talking about other people who may not be participating victims in this case, we do not know, we've seen the evidence, the proof of evidence sent to us, we have not seen the names of the participating victims that he actually submitted to us or to the Court who were involved in this process in a way.
> But with this particular witness, your Honours, your Honours have given guidance, you allow him to the give the background material specific to him. But for him to go ahead to say they did this in the camp, this is completely inappropriate for the

purposes for which you permitted victim participation.
PRESIDING JUDGE SCHMITT: [9:52:17] Okay. Any comments? It's not necessary, but if you want to, Mr Manoba, or somebody from the Prosecution.
MR MANOBA: [9:52:23] Mr President, I think his account simply leads into what he suffered, so I don't see any problem with what he is telling the Court.
PRESIDING JUDGE SCHMITT: [9:52:33] Okay. Thank you for these remarks. The Chamber has already explained the scope of questions that the LRVs can put to Witness and the scope of the evidence that might be presented by LRV. That's correct, Mr Taku.
And the Chamber has previously especially explained that the LRV may not ask questions as a Prosecution, especially when related to the commission of or Mr Ongwen's role in the commission of certain crimes, alleged crimes.
However, we have also said that this has to be decided on a case-by-case basis, having in mind the purpose of presenting evidence by LRVs and, of course, the rights of the accused to a fair trial.
I'm a little bit longer now so that this is not an issue that repeats itself. Because of that, I explain it a little bit in length.
At the core of this evidence by this witness is, according to the evidence summary that you gave, Mr Manoba, his life after his return and the harm he continues to suffer,
especially the trauma he still experiences, if we have understood this correctly. But you cannot speak about trauma and harm without knowing where it comes from.
Also the reactions of, possible reactions of family, of community, of teachers, of fellow
pupils, for example, towards the witness can only be understood if you know at least basically what has happened during his time in the bush.
So we allow the question, and you may continue. But as I have already said, Mr Manoba, you keep in mind that you focus your examination on the life of the witness after his return from the bush, but you have—it's correct what you're saying, the victim, the witness was in a narrative, and this leads now to I think also his personal involvement in certain acts, I would assume.
So please continue, Mr Manoba. I hope that it is cleared now, the question, that it does not pop up again so to speak.
MR MANOBA: [9:54:55] Thank you, Mr President.

56 ((the LRV resumes questioning))[40]

To understand the nature and content of defense counsel Taku's objection, we must hark back to the complex of interchanges between LRV, defense, and Trial Chamber that paved the way for the LRV submissions and that established the conditions under which the former child soldier and the other DSVs were allowed to testify. On 2 February 2018, the LRV had submitted a request for leave to present evidence on behalf of the victims,[41] to which the defense responded on February 15.[42] On 6 March 2018, Trial Chamber IX gave the LRVs permission to submit not previously disclosed evidence. Nevertheless, the Chamber also instructed that their questioning of DSV witnesses should (a) be restricted to victim-related issues (particularly the harm inflicted on them), and (b) not be repetitive of the Prosecution's questioning (as the Prosecutor must prove the accused person's criminal liability).[43] Trial Chamber IX thus insisted that DSVs must unequivocally stay within the witness role, and that their testimony should concentrate on the harm they suffered. In practice, however, maintaining such a sharp distinction is challenging, and the objection conference illustrates how difficult it is to give testimony on harm without also disclosing elements related to criminal liability and the victim participant role (such as the DSV's identity, the type of harm suffered, the way it was caused, etc.).[44]

Thus, in lines 08–23 defense counsel Taku argues that the DSV's account of the woman's slaying exceeds the scope of admissible LRV evidence. His intervention explicitly references the Chamber's 6 March decision ('your decision', line 11; 'your Honours have given guidance', line 20) that granted the former child soldier permission to testify on the impact of the abduction and his life after he returned from the bush ('what he feels', line 11), which also includes providing the necessary background materials (lines 14, 21). The intertextual connections established in counsel Taku's objection, however, extend beyond the decision in the strict sense. Thus, he states that the LRV has already supplied sufficient

[40] ICC, *Prosecutor* v. *Ongwen*, Case No ICC-02/04-01/15-T-171-Red-ENG, Trial Chamber IX, Transcripts, 1 May 2018. The transcript starts at p. 8, line 7, but has been renumbered for the sake of clarity.
[41] ICC, *Prosecutor* v. *Ongwen*, Case No. ICC-02/04-01/15-1166, Legal Representatives of Victims, Victims' requests for leave to present evidence and to present victims' views and concerns in person, 2 February 2018.
[42] ICC, *Prosecutor* v. *Ongwen*, Case No. ICC-02/04-01/15-1182-Red, Defense, Public Redacted Version of 'Defence Response to the LRV and CLRV Requests to Present Evidence and the Views and Concerns of Registered Victims', 22 February 2018.
[43] ICC, *Prosecutor* v. *Ongwen*, Case No. ICC-02/04-01/15-1199-Red, Trial Chamber IX, Decision on the Legal Representatives for Victims' Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, para. 18.
[44] Bachvarova, *supra* note 7, p. 185.

background information (lines 14–15) and that the current evidence (a) is *repetitive* of what the Prosecution submitted earlier ('not to provide again additional evidence about what may have happened', lines 11–12) and (b) establishes *new liabilities* not included in the confirmed charges:

> [B]ut when [the witness has] now started talking about other people who may not be participating victims in this case, we do not know … we have not seen the names of the participating victims that he actually submitted to us or to the court who were involved in this process. (lines 15–18)

This deduplication of repetitiveness (lines 11–12) and the establishment of new liabilities (lines 15–18) was not present in the original restrictions on questioning formulated by the Trial Chamber in its 6 March decision. It is, however, reminiscent of the criteria for DSV testimony that Trial Chamber III adopted in *Prosecutor* v. *Bemba*, which both the LRV and defense quoted at length in the exchange that preceded the 6 March decision:

> In the view of the Majority, these conditions entail a number of criteria that will assist in determining which victims are best placed to present evidence by personally appearing before the Court. Trial Chamber II identified these criteria as follows:
> a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.
> b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.
> c. … [45]

Besides this implicit allusion to the preceding exchange between LRVs and the defense (in February 2018), counsel Taku also references the evidence summary the LRV circulated a month earlier (on 5 April 2018), to further underscore the unanticipated nature of the witness's account of the killing (it was not included in 'the proof of evidence sent to us', line 17). For the sake of completeness, we should add that the witness's initial application for victim participant status is also mentioned (lines 8–10).

[45] *Bemba*, *supra* note 9, para. 24.

Two observations are in order here. First, counsel Taku's objection illustrates the multilayered character of this second form of intertextuality. As we noted, the establishment of such 'lateral' connections proceeds in two steps: the trial actors establish references to written documents that were exchanged in preparation for the LRVs submissions (representing a text trajectory that is *internal* to the Ongwen trial and hence does not extend before December 2015), but these documents in turn index prior decisions by other Trial Chambers (the trajectory of jurisprudential construction, which dates back to *Lubanga*, the first case that went to trial). Second, the absence of *stare decisis* results in a form of cherry-picking. While the LRV's application and the defense response both enlisted the criteria for DSV testimony established in *Bemba*, Trial Chamber IX eventually grounded its 6 March decision in the criteria adopted by the Appeals Chamber in *Prosecutor* v. *Katanga*. The latter addressed the more general question of the conditions under which victim participants are allowed to intervene in trial proceedings.[46] Jurisprudence is thus not a set recipe, but a menu from which trial actors make a selection that best suits their purpose.

The remainder of our analysis further explores this judicial maneuvering space, as it elucidates how the implementation of the criteria drawn from *Bemba* and *Katanga* has in turn been 'contaminated' by a set of deep-rooted ambiguities surrounding testimony ownership.

5. Who Owns Testimony?

To open our inquiry into these ambiguities and taken-for-granted assumptions, let us concentrate on the slightly curious way in which Trial Camber IX's 6 March 2018 decision selects its addressee. In its analysis of the request for leave to present evidence, the Chamber first establishes the legal grounds on the basis of the which *participating victims* may lead evidence (in paragraph 15), after which it seamlessly proceeds to the instructions *for the LRV* on the scope of questioning (paragraph 18):

> 15. The Chamber considers it to be the established jurisprudence of this Court that Article 68(3) of the Statute, in conjunction with Article 69(3), provides an avenue for participating

[46] ICC, *Prosecutor* v. *Katanga*, Case No. ICC-01/04-01/07-2288, Appeals Chamber, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial', 16 July 2010, para. 114.

> victims to lead previously undisclosed evidence, pertaining to the innocence or guilt of the accused, when the personal interests of the victims are affected …
> 18. Further, the Chamber recalls its oral decision of 4 April 2017 on the scope of questioning by the LRV. The same limitations and considerations apply to the questioning of witnesses which are called upon request by the Legal Representatives.[47]

In these two paragraphs, the Chamber subsequently addresses the LRVs (a) in their role of *representative* of the victim participants established by Rule 90(2) of the ICC Rules of Procedure and Evidence (as it examines the legal grounds on the basis of which victim participants may submit evidence, in response to a request which the LRV submitted *on their behalf*) and (b) as the trial actors who will conduct the *examination* of these victim-participants. The apparent ease with which the authors of the decision leap from one role to the next conceals a fundamental tension characterizing the participation structure for DSV testimony. A much more candid formulation can be found in the criteria established in *Bemba* (which both the LRV and the defense referred to in the exchange leading up to the 6 March decision, cf. supra), which explicitly talks of 'a victim [who] proposes to testify'.[48] Because the DSV witness is called to the stand by a representative *acting on his/her behalf*, he/she is de facto 'calling him/herself' and is therefore, ultimately, 'proposing' to testify.

This equivocality concerning who is actually 'in charge' of evidence led by a DSV is premised upon a more fundamental uncertainty about the responsibility for testimony in general. For this, Goffman's deconstruction of the monolithic category speaker into different 'production formats' provides a useful point of departure, in particular the differentiation he proposed between the roles of *principal* (the individual or party whose position is represented), *author* (the one who drafts the discourse), and *animator* (the one who physically utters it).[49] Reading the ICC legal instruments and ICC case law through Goffman's lens, one can easily identify a number of normative provisions and decisions expressing a normative presumption that witnesses are the principal (and hence the 'owner') of the answers they give before the Court, and by extension, of the evidence produced during their examination. Thus, the ICC's jurisprudence has explicitly stated that 'neither party 'owns' the witnesses it intends to call'.[50] Before testifying witnesses are required to give 'an

[47] *Ongwen*, *supra* note 43, paras. 15, 18.
[48] *Bemba*, *supra* note 9, para. 24.
[49] Goffman, *supra* note 16.
[50] ICC, *Prosecutor* v. *Lubanga*, Case No. ICC-01/04-01/06-2192-Red, Trial Chamber I, Redacted Second Decision on disclosure by the defence and Decision on whether the Prosecution may contact defence witnesses, 20 January 2010, para. 49.

undertaking as to the truthfulness of the evidence' (ICC Statute, Article 69(1)), and provision of false witness testimony constitutes an offence against the administration of justice (Article 70(1)(a)).

The above-mentioned normative presumption that witnesses speak in their own name is confirmed by various measures the Court imposed to prevent the calling party from 'co-authoring' testimony or influencing the way in which it is presented (or 'animated'). In general, ICC judges have rejected the practice of 'witness proofing' altogether.[51] Yet, ICC Chambers have accepted 'witness preparation' by the calling party, but this is subject to protocols and safeguards (including the video recording of preparatory encounters) to prevent the rehearsing of testimony.[52] The ICC also recognizes the importance of 'witness familiarization', but this task is not entrusted to the parties but to the ICC Registry (the Victims and Witnesses Unit).[53] Furthermore, successive Trial Chambers have systematically imposed restrictions on the questions that the calling party can pose to the witness. Hence, '[a]s a general rule, during examination-in-chief only neutral questions are allowed. The party calling the witness is therefore not allowed to ask leading or closed questions, unless they pertain to an issue that is not in controversy'.[54] These restrictions only hold for the calling party;[55] if a witness is behaving adversely, examiners-in-chief may exceptionally also pose leading and closed questions, but only after requesting the Court to lift these restrictions.[56]

From an interaction-analytic angle, the existence of such restrictions is utterly significant. Discourse scholars have repeatedly stated that testimony elicited in an adversarial setting is 'dual-authored', because of the impact question format has on the shape of the

[51] ICC, *Prosecutor* v. *Lubanga*, Case No. ICC-01/04-01/06-679, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006; ICC, *Prosecutor* v. *Lubanga*, Case No. ICC-01/04-01/06-1049, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007; ICC, *Prosecutor* v. *Katanga*, Case No. ICC-01/04-01/07-1134, Trial Chamber II, Decision on a number of procedural issues raised by the Registry, 14 May 2009, para. 18; ICC, *Prosecutor* v. *Bemba*, Case No ICC-01/05-01/08-1016, Trial Chamber II, Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, 18 November 2010.

[52] ICC, *Prosecutor* v. *Murau and Kenyatta*, Case No. ICC-01/09-02/11-588, Trial Chamber V, Decision on witness preparation, 2 January 2013; ICC, *Prosecutor* v. *Ruto and Arap Sang*, Case No. ICC-01/09-01/11-524, Trial Chamber V, Decision on Witness Preparation, 2 January 2013; ICC, *Prosecutor* v. *Kenyatta*, Case No. ICC-01/09-02/11-716, Trial Chamber V, Decision on VWU Submission Regarding Witness Preparation, 11 April 2013.

[53] *Lubanga*, *supra* note 51, paras. 28-34.

[54] ICC, *Prosecutor* v. *Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-1665, Trial Chamber II, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009, para. 66.

[55] *Ibid.*, para. 74.

[56] *Ibid.*, para. 67.

answers. [57] The restrictive measures reviewed here suggest that ICC trial judges are aware of the risk dual authoring poses to testimonial integrity. Yet, dual authoring is only considered problematic if examining counsel and witness are identically aligned towards the truthfulness of the account being construed (that is, during examination-in-chief), which implies that the calling party also has a 'stake' in the testimony. This last presumption is confirmed by Article 70(1)(b) of the Statute, which holds 'the party' criminally liable for knowingly submitting false evidence . The overall picture is a complicated one, in which the calling party owns the 'point' made by submitting the testimony (and thus acts as its co-principal), but the Court depends on the autonomy of the witness (as main principal, author, and animator) to determine the testimony's probative value and veracity:

> Finally, the Trial Chamber is of the opinion that the preparation of witness testimony by parties prior to trial may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings. [58]

In situations like the one reviewed in this article, where a DSV witness is examined by his own representative, the picture is additionally complicated by the fact that the distinction between the roles of co- and main principal is blurred even further, and restrictions on dual authoring eventually become untenable.[59]

6. Ownership and Timing

The same indeterminacy concerning testimony ownership that we came across in the ICC legal instruments and jurisprudence thwarts the implementation of the criteria from *Bemba* and *Katanga* in the 1 May 2018 objection conference. Thus, at certain points the trial actors ostensibly orient to the responsibility of the witness as the one who is 'giving' the evidence

[57] Janet Cotterill, ''Just One More Time…': Aspects of Intertextuality in the Trials of OJ Simpson', in Janet Cotterill (ed.), *Language in the Legal Process* (Palgrave Macmillan, London, 2002), pp. 147-161, p. 149.
[58] *Lubanga*, *supra* note 51, para. 52.
[59] The virtual coincidence of the two roles may have far-reaching legal consequences. For example, a failure by the DSV to supply truthful evidence in the witness role may result in seeing one's status as victim participant forfeited. *See Prosecutor* v. *Lubanga*, Case No. ICC-01/04-01/06-2842, Trial Chamber I, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paras. 484 and 1362

and seem to hold the former child soldier accountable for the testimony's shape and content. Elsewhere, however, the LRV comes into sight as the 'caller' of the witness. Trial actors continually oscillate between these two positions, regardless the position they occupy in the proceedings.

First, there is something curious about the timing of counsel Taku's objection. According to previous research, in the overwhelmingly majority of cases objections follow immediately after the question.[60] This distributional observation is borne out by qualitative analyses underscoring the intrinsic connection between objection and antecedent question. For Atkinson and Drew, the pauses following the examining counsel's question provide an opportunity space for the opposing counsel to identify and call out a potential 'objectionable'.[61] Matoesian argues that testimony-taking is not dyadic but essentially consists of three-part sequences. His analysis of the videotaped embodied conduct of a defendant subject to cross-examination shows how witnesses assume that the questions put to them (part one) are followed by an 'objection option space' (part two). It is only if their own counsel does not seize this opportunity (and the objection space is cleared), that they proceed to the answer (part three).[62]

In this case, however, the defense counsel raises the objection after the witness had the floor for over one and a half minute, thus suggesting that the trouble source is located in the witness's response rather than the LRV's question. This is confirmed by the objection's unfolding content. Counsel Taku first reviews the Trial Chamber's instructions on the scope of admissible LRV evidence (the impact of the abduction and the resulting trauma, plus the background information required for such testimony, lines 8–13), after which he brands the immediately preceding episode of testimony as violating these instructions:

> 14 And, your Honours, my colleague has given sufficient background as to what
> 15 happened to him, but when he's now started talking about other people who may not
> 16 be participating victims in this case, […]

On the one hand, the statement 'my colleague [i.e., the LRV] has given sufficient background' frames the LRV in the role of 'submitter' and ignores the interactionally produced nature of the evidence. Nevertheless, in the next line counsel Taku refers to the

[60] Gregory Matoesian, *Reproducing Rape* (University of Chicago Press, Chicago, 2005).
[61] John Maxwell Atkinson and Paul Drew, *Order in Court* (MacMillan, London & Basingstoke, 1979), pp. 209-215.
[62] Matoesian, *supra* note 14.

presumed violation of the Chamber's guidelines as 'when he's [i.e., the witness] now started talking about'. Here, he again firmly locates the 'onset' of the deviation in the witness's response in progress, suggesting that the former child soldier is somehow narrating on his own initiative and should be considered the 'owner'/principal of the testimony.

The LRV, too, appears to hold the witness accountable. In his (short) rejoinder, he characterizes the former child soldier's recounting of the killing as a preface to the trauma he suffered and the harm he experienced, and hence as falling within the scope of acceptability established by the Chamber:

> 26 MR MANOBA: [9:52:23] Mr President, I think his account simply leads into what
> 27 he suffered, so I don't see any problem with what he is telling the Court.

The LRV qualifies the objected testimony as an 'account' by the witness, not as an 'answer'. Like defense counsel Taku, he downplays the interactional nature of the witness's testimony, but with radically different implications. The emphasis on the witness's ownership of the discourse aligns with the necessarily subjective nature of harm;[63] the related suggestion that the child soldier volunteered the account of the killing conceals the LRV's own involvement as examiner-in-chief and refutes that he might have overstepped the scope of questioning.

In his wrapping up of the conference, Presiding Judge Schmitt acknowledges that the defense correctly pointed out the limitations imposed by the Chamber (lines 28–34). However, he also reiterates that decisions will be taken on a case-by-case basis (lines 35–38) and insists that in the present instance, the testimony does not overstep these limitations. At this point, we advise the reader to take a fresh look at lines 41–54 of the excerpt above, because it is here that the contradictory picture again presents itself in all its glory. Thus, in lines 42 and 49 the Presiding Judge singles out the LRV as the recipient of his guidance, and in line 41 he references the LRV's evidence summary for anticipating the nature of the evidence to be expected from the witness. Both the actual rejection of the objection ('so we allow the *question*', line 48, emphasis added) and the related instruction to focus on the witness's life after his return from the bush (lines 49–50) frame the LRV as the 'questioner' and as 'owner/submitter' of the evidence. Nonetheless, in spite of this recognition of the LRV's active involvement, the Presiding Judge also picks up on the 'exonerative'

[63] Sigurd D'hondt, Juan Pablo Perez-Leon-Acevedo, Fabio Ferraz de Almeida, Elena Barrett, 'Evidence about Harm: Dual Status Testimony at the International Criminal Court and the Straitjacketing of Narratives about Suffering', forthcoming.

metapragmatic regimentation of the witness's testimony which the LRV provided in lines 26–27. In line 51, the Presiding Judge agrees that the witness's account of the killing formed part of 'a narrative', and he treats this as a valid ground for accepting the testimony. At one level, this invocation of narrativity reflects the Trial Chamber's prior instruction that witnesses called by the LRV are permitted to give background information ('this leads now to I think also his personal involvement in certain acts', lines 51–52). In this instance, however, narrativity also at least partially refers to the witness's capacity *to speak for himself*, as principal-owner of the testimony. This is made explicit later in the same examination, when the Presiding Judge praises the former child soldier for his ability to produce coherent narratives, qualifying him as 'a clever person' and adding that 'we should let him simply speak and that might speak for itself' (sic).[64]

It is balancing exercises like these that allow the Trial Chamber to exercise discretionary power and take admissibility decisions on an ad hoc basis, and the excerpt illustrates the mediating role that ambiguities concerning testimony ownership play in such decisions. To our understanding, the duality that we identified impinges upon the negotiation of admissibility through precedent in two ways. First, it allows the defense to raise an objection against a question based on the answer of the witness rather than the content of the question. Second, it opens up a broader canvass, a discursive space beyond simple yes/no binaries that allows trial actors to take into consideration detailed metapragmatic considerations about the quality of the witness's discourse. The last remark by Judge Schmitt is particularly illustrative of this.

To illustrate that this balancing exercise can go in different directions, let us look at one more objection conference. The episode below comes from the examination-in-chief of another DSV two days later (3 May 2018), and exhibits a similar structure but led to a markedly different outcome. This time, the DSV is not an abducted child soldier but a resident of Lukodi IDP camp, which had been attacked by the LRA two weeks before Abok, on 19 May 2004. The witness is a 'local councillor', elected by his fellow townsmen to mediate between local community and administration. Typical of this second DSV is his constant switching between contrasting voices, oscillating between the victim role and a voice indexing the 'administrative oversight' he exercised as a councillor. Here as well, the defense objection occurs at the very beginning of the LRV's examination-in-chief. Right before the objected episode, the witness had been answering general questions about living

[64] *Ongwen*, *supra* note 40, p. 27, lines 6-7.

conditions in the IDP camp, for which he assumed the voice of administrative oversight. In line 01 below, the LRV (Mrs. Hirst) switches the topic and asks an open question about the LRA attack. The witness continues giving an overall account, summarizing multiple event episodes at different locations in the camp. In line 11, defense counsel Taku objects that he should restrict his testimony to personal experience:

01 Q. [10:08:32] I'm going to move on now from the conditions in the camp in general
02 to the events which took place on 19 May 2004. Can you tell us what happened on
03 that day?
04 A. [10:08:56] On that day, the 19th of May 2004, at 6 p.m. in the evening, the LRA
05 rebels entered Lukodi camp and surrounded it. Then they began shouting and
06 blowing whistles and immediately started shooting at people. If they find you,
07 you'll just have to be shot or they will stab you with the bayonet of the gun or they
08 would throw you in the burning huts as they also continued torching the huts that
09 were there. Some people would be looting food items, until when they completed
10 their operations they completely burnt down the camp.
11 MR TAKU: [10:10:31] Your Honour, I object very vehemently to this evidence led
12 through this witness. It goes to the heart of the charges. He should say what he
13 saw, what he did, constrain himself to that and not to make a general statement about
14 the charges.
15 PRESIDING JUDGE SCHMITT: [10:10:47] I think before we decide on that, the
next
16 question would of course be, and I think Mrs Hirst will put it to the witness, what he
17 really saw, what he heard, where he was and it might be that perhaps the Defence
18 would ask him later on if he was able to hear and to see and all these matters. But in
19 principle, I would agree, but it's a little bit premature, your objection. So it is for the
20 moment, so to speak, overruled because I assume otherwise.
21 I would put the question, Mrs Hirst, we continue in that way.
22 MS HIRST: [10:11:24] I'm grateful, Mr President.
23 Q. [10:11:28] Mr [anonymized], where were you when these events began occurring?
24 A. [10:11:35] I was in Lukodi IDP camp.
25 Q. [10:11:44] Which part of the camp were you in specifically?
26 A. [10:11:47] I was in a certain business shop. He had called me. He wanted a
27 document from me that I should write for him so he could go and buy items. So the
28 rebels entered at that time when I was even there. I was not told. I saw it with my

29 own eyes.[65]

Here too, the defense counsel raises the objection after having monitored the witness's answer for over one and a half minutes, and the witness is blamed for having transgressed the scope of admissibility: 'He should say what he saw, what he did, constrain himself to that' (lines 12–13). The Presiding Judge's response, however, now follows a markedly different trajectory. He dismisses the defense counsel's objection as premature (line 19) and temporarily puts it on hold (line 20), but also indicates that, in principle, he agrees to the counsel's remark. And even though the objection specifically addressed the witness's narrative, he directs his instruction to the LRV, advising her to adapt her line of questioning (which she does in line 23 and 25). The content of the objection did not escape the witness, who in lines 28–29 adds on his own initiative that his testimony is based on personal observation not hearsay.

This second objection conferences has a structure that is similar to the first one and here too, indeterminacies about testimony ownership play a major role in negotiating the acceptability of testimony. This time, however, the dices roll in a different direction and the Presiding Judge aligns with the objecting counsel. Taken together, the two excerpts demonstrate the leverage that is introduced by the ambiguities that we documented, which offers trial actors maneuvering space and the opportunity to negotiate the admissibility of evidence.

7. Conclusion

In his famous comparison of the French *Conseil d'État* and a research laboratory, Bruno Latour asserts that scientific discoveries are the product of long 'referential chains' (in which raw empirical data are converted into 'findings') followed by short 'qualificational chains" (in which these findings are debated).[66] Legal decisions, in contrast, are the outcome of extremely short referential chains, where the social world is instantaneously transformed into the field of application of a legal category, followed by lengthy qualificational chains, as these categorized facts are continually requalified as the case progresses. The distinction

[65] ICC, *Prosecutor* v. *Ongwen* Case No. ICC-02/04-01/15-T-173-Red-ENG, Trial Chamber IX, Transcripts, 3 May 2018, p. 13. The fragment starts at line 13.
[66] Bruno Latour, *The Making of Law* (Polity, Cambridge, 2010).

between reference and qualification provides an interesting perspective on the approach developed in this paper. Thus, doctrinal analysis is primarily concerned with the intricacies of processes of requalification, explicating the transformability of legal categories 'from within' the legal framework, after 'the passage to law' has been completed. The linguistic-anthropological approach pursued here, in contrast, broadens the picture by drawing analytical attention to the instantaneous, locally accomplished referential chains in which the co-articulation of law and the social is initiated. An additional layer of complexity stems from the fact that the two objection conferences in which defense and LRVs clashed over the admissibility of DSV testimony constitute examples of a 'reflexive' translational chain, in which prior jurisprudence is brought to bear not on acts/events in the outside world, but on the nitty-gritty of the everyday communicative encounters in and through which international criminal trials unfold. The analysis highlighted the intricacy of the process. Thus, trial actors establish a multiplicity of lateral intertextual connections to both earlier trial documents and prior jurisprudence, and the 'found doctrine' distilled from these prior rulings is implemented in ways that are inflected by unexplicated common sense assumptions.[67] The latter, in turn, introduces a measure of indeterminacy, which grants trial actors the maneuvering space they need to take ad hoc decisions based on delicate metapragmatic characterizations of the testimony. Eventually, these seemingly insignificant 'reflexive translations' that happen *en cours de route* will also affect the overall direction into which ICC evidence law on DSV testimony develops. It is through such discrete, unpredictable acts of 'reflexively translating' the trial process itself that the ICC determines the conditions under which justice can be spoken, and that the path which Richland described as *juris-diction* maps out itself.[68]

[67] Riles, *supra* note 39.
[68] Richland, *supra* note 15.