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Mass Atrocity, Mass Testimony, and the Quantitative Turn in International Law

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The article identifies and analyses the development it labels the "quantitative turn" in international criminal law. Addressing the cumulative effect of the large numbers of witnesses in international processes, the article considers quantity as an integral, and substantively beneficial, component of the law's response to atrocity crimes. The article develops a theorized understanding of the relationship between mass atrocity and mass testimony and provides a taxonomy of the functions that the quantity of testimonies fulfills in international trials: the evidentiary, didactic, epistemic, and restorative functions. Focusing on a recent case before the International Criminal Court in the matter of The Prosecutor v. Bemba, the article demonstrates how the different players in the international justice system—Prosecution, Defense, Victims, and the Court—employ the functions of quantity, while negotiating concerns over manageability and scale. The goal of this article is to prompt a debate and a more careful consideration of the potential benefits of a meaningful participation of witnesses and victims in post-atrocity proceedings. This is particularly important given the dominance of the efficiency paradigm in international criminal law (ICL) discourse, which directly impacts the quantitative turn. The article forges new ways for ICL institutions to maintain a plurality of voices and their commitment to victims while safeguarding the rights of the accused.

When one man is murdered, you investigate when, how, who, why. ... What do you do when a whole people is murdered? You ask those same questions and call many witnesses (Gouri 2004: 269–270)

Ever since the Eichmann trial ushered in the Era of the Witness (Wieviorka 2006), personal narratives have become a primary means for conveying information regarding atrocity crimes

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and grave human rights violations.[1] International criminal trials investigating large-scale, violent crimes and human rights violations rely almost exclusively on personal narration for establishing facts about the past (Combs 2010).[2] The resort to testimonial narratives as a means for revealing truth and achieving justice in the aftermath of atrocity is not limited to the criminal justice system. Truth commissions (Hayner 2011), human rights campaigns (Schaffer and Smith 2004), cultural narratives such as documentary films, museums (Sarkar and Walker 2010), and atrocity archives (Caswell 2014), all share a fascination with personal narration of past abuses.

Scholars across the disciplines have extensively examined the relative merits and faults of the witness-driven model, highlighting concerns such as reliability and re-traumatization, to name a few (Ciorciari and Heindel 2016; Combs 2010; Dembour and Haslam 2004; King et al. 2016; Stover 2005). Such studies often focus on the experience of the individual witness as their object of research. This concern with the single witness, while fundamental to the understanding of the act of testimony, is also limiting. It overlooks a distinctive, yet crucial, aspect of the witness-driven model; namely its *quantitative* nature.

When invoking *quantity*, this article refers primarily to the large number of witnesses and victims participating in legal proceedings dealing with mass atrocity. Since the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda in the mid-1990s (henceforth: ICTY and ICTR, respectively) and more so since the inauguration of the International Criminal Court (henceforth: ICC) a decade and a half ago, international criminal law (henceforth: ICL) has experienced a surge in the voices it accommodates. Recent years have seen a shift in the nature of evidence presented to the courts, with less documents and other material evidence and more eyewitnesses testimony, leading to a sharp rise in the number of witnesses participating in international criminal tribunals (May and Wierda 1999). In addition, under article 68(3) of the Rome Statute (1998), the founding document of the ICC (henceforth: RS), a high volume of victims apply to participate in the legal process, adding a new dimension of quantity to the proceedings (Haslam and Edmunds 2013).

[1] Literature on witness testimony in the context of atrocities and human rights violations is vast. In general, see (Schaffer and Smith 2004) On witness testimonies in war crimes tribunals, (Combs 2010; Dembour and Haslam 2004; Stover 2005). On witness testimonies in truth commissions, see (Phelps 2011) (Ross 2003). On trauma and witness testimonies, see (Felman and Laub 1991) (Pinchevski 2012).

[2] As Combs notes, fact witnesses provide virtually all witness testimony in current international tribunals; only a tiny percentage of prosecution witnesses at the international tribunals are experts (Combs 2010: 12).

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Despite these profound changes, the quantitative turn, its functions and impact on the different actors in the legal process, have not been sufficiently researched, theorized or addressed in scholarship and practice. To date, the quantity of witnesses and victims in the legal process has been perceived mainly as a contingent predicament that threatens institutional efficiency. Accordingly, the pressures of quantity have thus far been answered with proposals to broaden the courts' reliance on prerecorded and written statements and video-link testimonies (Fairlie 2017; Wald 2001), in efforts to curtail quantity and plurality in favor of efficiency.

This article argues for a different approach. Instead of treating the large number of actors and voices in ICL mechanisms as a contingent condition that could be mitigated by more effective evidentiary procedures, the article considers quantity as an integral, and substantively beneficial, component of the international justice system's response to crimes of mass atrocity. Because the efficiency paradigm in the field of ICL is so dominant, and directly impacts the quantitative turn, it is particularly important to develop a theorized understanding of the functions of quantity.

The article first identifies and describes the current quantitative turn in ICL. It then examines the relationship between the social phenomenon of atrocity crimes—characterized by quantity—and the legal phenomenon of the quantitative turn—characterized by large-scale testimonial schemes. The article theorizes that the turn to mass testimony is an integral part of the law's response to the mass scale of atrocity crimes and their ungraspable nature. More particularly, the article hypothesizes that the large quantity of witnesses serves crucial functions in addressing such grave human rights violations. The article provides a taxonomy of four functions of quantity, both stated and implicit: the evidentiary, the didactic, the epistemic, and the restorative functions. These functions of quantity correspond to existing scholarship on ICL objectives, while also expanding it. Drawing on literary theory and the experiences of commentators on international criminal trials, the article focuses on the social functions of quantity in enhancing society's ability to comprehend mass atrocity, and to grasp its horrific nature. Developing the epistemic function, the article suggests that quantity brings the incomprehensible excess of the crimes to bear on the listeners—judges and audience alike—through aesthetics of excess. To demonstrate the generated theory and the derived functions, the article focuses on one case study, a recent case before the ICC in the matter of *The Prosecutor v. Jean-Pierre Bemba Gombo* (henceforth: Bemba) that foregrounds questions of quantity.

The article positions the quantity of testimonies as a key to understanding how societies deal with legacies of systematic

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violence and human rights abuses. The article's proposed taxonomy of functions demonstrates how the international legal process interweaves legal and extralegal objectives, through the use of a multitude of witnesses. Identifying the multifunctional character of the testimonial enterprise in ICL emphasizes the appeal of this research to the social study of the law. Employing tools and concepts from multidisciplinary sources, such as social science methodologies and literary theory in its analysis of testimonies in the legal context, the article points to new avenues for future research in the field of law and society.

Methodology

The article uses a two-step methodology. It begins with a grounded theory approach to theorize the relationship between mass atrocity and mass testimony and, in particular, to hypothesize the functions of quantity in the legal process. It then moves to demonstrate the theoretical underpinnings, employing a case-study methodology.

Grounded theory (henceforth: GT) is a methodological strategy that seeks to generate theory from real-life experience (Glaser and Strauss 1967). Whereas some other traditions tend to describe analytical strategies from first principles, GT follows a very structured and systematic approach to the creative process. In essence, this is an iterative process involving concurrently collecting and analyzing data with the ultimate aim of generating a theory (during the actual research) that is "grounded" in the context in which the inquiry takes place (Corbin and Strauss 2015). In the GT method, then, theory develops along with the research following the natural pattern of human inquiry (Webley 2010).

This article seeks to develop a new explanatory model for the relationship between mass atrocity and mass testimony. To reach this explorative goal, I favored an approach that allows gathering data without being bound by predetermined theories. This is the cornerstone of GT (De Bie and De Poot 2016). I use GT here in order to develop plausible relationships between concepts (Corbin and Strauss 2015): in particular, for conceptualizing the relations between mass atrocity and mass testimony, in order to deal with these two sociolegal phenomena in scientific ways. Moreover, GT method is especially useful when using interdisciplinary sources (Malagon et al. 2009), making it suitable for this research, which draws on a diverse body of sources and documents, from case law and legal scholarship on the objectives of international criminal law, through multidisciplinary research on atrocity crimes, to literary theory on cultural representation of atrocities. Furthermore,

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GT advocates for sampling aimed at theory construction, instead of population representativeness (Malagon et al. 2009). The case law used in developing the theory is not intended to represent the entirety of cases before international tribunals. Instead, this study seeks to develop a theory that will explain the presence of a multitude of voices in legal institutions addressing atrocity. To achieve this, I draw on cases from international tribunals characterized by multitude—both in terms of the crimes in question and the number of participants in the legal process. The texts in this study, while not observationally gathered, were produced in the real context in which my inquiry takes place, that is, the arena of international criminal justice, which stands at the center of my sociolegal investigation. As such, these texts reflect the human interaction and the attitudes of the agents that shape the legal process confronting mass atrocity.[3]

Based on the theorization of the quantitative turn developed in the first stage of the article, the study then demonstrates the findings, by employing a case study methodology. The case study method is an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident (Yin 2009). Case studies allow to explore in depth a specific event or process and its contextual elements (Creswell 2009; Stake 1995). Given the scope of this article, examining why there is a multitude of witnesses in trials of mass atrocity and how the various players in the international justice system address this quantity of testimonies, the method of a case study is particularly salient.

Case Study Selection

The case study I analyze is a recent ICC case in the matter of *Bemba*.[4] I limited my case selection to cases before the ICC, given its status as the permanent international criminal court which stands in the forefront of the international criminal justice system. The ICC's RS and its Rules of Procedure and Evidence (RPE) make it the most elaborate international criminal mechanism to date, fashioning the field's response to mass atrocity. In addition, the ICC is particularly innovative in its institutional commitment

[3] Another example for the application of grounded theory for documents' analysis can be found in a recent article in which in order to understand jihadist networks, police files have been used as the raw data employing grounded theory analysis (De Bie and De Poot 2016).

[4] For a useful summary of the legal process in the *Bemba* case, See: https://www.icc-cpi.int/car/bemba/Documents/bembaEng.pdf.

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to victims of atrocity, which pertain to the restorative function, one of the four functions I delineate in the theoretical section.

Though the ICC has issued more than 40 indictments, after a decade and a half it has rendered convictions in only five cases: the *Lubanga*; *Katanga*;[5] *Bemba*; *Al Mahdi*;[6] and *Bemba* et al.[7] cases. Among the concluded cases, *Bemba* is the latest case to be adjudicated.[8] Substantially, it deals with core charges of systematic and wide spread crimes against humanity and, in terms of quantity, it features the largest number of witnesses and victims in the history of the ICC,[9] making it a paradigmatic case of the quantitative turn (Flyvbjerg 2004), thus foregrounding questions of quantity.

My engagement with *Bemba* follows a different path than that of the doctrinal analysis of legal cases. In my analysis, I examine *Bemba* holistically (Stake 1995). Performing an in-depth study of a single legal process, I seek to understand how the various actors in the system—Prosecution, Defense, victim groups through their

[5] The case against Katanga was initially joined to the case against Ngudjolo Chui. On 21 November 2012, the charges were severed and subsequently Ngudjolo Chui was acquitted on 18 December 2012.

[6] At the trial's opening, Al Mahdi admitted guilt. Subsequently, his trial lasted only 3 days and included three witnesses and eight victims who participated in the trial through legal representative (https://www.icc-cpi.int/mali/al-mahdi/Documents/al-mahdiEng.pdf). Due to its limited scope, I did not include it among the relevant cases for selection.

[7] The Bemba et al. case deals with offenses against the administration of justice related to the false testimonies of defense witnesses in the main case of The Prosecutor v. Bemba. Given its secondary nature, I did not include it among the relevant cases for selection (https://www.icc-cpi.int/car/Bemba-et-al/Documents/Bemba-et-alEng.pdf).

[8] Verdict rendered on 21 March 2016; Sentence on 21 June 2016. On 8 June 2018, the Appeal Chamber reversed Trial Chamber III's decision of 21 March 2016 and decided, by majority, to acquit Bemba from the charges of war crimes and crimes against humanity. While this decision clearly carries significant legal ramification, it does not directly affect my analysis of quantity in the Bemba case. In addition, proceedings are currently ongoing in three trials: the Ongwen case, the Ntaganda case, and the Gbagbo and Blé Goudé case (The Women's Initiatives for Gender Justice 2017).

[9] In *Bemba* Trial Chamber III heard 77 witnesses, including 40 witnesses called by the Prosecution, 34 called by the Defense, 2 witnesses called by the Legal Representative of Victims and one witness called by the Chamber. The Chamber also permitted three victims to directly present their views and concerns. The Chamber granted 5229 persons the status of victims authorized to participate in the proceedings (https://www.icc-cpi.int/car/bemba/Documents/bembaEng.pdf). In comparison, in the Lubanga case, the ICC heard 36 witnesses, including 3 experts, called by the Prosecutor, 24 witnesses called by the defense and 3 witnesses called by the legal representatives of the victims participating in the proceedings. The Chamber also called four experts. A total of 129 victims, represented by two teams of legal representatives and the Office of Public Counsel for Victims, were granted the right to participate in the trial (https://www.icc-cpi.int/drc/lubanga/Documents/lubangaEng.pdf) In the Katanga case, Trial Chamber II heard 25 witnesses and expert witnesses called by the Prosecution, 28 called by the defense teams for Katanga and Ngudjolo Chui and two called by the legal representatives of the victims. The Chamber also called two further experts to testify. The judges granted 366 victims the right to participate in the proceedings, represented by their legal counsels (https://www.icc-cpi.int/drc/katanga/documents/katangaeng.pdf).

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representatives, and the different judges of Trial Chamber III—address and utilize the quantity of witnesses. Through a detailed analysis of these actors' positions as expressed in a multitude of court documents, such as transcripts, requests, majority and dissenting opinions, and the verdict, I explore how different agents employ different functions of quantity, whole negotiating the social anxieties aroused by the challenge that quantity poses to the efficiency paradigm.

The Quantitative Turn in International Criminal Law

While the International Military Tribunal in Nuremberg provides the legal, theoretical, and normative foundations for contemporary international tribunals, it does not stand as their evidentiary model (Combs 2010). Prosecutors at the Nuremberg Tribunal could rely on a colossal cache of documents to establish the guilt of the Nazi defendants.[10]

Recent years have seen a shift in the nature of evidence, with fewer documents and more eyewitness testimony presented to the courts, leading to a surge in the number of witnesses (May and Wierda 1999). The ICTY, for instance, relied on substantial numbers of eyewitnesses. As of mid-2015, more than 4650 witnesses had testified since the Tribunal's first trial in 1996. In the Tadić trial, the first determination of guilt by the ICTY, 126 witnesses were heard (May and Wierda 1999). The recently concluded hallmark trial of Serb leader Radovan Karadžić alone featured 337 prosecution witnesses and 248 defense witnesses (ICTY 2016b). Similarly, the ICTR heard more than 3500 witnesses (Sadat 2012). The Special Court for Sierra Leone (henceforth: SCSL) heard 547 testimonies in four cases (SCSL, n.d.). In the Ayyash trial before the Special Tribunal for Lebanon (henceforth: STL) dealing with a single incident, 300 witnesses testified before the Trial Chamber (124 of whom appeared in person, and statements of 190 witnesses, of whom 14 also testified in person, were admitted in writing) (STL, n.d.).

The victim participation regime in the ICC poses new quantitative challenges. Article 68(3) of the RS offers an innovative participatory role to victims, as a distinct group:

[10] Only 94 witnesses appeared before the IMT. Interestingly, in the International Military Tribunal for the Far East (the Tokyo tribunal), 419 witnesses testified in court. Given the marginal influence of the Tokyo tribunal on contemporary ICL jurisprudence, it is hard to claim it as a harbinger of the current quantitative turn. If anything, it serves as a warning sign for the dangers of prioritizing expediency over plurality of testimonies. See (Boister and Cryer 2008: 108–9) discussing the admission of affidavit evidence in the Tokyo tribunal.

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> Where the personal interests of the victims are affected, **the Court shall permit their views and concerns to be presented and considered** at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (emphasis added, RK).

Increasingly victim participation is being challenged by the high volume of requests (Haslam and Edmunds 2013). Between 2005 and 2014, the ICC received a total of 16,194 applications from persons seeking to participate as victims in proceedings (Gender Report Card on the ICC 2014). Much of the growing scholarship on victim participation deals with effective representation of the large numbers of participants and their different interests through various mechanisms of collective representation (see, example, (Haslam and Edmunds 2017; Kaoutzanis 2010; Kendall and Nouwen 2013; Killean and Moffett 2017). This article expands the existing discussion to consider the novel regime of victim participation as part of the unfolding quantitative turn.

The Efficiency Paradigm and the Anxieties of Quantity

Quantity has substantial repercussions for the policy and procedures of international courts. The most significant factor affecting length of proceedings is likely the large number of witnesses called to provide oral testimony. This poses unique challenges to an ICL discourse that is dominated by efficiency concerns (Ford 2015). Indeed, one of the most persistent criticisms of international tribunals has been that they cost too much and take too long (Higgins 2009).

Anxieties over the scope of testimonies are articulated in the various requests by both defense and prosecution parties. In the *Laurent Gbagbo* case before the ICC, both prosecution and defense raised concerns regarding the challenges of dealing with a "particularly large" and even "astronomical" number of witnesses, referring to the prosecution's forecast of potentially 80–100 witnesses (*Prosecutor v. Laurent Gbagbo* 2015, para. 28). Similarly, international judges take count of the volume of testimonies they are confronted with in their judicial decisions. In the *Milutinović* case before the ICTY, the judges directly addressed the quantitative aspect, linking the large scale nature of the charges to the multitude of witnesses in the trial:

> The Chamber heard oral testimony from a total of 235 witnesses, and admitted over 4,300 exhibits. The length of the trial, and volume of evidence, as well as the size of the Judgement, are in

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> large part a consequence of the number and nature of the charges in the Indictment (Prosecutor v. Milutinović et al. 2009).

In a recent judgment in the *Mladić* case, the ICTY acknowledged the challenges of navigating the "vast quantity" of evidence, including almost 600 witnesses, while also appreciating the advantages of such an expansive repository of testimonies:

> The Trial Chamber notes that the various witness accounts are not entirely consistent as to the precise date or time when specific individuals were killed. Considering the number of witnesses providing evidence and the fact that these witnesses gave evidence many years after the incidents in question, the Trial Chamber finds that these inconsistencies do not affect the overall finding on the charge (Prosecutor v. Mladić 2017: para. 374, text in footnote 1461).

This remark exposes the tensions around quantity. The multitude of testimonies is acknowledged for yielding factual contradictions while also serving as a justification for such inconsistencies.

Despite the growing attention to the number of witnesses in ICL, up until now there has not been an attempt to theorize the quantitative turn, nor to suggest strategies for harnessing it for the goals of the justice process.[11] Scholarly and practical engagement with the quantitative turn has thus far revolved almost exclusively around procedural challenges. Researchers have pointed out that the large numbers of witnesses contribute to the length of proceedings (Ciorciari and Heindel 2016; Wippman 2006; Zacklin 2004).[12] Lengthy proceedings in turn may compromise the right of the accused to a fair and expeditious trial, add to the rising costs of international trials (Wippman 2006; Zacklin 2004), and submit the tribunals to more criticism (e.g., Prosecutor v. Katanga 2010).

Within this efficiency paradigm, suggestions for reform often focus on questions of scale and manageability of the cases brought before the tribunals. The pressures of quantity have thus far been answered with practical provisions and proposals such as increasing reliance on written depositions and video-link testimony

[11] In a recent article, Haslam and Edmunds discuss the challenge of quantity in relation to the ICC regime of victim participation, noting in concern the emergence of the "statistical victim" (Haslam and Edmunds 2017).

[12] Fry (2014) suggests that quantity of witnesses may lead to "factual" quality on the one hand, but also to evidence debris and other unwanted side effects on the other hand. Too much evidence can clog up the system and create unmanageable trials, thus compromising the quality of the proceedings as a whole.

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(Wald 2001). Stating concerns of "efficiency and effectiveness," the ICC's Assembly of States Parties recently adopted a resolution amending Rule 68 of the court's RPE, making it easier to admit the statements of absent witnesses in lieu of live testimony (Fairlie 2017; ICC 2013b).[13] The drafters of the amendment cited expediency concerns, stating that it was "intended to reduce the length of Court proceedings and streamline evidence presentation" (ICC 2013a). While this may seem like a procedural change, I argue that it marks a substantial, if inadvertent, choice, effectively reducing the number of voices and of witnesses (including survivor-witnesses) telling their story in the courtroom.

Connecting the Dots between Mass Atrocity and Mass Testimony

The previous sections identified the quantitative turn in ICL and the resistance it meets. Because the efficiency paradigm field is so dominant in ICL, and directly impacts the quantitative turn, it is particularly important to develop a theorized understanding of the multitude of testimonies in ICL and their functions. This section develops a preliminary theorization of the relationship between the social phenomenon of mass atrocity and the legal phenomenon of mass testimony.

Mass atrocity crimes are social phenomena, involving many thousands of people, perpetrators, victims, benefactors, and bystanders, and they usually have long-term structural and systemic causes (Milanović 2017). Mass atrocity, itself not a legal term, encompasses elements of three legally defined international crimes: genocide, crimes against humanity, and war crimes (and more recently also the crime of aggression). The term "atrocity crimes" has gained popularity in recent years as a practical unifying term to refer to these international crimes (Karstedt 2013; Schabas 2012; Scheffer 2006, 2007, 2013). David Scheffer, first United States Ambassador-at-Large for War Crimes Issues, suggested the following practical term: "high-impact crimes of severe gravity that are of an orchestrated character, that shock the conscience of humankind, that result in a significant number of victims… meriting an international response holding the lead perpetrators accountable before a competent court of law"

[13] Fairlie examines the newly instituted amendment to ICC's rule 68 in light of past experiences of post-World War II international military tribunals as well as the more recent ICTY in admitting written statements due to efficiency concerns. While Fairlie does not deal with quantity of testimonies per se, she points to the risks this controversial use of evidence entails. Her concerns support the need to accommodate the quantity of testimonies in the international legal process (Fairlie 2017).

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(Scheffer 2006: 239). This definition is premised on the encounter between the quantitative scale of the wrongs committed and a qualitative moral wrongness. Similarly, the RS's preamble states: "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." The mass nature of atrocity crimes is expressed both in terms of their quantitative scale, namely, the substantial number of perpetrators and of victims, their geographical spread, and the temporal duration of criminal acts to name a few elements, as well as in their qualitative scale, as unimaginable acts that shock the fundamental morals of humanity.[14]

Scholars have long grappled with the seeming intrinsic incommensurability between "extraordinary crimes" and ordinary criminal justice. Judith Shklar famously wrote of the Nuremberg trial that "all analogies drawn from municipal law ... are unconvincing" (Shklar 1986: 176). Various challenges arise from the encounter between mass atrocity and traditional criminal jurisprudence, including the potential incompatibility of the traditional objectives of the criminal process, and in particular its punitive reasoning (Drumbl 2005; Sloane 2007). Even if we accept a milder stance that sees the difference between ordinary and extraordinary criminal justice as one of degree and not of essence (Posner and Vermeule 2004), in the case of atrocity crimes, at least, size does matter (Combs 2018). In other words, the scale of the crimes places a demand on the legal system to find new ways to represent, understand, and respond to this phenomenon in the confines of a legal process.

The turn to mass testimony, termed here "the quantitative turn," stands at the heart of the law's attempt to represent and response to the mass scale of atrocity crimes and their ungraspable nature.

The Functions of Quantity

The preliminary theorization of the connection between mass atrocity and mass testimony, developed above, considers the quantitative turn not as a contingent occurrence, but rather as a

[14] Recently scholars have doubted the usefulness of the "mass scale" factor in prosecutorial decisions of the Office of the Prosecutor in the ICC (OTP). Criticizing the dominance of the quantitative factor of number of victims in the OTP's prioritization policy, Heller (2010) proposed instead to adopt qualitative factors of situational gravity. Kalpouzos and Mann (2015) suggested to de-scale the "shock value" of the cases brought before the ICC and shift attention to banal crimes, such as the plight of the asylum seekers in Europe (in itself a phenomenon characterized by quantitative mass-scale). These views confirm (albeit critically) the dominance of scale in current adjudication of mass crimes (both quantitatively in the large number of victims, as well as qualitatively in the shock value).

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structural-institutional response to the mass scale of atrocity crimes. Subsequently, this part elaborates on the particular functions that the multitude of testimonies serves in legal processes.

Existing case law and scholarship on mass atrocity deal extensively with the functions of eye-witness and survivor testimony in relation to the recognized goals of ICL institutions (on the goals of ICL in general, see, Damaska 2008; Shany 2014). As previously mentioned, however, most of this literature deals with the single act of testimony, neglecting to address the cumulative effect of multiple acts of narration. Here, I draw on my observations from existing international and domestic case law, sociolegal studies on witness testimony, legal scholarship on the objectives of ICL and extra-legal commentary on the justice system, in order to hypothesize that quantity fulfills several social-legal functions in the international criminal process; thus, complementing the focus on individual acts of testimony that dominates existing scholarship.

In particular, I offer a taxonomy of four legal and social functions: the evidentiary function, the didactic function, the epistemic function, and the restorative function. Some of the functions are straightforward, like fact-finding, which is explicitly stated in international documents and integral to any criminal trial. Other functions, however, are more implicit, latent, and sometimes less integral to the criminal process. Side by side with its descriptive analysis, this part offers a normative view of the turn to quantity as a potentially useful means for addressing atrocity in the confines of the law.

The Evidentiary Function—Proving Mass Atrocity

The primary goal of international criminal courts and tribunals—like that of domestic mechanisms—is to punish those deserving punishment. As mentioned earlier, the vast bulk of evidence presented to international tribunals currently comes in the form of witness testimony (Combs 2010), with little forensic evidence to support it (Combs 2017). Therefore, witnesses are vital in establishing proof of the crimes and in practice, without enough witnesses, reported episodes of atrocity cannot be included in the indictment in the absence of other means to prove them (Wald 2002).

My hypothesis is that the large quantity of testimonies is integral to proving crimes of mass atrocity. This is due to the factual complexity of the cases before international tribunals (ICC-OTP 2003), as well as the contextual elements of the crimes, such as the requirement of Article 7 of the RS to prove that crimes against humanity were part of a "widespread or systematic attack against civilian population" (Sadat 2013). Put simply, as the perpetration of mass crimes requires multiple perpetrators committing systematic and widespread attacks, proving of such systematic, widespread

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patterns of violence also requires multiple witnesses standing at various points in the chain of action and covering a lot of ground (both literally and metaphorically).

It could be argued that the evidentiary function of quantity may, under ideal conditions, be rendered redundant, given, for example, sufficient material or forensic evidence to prove the crimes. In reality, the Nuremberg tribunal is almost the sole example for such conditions. Interestingly, the prosecution in the Eichmann trial "enjoyed" the same wealth of documentary evidence as its predecessor in Nuremberg. Still, despite the existence of sufficient material evidence, the Israeli prosecutor decided to integrate an unprecedented number of oral testimonies in the prosecution case. This turn to quantity, despite the lack of evidentiary justification, is explained by the additional functions that quantity fulfills in trials of atrocity.

The Didactic Function—Representing the Atrocious Experience

While the evidentiary turn to a multitude of testimonies is driven by traditional objectives of ordinary criminal law, that is, fact-finding and truth-telling, the didactic function relates to a broader and more contested view of the objectives of international criminal law.

The civilizing mission of international law—heralded in Nuremberg—understands the task of the international criminal process as going beyond assigning individual responsibility. The demarcation of this expanding scope, however, is constantly debated. One such particularly disputed aspect of the didactic function of atrocity trials assigns the courts an active role in remembering the past, through history writing and the formation of collective memory (Douglas 2001; Osiel 1999; Wilson 2011). Nonetheless, history writing in the courtroom remains a challenged endeavor (Wilson 2011) with controversy around the status of the historical narrative that is produced by the court, whether these are established facts or merely a contextual background, the narrative's reception, and its public legitimacy (Milanović 2017).

Examining the didactic-historic objective of ICL through the quantitative lens, the article hypothesizes that the quantity of witnesses serves a *representational* role: each witness in his or her testimony sheds light on a facet of the crime in question to the didactic outcome of representing the entirety of the historical event in the courtroom. According to the evidentiary function of quantity, each witness contributes an additional piece of information to the puzzle that comprises the charges against the accused. While partially overlapping, according to the didactic function of quantity, the role of the large number of witnesses extends

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beyond the limits of proving the crimes of the accused to narratively reconstruct the experience of atrocity.

The Eichmann trial is the emblematic illustration of the didactic-representational function of quantity in a legal process. The Israeli prosecution introduced more than a hundred witnesses, most of them Holocaust survivors whose testimony did not directly relate to proving Eichmann's guilt (Bilsky 2004; Douglas 2001). The role of this unprecedented number of witnesses was overtly didactic. The testimonies were meant to relate the experience of the Holocaust to the Israeli public, as Attorney General Gideon Hausner summed up: "it attracts people's attention, tells a story and conveys a moral" (Hausner 1966: 292).

Shifting from the Holocaust to more recent atrocity trials, one can trace the evolution of the representational function of quantity. In the *Milutinović* case, for example, the ICTY acknowledged, albeit with sharp criticism, the prosecution's representational use of witnesses in its attempt to bring the atrocities that were committed in Kosovo in 1999 into the courtroom:

> *The Breadth of the Case:* The Prosecution chose to present a case founded upon a multitude of alleged events in 15 separate municipalities ... The Prosecution led evidence from a small number of people in relation to each of the municipalities, but invited the Chamber to make wide-ranging findings about the perpetration of crimes and the movement of hundreds of thousands of people and the murders of many hundreds of people. (Prosecutor v. Milutinović 2009: para. 45).

The symbolic status of the witnesses—representing the dire fate of the expelled communities—reflects the ambition of the prosecution to illustrate the multifaceted catastrophe that befell them. The court's criticism highlights the tension between the evidentiary function and the didactic function. It also exposes the anxiety around the demands for efficiency, as the court acknowledged the difficulty of both sides in "marshalling their evidence in a way that would enable them to optimise its presentation within a reasonable time." The court's "efficient" proposal to submit evidence in written form, while potentially fulfilling the evidentiary function, undermines the didactic-representational function of the quantity of witnesses that would have symbolized the perished communities of Kosovo.[15]

[15] A similar effort of representational quantity, albeit outside the confines of the criminal process, can be found in the choice of "window cases" in the South African Truth and Reconciliation Commission (and similarly of "Illustrative cases" in the Guatemalan Commission of Historical Clarification).

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The Epistemic Function—Grasping Mass Atrocities

The previous functions of quantity, evidentiary, and didactic correspond to well-recognized objectives of ICL. The epistemic function, which I develop here, broadens the traditional role assigned to testimonies of atrocity.

Understanding past episodes of mass atrocity is key in responding to them, and more ideally perhaps, in preventing them (U.N. Human Rights Council 2016). In order to fulfill the "never again" pledge, the magnitude of the atrocious experience cannot just be known, it must be comprehended. The challenge then is how to convey the horrific experience of atrocity, which is too often labeled as "unspeakable" (Hayner 2011)?

I hypothesize that the quantity of stories heard in the courtroom fulfills an epistemic function meant to enhance society's ability to understand atrocity. Importantly, it does so by bringing the incomprehensible excess of the crimes to bear on the listeners—judges and audience alike. In order to conceptualize this unconventional epistemic function, I draw on sources that expand the disciplinary scope of my investigation: literary theory and cultural trial commentary that conceptualize the representation of mass atrocity as characterized by *the aesthetics of excess*.

Aesthetics of excess are defined primarily by *scale*. As literary critic Eric Sandberg writes of Jonathan Littell's almost 1000-page fictional memoir of an SS officer who played a key role in Nazi atrocities, *The Kindly Ones* (2010): "The very length of the novel is an indication of Littell's aesthetic: this is a book about excessive suffering that is itself excessively long" (Sandberg 2014: 238). The "overwhelming excess of narrative" argues Sandberg, brings about a sense of overload that burdens and strains the listener (Sandberg 2014: 238).

Applying the aesthetics of excess to the legal field, the demanding volumes of testimonies, the hours "spent" by the court in listening to horrific stories by those who witnessed the terror, fulfill an epistemic function of making the atrocious experience present through its excessive reenactment. Israeli author Haim Gouri, who reported daily from the Eichmann trial, points to this sense of excess in the testimonial scheme of the trial:

> Each piece of testimony as multiplied by the others acquired an astonishing power by association with them… the similarity among them did not detract at all from their power... (Gouri 2004: 268–69)

Gouri understood in real time the correlation between the extreme experience of the Holocaust and the extreme measures

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employed by the prosecution in the Eichmann trial in its attempt to grasp the atrocity, an attempt for which statistics and material evidence alone would not suffice. Summing up the process of listening to long hours, days, and weeks of testimony, Gouri writes:

> Something strange and unparalleled has happened. The court had managed . . . to restrain the shattering effect of this seemingly new outcry, channeling part of it into the language of facts, numbers and dates, while allowing the rest to hover, ghostlike, over the trial (Gouri 2004: 271)

This beautiful description captures the epistemic potential of quantity. It articulates the shock produced by the superfluous nature of the storytelling enterprise. The storytellers and their stories are at once both data: facts, numbers, and dates, and something else, which remains unquantified and continued to hover like a specter over the trial. This ghostlike presence is key to understanding the atrocious experience related by the survivors, which could not have been achieved in the absence of quantity.

An additional element in the aesthetic of excess that underlines the epistemic function of quantity is the emphasis on *numbers*. In its literary form, numerical stocktaking of the dead is a characteristic of aesthetics of excess (Sandberg 2014: 239). In its judicial form, the practice of stock-taking finds its articulation in what became a generic convention of international judgments—the "numbers" paragraph:

> The prodigious amount of evidence in this case included the testimony of 434 witnesses who appeared before the Chamber, the evidence in writing of 152 other witnesses and a total of 11,469 exhibits representing 191,040 pages. A total of 48,121 transcript pages recorded the daily proceedings and 94,917 pages of filings were submitted to the Chamber. The scope of the Indictment and the high profile of the Accused conjointly contributed to the unprecedented nature of this case (The Prosecutor v. Radovan Karadžić 2016).

This paragraph, which appears in almost every judgment of the international courts, conveys the sheer number of witnesses and other evidentiary artifacts. The witnesses are neither exhaustively named, nor symbolically represented. Instead, they are mathematically calculated. If the tallying of the dead creates, within the literary form, a shocking effect, "the long numbers that rocket the mind" (Sandberg 2014: 239), then the judicial stock-taking paragraph has a dual function. On the most basic level, it records the work of the court and legitimizes the soundness of its decision. It

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also articulates in arithmetic terms the magnitude and scale of the crimes for which the law seeks justice, unsettling its readers, prompting them to see beyond the legalistic language.

According to the epistemic function, quantity is used, through scale and stock-taking, as a means for comprehending what otherwise seem to lie beyond the law's reach. In its excess, quantity functions aesthetically and epistemically, as a means to shock the audience into understanding. Quantity then becomes a critical component for both proving and probing mass atrocity. While this epistemic function is perhaps latent in legal documents such as the RS, it appears to be no less integral to contemporary jurisprudence of atrocity crimes than the evidentiary or didactic functions.

The Restorative Function—Victim Participation

The ICC, created with both a punitive and a restorative function, granted victims unprecedented rights to directly participate in the justice process (ICC Assembly of State Parties 2012: 10). Reasons advanced in support of victim participation include determining the truth, individual and collective healing, morality, and victims' reparations (Haslam 2004; Pena and Carayon 2013; Wheeler 2016). The turn to victims both as witnesses and as participants of their own right in the legal process is now seen as part of the jurisprudence of atrocity (Bilsky 2014). Moreover, as Kendall and Nouwen point out, the role of victims in the ICC's representational practices goes beyond being represented in court proceedings. More indirectly and abstractly, actors both within and outside the ICC have invoked victims' interests as a telos of the work of the ICC—sometimes together with other objectives of ICL such as "the rule of law" or "ending impunity" (Kendall and Nouwen 2013).[16]

While explicitly stated as an objective of the ICC in the RS, the restorative function is the least integral to the criminal process as such and remains a contested endeavor. International legal scholars have strongly criticized the "victim-focused teleological reasoning" of ICL as incompatible with fundamental principles of criminal law (Robinson 2008), arguing that the ICC must free itself from the restorative complex that has no place in fashioning the victim participation system (Vasiliev 2015).

The court acknowledged that the participation of victims is driven by various restorative motivations, stressing that victims'

[16] Given the high percentages of victims among the crime-based witnesses in international criminal tribunals (Ngane 2009), these two categories share motivations and objectives. Indeed, much of the literature on witnesses in ICL deals in fact with their identity as victims. The pioneering studies on witnesses by Stover and Wieviorka, for example, deal almost exclusively with the figure of the survivor-witness.

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personal interests are not limited to reparation issues (e.g., Prosecutor v. Ruto and Sang 2012: para 10; Prosecutor v. Lubanga 2008: para. 98). The ICC stated that victims are also seeking "determination of the truth concerning the events they experienced, or wishing to see the perpetrators of the crimes they suffered being brought to justice" (Prosecutor v. Katanga And Ngudjolo Chui 2010: para 59). Against a more restrictive interpretation of the term "personal interests" by the OTP (Walleyn 2016: 997), the ICC stated that participation by victims should encompass their personal interests in an appropriately broad sense and be "meaningful" as opposed to "purely symbolic" (Prosecutor v. Lubanga 2008: para. 85; Prosecutor v. Katanga 2010: para. 57).

My hypothesis is that quantity plays a significant role in shaping the restorative function, under the novel victim participation regime of the ICC.[17] The question of meaningful participation touches directly on the issue of quantity. The current system of common or collective legal representation of groups of victims raises concerns on the ICC's ability to substantially fulfill the participatory rights of the victims (Haslam and Edmunds 2013, 2017). With the RS providing little guidance on what a "meaningful" victim participation entails, the judges are left to reconcile the tension between the court's mandate for victim inclusion and its interest in fair and efficient trials (Cody et al. 2015: 26; Prosecutor v. Ruto and Sang 2012: para. 14).

It seems straightforward that the turn to quantity, namely the inclusion of many victims in the legal process, will contribute to the fulfillment of the restorative function. However, it is also becoming increasingly evident that quantity looms large on the judicial task of balancing the different commitments, as can be gleaned from the ICC's position in the *Ruto and Sang* case:

> The accused should not be forced to address a large volume of views and concerns from victims which go beyond the case of the prosecution that the accused must also meet (Prosecutor v. Ruto and Sang 2012: para. 14).

In the *Katanga* case, the ICC stated that among the factors that each Chamber must consider in its decision on the modalities of victim participation is the number of victims taking part in the

[17] The number of victims admitted to the proceedings, through individual or collective *written* applications, varies on a case-by-case basis, sometimes reaching the thousands. For example, in the *Bemba* case, 5229 victims were authorized to participate in the trial proceedings; in the *Ntaganda* case, 2159 victims, and in the *Ongwen* case, 4113 victims (The Women's Initiatives for Gender Justice 2017).

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proceedings and the degree of similarity between their respective interests:

> In the instant case, it is important for the Chamber specifically to take into account the participation, at the present time, of more than 350 victims of offences as varied as murder, rape, acts of sexual slavery, destruction, pillaging and the use of child soldiers to participate actively in hostilities (Prosecutor v. Katanga 2010: para. 55).

The tension between the commitment to allow victims to participate in the proceedings and the quantitative characteristics of such inclusion, both in terms of number of victims and in terms of the diverse range of atrocities they suffered, leads to a constant remodeling of the modalities of participation by the ICC (Cody et al. 2015: 26–28). In the *Gbagbo* case the Pre-Trial Chamber indicated that a collective approach to victims' participation should be encouraged, and requested the Registry to "map" the main victims' communities in Ivory Coast (Walleyn 2016: 1000). Such an approach exposes a tension between the didactic function that aims to harness the quantity of testimonies to produce a comprehensive view of the atrocious experience by turning to representative cases and individuals and the restorative function that values a less structured, more democratic approach to quantity.

The challenge of quantity becomes particularly charged when dealing with the question of direct participation of victims in the trial stage, through their personal testimony before the court (and not through legal representatives). This model of participation is still very limited in numbers. Specifically, in the Lubanga case, three victims were granted the right to testify in person in The Hague; in the Katanga case, the Chamber initially decided four victims would be permitted to testify in The Hague, but later revoked the victim status of two due to concerns about veracity. However, despite its limited scope, the following analysis of the Bemba case will demonstrate how the decision on modalities of victim participation is turning into a contested arena of competing functions of quantity.

The Relationship between the Functions—an Interim Summary

Drawing on case law, legal scholarship, trial commentary, and literary theory, this paper has developed a theory regarding the functions that the large numbers of witnesses and victims fulfill in legal proceedings dealing with crimes of atrocity. The functions reflect the diverse objectives of ICL, while also expanding them to include the epistemic function of quantity which enhances society's ability to comprehend mass atrocity, and to grasp its horrific nature.

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The field of international criminal law is dynamic and ever changing and not all ICL objectives are equally influential at any given moment. Scholars have identified changes over time in this regard. For example, it has been argued that the didactic function of history writing in the courts, born out of post-World War II trials, is on the decline (Wilson 2016). The restorative objective, which gained popularity following the experience of the South African Truth and Reconciliation Commission and influenced the ICL discourse has recently been criticized as incompatible with criminal proceedings, with scholars pointing out the difficulties of integrating the restorative function into the criminal trial and suggesting that the ICC is returning to a more traditional retributive function (which can explain tensions between the restorative function and the refusal to admit individual victims to testify, unless they can be instrumentalized for the purposes of the criminal trial (Kendall and Nouwen 2013; Robinson 2008; Vasiliev 2015). The challenge of integrating the restorative function is particularly palpable when examined through the lens of quantity. This is manifested in my analysis of the tension between victim participation and the efficiency paradigm dominating ICL discourse.

I hypothesize that the four functions coexist in legal processes dealing with mass atrocity. Instead of thinking of these functions as mutually exclusive, I propose a more dynamic view of the relationship between the functions, in which the different functions of quantity compete with each other while also complementing one another in the course of the trial. In the next chapter, I will focus on one case study from recent ICC jurisprudence that demonstrates how the theory regarding the quantitative turn and the relationship between the functions of quantity unfold in the lived experience of the various actors in the international legal system.

The Challenges of Scale—A Case-Study-Based Analysis

In previous parts, I hypothesized that quantity fulfills several legal and social functions in the law's response to mass atrocity. This section focuses on a recent case before the ICC, *Bemba*, to examine how the different actors in the legal process—prosecution, defense, victims, and the trial chamber utilize quantity in the lived experience of the court. Through my analysis of the dynamic relationship between the functions of quantity, I will also examine how the various players negotiate quantity in face of growing anxieties over the scale and manageability of international trials.

On 21 March 2016, the ICC found the former Vice-President of the Democratic Republic of Congo (DRC), Jean-Pierre Bemba

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Gombo, guilty of crimes against humanity and war crimes including rape, murder, and pillage (Prosecutor v. Bemba 2016; henceforth: Bemba Judgment). The judgment was significant for two main reasons. First, Bemba, the former leader of the Mouvement de Liberation du Congo (MLC), is the first ICC defendant to be convicted on the basis of command responsibility, under article 28 of the RS. Second, this is the first ICC case to end in a conviction for rape (Clark 2016).[18] In this brief analysis, I will not attempt to discuss either the legal significance of the case (Clark 2016; D'Aoust 2017), or the political criticism leveled against the court (e.g., Carayannis 2016).[19] Instead, I trace the different, often contradictory, uses of the quantity of testimonies in the various positions expressed by the different parties and the Trial Chamber.

My analysis of *Bemba* expands the scope of doctrinal, black-letter-law examination of the judgment. I look at *Bemba* holistically (Stake 1995) as a sociolegal event. Performing an in-depth study of the legal process, I examine the various parties' modes of engagement with the large number of witnesses. I concentrate on three elements in the *Bemba* proceedings that foregrounded questions of quantity: the opening and closing statements by the parties to the case; the Court's verdict; and the Majority Decision and Dissenting Opinion on the modalities of victim participation.

Party Statements

The prosecution first invoked the quantity of witnesses in its presentation of the case in the opening statement:

> These multiple witnesses will tell the Court about the variety of ways in which MLC troops raped them (Bemba 2010, transcript page 29, line 10).

In its closing arguments, the Prosecution highlighted the representational quality of the quantity of testimonies:

> These accounts of rapes are just a few illustrations …We are seeking justice today on behalf of all the rape victims in this case and countless other victims in the Central African Republic (Bemba 2014a, transcript page 28, lines 18-21).

[18] As mentioned above, on 8 June 2018, the Appeal Chamber reversed Trial Chamber III's decision of 21 March 2016 and decided, by majority, to acquit Bemba from the charges of war crimes and crimes against humanity.

[19] Pertinently, it has been argued that the doctrine of command responsibility—central to the judgment in the Bemba case—has its origins in victim-focused teleological reasoning (Robinson 2008, 2017).

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Emphasizing the didactic function of the multitude of testimonies, the Prosecution impressed on the Trial Chamber:

> During the course of this three-year trial, your Honours heard in this very courtroom harrowing stories from victims who were subjected to very personal questions in a strange and foreign court. They did so in order to tell the world about the brutal crimes they suffered at the hands of Bemba's men (Bemba 2014a, transcript page 16, lines 18–20).

The fulfillment of the didactic function, calling on the court to inform the world of horrific atrocities through the multitude of stories is entwined with the Prosecution's wish to convey, epistemically, the horrendous experience suffered by the victims. It does so through stock-taking, in enumerating the identity numbers of witnesses that testified on the crime of rape:

> Witnesses 23, 29, 68, 69, 79, 80, 81, 82, 87 and Victim 1 were internally consistent, clear and compelling accounts... (Bemba 2014a, transcript page 18, lines 2–5).

Reiterating the contextual elements of the crimes, the Prosecution's closing statement relates for pages on end the multitude of testimonies by survivor-witnesses brought before the court during the long months of the trial, recreating the aesthetic of excess. Moving from general description of the rape campaign by Bemba's men to specific examples from the testimonies of victims, male, female, and children, to more testimonies of insider witnesses confessing on perpetrating such crime, the Prosecution's closing statement creates a dictionary of suffering, images upon images of horror and pain, providing an example for the epistemic function.

Acknowledging the "exceptionally high number of victims admitted to this case" that bears testimony to the "seriousness or the wide scale nature of those crimes," the Representative of the Victims criticized the length of the trial:

> Your Honours, what do the victims expect? Let me say they have waited a very long time. Now, of course, the trial began four years ago on 22 November 2010. The victims remember another date, namely, the date on which the Banyamulenge withdrew from the country, 15 March 2003. That is when their hopes for assistance began. Their hopes have been lessened because they still are awaiting justice… (Bemba 2014a, transcript page 87, lines 12-21).

Efficiency concerns are often raised against the participation of victims, impeding on the restorative function. Interestingly, the Victims Representative in the *Bemba* case admonishes the inefficiency of the

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legal process in the name of the victims who participate in the process. It was assessed that the length of the trial was due to a combination of appeals and the Prosecution's strategy to present as much evidence as possible—including testimony by survivor-witnesses—to entertain multiple paths to conviction (Carayannis 2016). Still, in the *Bemba* case, the Legal Representative of the Victims invokes efficiency concerns in the name of the restorative function, against competing functions that the Prosecution illuminated.

Bemba's Defense criticized the small number and selective character of the witnesses brought before the court. Arguing that it was only in the power of the Prosecution to convince witnesses to testify in the proceedings, the Defense highlighted the potential benefit of quantity to the fulfillment of the truth finding mission of the court:

> But … the rest of those witnesses who could give you the truth, you have simply been denied, systematically and deliberately denied by a Prosecutor who had it in the palm of her hands to bring them before you. … So where does it leave you? Well, it leaves you with very poor quality evidence on an issue which could have been really clarified by those at the heart of the action (Bemba 2014b: transcript page 25, lines 3-13).

Arguing against the thwarted factual picture to have emerged from the small and selected group of witnesses, Bemba's Defense invokes the evidentiary function of quantity. Furthermore, in its criticism, it signals an intuitive "Big Data" approach to testimony: the greater the number of witnesses testifying on the facts of the case, the more objective the truth that emerges.

The Verdict

In line with the generic conventions of the legal "aesthetics of excess", the Bemba verdict opens with a stock-taking paragraph, tallying the quantities brought before the court:

> During the trial, evidence was introduced in oral, written, and audio-visual form. This included the viva voce testimony of 77 witnesses, including seven expert witnesses.... The Chamber admitted a total of 733 items of documentary evidence, including, inter alia, witnesses' written statements… (Bemba Judgment, para. 17, reiterated in para 221).

The verdict makes repeated references to the testimonies brought before it in its analysis of the legal and factual elements of the case. The different references to the testimonies demonstrate the interplay between the four functions identified in the previous section. The evidentiary function, mostly self-explanatory, is

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articulated in Part V of the judgment that determines the facts of the case based on the stories of witnesses, through constant referral to each specific testimony in the many footnotes that accompany the main text of the judgment. When describing the specific crimes of rape, murder, and pillaging committed by MLC men, the judgment does not contend with footnoting the source testimony. Instead, it integrates into the judgment, the many stories that survivor-witnesses shared with the court (Bemba Judgment, section V(c)). For more than 120 paragraphs, the Trial Chamber relates the multiple episodes and acts of horrific violence committed by the MLC soldiers against civilians (Bemba Judgment, paras. 452–573). Importantly, the court does not stop at the facts alone. The judgment brings the voices of the victims, their own words, which they used for telling about their suffering, their deteriorating physical and mental health, the emotional, social, and economic damages they continue to endure in the aftermath of atrocity (e.g., Bemba Judgment, paras. 465, 492, 494, 498, 510, and so on). The cumulative effect of the witnesses' stories told during the legal process and reflected in the judgment extends beyond the fulfillment of the evidentiary function. The expansive factual framework provided by the testimonies creates a clear picture of the historical events in CAR in the period in question (2002–2003), demonstrating the didactic function of quantity. Moreover, the presentation within the judgment of the repeated stories of rape, murder, and pillaging, told in great intimacy and detail by the witnesses, convey the experience of atrocity, through the aesthetics of excess that lies at the heart of the epistemic function. The incorporation of such a large body of testimonies in the judgment—rectifying the witnesses' experience—also fulfills the restorative function vis-à-vis the survivor-witnesses.

In the analysis of the contextual elements of the crimes (part VI of the judgment),[20] quantity again plays a critical role. The court catalogs long lists of testimonies that when considered accumulatively substantiate the widespread and systematic element of crimes against humanity (Bemba Judgment, paras. 633 and 640). This stock-taking of testimonies, fulfills, once more, both the

[20] The judgment makes repeated reference to the requirements of scale in its analysis of the contextual elements of war crimes and crimes against humanity: the "large scale commission" (Bemba Judgment, para. 126), the spread of attacks over territory and over a period of time" (Bemba Judgment, para. 137), "multiple commission of acts" that indicates a "quantitative threshold requiring "more than a few", "several" or "many" acts (Bemba Judgment, para. 149–150) or the "widespread" requirement that connotes the "large-scale nature of the attack and the large number of targeted persons" and that such attack may be "massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims" (Bemba Judgment, para. 162–163).

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evidentiary function, but also the epistemic function, conveying the ungraspable scope of the atrocities endured by the victims.

Decisions on Modalities of Victim Participation

The unprecedented number of victims authorized to participate in the *Bemba* process—5229—serves as the background for a judicial debate on the modalities of participation, especially regarding the requests for direct participation. According to the regime established under Article 68(3) of the RS, two victims were permitted to present evidence in Bemba, and three victims were permitted to present their views and concerns (via video-link). The court rejected the request of five additional victims to present evidence (*Bemba* Judgment, para. 24).

Judicial deliberations leading up to this decision expose how the novel regime of victim participation becomes a battleground between the supporters and opponents of the restorative function, as well as other functions of quantity. In *Bemba*, the court adopts strict criteria for victims to express views and concerns: "The Chamber will consider whether the personal interests of the individual victims are affected and whether the accounts expected to be provided are representative of a larger number of victims" (Bemba 2012a, para. 14; henceforth: Bemba Decision on Victims). The court conflates the restorative function of quantity and its didactic-representative function. It allows victims to participate only inasmuch as their views contribute to the representation of the wider experience of mass atrocity victims.

The court adopts an even harsher criteria in regard to the victims' request to present evidence. The court demands whether the proposed testimony would be "unnecessarily repetitive," whether "the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify," and whether "the testimony will likely bring to light substantial new information" (Bemba Decision on Victims, para. 24). The court draws a distinction between victims' evidence, which form part of the trial evidence, hence serving the evidentiary function,[21] and the victims' views and concerns, which do not form part of the trial evidence and hence serve purely

[21] Victims' evidence is given under oath and forms part of the trial's evidence, but it should be distinguished from "ordinary" witnesses' evidence in that it is given not by the invitation of the Prosecution, Defense or the Trial Chamber, but upon the request of the victims to participate. Compare to a recent decision by the Special Tribunal for Lebanon in the *Ayyash case* (dealing with the 2005 attack that killed former Lebanese Prime Minister Rafiq Hariri) regarding the right of victims to present evidence (The Prosecutor v. Salim Jamil Ayyash 2017). The statutory provisions of Article 17 of the Statute of the STL and of Article 68 (3) of the RS set out in identical terms the frameworks of victim participation (Milanovic 2007).

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restorative purposes. The judicial criteria for inclusion expose the anxiety that quantity raises among the players in the international criminal process. On the one hand, the explicit objective is to enable victim participation according to the legal and moral commitments stated in the RS. On the other hand, the quantitative and qualitative conditions of this commitment (to allow as many victims as possible to express views and concerns) are severely curtailed by the court.

Interestingly, the court puts a cap on quantity by pitting the different functions of quantity one against the other, demanding that each victim testimony fulfills not only its restorative goal, but also either an evidentiary function ("substantial new information"), or a didactic-representative function ("typical of a larger group"). The court rejects the epistemic function of excess ("unnecessarily repetitive"), demonstrating the tension between the functions of quantity.

In a dissenting view, presiding Judge Steiner criticized the "strict limitations adopted by the Majority" which reflect a "utilitarian approach towards the role of victims before the Court" premised on the concept that testimonies should be "useful" (Bemba 2012b, para. 11, 16; henceforth: Bemba Dissenting Opinion on Victims).

Judge Steiner acknowledged that the number of victims participating in the *Bemba* case is "unprecedented in this Court" (para. 21).[22] Nevertheless, the presiding judge criticized the Majority for denying five victims who requested to present evidence their statutory rights (Bemba Dissenting Opinion on Victims, para. 23). Judge Steiner's approach, while not confronting the full quantitative potential of victims' participation, interprets "meaningful participation" in direct relation to quantity. Importantly, Judge Steiner insists that the quantitative scale should not compromise the rights of the victims to have "an independent voice in the trials" and a "right to be heard" (Bemba Dissenting Opinion on Victims, para. 25). Coupling together the evidentiary and restorative functions, Judge Steiner's demand to preserve the independent voice of the victims even in wake of the pressures of quantity remains a contested approach. Following Judge Steiner's critical stance, the Majority decision may seem to be working against quantity and against a plurality of voices. Reading more carefully, however, reveals that while the court is cautious over quantity, it is nevertheless interested in hearing *more* voices, albeit without excess and repetition. The Majority decision demonstrates an interest in broadening

[22] The decision reflects the number of victims then authorized to participate, 2287 people (the vast majority through their Legal Representative). Ultimately, the number of victims authorized to participate in the trial amounted to 5229.

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the scope of the stories it hears from victims by allowing *new* information to be told. This fulfills the evidentiary and the didactic functions, while hindering both the epistemic and the restorative ones. More truth, but not necessarily more healing or more understanding.

The judicial debate over the modalities of victim participation demonstrates the competing functions of quantity. It echoes the "identity crisis" of ICL: while ICL is a criminal law discipline, its norms draw deep inheritance from human rights and humanitarian law (Robinson 2008). The experience of the ICC shows that a striking balance between these objectives—the meaningful participation of victims and the rights of the accused—is easier said than done (Vasiliev 2015).

Final Notes on Quantity vs. Quality

What the analysis of *Bemba* reveals is that quantity is not a singular term. The judicial debate over victim participation demonstrates a tension between two ideas of quantity: numerical quantity—the number of participants partaking in the legal process—and qualitative quantity manifested in a polyphony of voices.

The literary term *polyphony* was developed by renowned literary theorist Mikhail Bakhtin. It characterizes literary texts that comprise a multiplicity of voices, different and diverse, that do not merge into one perspective nor are they subjugated to that of the author (Bakhtin 1984). I borrow this literary metaphor to highlight the two conflicting modes of engagement with the multitude of voices in the international criminal process. Transporting Bakhtin's polyphony to the sphere of testimonies, we can use polyphony as a prism through which to examine the relationship between numerical quantity and qualitative quantity. For example, the Majority stance on the modalities of victim participation in *Bemba* is illustrative of the pole of formal, numerical quantity. The Trial Chamber authorized more than 5000 victims to participate in the legal process. Substantively, however, only a minuscule percentage of them was allowed to sound their voices in the courtroom through direct participation. The dissenting opinion of Judge Steiner, on the other hand, seems more supportive of a polyphonic model. While still limited in its numerical scope, the dissenting judge places an emphasis on guaranteeing the victims "an independent voice in the trials" (*Bemba* Dissenting Opinion on Victims, para. 25). Nevertheless, even within *Bemba*, we can identify not only a conflict between numerical quantity and qualitative quantity, but also an interplay between the two concepts. The Majority decision ultimately calls for some measure of polyphony, wishing to enable more new voices and new truths. This position

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then supports substantive polyphony, while shying away from sheer numerical multiplicity, repetition, or excessiveness.[23]

A question remains whether a criminal legal process could—and should—accommodate a plurality of voices when it structurally strives for an exclusive and determinative narrative, a final judgment. And whether the participation of victims could offer an alternative arena of polyphony that does not threaten the inevitable conclusivity of the legal process.

Conclusion: New Avenues for Quantity in the Courtroom

This study developed a novel theorization of the relationship between the social phenomenon of mass atrocity and the legal phenomenon of mass testimony. Amid growing anxieties over the scale and manageability of international trials, it argued for considering the quantitative turn in ICL as integral to the legal response to atrocities. The article drew on interdisciplinary sources of data, international tribunal decisions, trial commentaries, legal scholarship, and literary theory to shed light on the legal and social functions that the large numbers of testimonies serve in international criminal proceedings. In particular, the article developed the epistemic function of quantity which enhances society's ability to comprehend mass atrocity, and to grasp its horrific nature. Focusing on a single case study, *Bemba*, the article demonstrated how the different actors in the international legal process use quantity for various legal, social, and epistemic functions, while illuminating the conflict between the ideal of polyphony, namely the plurality of voices in the legal process, and the efficiency paradigm governing ICL. Conceptualizing the role of quantity in fulfilling the diverse objectives of international criminal justice, the article demonstrated the value in, and importance of, utilizing social-science-based methodologies for the analysis of legal institutions, pointing to new avenues for future research in the field of law and society.

The quantitative turn is not limited to criminal tribunals, nor to legal institutions. Truth commissions, for example, are emblematic of the push for broader participation and greater inclusion of survivors—both as victim participants and as witnesses.[24] So are

[23] For an analysis of the Eichmann trial as another example of the interplay between quality and quantity, see (Keydar 2015).

[24] The South African Truth and Reconciliation Commission collected more than 20,000 statements from victims of gross human rights violations in the Apartheid era, 2000 of which were related orally during public hearings (Hayner 2011). Similarly, the Commission for Historical Clarification in Guatemala investigated more than 7500 cases derived from interviews with more than 11,000 deponents (Chapman and Ball 2001, 8; Hayner 2011, 32–35).

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class actions under the Alien Tort Statute and related U.S. legislation that mark another arena of quantity (Davidson 2017a, 2017b). Outside the legal sphere, archival initiatives, for example, demonstrate a similar turn to quantity in the wake of large-scale violence, aggregating testimonies of survivors. Despite the apparent quantitative aspects of these alternative mechanisms, which are characterized by a high volume of testimonies, the effects of quantity have yet to be studied.

The strength of the proposed theorization of the relationship between mass atrocity and mass testimony lies in its broader applicability to other forms of response to mass crimes and systematic human rights violations. Providing a theoretical framework as well as a new vocabulary and tools, the article invites further research on the distinctions and the interrelations between different types of institutions, legal and nonlegal alike, vis-à-vis the quantitative turn.

In conclusion, I would like to suggest that while currently the price of quantity may deem too high given the compromise of efficiency, alternative evidentiary models, as well as technological developments in the growing field of Big Data, may assist in balancing this equation. This article is meant then as a theoretical and empirical springboard that seeks to prompt a debate and a more careful consideration of the potential benefits and advantages of the large quantity of testimonies in face of efficiency-driven concerns. By doing so, it hopes to bring about new ways for ICL institutions to maintain a plurality of voices and their commitment to victims of atrocity while safeguarding the rights of the accused and the efficiency of the legal process.

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