

THE SURVIVOR-CENTERED APPROACH TO TRANSITIONAL JUSTICE: WHY A TRAUMA-INFORMED HANDLING OF WITNESS TESTIMONY IS A NECESSARY COMPONENT

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ABSTRACT

This Article studies the reported experiences of witness-survivors who testified in previous trials and truth commissions erected after periods of mass atrocity. Finding a paucity of information on the effects of providing testimony, the authors analyze the existing studies with such witnesses and posit an approach to witness participation that is informed by trauma healing principles to remedy the many negative reported experiences. The Article clarifies that such an approach, informed by trauma healing, does not conflict with, but rather furthers the objectives of international transitional justice in post-conflict settings. The authors contend that such an approach can make for a better experience for witnesses and the work of truth and justice mechanisms more effective.

INTRODUCTION

The post-conflict experiment with transitional justice has unfolded with varying degrees of success since the 1980s. Transitional justice has appeared in different forms across Latin America, the Balkans, Africa, Southeast Asia, and—most recently—the Middle East. As countries seek to strengthen democracy and fortify the

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rule of law, they show an increased willingness to carry out national prosecutions. Some states create truth commissions that prioritize societal healing and the survivors' right to truth.¹ Where national prosecutions are not possible, international tribunals erected by the United Nations or regional bodies carry out prosecutions against high-level perpetrators of massive violations. Traditional or cultural justice and reconciliation mechanisms, memorialization, and reparations also play a key role in the transition to justice.

Each of these mechanisms has its benefits, and societies transitioning from a period of widespread atrocities and war often grapple with one or more of them for asserting the rule of law and moving towards rebuilding efforts. Although the merits of employing each of the mechanisms in a transitional context will not be discussed,² the philosophical underpinnings for transitional justice as a whole and each mechanism, in particular, are important to understand because they are necessarily justified for the benefits to—and the rights of—victims, survivors, and witnesses. Each mechanism requires the support and participation of the survivors of violence and mass atrocities. Without witnesses, perpetrators cannot be brought to justice and the truth cannot be fully revealed.

1. This Article uses the term “survivor” to describe all those who were affected directly or indirectly by conflict, war, and mass atrocities, and survived. “Victim” is often used among the human rights and international community to describe the same set of people. Where a source that uses the term “victim” is quoted, the original term has been maintained. Because the Article addresses those victims who have survived atrocities and could provide witness in transitional justice settings, the term survivor was chosen. Witnesses, as used herein, are the subset of survivors that provide testimonial evidence (either public or non-public) in a judicial, quasi-judicial, truth-telling, or memorialization proceeding.

2. See generally *Criminal Justice*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (last visited Sept. 1, 2017) [<https://perma.cc/B885-3GET>]; *Reparations*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (last visited Sept. 1, 2017) [<https://perma.cc/3H95-HNX8>]; *Institutional Reform*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform> (last visited Sept. 1, 2017) [<https://perma.cc/84ZV-LCSE>]; *Truth and Memory*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory> (last visited Sept. 1, 2017) (providing a comprehensive overview of the rationale for criminal prosecutions, truth commissions, reparations, and institutional reform) [<https://perma.cc/2S7W-F646>]. See also Evelynne Schmid, *Read On! Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, INT'L LAW GRRLS (Apr. 7, 2015), <http://ilg2.org/2015/04/07/read-on-taking-economic-social-and-cultural-rights-seriously-in-international-criminal-law/> (providing an overview of why social, economic, and cultural rights must be considered in a transitional justice context) [<https://perma.cc/VHP2-WZPJ>]; Annika Bjorkdahl & Johanna Mannergren Selimovic, *Gendering Agency in Transitional Justice*, 46 SECURITY DIALOGUE 165, 165–82 (2015) (discussing the role of women in transitional justice and peacebuilding).

Studies show that survivors of mass atrocities genuinely desire participating in reconciliation and justice processes and want to contribute to the historical record.³

Thus, the role that survivors play as witnesses must also be safe and effective. Any mechanism of transitional justice must therefore take into account the subjective experience of witnesses. While it is “important to bear in mind that neither trials nor truth commissions are intended as therapy centres,” the specific needs of survivors must be a priority.⁴ Truth commissions are often described as taking “a victim-centered approach” to establish a historical record and restore “public trust in national institutions of governance.”⁵ To do so, they must be tailored so that the supposed beneficiaries of the systems maintain trust and confidence in their continued necessity. Most importantly, testifying in a courtroom or quasi-judicial proceeding should include serious measures to avoid traumatizing, re-traumatizing, or overall negatively impacting the mental health and well-being of the survivor and her ability to rebuild her life after the conflict. When fashioned in a “victim-centered” manner, truth commissions can “provide a public platform for victims to address the nation directly with their personal stories and can facilitate public debate about how to come to terms with the past.”⁶

3. Karen Brounéus, *The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health*, 54 J. CONFLICT RESOL. 408, 428 (2010) [hereinafter Brounéus, *The Trauma of Truth-Telling*] (citing a study that found that the majority of witnesses in the South Africa Truth and Reconciliation Commission would testify again despite the anguish entailed and citing another study that found that witnesses at the International Criminal Tribunal for the Former Yugoslavia (ICTY) were not looking for vengeance in testifying, but wanted to set the record on their suffering straight); see also Shanee Stepakoff, G. Shawn Reynolds, Simon Charters & Nicola Henry, *Why Testify? Witnesses' Motivations for Giving Evidence in a War Crimes Tribunal in Sierra Leone*, 8 INT'L J. TRANSITIONAL JUST. 426, 426, 429–30 (2014) [hereinafter Stepakoff, et al., *Why Testify?*] (finding that the two most common reasons for witnesses testifying in the Special Court for Sierra Leone (SCSL) were to denounce the wrongs committed and to contribute to public knowledge about the war; “[t]he results support the idea that witnesses value the opportunity to publicly denounce atrocities committed against themselves and others” and citing two studies finding that witnesses in the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Tribunal for Rwanda (ICTR), or *gacaca* courts, expressed similar motivations, such as pursuing justice, needing to educate the world about crimes, and needing to tell their story and know more about what happened).

4. Jonathan Doak, *The Therapeutic Dimensions of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, 11 INT'L CRIM. L. REV. 263, 290 (2011) [hereinafter Doak, *Therapeutic Dimensions*].

5. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 2, U.N. Doc. S/2004/616 (Aug. 23, 2004), <http://www.refworld.org/docid/45069c434.html> [hereinafter U.N. SG Report] [<https://perma.cc/J925-T4HJ>].

6. *Id.* ¶ 50.

However, it is increasingly clear that the experiences of witness-survivors in transitional justice mechanisms have been far from ideal and the reasons why are not clearly understood. In many cases, after testifying, witnesses admit that the experience fell far below their expectations—many even say they would not do it again, given the opportunity.⁷ The answers to the questions of why witnesses' experiences have been mediocre or worse and what can be done to enhance these experiences are more important now than ever.⁸ In particular, the fear of a negative testimonial experience should not have a chilling effect on witness participation, which would necessarily compromise the goals of truth-telling and justice.

Transitional justice necessarily aims to move a society towards a better future and replace the institutions of justice that failed to prevent atrocities.⁹ Societal reconciliation—or at least moving forward—is among its essential goals.¹⁰ But a society cannot be

7. Doak, *Therapeutic Dimensions*, *supra* note 4, at 271; Rebecca Horn, Simon Charters & Saleem Vahidy, *Testifying in an International War Crimes Tribunal: The Experience of Witnesses in the Special Court for Sierra Leone*, 3 INT'L J. TRANSITIONAL JUST. 135, 135 (2009); Karen Brounéus, *Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts*, 39 SECURITY DIALOGUE 55, 58 (Feb. 2008) [hereinafter Brounéus, *Truth-Telling as Talking Cure?*].

8. At the time of this writing in 2016, discussions over a potential national or internationalized tribunal for justice for victims of the ongoing Syrian conflict continue in earnest. *See, e.g.*, Julian Borger, *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, GUARDIAN (Mar. 17, 2015), <http://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria> [<https://perma.cc/2K4R-2PMT>]. In 2014, Tunisia created the Truth and Dignity Commission. *See ICTJ Welcomes Launch of Tunisia's Truth and Dignity Commission*, INT'L CTR. FOR TRANSITIONAL JUSTICE, (June 6, 2014), <https://www.ictj.org/news/ictj-welcomes-launch-tunisia%E2%80%9999s-truth-and-dignity-commission> [<https://perma.cc/888Z-MWWC>]; *see also* Wairagala Wakabi, *Former Child Soldier is Shielded from Ntaganda's View, but Fails to Testify*, INT'L JUST. MONITOR (Nov. 11, 2015), <http://www.ijmonitor.org/2015/11/former-child-soldier-is-shielded-from-ntagandas-view-but-fails-to-testify/> (explaining that a witness at the International Criminal Court (ICC) failed to testify in a case despite precautions taken to conceal the witness's identity) [<https://perma.cc/69WZ-WKHJ>].

9. UNITED NATIONS, WHAT IS TRANSITIONAL JUSTICE? A BACKGROUNDER (2008), http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf [hereinafter U.N., WHAT IS TRANSITIONAL JUSTICE?] (explaining that the goals of transitional justice include providing redress to victims and creating and enhancing opportunities for the transformation of systems and conditions that may have been at the root of abuses) [<https://perma.cc/P5BV-E8ZH>].

10. Martina Fischer, *Transitional Justice and Reconciliation: Theory and Practice*, BERGHOF HANDBOOK FOR CONFLICT TRANSFORMATION 415, http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/fischer_tj_and_rec_handbook.pdf ("Reconciliation has also been defined as a process 'through which a society moves from a divided past to a shared future'; looking at the past in a way that allows people to see it in terms of 'shared suffering and collective responsibility' may help to restore confidence.") [<https://perma.cc/ZP9T-3HG9>].

rebuilt with survivors who have little faith and confidence in the institutions intended to prevent the repetition of the crimes perpetrated against them.¹¹ It cannot be rebuilt with survivors who have suffered the severe psychosocial consequences of the trauma of war and violence without their particularized needs being addressed.¹²

The needs of survivors in a post-conflict society are great and cannot be addressed solely by transitional justice mechanisms. This Article does not address the need for institutional rebuilding on various levels, the provision of basic social services (including mental health and psychosocial support), reparations, and the many other issues with which a post-conflict society must grapple. This Article specifically addresses the necessary steps that must be taken to ensure that through testimonial evidence survivors are able to meaningfully contribute without compromising their mental health and well-being. Though the psychosocial needs of an entire victimized population should be addressed in the transitional justice and peacebuilding framework, witness-survivors were chosen as an initial case study because they are so integral to the process and because studies show that they report higher rates of post-traumatic stress disorder (PTSD) and depression than non-witnesses.¹³

In doing so, this Article analyzes the basic principles of trauma healing and considers how those principles can be incorporated into transitional justice mechanisms, without compromising the goals of justice or truth, thus proposing the “trauma-informed approach” to witness testimony in transitional justice. This Article does not suggest that well-planned and executed transitional justice mechanisms alone can satisfy the healing needs of survivors. On the contrary, comprehensive rehabilitation programs must be

11. GOVERNANCE IN POST-CONFLICT SOCIETIES: REBUILDING FRAGILE STATES, at xvi (Derick W. Brinkerhoff ed., 2007) (“Once societies have unraveled into violence and neighbors are preying on each other, trust is destroyed and the confidence to build a community is undermined.”).

12. Toni Luxenberg, Joseph Spinazzola & Bessel A. van der Kolk, *Complex Trauma and Disorders of Extreme Stress (DESNOS) Diagnosis, Part One: Assessment*, 21 DIRECTIONS IN PSYCHIATRY 378 (2001), http://www.traumacenter.org/products/pdf_files/DESNOS.pdf [hereinafter *DESNOS*] (stating with regard to chronically traumatized individuals, that “[i]n addition, their limited sense of self, and the problems they have experiencing their separateness from others, reduce their ability to truly engage in mature mutuality and sharing. The propensity of chronically traumatized individuals to dissociate from their own bodies also severely constricts their capacity to enter into relationships, as they struggle to know even themselves.”) [<https://perma.cc/874Z-M3SQ>].

13. See, e.g., Brounéus, *The Trauma of Truth-Telling*, *supra* note 3, at 425 (finding that witnesses in the *gacaca* courts had twenty percent higher relative risk of depression and forty percent higher relative risk of PTSD than non-witness survivors).

part of any post-conflict transition. However, the prevention of re-traumatization must be a priority in justice and truth-telling. In this vein, U.N. guidance on transitional justice and the rule of law notes that interventions designed to protect vulnerable and victimized groups must not re-victimize them.¹⁴ This could be improved upon by incorporating a trauma-informed approach to survivor participation in transitional justice mechanisms.

Part I of this Article outlines the main transitional justice mechanisms that have been adopted in post-conflict situations: prosecutions (internationalized and national) and truth commissions. Without articulating the theoretical framework for each, this Part discusses the goals related to survivors' needs that the main transitional justice mechanisms attempt to achieve. Framing the discussion of transitional justice in terms of rights of the victims and survivors—namely the rights to truth, justice, and participation—makes the need for a trauma-informed approach to witness testimony more apparent. This Part will necessarily focus on truth commissions and prosecutorial mechanisms, as they are the two most common forums where survivors present testimony. This Article excludes discussion focusing specifically on reparations and institutional rebuilding, because although these efforts have a meaningful effect on the psychosocial well-being of survivors, they do not have the collection of testimonial evidence at their core.

Part II discusses in some detail the basic needs of populations who have emerged from war and mass atrocities, with a particular focus on trauma recovery needs, including non-specialized intervention for the broader community. It answers the question of what a trauma-informed approach to working with survivors of conflict situations may entail and why a trauma-informed approach is necessary even for those who exhibit no symptoms of severe emotional distress or other mental health disorders. Likewise, this Article discusses the causes and consequences of trauma on the individual, including how effects of trauma on the individual may affect her ability to contribute meaningfully to societal reconciliation and participate in civic life. By explaining the basic principles and stages of trauma healing, with a particular emphasis on survivor empowerment, this Part provides the basis for how to successfully integrate trauma-informed approaches to witness participation in transitional justice.

14. U.N. SG Report, *supra* note 5, ¶ 33.

Part III discusses how to meaningfully incorporate the principles of trauma healing into survivor participation in transitional justice mechanisms. The trauma-informed approach can explain how legal and policy actors can work with survivor-witnesses in a way that preserves their mental and emotional wellbeing, while fulfilling the goals of the transitional justice mechanisms. Taking as a given that post-conflict peacebuilding and justice are among the main goals of transitional justice,¹⁵ ensuring a survivor-centered approach to testimony that preserves individuals' psychological health can encourage victims to speak out and create an effective foundation for preventing reoccurrence, while ensuring that survivors are able to participate in a way that empowers them for the future.

The concept of a survivor-centered approach to transitional justice includes many components. The most important components include: using gender-sensitive mechanisms that empower women in the society; incorporating cultural sensitivities that allow ethnic, racial, and religious minorities to meaningfully participate in the system; guaranteeing reparations to survivors of conflict; providing social, medical, psychological, and other rehabilitative services; and ensuring access to effective legal representation.¹⁶ This Article argues that in addition to these necessary components, a survivor-centered approach to transitional justice must include space for

15. *Transitional Justice: Information Handbook*, U.S. INST. PEACE 1–2 (Sept. 2008), http://www.usip.org/sites/default/files/ROL/Transitional_justice_final.pdf (describing the goals of transitional justice to be as follows: “establish the truth about what happened and why; acknowledge victims’ suffering; hold perpetrators accountable; compensate for past wrongs; prevent future abuses; [and] promote societal healing.”) [<https://perma.cc/K7BF-G3JJ>].

16. *Ongwen: Concerns Over Victims’ Legal Representation*, COALITION FOR THE ICC GLOBAL JUSTICE (Apr. 9, 2015), <https://cicglobaljustice.wordpress.com/2015/04/09/ugandan-victims-raise-concerns-about-effective-legal-representation/> (reporting that a Ugandan victim’s association asked the ICC for permission to file an amicus brief requesting that victims have their own counsel because of inadequate legal representation in the ICC for victims) [<https://perma.cc/N4GB-4C4J>]; NAHLA VALJI, UNITED NATIONS ENTITY FOR GENDER EQUAL AND THE EMPOWERMENT OF WOMEN, *A WINDOW OF OPPORTUNITY: MAKING TRANSITIONAL JUSTICE WORK FOR WOMEN 1* (2012), <http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06B-Making-Transitional-Justice-Work-for-Women.pdf> (discussing how implementation of a gender-sensitive transitional justice agenda helps) [<https://perma.cc/DPC4-HY7X>]; JUDY BARSALOU, UNITED STATES INST. OF PEACE, *TRAUMA AND TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES 8* (2005), <https://www.usip.org/sites/default/files/sr135.pdf> (discussing the importance of cultural sensitivities) [<https://perma.cc/2NM3-ZG9H>]; *Reparations*, INT’L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (last visited Sept. 1, 2017) (discussing reparations in the scope of transitional justice) [<https://perma.cc/H5D7-U9YH>].

witness testimony that is informed by basic trauma-healing and psychosocial principles.

The justification for such an approach is that transitional justice mechanisms do not stem from detached dictates of law seeking to strengthen the power of the state, but rather from the basic needs and inherent rights of the survivor population. In fact, the legal framework for such mechanisms is developing around the long-held recognition that survivors' dignity must be central in the aftermath of conflict.¹⁷ The rights to truth, justice, participation, and dignity belong to the survivors, as does their need for vengeance. Therefore, the mechanisms that implement those rights must ensure that they are fulfilled in a way that respects the survivors' needs and empowers them to rebuild their lives and societies.

The field of international law has long recognized that transitional justice must be survivor-centered, though it has not been adequately developed or implemented.¹⁸ Incorporating a trauma-informed approach in the field of transitional justice, however, is very recent and, indeed, is still missing critical components. According to several scholars on the survivor-centered approach to transitional justice, much more research must be done on the emotional effects of providing testimony for survivors of large scale atrocities and war.¹⁹ As a leading writer and researcher on the

17. U.N., WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9, at 1 (“Transitional justice emerged as part of a recognition that dealing with systematic or massive abuses requires a distinctive approach that is both backward- and forward-looking: transitional justice measures aim not only to dignify victims, but also to help prevent similar victimhood in the future.”).

18. Simon Robins, *Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal*, 5 INT'L J. TRANSITIONAL JUST. 75, 76 (2011); see, e.g., Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 3, 10 (Robert I. Rotberg & Dennis Thompson eds., 2000) http://cmapsconverted.ihmc.us/rid=1LFDZ3T7B-2314SZS-ZM2/Rotberg_Reconciliation.pdf (noting that at the heart of truth commissions “is a concept of justice that is survivor or victim centered, not retributive”) [<https://perma.cc/8THP-6FDG>].

19. Doak, *Therapeutic Dimensions*, *supra* note 4, at 297 (“Much more experimental research is also needed on how the precise micro-dynamics of why the act of accounting in legal or political settings might help to transform emotions and expedite healing.”); Brandon Hamber, *Does Truth Heal?: A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence*, in BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 131, 137 (Nigel Biggar ed., 2001) (“[T]here is little research that measures the exact psychological impact of uncovering the past on individuals, and even less on how it affects society.”); Brounéus, *Truth-Telling as Talking Cure?*, *supra* note 7, at 58 (“[T]here is very little empirical knowledge of these processes, even from a therapeutic point of view. . . . DeLat states that ‘scholars and practitioners of transitional justice must give greater attention to individual psychological processes [in truth commissions] if they genuinely believe healing and reconciliation are integral to promoting peace and

topic, Jonathan Doak points out the need for additional research on the mental health effects of providing testimony. The work he has already done to address the main gaps in the transitional justice field will be used throughout this Article to understand the current scope of the intersection between mental health and transitional justice. Similarly, the mental health effects of testifying may be better understood with research comparing “psychosocial functioning in witnesses with a group of persons who underwent similar wartime experiences but were not asked to testify”²⁰

This Article is a first step in the conversation about the mental health effects on survivors of war violence and mass atrocities. Without conducting large scale empirical studies on the mental health effects of testimony, it proposes one approach for how to best address those concerns in the context of transitional justice. Namely, by studying past experiences and presenting the therapeutic approach to working with survivors of trauma, it provides an understanding of how to ensure more safe and effective provision of testimony.

BACKGROUND AND ANALYSIS

I. WHAT IS TRANSITIONAL JUSTICE?

Transitional justice may be best understood as a set of measures taken in a post-conflict society with the goal of pursuing accountability for perpetrators of violence and abuse while ensuring non-reoccurrence of widespread atrocities.²¹ Transitional justice mechanisms may consist of truth commissions, local reconciliation measures, national prosecutions, internationalized tribunals, memorialization efforts, institutional reform, official acknowledgements of past wrongdoing, guarantees of non-repetition, and reparations programs.²² The most successful transitions to justice have been holistic programs integrating culturally appropriate elements

justice in the long term.”); *id.* at 61 (“Observers noted that ‘much of the language of the [South African Truth and Reconciliation Commission] is inherently psychoanalytic’ and, as the psychoanalytical tradition has not been based on empirical evidence, the assumption of the healing power of giving testimony was sufficient.”).

20. Shanee Stepakoff, G. Shawn Reynolds & Simon Charters, *Self-Reported Psychosocial Consequences of Testifying in a War Crimes Tribunal in Sierra Leone*, 4 INT’L PERSP. PSYCHOL.: RES., PRAC., CONSULTATION 161, 177 (2015) [hereinafter Stepakoff, *Psychosocial Consequences*].

21. *What is Transitional Justice*, INT’L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/about/transitional-justice> (last visited Sept. 1, 2017) [hereinafter ICTJ, *What is Transitional Justice?*] [<https://perma.cc/NL5E-6K3Y>].

22. *Id.*

of various mechanisms.²³ Because “transitional justice measures seek to restore belief in the idea of fundamental human rights as a basis for the social contract between citizens and the state,” they must include “a credible criminal justice process, a victim-centered reparations program, and reform measures that overhaul compromised public institutions.”²⁴ Thus, no element of transitional justice can be completely successful in isolation. Importantly, there is increasing recognition that mechanisms of transitional justice must create space for individual healing to heal society.²⁵

A. *What Does Transitional Justice Attempt to Address?*

During war and mass atrocities, “[e]ntire societies are victimized, civil institutions are destroyed, and the social fabric severely undermined.”²⁶ Because “unaddressed massive abuses [are] likely to be socially divisive,” states, regions, and international bodies establish truth commissions, carry out prosecutions, and rebuild institutions to encourage societal healing, facilitate security, and achieve development goals.²⁷ The needs of society cannot be addressed by one discipline alone, but must be multi-faceted and comprehensive.²⁸ Transitional justice aims to restore the inherent rights of victims and survivors while ensuring that the systemic breakdown or abuse that led to atrocities and violence is not repeated.²⁹ Although this

23. U.N., WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9, at 3 (“After two decades of practice, experience thus far suggests that, to be effective, transitional justice should be holistic. That is, it should be made up of several initiatives that complement and reinforce each other.”).

24. Paul Seils, *Towards a Transitional Justice Strategy for Syria*, INT’L CTR FOR TRANSITIONAL JUST. 2 (Sept. 2013), https://www.ictj.org/sites/default/files/ICTJ-Syria-Analysis-2013_0.pdf [<https://perma.cc/B4PB-THNX>].

25. Hamber, *supra* note 19, at 138 (“Truth commissions are caught between the internal needs of victims (and their ambivalence over holding onto or letting go of the past) and society’s external political exigencies, including the need for stability. . . . However, despite the integral link between their own internal states and their social context, victims can never override the internal psychological journey they have to make as they struggle to make sense of their loss.”).

26. *Id.* at 131.

27. KIRSTEN FISHER, TRANSITIONAL JUSTICE FOR CHILD SOLDIERS 114 (2013); ICTJ, *What is Transitional Justice?*, *supra* note 21.

28. Guidance Note of the Secretary-General, *United Nations Approach to Transitional Justice*, UNITED NATIONS 6 (Mar. 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (“Effective transitional justice programmes utilize coherent and comprehensive approaches that integrate the full range of judicial and non-judicial processes and measures, including truthseeking, prosecution initiatives, reparations programmes, institutional reform including vetting processes, or an appropriately conceived combination thereof.”) [<https://perma.cc/N2UB-9RS7>].

29. Helen Ahrens & Christian Grünhagen, *Introduction, in Rule of Law and Transitional Justice: Towards a Triangular Learning. The Case of Colombia*, EUR. INTER-U. CTR. FOR HUM.

Article does not address how to dole out reparations programs or rebuild government institutions through a survivor-centered approach, it must be acknowledged that the existence, or lack, of such programs can also have a profound effect on the well-being of survivors.³⁰

Transitional justice mechanisms may be envisioned long before violence or atrocities end.³¹ However, they cannot effectively come to fruition until there is a transition to be implemented and an authority to carry out justice or truth efforts.³² The International Center for Transitional Justice (ICTJ) warns that because transitional justice is “premised on the idea of accountability” for atrocities, “there is little value in talking about accountability for past crimes if repression and political violence persist.”³³ Effective implementation of transitional justice mechanisms “would first require the restoration of peace and a democratic transition.”³⁴ Thus, transitional justice mechanisms emerge after immediate

RTS. & DEMOCRATISATION 8 (Anja Mihr ed., 2013), [https://eiuc.org/tl_files/EIUC%20ME DIA/Publications/TJ-EIUC-GIZ-September2013_ok.pdf](https://eiuc.org/tl_files/EIUC%20ME%20DIA/Publications/TJ-EIUC-GIZ-September2013_ok.pdf) (“[S]pecial attention has to be given to the guarantees of non-repetition, which are measures referring to overcome structural problems as underlying causes for a set of violations.”) [<https://perma.cc/U87V-VVE6>].

30. See, e.g., *Reparations*, *supra* note 2 (“With their material and symbolic benefits, reparations are important to victims because they are often seen as the most direct and meaningful way of receiving justice.”); *Transitional Justice: Information Handbook*, U.S. INST. PEACE, *supra* note 15, at 16 (“Reparations are intended to recognize and repair harm, restore victims’ dignity and rebuild trust and solidarity among communities that have been torn apart by violence.”).

31. See, e.g., Seils, *supra* note 24, at 1 (“Syrian and international commentators have begun proposing visions for a new Syria, including ways in which transitional justice, in particular, may support a different path for the country, one committed to human rights and the rule of law.”); Cody M. Poplin & Sebastian Brady, *Today’s Headlines and Commentary*, LAWFARE BLOG (Mar. 11, 2015), <https://www.lawfareblog.com/todays-headlines-and-commentary-311> (citing a *Washington Post* article about former U.S. Ambassador for War Crimes Stephen Rapp’s comments that the case for war crimes against Syrian President Bashar al Assad is stronger than that against former Yugoslav leader Slobodan Milosevic) [<https://perma.cc/2LNU-ALC4>]; Julian Borger, *Syria’s Truth Smugglers*, GUARDIAN (May 12, 2015), <http://www.theguardian.com/world/2015/may/12/syria-truth-smugglers-bashar-al-assad-warcrimes> (describing the work of teams of investigators collecting documentary evidence from inside Syria with a view to eventual justice, even as the war is ongoing with great risk to themselves) [<https://perma.cc/C989-3PT9>].

32. See Seils, *supra* note 24, at 2 (“The political minimum requirement for a credible approach to accountability and human rights has to be that the government of the day is committed to those principles and is not actively violating them.”).

33. *Id.*

34. Mark Lattimer, Shabnam Mojtahedi & Lee Anna Tucker, *A Step Towards Justice: Current Accountability Options for Crimes Under International Law Committed in Syria*, SYRIA JUST. & ACCOUNTABILITY CTR. & CEASEFIRE CTR. FOR CIVILIAN RTS. 16 (Apr. 2015), <https://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf> [<https://perma.cc/YE4V-M2KW>].

needs for refuge and physical safety are met and the post-conflict society is able to grapple with holding perpetrators accountable, rebuilding survivors' lives, restoring or establishing institutions, and ensuring that the root causes that led to the violence do not resurface.

B. *Understanding Transitional Justice Mechanisms as Manifestations of Survivors' Rights*

Although there is significant debate over the theoretical basis of criminal justice, in many national criminal prosecutions, the underlying justification is for the state to punish criminals and assert its authority and control over its territory.³⁵ By contrast, in international criminal prosecutions, because of the breakdown of the state or the abuse of power that caused violence to occur, systems of transitional justice exist to vindicate the rights of the survivors and victims of atrocities as recognized under international law. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Human Rights Law recognize that the rights of the victims and survivors must be a priority in the wake of mass atrocities.³⁶ In the transitional justice context, certain rights are particularly prominent, including the right to reparations, the right to a remedy (encompassing the right to justice), the right to truth, and the right to participation.³⁷

Truth commissions, reparations programs, tribunals, and memorialization programs are all manifestations of the affected society and the international community to uphold these rights. By recognizing that these mechanisms derive from the rights of survivors and victims, the necessity of ensuring that survivors have the most positive possible experience in their participation deserves greater emphasis. The development of the right to truth, the right to justice (i.e., the need for retribution), and the right to participation

35. JONATHAN DOAK, VICTIMS' RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE: RECONCEIVING THE ROLE OF THIRD PARTIES 1 (2008) ("While the criminal justice system has traditionally been conceptualized as a mechanism for the state to resolve its grievances against suspects, defendants and offenders, it is now broadly accepted that justice cannot be administered effectively without due recognition of the rights and interests of other parties affected by the criminal action.")

36. G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law at 1 (Dec. 16, 2005), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> [hereinafter U.N., Basic Principles on Right to Remedy] [<https://perma.cc/9A6G-73RR>].

37. See, e.g., *id.* at 2–4.

highlight how transitional justice mechanisms aim to vindicate these rights. Therefore, the normative framework through which transitional justice must be understood should be as a manifestation of the collective rights of victims and survivors.

1. The Right to Truth

The right to truth encompasses both a collective and individual right, which the state must fulfill.³⁸ Former U.N. High Commissioner for Human Rights, Navi Pillay, stated that:

[T]he right to truth implies knowing the full and complete truth about events that transpired . . . their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place as well as the reasons for them. In cases of enforced disappearance and missing persons, the right also implies the right to know the fate and whereabouts of the victim.³⁹

Theoretical underpinnings of the right to truth have been elucidated rapidly in the international legal system—particularly in the Inter-American System—as the law sought to grapple with addressing large-scale disappearances under various South and Central American military dictatorships in the 1970s and 1980s. The right to truth is not explicitly articulated in any major multilateral treaty or declaration, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), or the regional human rights treaties.⁴⁰ However, it has developed under the jurisprudence of the regional and universal systems as a fundamental component of the human rights legal regime.⁴¹ Start-

38. *The Right to Truth*, U.N. OFF. HIGH COMMISSIONER FOR HUM. RTS. (Mar. 12, 2010), <http://www.ohchr.org/EN/NewsEvents/Pages/Therighttothetruth.aspx> [hereinafter OHCHR, *Right to Truth*] [<https://perma.cc/FXK6-RN46>].

39. *Id.*

40. See G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966), <http://www.un-documents.net/a21r2200.htm> [<https://perma.cc/FS8C-KFZW>]; G.A. Res. 217(III) A, Universal Declaration of Human Rights (Dec. 10, 1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf [<https://perma.cc/9XF2-W6FY>]; European Convention on Human Rights, Nov. 4, 1950, E.T.S. No. 1-193, C.E.T.S. No. 194, http://www.echr.coe.int/Documents/Convention_ENG.pdf [<https://perma.cc/PWT6-25JA>]; American Declaration of the Rights and Duties of Man, Apr. 30, 1948, KAV 7225, <https://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm> [<https://perma.cc/VJJ8-ULZP>].

41. Juan Méndez, Professor and U.N. Special Rapporteur on Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Remarks at the Duke University Franklin Humanities Institute, 33:00 (Sept. 25, 2014), <https://www.youtube.com/watch?v=1mPV5kUiKZY> [hereinafter SRT Méndez Duke Lecture] [<https://perma.cc/BW92-AS4F>].

ing in 1988 with the *Velásquez Rodríguez* case⁴² and culminating in 2002 with *Trujillo Oroza v. Bolivia*,⁴³ the Inter-American Court of Human Rights articulated states' obligation to reveal the truth about disappeared relatives to survivors, reading a right to truth into the Inter-American Convention.⁴⁴ The *Trujillo Oroza* Court explicitly stated that the "continued denial of the truth about the fate of a disappeared person is a form of cruel, inhuman and degrading treatment for the close family."⁴⁵ *Velásquez Rodríguez* is not only considered a seminal case on the development of the right to truth, but is often hailed as creating the foundational underpinning of the international framework for transitional justice as a whole.⁴⁶

The Inter-American System and the Human Rights Committee have both articulated the right to truth in terms of investigations and prosecutions.⁴⁷ This development in the law has led then-U.N. Special Rapporteur on Torture, Juan Méndez, to state that the right to truth is no longer an "emerging right" as it has often been described, but "has already emerged . . . because these decisions . . . are based on an interpretation of long-existing treaties in human rights like the [ICCPR]."⁴⁸ The International Committee of the Red Cross recognizes the right to truth in the context of international humanitarian law as customary international law.⁴⁹ The normative framework for the right to truth has since been further articulated in the International Convention for the Protection of All Persons from Enforced Disappearance, which states, "[e]ach victim has the right to know the truth regarding the circumstances

42. *Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), http://www1.umn.edu/humanrts/iachr/b_11_12d.htm [<https://perma.cc/PP6D-QJWP>].

43. *Trujillo Oroza v. Bolivia*, Reparations and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 114 (Feb. 27, 2002), http://www.corteidh.or.cr/docs/casos/articulos/Seriec_92_ing.pdf [<https://perma.cc/6QXQ-ZYKP>].

44. *Id.* ¶ 112–117.

45. *Id.* ¶ 114.

46. U.N., WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9, at 2.

47. *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 145 (Sept. 26, 2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf (finding that the state has to remove all obstacles to investigation, prosecution, and truth-telling) [<https://perma.cc/3BD7-RYKY>]; *Quinteros et al. v. Uruguay*, U.N. Hum. Rts. Committee, No. 107/198, U.N. Doc. CCPR/C/OP/2 at 138, ¶ 16 (1983).

48. SRT Méndez Duke Lecture, *supra* note 41, at 33:25.

49. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 421 (2005), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-icrc-eng.pdf> [<https://perma.cc/2PN8-GACK>].

of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”⁵⁰ Pillay explained that the right to truth has since “extended beyond its initial links to missing and disappeared persons, to encompass gross violations of human rights such as extra judicial executions and torture.”⁵¹

The truth commission has emerged as a manifestation of the survivors’ right to truth. The Inter-American Commission on Human Rights calls the right to truth “one of the pillars of the mechanisms of transitional justice.”⁵² In the context of post-conflict transitional justice, the truth has several important purposes: alleviating the suffering of the survivors, vindicating the memory of the victim, increasing the survivors’ understanding of the circumstances that led to the atrocity, and encouraging society to confront its dark past.⁵³ Revelation of the truth allows society to overcome the legacy of gross human rights violations, ensure a transition to liberal democracy, and combat impunity.⁵⁴ Because “repressive regimes deliberately rewrite history and deny atrocities in order to legitimize themselves and avoid being held criminally responsible for serious crimes,” truth commissions are established to reverse this distortion of history.⁵⁵ Post-conflict societies often opt for truth commissions because they prioritize the revelation of the truth over other considerations. Truth commissions can lead to the identification of perpetrators more quickly, they can reveal the emotional truth, and they can address root causes that led to atrocities.⁵⁶ The failure of some truth commissions and tribunals to reveal emotional truth and root causes illuminates the need for survivor-centered approaches to testimony, which will be addressed further below.

50. International Convention for the Protection of All Persons from Enforced Disappearance, art. 24(2), 2716 U.N.T.S. 3 (2006); *see also id.* pmb1.

51. OHCHR, *The Right to Truth*, *supra* note 38.

52. Inter-Am. Comm’n H. R., *The Right to Truth in the Americas*, OEA/Ser.L/V/II.152 Doc. 2, ¶ 48 (Aug. 13, 2014), <http://www.oas.org/en/iachr/reports/pdfs/Right-to-Truth-en.pdf> [<https://perma.cc/W8FG-DD2A>]; *see also* Org. of American States, AG/RES. 2509 (XXXIX-O/09), Right to Truth, ¶ 6 (June 4, 2009) *available at* <http://reliefweb.int/report/world/right-truth-agres-2509-xxxix-o09> [<https://perma.cc/XL5Z-BHJA>].

53. Raquel Aldana, *A Victim-Centered Reflection on Truth commissions and Prosecutions as a Response to Mass Atrocities*, 5 J. HUM. RTS. 107, 109 (2006).

54. OHCHR, *The Right to Truth*, *supra* note 38.

55. *In Search of Truth: Creating an Effective Truth Commission*, INT’L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/in-search-of-truth/> (last visited Sept. 1, 2017) [hereinafter ICTJ], *In Search of Truth*] [<https://perma.cc/CCN3-59L7>].

56. Aldana, *supra* note 53, at 109–112.

2. Survivors' Desire for Vengeance and the Right to a Remedy

A desire to avenge the affronts to life, dignity, and bodily integrity that victims of violence and mass atrocity suffer is both normal and healthy.⁵⁷ The overwhelming majority of survivors of violence and mass atrocities support justice and accountability measures, at least in principle, including truth-telling mechanisms.⁵⁸ The right to a remedy, which encompasses justice for the victims and survivors, includes the right of survivors to seek justice for the crimes perpetrated against them.⁵⁹ The United Nations describes "justice" as a universal "ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large."⁶⁰ Justice thus primarily vindicates the rights of the victims and society.

Under international human rights law, states are thus obligated to investigate, prosecute, and punish perpetrators of human rights violations.⁶¹ Many international human rights treaties, such as the Convention Against Torture, explicitly state this obligation.⁶² In formulating the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law, the primary formulators "highlighted the importance of the victims' right to know the truth and to hold the perpetrators accountable."⁶³ International and

57. ICTJ, *What is Transitional Justice?*, *supra* note 21.

58. David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice*, 31 HUM. RTS. Q. 592, 594 (2009) (stating that the "vast majority" of Croatian and Bosnian victims of the Balkan wars supported the principle of war crimes prosecutions at the ICTY and that the demand for justice among victims of human rights abuse in Argentina, Chile, El Salvador, Guatemala, South Africa, and Uganda was significant).

59. U.N., Basic Principles on Right to Remedy, *supra* note 36 ("Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected . . .").

60. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 7, U.N. Doc. S/2004/616 (Aug. 23, 2004), <https://www.un.org/rule-of-law/files/2004%20report.pdf> [<https://perma.cc/K5U8-UGGR>].

61. Doak, *Victims' Rights*, *supra* note 35, at 159.

62. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 7(1), 12, Dec. 10, 1984, 1465 U.N.T.S. 85, 24 I.L.M. 535 [hereinafter CAT].

63. Doak, *Victims' Rights*, *supra* note 35, at 163; ICTJ, *In Search of Truth*, *supra* note 55, at 1 ("International law clearly recognizes the right of victims and survivors to know the truth about the circumstances of serious violations of human rights and who was responsible.").

regional human rights courts have been similarly forceful in their insistence that survivors must have the right to ascertain the truth about violations against them and justice against the perpetrators.⁶⁴

Although post-conflict national prosecutions or internationalized tribunals are often not seen as the most effective avenues to obtaining the truth,⁶⁵ they do prioritize accountability, and for survivors they may be a necessary element of any transition to a just society.⁶⁶ Often, “the absence of substantive justice was ‘psychologically difficult’ for many victims to accept.”⁶⁷ As further explained below, although “victims may well *desire* truth and justice, . . . such mechanisms will not always bring relief or emotional repair in light of some of humanity’s worst atrocities.”⁶⁸ Justice against perpetrators does not necessarily have to have a therapeutic effect for survivors, including those who testify; however, because the requirement to investigate, prosecute, and punish gross violations of human rights stems from the internationally protected right to a remedy, actors in a prosecutorial function should take steps to ensure that witness-survivors are not harmed in the process—particularly given their centrality to the process.⁶⁹

3. The Right to Participate

The right to participate is a critical component of transitional justice mechanisms as a whole. It can secure key objectives in the context of justice and has its own dignitarian benefits.⁷⁰ Participation empowers the survivors and “may also enhance the legitimacy of the criminal justice system generally.”⁷¹ Although survivors have long had the opportunity to participate in both truth commissions

64. See, e.g., *Jordan v. United Kingdom*, Eur. Ct. H. R. App. No. 24746/94, ¶ 105 (May 4, 2001).

65. Doak, *Therapeutic Dimensions*, *supra* note 4, at 277 (“[C]ross-examination, coupled with selective filtration of evidence, means that truth often falls victim to the inherently partisan nature of the proceedings. Even before the trial begins, the practice of plea-bargaining serves to create a form of ‘truth’ which may appear incredulous or, at best, fragmented in the eyes of victims and their communities. Thereafter, as the storyteller, counsel will carefully select which parts of the story to tell and which to omit.”).

66. Mendeloff, *supra* note 58, at 615.

67. Doak, *Therapeutic Dimensions*, *supra* note 4, at 284.

68. *Id.* at 298.

69. Stepakoff, et al., *Why Testify?*, *supra* note 3, at 2 (“[W]itnesses have increasingly been viewed as the ‘lifeblood’ of war crimes courts.”).

70. Doak, *Victims’ Rights*, *supra* note 35, at 117 (quoting NEIL WALKER & MARK TELFORD, *DESIGNING CRIMINAL JUSTICE: THE NORTHERN IRELAND SYSTEM IN COMPARATIVE PERSPECTIVE* 10 (2001)).

71. *Id.*

and prosecutions, the international legal system has lagged in developing the framework of this right. The creation of the victims' offices in the International Criminal Court (ICC) helped systematize and centralize direct survivor participation in international tribunals.⁷² While "international instruments do suggest that victims ought to be able to participate to some degree in proceedings, they are extremely vague . . . [and] tend to center around the idea that some mechanism should be in place to allow the concerns and views of victims to be heard."⁷³ The right to participate has since developed significantly, with the advent of the Special Court for Sierra Leone's (SCSL) Witness and Victims Section, and culminating in the ICC's unprecedented amount of victim participation throughout all stages of the proceedings.⁷⁴

The International Criminal Tribunal for the Former Yugoslavia (ICTY)⁷⁵ and the International Criminal Tribunal for Rwanda (ICTR),⁷⁶ the first UN-sponsored ad hoc tribunals established in the face of ethnic cleansing and genocide, formulated victim-sensitive rules of evidence and procedure acknowledging "the need to protect victims and witnesses."⁷⁷ The South African Truth and Reconciliation Commission (SATRC) was created to deal with gross violations of human rights during the country's long history of

72. THORDIS INGADOTTIR, FRANÇOISE NGENDAHAYO & PATRICIA VISEUR SELLERS, THE VICTIMS AND WITNESS UNIT (ARTICLE 43.6 OF THE ROME STATUTE): A DISCUSSION PAPER 6–7, <http://www.vfwg.org/downloads/publications/02/PICTVWUMar2000.pdf> (explaining the differences between survivor/victim units in the ICC and the ICTY/ICTR) [<https://perma.cc/PFC9-A4NN>].

73. Doak, *Victims' Rights*, *supra* note 35, at 136.

74. While a significant departure from the much more muted level of participation in other international tribunals, and in the adversarial national systems, the ICC still has room for improvement, to be discussed in detail below.

75. *About the ICTY*, U.N.: INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about> (last visited Sept. 1, 2017) (explaining that, based in The Hague, the ICTY was established in 1993 by the U.N. Security Council to prosecute senior officials responsible for the carnage in the Balkans during the wars that led to the breakup of the former Yugoslavia) [<https://perma.cc/9MZB-QVAK>].

76. *The ICTR in Brief*, U.N. MECHANISM FOR INT'L CRIM. TRIBUNALS, <http://unictr.unmict.org/en/tribunal> (last visited Sept. 1, 2017) (explaining that the ICTR was established in Arusha, Tanzania in 1995 to prosecute senior officials responsible for the 1994 genocide in that country and has been instrumental in developing international law surrounding genocide and rape as a crime of war) [<https://perma.cc/N2Q8-LED7>].

77. Doak, *Victims' Rights*, *supra* note 35, at 32. The ICTY and ICTR both maintained rules on protecting the identity of witnesses and victims in pre-trial and trial proceedings. *See, e.g., Rules of Evidence and Procedure*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, r. 69, 75, http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf [<https://perma.cc/7Z5U-6UWW>]; *Rules of Procedure and Evidence*, INT'L CRIM. TRIBUNAL FOR RWANDA, r. 69, 75, <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf> [<https://perma.cc/QS9E-7QRD>].

apartheid, “affording victims an opportunity to relate the violations they suffered” and “restoring the human and civil dignity of the victims.”⁷⁸ Acknowledging the link between the right to participate and basic dignity, the commission’s objectives included “restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them.”⁷⁹ The ICC went a step further than all previous accountability measures and acknowledged the right of survivors to be involved in all stages of the process by establishing an Office of Public Counsel for Victims and a Victims Trust Fund.⁸⁰ Survivors have the right to choose their own representatives in the proceedings, “where the personal interests of the victims are affected.”⁸¹

As this Article discusses in further detail below,⁸² the role of survivors in post-conflict accountability measures has evolved to further establish the right to participate. International law increasingly recognizes that witnesses in both criminal prosecutions and truth commissions are not merely pieces of evidence, but that their underlying rights justify the mechanisms. However, even at the ICC, there are still obstacles to participation, many of which stem from the delicate balancing act required to achieve justice for the victims and survivors while ensuring the accused’s due process rights are protected.⁸³ These concerns, although less relevant for truth commissions, are central to prosecutions where life and liberty are at stake.⁸⁴ In the ICC, for example, the Chamber may

78. Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) pmbI, § 3, <http://www.justice.gov.za/legislation/acts/1995-034.pdf> [<https://perma.cc/DE7L-8V3F>].

79. *Id.* § 3(1)(c).

80. *Victims*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/victims> (“For the first time in the history of international criminal justice, victims have the possibility to share their views and concerns in the proceedings, represented by a lawyer.”) (last visited Sept. 1, 2017) [<https://perma.cc/P74B-NL2Q>]; TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org/> (last visited Sept. 1, 2017) (“The Trust Fund for Victims (TFV) is the first of its kind in the global movement to end impunity for the gravest of crimes and alleviate suffering.”) [<https://perma.cc/Y2K4-QSFT>].

81. Rome Statute of the International Criminal Court art. 68(3), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

82. *See infra* Section I.C.

83. Marlise Simons, *For International Criminal Court, Frustrations and Missteps in Its First Trial*, N.Y. TIMES (Nov. 21, 2010), <http://www.nytimes.com/2010/11/22/world/europe/22court.html> (noting that the ICC’s first trial, in which at least ten victim-witnesses testified at potential peril to themselves, was hampered by procedural issues that conflicted with the rights of the accused) [<https://perma.cc/N5YL-VWJW>].

84. Rotberg, *supra* note 18, at 16–17 (“Trials might deprive individuals of life, liberty, or property; truth commissions seek to piece together the fabric of the past, and thus can

reject a victim's application to participate in proceedings at its discretion.⁸⁵ The Rome Statute states that "the Court shall permit [witnesses'] views and concerns to be presented and considered at stages of the proceedings . . . in a manner which is not prejudicial to or inconsistent with the rights of the accused."⁸⁶ Thus, their right to participate is still restricted to the discretion of the court as it takes into account the defendants' rights.⁸⁷ As the ICC reforms and expands the role of survivors in its proceedings, nations transitioning to justice should ensure that the right to participate is fully respected and is empowering to survivors. This objective can be achieved without compromising due process rights.

C. *Centrality of Survivors' Roles in Truth Commissions and Prosecutions*

Truth commissions and prosecutions both come in many forms. Local and cultural justice and reconciliation practices are considered when formulating the mechanisms. Traditional justice measures and rituals may be used

in order to foster reconciliation of warring parties or reintegrate ex-combatants. In such cases, the role of transitional justice is to ensure that a holistic approach is taken—one that may include the ritual, but that neither excludes the possibility of criminal justice for those most responsible for serious crimes, nor the implementation of other justice measures, such as reparations, to provide additional forms of redress.⁸⁸

Truth commissions generally are not empowered to bring about criminal charges. Instead, they often allow survivors and perpetrators to tell their full stories in a public (or non-public) setting with the intention of leading to reconciliation.⁸⁹ Their finding and rec-

operate best—most effectively—with fairness but without the strict requirements of due process. Truth commissions could accept hearsay, even if they evaluated it critically. Courts could not accept it at all.”)

85. *Rules of Procedure and Evidence*, INT'L CRIM. CT., r. 89(2), <http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf> [<https://perma.cc/6DT4-9G7S>].

86. Rome Statute, *supra* note 81, art. 68(3).

87. Simons, *supra* note 83 (“Victims, who have been allowed to join the case as ‘civil parties,’ an innovation at the court, have protested that the prosecution has produced a narrow indictment of Mr. Lubanga, focusing on one charge and omitting the killing and the sexual violence of his group.”).

88. U.N., WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9, at 2.

89. *Can We Handle the Truth? Truth Commissions*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/gallery-items/truth-commissions> (last visited Sept. 1, 2017) [<https://perma.cc/D3W3-B5Z9>]; see also, e.g., Glenda Wildschut & Paul Haupt, THE CTR. FOR VICTIMS OF TORTURE, I'LL WALK BESIDE YOU: PROVIDING EMOTIONAL SUPPORT FOR TESTIFIERS AT THE SOUTH AFRICA TRUTH & RECONCILIATION COMMISSION 7 (Liam Mahony ed., 2004),

ommendations can often lead to criminal justice.⁹⁰ Prosecutions can take the form of traditional (or tribal) justice mechanisms, internationalized tribunals, or national courts.⁹¹ In each of these settings, the accused is brought before an arbiter—judge or jury—and presented with specific charges, witnesses, and forensic and documentary evidence.⁹² The ultimate goal is not to determine the root causes or create a comprehensive historical record, but rather to punish perpetrators and achieve justice for survivors and victims.⁹³

Without painting all truth commissions and prosecutions with a broad brush, the role of survivors as witnesses must be addressed. Survivors who may be angry and distressed, but emotionally healthy, should be afforded the opportunity to participate. In both settings, testimony of survivors plays a key role.⁹⁴ Truth commissions “determine the facts, causes, and consequences of past human rights violations.”⁹⁵ They prioritize testimonies and “provide victims with recognition, often after many years of their voices being silenced or ignored.”⁹⁶ Witnesses are thus central to truth commissions and “[c]ollecting statements is a core activity of the

<https://www.newtactics.org/sites/default/files/resources/Walk-Beside-You-EN.pdf> [hereinafter Wildschutz] (explaining that the South African Truth and Reconciliation Commission (SATRC), which had the Committee on Amnesty, “would facilitate open hearings on gross violations of human rights and grant or withhold amnesty for perpetrators”) [<https://perma.cc/A2HW-ATYB>].

90. *Can We Handle the Truth? Truth Commissions*, *supra* note 89; PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 94–96 (2d ed. 2001) (providing examples of the National Commission on the Disappeared in Argentina, which eventually handed its files directly to prosecutors, and the Peru truth commission, which embedded the Special Investigations Unit “specifically dedicated to preparing cases for prosecution,” though the eventual trials produced mixed results).

91. See HAYNER, *supra* note 90, at 6 (“[T]hese bodies can have significant long-term consequences that may be entirely unexpected at the start. This seems to be particularly true in the realm of criminal justice. The archives and reports of several truth commissions have been relied on, years later, in efforts to prosecute accused perpetrators in international (and sometimes domestic) courts. Suddenly, the usefulness of having a well-documented record of crimes becomes clear, even where domestic trials do not at first seem possible.”).

92. See *Can We Handle the Truth? Judicial Truth*, INT’L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/gallery-items/judicial-truth> (last visited Sept. 1, 2017) [<https://perma.cc/B7J8-J4BY>].

93. See *id.*

94. Eric Brahm, *Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies*, 9 INT’L J. FOR NON-PROFIT L. Aug. 2007, at 62, 65 (“Truth commissions and trials rely on the testimony of survivors, but frequently provide little in the way of support to facilitate physical and psychological healing. For many victims, recalling their sufferings can be painful and induce post-traumatic stress.”).

95. ICTJ, *In Search of Truth*, *supra* note 55, at 4.

96. *Id.*

truth commission.”⁹⁷ Witnesses are likewise central to prosecutions, both national and international. The ICC’s experience in the case against Kenyan officials demonstrates the crucial role of witnesses.⁹⁸ In the case against William Ruto and Joshua arap Sang, who were both charged with planning and organizing widespread and systematic post-election attacks, the pre-trial chamber was forced to declare as “hostile” a witness that had recanted and substantially changed testimony against the defendants.⁹⁹ The charges against Francis Muthaura, also indicted for post-election violence, were completely dropped in 2013 when the only witness recanted his statement to the prosecution.¹⁰⁰

Although documentary evidence is crucial to prosecutions, without witness testimony a case can seldom be made against perpetrators of mass atrocities. In the ICTY, some trials featured testimony with over 200 witnesses.¹⁰¹ National and internationalized tribunals recognize that for convictions to be legitimate, they “must be based on credible evidence presented in a public trial.”¹⁰² The U.N. Secretary General has recognized the centrality of survivors to the transitional justice process, stating that the “United Nations must assess and respect the interests of victims in the design and operation of transitional justice measures.”¹⁰³

D. *A Holistic Victim-Centered Approach to Transitional Justice*

Taken together, the understanding of transitional justice as the fulfillment of the rights of survivors makes obvious the necessity of transitional justice mechanisms to be formulated as a comprehensive whole and not in isolation. Concerning the need for a holistic approach, the U.N. Secretary-General stated the following:

97. *Id.* at 11.

98. See ICC: Kenya Deputy President’s Case Ends, HUM. RTS. WATCH (Apr. 15, 2016), <https://www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends> (“The court appears to have been unprepared to deal adequately with witness protection needs arising out of the Kenya situation.”) [<https://perma.cc/C5CT-ZJQM>].

99. Tom Maliti, *Trial Chamber Declares Witness 743 a Hostile Witness*, INT’L JUST. MONITOR (Jan. 20, 2015), <http://www.ijmonitor.org/2015/01/trial-chamber-declares-witness-743-a-hostile-prosecution-witness/> [<https://perma.cc/K78U-MNPW>].

100. Tom Maliti, *Judges Unanimously Terminate Charges against Kenyatta*, INT’L JUST. MONITOR (Mar. 18, 2015), <http://www.ijmonitor.org/2015/03/judges-unanimously-terminate-charges-against-kenyatta/> [<https://perma.cc/962N-4GE7>].

101. Patricia M. Wald, *To Establish Incredible Events by use of Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceeding*, 42 HARV. INT’L L.J. 535, 535 (2001).

102. Patricia M. Wald, *Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 217 (2002).

103. U.N. SG Report, *supra* note 5, ¶ 18.

The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law. A comprehensive strategy should also pay special attention to abuses committed against groups most affected by conflict, such as minorities, the elderly, children, women, prisoners, displaced persons and refugees, and establish particular measures for their protection and redress in judicial and reconciliation processes.¹⁰⁴

The SATRC is emblematic of the consequences of foregoing prosecutions in favor of revealing the truth. Many beneficiaries expressed disappointment that more perpetrators were not brought to justice and questioned the sincerity of their confessions.¹⁰⁵ SATRC officials acknowledged that too often, “the perpetrators got their amnesty immediately but reparation for victims was long-delayed.”¹⁰⁶ The ICTJ has explained why transition to justice cannot be successful without a holistic approach:

Without any truth-telling or reparation efforts, for example, punishing a small number of perpetrators can be viewed as a form of political revenge. Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as “blood money” – an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims’ legitimate expectations of justice, truth and reparation is not only ineffective from the standpoint of accountability, but unlikely to succeed in its own terms.¹⁰⁷

Memorialization efforts—whose value is often minimized by those focused on prosecutions—must be part of the victim-centered approach to transitional justice as they serve a vital role in a victim-centered approach. Such efforts may “include museums, memorials, and other means of preserving public memory of the victims and of raising moral consciousness about past abuse, in order to build a bulwark against its recurrence.”¹⁰⁸ In 2015, a Chadian court held elements of Hissène Habré’s brutal regime accountable for crimes committed during his rule from

104. *Id.* ¶ 25.

105. Hamber, *supra* note 19.

106. Wildschut, *supra* note 89, at 14.

107. INT’L CTR. FOR TRANSITIONAL JUSTICE, WHAT IS TRADITIONAL JUSTICE? 2 (2008), http://legal.un.org/avl/pdf/ls/Van-Zyl_RecReading1_.pdf [<https://perma.cc/VR3V-CLRN>].

108. U.N., WHAT IS TRANSITIONAL JUSTICE?, *supra* note 9, at 4.

1982–1990.¹⁰⁹ The judgment included \$125 million in reparations for nearly 7,000 victims, a government-erected monument to those killed, and a requirement that the police headquarters be turned into a museum.¹¹⁰ It came years after a truth commission was formed and while Habré himself was set to be tried in a hybrid African Union-Senegalese tribunal in Dakar, demonstrating that the transition to justice can be long, painful, and complicated.¹¹¹

As the field of transitional justice grows, the ultimate goal is to create a “rights-respecting state for all.”¹¹² This implies that the breakdown of respect for those rights led to the conflict and that restoring those rights is the reasoning for the mechanism. In recommending future mechanisms for justice and truth, the ICTJ has said they should “be based on a well-founded understanding of people’s sense of justice and demands for accountability, such as may be developed through a broad consultative process.”¹¹³ This highlights the need to put victim/survivors’ sensibilities at the heart of the transitional justice mechanisms chosen.¹¹⁴

II. THE COMPLEX AND MULTI-FACETED MENTAL HEALTH NEEDS OF SURVIVORS AFTER MASS ATROCITIES

Survivors of war and mass violence have multi-faceted needs that cannot be addressed by justice, truth-telling, or memorialization alone. Those with symptoms of mental health disorders such as depression, anxiety, or PTSD resulting from a distressing experience may require specialized mental health or psychosocial services to regain the ability to reintegrate into society and improve functioning on daily activities.¹¹⁵ Such interventions are separate

109. *Chad: Habre-era Agents Convicted of Torture*, HUM. RTS. WATCH (Mar. 25, 2015), <https://www.hrw.org/news/2015/03/25/chad-habre-era-agents-convicted-torture> [https://perma.cc/RB9A-MJMT].

110. *Chad: Landmark Trial Sees Reparations Awarded to Habré Regime Victims*, COALITION FOR ICC GLOBAL JUST. (Apr. 6, 2015), <https://ciccglobajustice.wordpress.com/2015/04/06/chad-landmark-trial-sees-reparations-awarded-to-habre-regime-victims/> [https://perma.cc/RL5T-KVNV].

111. *Id.*

112. Seils, *supra* note 24, at 3.

113. *Id.*

114. *See, e.g.*, SIMON ROBINS, *FAMILIES OF THE MISSING: A TEST FOR CONTEMPORARY APPROACHES TO TRANSITIONAL JUSTICE* 2–4 (2013) (explaining that in the fields of both transitional justice and peacebuilding, procedural and institutional concerns are at the heart of the disciplines, while the views and concerns of the affected populations are rarely considered or understood).

115. IASC GUIDELINES ON MENTAL HEALTH AND PSYCHOSOCIAL SUPPORT IN EMERGENCY SETTINGS, INTER-AGENCY STANDING COMMITTEE 11–13, 21–29 (2007), https://interagency-standingcommittee.org/system/files/legacy_files/guide-

and apart from transitional justice mechanisms and, often, those that require ongoing mental health support may not immediately be in a position to testify as witnesses in a transitional justice context.¹¹⁶ In addition to specialized support, survivors of severe violations of human rights and humanitarian law often have multiple needs that must be addressed, ranging from immediate needs, such as food and shelter, to longer term needs including access to livelihoods, reparations, and institutional rebuilding that guarantees non-repetition.¹¹⁷

To avoid stigmatizing and pathologizing all survivors of traumatic experiences, it must be clear that not all who have experienced a traumatic event will exhibit symptoms of chronic and severe emotional distress, such as PTSD. For example, although the majority of people will experience at least one traumatic event in their lifetime, only about a quarter of them will develop PTSD.¹¹⁸ Despite the fact that most people who encounter a traumatic experience like war violence will not require specialized mental health interventions, a trauma-informed approach is beneficial even to those who do not suffer from disorders.¹¹⁹ By formulating justice work in a manner that is sensitive to the needs of those who may be affected by traumatic experiences, and making services safer and more accessible for everyone, it creates stronger, more reliable outcomes for all involved.¹²⁰ To draw those lessons, a basic understanding of the causes and consequences of traumatic experiences is necessary.

lines_iasc_mental_health_psychosocial_june_2007.pdf [hereinafter IASC GUIDELINES] (explaining the multilayered mental health needs of survivors in emergency settings and the matrix of interventions for different layers of needs) [<https://perma.cc/C9GD-RE6J>].

116. Telephone Interview with Craig Higson-Smith, Research Director for Center for Victims of Torture (Apr. 2015) [hereinafter Higson-Smith Interview].

117. Guglielmo Schininá et al., *The Integration of Livelihood Support and Mental Health and Psychosocial Wellbeing for Populations Who Have Been Subject to Severe Stressors*, 14 J. MENTAL HEALTH & PSYCHOL. SUPPORT CONFLICT AFFECTED AREAS 211, 211–222 http://www.interventionjournal.com/content/november-2016-volume-14-issue-3#the_integration_of_livelihood_support_and_mental_health_and_psychosocial_wellbeing_for_populations_who_have_been_subject_to_severe_stressors (reinforcing the importance of livelihoods programming for individuals under stress) [<https://perma.cc/8MQ7-P8NN>].

118. *DESNOS*, *supra* note 12, at 374.

119. See IASC GUIDELINES, *supra* note 115, at 11–13 (explaining that only a small percentage of the population will face significant difficulties in daily functioning; however, mental health and psychosocial needs of the broader population can be addressed through various support systems).

120. *Trauma-Informed Approach and Trauma-Specific Intervention*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <http://www.samhsa.gov/nctic/trauma-interventions> (last updated Aug. 14, 2015) [<https://perma.cc/GY9U-2BVV>].

A. *The Impact of Traumatic Experience*

A traumatic stressor is one in which an individual faced death, serious injury, or sexual violence or was threatened with death, serious injury, or sexual violence.¹²¹ According to diagnostic criteria for PTSD, those with trauma and stressor-related disorders often experience symptoms that intrude into their daily lives and limit functioning, causing them to “avoid distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s)” and experience negative alterations in cognition, mood, or arousal and reactivity to the world around them.¹²²

After experiencing a traumatic stressor, a minority of people will develop severe enough symptoms for a PTSD diagnosis, but the vast majority will still develop some symptoms and experience distress related to the experience.¹²³ On a larger scale, which applies to many situations with need for transitional justice efforts, the rate of common mental disorders—including PTSD and depression—tends to double after conflict, war, and disasters (increasing from ten percent of the population to between fifteen and twenty percent of the population).¹²⁴ This emphasizes the need for transitional justice efforts to be responsive to the needs of those experiencing symptoms after a traumatic event. Many symptoms that result from experiencing a traumatic stressor, or ongoing stressors, break down essential trusting connections with other people, affecting how they are able to relate with people long after the traumatic event itself occurs.¹²⁵ As such, developing a trusting relationship with others can be healing in and of itself.¹²⁶ Ensuring

121. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5), AM. PSYCHIATRIC ASS'N 271 (5th ed. 2013).

122. *Id.* at 281.

123. ASSESSMENT AND MANAGEMENT OF CONDITIONS SPECIFICALLY RELATED TO STRESS: MHGAP INTERVENTION GUIDE MODULE, WORLD HEALTH ORG. & U.N. HIGH COMMISSIONER FOR REFUGEES I (2013).

124. *After 180 Days of Civil Conflict, a Need for Mental Health Support in Libya*, INT'L MED. CORPS (Oct. 11, 2011), <https://internationalmedicalcorps.org/story/after-180-days-of-civil-conflict-a-need-for-mental-health-support-in-libya/> [<https://perma.cc/NTF2-WKEK>].

125. See IASC GUIDELINES, *supra* note 115, at 1–2 (explaining that impacts of emergency situations include social breakdowns and destruction of community structures); see also Stepakoff, *Psychosocial Consequences*, *supra* note 20, at 172 (explaining that the most reported negative consequences of testifying included deterioration in interpersonal relationships in the long-term including with extended family, friends, and neighbors).

126. JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR* 132 (1992); Vanja M.K. Stenius & Bonita M. Veysey, *It's the Little Things: Women, Trauma, and Strategies for Healing*, 20 J. INTERPERSONAL VIOLENCE 1155, 1155 (2005) (positing that after interpersonal violence, “women find that caring individuals and a safe environment yield the greatest benefit.”).

that the relationships built as a part of the justice process are trustworthy is important to both the outcomes of the justice process, ensuring no more harm is done to the survivor, and for the survivors' healing process. If trust is not established through relationships in the justice process, there could be harmful effects of reinforcing the negative aspects of the trauma for the survivor.

Because of this disconnection, healing is not only conceptualized in terms of individual healing, but also as societal healing.¹²⁷ Supporting safe efforts, in which survivors can speak of their experience and their suffering can be formally acknowledged, can support individual and societal healing.¹²⁸

B. *Mental Health-Informed Principles of Working with Survivors*

While the transitional justice process is not formally a therapeutic intervention, including mental-health informed principles into the justice process can support and protect the healing process. Many clinical approaches for addressing the healing process for survivors of trauma, including torture and war violence, can fall within the structure set forth by Judith Herman's three basic stages: safety and stabilization, remembrance and mourning, and reconnecting.¹²⁹ Although the experience is different for each survivor and different practitioners group the therapeutic experience into different categories, these three basic phases can provide the transitional justice process with an understanding of mental-health informed approaches for those who have experienced traumatic events.

1. Safety and Stabilization

In the initial stage of the healing process, establishing safety and stabilization has been described as "perhaps the most important component of the initial phase of treatment."¹³⁰ Because individuals suffering from the symptoms of trauma-related disorder are often "apprehensive, guarded, and at times hostile toward new treatment providers,"¹³¹ establishing safe refuge "is the immediate task of crisis intervention."¹³² This is true for the physical safety of

127. HERMAN, *supra* note 126, at 241 ("Stages of recovery can be observed not only in the healing of individuals but also in the healing of traumatized communities.").

128. *Id.* at 241–47 (explaining the importance of anti-impunity efforts and allowing victims to speak for themselves in such efforts).

129. *Id.* at 155.

130. DESNOS, *supra* note 12, at 386.

131. *Id.*

132. HERMAN, *supra* note 126, at 162.

the survivor, as well as the emotional safety in the relationship between those in the justice process and the survivor. Physical protection of the survivor should not be underestimated. Ensuring that the survivor can trust those involved is essential. This includes, but is not limited to, ethical principles such as confidentiality, protection of boundaries, and “do no harm.”¹³³

The interventions of the justice system in violations against the person can undermine the individual’s sense of safety, particularly if the environment is hostile or dangerous, making the need to ensure against this particularly important.¹³⁴ As with mass atrocities, traumatic experiences “rob[] the victim of a sense of power and control.”¹³⁵ Thus, restoring control is essential to establishing safety and is the “guiding principle of recovery.”¹³⁶

2. Remembrance and Mourning

A component of therapeutic intervention for survivors of trauma includes exposure to the traumatic memory, or carefully remembering and systematically telling the story of the distressing memory.¹³⁷ Working therapeutically with the story can integrate the distressing memory into the client’s worldview in a meaningful way, minimize distress around the memory, and increase functioning. In a therapeutic setting, exposure to the traumatic event, whether through remembering or visiting places and situations associated with the event, is crucial to recovery.¹³⁸ However, the way in which this exposure is carried out is important.¹³⁹ While this is the work of the therapist and client, the justice process can support the testimony aspect of this work if the survivor is emotionally healthy, or has already sufficiently processed the painful memories therapeutically. By testifying to the traumatic memories, the survivor’s feelings are validated, and it allows the survivor to reinterpret the traumatic experience in a way that “affirms the dignity and value of the survivor.”¹⁴⁰

133. CANADIAN CODE OF ETHICS FOR PSYCHOLOGISTS, CANADIAN PSYCHOLOGICAL ASS’N 15 (3d ed. 2000).

134. HERMAN, *supra* note 126, at 165.

135. *Id.* at 159.

136. *Id.*

137. *See, e.g.*, JOHN BRIERE & CATHERINE SCOTT, PRINCIPLES OF TRAUMA THERAPY: A GUIDE TO SYMPTOMS, EVALUATION, AND TREATMENT 163 (2015).

138. *See* HERMAN, *supra* note 126, at 179.

139. Brounéus, *Truth-telling as Talking Cure?*, *supra* note 7, at 62–63.

140. HERMAN, *supra* note 126, at 179.

It is also important to understand the role of mourning, grief, loss, and ambiguous loss as a part of the recovery process, and how it relates to the role of transitional justice. Survivors of post-conflict environments have endured both tangible harm—death, destruction of properties, loss of communities—and abstract harm—loss of status, education, sense of structure, understanding of the future. Along with the ambiguity of their situation, they suffer an “unclear loss that defies closure,” such as missing loved ones, loss of home, or a chronic medical condition.¹⁴¹ Accounting for mourning and loss as a part of the transitional justice process, through memorialization, ritual, or otherwise, should be included to support healing as a part of the justice process. As Samuel Robins notes, “[w]hether the bodies of the Missing are considered objects of forensic investigation that serve judicial purpose or as sacred relics of a loved one that must permit mourning determines which of these understandings is prioritized.”¹⁴²

3. Reconnection

In the final stages of the therapeutic process, empowerment of the survivor and increased autonomous power and control can support recovery or discovery of ambitions and aspirations.¹⁴³ The goal in this stage of recovery is to learn how to live with fear and even “use it as a source of energy and enlightenment.”¹⁴⁴ Survivors can now identify social pressures that confined them to the victim role and overcome them.¹⁴⁵ Importantly, at this stage in the recovery, “survivors are ready to reveal their secrets, to challenge the indifference or censure of bystanders, and to accuse those who have abused them.”¹⁴⁶ Telling the story becomes an empowering experience because the power lies in the act of truth-telling; the response of others is immaterial because the survivor has taken control of the story.¹⁴⁷

Social support is one of the basic components of safety and reconnection because survivors may “feel unsafe in relation to other people.”¹⁴⁸ Establishing a healing environment cannot be

141. PAULINE BOSS, *LOSS, TRAUMA, AND RESILIENCE: THERAPEUTIC WORK WITH AMBIGUOUS LOSS*, xvii, 205 (2006).

142. ROBINS, *supra* note 114, at 5.

143. HERMAN, *supra* note 126, at 197.

144. *Id.* at 199.

145. *Id.* at 200.

146. *Id.*

147. *See id.*

148. *Id.* at 160, 173.

done in isolation; it is essential to rebuild or reinforce the survivor's "natural support systems" such as family and friends.¹⁴⁹ Once the survivor regains the capacity for trust, it is easier for them to reconnect with friends, family, and loved ones and reengage in social and political processes.¹⁵⁰

Finally, some survivors choose not only to reconnect, but find that the "trauma is redeemed only when it becomes the sources of a survivor mission."¹⁵¹ Thus, some survivors engage in social action to help others who have been similarly victimized or to contribute to prevention efforts.¹⁵² For some, the pursuit of justice becomes the mission, recognizing that "holding the perpetrator accountable for his crimes is important not only for her personal well-being but also for the health of the larger society."¹⁵³ This element not only empowers survivors, but also allows them to overcome the will of the perpetrators, who will "marshal the same methods of intimidation and deceit that they once used to dominate their victims" to avoid being brought to justice.¹⁵⁴ Some public acknowledgement is required to break the "corrupt dynamics of denial and secrecy."¹⁵⁵

This is an ideal point for the combination of justice and therapeutic work. Despite the positive changes that survivors experience after the healing process, it is possible they will experience distress and re-traumatization.¹⁵⁶ It is still important that justice processes incorporate the many lessons of mental-health informed approaches, as healing is not a singular, linear process.

149. *Id.* at 160.

150. *Id.* at 205 ("By the third stage of recovery, the survivor has regained some capacity for appropriate trust. She can once again feel trust in others when that trust is warranted, she can withhold her trust when it is not warranted, and she knows how to distinguish between the two situations.").

151. *Id.* at 207.

152. *Id.* at 208.

153. *Id.* at 209; *see, e.g.*, Marie Soueid, *A Political Solution in Syria Must Not Sacrifice Accountability*, CTR. FOR VICTIMS TORTURE (Jan. 19, 2016) <http://www.cvt.org/blog/healing-and-human-rights/political-solution-syria-must-not-sacrifice-accountability> (explaining that a Syrian victim, Manal, insisted on telling a difficult story about her torture to ensure that others do not face the same fate in the future) [<https://perma.cc/FBM7-ELLL>].

154. HERMAN, *supra* note 126, at 242.

155. *Id.* at 243.

156. Pilar Hernández, David Engstrom & David Gangsei, *Exploring the Impact of Trauma on Therapists: Vicarious Resilience and Related Concepts in Training*, 29 J. SYSTEMIC THERAPIES 67, 70–71 (2010), <http://www.healtorture.org/sites/healtorture.org/files/Hernandez%202010%20EXPLORING%20THE%20IMPACT%20OF%20TRAUMA%20ON%20THERAPISTS%20VICARIOUS%20RESILIENCE%20AND%20RELATED%20CONCEPTS%20IN%20TRAINING.pdf> [<https://perma.cc/JS3N-KN6R>].

III. INCORPORATING THE PRINCIPLES OF HEALING INTO THE TRANSITIONAL JUSTICE PROCESS WITHOUT COMPROMISING THE PURSUIT OF JUSTICE AND TRUTH

History has shown that because survivors of war and mass atrocities may suffer the consequences of the traumatic experiences, they are a vital element to the rehabilitation of society and its transition to justice. Not all survivors will be able to testify or actively participate in truth, justice, and reconciliation mechanisms; however, to those who are able and willing, testimony and telling their story can be important on several dimensions.¹⁵⁷ Among experts on transitional justice, the prospects of truth-telling and providing testimony having healing dimensions are often called into question.¹⁵⁸ Studies that find individuals who testify in international transitional justice proceedings plagued by “traumatization, ill-health, isolation, and insecurity” are alarming.¹⁵⁹ Such studies indicate that testimony alone may not be cathartic, and safeguards must be in place when empowering an individual to provide testimony in their own words and on their own terms. Such an envi-

157. HERMAN, *supra* note 126, at 26–27 (Historically, Vietnam veterans organized “rap groups” where they “retold and relived the traumatic experiences of war.” This setting was important because they were “in charge” and it was “on their own turf,” highlighting the need for empowerment of the survivors. “The purpose of the rap groups was twofold: to give solace to individual veterans who had suffered psychological trauma, and to raise awareness about the effects of war. The testimony that came out of these groups focused public attention on the lasting psychological injuries of combat. These veterans refused to be forgotten. Moreover, they refused to be stigmatized. They insisted upon the rightness, the dignity of their distress.” (internal quotations omitted)); *see also* Doak, *Therapeutic Dimensions*, *supra* note 4, at 271 (explaining that only twelve of eighty-seven of those surveyed who testified in the ICTY described the experience as “cathartic”).

158. *See* Doak, *Therapeutic Dimensions*, *supra* note 4, at 269 (“Both popular and academic literature are prone to making claims concerning the healing potential of post-conflict justice but such accounts are often impressionist or anecdotal in nature, and all too often they lack hard empirical evidence to support their assertions.”); Hamber, *supra* note 19, at 134 (“Despite little research and empirical evidence, the ability of processes of recovering the truth to contribute to healing and reconciliation with the past has been ubiquitously asserted.”). Although both are correct in asserting that claims in the transitional justice stating that account-making can have healing qualities lack hard evidence, it is precisely because of the siloing, until recently, of the fields of transitional justice and trauma healing. *See, e.g.*, Mendeloff, *supra* note 58, at 593 (“Transitional justice advocates claim that truth-telling encourages peace in post conflict society in two ways: 1) . . . 2) psychological and emotional effects—creating a sense of justice for victims, healing emotional and psychological trauma, dampening the desire for vengeance, encouraging a greater willingness for reconciliation, and instilling a fear of punishment and shame in potential perpetrators, thereby deterring violent spoilers and the commission of future crimes.”).

159. Brounéus, *Truth-Telling as Talking Cure?*, *supra* note 7, at 57.

ronment may provide a platform to allow survivors to take control over the attempts of the perpetrators to silence them.¹⁶⁰

A. *Why This Inter-Disciplinary Approach Is Necessary*

Despite differences in goals between trauma rehabilitation services and providing testimony in tribunals or truth commissions, there are important lessons to be drawn from the principles of therapeutic interactions and applied to a transitional justice context. Precisely because “we know relatively little about the individual psychological and emotional effects of national truth-telling and accountability mechanisms,”¹⁶¹ an inter-disciplinary approach to witness testimony must be raised. Scholars who have broached this topic often find themselves drawing comparisons to domestic criminal justice proceedings, while acknowledging that “there may be important difference between the experience of victims of violent crime and victims of wartime atrocity.”¹⁶² Because of a lack of “well-developed empirical studies that directly address the relationship between national truth-telling in post-conflict societies and the psychological health and emotions of victims and survivors of war and atrocity,” they are forced to turn to research from domestic clinical and forensic psychology.¹⁶³

This Article presents an alternative: understanding and incorporating the existing research on the effects of truth-telling and witnessing for survivors of war and atrocity in a mental health and psycho-social support context. The aim of such inclusion is not to replace the necessary provision of mental health services in post-conflict societies, but rather to prevent causing harm during the testimonial process in an accountability setting. Empirical research on the psychological effects of testifying in a formal setting are still necessary to fully understand how best to prevent harm; however, this approach can inform justice actors about how to ensure more safe and effective provision of testimony.

Incorporating a healing approach in this form of storytelling is important because the reactivation of the traumatic experience is distressing and damaging, even for those not suffering from

160. See HERMAN, *supra* note 126, at 242; Robins, *supra* note 114, at 55 (explaining that one study found that “trials can be cathartic and provide acknowledgement through the breaking of social silence.”); Stepakoff, *Why Testify?*, *supra* note 3, at 429 (finding that one of the major reasons that witnesses testified in the ICTY was to break their silence).

161. Mendeloff, *supra* note 58, at 596.

162. *Id.*

163. *Id.*

trauma-related disorders.¹⁶⁴ For those suffering from symptoms after a traumatic event, rehashing the traumatic incident without the appropriate precautions can re-traumatize the individual and reinforce harmful coping mechanisms and responses to the memory.¹⁶⁵ The recognition in the transitional justice field that “a more nuanced and composite understanding of trauma” is necessary to ensure that the needs of survivors are integrated into justice and truth mechanisms evidences the need for the field of rehabilitation to inform the approach to witness testimony.¹⁶⁶

Furthermore, the integration of rehabilitative principles into witness testimony is not only necessary for severely trauma-affected individuals. In a situation where many have been subjected to torture, lost relatives and loved ones, and sought refuge outside of their homes, the immediate needs of survivors often consist of basic survival assistance—shelter, food, water, and medical treatment.¹⁶⁷ As a part of any humanitarian response, the population’s mental health needs must be addressed along with emergency aid, particularly in circumstances where the severity of emotional distress impairs or reduces functionality.¹⁶⁸ The Inter-Agency Standing Committee Reference Group on Mental Health and Psychosocial Support in Humanitarian Settings states that protecting and improving mental health and psychosocial well-being is a priority in emergency situations.¹⁶⁹ Even for people that do not need specialized mental health care interventions, basic services that establish security, well-being, and family and community supports are necessary.¹⁷⁰

For some severely affected individuals, once emergency situations are over, the psychological effects of violence and atrocities

164. Brounéus, *The Trauma of Truth Telling*, *supra* note 3, at 412 (describing that short one-session de-briefings can increase the risk of PTSD or depression: “[V]ery short exposure to the traumatic experience risks increasing trauma reactions instead of decreasing them because there is not time for desensitization or relearning.”).

165. *See id.*

166. Hamber, *supra* note 19, at 143 (“[A] more nuanced and composite understanding of trauma is needed if we are to adequately integrate a process of addressing the needs of victims into strategies for dealing with the past.”).

167. *See What We Do: Preparedness*, U.N. OFF. FOR COORDINATION HUMANITARIAN AFF. (OCHA), <https://www.unocha.org/themes/preparedness-and-risk-management> (last visited Sept. 1, 2017) [<https://perma.cc/N8BW-ML4N>].

168. IASC GUIDELINES, *supra* note 115, at 1 (“One of the priorities in emergencies is thus to protect and improve people’s mental health and psychosocial well-being.”).

169. *Id.*

170. *Id.* at 11–12.

do not disappear.¹⁷¹ On the contrary, mental health needs may remain severe and intensify over time.¹⁷² For example, a study of hostage survivors conducted six to nine years after the events found that although “general anxiety symptoms tended to diminish over time, psychosomatic symptoms actually got worse.”¹⁷³ One study revealed that the prevalence of PTSD and depression after the genocide in Rwanda did not diminish over time and did not change when the *gacaca* court process began in the communities.¹⁷⁴ In some instances, depression even increased dramatically years after the reconciliation process began.¹⁷⁵

Transitional justice mechanisms are often implemented years after the widespread violence and atrocity are over and survivors are anxious to rebuild their society and institutions.¹⁷⁶ In this context, ensuring that the rebuilding and justice process are done in a manner protective of survivors’ mental health and psychosocial needs remains vital. It is not only necessary for the safety of the survivors, but also for the rebuilding prospects for the community as a whole, and the success of the transitional justice mechanisms. Officials in the SATRC presciently argued:

Any truth and reconciliation process will have to accept that it can only look at a fraction of the truth. The manner in which it looks at this fraction, though, is crucial: people watching the process must believe that it is legitimate. . . . A post-conflict process of reconciliation can only succeed if it is legitimate in the eyes of the victims.¹⁷⁷

Therefore, a mental health-conscious framework can—and should—be adopted in all stages of the rebuilding process to ensure that survivors are empowered throughout the whole process.¹⁷⁸ However, the following simply addresses the basic principles that should govern survivor-witness participation in the testimonial process in truth mechanisms or prosecutions.

171. Hamber, *supra* note 19, at 134 (“[P]ast traumas do not simply pass or disappear with the passage of time.”).

172. See HERMAN, *supra* note 126, at 48.

173. *Id.*

174. Brounéus, *The Trauma of Truth-Telling*, *supra* note 3, at 427.

175. See *id.*

176. See Seils, *supra* note 24, at 1 (advising that transitional justice should only be considered when the situation on the ground provides enough security to do so).

177. Wildschut, *supra* note 89, at 15.

178. See, e.g., *id.* at 13–14 (explaining that SATRC acknowledged that legal professionals working in such settings should be trained in Mental Health and Psychosocial Support services).

B. *Creating a Safe Environment*

The first and most basic principle, whether in a courtroom environment, a truth commission, or a local reconciliation mechanism—the safety of survivor-witnesses, and their perception of it—must be restored. Because of the damage that traumatic events can cause to relationships, “[a] supportive response from other people may mitigate the impact of the event, while a hostile or negative response may compound the damage and aggravate the traumatic syndrome.”¹⁷⁹ Trust must be rebuilt through connection with others, in particular, the community.¹⁸⁰ Insecurity is often associated with a sense of abandonment or threats by the family or community.¹⁸¹

Thus, understanding the effects of trauma and healing on the community can benefit not only the individual, but also the community as a whole. With this in mind, the environment of the transitional justice mechanism can have an overwhelming effect on both individual and societal healing, either positively or negatively. Reinforcing individual trust in these institutions through relationships with legal actors and following-up with witnesses can bolster their credibility.

1. Preparation

A safe and supportive environment includes appropriate preparation for the testimonial process and sufficient follow-up to ensure that the witness continues to be satisfied with the process and remains physically safe from threats and retaliation after providing testimony.¹⁸² This is particularly true in truth commissions and other non-prosecutorial reconciliation mechanisms.¹⁸³ Part of the specialized care for those suffering from severe war trauma or torture includes individual check-ins prior to sessions in which they will be discussing and processing the most difficult parts of their

179. HERMAN, *supra* note 126, at 61.

180. *See id.* at 61–62.

181. Brounéus, *The Trauma of Truth Telling*, *supra* note 3, at 428 (explaining that witnesses in the SATRC were stigmatized and abandoned by their own communities and families, and finding that Rwandan witnesses were threatened and intimidated).

182. Brounéus, *Truth-Telling as Talking Cure*, *supra* note 7, at 66–68 (“The women are threatened before the *gacaca*, to deter them from giving testimony; during the hearings to quieten them; and afterwards, as punishment.”).

183. *See, e.g.*, Brounéus, *The Trauma of Truth Telling*, *supra* note 3, at 428; Brounéus, *Truth-Telling as Talking Cure*, *supra* note 7, at 66.

experience.¹⁸⁴ Counselors discuss coping strategies with clients prior to the therapeutic sessions and prepare them for processing their experience.¹⁸⁵ A similar strategy requires minimal investment, but ensures a safer environment for a client preparing to give testimony in prosecutorial or truth-telling settings.

The SCSL is emblematic of the necessity of such a program. A study of 171 witnesses found that “the experience of testifying was positive for the majority.”¹⁸⁶ Researchers attributed this to a supportive courtroom environment and the witnesses’ positive experiences during both examination-in-chief and cross-examination.¹⁸⁷ They concluded that a witness will likely have a positive experience if they are not worried about testifying, feel respected by the court staff, and have a positive cross-examination experience.¹⁸⁸

To understand why the witnesses were not worried about providing testimony, the researchers explained the procedures that the SCSL put into place to prepare witnesses.¹⁸⁹ First, witnesses received a courtroom briefing from members of the Witness and Victim Section (WVS) about the court and its procedures, including a visit to the courtroom.¹⁹⁰ They spent some time with their legal teams reviewing their statements.¹⁹¹ When called to testify, they were brought to the SCSL in a Witness and Victim Section car with tinted windows so they could not be seen and were escorted into a waiting room with a psychosocial counselor.¹⁹² A psychosocial counselor and a protection officer from the WVS unit also accompanied witnesses in the courtroom for the duration of their testimony.¹⁹³ The same unit carried out a post-trial visit to assess the witnesses’ well-being; security; and the emotional, social, or financial impact of their testimony.¹⁹⁴ These comprehensive procedures to create a sense of safety for the witnesses proved to

184. See Stepakoff, *Psychosocial Consequences*, *supra* note 20, at 177 (explaining the extensive provision of psychosocial supports in the SCSL, including several layers of witness preparation and follow-up with mental health providers).

185. Veronica Laveta, *Jordan Counseling Group Session 5: Difficult Moments, Part 1*, CTR. FOR VICTIMS TORTURE (Oct. 12, 2015), <http://www.cvt.org/blog/healing-and-human-rights/jordan-counseling-group-session-five-difficult-moments-part-1> [https://perma.cc/Q42F-FSJJ].

186. Horn, et al., *supra* note 7, at 135.

187. *Id.*

188. *Id.*

189. See, e.g., Stepakoff, *Psychosocial Consequences*, *supra* note 20, at 177.

190. Horn, et al., *supra* note 7, at 138.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

have a positive impact on the psychological effects of providing testimony.¹⁹⁵

To further create a safe and supportive environment, prosecutors and investigators are tasked with ensuring that witnesses are comfortable coming forward.¹⁹⁶ This may include gathering information and evidence in the case that supports a witness's story and does not rely exclusively on the witness for crucial evidence.¹⁹⁷ The dangers of coming forward when a case relies exclusively on one or two witnesses can risk both the case and the safety of the witness, as the ICC has learned in its Kenya cases.¹⁹⁸ Witnesses may be more encouraged to come forward with their story knowing that the prosecutor's case does not solely rely on them and that their story will be supported by the evidence.

2. Confidentiality

The extent and limits of confidentiality should be explained in full to survivors in advance, and in language and terms they can understand.¹⁹⁹ Witnesses should be clearly informed if confidentiality cannot be ensured, including their option to end participation in the process. If possible, information should be shared with others on a need-to-know basis. Information, particularly personal or sensitive information that is not essential to the process, should remain confidential out of respect and empowerment for the survivor.²⁰⁰

For victims, particularly those who fear for their own safety or that of their families, confidentiality might be the most important pillar of establishing safety. Public tribunals or truth commissions often erode the perception of confidentiality, which deters individuals from testifying.²⁰¹ The ICC has taken steps to ensuring stronger confidentiality protections for witnesses. Under Rule 68 of the ICC's Rules of Procedure and Evidence, prior recorded testi-

195. Stepakoff, *Psychosocial Consequences*, *supra* note 20, at 179 ("The discrepancies between our findings and those of some previous researchers may be partly explained by the SCSL's provision of an extensive array of supportive services for witnesses.").

196. Interview with Craig Higson-Smith.

197. *Id.*

198. See Maliti, *supra* note 99; Maliti, *supra* note 100.

199. ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, AM. PSYCHOLOGICAL ASS'N, § 4.02, <http://www.apa.org/ethics/code/> (discussing the limits of confidentiality) [<https://perma.cc/2AKZ-7VJX>].

200. CANADIAN CODE OF ETHICS FOR PSYCHOLOGISTS, *supra* note 133, § 1.45.

201. See, e.g., HAYNER, *supra* note 90, at 116 (noting that without a guarantee of confidentiality, there may be a chilling effect on participation in truth commissions).

mony may be admitted under certain circumstances.²⁰² These circumstances include “obstacles that cannot be overcome with reasonable diligence.”²⁰³ Prior recorded testimony may be introduced at the behest of the trial chamber if improper interference has occurred that relates to the “physical, psychological, economic or other interests of the person.”²⁰⁴ Recorded testimony that affords concealment of one’s identity to all except certain court officials is important to maintaining confidentiality while preserving the defendant’s right to confront witnesses.

3. Setting boundaries

All persons involved in the justice process should explain the bounds of their relationship to the survivor at the beginning of the process, and those terms should be adhered to throughout the process. Understanding and relying on boundaries can form a sense of safety.²⁰⁵ Conversely, if boundaries are broken, through dual relationships, unethical behavior, or other unprofessional interactions with the survivor, this can destroy the sense of safety and stability needed for a supportive environment and harm the mental health of the survivor.²⁰⁶ Although the role of legal actors is not meant to be therapeutic, it is intended to support victims and witnesses.²⁰⁷ As such, articulating and maintaining appropriate boundaries allows witnesses to turn to the appropriate parties with particular questions and needs.

These boundaries should seek to manage expectations about what may or may not be included in testimony and explaining the legal necessity of circumscribing testimony, as described further below. Witnesses may or may not understand that there may be hundreds or thousands of people providing testimony in an international criminal setting, which preserves “the ability of individual victims to tell their story on their own terms . . . significantly restricted.”²⁰⁸ Ensuring that witnesses fully understand their role in the proceedings and their relationships with other parties can help create a more stable environment and better manage individ-

202. ICC Rules of Evidence and Procedure, r. 68(2).

203. *Id.* r. 68(2)(c).

204. *Id.* r. 68(2)(d)(ii).

205. HERMAN, *supra* note 126, at 15051, 192.

206. *See id.* at 151.

207. *Id.*

208. Susana SáCouto, *Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?*, 18 MICH. J. GENDER & L. 297, 352 (2012).

ual expectations. Witnesses may also be better equipped to understand when there may be professional breaches of ethical boundaries and be empowered to seek a remedy.

4. Do No Harm

The basic ethical expectation in any discipline is to avoid doing harm.²⁰⁹ Court officials, including judges and prosecutors, do not have a legal obligation to avoid harm to the survivor. However, avoiding harm to witnesses, even at the cost of the justice work, must be ensured to avoid causing them psychological harm. Investigators, prosecutors, and judges, whose primary job is to carry out the right to justice, must take a reflective stance to ensure that the principle to do no harm is respected, as it is possible to cause harm to the individual even when one has good intentions. Awareness of cultural and contextual factors is important to consider as a part of avoiding harm to the client. Even though the role of the psychologist to rehabilitate and the role of legal officials to carry out justice are vastly different, just as psychologists must attempt to resolve conflict in a way that avoids or minimizes harm,²¹⁰ so too should a court or commission attempting to fulfill the rights of victims, while ensuring a robust right to a fair trial.

5. Follow-Up

As with ethical obligations of the therapeutic relationship, boundaries of the process should be agreed upon with the survivor at the beginning of the process, and the members of the justice process should ensure that their obligations are upheld. Mental health check-ins should be included as a part of the follow-up process after testifying. Witnesses must recognize that important steps remain after giving their testimony, both for the justice mechanisms and for mental health needs.²¹¹ In fact, “[s]ome survivors and families of victims only began to experience a range of psychological problems months after their testimony.”²¹² Recent research on the SCSL suggests that follow-through with agreed upon obligations, as well as follow-up with mental health providers, can have

209. CANADIAN CODE OF ETHICS FOR PSYCHOLOGISTS, *supra* note 133, at 15.

210. ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, *supra* note 199, § 3.04.

211. Higson-Smith Interview.

212. Hamber, *supra* note 19, at 135.

positive mental health effects for individuals providing testimony.²¹³

Perhaps no truth commission was more highly publicized than the SATRC, which included victim testimony and provided perpetrators with amnesty on the condition of full disclosure.²¹⁴ It was heralded for its effectiveness in exposing the truth and providing space for societal healing and reconciliation.²¹⁵ The steps taken to ensure that individuals who testified had sufficient support demonstrate that the SATRC was mindful of the need for witness safety and avoiding harm.²¹⁶ However, witnesses were dissatisfied with the SATRC testimonial process, despite their desire to testify.²¹⁷ The relatively short engagement of the SATRC with each community may have contributed to this.²¹⁸ Many felt that the SATRC was no longer interested in them after they testified.²¹⁹ Members of the SATRC recognized that some individuals required much more sustained engagement, which the Commission could not offer.²²⁰

213. Stepakoff, *Psychosocial Consequences*, *supra* note 20, at 175.

214. Refik Hodzic & David Tolbert, *Media and Transitional Justice: A Dream of Symbiosis in a Troubled Relationship*, INT'L CTR. FOR TRANSITIONAL JUSTICE (Sept. 20, 2016), <https://www.ictj.org/publication/media-transitional-justice-symbiosis-troubled-relationship> [https://perma.cc/64V9-7MY9].

215. Brounéus, *Truth-Telling as Talking Cure?*, *supra* note 7, at 58 (“One slogan during the process read ‘Revealing is Healing’, and in its final report the TRC stated that giving testimony served a therapeutic function.”); Brahm, *supra* note 94, at 69–70 (“Of the many truth commission experiments around the world, none have proven as important in contributing to the justice cascade and promoting the truth commission model as South Africa. While South Africans have viewed it more critically, the [SATRC] has received near universal international acclaim. Its widespread publicity has made it the blueprint for subsequent discussions of truth commission the world over.”).

216. *See, e.g.*, Wildschut, *supra* note 89, at 10–13 (explaining the Briefing process set up by SATRC to keep individuals informed and that there were some psychosocial support staff hired in the SATRC as well; the process that allowed for debriefing before and after testimony; and the creation of a reparations and rehabilitation committee as one of the three main areas of work of the SATRC). Attention was paid to areas of victim empowerment, particularly in reconciliation settings. *Id.* (“In the preparation, we wanted to help the survivors into a position to feel empowered to meet the perpetrators face-to-face. It is a situation where the victims see, for the first time, the perpetrator as a human being rather than a power machine.”).

217. Hamber, *supra* note 19, at 135.

218. Wildschut, *supra* note 89, at 9 (explaining that SATRC engaged with each community for eight weeks and briefers only had one follow-up visit with witnesses after they testified).

219. *See* Hamber, *supra* note 19, at 138–39.

220. Wildschut, *supra* note 89, at 14 (“On a qualitative level, we had to be clear that this is a very focused model of support over a short time. Our briefers encountered many people in need of more intensive support, and had to refer quite a few to the Department of Health, Social Services and other services. We had to be strict about this, as the commission was not an implementing or service-providing body. The natural inclination of someone with psychological training might be to try to offer more intensive counselling

Similarly, the ICTY experienced witness dissatisfaction. Many of the eighty-seven witnesses surveyed in one study said that they valued the opportunity to tell their story, but their sense of catharsis “quickly faded once they returned home to their shattered villages and towns.”²²¹ Although the presence of the ICTY in The Hague, far from the site of the atrocities, may be a contributing factor to witness dissatisfaction, distance alone cannot explain the lack of contentment, particularly as so many survivors found the proceedings to be fair.²²² The goal of justice cannot be achieved in isolation from overall satisfaction of the witnesses in the process.

Part of creating a safe environment includes follow-up procedures that ensure that the witness continues to feel physically safe and emotionally valued after the testimonial process is complete. Illustrating this point very clearly, several women who testified in the *gacaca* courts of Rwanda said that one consequence of their “*traumatisme*” during testimony was that no one checked in on them after providing testimony, reaffirming their own shame in expressing such strong emotions.²²³ “*Traumatisme*” refers to “reliving the trauma very strongly, crying, shaking uncontrollably, or fainting.”²²⁴ Just as the therapeutic sessions do not end after the second stage of recovery, the testimonial process does not end once the survivor vacates the witness chair. Thus, a safe environment must be provided throughout the testimonial process.

Similarly, much of the dissatisfaction of witnesses in the South Africa and former Yugoslavia proceedings lies not only in the lack of physical safety, but also in feeling as if their contribution did not hold meaning and effect change.²²⁵ Providing follow-up on the justice process and the outcome of the trial, showing survivors how

support, but it was important that we not create unrealistic expectations of what we could offer. . . . It was a victim-based process in the short-run, but in the longer process the perpetrators got their amnesty immediately but reparation for victims was long-delayed.”)

221. Mendeloff, *supra* note 58, at 607 (quoting Eric Stover, *Witnesses and the Promise of Justice in The Hague, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 104 (Eric Stover & Harvey M. Weinstein eds., 2004)).

222. *Id.* at 60708 (“The interviews revealed that the overwhelming majority believed the ICTY to be fair and that they would receive ‘procedural and substantive justice’ from the proceedings.” (citation omitted)).

223. Brounéus, *Truth-Telling as Talking Cure, supra* note 7, at 69.

224. *Id.*

225. See, e.g., Hamber, *supra* note 19, at 135, 138–39; Mendeloff, *supra* note 58, at 607 (citing Eric Stover, *Witnesses and the Promise of Justice in The Hague, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 104, 105–06 (Eric Stover & Harvey M. Weinstein eds., 2004)) (finding that many ICTY witnesses “felt abandoned and betrayed, and had dashed hopes and expectations of achieving ‘justice’ and ‘truth’ from the [ICTY testimonial] process”).

their testimony ended up positively impacting the process, or how it might positively impact trials in other countries—no matter the verdict—can create a feeling of respect and help fulfill the expectations of witnesses, even if the court cannot promise to engage in large-scale efforts, such as rebuilding a shattered village and town. Demonstrating commitment of the tribunal or truth commission to the physical and emotional safety of witnesses is paramount to retrospective positivity with regard to the tribunal.

C. *Allowing Full Truths to Emerge*

Perhaps the most important element of the trauma-informed approach to witness testimony is providing the space to allow full truths to emerge. Whether testifying in transitional justice mechanisms may have harmful effects is hotly questioned with some arguing “that truth-telling itself may actually produce psychological and emotional harm by re-traumatizing victims.”²²⁶ However, when services are appropriately delivered, it is possible to avoid re-traumatizing survivors of violence and mass atrocities by well-intentioned people, such as investigators and prosecutors, and make all areas of victim assistance, including prosecution of perpetrators, more successful.²²⁷ Testimony can be a healing experience when the survivor is able to understand the story as not one about “shame and humiliation” but one about “dignity and virtue.”²²⁸ The second stage of the healing process guides the survivor into transforming the traumatic memory. Likewise, in a testimonial setting, although it is not therapy, an individual can transform the story-telling experience from shame to dignity under the appropriate circumstances.

A study of torture and trauma survivors of torture asked patients how they want to be asked about their trauma histories by mental health professionals—an endeavor that is admittedly fraught with barriers on both sides.²²⁹ Two results in particular were illuminating and are applicable in the transitional justice context. Survivors indicated needing more time to speak and not to be cut short.²³⁰ They also wanted to be asked about the historical contexts of the

226. Mendeloff, *supra* note 58, at 595; see also Robins, *supra* note 114, at 55 (explaining that although there may be cathartic effects to trials, they can also re-traumatize victims).

227. See, e.g., Stepakoff, *Psychosocial Consequences*, *supra* note 20, at 174–77 (explaining the positive outcomes of testifying when provisions in the SCSL were centered around survivor needs).

228. See HERMAN, *supra* note 126, at 181.

229. Patricia J. Shannon, *Refugees' Advice to Physicians: How to Ask About Mental Health*, 31 FAM. PRAC. 462, 463 (2014).

230. *Id.* at 464.

symptoms including the political situation that led to their trauma.²³¹ Research has shown that individuals are able to gain perspective on their lives and see both pain and joy by discussing traumatic events in chronological order and with detail while integrating them into one's life story of both non-traumatic and positive experiences.²³² Some evidence indicates that telling their story multiple times could help survivors reduce trauma and anxiety as well, even in testimonial settings.²³³

As with mental health therapeutic processes, the need to provide a safe environment in the courtroom or truth commission must be balanced against the need to confront the past and allow the survivor's story to emerge.²³⁴ Although legal actors cannot play the role of the therapist in navigating this process with the survivor, they can allow the survivor to safely reconstruct the memory in a public setting while being mindful of the rights of the accused. When beginning the second stage of the trauma healing process, the survivor reconstructs the story beginning with life before the trauma and the circumstances that led up to the event.²³⁵ Like reconstruction, providing testimony must also be contextual and must include the emotions as well as the facts and circumstances.²³⁶ In other words, although truth "can never be full enough to connect profoundly different perceptions of what happened,"²³⁷ the full truth, as subjectively experienced by the survivor, must be told. Past experience shows that truth commissions and tribunals alike have failed witnesses significantly in this regard.²³⁸

1. Prosecutions

Nowhere is the tension between the goals of international justice and the desire of witnesses to tell their stories more pronounced than in prosecutorial settings.²³⁹ The traditional role of witnesses

231. *Id.*

232. See MAGGIE SCHAUER, FRANK NEUNER & THOMAS ELBERT, NARRATIVE EXPOSURE THERAPY: A SHORT-TERM TREATMENT INTERVENTION FOR TRAUMATIC STRESS DISORDERS AFTER WAR, TERROR, OR TORTURE 35 (2005).

233. Stepakoff, *Psychosocial Consequences*, *supra* note 20, at 175 (explaining that similar observations were made in individuals who testified in Rwanda's *gacaca* proceedings).

234. HERMAN, *supra* note 126, at 176.

235. *Id.*

236. See *id.* at 177.

237. Doak, *Therapeutic Dimensions*, *supra* note 4, at 276.

238. See, e.g., Mendeloff, *supra* note 58, at 621–22 (grappling with the notion that truth-telling may be failing victims of grave international crimes because their expectations have not been met).

239. Stepakoff, *Why Testify?*, *supra* note 3, at 433 ("Although it is widely accepted that such courts should provide a space for witnesses to tell their stories, there is a fundamental

in criminal justice proceedings is to provide testimony “only when questioned in the context of examination or cross-examination.”²⁴⁰ Survivors providing testimony are often “let down by the very selective account of past events which criminal trials tend to produce.”²⁴¹ One scholar noted that “[t]he adversarial format of proceedings system serves to stifle the potential for victims to give accounts in a free narrative form,” making the experience “disempowering and emotionally exhausting.”²⁴²

Too often, legal actors usurp the role of survivors as the story tellers by determining legally relevant information to be presented at trial.²⁴³ In these cases, “individual narratives are suppressed” and survivors lose the “opportunity to present their own account of past events, but are instead confined to answering questions within the parameters set down by the questioner.”²⁴⁴ As the SATRC commissioner Glenda Wildschut and SATRC psychologist Paul Hout acknowledged, “[a]ll too often, legal processes are blind to the emotional and psychological impact on participants.”²⁴⁵ Despite significant progress in the realm of victim participation and protection, the ICC continues to struggle with balancing the right to confrontation and preventing re-traumatization of potential witnesses.²⁴⁶

Cross-examination in particular can contribute to re-victimizing the witness as cross-examiners on occasion may attack the character of the victim witnesses.²⁴⁷ Because criminal prosecutions tend to focus on the accused rather than the victim, the right of the accused to confront their accusers is a cornerstone of international human rights law.²⁴⁸ The ICTY had to confront the issue of the right to cross-examination and its potential to re-traumatize wit-

tension between the need to adhere to the rigorous demands of the legal process and victims’ need to exercise some measure of control over the narration of their experiences.”).

240. Doak, *Victims’ Rights*, *supra* note 3535, at 136.

241. Doak, *Therapeutic Dimensions*, *supra* note 4, at 277.

242. *Id.* at 272, 282–83.

243. *Id.* at 272.

244. *Id.*

245. Wildschut, *supra* note 89, at 14 (further expounding on the necessity of having a trauma-informed approach to witness testimony). “Because human rights litigation is intended to promote the welfare of past and future victims, it is essential that such supportive processes be integrated into all witness preparation and testimony.” *Id.*

246. See Wakabi, *supra* note 8 (reporting that a former child soldier refused to testify in the Bosco Ntaganda case and judges refused to admit prior testimony because the defense would need to question credibility).

247. See Doak, *Therapeutic Dimensions*, *supra* note 4, at 283.

248. Brounéus, *Truth-Telling as Talking Cure?*, *supra* note 7, at 59.

nesses, particularly victims of sexual and gender-based violence.²⁴⁹ In balancing the needs of victims against the right to cross-examination, the ICTY concluded that the balance favors cross-examination, likely to protect defendants and obtain meaningful convictions.²⁵⁰ However, rules preventing harassment of witnesses, as well as the rape shield rule, demonstrated in the ICTY that limits on cross-examination may be placed under international law that do not interfere with the right to confront witnesses.²⁵¹

More room for witnesses to elaborate would not compromise the right of confrontation. A process focused entirely on perpetrators can set the goals of transitional justice back, “[if], on the other hand, the invisible majority of victims see a process that further traumatizes testifiers, or focuses entirely on the perpetrators, this will not empower the nation to see a better future for itself.”²⁵²

History has proven that survivors of mass atrocities prefer to reveal the contextual and historical accounts of their experience. In the United States, a study of torture survivors of various ethnic backgrounds underscored survivors’ desire to reveal such historically relevant facts to medical and psychological professions as part of their healing.²⁵³ In a legal context, survivors must be given space to explain not only the “legally relevant facts,” but must themselves be able to determine what other details may be relevant to their experience. This may include the historical context in which the crimes took place. The ability to put a story in its historical context does not prejudice the rights of the accused to exclude irrelevant evidence or question their accusers. It simply allows the survivor to tell the full story of the incident leading to the charges in such a way that is meaningful to the witness and relevant to the arbiter (judge or jury) in deciding the ultimate disposition of the case.

In both the ICTY and the SCSL, the witnesses’ main reason for dissatisfaction was their inability to convey their full story.²⁵⁴ Witnesses in the ICTY “were regularly discouraged from explaining

249. See Alex C. Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses’ Needs against Defendants’ Rights*, 46 HASTINGS L.J. 909, 924 (1995).

250. *Id.* at 933.

251. *Id.* at 933–34.

252. Wildschut, *supra* note 89, at 15.

253. Shannon, *supra* note 229, at 464.

254. Doak, *Therapeutic Dimensions*, *supra* note 4, at 272; Mendeloff, *supra* note 58, at 602–09 (describing several studies that found broad witness dissatisfaction with the SATRC).

the background and/or context of events, with counsel urging them to confine their testimony to legally relevant facts.”²⁵⁵ In the SCSL, survivors of sexual violence were “prohibited by the Court from relating details about sexual violence, since this was not deemed relevant to the charges of crimes against humanity and war crimes. As a result, many of the women felt that their narratives had been stifled and justice had not been served.”²⁵⁶

Prioritizing evidentiary issues and procedural law over the concerns of survivors makes the witnesses feel detached from the legal exercise in which they become “weapons” against the adversary.²⁵⁷ In the ICTY, “many witnesses felt that [defense] lawyers were launching personal attacks against them.”²⁵⁸ In fact, the need to balance the due process rights of the accused and abide by procedural and evidentiary rules led to a “limited, and sometimes inaccurate, record of victims’ experience[s]” including “under or misrepresentation of the actual experience of survivors of gender-based violence” in the ICTY and ICTR.²⁵⁹

Concerns about the due process rights of the accused are central to credible prosecutions and important for survivors, and it is due process for the accused “that most clearly differentiates a human rights trial from political trials or kangaroo trials.”²⁶⁰ Without such protections for the accused, “accountability” can look more like “revenge.”²⁶¹ Article 14 of the ICCPR on the right to a fair trial includes the right to “examine, or have examined, the witnesses against him”²⁶² This right is rigorously observed under international law.²⁶³ It has been the subject of heated debate regarding

255. Doak, *Therapeutic Dimensions*, *supra* note 4, at 272.

256. *Id.*

257. Letter from Karim Lahidji, President of International Federation of Human Rights, to Herman Von Hebel, Registrar of the International Criminal Court 8 (Nov. 18, 2014), https://www.fidh.org/IMG/pdf/letter_registar_icc.pdf [hereinafter Lahidji] [<https://perma.cc/9XGF-QUC4>].

258. Doak, *Therapeutic Dimensions*, *supra* note 4, at 283.

259. SáCouto, *supra* note 208, at 300.

260. KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 13 (2011).

261. *Id.* at 256.

262. International Covenant on Civil and Political Rights art. 14(3)(e), Dec. 16, 1966, 999 U.N.T.S. 171, KAV 2306.

263. *Training Manual on Human Rights in the Administration of Justice: A Facilitator's Guide on Human Rights for Judges, Prosecutors and Lawyers, Chapter 7: The Right to a Fair Trial Part II: From Trial to Final Judgment*, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., 255, <http://www.ohchr.org/Documents/Publications/training9chapter7en.pdf> (stating that the right to a fair trial was violated where the court failed “to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence

anonymous testimony.²⁶⁴ However, the right of confrontation does not necessarily prevent witnesses from discussing the historical context and emotional feelings associated with the violation against them. As discussed above, it also should not prevent the admissibility of carefully vetted, anonymous information in a public trial.

Furthermore, the constraints presented by the evidentiary restrictions that may prevent witnesses from retelling their experience thoroughly in court may be assuaged by adequate preparation. Thorough preparation of witnesses may facilitate the emergence of an individual's full truth and allow the witness to describe their own experience fully. Some evidence suggests that witnesses in the SCSL, who had several opportunities to recount their experiences with at least two attorneys, investigators, and mental health staff, actually benefitted from telling their story more than once.²⁶⁵

The tension between evidentiary rules and the rights of the accused, on one side, with the witnesses' right to participate and have the full truth emerge, on the other, is inherent to prosecutions. Scholar Eric Stover noted this tension, stating that "[i]f we were ever prompted to design a system for provoking intrusive post-traumatic symptoms in victims of war crimes, we could not do better than a court of law."²⁶⁶ To prevent these harmful effects, a careful balancing act must be followed to ensure that the survivor's full story emerges in the prosecutorial setting.

2. Truth Commissions

Truth commissions, ideally, should be more effective at exposing the full truth, including its emotional aspects, than prosecutions. Researchers found that "extensive truth-telling formed a core part of each successful reconciliation and was absent from all three unsuccessful ones."²⁶⁷ Truth commissions, in fact, are often hailed as "restorative justice" because of their ability to promote reconciliation.²⁶⁸ Because trauma affects the memory in profound ways,

counsel to properly cross-examine the witnesses" and present a defense) [<https://perma.cc/6578-3CC6>].

264. See, e.g., Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT'L L. 75 (1997); Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235 (1996).

265. Stepakoff, *Psychosocial Consequences*, *supra* note 20, at 175.

266. ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* 81 (2005).

267. *Id.* at 274–75.

268. Sikkink, *supra* note 260, at 256–57.

often the emergence of emotional truth is equally as important as the facts.²⁶⁹ When a person experiences trauma

the linear narrative—the actual facts of the story—is disrupted, while the emotional memory continues recording. So a survivor may acutely remember the fear they felt, but are unable to recall the order of events or people involved in their torture. This impairs a torture survivor's ability to tell the story in a chronological order and believable manner. Shame—whether from surviving a sexual assault, or being unable to help a loved one or any other event—also impacts a survivor's ability to tell their story.²⁷⁰

The witness must thus “be able to tell their stories in a form that is culturally and psychologically meaningful to them and respects their narrative techniques.”²⁷¹

The SATRC has acknowledged this with a parliamentary resolution stating that its objective was to unveil the “factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations.”²⁷² However, the experience of survivors told a different story. A treatment center in Cape Town, South Africa, “estimated that 50 to 60 per cent of those with whom it has worked experienced serious psychological problems after testifying, or stated that they regretted having taken part in the SATRC's hearings.”²⁷³ Many felt that only part of the truth had emerged and were unsatisfied because the emotional and contextual factors were left out.²⁷⁴ It often “re-open[ed] old wounds and ignite[d] a sense of anger and injustice.”²⁷⁵ Witnesses were particularly “angry that they had been prevented from giving longer and more contextual accounts of the origins of the conflict.”²⁷⁶

Public mourning may also be part of the testimonial process and it is important that this act be respected. Because survivors often

269. See generally J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, DIALOGUES CLINICAL NEUROSCIENCE 445–61 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3181836/> (explaining how trauma affects and alters the memory) [<https://perma.cc/LTY9-XWK6>].

270. See, e.g., Alison Beckman, *Training Asylum and Refugee Officers*, CTR. FOR VICTIMS TORTURE (Apr. 21, 2015), <http://www.cvt.org/blog/healing-and-human-rights/training-asylum-and-refugee-officers#sthash.B7WRLkyZ.dpuf> [<https://perma.cc/7X4R-LEX5>].

271. ICTJ, *In Search of Truth*, *supra* note 55, at 10.

272. Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.), Ch. 2, § 3(1)(a).

273. Doak, *Therapeutic Dimensions*, *supra* note 4, at 278.

274. *Id.*

275. *Id.*

276. *Id.* at 271.

resist mourning both out of fear and pride,²⁷⁷ care must be taken during testimony not to validate the resistance to mourning. In both the healing process and testimonial settings, re-living the feelings, memories, or sensations of traumatic experiences is a normal, healthy reaction as the mind attempts to digest and understand trauma.²⁷⁸ “Reliving feelings, pictures, and bodily sensations feels miserable but is actually a normal, healthy reaction that indicates the mind is actively attempting to digest the trauma, to make it understandable.”²⁷⁹ In the SATRC, witnesses who expressed grief and cried as they were testifying were approached and had their tears wiped away by commission staff.²⁸⁰ Though well-intentioned, such actions may reaffirm survivors’ own embarrassment at expressing grief.²⁸¹ The mourning process is an important part of healing and integral to the remembrance stage. Expressions of emotions in testimony should not be discouraged as they are likewise empowering and cathartic.

D. *Ownership and Empowerment*

Both the means and ends of the transitional justice process and trauma healing process are to empower the survivor. In fact, “victims’ movements argue for participation primarily for empowerment to express oneself and communicate messages to other criminal justice stakeholders, rather than any actual decision-making power.”²⁸² In the ICTY, survivors participated by giving testimony in the trials.²⁸³ However, without the right to representation or to present evidence beyond the scope of examination and cross-

277. HERMAN, *supra* note 126, at 188.

278. KAETHE WEINGARTEN, *COMMON SHOCK: WITNESSING VIOLENCE EVERY DAY: HOW WE ARE HARMED, HOW WE CAN HEAL* 115 (2003).

279. *Trust Fund for Victims: Draft Implementation Plan for Collective Reparations to Victims Submitted to the Amended Reparations Order of 3 March 2015 in the Case Against Thomas Lubanga Dyilo*, INT’L CRIM. CT. ¶ 139, https://www.icc-cpi.int/RelatedRecords/CR2015_20833.pdf [<https://perma.cc/2AR3-XXLM>].

280. Higson-Smith Interview, *supra* note 116.

281. Brounéus, *Truth-Telling as Talking Cure*, *supra* note 7, at 69 (explaining that several women who testified in the *gacaca* courts of Rwanda stated that they relived their trauma very strongly during testimony including crying, shaking, and fainting, which led to “feelings of shame about having exposed such strong emotions in public”); Stepakoff, *Why Testify?*, *supra* note 3, at 437 (“[S]ome Zimbabwean torture survivors subscribe to cultural norms that traumatic experiences should only be disclosed in confidential settings.”).

282. Doak, *Victims’ Rights*, *supra* note 35, at 117.

283. Wald, *supra* note 77, at 535 (explaining that some ICTY trials featured over 200 witnesses).

examination, trials did not empower survivors.²⁸⁴ Rather, they contribute to the frustration of survivors with the system.²⁸⁵ Among Bosnian Muslims and some Croats, the ICTY is largely perceived as fair and issued mainly guilty verdicts, with some disappointment in the short length of sentences.²⁸⁶ However, witness dissatisfaction is a blight on its record for survivor empowerment.²⁸⁷

In the trauma recovery process, survivors establish control by developing a plan for future protection, assessing possible threats, and determining what precautions are necessary.²⁸⁸ In the third stage of the recovery process, the point at which survivors are ready to share their story, the survivor has ownership of the story and must be clear about who she wishes to reveal the information to and what information she wishes to reveal.²⁸⁹ The survivor “must be the author and arbiter of her own recovery.”²⁹⁰ The ICTJ notes that for the needs of survivors, namely restoring trust, “the process by which [transitional justice mechanisms] are developed and implemented is as likely to be as important for restoring trust as the results of the processes themselves.”²⁹¹ Thus, empowering the survivors to take control throughout the process is necessary. This is particularly true in the provision of testimony.

Empowering the survivor is crucial because it enables the survivor to engage in a legal battle with the perpetrator from the position of strength, rather than weakness.²⁹² More than any other

284. See, e.g., Mendeloff, *supra* note 58, at 607 (explaining the sense of abandonment and betrayal witnesses felt after testifying in the ICTY).

285. The International Criminal Court has attempted to remedy this issue by allowing victims to participate in all stages of the proceedings. See *About the Court: Participation of Victims in Proceedings*, INT'L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/participation/Pages/participation%20of%20victims%20in%20proceedings.aspx (last visited Sept. 1, 2017) [<https://perma.cc/BN8L-G9PU>]; Mariana Pena & Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?*, 7 INT'L J. TRANSITIONAL JUST. 518, 518 (2013); Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 CASE W. RES. J. INT'L L. 475 (2011).

286. *'Is the tribunal not ashamed?' Karadžić Sentence Angers Victims*, GUARDIAN (Mar. 24, 2016), <http://www.theguardian.com/world/2016/mar/24/radovan-karadzic-hague-tribunal-sentence-survivors-victims-reaction> [<https://perma.cc/2JYK-A9U5>].

287. Studies show that Serbians mostly did not trust the ICTY and thought it “defeated” them. See Sanja Kutnjak Ivković & John Hagan, *Images of International Criminal Justice in the Former Yugoslavia*, in TRANSITIONAL JUSTICE: IMAGES AND MEMORIES 182–83 (Chrisie Brants, Antoine Hol & Dina Siegel eds., 2013).

288. HERMAN, *supra* note 126, at 164.

289. *Id.* at 201.

290. *Id.* at 133.

291. See Seils, *supra* note 24, at 2.

292. HERMAN, *supra* note 126, at 210.

truth-seeking entity, the ICC has actively sought to empower survivors and include them in various stages of the proceedings, as discussed above.²⁹³ However, as victims' rights organizations show, much more must be done to adequately represent victims' interests. Although the ICC provides for the legal representation of victims, the effectiveness of that representation is analyzed by the court rather than the victims themselves, depriving proceedings of a necessary element to make victim participation meaningful.²⁹⁴ Such representation is not without its complications, and without proper communication and setting goals of the various layers of representation, it can cause more confusion than support.²⁹⁵ Rights groups argue that the full right to participate—including legal representation—in the ICC must be “exercised in such a way that it puts victims at the [center] of consultation initiatives and allows them to practically and really be part of the proceedings, even through remote non-physical intervention.”²⁹⁶

Small, but crucial measures can create trust and empower witnesses in the proceedings. In the prosecutorial context, explanation and elaboration about the testimonial process can eliminate frustration. Direct and cross-examination of witnesses is often much shorter and less contextualized than witnesses would like, causing dissatisfaction. Criminal trials often

stifle free narrative and curtail the ability of victims and offenders to give free accounts of past events. . . . [I]t is the advocates and the judiciary (through the application of evidential rules) who exercise control over what witnesses are permitted to say. . . . Even outside the trial setting, there is no opportunity for the victim and perpetrator to address each other directly and have such questions answered.²⁹⁷

By simply explaining why some aspects of testimony may be deemed irrelevant, court staff can help create understanding and trust in the proceedings.²⁹⁸ The rights of the accused are particularly important here. Excluding evidence of crimes that the accused is not charged with is important in the prosecutorial con-

293. *About the Court: Participation of Victims in Proceedings*, *supra* note 285.

294. Lahidji, *supra* note 257, at 2.

295. Lino Owor Ogora, *Challenges of Legal Representation in the Case of Dominic Onugen*, INT'L JUST. MONITOR (Sept. 29, 2016), <http://www.ijmonitor.org/2016/09/challenges-of-legal-representation-in-the-case-of-dominic-onugen/> [<https://perma.cc/S7G2-A96C>].

296. Lahidji, *supra* note 257, at 2.

297. Doak, *Therapeutic Dimensions*, *supra* note 4, at 287.

298. *See id.* at 283–84.

text.²⁹⁹ However, explaining the rules of evidence can allow the survivor to tell the full story without being cut short by rules of exclusion. Prosecutors can work with witnesses to ensure that relevant parts of the story get articulated within the evidentiary rules. This can serve to change the dynamic of the legal advocates' roles *vis-à-vis* the survivor-witnesses from primary story tellers into serving the interests of the survivors and justice.

Furthermore, education and awareness-raising about the safeguards of the proceedings can foster trust. In the SATRC, many refused to testify because of fears that they would not be able to bring a civil case later.³⁰⁰ Others feared that perpetrators would be granted amnesty without full disclosure.³⁰¹ These concerns demonstrate distrust in the system, which could be addressed by witness engagement in formulating the proceedings and education on the nature of the mechanism. Use of witnesses' native language is particularly important to ensuring ownership over the process, rather than a sense of foreign-imposed justice.³⁰² Finally, for those who cannot participate in a public testimonial process without harm to themselves, there should be alternative ways to protect their security or mental health. This may include the submission of vetted written statements.³⁰³

Communication between the mechanism and the witnesses is crucial to empowerment and creating trust in the system. A survey of participants in the ICTY showed that witnesses were disappointed because outcomes were not communicated to them, procedures were not explained, and they were frequently returned to their communities prior to sentencing.³⁰⁴ Many found this "disempowering and emotionally exhausting."³⁰⁵ In the national criminal context, "the capacity of . . . processes to deliver therapeutic benefits bears direct correlation with how fairly victims feel they have been treated."³⁰⁶ It is a small measure to ensure communica-

299. *Rules of Procedure and Evidence*, INT'L CRIM. CT., r. 140(2)(b), 64(3) (stating evidence ruled irrelevant or inadmissible shall not be considered by the Chamber).

300. Higson-Smith interview, *supra* note 116.

301. *Id.*

302. See, e.g., *Sweden's First Steps Towards Justice Prove Controversial Among Syrians*, SYRIAN JUST. & ACCOUNTABILITY CTR. (Mar. 9, 2015), <http://syriaaccountability.org/updates/2015/03/09/swedens-first-steps-towards-justice-prove-controversial-among-syrians/> [<https://perma.cc/D33L-N4QV>].

303. Higson-Smith Interview, *supra* note 116.

304. Doak, *Therapeutic Dimensions*, *supra* note 4, at 283.

305. *Id.*

306. *Id.* at 279–80.

tion with those testifying, but can have significant effects on empowerment and countering dissatisfaction.³⁰⁷

Although the idea of legal representatives for victims is fairly new under international law, with the ICC pioneering the effort,³⁰⁸ a tribunal or truth commission must still bear the responsibility of providing victims, or their chosen representatives, a measure of ownership of the process from its inception through various stages of the proceedings. We do not include providing victims with legal counsel as a specific requirement of the trauma-informed approach, though right to independent legal representation for victims of mass atrocities is an important component of the victim-centered approach to transitional justice.³⁰⁹ However, giving victims a role in initiating proceedings, and keeping survivors and witnesses informed throughout the process is important to ensure that they have ownership of the process.

Despite unprecedented levels of victim participation in the ICC, communication with the victims themselves remains an obstacle. The ICC aims to bring “the court’s proceedings closer to affected victims and communities, ensuring an outward looking and inclusive Court.”³¹⁰ Some survivors in the proceedings against Lords’ Resistance Army commanders in Uganda have expressed disappointment that they cannot participate because some perpetrators are not charged with certain crimes.³¹¹ Rights groups express the need for the victims’ legal representatives at the ICC to interact more regularly with victims,³¹² employing the bottom-up approach to proceedings that removes unnecessary layers between victims/witnesses and their representatives in court.³¹³ They emphasize that victims’ representatives must promote communication with victims during the early stages of the proceedings—when there is light judicial activity—to ensure that victims’ perspectives are incor-

307. Stepakoff, *Why Testify?*, *supra* note 3, at 451 (noting that when a tribunal is more responsive to witnesses’ priorities and needs, it “can reduce the risk of disappointment and increase the probability that witnesses will be satisfied with their participation in war crimes trials”).

308. Lahidji, *supra* note 257, at 5.

309. *Id.*

310. COMMENTS TO THE REGISTRAR IN RELATION TO THE REVISION PROJECT AS IT RELATES TO VICTIMS RIGHTS BEFORE THE ICC, REDRESS 4 (2015), <http://www.redress.org/downloads/publications/2015-feb-redress-comments-on-revision.pdf> [https://perma.cc/NP42-XP3H].

311. *Ongwen: Concerns Over Victims’ Legal Representation*, *supra* note 16.

312. *Id.*

313. Lahidji, *supra* note 257, at 8.

porated throughout the process.³¹⁴ This has important consequences for reparations as well, including how to identify victims, what services should be provided in the reparations scheme, whether direct and indirect victims should be included, and the manner in which reparations are provided.³¹⁵ Thus, keeping survivors informed on the restraints of the law throughout the process is important.³¹⁶

CONCLUSION

Formulating justice mechanisms in post-conflict societies requires a complex and multi-faceted approach. This Article suggests that in creating such mechanisms, local and international justice actors must be mindful of the needs of the population that will be served, which includes mental health needs. Providing psychosocial support services is crucial and necessary, but insufficient to ensure that accountability will not have a negative effect on those seeking justice. Addressing mental health needs must be culturally sensitive and adaptable to each situation and individual. As Doak has noted, “the interests and needs of individual victims may diverge substantially not only with each other, but also with the broader institutional thrust towards reconciliation and social reconstruction.”³¹⁷

Although there is no perfect formula for building justice institutions with a mental-health informed approach, some basic principles apply universally. The foregoing is merely an initial foray into the integration of the mental health and transitional justice fields providing the broad principles by which survivors of violence and atrocity are empowered to safely and effectively participate in and take ownership of truth and justice. This Article argues that witnesses may have a healthier experience testifying if the testimony is carried out in a safe environment that allows more complete stories to emerge along with the witnesses' subjective emotions, and if the

314. *Ongwen: Concerns Over Victims' Legal Representation*, *supra* note 16.

315. In formulating the reparations scheme for its first case, the ICC's Trust Fund for Victims noted the complexity of identifying victims and their needs given the limited resources. See *Draft Implementation Plan for Collective Reparations to Victims Submitted to the Amended Reparations Order of 3 March 2015 in the Case Against Thomas Lubanga Dyilo*, *supra* note 279, ¶ 20–28.

316. Mariana Pena, *Ugandan Victims Raise Concerns in Relation to the Ongwen Case*, INT'L JUST. MONITOR (Feb. 5, 2015), <http://www.ijmonitor.org/2015/02/ugandan-victims-raise-concerns-in-relation-to-the-ongwen-case/> [<https://perma.cc/PY2L-SGR4>].

317. Doak, *Therapeutic Dimensions*, *supra* note 4, at 290.

mechanism allows for survivor-informed consent, ownership, and empowerment throughout the process.

Furthermore, an approach that better serves the survivors also serves the interests of justice. Survivors that are fully informed of the legal process and have more positive experiences providing testimony are also more likely to support the mechanisms and thus foster support within the community. An empowered witness presents a clearer and stronger case before the court or commission. Formulating justice mechanisms with these aims in mind can also conserve precious resources for the chronically under-funded transitional justice programs and the institutional rebuilding process. Where prevention of re-traumatization is prioritized, less resources will be funneled into more expensive treatment afterwards.

Among transitional justice scholars, there is a recognition that much more needs to be done to understand the psychological impact of uncovering the past and its healing effects on the individual and society.³¹⁸ In the mental health and psychosocial support field, clinicians acknowledge that prosecutions or truth telling will not have much of an impact on healing for people with severe emotional disorders which require intervention to directly address mental health. However, for individuals that are willing and able to provide testimony, the study of trauma recovery has an important role to play to ensure the safety of witnesses. This approach is not only important for individual well-being, but for societal healing and a vibrant civic life and institutional rebuilding process. More interdisciplinary research is needed to understand the psychological effects of transitional justice mechanisms. Investing in such research can contribute to both individual well-being and transitional justice. This Article attempts to begin the conversation on how to provide safe and effective witness testimony, which ensures psychological well-being and fulfills the goal of carrying out credible prosecutions and truth commissions.

318. Hamber, *supra* note 19, at 316 (explaining that the motto, “revealing is healing,” has little merit because more research is needed on psychological impacts); Mendeloff, *supra* note 58, at 592 (“Although there is little evidence that truth-telling in general dramatically harms individuals, the notion that formal truth-telling processes satisfy victims’ need for justice, ease their emotional and psychological suffering, and dampen their desire for vengeance, remains highly dubious.”); Brounéus, *The Trauma of Truth Telling*, *supra* note 3, at 430 (“More research is urgently needed to lay a solid, empirical, and evidence-based ground for post-conflict peace-building policy.”).

