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Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands

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ABSTRACT

Whether they appear as witnesses, victim participants, or civil parties in mass crimes proceedings, victims can contribute vital evidence and insight bearing on the guilt or innocence of the accused. Their testimony can contribute to the truth-telling function of the process, and under some circumstances, may help them cope with trauma. However, victim testimony can also lead to re-traumatization and compromise the fairness or efficiency of the judicial process if emotional distress undermines its relevance, credibility or focus. Inherent tensions exist, because the aspects of the courtroom experience that tend to threaten victims—such as pointed questioning and cross-examination on the details of painful events—are essential for a fair trial. This article discusses the benefits and challenges of engaging victims in international and hybrid criminal trials and examines how these issues have been addressed in the courtroom. We devote particular attention to the Extraordinary Chambers in the Courts of Cambodia (ECCC), a UN-backed hybrid court established to address crimes of the Pol Pot era. The ECCC has tried to facilitate victim testimony through formal procedures and informal trial management strategies, including two important innovations in international criminal justice—special "victim impact hearings" and "statements of suffering," both of which allow civil parties to describe harms they endured under Khmer Rouge rule before judgment. We argue that while effective trial management and innovative strategies can help reduce the tension between survivors' interests and the rights of the accused, the ECCC's experience reinforces the difficulty of featuring victim narratives in criminal trials.

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I. INTRODUCTION

Victim testimony has featured prominently in all international criminal trials since Nuremberg and in hybrid court proceedings featuring domestic and international personnel. Victims appear as witnesses and increasingly as participants or civil parties with additional rights to engage in the proceedings. Their testimony can provide vital perspectives, insights, and evidence bearing on the guilt or innocence of the accused, while also advancing other aims of a mass crimes process. The political sponsors of international and hybrid courts often promote criminal trials as ways to meet victims' needs and contribute to truth and reconciliation, especially in societies in which no official truth commission exists. Victim testimony can contribute to a court's truth-telling function, giving victims a platform from which to share their stories, and help focus due attention on their suffering. Testifying may also help some victims heal by giving them a sense of empowerment and helping them obtain a partial remedy in the form of acknowledgment.

Criminal trials are not designed for therapeutic impact, however, and the risk of re-traumatization is not easily defused, since some potentially re-traumatizing aspects of testifying—such as detailed questioning on painful events, vigorous cross-examination, and confrontation with the accused—are necessary aspects of fair trials. Moreover, the fairness and efficiency of the proceedings can suffer if emotional distress undermines victims' ability to provide relevant, credible, and focused testimony. Victims' needs and the legitimate demands of a sound criminal trial do not always point in the same direction, and mass crimes courts must consider multiple, sometimes competing objectives when managing victim testimony.

This article examines the tensions inherent in reliance on victim testimony and analyzes ways in which international and hybrid criminal courts have sought, with varying degrees of success, to reduce the tradeoffs between victims' interests and the rights of the accused. We first review some general effects of victim-witness testimony on survivors and the trial proceedings. We then discuss a variety of informal in-court management strategies that can improve victims' experience testifying and the value of their testimony for the proceedings—strategies that are particularly important when victim-witnesses are not provided formal courtroom protections. Finally, we discuss an important pair of innovations at the Extraordinary Chambers in the Courts of Cambodia (ECCC), a hybrid tribunal established by the United Nations and Cambodian government to adjudicate selected crimes of the Pol Pot regime. These include special "victim impact hearings" and "statements of suffering" that allow certain victims to relate the harms they suffered

under Khmer Rouge rule prior to judgment. We consider the potential and observed effects of these innovative measures on victims and the criminal process.

We draw on several courts for our analysis but focus particular attention on the ECCC, which has completed two trials to date. Case 001 featured Duch—who headed the infamous S-21 (Tuol Sleng) prison in Phnom Penh, the S-24 prison work camp at Prey Sar, and the "Killing Fields" at Choeung Ek—and led to his 2010 conviction for war crimes and crimes against humanity. Case 002/01, the first of at least two trials against surviving former senior Khmer Rouge leaders, led to the conviction in August 2014 of Nuon Chea and Khieu Samphan for crimes against humanity.[1] Both trials featured extensive testimony from trauma survivors. Some appeared as witnesses, but most appeared as civil parties pursuant to a scheme—unprecedented in international criminal law—that allows certain victims to join the proceedings as parties entitled to courtroom representation by counsel and able to request "collective and moral" reparations.[2]

The ECCC proceedings shed additional light on the challenges and opportunities of engaging victims in the courtroom. Although numerous victims testified in Cases 001 and 002/01, only one civil party (a former prison camp guard afraid of public scorn[3]) has been afforded the types of

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[1] Case 002 initially involved four charged persons: former Deputy Secretary of the Communist Party of Kampuchea Nuon Chea, former president of the Democratic Kampuchea (DK) state presidium Khieu Samphan, former DK Deputy Prime Minister Ieng Sary, and former DK Social Affairs Minister Ieng Thirith. Ieng Thirith was severed from the case in 2011 due to dementia, and Ieng Sary died before the end of the Case 002/01 hearings in 2013. The Trial Chamber split the complex case into a series of mini-trials, each adjudicating a distinct set of alleged crimes. *See* JOHN D. CIORCIARI & ANNE HEINDEL, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA ch. 5 (2014). Case 002/01 dealt with the evacuation of Phnom Penh in 1975, other forced population movement, and related crimes. ECCC, *Case 002/01,*http://www.eccc.gov.kh/en/case/topic/1294 (last visited June 30, 2015). Case 002/02 began evidentiary hearings in January 2015 and addresses alleged genocide against Cham Muslims and ethnic Vietnamese, forced marriages (and rape in that context), internal party purges, and crimes at specified security centers and worksites. ECCC, *Case 002/02,* http://www.eccc.gov.kh/en/case/topic/1299 (last visited June 30, 2015).

[2] Internal Rules of the ECCC R. 23*bis*(1), *quinquies*(1) (revised Jan. 16, 2015) [hereinafter ECCC Internal Rules]. ECCC judges created the scheme in 2007, allowing victims to join pre-trial and trial proceedings if they can demonstrate injury as the direct result of an alleged crime of the accused. *Id.* In Case 001, the 92 civil parties had an exceptional level of courtroom participation. Twenty-two testified, and selected others sat in each courtroom hearing. Case 002/01 also featured extensive civil party testimony, but facing roughly 4,000 applicants for civil party status, the court appointed a pair of Lead Co-Lawyers to represent civil parties and scaled back their participation rights in the interests of efficiency and equality of arms. CIORCIARI & HEINDEL, *supra* note 1, at 216-30.

[3] *See generally* Prosecutor v. Nuon Chea et al., Case No. 002/19-09-2007-ECCC-TC, Decision on Protective Measures for 2-TCCP-304, ¶¶ 6, 8 (Trial Chamber, March 19, 2015) (granted "minor" protections prohibiting public release of his image and disclosure of personal details beyond his name due to his fear of "social responses such as scorn, contempt or ostracization of himself and his family"). The same protections were provided to another prison camp guard who testified as a

courtroom protections—such as partitions, use of video testimony, or *in camera* hearings—provided to some child witnesses and sexual abuse victims at other hybrid and international courts.[4] This largely reflects the fact that all of the victims who testified in Cases 001 and 002/01 were adults, and none alleged suffering sexual violence at the hands of the accused.[5] The general absence of formal protections for victims testifying at the ECCC has highlighted the importance of informal courtroom management for balancing victims' needs against the rights of the accused. Cases 001 and 002/01 thus furnish useful new information about strategies for managing survivor testimony.

In addition, Case 002 has featured two important novel elements that merit examination: "victim impact hearings" and "statements of suffering." Victim impact hearings are forums held prior to judgment at which a select group of civil parties describe harms they suffered from the charged crimes.[6] Statements of suffering are opportunities for all civil parties who testify to describe briefly any harms they suffered under the Khmer Rouge regime and ask questions of the accused through the Trial Chamber President—including questions unrelated to the charges.[7]

We advance three main arguments. First, victim testimony is generally imperative for effective trials but inevitably challenging for trauma survivors. Liberal legal norms demand a focus on the culpability of the accused, which has the effect of instrumentalizing victim accounts.[8] Partly for this reason, courtrooms are ill-suited places for therapeutic narrative—a problem that even expansive victim participation schemes do not cure. Although civil parties have deeper trial involvement than ordinary witnesses and may have added opportunities for empowerment (or disappointment), we observe more parallels than differences in their experiences testifying. These include occasional feelings of empowerment or relief but also frequent fears of testifying and pain in revisiting past

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witness. Press Release, Oral Order Prohibiting the Publication of Photographs and Images of a Witness (Feb. 19, 2015).

[4] *See infra* Part IV. However, the Trial Chamber has issued an oral direction establishing when closed session is appropriate for testimony identifying victims of sexual violence. ECCC, Transcript of Trial Proceedings—Case 002, Case File No. 002/19-09-2007-ECCC/TC at 11 (Feb. 6, 2015). *But see* KRT TRIAL MONITOR, Issue No. 14 (Mar. 24-26, 2015), at 6, *at* https://krttrialmonitor.files.wordpress.com/2015/04/case002_02_issue-14_en.pdf (criticizing the Trial Chamber's inconsistent application of this directive).

[5] Relatively few alleged sexual violence at all, partly because the first two trials did not feature prosecution for sexual violence. Comparatively, the third trial, Case 002/02, has already included multiple survivor accounts of sexual violence by lower-level cadre.

[6] *See infra* Part IV(B)(1).

[7] *See infra* Part IV(B)(2).

[8] MARK DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 127-28 (2007); KAMARI MAXINE CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA 109-10 (2009); Kieran McEvoy & Kirsten McConnachie, *Victimology in International Criminal Justice: Victimhood, Innocence, and Hierarchy,* 9 EUR. J. CRIMINOLOGY 527, 528 (2012).

abuses. In some senses, victim testimony is a necessary evil. It needs to be managed in a manner that minimizes risks to the victim and offers some prospects for empowerment and catharsis while still performing an essential instrumental function.

Second, informal courtroom management strategies can be as important as formal courtroom protections in balancing victims' needs and the demands of a fair trial. Many victims who have testified in Cases 001 and 002 found the experience emotionally jarring. Even if they did not require formal, rule-based protections, ECCC judges and lawyers have tried to take their needs into account in the day-to-day practice of the court. The ECCC proceedings thus illuminate and seek to address something of a blind spot in the existing regime of legal norms and practices. There is no clear dividing line between trauma survivors who need protection and those who do not. Victims have a range of vulnerabilities resulting from the harms they suffered, and these need to be addressed informally when formal protections are not provided. Whether during "normal" testimony or victim impact statement hearings, upholding basic norms of civility and respect is one of the most effective means of minimizing harm to trauma survivors and realizing the positive potential outcomes of their testimony.

Third, victim impact hearings and statements of suffering offer promising ways to give something back to trauma survivors who testify but are only justified if victims' statements are subject to carefully designed constraints. Civil parties and their advocates have welcomed the ECCC's innovations offering victims wider scope to tell their stories, seek empowerment and catharsis, and advance the truth-telling goals of the process. However, not all survivors will find these circumscribed opportunities cathartic, and only a small number of survivors can be heard, making it unclear whether any therapeutic benefits are shared with the larger victim population. In addition, defense teams have criticized the practice. Most statements have strayed from the subject of the trial and some have included factual assertions potentially prejudicial to the accused, threatening both trial fairness and the appearance of fairness, which is crucial to the court's public legitimacy and ability to advance (or at least not undermine) reconciliation. Time limits, opportunities for subsequent defense questioning, and effective management of survivor expectations are all needed to forestall these dangers. Like its other efforts to manage victim testimony, the ECCC's experience with victim impact hearings and statements of suffering highlights the difficulty of promoting survivors' interests in the context of a criminal trial.

II. EFFECTS OF COURTROOM TESTIMONY ON VICTIMS

Scholars and victims' advocates have long argued that courtroom testimony can have therapeutic effects. Jose Alvarez argues that international criminal trials give victims opportunities to "find psychological comfort" by telling their stories.[9] Jonathan Doak adds that in some cases, testimony can help transform "[s]hame and humiliation…[in]to dignity and virtue" and instill victims with "a sense of empowerment and control."[10] These claims are rooted in psychological studies that show verbalizing traumatic experiences in a supportive environment helps many clinical patients cope with violent crime and other abuses,[11] as well as studies on "therapeutic jurisprudence" in domestic criminal systems suggesting that courtroom testimony can have similar benefits.[12] Dori Laub argues that survivors of atrocities "need to tell their story to survive,"[13] because:

> the 'not telling' of the story serves as a perpetuation of its tyranny. The events become more and more distorted in their silent retention and pervasively invade and contaminate the survivor's daily life.[14]

The belief that telling one's story can help victims heal has been "ubiquitously asserted" at truth commission proceedings,[15] perhaps most

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[9] Jose Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2036, 2038 (1998).

[10] Jonathan Doak, *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions,* 11 INT'L CRIM. L. REV. 263, 271 (2011). *See also* Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?* 46 HARV. INT'L L.J. 295, 337 (2005) (arguing that participation may help victims "regain a sense of agency"); Yael Danieli, *Victims: Essential Voices at the Court,* VRWG BULLETIN (Sept. 2004), at 1, *available at* http://www.vrwg.org/smartweb/bulletins/past-issues (asserting that participation helps victims "take back control of their lives").

[11] *See, e.g.,* Ervin Staub, *Genocide and Mass Killing: Origins, Prevention, Healing, and Reconciliation,* 21 POL. PSYCHOLOGY 367, 376 (2002) (summarizing such studies); Joshua Smyth & James Pennebaker, *Sharing One's Story: Translating Emotional Experiences Into Words As A Coping Tool, in* COPING: THE PSYCHOLOGY OF WHAT WORKS (C. Richard Snyder ed., 1999); J. Scott Kenney, *Gender roles and grief cycles: Observations of models of grief and coping in homicide survivors*, 10 INT'L REV. OF VICTIMOLOGY 19 (2003); MICHAEL WHITE, NARRATIVE MEANS TO THERAPEUTIC ENDS (1990).

[12] *See* Christian Diesen, *Therapeutic Jurisprudence and the Victim of Crime* (ca. 2012), *available at* http://www.law.arizona.edu/depts/upr-intj/pdf/Therapeutic-Jurisprudence-and-the-Victim-of-Crime.pdf.

[13] Dori Laub, *An event without a witness: truth, testimony, and survival, in* TESTIMONY: CRISIS OF WITNESSING IN LITERATURE, PSYCHOANALYSIS, AND HISTORY 78 (Shoshana Felman & Dori Laub, eds., 1991).

[14] *Id.* at 79.

[15] Brandon Hamber, *Does the Truth Heal: A psychological perspective on the political strategies for dealing with the legacy of political violence, in* BURYING THE PAST: MAKING PEACE & DOING JUSTICE AFTER CIVIL CONFLICT 155, 158 (Nigel Biggar ed., 2003). *See also* SOUTH AFRICAN TRC FINAL REPORT, vol. 5 (1998), at 351 (affirming the "healing potential of storytelling, of revealing the truth before a respectful audience and to an official body").

clearly in a banner in the main hall of South Africa's Truth and Reconciliation Commission (TRC) that read: "Revealing is Healing."[16]

Claims about the healing effects of testimony were part of the "therapeutic turn"[17] in international criminal law in the late 1990s and the related campaign to upgrade victims from their "accessory roles" as witnesses at the International Criminal Tribunal for the former Yugoslavia and Rwanda (ICTY and ICTR) to active participants.[18] That campaign succeeded in convincing the architects of the International Criminal Court (ICC) to allow victims to participate directly and seek reparations in addition to serving as witnesses.[19] The hybrid Special Tribunal for Lebanon (STL) also includes a mechanism for victim participation.[20] The ECCC went one step further by developing a civil party scheme, though that mechanism was later revised in ways that make civil party roles more comparable to those of victim participants at the ICC.[21] The notion that testimony can facilitate healing has thus gained considerable currency and affected how victim participation schemes are designed.

Nevertheless, claims about the therapeutic payoffs of courtroom testimony remain more articles of faith or expressions of hope than conclusions rooted in robust empirical observation. The available evidence is mixed,[22] and some have suggested that the prevailing Western emphasis on the "talking cure" for trauma can backfire in different cultural contexts.[23] Conducting controlled studies is difficult. The protection of

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[16] ERIC STOVER, THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE 29 (2005).

[17] Diana E. Anders, The Therapeutic Turn in International Humanitarian Law: War Crimes Tribunals as Sites of "Healing?" dissertation at the Univ. of Cal.-Berkeley (2012).

[18] Susana SáCouto & Katherine Cleary, *Victims' Participation in the Investigations of the International Criminal Court,* 17 TRANSNAT'L L. & CONTEMP. PROBS. 73, 76-77 (2008) (noting that victims' advocates advanced psychological healing as a key "potential restorative benefit[]" of participation); Yael Danieli, *Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law,* 27 CARDOZO L. REV. 1633, 1641-43 (2005-06) (arguing that accessory roles foreclose healing opportunities).

[19] Victims whose applications are approved by the ICC Registrar may select or be assigned a representative who may file written submissions, join courtroom proceedings (if the judges approve), and request reparations. ICC Rules of Procedure and Evidence, RR. 89-93, ICC-ASP/1/3 (Sept. 3-10, 2002) [hereinafter ICC Rules]; Rome Statute of the International Criminal Court, arts. 68(3) & 75, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

[20] The STL enables victim participants to make oral and written submissions, including opening statements and closing arguments; tender other evidence; and call, examine, and cross-examine witnesses, normally through a legal representative and with permission of the relevant Chamber. STL Rules of Evidence and Procedure, *adopted* Mar. 20, 2009, *corrected* Apr. 3, 2014, RR. 87, 143, 147(A).

[21] CIORCIARI & HEINDEL, *supra* note 1, at 216-25.

[22] *See* David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice,* 31 HUM. RTS. Q. 592 (2009) (finding a "paltry empirical record that offers little support for claims of either salutary or harmful effects of post-conflict justice").

[23] *See* Karen Bronéus, *The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health,* 54 J. CONFLICT RESOLUTION 408 (2010) (discussing a random survey of 1,200 Rwandans that found higher levels of psychological ailments among those who testified); Timothy Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission,* 27 HUM. RTS.

witnesses' identities limits researchers' ability to access them before and after the process.[24] Moreover, identifying relevant control groups is challenging given the relatively small, non-random nature of the victim participant groups. The therapeutic payoffs of courtroom participation thus remain largely unproven.[25] The slogan "Revealing is Healing" is overly simplistic at best and may instill false expectations, setting survivors up for disappointment.[26]

A. Cathartic Effects?

Many victims who testify at international and hybrid criminal tribunals report suffering from the psychological effects of trauma.[27] Some expect that courtroom testimony will help relieve their psychological burdens, and some have reported a sense of catharsis. However, these payoffs are far from certain, and the limited available evidence suggests that effects can be modest and fleeting when they appear.

1. Expectations and Expressions of Relief and Empowerment

In interviews, some ICTY and SCSL witnesses explained that they chose to testify partly to reduce their psychological pain. One rape survivor appearing before the ICTY explained that she would "go crazy if [she] couldn't speak about it."[28] Another reported: "I couldn't carry it in my soul."[29] Some ECCC witnesses and civil parties likewise have

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Q. 361 (2005); Anna Leach, *Exporting Trauma: Can the Talking Cure Do More Harm Than Good?*, THE GUARDIAN, Feb. 5, 2015.

[24] Rebecca Horn et al., *Testifying in the Special Court for Sierra Leone: Witness Perceptions of Safety and Emotional Welfare,* 17 PSYCH., CRIME & L. 435, ca. 437 (2011).

[25] O'Connell, *supra* note 10, at 319 (noting that most evidence is anecdotal); David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice*, 31 HUM. RTS. Q. 592, 601-15 (2009); Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151 (2004).

[26] BRANDON HAMBER, TRANSFORMING SOCIETIES AFTER POLITICAL VIOLENCE: TRUTH, RECONCILIATION, AND MENTAL HEALTH 66 (2009).

[27] This has certainly been true at the ECCC. *See, e.g.*, ECCC, Transcript of Trial Proceedings—Kaing Guek Eav "Duch," Case File No. 001/18-07-2007-ECCC/TC [hereinafter ECCC Case 001 transcript], at 70-71 (July 6, 2009) (including civil party Ly Hor's testimony that he was "mentally ill" and "living with anger and traumatization" due to severe beatings he took during the Khmer Rouge period); ECCC Case 001 transcript (Aug. 19, 2009), at 20 (with civil party Im Sunthy saying: "it has been more than 30 years, but time only intensifies my grief…I have been terrified and living with trauma"); ECCC, Transcript of Trial Proceedings—Case 002, Case File No. 002/19-09-2007-ECCC/TC [hereinafter ECCC Case 002 transcript], at 78 (May 27, 2013) (including Case 002 civil party Yos Phal's statement: "whenever I think of the events that happened […] my body becomes trembling. I feel heavy in my chest"). All ECCC transcripts cited herein are available on the court's website at http://www.eccc.gov.kh.

[28] Gabriela Mischkowski & Gorana Mlinarević, Medica Mondiale, *The Trouble with The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yugoslavia* (2009), at 55.

[29] *Id.*

explained that they testified to seek empowerment and psychological healing. Case 001 civil party Ouk Neary quoted the documentary film-maker Rithy Panh to articulate her desire for catharsis:

> The older you become, the more the history of the genocide comes back to you in an insidious way, a bit like a poison that has been distilled into your body bit by bit. The only way to relieve things is to testify. [30]

Some survivors have also expressed that their mere appearance in court had therapeutic effects by allowing them to engage in truth-telling and participate directly in the pursuit of justice. Case 001 civil party Chum Mey was among the most explicit:

> My feeling, after I received the summons to appear before this Chamber, was so exciting, so happy. I was so clear in my mind that I would testify to shed light before this Chamber, to tell the truth. I felt so relieved. If I were not able to come before this Court to testify . . . my mind [would be] so disturbed, so bothering, and I wanted to get it out of my chest. [31]

Other survivors reported that testifying gave them a sense of psychological relief. Case 001 civil party Bou Meng reflected that despite psychological counseling and medication, he found coming to the ECCC emotionally difficult and was "overwhelmed."[32] Nevertheless, toward the end of his testimony, he said: "my chest seems to be lighter. [After a]ll my statements to the Judges and to the lawyers and the rest, I [feel] much better now."[33] A number of civil parties in Case 002/01 described the sharing of "statements of suffering" as particularly helpful to them psychologically.[34]

There is also some evidence that courtroom appearances can be empowering for survivors. One refrain in Case 001 was the momentousness of victims' opportunity to express themselves directly to

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[30] ECCC Case 001 transcript (Aug. 17, 2009), at 69-70. *See also* ECCC Case 002 transcript (Dec. 13, 2012), at 103-06 (in which Case 002 civil party Denise Affonço outlined harms she and her family endured and said: "I appear to be in reasonable health, but I can tell you inside my head, it's not healthy at all…my nights are filled with nightmares… I wasn't alone. There were another 2 million Cambodians who suffered this physically and morally. Now that they can speak, I hope they are liberated").

[31] ECCC Case 001 transcript (June 30, 2009), at 67. Asked how he copes with torture he suffered at Tuol Sleng, Chum Mey said he follows the ECCC and "would really like the court to find justice." *Id.* at 33.

[32] ECCC Case 001 transcript (July 1, 2009), at 74.

[33] *Id.* at 85.

[34] *See infra* Part V(B) for a detailed discussion.

Duch.[35] Many testifying witnesses and civil parties were either survivors of one of the prisons Duch managed or lost a loved one there. Some wished to question him.[36] Others wished to reject his pleas for forgiveness. For example, Ou Kamela, the daughter of an S-21 victim, said in a letter read in Court, "On behalf of my father, I refuse to express the slightest amount of pity. On behalf of my father, I request that justice be handed down."[37] Her statement highlights the empowerment victims may experience by confronting defendants accused of direct responsibility for their harms[38]—an experience unavailable at truth commissions, which are typically "devoid of meaningful encounters between victims and offenders."[39]

In general, the high-level Khmer Rouge officials on trial in Case 002 were further removed from the atrocities recounted by testifying survivors. Most witnesses and civil parties said they appeared to pursue justice against the Khmer Rouge regime on behalf of the larger community of victims rather than to confront individual defendants.[40] For example, civil party So Sotheavy said:

> The testimony is really important for me. I have been waiting for more than 30 years now. Today, I am willing to be here taking the stand to find justice, hoping that my message … [will] help tell younger generation[s] that the regime of the Khmer Rouge would not be followed again; and I would like to tell everyone about the great suffering we have had. [41]

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[35] *See* Eric Stover et al., *Confronting Duch: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia,* 93 INT'L REV. OF THE RED CROSS 503, 543 (2011) (arguing that civil parties testified in Case 001 "largely because they viewed Duch as the individual most directly responsible for the death of their loved ones").

[36] *Id.* at 519 (quoting one civil party as saying: "Of all my family I am the only survivor. So I wanted Duch to tell me what exactly had happened to my family").

[37] ECCC Case 001 transcript (Aug. 20, 2009), at 64. *See also* ECCC Case 001 transcript (Aug. 24, 2009), at 42-43 (in which civil party Chum Neou says she "cannot accept the apology made by the accused").

[38] The same encounters pose special dangers of re-traumatization. *See infra* Part II(B)(2).

[39] George Wachira & Prisca Kumunge, *Noble Intentions, Nagging Dilemmas: In Search of Context-Responsive Truth Commissions in Africa*, Policy Brief, Nairobi Peace Initiative-Africa & West African Network for Peace-building, at 5 (2010).

[40] One exception was Case 002 civil party Chau Ny. *See infra* notes 352-359.

[41] ECCC Case 002 transcript (May 27, 2013), at 20. *See also* ECCC Case 002 transcript (May 29, 2013), at 52 (in which Chan Sopheap said: "I have endured tremendous suffering. It was so painful, that I decided to file my application to join as a civil party. I want the Court to seek justice for my family and for the Cambodian families at large who have lost their loved ones"); ECCC Case 002 transcript (Dec. 4, 2012), at 103 (with Toeung Sokha expressing her desire to help the court ensure that "the next generation will understand and remember" the Khmer Rouge tragedy and deliver "justice to me and my family members, and to all the victims").

The opportunity to contribute to the broader public quest for justice and truth thus offers another means of potential empowerment.

2. Evident After-Effects

Even for survivors who experience a rush of relief or sense of empowerment immediately after testifying, the longer-term contribution of that process to healing is often unclear. In a survey of 87 victims and witnesses who testified at the ICTY, Eric Stover found that most "valued the opportunity to tell their story to the wider world," and some relatives of deceased persons expressed "relief that they could exercise what was perceived to be a moral duty in testifying."[42] Some also reported a sense of catharsis, but that feeling tended to dissipate when they returned home.[43] Rebecca Horn et al. interviewed numerous SCSL witnesses, finding that most would testify again but felt anxious and fearful for their security—especially those who did not have significant familiarity with the Court or its procedures before testifying.[44]

The most extensive study of the effects of testifying at the ECCC was conducted in 2011 by Eric Stover et al. on 21 of the 22 civil parties who testified in the *Duch* trial. Most characterized their experiences as positive, though sometimes difficult and frustrating.[45] Unsurprisingly, many linked their experience testifying with their sense of satisfaction or disappointment with the broader judicial process.

Even testimony at truth commissions, which are designed more explicitly as victim-centered institutions, appears to have limited therapeutic effects. A 2001 study of 134 black South Africans who suffered gross human rights violations under Apartheid found that testifying publicly at the TRC and giving closed statements had no "significant effect on psychiatric health."[46] The researchers concluded that the experience of participating in the TRC proceedings "may be qualitatively different from that of testimony therapy in a clinical setting. Thus, it may be overly ambitious for truth commissions to have a 'therapeutic' goal, except at the broader national level."[47]

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[42] STOVER, *supra* note 16, at 76.

[43] *Id.* at 107. An ICTY pilot study of the long-term impact of testimony with researchers at the University of North Texas may shed further light. ICTY, *The echoes of witnesses and testimonies* (July 2013), http://www.icty.org/x/file/About/Registry/Witnesses/study_participants.pdf.

[44] *See* Horn et al., *supra* note 24 (also noting a lack of information about witnesses' pre-trial mental health).

[45] Stover et al. *supra* note 35, at 541.

[46] *See* Debra Kaminer et al., *The Truth and Reconciliation Commission in South Africa: Relations to Psychiatric Status and Forgiveness among Survivors of Human Rights Abuses,* 178 BRIT. J. PSYCHIATRY 373 (2001) (using TRC definitions of gross human rights violations and comparing rates of depression, post-traumatic stress disorder (PTSD), and other ailments in victims who participated in the TRC and those who did not).

[47] *Id.* at 375.

These parallels between trials and truth commissions should not be too surprising. Although more victim-centric than trials, truth commissions instrumentalize victim accounts to some extent in their pursuit of larger social and political ends. If trials reduce trauma survivors to "evidentiary cannon fodder,"[48] before truth commissions they become "statement-givers," depositing their testimonies without necessarily benefitting from follow-up measures.[49] Matiangai Sirleaf finds that as in trials, victims who participated in truth commission processes in Ghana, Sierra Leone, and Liberia were essential for the function and legitimacy of the process but often got relatively little in return for sharing their stories.[50]

These findings suggest that the long-term benefits to victims from testifying about their suffering are variable, uncertain, and frequently overstated. Even innovative victim-focused procedures—such as those adopted by the ECCC and discussed *infra*—cannot be expected to transform the experience into one that is reliably cathartic. Instead, they must be evaluated primarily on their effectiveness in reducing the risks of re-traumatization.

B. Risks of Re-traumatization

While the cathartic effects of courtroom testimony have been difficult to assess, there is ample evidence of its potential to re-traumatize victims. Trauma survivors are often intimidated when they are ushered into sophisticated international criminal courtrooms and face the gazes of judges, lawyers, and sometimes the accused.[51] Stover argues 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."[52] Recalling past events can be painful, especially when graphic details of violence are depicted in a public forum. Confronting

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[48] Doak, *supra* note 10, at 264.

[49] Matiangai V.S. Sirleaf, *Beyond Truth & Punishment in International Criminal Justice,* 54 VIRGINIA J. INT'L L. 223, 288 (2014). *See also* Yazir Henry, *Where Healing Begins, in* LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 166, 166-67 (Charles Villa-Vicencio & Wilhelm Verwoerd, eds., 2000) (despairing instrumental use of his testimony as "a story" by journalists, scholars, and the South African TRC without his knowledge or consent).

[50] *Id.* at 288-89.

[51] *See, e.g.,* Redress, *Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes* 59 (2008) (noting one ICTR witness's recollection that "when we were called to testify, the guards led us in a manner that […] left a lasting impression on me […] the room was so sophisticated that it would intimidate a victim of genocide. And when you are psychologically destabilised, it has a really negative impact on the way that witnesses testify. One of the women who had left with me was left so disturbed that she stammered and wasn't able to talk about things she knew in the way she wanted to").

[52] STOVER, *supra* note 16, at 81.

tormentors can re-traumatize victims and set back their recovery,[53] and questions from judges and defense counsel can make survivors feel as if they, rather than their abusers, were on trial.[54] For all of these reasons, testifying tends to "blow up" painful post-traumatic stress symptoms.[55] Moreover, survivors may suffer after testifying if they are disappointed with the outcome of the judicial process.

1. Recalling Painful Memories

Recalling trauma can itself be re-traumatizing. One study found that 65% of women interviewees who testified about rape before the ICTY or hybrid War Crimes Chamber in Bosnia and Herzegovina reported the experience as traumatic.[56] Most of the ICTY witnesses Stover interviewed found the experience disempowering and emotionally taxing, and some found it painful.[57] Michelle Staggs Kelsall and Shanee Stepakoff similarly found that rape victims at the SCSL often reported that testifying was difficult and emotionally painful.[58]

These difficulties are often compounded by performance anxiety and apprehension about the courtroom setting. Researchers reported that in the ECCC's first case:

> [M]any [civil parties] were concerned about how they would perform in the courtroom, especially when relating traumatic events and feelings, and, ultimately, how the judges and audience would perceive their testimonies. Respondents described a range of physical and emotional symptoms, including a perceived rise in blood pressure, sweaty palms and feet, trembling hands, and alternate feelings of terror and lightness immediately before entering the courtroom. [59]

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[53] Arthur J. Lurigio & Patricia A. Resick, *Healing the Psychological Wounds of Criminal Victimization: Predicting Postcrime Distress and Recovery*, in VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS 60 (Arthur J. Lurigio et al. eds., 1990); Karen Bronéus, *Truth-Telling as Talking Cure? Insecurity and Re-traumatization in the Rwandan Gacaca Courts*, 39 SECURITY DIALOGUE 55 (2008) (noting that some Rwandan women testifying in Gacaca courts "re-experienced their traumas of the genocide so strongly that they felt as though it was happening again. They saw the machetes, heard the noises, smelled the smells"); O'Connell, *supra* note 10, at 331-36.

[54] Doak, *supra* note 10, at 282.

[55] Nora Sveaass & Nils Lavik, *Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation,* 35 NORDIC J. INT'L L. 35, 41 (2000).

[56] Mischkowski and Mlinarević, *supra* note 28, at 56.

[57] *See generally* STOVER, *supra* note 16.

[58] Michelle Staggs Kelsall & Shanee Stepakoff, "*When we wanted to talk about rape": silencing sexual violence at the Social Court for Sierra Leone,* INT'L J. TRANS. JUST. 355 (2007).

[59] Stover et al., *supra* note 35, at 525. *See also* ECCC Case 001 transcript (July 9, 2009), at 50 (in which lawyers for civil party Nam Mon said she had never told her story before relating it to them shortly before the trial and was therefore "very excited, discomposed and nervous"). Judge Cartwright

Courtroom appearances mark the first time some survivors have told anyone beyond a select few about their harrowing experiences. For example, Case 002 civil party Aun Phally testified that for years he avoided telling others about the torment he suffered in Democratic Kampuchea and his enduring pain, saying "[t]oday is the first day which is a new chapter in my personal history that I reveal to the world of my suffering."[60] Some were unwilling or unable to testify,[61] while others said they could not discuss all aspects of their trauma, because "the pain [was] too great."[62]

Graphic courtroom depiction of crimes can also induce psychological stress. Seventy-year-old civil party Im Sunthy, whose husband was an S-21 victim, passed out during the testimony of another civil party in the *Duch* trial. She later explained:

> When I come to these hearings … I have visualized the brutality of the regime, and when [the testifying civil party] put the photo of the person who was seen struggling in a pool of blood, it really shocked me, because I could imagine how difficult life could have been for my husband at that time, and I could not really control my feeling at that time, and [so] I passed out. [63]

The ECCC thereafter stationed psychological support staff in the courtroom,[64] but even their presence and advance warnings of possibly disturbing material do not eliminate the risk of re-traumatization. Judges and prosecutors again face a dilemma, because the details most unsettling to trauma survivors are sometimes crucial to establishing the guilt or innocence of the accused. For example, some women's rights groups have

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replied that the ECCC had done an emotional assessment of the victims and had training in how to handle episodes of emotional distress. *Id.* at 53.

[60] ECCC Case 002 transcript (May 27, 2013), at 42. *See also* ECCC Case 001 transcript (July 9, 2009), at 93-94 (in which Case 001 civil party Chin Met explained: "I do not want to talk about my suffering to anybody or to my family members because every time I recall I suffer emotionally").

[61] *See, e.g.,* ECCC Case 002 transcript (Dec. 12, 2012), at 93 (featuring civil party Denise Affonço's statement that after being badly beaten by Khmer Rouge cadres for scavenging for wood to help his family, her son "was so traumatized that even today he doesn't want to even talk about this period. I can't bring him to testify, I can't ask him to help me testify… he can't even see scenes of people being beaten on TV without suffering").

[62] ECCC Case 002 transcript (May 27, 2013), at 18 (in which Case 002 civil party So Sotheavy recounted rape and other abuses in detail but responded to a question about her psychological harms by saying: "Words cannot be used to describe the great suffering I have had because I am an orphan now as the result of the regime. That's all I can tell"). *See also id.* at 37 (in which civil party Aun Phally described himself as having "clinical disease" due to the loss of multiple family members, broke down, and said he "could not say anything further").

[63] ECCC Case 001 transcript (Aug. 19, 2009), at 22. *See also* ECCC Case 001 transcript (June 30, 2009), at 35-36 (in which Chum Mey testified, "I cry every night. Every time I hear people talk about Khmer Rouge, it reminds me of my [deceased] wife and kids. I am like a mentally ill person now").

[64] *See infra* Part IV.

applauded the ICTR for being more explicit than previous tribunals in examining the details of rape cases.[65]

2. Confronting the Accused

Confrontations between trauma survivors and the accused present heightened risks of re-traumatization, especially when the defendant stands accused of direct responsibility for violence against the victim or his or her loved ones. Dr. Elisabeth Schauer emphasized in expert testimony at the ICC's *Lubanga* trial: "if you ask a question related to a traumatic event, you provoke the fear network[,]" which survivors may be able to control sometimes but not others, and may be exacerbated by facing a feared accused.[66] That occurred in the *Duch* trial, since almost all of the civil parties and key witnesses were survivors of S-21 or Prey Sar prison or lost a loved one there.[67] At least one potential ECCC civil party did not join the proceedings for fear of re-traumatization, as her son explained,"she does not want to face the accused."[68]

Some testifying survivors appeared intimidated by Duch, who engaged actively in the courtroom proceedings.[69] While witness Bou Thon was on the stand, Duch issued a detailed confession, apparently moved by Ms. Bou's brave testimony and obvious suffering.[70] Bou broke down while Duch was speaking, and a civil party lawyer asked the Trial Chamber to stop Duch, but the Trial Chamber refused.[71] Here, the Court's legitimate interest in obtaining Duch's full statement of responsibility and remorse cut against its interest in sparing the witness from distress—another prime example of the tension between victims' needs and the imperatives of an effective trial.

Case 002/01 featured high-ranking defendants who issued policies and commands but generally were not present when physical atrocities were committed against testifying survivors and their loved ones. Likely for that reason, confrontation with the accused did not appear to have been a

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[65] *See* Lori A. Nessel, *Rape and Recovery in Rwanda: The Viability of Local Justice Initiatives and the Availability of Surrogate State Protection for Women That Flee,* 15 MICH. ST. J. INT'L L. J. 101, 113-14 (2007).

[66] Transcript of Trial Proceedings—Lubanga Dyilo, Case No. ICC-01/04-01/06-T-166ENG, at 54, 57 (Apr. 7, 2009) (testimony of Dr. Elisabeth Schauer) [hereinafter Schauer testimony].

[67] Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶¶ 645, 648, 650 (Trial Chamber, July 26, 2010) [hereinafter Duch Trial Chamber Judgment].

[68] ECCC Case 001 transcript (Aug. 18, 2009), at 49 (including testimony from Hav Sophea, whose father was detained at S-21 and sent to the Killing Fields, and whose mother declined to be a civil party).

[69] Michelle Staggs Kelsall et al., *Lessons Learned from the 'Duch' Trial* 35 (Dec. 2009), *available at* http://socrates.berkeley.edu/~warcrime/documents/Lessons%20Learned%20from%20the%20Duch%20Trial_MRSK_FINAL.pdf.

[70] ECCC Case 001 transcript (Aug. 12, 2009), at 46-47.

[71] *Id.* at 46-50.

major cause for re-traumatization. Still, some victims found the experience unsettling,[72] showing that the psychological challenges of testifying do not occur only when a trauma survivor's tormentor sits across the courtroom.

3. Facing Judicial Challenges and Cross-Examination

Appearing in a formal judicial setting and facing queries from robed judges and lawyers can intimidate even experienced witnesses. The fear such an appearance can instill in trauma survivors is considerable, especially since many lack previous courtroom experience, have limited legal knowledge, and are testifying about deeply personal and painful experiences, often for the first time in a public setting.

Lengthy, aggressive, and repetitive cross-examination pose particular concerns, both for re-traumatization and for the interests of a fair and speedy trial. Some studies also suggest that repetitive questioning can lead to inaccurate testimony by disconcerting or exhausting a trauma survivor.[73] International and hybrid criminal tribunals have acknowledged this possibility. For example, in the *Nsabimana* case, the ICTR denied the defendant's motion for a separate trial and affirmed the appropriateness of a joint trial to increase efficiency and "avoid the unnecessary pressure and trauma caused to victims and other witnesses who may be repeatedly called upon to testify in separate trials."[74] Prosecutors and defense attorneys have also invoked the risk of re-traumatization to demand special arrangements for certain witnesses or keep them from being recalled.[75] Similar concerns prompted an ECCC defense lawyer to object to the prosecution's repetitive questions of survivor Denise Affonço, asserting that "we're not learning anything new and we're just re-traumatizing a traumatized witness."[76]

The need for a fair and efficient judicial process inevitably leads to questions, challenges, interruptions, and limits on the testimony that a survivor provides. As Dembour and Haslam argue, "judicial 'effectiveness'

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[72] *See, e.g.,* notes 62 and 335-336 and accompanying text.

[73] *See, e.g.,* Annie Cossins, *Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?* 33 MELBOURNE L. REV. 68 (2009).

[74] Prosecutor v. Nsabimana, ICTR-97-29A-T, Decision of the Defense Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana, ¶ 42 (Trial Chamber, Sept. 8, 2000).

[75] Such requests have had limited success. In the ICTR *Ntahobali* case, the prosecutor argued that questioning of two inconsistent witnesses on recall "should be very limited to avoid any further trauma." Without explicitly mentioning trauma, the Trial Chamber agreed to limit the questioning. Prosecutor v. Ntahobali, ICTR-97-21-T, Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Prosecution Witnesses QY, SJ, and Others, ¶15 (Trial Chamber II, Dec. 3, 2008). In the *Bagosora* case, the ICTY Trial Chamber denied one witness's request to provide videoconference testimony partly on the basis of her past trauma. Prosecutor v. Bagosora, ICTR-98-41-T, Decision on Ntabakuze Motion to Allow Witness SK52 to Give Testimony by Video-Conference, ¶¶ 2 & 5 (Trial Chamber I, Feb. 22, 2005).

[76] ECCC Case 002 transcript (Dec. 12, 2012), at 113.

may mean for [survivors] that significant events and emotions are glossed over."[77] Staggs Kelsall and Stepakoff found that rape victims at the SCSL often felt that their stories had been stifled by the demands of the criminal process.[78] At the ECCC, judges have repeatedly cautioned witnesses and civil parties not to go beyond the questions asked, both for reasons of efficiency and in the interest of upholding the rights of the accused.[79] This problem of stifling victim accounts is not confined to criminal courts. When the Amnesty Committee of South Africa's TRC adopted legalistic procedural measures to respect the rights of amnesty applications and forestall judicial challenges, victims found their scope for testimony reduced and complained that the process undermined the TRC's victim-centric intent.[80]

Challenges to victims' truthfulness can evoke further anguish,[81] even when those challenges comport with due process norms. For example, during the *Duch* trial, ECCC defense counsel unsettled one civil party by reminding her twice of her oath to speak the truth and demanding to know why the number of siblings she mentioned in oral testimony differed from the account in her written complaint.[82] Victim witnesses also have reported feeling attacked when asked repetitive questions about sexual violence.[83] Yet such challenges are often necessary to adjudicate alleged crimes faithfully, especially since international and hybrid courts typically address alleged crimes in conflict-torn societies where documentary proof of witnesses' identities and experiences is scarce. Even at truth commissions, public hearings can be adversarial,[84] raising the risk of re-traumatizing witnesses whose accounts are challenged.

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[77] Dembour & Haslam, *supra* note 25, at 159.

[78] Kelsall & Stepakoff, *supra* note 58.

[79] *See, e.g.,* ECCC Case 002 transcript (Feb. 7, 2013), at 31. *See also id.* at 67 (in which defense lawyer Michael Kanavas tells Pin "I don't mean to be rude, but my questions are rather specific, and so if I want […] further explanations, I will ask you").

[80] Louise Mallinder & Kieran McEvoy, *Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies*, 6 CONTEMP. SOC. SCI. 107, 121-22 (2011). The testimony of witnesses at truth commissions is also constricted by the temporal scope of the process. *See, e.g.,* Wachira & Kumunge, *supra* note 39, at 6.

[81] O'Connell, *supra* note 10, at 334 (arguing that such challenges may "exacerbate their loneliness, alienation, confusion about what happened, and sense that they might be responsible for the horrors that befell them").

[82] ECCC Case 001 transcript (July 13, 2009), at 61-62. The civil party, who had previously required courtroom support from counselors working with the ECCC, explained that one younger brother was in fact a god-brother. *Id.* at 62.

[83] *See, e.g.,* Binaifer Nowrojee, *Your Justice Is Too Slow*, United Nations Research Institute for Social Development, at 23 (Nov. 2005); FIDH, *Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda*, at 8-9 (Nov. 2002) (describing distress caused by repetitive questioning).

[84] *See, e.g.,* Wachira & Kumunge, *supra* note 39, at 6. For example, commissioners at the Liberian Truth and Reconciliation Commission reportedly questioned victims with a "shrill' tone and tended "to subject victims to more probing examination, as in actual trials, than they do alleged perpetrators[.]" Lansana Gberie, *Briefing: Truth and Justice on Trial in Liberia*, 107 AFR. AFF. 455, 459 (2008).

ECCC defense lawyers often have challenged victims' accounts based on a lack of corroborating evidence. In the *Duch* trial, survivors faced added challenges from the defendant himself. Duch compiled the S-21 archival records that formed the main source of documentary evidence for the trial and demonstrated close familiarity with their contents.[85] During the testimony of civil party Norng Chanphal, a former child detainee at S-21, Duch admitted that Norng's mother and siblings had suffered but doubted that they had been detained at S-21, because no documents were filed establishing their detention there.[86] Only later, after the prosecution submitted the S-21 biography of Chanphal's mother into evidence, did Duch accept that the document "belongs to the S-21" and acknowledge the handwriting.[87]

The most serious challenge to the veracity of survivor testimony arguably came from the Trial Chamber itself. In the *Duch* trial verdict, the judges rejected the claims of two civil parties who asserted that they had been detained and tortured at S-21. Pointing to confused testimony and a lack of corroborating documentary evidence, the judges ruled that the individuals in question had not proven that they were harmed as a result of Duch's actions and were not entitled to status as civil parties.[88] Several survivors who claimed to have lost relatives at S-21 were likewise denied recognition on this basis.[89]

The Transcultural Psychosocial Organization found that the day after the verdict reading, civil parties who were rejected "reacted with intense emotional distress" and viewed it as shameful and a personal failure "as they could not fulfill the felt obligation to seek justice for the spirits of their relatives."[90] One rejected survivor said:

> I feel so exhausted. I feel pain in my head, in my chest. I feel so much ashamed. I am here to find justice for my

[85] *See, e.g.,* ECCC Case 001 transcript (May 26, 2009), at 37 (in which Duch references an S-21 confession document to challenge a factual assertion by expert witness); *id.* at 52-58 (in which he walks the court through a 1976 document to argue that he did not make the decision to kill a particular group of 29 people).

[86] Duch did acknowledge that Norng Chanphal's father "suffered and died [at S-21]" based on documentary records presented at trial. ECCC Case 001 transcript (July 2, 2009), at 87.

[87] ECCC Case 001 transcript (July 8, 2009), at 4. Duch then offered his apology, "[T]hrough this Court I would like to seek forgiveness from Mr. Norng Chanphal because [before] I did not have the document and I would not accept it, but now I would accept it entirely." *Id.* at 5.

[88] Duch Trial Chamber Judgment, *supra* note 67, ¶647.

[89] *Id.* ¶¶ 648-649. Of the twenty-four civil party applicants rejected at the end of trial, eighteen were excluded at least in part due to a lack of documentation.

[90] Transcultural Psychosocial Organization, Report on TPO's After-Verdict Intervention with Case 001 Civil Parties, 27 July 2010, § 2.

> mother, who was killed at S-21… [I]nside there is a lot of pain.[91]

With their expectations disappointed, some survivors suffered renewed injury, undercutting any therapeutic benefits of testifying. [92]

4. Enduring Disappointment

The longer-term effects of testifying are clearly contingent on victims' broader experiences with the transitional justice process. Numerous studies have found that victims who testify at truth commissions often suffer disappointment when they receive no reparations or when the commissions' policy recommendations are not adopted.[93] Similarly, when criminal courts deliver undesired verdicts or sentences or meager awards, survivors who participated in the process suffer. Victims often summon the strength to endure the difficult process of testifying because they hope and expect justice to be done. Many express a sense of obligation toward lost loved ones. These hopes and expectations leave survivors vulnerable if trial outcomes do not satisfy their senses of justice.

The ECCC offers numerous examples. A Case 001 witness initially struggled to testify about her experiences at the S-21 and Prey Sar detention centers but returned a few days later, saying: "I tried to make myself strong in order to find justice for my parents, my siblings[,] and my uncles today."[94] Case 002/01 civil party Thouch Phandarasar expressed a similar sense of moral burden:

> [M]y parents died in a way that there are no words to describe; thrown into the ditch naked. … I retain a terrible

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[91] *Id.* The pain went beyond those rejected. A Case 002 civil party applicant expressed apprehension about his future participation, saying: "We lost all evidence, because the prisons were destroyed right after the regime […] We were so painful, but now we are painful again. I am suffering; I feel so much pain." *Id. See also* Charles Trumbull IV, *The Victims of Victim Participation in International Proceedings*, 29 MICH. J. INT'L L. 777, 810 n.224 (2008) (highlighting the risk that victims with applications rejected on technical grounds will feel that they are being accused of untruthfulness or lack of injury).

[92] Harry Hobbs, *Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice,* 49 TEXAS INT'L L. J. 1, 11 (2014). *See also* Stover et al., *supra* note 35, at 537-40.

[93] *See* Rosalind Shaw, *Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone,* 1 INT'L J. TRANS. JUST. 183, 202-06 (2007) (noting that survivors believed testifying would help them heal as part of a reciprocal arrangement whereby participation would help them access other forms of humanitarian and development assistance); Gearoid Miller, *Assessing Local Experiences of Truth-Telling in Sierra Leone: Getting to "Why" through a Qualitative Case Study Analysis,* 4 INT'L J. TRANS. JUST. 477, 490-94 (2010) (finding that local elites who testified in Sierra Leone's TRC reported therapeutic gains, largely due to their better social situation and access to aid, while poorer victims reported little therapeutic payoff).

[94] ECCC Case 001 transcript (July 13, 2009), at 48-49. Witness Bou Thon likewise emphasized that she came "to find justice for my husband and my children." ECCC Case 001 transcript (Aug. 12, 2009), at 26.

> feeling of guilt about this; not having been able to save my parents. If I was perhaps a little braver I might have been able to feed them, bring them some rice or something. You never erase memories like that and that's why I'm here to ask this Court for justice. To give the deceased back their souls so they may live in peace because, right now, I know their souls are lost between the living and the dead and if there is justice that would be an honour to them. That's why I want to come to Court for justice and not just for them; for the two million other Cambodians who disappeared thanks to that Khmer Rouge regime. [95]

Many testifying survivors expressed a sense of anxiety and ardent hope that justice would be done.[96] Some civil parties also requested reparation awards that would help ease their mental anguish. For example, Case 002 civil party Pech Srey Phal requested "a medical center for the victims" and a stupa where victims could "find peace within ourselves."[97]

When the trial verdict was issued, many Case 001 civil parties were dismayed by Duch's sentence of a mere 35 years,[98] as well as the finding that the defendant was indigent and the decision to award only token reparations.[99] Civil party Chum Mey said: "We are victims two times, once in the Khmer Rouge time and once now again."[100] Some civil parties expressed similar disappointment after the verdict in Case 002/01. The court sentenced the defendants to life in prison and approved 11 diverse NGO-led reparations projects as part of a new reparations scheme put in place after Case 001, but approximately 200 civil parties organized a

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[95] ECCC Case 002 transcript (May 29, 2013), at 13.

[96] *See, e.g., id.* at 82 (including civil party Huo Chantha's assertion that despite suffering from a "psychiatric problem," "I tried my best…to be on my feet today…to find justice for my parents, my relatives, my grand-parents, uncles and aunts.... I am so excited that I am given the opportunity by this International Court [...] this is the day that I have been waiting for more than 30 years with anxiety." *See also* ECCC Case 002 transcript (Feb. 7, 2013), at 107 (in which civil party Pin Yathay said that if justice were done, victims would be "relieved greatly" and "[a]ll the bad memories, angers, sorrow, would gradually dissipate from our mind and feeling").

[97] *See, e.g.,* ECCC Case 002 transcript (Dec. 5, 2012), at 75-76.

[98] The Trial Chamber gave Duch a term sentence partly to be able to offer a meaningful remedy for his unlawful pre-trial detention for several years by the Cambodian government. *See* CIORCIARI & HEINDEL, *supra* note 1, at 121-28 (discussing the Trial Chamber's reasoning and the appellate chamber's subsequent decision to raise the sentence to life imprisonment).

[99] Duch Trial Chamber Judgment, *supra* note 67, ¶¶ 664-75; Dacil Keo, *Disarray and Disappointment after Duch Verdict*, in THE DUCH VERDICT (Doc. Ctr. Of Cambodia, 2010), at 95-96, *available at* http://www.dccam.org/Projects/Living_Doc/pdf/The_Duch_Verdict-A_DC-Cam_Report_from_the_ Villages.pdf. The judges amended the rules on reparation for the Court's second case, enabling the Trial Chamber to recognize specific projects designed in cooperation with the Victim Support Section and with sufficient external funding. ECCC Internal Rules, *supra* note 2, R. 23*quinquies*(3)(b).

[100] Seth Mydans, *Anger in Cambodia over Khmer Rouge Sentence,* N.Y. TIMES, July 26, 2010.

protest, arguing that the reparations projects were inadequate and demanding compensation. Civil party Chim Sim said:

> [Without compensation] it means nothing to proceed to the next trial because the verdict will be the same. We will get nothing except becoming traumatized—psychological and emotional hurt deep inside our bodies. [101]

These experiences demonstrate that the after-effects of a survivor's testimony are closely linked to his or her broader experience with the judicial process. Disappointment with the results of a trial tends to magnify the painfulness of testifying and to undercut any therapeutic benefits of courtroom testimony.[102] That risk of dashed expectations may be especially high for victims granted civil party status, which encourages added personal investment in the process.[103] This reinforces the inherent difficulty of protecting trauma survivors from pain while engaging them as necessary players in a fair trial process.

Many potential causes of re-traumatization, such as recalling painful memories or disappointment with a judicial result, are inseparable from the experience of testifying or the nature of the legal process. Others, such as the manner in which confrontations with the accused take place and cross-examinations are conducted, are subject to judicial control and potentially ameliorating procedures. Indeed, a supportive testimonial environment might reduce the potential for long-term victim disappointment in the legal outcome. However, as discussed *infra*, because the reliability of all testimony used for evidentiary purposes must be tested, victim-centric approaches can collide with the need to ensure a fair judicial process.

III. EFFECTS ON THE JUDICIAL PROCESS

Just as courtroom testimony can affect victims' psychological well-being, trauma can affect survivors' testimony and thus their contribution to the proceedings. Survivor testimony is often crucial to building the case against the accused, but victim-witnesses may have selective recall or have difficulty imparting facts accurately and concisely. Revisiting traumatic

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[101] Kuch Naren & Holly Robertson, *Victims Call from Money from ECCC,* CAMBODIA DAILY, Oct. 17, 2014.

[102] Harry Hobbs, *Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice,* 49 TEXAS INT'L L. J. 1, 11 (2014).

[103] The ECCC Supreme Court Chamber recognized this possibility in Case 001, noting that the denial of some civil party applications at judgment had "caused anguish and frustration at the futility of their practical and emotional investment in the proceedings." Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/SCC, Appeal Judgement, ¶ 501 (Supreme Court Chamber, Feb. 3, 2012).

memories may lead them to become confused, speak incoherently, veer from topics relevant to the charges, and raise personally significant but potentially prejudicial matters. They frequently (and understandably) break down and sometimes express anger or make accusations against the defendant. This section discusses both the contributions victim testimony makes to the proceedings and the challenges it presents for evidentiary reliability, efficiency, and impartiality.

A. The Value of Victims' Testimonies

All transitional justice proceedings rely extensively, if not primarily, on information provided by victim-witness accounts to accomplish their mandates.[104] Judge Patricia Wald has called victim-witnesses "the soul of war crimes trials at the ICTY."[105] Victim testimony has contributed to international criminal proceedings in at least three important respects: providing direct evidence of crimes; providing insight into the local cultural context, including both why particular acts were committed against particular groups and the full spectrum of harm suffered by victims; and providing evidence of marginalized or otherwise overlooked crimes, in particular sexual violence.

1. Eyewitness Evidence

Most obviously, victims can provide eyewitness testimony that directly implicates an accused or contributes to a pattern of evidence proving the existence of criminal policies. In theory, "[v]ictims will clearly be best placed to describe the actual commission of crimes, and may be able to give a more personal perspective on the events as presented by the Prosecutor."[106] For example, where a man witnessed his wife's rape and murder, the ICTR found him credible and his account reliable without corroboration, "because he was an eyewitness and the circumstances of the events were peculiar, in particular, the relationship between the witness and the victim[.]"[107] Nevertheless, because eyewitness identification is not

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[104] *See, e.g.,* Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: Truth Commissions (2006) at 17 (noting the dependence of truth commissions on victim-witness accounts).

[105] Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L & POL'Y 87, 107 (2001) (noting the lack of a paper trail and the need for "[a] parade of victim-witnesses" to be mobilized to refute accused's defenses that they were low-level actors or not present at the events at issue).

[106] Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings at the ICC*, 4 J. INT'L CRIM. JUST. 219, 226 (2006).

[107] Prosecutor v. Gacumbtsi, Case No. ICTR-2001-64-T, Judgment, ¶ 218 (Trial Chamber III, June 17, 2004).

only "impressive" and "persuasive" but also "notoriously uncertain[,]"[108] courts generally place greater weight on corroborated accounts. For example, in the *Furundžija* case, the ICTY trial chamber noted that a key witness had testified in a convincing manner and made clear that "she was testifying to the best of her recollection, that the evidence she gave was the way she, as the person who endured these events, saw them happen."[109] Although under the court's rules her sexual assault identification required no corroboration, the chamber highlighted the fact that her account was confirmed in part by other witnesses.[110]

Eyewitness accounts can also furnish details indicating that crimes took place as part of a larger practice or policy.[111] Thus, at the ICTY, one victim wanted to testify about rape "to prove that rape was 'a strategy that was not only going on in the camp where they took [her] to, but also in other places, other camps, prisons and so on'."[112] Similarly, at the ECCC, a victim who had been sent to work in two different locations was able to testify to the fact that in both places "[t]he situation and the conditions were the same, that is, hard labour and insufficient food," which led him to believe that they derived from "one same policy."[113] This function is comparable to witness contributions at many truth commissions, which instead of focusing on individual cases typically seek "to understand

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[108] Prosecutor v. Kunarac et al., Case No. IT-96-23-t & IT-96-23/1-T, Decision on Motion for Acquittal, ¶ 8 (Trial Chamber, July 3, 2000) (noting variables including "the difficulty one has in recognizing on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed"). *See also* Prosecutor v. Kupreškić et al., Case No. IT-95-16-A, Appeals Judgment, ¶ 138 (Appeals Chamber, Oct. 23, 2001) ("Even witnesses who are very sincere, honest and convinced about their identification are very often wrong.").

[109] Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 116 (Trial Chamber, Dec. 10, 1998) [hereinafter Furundžija Judgment].

[110] *Id.* ICTY Rule 96(i) affirmatively rejects this requirement in sexual assault cases. *Cf.* Prosecutor v. Kunarac et al., Case No. IT-96-23-t & IT-96-23/1-T, Judgment, ¶¶ 561-62 (Trial Chamber II, Feb. 22, 2001) (seeking corroboration of identification evidence by a rape victim, noting that "the true issue" was not whether the witness of a crime in "turbulent and often traumatizing circumstances" is making an honest identification, but whether he or she is making a reliable one). Reliability concerns and eyewitness testimony is discussed in detail *infra*.

[111] *See, e.g.,* Salvatore Zappalà, *The Rights of Victims v. the Rights of the Accused*, J. INT'L CRIM. JUST., 137, 156 (2010) (noting that first-hand victim accounts can be "very useful" for this purpose). *See also* Prosecutor v. Nuon Chea et al., Case No. 002/19-09-2007-ECCC/TC, Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party Lists for Case 002/02 with Confidential Annexes, ¶ 9 (Trial Chamber, May 9, 2014) (including the view of civil party lawyers in Case 002/02 that their clients' evidentiary testimony "would substantially assist" the trial chamber, especially in "establishing the crime base evidence").

[112] Mischkowski & Mlinarevic, *supra* note 28, at 52.

[113] ECCC Case 002 transcript (June 4, 2013), at 114 (testimony of civil party Seng Sivutha).

comprehensively root causes, circumstances, factors, context and motives of countrywide situations of … violence."[114]

However, courtroom testimony establishing broad patterns of crime does not always assist greatly in ascertaining the culpability of specific accused, and it can re-traumatize victims and introduce legally irrelevant graphic details that "shock the heart[,]"[115] potentially prejudicing the proceedings. Dembour and Haslam note that in the ICTY's *Krstić* trial, victim-witnesses who testifyied about the fall of Srebrenica provided information about the atrocities they observed but rarely mentioned the accused. Dembour and Haslam question why victims were asked to contribute to a generally uncontested factual history, especially if their testimonial experience was "an ordeal rather than an empowering process."[116] This problem also arose in the SCSL's *Civil Defence Forces (CDF)* case. Seven victims felt "intense disappointment" when they were forbidden to speak about uncharged acts of sexual violence crimes but asked to testify about other types of violence they witnessed—testimony that ultimately did not help the trial chamber determine the culpability of the accused.[117] Significantly, the UN Office of the High Commissioner for Human Rights finds that the opportunity to contribute facts only to a "global truth, a description of patterns" will "often" disappoint victim-witnesses at truth commissions, as they "usually" have provided testimony "with the hope that their own case would be solved."[118]

2. Evidence of Local Context and Specific Harms Suffered by a Class of Victims

Victims can also offer contextual information to help a court "better understand the contentious issues of the case in light of [victims'] local knowledge and socio-cultural background."[119] For example, victims participating in the *Lubanga* trial were said to have "played an important

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[114] *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff*, ¶ 40, UN Doc. A/HRC/24/42 (Aug. 28, 2013).

[115] Dembour & Haslam, *supra* note 25, at 168.

[116] *Id.* at 167.

[117] Staggs Kelsall & Stepakoff, *supra* note 58, at 372. *See* Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Judgment, ¶¶ 923, 930, 932 (Trial Chamber I, Aug. 2, 2007) (offering facts not clearly falling within the time frame of the indictment or proof that the accused were responsible for the criminal acts committed).

[118] OHCHR, Rule-of-Law Tools for Post-Conflict States: Truth Commissions, *supra* note 104, at 20.

[119] Katanga & Ngudjolo, Case No. ICC-01/04-01/07-1665, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, ¶ 82 (Trial Chamber II, Nov. 20, 2009). *See also* VRWG, The Importance of Victim Participation, Submission to the Hague Working Group of the Assembly of States Parties (July 8, 2013), at 1 (citation deleted), *at* http://www.vrwg.org/VRWG_DOC/2013_July_VRWG_HWG_ParticipationFINALrevised.pdf (emphasizing that "victims who participate in proceedings can bring to the attention of the Judges important factual and cultural elements that assist the Chambers to understand the context in which crimes took place").

role in clarifying the use of first and second names in the DRC[.]"[120] A related example arose at the ECCC, where victims in Case 002/01 testified that the word "smash" meant "to kill."[121]

Victims are also able to explain the physical and emotional impact they and others suffered as a result of the crimes charged. Such evidence helps courts impose an appropriate sentence and provides a basis for determining appropriate reparations. At the ICC, which allows victims not called by the parties to participate and receive reparations, the chambers have found oral victim participant testimony particularly useful when it describes crimes affecting a class of victims. For example, trial chamber judges allowed a man to testify about witnessing his mother's murder despite concluding that his evidence would likely be cumulative of other witness testimony on murders in the same area, because his harm was "representative of the harm suffered by a significant number of victims."[122]

The ECCC has created two procedures that have opened space for civil parties to describe representative crimes and their impact: speaking at special victim impact hearings, and offering "statements of suffering" that may address the full scope of their mental and physical harm, even if it arises from events outside the charged crimes.[123] According to civil party lawyers, these opportunities help the court assess the gravity of the crimes and also "express grief and suffering on behalf of all victims."[124] However, the benefits to the court from hearing about harms outside the scope of the charges are not clear and raise bias concerns, as discussed *infra.*

3. Evidence of Additional Crimes

Finally, victim testimony can provide evidence of overlooked or traditionally marginalized crimes. In the first ICTR trial, crimes of sexual

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[120] Brianne McGonigle Leyh, *Victim-Oriented Measures at International Criminal Institutions: Participation and Its Pitfalls*, 12 INT'L CRIM. L. REV. 375, 395 (2012). *Cf.* ECCC Case 002 transcript (Nov. 22, 2012), at 52 (civil party testimony explaining that "people from different province of Kampuchea Krom [a minority allegedly targeted by the Khmer Rouge] would have different family name and they can be identified according to these different identification").

[121] *See, e.g.,* ECCC Case 002 transcript (Dec. 5, 2012), at 51 (testimony of civil party Pech Srey Phal).

[122] Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Supplemented Applications by the Legal Representative of Victims to Present Evidence and the Views and Concerns of Victims, ¶¶ 50-54 (Trial Chamber III, Feb. 22, 2012).

[123] *See* Prosecutor v. Nuon Chea et al., Case No. 002/19-09-2007-ECCC-TC, Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure Concerning Civil Parties' Statements on Suffering and Related Motions and Responses (E240, E240/1, E250, E250/1, E267, E267/1 and E267/2), ¶¶ 14-17 (Trial Chamber, May 2, 2013) [hereinafter Decision on Request to Recall].

[124] Decision on Request to Recall, *supra* note 123, ¶¶ 3-4. *Cf.* Prosecutor v. Nuon Chea et al., Case No. 002/19-09-2007-ECCC/TC, Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party Lists for Case 002/02 with Confidential Annexes, ¶ 9 (Trial Chamber, May 9, 2014) (arguing that the evidence provided by civil parties will assist the trial chamber "to assess the gravity of the alleged crimes and the harm endured by civil parties).

violence were added to the indictment only after a witness testified about the rape of her daughter and other young girls, and another witness testified about her and other women's rapes, all in the vicinity or presence of the accused.[125] According to the prosecution, the testimony "motivated them to renew their investigation of sexual violence," acknowledging that charges had not been previously brought due to a lack of evidence caused in part by "insensitivity in the investigation of sexual violence."[126] Based on the testimony of numerous victims, the accused was convicted of the crimes against humanity of rape and other inhumane acts, and in an historic first, the underlying acts of sexual violence were also found to constitute genocide.[127]

At the ECCC, civil party evidence both within and outside of court catalyzed supplementary investigations of forced marriage (and rape within that context) in Cases 002-004, a supplementary investigation of rape outside of forced marriage in case 004, and charges of forced marriage (and rape within that context) in the court's centerpiece Case 002.[128] Civil party evidence also led the international prosecutor to request investigation of crimes against the historically marginalized Khmer Krom minority.[129]

For all these reasons, victim testimony is essential to the judicial process. International and hybrid courts rely on it extensively to fulfill their mandates. However, not all victim testimony contributes equally to the primary ends of the trial process: verdict, sentence, and reparations. The value of judicial procedures that incorporate victim narratives must be assessed, first and foremost, on their ability to contribute directly to these core objectives. This focus is justified not only by fair trial obligations, but also by the high potential for victim re-traumatization in a courtroom setting.

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[125] *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Leave to Amend the Indictment (Trial Chamber 1, June 17, 1997); Prosecutor v. Akayesu, Case No. ICTR-96-40-T, Judgment, ¶¶ 416-17 (Trial Chamber I, Sept. 2, 1998).

[126] Akayesu Judgment, *supra* note 125, ¶ 417.

[127] *Id.* ¶¶ 731-34. *But see, e.g.,* Heidi Nichols Haddad, *Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals*, 12 HUM. RTS. REV. 109, 110 (2011) (noting that "rape was not a central focus of the ICTR prosecution strategy," and the *Akayesu* achievement was not the norm).

[128] *See generally* Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations, Case No. 002/19-9-2007-ECCC/OCIJ (Dec. 18, 2009); Press Release, Statement by the International Co-Prosecutor Nicolas Koumjian Regarding Case File 003 (Nov. 4, 2014); Press Release, Statement by the International Co-Prosecutor Nicholas Koumjian Regarding Case File 004 (Apr. 24, 2014).

[129] *See* Press Release, Statement by the International Co-Prosecutor Regarding Case File 004 (June 16, 2011); John Ciorciari, *The Khmer Krom and the Khmer Rouge Trials* (Aug. 2008), *at* http://www.d.dccam.org/Tribunal/Documents/pdf/Summer_Assn_John_KRT_Khmer_Krom.pdf. (discussing Khmer Rouge abuses against the Khmer Krom).

B. The Possibility of Unreliable Testimony

Because victims' testimony provides indispensable evidence for international criminal judgments, their reliability as witnesses is an abiding concern. Assessing reliability is a key function for all criminal courts—requiring judges to evaluate witnesses' veracity and the likely accuracy of their original perceptions and memories.[130] Trauma can contribute to doubts about reliability if it impairs a victims' memory or undermines the consistency or coherence of his or her testimony.

1. The Impact of Trauma on the Reliability of Recall

All memory is fragile and incomplete.[131] Recall is selective and vulnerable to taint, including from the phrasing of questions and from refashioning over time.[132] Concerns about the fallibility of memory are heightened when trauma survivors take the stand. It seems intuitive that if a witness is traumatized, then his or her recollections will be more susceptible to fragmentation and error. Scientific research suggests that victims of severe trauma can experience significant memory impairment.[133] Some experts say this results in a higher than normal level of inconsistent and unreliable recall: "[T]he more trauma, the worse the memory."[134] At the ECCC, civil party Chin Met suggested as much when she said, "Emotionally I am more forgetful now. I remember less at present . . . sometimes I [have been] blamed that because I think of the Khmer Rouge past a lot that's why I am now more forgetful."[135]

Other experts assert that traumatized witnesses retain the capacity to recall information vividly, but the more traumatized they are, the more painful and difficult they find it to offer detailed chronological accounts of

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[130] The ICTY distinguishes between credibility (truthfulness) and reliability in this way. *See* Prosecutor v. Kunarac et al., Case No. IT-96-23-t & IT-96-23/1-T, Decision on Motion for Acquittal, ¶ 7 (Trial Chamber, July 3, 2000); MARK KLAMBERG, EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS 172-77 (2013)

[131] *See, e.g.,* Schauer testimony, *supra* note 66, at 54. *See also* Laura Beil, *The Certainty of Memory Has Its Day in Court*, N.Y. TIMES, Nov. 28, 2011.

[132] *See generally* Beil, *supra* note 131. *See also* Stephen Porter et al., *Memory for Murder: A Psychological Perspective on Dissociative Amnesia in Legal* Contexts, INT'L J. L. & PSYCHIATRY, 23, 33 (2001) ("Research has consistently found that emotional stress narrows attention such that a witness tends to focus on the central details of an emotional experience rather than peripheral details."). *See also* Prosecutor v. Kupreškić et al., Case No. IT-95-16-A, Appeals Judgment, ¶¶ 191-201 (Appeals Chamber, Oct. 23, 2001) (noting that witness reliability may be influenced by intra-family interactions over time).

[133] *See* Julia A. Golier, Rachel Yehuda, & Steven Southwick, *Memory and Posttraumatic Stress Disorder*, *in* TRAUMA AND MEMORY: CLINICAL AND LEGAL CONTROVERSIES 225-42 (Paul S. Applebaum, Lisa A. Uyehara, & Mark R. Elin, eds. 1999).

[134] Furundžija Judgment, *supra* note 109, ¶¶ 102-03 (recounting the testimony of experts for the defense).

[135] ECCC Case 001 transcript (July 8, 2009), at 93-94 (not specifying whether her impairment related to short-term memory loss or memories from the DK era).

their experiences as required for court hearings.[136] An ICTR investigator has similarly noted the tension between the parties' need to establish "a timeline of atrocities," and witnesses' problems "remembering the chronology of their suffering" when their exposure to atrocity was not an isolated instance but occurred repeatedly over a period of time.[137] Paradoxically, victims' "heightened memories" of traumatic events may sometimes increase their reliability as witnesses[138] while reducing their ability to explain what happened in an accurate and credible manner. The result can be a courtroom exchange that casts doubt on the victim's credibility. Incongruent testimony raises the risk of errant verdicts and complicates the effort to arrive at a definitive truth about episodes of mass atrocity.

The impact of trauma on the accuracy of witness testimony has been raised at all mass crimes tribunals. Traumatized witness testimony inevitably generates reliability concerns, and many judges and prosecutors view trauma as "an obstacle for 'getting the facts'."[139] However, similar memory and consistency problems arise for all fact witnesses,[140] and international courts have not presupposed that the testimony of victims has reduced value.[141] The principle that trauma does not necessarily render

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[136] *See* Elisabeth Schauer, The Psychological Impact of Child Soldiering, Vivo International, at 35, 37, ICC-01/04/01/06-1729-Anx1 (Feb. 25, 2009); Schauer testimony, *supra* note 66, at 56 (discussing traumatized witnesses and specifically former child soldiers). *Cf.* Bessel A. van der Kolk, *Trauma and Memory*, 52 PSYCHIATRY & CLINICAL NEUROSCIENCES S97 (1998) (noting that victims sometimes experience vivid flashbacks but have difficulty articulating what they are thinking and feeling); ECCC Case 002 transcript (Dec. 6, 2012), at 28 (with civil party Kim Vanndy saying, "Every time I think of [the suffering and deaths in his family under the Khmer Rouge], it seems so vivid, living in front of my eyes and it makes me so angry").

[137] Jonneke Koomen, *"Without These Women, the Tribunal Cannot Do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda*, 38 SIGNS 253, 267 (2013).

[138] Prosecutor v. Furundžija, Case No. IT-95-17/1, Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of July 16, 1998, Requesting that the Tribunal Reconsider Its Decision Having Regard to the Rights of Witness "A" to Equality, Privacy and Security of the Person, and to Representation by Counsel [hereinafter Furundžija Amicus Brief], ¶ 32. *See also* Porter et al., *supra* note 132, at 32 (noting a study finding that Nazi concentration camp survivors "generally had highly accurate, detailed memories that were resistant to misinformation … more than 40 years after they had first testified in Nuremberg" and that "[f]or the most part, their memories for the brutal violence they had experienced and witnessed corresponded closely with their original testimony").

[139] Mischkowski & Mlinarevic, *supra* note 28, at 66. This is particularly true with regard to rape and torture survivors, who are perceived as "the most vulnerable" categories of witnesses. *Id.* at 65, 68.

[140] *See generally* Nancy Amoury Combs, *Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials*, 14 UCLA J. INT'L L. & FOREIGN AFF. 235, 235, 251-59 (2009) (reviewing all SCSL transcripts and a "handful" of ICTR cases, finding that "approximately 50 per-cent of the witnesses testified seriously inconsistently with their past statements," and attributing this to poor education, never being taught how to measure time or distance, cultural factors, interpretation challenges, poor memory and perception, and lying).

[141] *See, e.g.,* Prosecutor v. Gacumbtsi, Case No. ICTR-2001-64-T, Judgment, ¶ 220 (Trial Chamber III, June 17, 2004). *See also* Prosecutor v. Kunarac et al, Case No IT-96-23/1-A, Judgment, ¶ 324 (Appeals Chamber, June 12, 2002) (stating that "there is no recognized rule of evidence that traumatic circumstances necessarily render a witness's evidence unreliable"); Furundžija Judgment,

witness testimony less reliable supports victims and the institutional interests of international and hybrid courts, which rely heavily on victim evidence in their judgments.[142]

Of course, the effects of trauma on testimony vary according to victims' constitution, what they have endured, and the post-trauma support they have received.[143] Bearing this in mind, even when traumatized witnesses are confident and clear in their responses, a court may not find their account reliable. Thus the ICTY appeals chamber, noting the weight the lower chamber had placed on the demeanor of a witness, cautioned, "[V]ery often, a confident demeanour is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy."[144]

2. Assessing Factual Inconsistencies

Factual inconsistencies often arise between earlier and later statements of one witness or between two different witness accounts. At truth commissions, although the accuracy of victim recall is "frequently in dispute[,]"[145] there is reduced institutional concern with verifying the reliability of individual testimonies, as the aim of the process is not to establish truth beyond a reasonable doubt in specific cases, but to construct a larger social truth through "a contested and debated process" that "narrow[s] the range of permissible lies."[146] Lacking the focus of a charging indictment, truth commission testimony may be even more susceptible to reliability problems.[147] However, each witness's impact on a

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supra note 109, ¶ 109 (ruled that "even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given").

142 *See, e.g.,* M. Cherif Bassiouni, *Enslavement: Slavery, Slave-Related Practices, and Trafficking in Persons for Sexual Exploitation, in* 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 586 (M. Cherif Bassionui ed., 2002) (noting increased reliance on witnesses as a "central source of evidence in international criminal trials"); Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal,* 5 YALE HUM. RTS. & DEV. L.J. 217, 219 (likewise emphasizing the greater dependency of modern tribunals that the Nuremberg court on witness testimony and noting that "witnesses have been vital in establishing the occurrence of the crimes committed" at the ICTY).

143 As reported by one judge: "Some witnesses do very well in court … and describe their experiences in a very convincing and extremely authentic way while others are still scared and suffer from traumas; and some of the witnesses simply don't know how to answer some quite logical questions. […] It varies from witness to witness." *Id.* at 68.

144 Prosecutor v. Kupreškić et al., Case No. IT-95-16-A, Appeals Judgment, ¶ 138 (Appeals Chamber, Oct. 23, 2001).

145 Wachira & Kamunge, *supra* note 39, at 6.

146 *See* Leah Kimathi, *Whose Truth, Justice, and Reconciliation?: Enhancing the Legitimacy of the Truth, Justice and Reconciliation Commission among Affected Communities in Kenya*, International Peace Supporting Training Center, Occasional Paper 1:6 (2010).

147 *See, e.g.,* George Wachira & Prisca Kumunge, *Truth and Reconciliation Commissions in Africa: Lessons and Implications for Kenya***,** Nairobi Peace Initiative-Africa**,** at 4 (Apr. 2008) (noting that "[t]he expectations, fears and political leanings of [TRC] witnesses can to a large extent determine the testimony or 'truth' they bring before the commission"), *available at* http://rescuekenya.files.wordpress.com/2008/05/briefing-paper-tjrc-2.pdf. *See also id.* at 5 (stating

commission's findings is reduced due to the large number of participants.[148]

At international courts, testimonial discrepancies cannot be overlooked. International courts consider not only witness trauma, but also factors including the passage of time; cultural, educational and other barriers to identifying precise dates, measuring distances, and estimating the duration of events; variations in how questions are asked; and translation problems.[149] In weighing the evidence, they carefully scrutinize victim-witness testimony with the potential impact of trauma in mind,[150] and generally find all or portions of victim-witness accounts reliable despite discrepancies deemed "immaterial" or "insubstantial."[151] For

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that "[s]ome respondents admitted to submitting highly subjective narratives in a vengeful quest or to qualify for reparations").

[148] The Sierra Leone Truth & Reconciliation Commission Report defined "personal and narrative truth" as "a witness's personal truth which he or she tells either in a statement or at a hearing":

> This is what he or she believes and should be respected. Often the individual accounts did not initially appear to contribute significantly to the more general "impartial historical record" that the Truth and Reconciliation Commission Act 2000 requires of the Commission. But over time, the sheer volume of these accounts provided a complex, multi-layered vision of the conflict. The truth is … a series of personal stories and accounts, telling a tale of the suffering, the pain and of [*sic*] the immense dignity of the common people of Sierra Leone.

Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission, vol. 1, ch. 3, ¶ 25 (2004).

[149] *See, e.g.,* Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment, ¶ 21 (Trial Chamber II, Nov. 29, 2002) (noting that "a witness may be asked questions at the trial not asked previously or may through questioning remember details previously forgotten"); Prosecutor v. Nchamihigo, Case No. ICTR-01-63-T, Judgement, ¶ 15 (ruling that "discrepancies attributable to the passage of time or absence of recordkeeping, or other satisfactory explanation, do not necessarily affect the credibility or reliability of the witnesses); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 155 (Sept. 2, 1998) (discussing what the court called "cultural factors" such as traditions of reliance on oral transmission); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 411 (Trial Chamber, June 7, 2001) (noting that "differences between earlier written statements and later testimony in court may be explained by many factors, such as the language used, the questions put to the witness, and the accuracy of the interpretation and transcription").

[150] *See, e.g.,* Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶ 31 (Appeals Chamber, Oct. 23, 2001); Prosecutor v. Kunarac et al, Case No IT-96-23/1-A, Judgment, ¶ 324 (Appeals Chamber, June 12, 2002) (stating that a trial chamber "must be especially rigorous in assessing identification evidence" provided by traumatized witnesses); Prosecutor v. Akayesu, Case No. ICTR-96-40-T, Judgement, ¶¶ 142-43 (Trial Chamber I, Sept. 2, 1998); Prosecutor v. Limaj et al., Case No. IT-03-66-T, Judgement, ¶ 15 (Trial Chamber II, Nov. 30, 2005) ("In evaluating the evidence given by [victim] witnesses, the Chamber has taken into consideration that any observation they made at the time may have been affected by stress and fear; this has called for particular scrutiny on the part of the Chamber"); Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Judgment, ¶ 111 (Trial Chamber, June 20, 2007).

[151] *See, e.g.,* Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgement, ¶¶ 484-85 (Appeals Chamber, Feb. 20, 2001) (ruling that where there are inconsistencies affecting the credibility of witnesses, a trial chamber can still accept the "fundamental features" of their testimony); Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, Judgment and Sentence, ¶ 43 (Trial Chamber II, Dec. 30, 2011) (discussing witness credibility generally); Prosecutor v. Kunarac et al, Case No IT-96-23/1-A, Judgment, ¶ 309 (Appeals Chamber, June 12, 2002) (stating that "the absence of such natural discrepancies [between prior statements and trial testimony] could form the basis for suspicion as to

example, the eyewitness evidence of two witnesses, one of whom lost 100 members of her family including her seven children, and another who lost his wife and children, was found reliable by an ICTR trial chamber despite minor discrepancies "explained by the time that has elapsed since the massacres, … and the considerable stress they were subjected to."[152] Another witness at the ICTR testified that her rapist was on top of her for "four hours" or "even a day" and "that a distance which would take a young man five minutes to cover would take her two hours."[153] The Chamber found that these measurement problems did not undermine her account.[154] Similarly, in the *Kunarac* case, noting the passage of time, an ICTY trial chamber overlooked "minor discrepancies" among young witnesses alleging unlawful detention and sexual abuse:

> [T]he experiences which the witnesses underwent were traumatic for them at the time, and they cannot reasonably be expected to recall the minutiae of the particular incidents charged, such as the precise sequence, or the exact dates and times, of the events they have described.[155]

Nevertheless, courts sometimes find victim-witnesses to lack credibility when major factual discrepancies appear. The first witness in the ICC's *Lubanga* case recanted his prior claims to have been recruited as a child soldier in Lubanga's Congolese militia, saying it was coached.[156] His legal

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the credibility of a testimony"). ICC Judge Van den Wyngaert argues that judges are sometimes too eager to "explain away" inconsistencies based on the passage of time or existence of trauma: "[U]nderstanding why someone may be unreliable does not make the unreliability disappear. On the contrary, such insights should be a reason for treating the evidence in question with extra caution." Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3426-AnxI, Judgment, Minority Opinion of Judge Van den Wyngaert ¶ 152 (Mar. 7, 2014).

[152] Prosecutor v. Gacumbtsi, Case No. ICTR-2001-64-T, Judgement, ¶¶ 109-23, 145 (Trial Chamber III, June 17, 2004).

[153] Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 841 (Trial Chamber I, Jan. 27, 2000). *Cf.* Transcript of Trial Proceedings—*Muvunyi*, Case No. ICTR-00-55A-T, at 20 (June 8, 2005) (witness answering "I do not remember the number of days we spent there because for us, a day was as good as ten[,]" when asked to clarify how long she was held at the location where she was raped).

[154] Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 841 (Trial Chamber I, Jan. 27, 2000). *See also* Prosecutor v. Gacumbtsi, Case No. ICTR-2001-64-T, Judgment, ¶ 219 (Trial Chamber III, June 17, 2004) (rejecting defense arguments that a rape victim's testimony was not credible because of inconsistent testimony about the date on which it occurred, "as she testified during cross-examination that the time that had elapsed since the events did not allow her to ascertain dates").

[155] Prosecutor v. Kunarac et al., Case No. IT-96-23-t & IT-96-23/1-T, Judgment, ¶ 564 (Trial Chamber II, Feb. 22, 2001). As Dembour and Haslam emphasize, although a witness may not remember details precisely, "the core event he cannot forget." Dembour & Haslam, *supra* note 25, at 166. *Cf.* Furundžija Judgment, *supra* note 109, ¶ 105 (summarizing the prosecution argument that the "core" of intense experiences "are often remembered accurately despite some inconsistencies).

[156] Transcript of Trial Proceedings—*Lubanga Dyilo*, Case No. ICC-01/04-01/06-T-166ENG, at 40 (Jan. 28, 2009).

representative argued that he was young and "deeply perturbed" when he first testified, in particular by the accused's presence in the courtroom.[157] However, due to significant "contradictions and inconsistencies" between his resumed testimony and that of other witnesses, and the fact that he "never explained" why he claimed to have received payment to lie under oath, the trial chamber found his honesty uncertain.[158] Although the trial chamber acknowledged that the problems with his testimony, as well as that of other child soldier witnesses, may have been caused by their war experiences, it found all of them "unreliable" as witnesses.[159] Notably, even a judge who believed that the witnesses had been traumatized and that their stories likely had a basis in fact nevertheless agreed that their accounts should be not considered in determining the criminal accountability of the accused.[160]

Similarly, in the first ECCC case a civil party was found unreliable when she testified that she had been a medic at the S-21 security center, and later a prisoner, and that her entire family had been killed there.[161] There were significant inconsistencies between her civil party application, her in-court testimony, and subsequent filings; and her descriptions of the detention center and its regimen did not match those of other victims or experts. The trial chamber acknowledged the "tremendous" physical and psychological harm she had undoubtedly suffered under the Khmer Rouge regime, but found her account not credible "[e]ven allowing for the impact of trauma and the passage of time[.]"[162] Both episodes precipitated debates on the extent to which vulnerable victims should be prepared for the courtroom environment.[163]

Testimony from poorly prepared victim-witnesss may contribute some contextual understanding but be too imprecise or muddled to be used for

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[157] Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 431 (Trial Chamber I, Mar. 14, 2012).

[158] Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 436-41 (Trial Chamber I, Mar. 14, 2012) (noting inconsistencies including whether his mother was dead, if he had finished school, his age, and if and when he was recruited).

[159] *Id.* ¶¶ 478-80.

[160] Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶¶ 22-34 (Trial Chamber I, Mar. 14, 2012) (separate opinion of Judge Adrian Fulford). In this case, the Chamber's decision to disregard these testimonies in full is also explained by a unique set of circumstances: evidence of a pattern of witness subordination by court intermediaries. *See* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, at 101-215 (Trial Chamber I, Mar. 14, 2012).

[161] *See* ECCC Case 001 transcript (July 9, 2009), at 59-60, 64 (testimony of Nam Mon).

[162] Duch Trial Chamber Judgment, *supra* note 67, ¶ 647.

[163] *See* Kathy Glassborow, *Lawyers Divided Over ICC Witness Preparation,* ACR, Mar. 9, 2009, *available at* http://iwpr.net/report-news/lawyers-divided-over-icc-witness-preparation; ECCC Case 001 transcript (July 6, 2009), at 55 (Judge Silvia Cartwright lamenting, "This civil party has been very poorly prepared for this morning's experience."). Witness preparation is discussed *infra* § IV.A.

determining the culpability of the accused.[164] If it is uncorroborated, it may be entirely discounted. As Nancy Combs emphasizes, a court cannot critically evaluate the facts if witnesses provide only vague information about times, locations, and other crucial details.[165] The result may be traumatized witnesses and significant court time spent on legally unhelpful testimony.

C. Efficiency Challenges

In addition to generating reliability concerns, traumatized witness testimony has the potential to unduly lengthen courtroom proceedings. It is commonly said that international courts are not a therapist's couch.[166] Trauma survivors experience powerful emotions that lead them to give lengthy accounts of their personal suffering and pain. While their outbursts and digressions may be morally justified, and their difficulty answering sensitive questions concisely and clearly understandable, in theory these problems can consume a considerable amount of time and divert a court's focus from relevant facts. Fairness to the accused requires that hearings proceed without undue delay.[167]

As discussed *supra*, it is not uncommon for witnesses to break down while speaking about violence they experienced or witnessed. At the ICTR, one woman describing her daughter's rape was "[r]acked by fits of coughing and choked with emotion."[168] Another had "a violent fit" that required her to be "stretchered off from the courtroom."[169] At the ECCC, civil party Chum Neou, who survived the S-24 detention camp, said: "It is extremely difficult. It's indescribable. I can recall one event after another[,] and this is the first time after 32 years that I start talking. And every time now when I think of that event, my tears keep flowing."[170] Civil Party Nam Mon also broke down while testifying about the deaths of her family under the regime.[171] Such reactions can delay the proceedings: the hearing may pause while a witness recomposes him or herself; the judges may call

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[164] Similarly, truth commissions tend to apply a higher standard in assessing witness evidence "before naming names" than they do for their basic findings. OHCHR, Rule-of-Law Tools for Post-Conflict States: Truth Commissions, *supra* note 104 at 22.

[165] Combs, *supra* note 140, at 243-45.

[166] *See, e.g.,* Doak, *supra* note 10, at 290.

[167] Every victim participant application to testify before one ICC Chamber is therefore assessed "taking particular account of the rights of the accused to be tried without undue delay." Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, ¶ 87 (Trial Chamber II, Jan. 22, 2010).

[168] *Rwanda: Witness at Genocide Trial Tells Court of Rape and Murder*, INTERNEWS, Mar. 12, 1999.

[169] Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 98 (Trial Chamber, Dec. 1, 2003) (dissenting opinion of Judge Ramaroson).

[170] ECCC Case 001 transcript (Aug. 24, 2009), at 10.

[171] ECCC Case 001 transcript (July 13, 2009), at 27 (continuing testimony of Nam Mon).

a break to facilitate this; or the testimony may be postponed to another day.[172]

Witnesses also frequently offer longwinded accounts incorporating legally extraneous but personally significant detail, bristling against time restrictions as they seek to convey a full account of the harm they have suffered. For example, in ECCC Case 002, a civil party provided a detailed chronological account of everything he experienced on the day Phnom Penh was forcibly evacuated by the Khmer Rouge, the subject matter of the charges. His lawyer stepped in, emphasizing that "[d]ue to time constraints, I would like to ask you to please describe your general activities and the events of the evacuation …, but please be brief on this." The civil party responded, "Actually … I had already been very brief."[173]

In ECCC Case 001, some witnesses and civil parties, limited to the topic of two security centers, nevertheless spoke broadly about their families' suffering during the entire Pol Pot era. In a few instances, civil parties provided eulogies for their lost loved ones,[174] departing from facts specifically related to the charges.[175] For example, civil party Touch Monin was cut off by the defense because he recounted a long story of his family's evacuation from Phnom Penh instead of events related to the accused and the harm the civil party suffered as a result.[176] Even journalist Sydney Schanberg, likely traumatized by his experiences but also acutely aware of time limitations, felt compelled to eulogize his friend Dith Pran during his witness testimony in the *Nuon Chea et al.* case, saying:

> Pran is a very interesting subject and—but probably not for this Tribunal. But he saved our lives and he was a great man, he died a few years ago. He believed in peace and he suffered badly under the Khmer Rouge. … I've gone off–I've gone off track, but in any case it was something that will stay with me all my life. [177]

Although judges and party lawyers can be frustrated by the need to rein in victim accounts, the typical question and answer format and judicial and party vigilance appear to prevent victim digressions from becoming a

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[172] Trial management approaches in such instances are discussed *infra*.

[173] ECCC Case 002 transcript (Feb. 7, 2013), at 17. *See also id.* at 31 (reminding the same witness to "please listen to the questions carefully and limit your response to the questions only. And please do not make additional comments further from what is being asked of you."). *Cf.* ECCC Case 002 transcript (Dec. 12, 2012), at 75 ("I'm going to ask some precise questions, so do your very best to answer precisely because we have relatively little time. So if possible, let's stick to the questions and answers as asked.").

[174] *See, e.g.,* ECCC Case 001 transcript (Aug. 19, 2009), at 28-29 (in which Phung Guth details the character of her father).

[175] *See, e.g.,* ECCC Case 001 transcript (Aug. 20, 2009), at 60-66.

[176] ECCC Case 001 transcript (Aug. 24, 2009), at 93-96.

[177] ECCC Case 001 transcript (June 5, 2013), at 36.

significant cause of trial delay.[178] Rather, it seems that witnesses who are not prepared in advance for the courtroom setting, and the types of questions they will be asked, are most likely to expend a significant amount of court time as the parties attempt to untangle and verify chronologies and specifics of time and place. For example, in the ECCC's first case, the testimony of civil party applicant Ly Hor was confused regarding where and when he had been detained.[179] He had difficulty understanding questions from lawyers and judges in the courtroom, and his disjointed oral testimony contradicted his written statement.[180] His testimony took an entire day while the parties attempted, unsuccessfully, to clarify his confusing and contradictory account.[181]

The most significant factor lengthening proceedings is likely the large number of witnesses called to provide oral testimony in international criminal cases. Speaking specifically of victim participation at the ICC, Judge Steiner has said that the primary means to ensure an expeditiousness trial is to limit the number of participants who testify and the modalities of their participation.[182] For this reason, to improve efficiency all international courts have increasingly admitted written, in lieu of oral, testimony under certain conditions.[183] Nevertheless, former ICTY Judge Patricia Wald has cautioned:

> There is little doubt that it would be infinitely more efficient for witnesses merely to affirm prior statements than to give their testimony live and be cross-examined on it. But the excruciating process of facing one's torturer,

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[178] *See, e.g.,* Doak, *supra* note 10, at 272; Dembour & Haslam, *supra* note 25, at 158.

[179] *See generally* ECCC Case 001 transcript (July 6, 2009).

[180] Afterward, Ly Hor said he did not know what happened during trial; he had become confused and could not think clearly. Interview with Terith Chy, Documentation Center of Cambodia (Nov. 04, 2010). Although there were documents submitted attesting that someone named "Ear Hor—the name Ly Hor allegedly went by at the time—was detained at S-21, the Trial Chamber expressed doubt that they were the same person and rejected his civil party application in the trial judgment. Duch Trial Chamber Judgment, *supra* note 67, ¶ 647. His lawyers submitted additional identification evidence to the Supreme Court Chamber, which was satisfied and overturned the trial chamber, accepting his civil party application. Prosecutor v. Kaing Guek Eav *alias* "Duch," Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶ 540 (Supreme Court Chamber, Feb. 3, 2012). This recognition was clearly a relief: "I have now been accepted as a civil party in Case 001, which means that my suffering has been acknowledged by the court. ... I feel proud." Ly Hor, Banteay Meanchey Province, unpublished interview by staff of the Documentation Center of Cambodia (2011) (on file with authors).

[181] *See generally* ECCC Case 001 transcript (July 6, 2009).

[182] Bemba Gombo, Case No. ICC-01/05-01/08, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representative of Victims to Present Evidence and the Views and Concerns of Victims, ¶¶ 20, 23, 25 (Trial Chamber III, Feb. 23, 2012).

[183] For example, in the *Taylor* case at the SCSL, reportedly "[m]ost of the crime-based witnesses [were intended to] testify in writing to speed up the process." Gill Wigglesworth, *The End of Impunity? Lessons from Sierra Leone*, 84:4 INT'L AFFAIRS 809, 820 (2008).

> reliving awful times, and defending one's account on cross-examination may sometimes be indispensable to the integrity of the Tribunal's final product. Certainly, I believe that where the testimony is important to a critical issue it should be live. [184]

Ultimately, there is no clear evidence that traumatized witnesses are the cause of greater inefficiency than other fact witnesses, especially if courts apply standard procedural protections and best management practices, discussed *infra*, that have been shown to ease the experience of testifying.

D. The Danger of Bias

The impulse of some victims in the courtroom to express rage, distress, or the desire for revenge, or to offer information extraneous to the charges, not only lengthens the proceedings, but also potentially jeopardizes the impartiality of the courtroom atmosphere. As expressed by Judge Van den Wyngaert of the ICC:

> [A] criminal trial, unlike, for example, a truth and reconciliation commission, is not the appropriate forum for victims to express their feelings, as this would detract from the serenity of the trial and would not serve a useful purpose from the perspective of a criminal proceeding. [185]

At the ECCC, in a number of instances, victims addressed the accused Duch angrily during the court's first trial. A survivor of the S-21 torture center Duch headed said, "So I would like to tell this to Duch; that Duch did not beat me personally, directly, otherwise he would not have the day to see the sunlight. I would just like to be frank."[186] When given the opportunity to provide a statement unconstrained by focused questioning, the likelihood of emotive statements increased. For example, a civil party whose brother Kerry was killed at S-21 took the opportunity provided by his party status to express at length his desire to see Duch suffer the type of anguish he had inflicted on others:

> Duch, at times I've wanted to smash you—to use your words—in the same way that you smashed so many others. At times, I've imagined you shackled, starved, whipped[,] and clubbed viciously—viciously. I have

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[184] Wald, *supra* note 105, at 112.
[185] 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, 489 (2011).
[186] ECCC Case 001 transcript (June 30, 2009), at 12.

> imagined your scrotum electrified, being forced to eat your own faeces, being nearly drowned, and having your throat cut. I have wanted that to be your experience, your reality. I have wanted you to suffer the way you made Kerry and so many others.[187]

Victims' expressions of anguish can also lead to assertions regarding the criminal responsibility of the accused. In ECCC Case 002, when a civil party called the accused senior leaders "immoral," defense counsel emphasized that "such a wording is very inappropriate and of course it has an impact on the status of the accused."[188]

In the same case, a few civil parties also introduced evidence, opinions, and allegations extending beyond the scope of crimes charged. Such legally irrelevant information can have a prejudicial effect that may be impossible to erase.[189] For this reason, in the *CDF* case at the SCSL, Judge Itoe agreed with the trial chamber majority that segments of victim-witnesses accounts relating to sexual violence should be prohibited, as such evidence had not been referenced in the indictment, and would be "of a nature to cast a dark cloud of doubt on the image of innocence" of the accused.[190] According to Judge Ito, in accordance with the principle of equality of arms:

> [Judges must] see to it that only relevant and legally admissible evidence is admitted whilst at the same time ensuring that evidence which is unfair and prejudicial to either party, even if it were ordinarily relevant, is excluded, if it is prejudicial and if admitting it will not only violate the doctrine of fundamental fairness but will also impact negatively on the integrity of the proceedings, and more

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[187] ECCC Case 001 transcript (Aug. 17, 2009), at 104-05.

[188] ECCC Case 002 transcript (Oct. 22, 2012), at 25.

[189] *See, e.g.,* Robert Cryer, *Witness Evidence Before International Criminal Tribunals,* 3 LAW & PRACTICE OF INT'L CTS. & TRIBUNALS 411, 420 (2003).

[190] Prosecutor v. Norman et al., Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶ 78(vi) (Trial Chamber I, May 24, 2005) (separate and concurring opinion of Judge Itoe). In dissent, Judge Poutet disagreed, saying that "[e]vidence of acts of sexual violence are no different than evidence of any other act of violence … and are not inherently prejudicial or inadmissible character evidence by virtue of their nature or characterization as "sexual." *Id.,* dissenting opinion of Justice Boutet ¶ 33. This majority decision was extremely controversial, as it resulted in victims being forced to parse their stories to exclude mention of sexual violence that was arguably "so much woven into the thread of the witness's story as to make it impossible for her to implicate the accused's knowledge of other events … without describing them." Staggs Kelsall & Stepakoff, *supra* note 58, at 370. In this instance it was not victim's desire to share her entire story that was the primary cause of potential prejudice, but the failure of the prosecution to plead sexual violence and the chamber's decision that any testimony discussing rape or forced marriage would be unfair to the accused. Strict rules of exclusion thus may remove not only potential prejudice, but also important contextual information. *See, e.g,* Cryer, *supra* note 189, at 419.

> importantly, bring the administration of justice into dispute.[191]

According to Judge Itoe, in making this determination, the SCSL considered whether evidence "may be relevant" to the facts at issue and the charges, and whether "the prejudicial effect of the admission of the evidence does not outweigh its probative value."[192] Similarly, the ICC's standard for authorizing evidentiary testimony from victim participants (that is, persons not called to testify by the prosecution or the defense) is their ability to contribute factual information that "can make a genuine contribution to the ascertainment of the truth[,]" taking into account "the rights of the accused to a fair and impartial trial."[193]

As discussed *supra*, victims want to tell their full story, and some psychologists assert that traumatized witnesses will often be able to testify more clearly and accurately if they are allowed to offer a free account instead of responding to questions.[194] However, this victim-centered approach also increases the likelihood that witnesses will offer legally irrelevant information prejudicing the accused. This tendency has arisen most noticeably in civil parties' "statements of suffering" at the ECCC, discussed in detail *infra*.[195]

IV. BALANCING VICTIMS' NEEDS AND RIGHTS OF THE ACCUSED

International and hybrid courts have adopted a number of rule-based provisions to strike an appropriate balance between survivors' needs and the rights of the accused. Among the most salient are special in-court protective measures to protect certain categories of victims and witnesses—particularly children and sexual violence victims—from

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[191] Prosecutor v. Norman et al., Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶ 75 (Trial Chamber I, May 24, 2005) (separate and concurring opinion of Judge Itoe).

[192] *Id.* separate and concurring opinion of Judge Itoe ¶ 73 (quoting an oral decision in the *RUF* case).

[193] *See, e.g.,* Katanga & Ngudjolo, Case No. ICC-01/04-01/07-1665, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, ¶ 20 (Trial Chamber II, Nov. 20, 2009) (seeking clear explanation of "the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts"); Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Supplemented Applications by the Legal Representative of Victims to Present Evidence and the Views and Concerns of Victims, ¶ 18 (Trial Chamber III, Feb. 22, 2012) (noting that all three ICC Trial Chambers and the ICC Appeals Chamber agree on this point); *id.* ¶ 23 (discussing the additional requirements that the presentation by a victim participant of testimonial evidence is consistent with the defense's fair trial rights and is not done anonymously). Thus, the ICC does not consider the interest in victim participation in isolation, but balanced against the defendant's right to a fair trial. *See* Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT'L CRIM. L. REV. 345, 357 (2003); Gioia Greco, *Victims' Rights Overview Under the ICC Legal Framework: A Jurisprudential Analysis,* 7 INT'L CRIM. L. REV. 531, 546 (2007).

[194] *See discussion infra* Part IV(B)(1).

[195] *See infra* Part V(B)(2).

unnecessary harm. The ICTY and SCSL rules give trial chambers the discretion to adopt measures such as one-way closed circuit television screens or partitions,[196] which those courts have used for victims of sexual violence and child witnesses.[197] The ICC Statute goes a step further, providing that special protective measures *shall* be implemented for victims of sexual violence or child victims or witnesses, and the defense bears the burden of showing that such measures should not apply.[198] All these courts acknowledge that protective measures must be balanced against the rights of the accused, particularly when considering requests for witness anonymity.[199]

Although the ECCC rules likewise permit special protections,[200] until recently the trial chamber has not found the need to adopt them.[201] This is largely due to the fact that no children have appeared as witnesses or civil parties (as the trials took place more than 30 years after the fall of the Pol Pot regime). Nevertheless, many continue to suffer the effects of trauma. The ECCC proceedings thus highlight that the needs of persons who do

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[196] ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32.Rev.44, R.75 (Dec. 10, 2009) [hereinafter ICTY Rules]; Rules of Procedure and Evidence for the Special Court for Sierra Leone (2003), *amended* May 28, 2010, R. 75 (2003) [hereinafter SCSL Rules].

[197] The ICTY adopted special protections for sexual violence victims in the *Delalić* and *Tadić* cases, as did the SCSL for child witnesses in the *Sesay* case. Prosecutor v. Delalic, Case No. IT-96-21, Decisions on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M" (Trial Chamber, Apr. 29, 1997); Prosecutor v. Sesay, Case No. SCSL-2004-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses (Trial Chamber, July 5, 2004).

[198] Rome Statute, *supra* note 19, art. 68(2). Such measures may include "conduct[ing] any part of the proceedings in camera or allow[ing] the presentation of evidence by electronic or other special means." ICC Rules, *supra* note 19, R. 88(1). *See also* Prosecutor v. Lubanga, Decision on Victims' Participation, ¶¶ 127, 129, Doc. No. ICC-01/04-01/06-1119 (Trial Chamber I, Jan. 18, 2008) (holding that these measures are "not favours but…rights of victims"). By contrast, no presumption in favor of special protective measures exists at the *ad hoc* tribunals, where the prosecution must apply for protections and bears the burden of proof. Garkawe, *supra* note 193; ANNE MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE 243 (2005).

[199] ICTR Rules of Procedure and Evidence, *adopted* June 29, 1995, *amended* Apr. 10, 2013, R. 75(A) [hereinafter ICTR Rules]; ICTY Rules, *supra* note 196, R. 75(A); SCSL Rules, *supra* note 196, R. 75(A). *See, e.g.* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶¶ 130-32 (Trial Chamber I, Mar. 14, 2012); Prosecutor v. Norman, Case No. SCSL-2004-14-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses (Trial Chamber, June 8, 2004) (noting that the use of screens and similar devices needs to be balanced against the accused's right to a fair and public hearing).

[200] These include live remote testimony by audio or video link, voice and video distortion, and exceptionally, *in camera* proceedings or "the presentation of evidence by electronic or other special means." ECCC Internal Rules, *supra* note 2, R. 29(4)(d),(e). The ECCC Trial Chamber allowed civil party Denise Affonço to testify via video-link, but its rationale was simply to save her a trip from France. ECCC, *Order for Video-Link Testimony of Civil Party TCCP-13* (Trial Chamber, May 22, 2013).

[201] In Case 001 a civil party was granted a protection measure that was rescinded after the verdict at the request of the civil party's lawyer. On occasion witness names have not been disclosed prior to their testimony. However, only in Case 002/02 have specific in-court protection measures been granted, thus far to only one witness and one civil party who worked as Khmer Rouge prison guards in Case 002/02. *See supra* note 3. As this case is also the first to include testimony about sexual violence, some testimony has also been heard in closed session.

not qualify for special in-court protective measures should not be overlooked.

Most international and hybrid courts have established psychological support services as an important additional layer of protection. The ICTR Witness Support and Protection Programme and ICTY Victims and Witnesses Section offer psychological counseling to witnesses, focusing on trauma survivors.[202] The SCSL Rules of Procedure and Evidence provide that its Witnesses and Victims Section be staffed by experts in trauma related to sexual violence.[203] The ICC likewise has a Victims and Witnesses Unit (VWU) with staff members who specialize in trauma, psychological counseling, and crisis intervention.[204] The ECCC likewise set up a Witness and Experts Support Unit (WESU) and Victims' Support Section (VSS). WESU is responsible for services required to provide "a safe and supportive environment" for witnesses and civil parties who testify,[205] and the VSS provides psychosocial support for victims participating as civil parties.[206] In practice, all psychological assistance is provided by the Transcultural Psychosocial Organization (TPO), a non-governmental organization that signed a memorandum of understanding with the Court. TPO support for testifying victims includes "reducing anticipatory anxiety through psychological briefing prior to the proceedings, monitoring participants' mental health condition, offering emotional support during the trial and debriefing after the proceedings."[207] At times, TPO representatives have sat beside civil parties who broke down during testimony.[208]

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[202] Michael Bachrach, *The Protection and Rights of Victims Under International Criminal Law,* 34 INT'L L. 7, 12-13 (2000). *See also* ICTY *Support for Witnesses*, http://www.icty.org/sid/158 (last visited Nov. 19, 2014).

[203] SCSL Rules, *supra* note 196, R. 34(B).

[204] The VWU is responsible for out-of-court counseling, familiarizing witnesses with the courtroom environment to dampen anxiety, and accompanying them during testimony if required and may assign staffers to support children through all stages of the proceedings. ICC Rules, *supra* note 19, RR. 17(2)(iii)-(iv), 19(d)-(j), 88(2). The Rome Statute authorizes the ICC to take measures to protect witnesses' psychological well-being. *See* Rome Statute, *supra* note 19, arts. 68(1), 87(4).

[205] ECCC, *Court Management Section,* http://www.eccc.gov.kh/en/office-of-administration/court-management-section (visited Nov. 15, 2014).

[206] Unlike the Rome Statute, the ECCC's governing legal instruments do not provide for measures to protect the psychological well-being of witnesses, but the ECCC website states: "VSS ensures the safety and well-being of Victims who participate in the proceedings [by] ensuring that Victims properly understand the risks sometimes inherent in such participation, as well as providing them with protective measures and other assistance, like psychosocial support." ECCC, *Victims Support Section*, http://www.eccc.gov.kh/en/victims-support/victims-support-section (last visited Nov. 16, 2014).

[207] Transcultural Psychosocial Organization, Khmer Rouge Tribunal Project Information Sheet, *at* http://tpocambodia.org/uploads/media/Khmer_Rouge_Tribunal_Project_Information_English.pdf; Stover et al., *supra* note 35, at 525.

[208] ECCC Case 001 transcript (July 13, 2009), at 27 (featuring civil party Nam Mon). A TPO representative was also asked to sit beside Chum Neou, a civil party who survived the S-24 detention camp, while she testified at the Trial Chamber.

Special in-court protections and psychological support services are important aspects of seeking to respect victims' needs while upholding the rights of the accused. These measures have rightly received much attention in both the formal laws and rules governing international and hybrid court proceedings and in the surrounding commentary and advocacy efforts of international organizations and civil society.[209] However, such measures rarely suffice. Practices of arguably equal importance include the preparation of trauma survivors for testimony, as well as informal standards related to time management, questioning practices, acknowledgement of survivors' suffering, and the basic civility and decorum of judges and lawyers. All of these can have profound effects on survivors' experiences testifying and the nature of their contributions to justice.

A. Witness Familiarization and Preparation

All international and hybrid criminal courts allow witness "familiarization"—measures to acquaint witnesses with the courtroom environment and applicable procedures and court personnel.[210] More controversial is witness "preparation," defined by the ICC as "a meeting between a witness and the party calling that witness, taking place shortly before the witness's testimony, for the purpose of discussing matters relating to the witness's testimony."[211] Such preparatory meetings typically enable witnesses to review prior statements, thereby refreshing their memories before they testify.[212] In any criminal proceeding, witness

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[209] *See, e.g.,* Report of the Special Rapporteur on Violence Against Women, Mission to Sierra Leone, ¶¶ 76 & 127, UN Doc. E/CN.4/2002/83/Add.2 (2002) (encouraging courts to establish victim and witness units with expertise in trauma related to sexual violence); ESCOR, Guidelines for Justice in Matters Involving Child Victims and Witnesses of Crime, ¶¶ 10-19, 29-34, & 38-46, Res. No. 2005/20 (July 22, 2005) (including guidelines on protections for child victims and witnesses); Report of the High Commissioner for Human Rights, pursuant to Human Rights Council Resolution 9/11, ¶¶ 60-61, UN Doc. A/HRC/12/19 (Aug. 21, 2009) (endorsing both set of recommendations).

[210] *See, e.g.,* Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, ¶ 55 (Trial Chamber, Nov. 30, 2007) [hereinafter ICC *Dyilo* Decision on Witness Preparation]; Prosecutor v. Muthaura et al., Case No. ICC-01/09-02/11, Victims and Witnesses Unit's Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony, § 2.6 (Registrar, Aug. 22, 2011), *available at* http://www.icc-cpi.int/iccdocs/doc/doc1208303.pdf; Prosecutor v. Nuon Chea et al., Case No. 002/19-09-2007-ECCC/TC, Memorandum from Senior Trial Officer Susan Lamb re Provision of Prior Statements to Witnesses in Advance of Testimony at Trial (Nov. 24, 2011); INTERNATIONAL CRIMINAL PROCEDURE: THE INTERFACE OF CIVIL LAW AND COMMON LAW LEGAL SYSTEMS 67-90 (Linda Carter & Fausto Pocar, eds., 2013) (noting practices at various courts and noting disagreement on whether familiarization should be conducted solely by victim and witness units or also by the parties).

[211] Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11, Decision on Witness Preparation, ¶ 4 (Trial Chamber, Jan. 2, 2013) [hereinafter ICC *Ruto* Decision on Witness Preparation].

[212] The ICC makes this a requirement. *See* Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11, Witness Preparation Protocol, ¶¶ 17-19, *revised* Mar. 28, 2014.

preparation risks jeopardizing the rights of the accused if preparation veers into coaching witnesses, and also makes it more difficult for judges to assess the reliability of testimony. Nevertheless, all international and hybrid criminal courts except the ECCC have authorized this practice in an effort to improve the coherence and efficiency of oral testimony and prevent re-traumatization.[213]

The ICTY and ICTR allow parties to prepare their witnesses in advance by, for example, comparing prior witness statements and highlighting potential inconsistencies.[214] ICC trial chambers I-III did not allow witness preparation due to the potential for the session to become "a rehearsal of in-court testimony" and "diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness."[215] However, trial chamber V authorized this practice in the two Kenya cases, noting, "A witness who testifies in an incomplete, confused and ill-structured way because of lack of preparation is of limited assistance to the Chamber's truth-finding function."[216] In addition to completeness and coherence benefits, the trial chamber highlighted the benefits of witness preparation for reducing witnesses' stress and anxiety about testifying in an unfamiliar setting.[217] According to the chamber:

> Particularly with regard to vulnerable witnesses, such prior preparation may help to reduce the psychological burdens of testimony, since those witnesses may face unique difficulties when being questioned about traumatic events. Enabling interaction with counsel on the substantive aspects of their evidence may help to increase witnesses' confidence and may reduce their reluctance to reveal sensitive information on the stand.[218]

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[213] *See generally* Prosecutor v. Limaj et al., Case No. IT-03-66-T, Decision on Defense Motion on Prosecution Practice of "Proofing Witnesses" (Trial Chamber II, Dec. 10, 2004); Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing (Trial Chamber, Dec. 12, 2006) [hereinafter ICTY Witness Proofing Decision]; Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing (Appeals Chamber, May 11, 2007) [hereinafter ICTR Witness Proofing Decision]; Prosecutor v. Sesay, Case No. SCSL-2004-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141 (Trial Chamber, Oct. 26, 2005); Prosecutor v. Ayyash et al., Case No. STL-11-01/T/TC, Directions on the Conduct of the Proceedings, ¶18, n. 4 (Trial Chamber, Jan. 16, 2014); ICC *Ruto* Decision on Witness Preparation, *supra* note 211, ¶ 4.

[214] *See generally* ICTR Witness Proofing Decision, *supra* note 213; ITCY Witness Proofing Decision, *supra* note 213.

[215] *See, e.g.,* ICC *Dyilo* Decision on Witness Preparation, *supra* note 210, ¶¶ 51-52 (Trial Chamber, Nov. 30, 2007).

[216] ICC *Ruto* Decision on Witness Preparation, *supra* note 211, ¶ 31. *See generally* International Bar Association, Witnesses Before the International Criminal Court (July 2013), at § 3 (discussing the evolution of witness proofing practices at the ICC).

[217] ICC *Ruto* Decision on Witness Preparation, *supra* note 211, ¶ 37.

[218] *Id.*

Some ICTY witnesses queried identified review of former statements "either alone or together with the prosecutor" as the most beneficial kind of preparation for testifying, due to the number of statements they had provided pre-trial and the time that had passed between those statements and trial.[219] One witness emphasized:

> I talked about it 100 times, and something is always forgotten or added, and remembered. Sometimes that small piece of information does not mean anything, but sometimes it means a lot. The first statements I gave under a lot of stress, and those are brief and clear statements. Later on when we were more relaxed, the statements were longer, but the defense sticks to the first statements.[220]

At the ECCC, which is governed largely by civil law procedures, although no provisions mention witness preparation, in practice, due to the fact that "all witnesses are called by the Court and not by the parties, there is no possibility that they can be proofed by the parties."[221] The lack of any ability to prepare witnesses may have contributed to some confusion and inefficiency in ECCC witness questioning, and made the experience more stressful for victim-witnesses.[222] It is possible for civil parties who testify to be prepared by their attorneys, as they are not considered simple witnesses, but interested parties.[223] This gives civil party lawyers an advantage in assessing whether their clients are likely to give effective testimony and fare well under questioning.[224]

B. Courtroom Civility

Studies of witness experiences at international and hybrid criminal trials have found that survivors' psychological experiences depend

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[219] Mischkowski and Mlinarević, *supra* note 28, at 62.

[220] *Id.*

[221] E-mail from Anees Ahmed, former ECCC Assistant Prosecutor (March 10, 2011). Although the Special Tribunal for Lebanon is also a civil law-based court, it is following the practice of the other international and hybrid courts in allowing witness preparation. *See* Prosecutor v. Ayyash et al., Case No. STL-11-01/T/TC, Decision on the Conduct of Proceedings, ¶ 18 (Trial Chamber, Jan. 16, 2014).

[222] *See, e.g.,* Kelsall et al., *supra* note 69, at 35 (noting that ECCC parties' inability to prepare witnesses likely prevented undue influence but also left some witnesses "ill prepared to take the stand").

[223] ECCC Internal Rules, *supra* note 2, R. 23(4).

[224] This gives prosecutors an added incentive to work closely with civil party lawyers. Author's e-mail correspondence with Lyma Nguyen, ECCC International Civil Party Lawyer (Nov. 19, 2014). At least one civil party team in the court's first case did not take advantage of the opportunity to prepare its clients due to the lack of clarity of the rules at that time. Email from Alain Werner, Civil Party Lawyer Team 1, Case 001 (March 23, 2011) (noting that the CP1 team's only client called as a witness, Ly Hor, was not prepared in advance due to concerns underscored by the prosecution that it was an inappropriate practice in a civil law jurisdiction).

significantly on whether they believe they were treated with civility and respect. One obvious factor is the manner in which a court conducts and manages questioning. The order, tone, pace, and content of questions can all affect survivor testimony. Another factor is whether and how judges and parties acknowledge a witness's contribution to the proceedings.

1.Questioning Practices

Adversarial questioning can be a distressful experience, exacerbating the effects of trauma on recall. In the ICC's *Lubanga* trial, Dr. Elisabeth Schauer testified that chronological questioning can help reduce the risk of re-traumatization and help produce the most useful, complete, and coherent information. She argued that trauma survivors' recall is influenced by how information is elicited:

> You can get every piece of information, anything, if you ask—if you ask in a chronologic context, forward-moving way. You probably have a hard time just wanting to know—jumping and wanting to know little details here and there. That's difficult to do for somebody, because in a traumatised person the memory isn't [...] awfully connected to time and place.[225]

She therefore suggested that judges and counsel not disrupt the flow of a victim's account by pressing for specific details—a step toward allowing survivors to tell their stories in a free-flowing, natural manner.[226]

However, there are obvious limits to this approach. Defense counsel have ethical and professional obligations to defend their clients' interests, which sometimes requires posing difficult questions to survivors who testify in court. The "little details" may be precisely the granular information needed to determine the guilt or innocence of the accused or may bear on the overall credibility of the victim's testimony. Non-chronological questioning and prodding is often necessary in criminal proceedings. Interrupting victim's narratives is also sometimes required to protect the accused's right to a speedy trial. At the ICTY, ICTR, and SCSL, trial chambers are specifically authorized to control the mode of witness questioning in part to "avoid needless consumption of time."[227] Witnesses at all international and hybrid courts have been counseled to answer questions briefly and concisely without excessive emotion.[228]

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[225] Schauer testimony, *supra* note 66, at 56-57.

[226] *Id.*

[227] ICTY Rules, *supra* note 196, R. 90(F); ICTR Rules, *supra* note 199, R. 90(F); SCSL Rules, *supra* note 196, R. 90(F).

[228] *See, e.g.,* Transcript of Trial Proceedings—*Krstić*, Case No. IT-98-33 (Apr. 10, 2000), at 2474 (with the prosecutor stating: "Witness, I realise that the trip that you made to Zepa was very difficult and

At the same time, courts have consistently recognized the possibility that victims can be re-traumatized on the stand if questioning is conducted in an unnecessarily aggressive or hostile manner. The ICC Rules of Procedure and Evidence require judges to be "vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation," particularly in cases of sexual violence.[229] The ICTY, ICTR, and SCSL rules include similar provisions.[230] The onus is therefore on the judges to prevent questioning that his gratuitously repetitive or badgering. One defense attorney has noted that her job is to challenge testimony and "it [i]s up to the judges to stop the line of questioning if it [i]s inappropriate."[231]

A more difficult set of questions surrounds the kinds of questioning that the court should disfavor. In Case 002/01, defense counsel Andrew Ianuzzi posed a series of questions to civil party Meas Saran about the ECCC's administrative and financial challenges. The Trial Chamber president intervened to state that the question was not relevant, and after Ianuzzi asked a further question about alleged corruption at the Court, Judge Silvia Cartwright chastised him, saying: "this civil party is clearly a person who has suffered. He deserves to be treated with more humanity and respect."[232] Although the judges' points about relevance were defensible, the exchange highlighted the risk that judges could use norms of respect and civility to prevent defense counsel from raising topics they would rather avoid.

Judges also have the discretion to pause or take other measures when victim-witnesses break down, and chambers often do take short recesses to give emotional witnesses time to recompose themselves. For example, in the *CDF* case, the SCSL trial chamber took a 10-minute break when a witness became emotional describing how her mother was murdered.[233] However, one ICTY judge has said that he thinks proceedings should not be stopped when witnesses become emotional, arguing that their distress is a necessary part of the process of hearing their evidence:

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very frightening, but I would just like you to simply confirm a number of points to the Judges by simply answering yes or no.").

[229] ICC Rules, *supra* note 19, R. 88(5).

[230] ICTY Rules, *supra* note 196, R. 75(D) (setting forth that, "[a] Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation"); ICTR Rules, *supra* note 199, R. 75(D); SCSL Rules, *supra* note 196, R. 75(C).

[231] Julia Crawford, *Rwanda Tribunal's Witness Protection in Question*, HIRONDELLE, Dec. 10, 2001.

[232] Nov 22 – at 83-84. Ianuzzi replied by telling Meas Saran he had "nothing, but the utmost respect for you, as an individual, for you as a civil party, and for you as someone who obviously suffered at a period of your life." *Id.* at 84.

[233] Transcript of Trial Proceedings—*CDF*, Case No. SCSL-2004-14-T (May 31, 2005), at 17. *See also* ECCC Case 001 transcript (July 9, 2009), at 97-98 (taking a 10-minute break so that the civil party testifying can recompose herself, but shortly after concluding for the day as she became emotional again close to the end of the day's proceedings).

> I give space for witnesses to cry. It's important not to take a break then because that's the big and important moment when it is about to come out. In one case I waited for 3 ½ minutes while the female witness stayed silent until she said, I am ready to continue. Then it came naturally.[234]

Court management of questioning has been an important factor in survivors' experiences at the ECCC, especially when survivors break down in court. During the *Duch* trial, civil party lawyers asked the court on a number of occasions to give their clients more time to cope with the emotional difficulty of testifying. The judges explained that they would endeavor to do so within the time limitations.[235] When civil party Lay Chan was asked what he did during the Khmer Rouge time when he was thirsty but dared not ask for water, Lay responded, "I cannot respond to the question" and broke down before completing another sentence. The trial chamber president asked Lay to "try to collect [him]self" and asked if he needed time to re-compose. Lay paused before recounting that he had to drink his own urine.[236]

A number of court personnel have responded gruffly or coldly to expressions of emotional distress in the courtroom.[237] For example, when civil party Bou Meng broke down speaking about his torture at the S-21 security center during the *Duch* trial, presiding ECCC trial judge Nil Nonn said sternly:

> Uncle Meng, please try to recompose yourself so that you would have the opportunity to tell your story. As you have stated, you have been waiting for this opportunity to tell your accounts, your experience[,] and the sufferings that you received from those unjust acts; from the torture committed by the Khmer Rouge, as well as the ill treatment on your wife. So please try to be strong, recompose yourself so that you are in a better position to recount what they did on you so that the public and the Chamber who are participating in this proceeding or the Cambodian people as a whole as well as the international community to hear, to understand the acts committed by the Khmer Rouge clique on you and that they would express the pityness on you as you received those ill treatment from them. So do not let your emotion

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[234] Mischkowski & Mlinarevic, *supra* note 28, at 70.

[235] *See, e.g.,* ECCC Case 001 transcript (July 1, 2009), at 1-3.

[236] ECCC Case 001 transcript (July 7, 2009), at 37-38.

[237] This has included civil party lawyers. *See, e.g.,* ECCC Case 002 transcript (May 27, 2013), at 37, 57 (in which civil party lawyer Ven Pov asked civil parties Aung Phally and Sang Rath to "please recompose yourself" and "recollect yourself," respectively).

> overwhelm you. So try to grab the opportunity to tell your accounts to the Chamber as well as to the public. Uncle Meng, do you understand what I said?[238]

He similarly admonished survivor Norng Chanphal to "be strong" and "control [his] emotion."[239] Cool responses by judges and parties to victim suffering appear to have resulted more from discomfort than a lack of empathy. To his credit, Nil Nonn appears to have sought advice and learned to respond in a more understanding manner,[240] as did some of the parties. A modest amount of advance training would likely have been effective in forestalling insensitive responses.

Examples of helpful and well-calibrated guidance also exist. In the *Duch* trial, the Trial Chamber instructed defense co-lawyer Kar Savuth to "use a lower voice projection and make your speech gentle so that [civil party Nam] can respond to your questions fully."[241] This intervention appears to have been a well-calculated effort to reduce the risk of re-traumatization without unduly restricting the right of the defense counsel to ask pointed questions. In Case 002, civil party Chum Sokha began to break down when testifying about the arrest and torture of his late father. After a short pause, the Trial Chamber president asked, "would you like to take a short break or you can continue?" Chum Sokha replied, "It's okay, Mr. President. I'll recompose myself."[242]

All digressions, gaps, and inconsistencies in testimony are not necessarily caused by trauma, but the awareness that most testifying survivors have experienced some level of trauma makes it more difficult for judges to impose limits without appearing callous. Indeed, efforts by the judges to explain the parameters of the proceedings perhaps inevitably sound cold and mechanistic.[243] Striking the right balance can be difficult. If judges interview witnesses in draconian fashion or allow lawyers to do so, they risk re-traumatizing survivors and compromising the public legitimacy needed to make any transitional justice mechanism successful. On the other hand, if judges are too *laissez faire*, they run the risk of presiding over a process that loses credibility for another reason—it

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[238] ECCC Case 001 transcript (July 1, 2009), at 14.
[239] ECCC Case 001 transcript (July 2, 2009), at 29.
[240] *See* John D. Ciorciari & Anne Heindel, *Trauma in the Courtroom, in* CAMBODIA'S HIDDEN SCARS 122, 135 (Beth Van Schaack et al., eds., 2011).
[241] ECCC Case 001 transcript (July 13, 2009), at 62-63.
[242] ECCC Case 002 transcript (Oct. 22, 2012), at 71.
[243] *See, e.g.,* ECCC Case 001 transcript (Aug. 24, 2009), at 97 (accepting a defense objection, President Nil stated, "I myself made it clear of the 11 facts alleged on the accused that you received as a result of the establishment and operation of S-21 from the 17th April '75 to the 6th of January '79, which leads you to being joined as a civil party in this case. . . . So Mr. Civil Party, please only focus on the relevant part in relation to the facts and the accused").

appears to privilege the emotional accounts of victims over the hard facts needed to establish the defendants' culpability.

2. Acknowledgment of Survivors' Suffering

The distress caused by adversarial questioning can be moderated but not eliminated. Nevertheless, trauma psychologists suggest that affirmative expressions of civility and respect can reduce the psychological stress of victims appearing in court. In the *Duch* case at the ECCC, defense lawyers challenged one civil party's claim that he had survived the S-21 prison, arguing that he had failed to produce documentary support. Nevertheless, defense lawyer Kar Savuth added: "I don't really contest your suffering during the Khmer Rouge regime."[244] This simple affirmation, which posed little if any threat to the rights of the accused, reflected an admirable recognition of the vulnerability of the testifying survivor.

Conversely, signs of disrespect can be devastating. There was a notorious incident at the ICTR when the trial judges laughed during the questioning of a rape survivor. It seems that the judges were not laughing at the witness,[245] but in response to inappropriate defense counsel questions, which were degrading to the witness.[246] Similarly, at public hearings of the Truth and Reconciliation Commission in Liberia, "onlookers, including some Commissioners, would giggle when victims narrated unusual forms of atrocities, including particularly creative forms of rape."[247] The ICTR witness said later that the laughing made her "angry and nervous"[248]: "Today I would not accept to testify, to be traumatized for a second time. No one apologized to me. Only Gregory Townsend [the ICTR prosecuting lawyer] congratulated me after the testimony for my courage."[249]

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[244] ECCC Case 001 transcript (July 7, 2009), at 48. The Trial Chamber later reached a similar conclusion, denying Lay Chan's civil party application at judgment, because: "[a]lthough the Chamber does not doubt that LAY Chan (E2/23) suffered severe harm as a result of detention, interrogation and torture during the DK period, no evidence was provided to show that this occurred at S-21." Duch Trial Chamber Judgment, *supra* note 67, ¶ 647.

[245] *See* Statement of Judge Pillay, President of the Tribunal, ICTR/INFO-9-3-07 (Dec. 14, 2001) ("It is also clear from the audio-visual record that the reactions from the bench described as inappropriate in the article were responses to defence counsel's questions and arose in the course of dialogue with defence counsel").

[246] *See* Nowrojee, *supra* note 83, at 24 ("As lawyer Mwanyumba ineptly and insensitively questioned the witness at length about the rape, the judges burst out laughing twice at the lawyer while witness TA described in detail the lead-up to the rape."). *See also id.* (reporting defense questions including whether the witness had a bath prior to being raped by nine men, implying "that she could not have been raped if she smelled").

[247] Gberie, *supra* note 84, at 459.

[248] *See* Nowrojee, *supra* note 83, at 24. *See also id.* ("If you say you were raped, that is something understandable. How many times do you need to say it? When the judges laughed, they laughed like they could not stop laughing.")

[249] *Id.*

Elisabeth Schauer argues that even simple statements such as "thank you, your account is very helpful" have non-negligible effects on survivors.[250] ICTY psychologists Lobwein and Naslund have similarly advocated "that judges and lawyers should go out of their way to make witnesses feel their participation is valuable."[251] As one ICTY witness remarked, "Can you imagine how I felt when the prosecutor came to greet me afterwards to say thank you, and to accompany me when I was going back? I mean I felt like a human."[252] ECCC judges and lawyers have often taken simple steps to thank and reassure survivors either at the outset or the conclusion of their testimony. For example, an assistant prosecutor said to Case 002 civil party So Sotheavy, "I'd like to congratulate you for your courage for having come today, and of course we respect the suffering you went through."[253] He added that the prosecution's questions would aim not to provoke an emotional response but to focus on facts.[254] Senior Assistant Prosecutor Dararasmey Chan concluded his questioning of civil party Denise Affonço by thanking her and asserting: "Your testimony is very useful for our mission to search for the truth."[255] In some instances, ECCC civil lawyers have coupled their thanks with an acknowledgment of the difficulty of testifying about painful past events.[256]

All words of acknowledgement may not be equally helpful. Dembour and Haslam have pointed to many instances in the ICTY *Krstic* trial in which efforts at reassurance came off as insensitive. For example, they highlight one instance in which a witness asked for advice from the court about the ongoing suffering of thousands of people displaced from their homes in his area, and the judge commended him for his courage and then wished him "a happy return" home, clearly brushing over the substance of

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[250] The American Non-Governmental Organizations Coalition for the International Criminal Court, *The International Criminal Court and Children in Armed Conflict: Prosecuting the Crime of Enlisting and Conscripting Child Soldiers* 5 (June 5, 2009), available at http://www.amicc.org/docs/Child_Soldiers.pdf (speaking in particular about child trauma survivors).

[251] Nicola Henry, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victis of Wartime Sexual Violence,* 3 INT'L J. TRANS. JUST. 114, 120 (2009). Notably, Lobwein has served as head of the Head of the ECCC Witness and Experts Support Unit since 2008.

[252] *See, e.g.,* Medica Mondiale, *supra* note 25, at 62. Studies also indicate that post-testimony acknowledgement, such as basic check-ups or information on the status of the case, strongly influences victims' perception of their experience. *See, e.g., id.* (reporting one witness saying, "I can't tell you how much it means when someone calls you and asks how you are doing, whether you need anything. A kind word means a lot").

[253] ECCC Case 002 transcript (May 27, 2013), at 24.

[254] *Id.*

[255] ECCC Case 002 transcript (Dec. 12, 2012), at 114.

[256] *See, e.g.,* ECCC Case 002 transcript (Dec. 4, 2012), at 76-77 (with civil party lawyer Elisabeth Simonneau Fort concluding her questions about the suicide of civil party Toeung Sokha's late husband by saying: "Thank you, Madam. I think this is very difficult for you, so I won't dwell on the matter any further").

the witness's question.[257] To avoid such disconnect, Dembour and Haslam advise judges to "keep to their formal role" and avoid "superficially comforting conclusion[s]" to prevent appearing callous.[258] The ECCC Trial Chamber president has sometimes sounded antiseptic, such as when he told one civil party, "We hope the testimony of yours will be contributing to ascertaining the truth. And you are now excused. We wish you all the very best[,]"[259] but appears to have avoided potentially harmful platitudes.

Overall, the conduct of courtroom proceedings—such as the manner in which judges and lawyers speak to a witness—can have significant salutary or adverse impacts. Experience in international and hybrid courts over the past two decades underscores the need for training to ensure that judges and other key court personnel are sensitive to risks of re-traumatization and other challenges of involving trauma survivors in the courtroom. It is unfortunate that the ECCC has not taken advantage of offers to provide psychosocial training to judges and staff thus far. They and judges at other international and hybrid courts should do so.

V. EXPANDING VICTIM NARRATIVE OPPORTUNITIES

As discussed *supra*, one of the most important challenges regarding survivor testimony concerns the extent to which tribunals allow survivors to tell their stories freely and without interruption. Victims' advocates have long argued in favor of permitting trauma survivors to tell their stories in a manner of their choosing—an approach believed to be conducive to the storyteller's psychological well-being. Such arguments have long been pressed in the domestic criminal context. For example, Matthew Hall advocates a "victim-centered system" that would be "geared around filtering *in* as much of the victim's narrative as possible rather than filtering it *out*,"[260] noting wide acceptance by courts of "free narrative" accounts from child victims and arguing that other vulnerable participants in criminal trials should be allowed to follow a similar practice.[261]

In a mass crimes context, victim narratives offer the possibility of advancing the reparative and truth-telling goals of the judicial process, as well as the well-being of individuals testifying. Yet the rights of the accused can suffer, as victim statements are likely to be less legally relevant than directed testimony focused on the disputed facts relating to the

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[257] Dembour & Haslam, *supra* note 25, at 172.
[258] *See id.* at 173.
[259] ECCC Case 002 transcript (Dec. 13, 2012), at 106. This resembles the parting statement made to a number of Case 002/01 civil parties. *See, e.g.,* ECCC Case 002 transcript (Nov. 23, 2012), at 99; ECCC Case 002 transcript (Dec. 5, 2012), at 76.
[260] MATTHEW HALL, VICTIMS OF CRIME: POLICY AND PRACTICE IN CRIMINAL JUSTICE 208 (2009).
[261] *Id.* at 208-09.

charged crimes, while also extending the length of proceedings. Victim narratives also present special risks of bias in a mass crimes context, because victims emerging from an extended period of great hardship and suffering are prone to testify to an array of injuries not directly attributable to the accused and contribute to a narrative atmosphere prejudicial to the defense. The opportunities the ECCC has given civil parties to tell their stories in special "victim impact hearings" and through "statements of suffering" are unprecedented in international criminal justice and require careful analysis.

A. Victim Impact Statements in Domestic and International Courts

In inquisitorial civil law systems, victims have traditionally enjoyed more extensive rights of participation than in adversarial common law criminal proceedings. Among other differences, witnesses and victims in civil law systems typically have more scope for testifying in narrative form without frequent interruption by lawyers.[262] Common law criminal courts do not allow for extensive narrative testimony, as they permit intensive questioning of witnesses.[263] However, an element of the free narrative approach exists in some domestic systems in the form of "victim impact statements," which enable victims to speak during the sentencing phase of a criminal trial, informing the court about the physical and psychological harm they suffered as a result of the crime in question.

The advent of victim impact statements in many common law systems is one of the most important legal reforms achieved by victims' advocates to date. Victim impact statements, also referred to as victim allocution, are permitted in criminal courts in numerous common law systems, including Australia,[264] New Zealand,[265] Canada,[266] South Africa,[267] all 50 United States, and other jurisdictions.[268] Where the victim is deceased, a family member may generally speak on his or her behalf. Advocates argue that a judge can only reach an appropriate sentencing decision after understanding the impact the crime had on its victim(s) and that fairness

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[262] INTERNATIONAL CRIMINAL PROCEDURE, *supra* note 210, at 169-70.
[263] *Id.* at 170.
[264] *See, e.g.,* Sentencing Act 1991, L-49/1991 [Victoria], Part 6, Division 1A; Crimes (Sentencing Procedure) Act 1999, L-92/1999 [New South Wales], §§ 26-30A.
[265] Victims' Rights Act 2002 [New Zealand], Part 2, ¶¶ 17=27.
[266] Criminal Code [Canada], RSC 1985, § 722.
[267] The Child Justice Act 75 of 2008 [South Africa], § 70.
[268] *See* Payne v. Tennessee, 501 U.S. 808 (1991). Other examples include Japan, South Korea, Taiwan, and Singapore. Tatsuya Ota, *The development of victim support and victim rights in Asia, in* SUPPORT FOR VICTIMS OF CRIME IN ASIA 113, 127-29 (Wing-Cheon Chan ed. 2008).

demands that victims be heard.[269] Advocates also contend that victim allocution can have "healing" and "therapeutic" effects,[270] although empirical studies conducted in a number of jurisdictions have produced conflicting evidence on whether and to what extent this occurs in practice.[271] Erin Sheley argues further that complex victim narratives can "effectively convey the social experience of harm, without which the criminal justice system loses its legitimacy[.]"[272] This possibility has particular relevance in mass crimes proceedings at international and hybrid courts, where victim accounts are apt to be in some measure representative of harms suffered by many others. It is difficult to imagine a mass-crimes process being regarded as legitimate if it fails to address the types of harms—if not the specific individual harms—endured by many members of the survivor population.

Nevertheless, victim impact statements are controversial. Not all analysts agree that they are reliably therapeutic. Lynne Henderson warns that victims may leave "embittered" if they are treated in a perfunctory manner or view the sentence as unreflective of their wishes.[273] A more trenchant criticism is that victims are apt to voice emotional pleas prejudicial to the defense, leading to harsher sentences.[274] Susan Bandes argues that victim impact statements "should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing [such as] hatred, the desire for undifferentiated vengeance, and even bigotry."[275] These concerns have been particularly acute in capital cases, where the life of the accused hangs in the balance.[276]

The effects of victim allocution on sentencing have been difficult to pin down empirically. Numerous quantitative and qualitative studies across

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[269] *See, e.g.,* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME 76-77 (U.S. Government Printing Office, 1982); Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality,* 18 J. CRIM. JUST. 19 (1990); Paul G. Cassell, *In Defense of Victim Impact Statements,* 6 OHIO ST. J. CRIM. L. 611 (2009).

[270] Cassell, *supra* note 269, at 621-23; Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. 545, 550–51 (1999).

[271] JUAN CARLOS OCHOA, THE RIGHTS OF VICTIMS IN CRIMINAL JUSTICE PROCEEDINGS FOR SERIOUS HUMAN RIGHTS VIOLATIONS 180-82 (2013) (reviewing a number of studies from England, ales, Canada, Australia, and the United States).

[272] Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment,* 87 INDIANA L. J. 1247, 1248-49 (2012).

[273] Lynne N. Henderson, *The Wrongs of Victims' Rights,* 37 STAN. L. REV. 937, 1006 (1985).

[274] Susan Bandes, *Empathy, Narrative, and Victim Impact Statements,* 63 U. CHI. L. REV. 361, 365-66 (1996); Henderson, *supra* note 273, at 994 (warning that impact statements may "provoke outrage" and further the idea of "retribution-as-vengeance"); Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85, 86–87 (1993).

[275] Bandes, *supra* note 274, at 365-66 (adding that "neither narratives nor benign emotions such as caring, empathy, or compassion are always helpful or appropriate in the legal arena").

[276] Before *Payne,* the U.S. Supreme Court's rationale for rejecting victim impact statements was specifically focused on capital cases. Booth v. Maryland, 482 U.S. 496, 509 n. 12 (1976). *See also* Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials,* 41 ARIZ. L. REV. 143 (1999); Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements,* 1999 Utah L. Rev. 545 (1999).

different jurisdictions have come to differing conclusions about the effects of victim impact statements on sentencing, with most suggesting a modest effect, if any at all.[277] Studies using simulations of jury deliberations in capital cases have found some effects but carry significant limitations, since jurors lack the experience of a real trial and do not make decisions carrying the same real-life consequences.[278]

Common law systems generally treat victim impact statements as too prejudicial to introduce before sentencing,[279] especially given the role of juries in judging the guilt or innocence of the accused. At international and hybrid courts, these concerns may be mitigated to some degree. No such court has permitted the death penalty,[280] and both verdicts and sentences are handed down by professional judges, who are often presumed to be less easily swayed by emotive accounts of victim suffering than juries are.[281] Still, the danger of dehumanizing the defendant remains and can prompt legitimate defense challenges and undermine the trial's actual or apparent fairness. As Robert Cryer argues, permitting allocution increases the likelihood that victims will offer legally irrelevant information, including information on uncharged crimes, the prejudicial effect of which "is impossible to remove … completely."[282] The risk of bias is acute in a mass crimes context, when pressure to assign responsibility for widespread atrocities is usually high.

This relates to a further criticism of victim impact statements—that they enable the state or other empowered official actors to use victim narratives as political instruments. To Jonathan Simon, victim allocution is a mechanism whereby the state amplifies the "kind of victim voice that has been promoted by the victim's rights movement, one of extremity, anger, and vengeance," which in turn favors hardline crime policies that prioritize "vengeance and ritualized rage over crime prevention and fear

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[277] *See* Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals,* 39 BRIT. J. CRIMINOL. 216, 219-220 (1999) (summarizing studies done on the subject suggesting that victim impact statements have little effect); Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment,* 1999 UTAH L. REV. 479, 491-94 (reaching a similar conclusion); Amy L. Wevodau et al., *The Role of Emotion and Cognition in Juror Perceptions of Victim Impact Statements,* SOC. JUST. RES. (2014) (finding an effect on a sample of jurors and summarizing other research that suggests an effect).

[278] *See* Bryan Myers et al., *Psychology Weighs In on the Debate Surrounding Victim Impact Statements and Capital Sentencing: Are Emotional Jurors Really Irrational?* 19 FED. SENT'G REP. 13, 14-17 (2006) (reviewing some such studies and their limitations).

[279] Sigall Horovitz, *The Role of Victims, in* INTERNATIONAL CRIMINAL PROCEDURE, *supra* note 210, at 166, 168.

[280] UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, MOVING AWAY FROM THE DEATH PENALTY 19 (New York: United Nations, 2012).

[281] G.P. Fletcher, *The Influence of the Common Law and Civil Law Traditions on International Criminal Law, in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 108 (Antonio Cassese ed., 2009).

[282] Cryer, *supra* note 189, at 420.

reduction."[283] Although not all victims are as vindictive as the "activist victims" Simon portrays,[284] it is true that the risk of instrumentalizing victim voices does not disappear simply because victims are given freer rein to tell their stories.

Analogous risks apply to international and hybrid courts, where victim accounts of suffering, grief, and sometimes anger and vindictiveness may favor the agendas of a court's political architects. That brings the analysis back to the question of what the goals of an international or hybrid tribunal should be. Providing an opportunity for victims to air grievances may advance laudable policy objectives—such as promoting reconciliation by providing a form of social acknowledgement to those who suffered harm—or buttress less worthy aims — such as demonizing members of a disfavored group to help justify repressive or belligerent policies. Evaluating the merits of victim impact statements in any given judicial and political context requires assessment of the ends a given trial is intended to serve, as well as the statements' evident contribution toward those ends.

Practice at international and hybrid tribunals has varied. The ICTY occasionally has allowed victim impact statements,[285] justifying that practice in the *Krstić* case as a way to "give 'a voice' to the suffering of victims" at the sentencing phase.[286] At the ICTY, victims also may submit written impact statements for consideration in sentencing.[287] Dembour and Haslam note that ICTY judges often have asked victim-witnesses questions at the conclusion of their testimony that offer them opportunities to discuss their suffering. Victim replies to these final questions differ from the main testimony, as they "tend to be inscribed in the present" and emphasize how difficult it is for survivors to keep living.[288] However, these types of final remarks have been woven into replies to judicial questions—not an explicit and structured opportunity for statements of suffering.

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[283] JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 106 (2007).

[284] Simon, *supra* note 283, at 106. Sheley, *supra* note 272, at 1284 (arguing that individual accounts can disrupt official narratives and may be especially important where the state does seek to construct "a false 'victim voice' as an agent of its own power").

[285] LUKE MOFFETT, JUSTICE FOR VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT 81-82 (2014); INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 1328-29 (Goran Sluiter et. al, eds. 2013)

[286] Prosecutor v. Krstic, Case No. IT-98-33, ¶ 703 (Trial Chamber, Aug. 2, 2001).

[287] ICTY Rules, *supra* note 196, R. 92*bis*(A)(i)(d).

[288] Dembour & Haslam, *supra* note 25, at 171. *See also* ICTY, Transcript of Trial Proceedings—*Krstic* case, Apr. 7, 2000 (in which a witness describes the ongoing pain of living after his two sons were killed and his property was destroyed); ICTY, Transcript of Trial Proceedings—*Krstic* case, Mar. 22, 2000 (in which a victim depicts suffering he and others endured after Srebrenica, and a judge replied, "Very well, Mr. Mandzic. We have finished. You have told us about your suffering," and then thanked him for his courage in testifying).

The Special Tribunal for Lebanon and ICC were designed to put greater emphasis on meeting victims' needs, and provide for more expansive victim participation in the courtroom, including the opportunity to give statements prior to judgment. At the STL, victim participants are permitted to make opening statements and closing arguments,[289] as well as victim impact statements during the sentencing phase.[290] The ICC Rules are less specific. Rule 68(3) states:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented, and considered, at stages of the proceedings determined to be appropriate by the Court, and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. [291]

The ICC Trial Chamber has ruled that victims' participation may include opening and closing statements,[292] but in practice the ICC has allowed only a limited scope for victim participation in the courtroom. Victims have been allowed to participate through their legal representatives but have not been permitted to make personal statements.[293] As discussed *infra*, the ECCC has provided the most extensive and explicit opportunities yet devised in an international or hybrid court for victims to tell their stories and relate their harms.

B. Innovations at the ECCC

Nothing akin to victim impact statements was envisioned in the ECCC's constitutive instruments. Instead, opportunities emerged as a matter of judicial discretion as the Trial Chamber experimented with ways to involve civil parties in the courtroom and provide them with redress after the Court's rules were amended to reduce the scope of their party rights.[294] In the *Duch* trial, the judges encouraged civil parties to express their suffering by asking them questions to that effect or characterizing

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[289] STL Rules of Procedure and Evidence, *supra* note 20, RR. 143, 147(A).
[290] *Id.* R. 87(C).
[291] ICC Rules, *supra* note 19, R. 68(3).
[292] Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, ¶ 117 (Trial Chamber I, Jan. 18, 2008); Katanga & Ngudjolo, Case No. ICC-01/04-01/07, ¶ 68 (Trial Chamber II, Jan. 22, 2010).
[293] Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court,* 90 INT'L REV. RED CROSS 409, 428-29 (2008) (noting that victim representatives were allowed to make opening and closing statements limited to legal observations at the hearing on confirmation of charges and were allowed to tender evidence and pose questions); ICC, *Confirmation of charges hearing in Blé Goudé case opens at ICC* (Sept. 29, 2014), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/ma165.aspx (noting similar participation by victims in that process).
[294] *See* CIORCIARI & HEINDEL, *supra* note 1, at 216-25 (discussing reductions in the scope of individual civil parties role in proceedings).

their appearance as an opportunity to share suffering.[295] This resembles the general practice of national systems recognizing civil parties, who express their suffering as their testimony unfolds.[296] In Case 002/01, the Trial Chamber introduced two major innovations. It organized "victim impact hearings" prior to judgment, allowing selected civil parties to tell their stories and respond to questions, and permitted nearly all civil parties who testified during the trial to make uninterrupted "statements of suffering."

1. "Victim Impact Hearings"

The ECCC Trial Chamber introduced victim impact hearings in Case 002/01, announcing that the two lead lawyers representing civil parties (the "Lead Co-Lawyers") would have four days of in-court time to "present evidence of the suffering of Civil Parties, and hence, the impact of the crimes tried in Case 002/01 on victims."[297] These hearings, which were characterized as "adversarial,"[298] were scheduled after the hearing of evidence on the alleged crimes but before evidence on the character of the accused and closing arguments[299]—distinguishing them from victim impact statements used elsewhere at the sentencing phase. A similar practice is being followed in Case 002/02, the trial currently underway. Whereas Case 002/001 focused primarily on one criminal policy, Case 002/02 addresses several. The Trial Chamber therefore intends to hold two-day victim impact hearings after each trial topic, with "a representative selection of Civil Parties who are primarily relevant to the topic examined[.]"[300]

The official rationale for these hearings is to demonstrate the impact of alleged crimes on victims, helping the court assess the crimes' gravity and substantiating civil parties' claims for "collective and moral reparations" under the ECCC Rules.[301] The Lead Co-Lawyers have further emphasized:

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[295] *See, e.g.,* ECCC Case 001 transcript (June 30, 2009), at 34 (in which the Trial Chamber president asks civil party Chum Mey to "[t]ell us about the suffering you have suffered physically and mentally" from torture and other mistreatment by the Khmers Rouges); ECCC Case 001 transcript (July 2, 2009), at 29 (encouraging a civil party to "share [his] sufferings").

[296] Mélanie Vianney-Laiud, *Civil Parties' Statements of Suffering at the ECCC,* Destination Justice (Aug. 2, 2013), http://destinationjustice.org/civil-parties-statements-of-suffering-at-the-eccc/.

[297] ECCC, Memorandum from Trial Chamber President Nil Nonn to Case 002 Parties, Re: Scheduling of Trial Management Meeting, ¶ 18 (Aug. 3, 2012) [hereinafter Trial Management Memorandum] (on file with the authors).

[298] ECCC Case 002 transcript (May 27, 2013), at 3.

[299] Trial Management Memorandum, *supra* note 297, ¶ 16.

[300] ECCC, Memorandum from Trial Chamber President Nil Nonn to Case 002 Parties, Re: Information on (1) Key Document Presentation Hearings in Case 002/02 and (2) Hearings on Harm Suffered by the Civil Parties in Case 002/02, ¶ 7 (Dec 17, 2014).

[301] ECCC, Memorandum from Trial Chamber President Nil Nonn to Case 002 Parties, Re: Order for Video-Link Testimony of Civil Party TCCP-13 (May 22, 2013) (providing that "[t]he purpose of the

> Though not the raison d'être for these hearings, another undeniably important aspect of these hearings is the opportunity they provide for at least a limited number of Civil Parties to tell their stories in an official, judicial setting with the presence of (and sometimes exchange with) one or more of the Accused. Under the right circumstances, this can be a meaningful, empowering and healing experience for civil parties wherein the process itself provides a reparative benefit—in the broader meaning of the term.[302]

The hearings were intended to be brief and efficient, and in Case 002/01 they were. The Lead Co-Lawyers selected a small number of representative civil parties,[303] three or four of whom testified per day. A total of fifteen civil parties were chosen out of nearly 4,000 admitted in the case, based on the evidence they could provide on suffering, the relevance of that evidence to the crimes charged in Case 002/01, and the diversity of harms their experienced represented.[304] At each hearing, civil parties testified in relatively rapid succession, giving statements of suffering unconfined to the charges, or taking questions from civil party lawyers[305] before answering questions from prosecutors, defense, and the bench about facts related to the charges.

Although initially uncontroversial, the hearings became a basis of appeal from the Case 002/01 judgment when the defense challenged the Trial Chamber's decision to rely on impact-hearing testimony as material evidence in the substantive portion of the judgment instead of limiting its relevance to sentencing and reparations.[306] The *Nuon Chea* team argued

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Victim Impact hearings is to provide the Civil Parties an opportunity to present evidence related to collective and moral reparations" as provided for in the internal rules). *See also* ECCC, *The Purpose of Hearing Victims' Suffering* (June 7, 2013), http://www.eccc.gov.kh/en/blog/topic/1274 (including a similar explanation by the Lead Co-Lawyers); ECCC, Internal Rules [rev. 9], *rev'd* Jan. 16, 2015, R. 23*quinquies*(2)(b).

[302] ECCC, *The Purpose, supra* note 301.

[303] ECCC, Memorandum from Trial Chamber President Nil Nonn to Case 002 Parties, Re: Further information regarding trial scheduling, ¶ 4 (Feb. 7, 2013). *See* ECCC Case 002 transcript (May 27, 2013), at 14 ("You are today to represent other victims of the Khmer Rouge regime.").

[304] ECCC, *The Purpose, supra* note 301.

[305] ECCC Case 002 transcript (May 27, 2013), at 1 (noting that "the Chamber will hear the statements of suffering and harms suffered by the civil parties"); *id.* at 10-11 (noting that statements of suffering may address harms related to any crimes in the entire Case 002 indictment, of which only a small number were at issue in Case 002/01). In the first Case 002/02 impact hearing, civil party lawyers announced that unlike in Case 002/01 they would be putting questions to all civil parties "to help them come up with the answers with regard to their suffering"). ECCC Case 002 transcript (April 1, 2015), at 23-24. The "statements of suffering" procedure is discussed *infra.*

[306] Prosecutor v. Nuon Chea et al., Case No. 002/19-09-2007-ECCC-SC, Nuon Chea's Appeal Against the Judgment in Case 002/01, 193, (SCC, Dec. 29, 2014) [hereinafter Nuon Chea Appeal Brief] (saying that the Trial Chamber informed the accused "that victim impact testimony would be used only to determine sentencing and reparations"). *Cf.* Prosecutor v. Nuon Chea et al., Case No.

that its fair trial rights were violated by the Trial Chamber's failure to provide notice that the testimony would be used for this purpose.[307] The team argued further that it had little opportunity for cross-examination, as the Lead Co-Lawyers were given 50 of the 75 minutes for each civil party and the prosecution and defense teams divided the remaining 25.[308]

Had it known that impact-hearing testimony would be used as material evidence, the *Nuon Chea* team argued, it would have objected to this time allotment and attempted a thorough cross-examination of each civil party.[309] Their concerns are not unfounded. Before the first victim impact hearing, former Lead Co-Lawyer Elisabeth Simonneau-Fort offered a plea for understanding that victims would be emotive, while acknowledging that "the testimonies here might not be as clear cut and specific as testimonies that are purely factual. Sometimes there probably will be inaccuracies regarding dates or regarding names or regarding places."[310] As discussed *supra*, these are common problems with victim accounts, and if victim testimonies are used to prove criminal responsibility, sufficient confrontation is necessary to establish their evidential reliability.

In the first Case 002/02 victim impact hearings, eight civil parties testified. Originally intended to take place over two days, due to pressure from the defense for equal questioning time, the hearings extended over three days. In addition, detailed factual questioning by the prosecution of one civil party led the defense to request that his status be changed to an evidentiary witness so he could be called back later and interviewed at length.[311] During the course of the hearings, civil party lawyers and the defense exchanged criticisms that each was exceeding the narrow purpose of the hearings. Indeed, due to robust defense exercise of their questioning rights, the hearings were largely transformed into regular, if abbreviated, hearings of each victim-witness. [312]

Special hearings focused on victim harm related to the charges may offer some benefits to victims—at least those few who testify—at little cost to the efficiency and focus of the proceedings. It is noteworthy that nearly half of all civil parties who had the opportunity to testify in Case

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002/19-09-2007-ECCC-SC, Mémoire d'appel de la Défense de M. Khieu Samphân contre the jugement rendu dans le process 002/01, ¶ 30 (Dec. 29, 2014).

[307] *Id.*¶¶ 187-93.

[308] *See id.* ¶ 185.

[309] *Id.* ¶ 193.

[310] ECCC Case 002 transcript (May 27, 2013), at 8-9.

[311] *See* ECCC Case 002 transcript (April 2, 2015), at 39, 50-55.

[312] *See, e.g.,* Case 002 transcript (April 3, 2015), at 14-16 (including the civil party lead co-lawyer's criticism that intensive defense questioning regarding inconsistencies between civil parties' party applications and their current testimony "on … issues which of course are important but that today are polluting, contaminating the purpose of this hearing"; and the defense rebuttal that these questions could only be addressed while the witness was before the court.

002/01 did so during the victim impact hearings. Victims would have had a substantially reduced voice in the proceedings had the hearings not been held. However, the decision to hold these hearings before judgment mandates that they be adversarial, because, "the harm and the facts are intrinsically linked and it is necessary, of course, to speak about the facts, to speak about the harm."[313] For this reason, when in Case 002/02 the defense were given an equal opportunity for cross-examination, the length of the hearings nearly doubled, the purpose of the hearings was at least partially buried by the parties' efforts to build a supportive evidentiary record, and the victims who testified were asked potentially traumatizing questions challenging their veracity. The hearings thus did not offer the opportunity for free narrative testimony extolled by victim advocates and provided by the innovative "statements of suffering" procedure.[314]

2. "Statements of Suffering"

The Trial Chamber's incorporation of statements of suffering was more improvisational. After questioning the second civil party to appear in Case 002/01, Trial Chamber president Nil Nonn thanked him and said, "we would like to give you the opportunity to address your suffering and harms you have incurred if you would wish to do so now."[315] Civil party Klan Fit was unprepared for the opportunity and said he had nothing to add.[316] Months later, Em Oeum became the third civil party to testify in the trial. At the end of his questioning, civil party Lead Co-Lawyer Pich Ang asked Em if he had been affected by the loss of his loved ones. Em said he would "need more time" to speak about that topic and asked Nil Nonn whether he would be allowed to do so. Nil replied that he would have the opportunity to do so at the end of his testimony, so "the injuries and your suffering could be expressed at a later date, indeed."[317] The Trial Chamber later did allow him to "express [his] harms" suffered during the Pol Pot era and request reparations related to Case 002/01 in what became the court's first recognized statement of suffering.[318]

When the next civil party appeared, the Lead Co-Lawyers requested that their clients again be permitted to make "statements concerning

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[313] ECCC Case 002 transcript (Mar. 31, 2015) (quoting incumbent civil party lead co-lawyer Marie Guiraud).

[314] As mentioned *supra*, those persons who testified at the victim impact hearings were also allowed to offer a statement of suffering, likely because all other testifying civil parties had been provided the same opportunity; however, it was an add-on to the basic hearing procedure, and was not continued in Case 002/02, and is therefore discussed separately.

[315] ECCC Case 002 transcript (Jan. 11, 2012), at 87.

[316] *Id.* at 88.

[317] ECCC Case 002 transcript (Aug. 23, 2012), at 109.

[318] *Id.* at 27-28.

harms occurred for the entire Case 002,"[319] as opposed to limiting those statements to the facts surrounding the mini-trial in question, a limitation of the victim impact hearing procedure discussed *supra*. Pich Ang and his former international co-counsel Elisabeth Simonneau Fort argued that victims cannot limit discussion of their suffering to charged acts and narrow time periods and derive psychological benefits from the opportunity to speak holistically. Pich said:

> [I]t is better for them to express such statement rather than try to limit their harm to the portion of the case, because they are not legal experts. In addition, their sorrow and harm are both physical and psychological, which are part of the whole Case 002, and it is extremely difficult for them to limit that harm, physical or psychological, to a portion of this case. And if the civil party is given such opportunity to make a statement before this Chamber, it is important for that civil party to make a complete statement, and that would make that civil party feel better. [320]

Khieu Samphan defense lawyers responded that allowing statements of suffering would prejudice the rights of the accused and make a "joke" of the trial by bringing in facts unrelated to the charges and associating the accused with the crimes of the entire Khmer Rouge regime.[321]

Over these objections, the Trial Chamber ruled that it would allow Yim Sovann to give a statement of suffering on the totality of Case 002 but that other parties would have the opportunity afterward "to raise [their] points and to address the elements of the statement that seem irrelevant."[322] Yim Sovann's remarks set a precedent for further statements of suffering. They included a prepared statement of roughly 1,000 words describing her experience of forced labor and migration during the Pol Pot era, the arrest and killing of family members accused of being enemies of the Khmer Rouge, the ensuing trauma and pain she endured, and her plea to the court for justice—remarks that were powerful but largely unrelated to the charges.[323]

A.[319] ECCC Case 002 transcript (Oct. 22, 2012), at 2. *See also* Prosecutor v. Nuon Chea et al., Case No. 002/19-09-2007-ECCC/TC, Demande des co-avocats principaux pour les parties civiles afin de definer l'étendue de la déclaration sur la souffrance des parties civiles déposantes (Office of the Co-Lead Lawyers, Oct. 30, 2012).

[320] ECCC Case 002 transcript (Oct. 22, 2012), at 4.

[321] *Id.* at 10-11 (quoting Khieu Samphan's national co-lawyer Kong Sam Onn). *See also id.* at 12-13 (quoting Khieu Samphan's international co-lawyer Arthur Vercken arguing in part that civil parties would present "facts that will make them lose credibility because the victims will describe harm suffered that [...] will go beyond the consequences of the facts [in the case]").

[322] *Id.* at 17.

[323] *Id.* at 19-22.

Trial Chamber president Nil Nonn thereafter informed civil parties at the start of their testimony that they would be able to give statements of suffering at the end.[324] In total, 12 civil parties gave statements of suffering during the main evidentiary proceedings in Case 002/01[325] speaking to harms beyond those relating to the specific crimes at issue.[326] In its principal decision on statements of suffering, issued in May 2013, the Trial Chamber acknowledged possible prejudice to the accused but insisted that it "distinguished at all time[s] between testimony on the facts at issue, which is confined to the scope of Case 002/01 and subject to adversarial argument, and general statements of suffering, which the Civil Part[ies] can freely make at the conclusion of their testimony."[327] The Court also allowed the parties to comment on statements of suffering after their completion, though this has not prevented defense lawyers from arguing that such statements often introduce irrelevant and potentially prejudicial facts against which the defense has little opportunity to defend itself—challenges discussed *infra*.

C. Impacts of "Statements of Suffering"

The relatively small number of civil parties who have offered statements of suffering and limited available data about their reactions militates against robust empirical findings on the effects of this narrative opportunity. Nevertheless, some of its strengths and hazards have become apparent.

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[324] ECCC Case 002 transcript (Oct. 23, 2012), at 80 (advising civil party Lay Bony that at the end of her testimony, she would be given "appropriate time" to "express to the Court the injury you have sustained physically, materially, which may have resulted from the crimes that took place during the period of the Democratic Kampuchea that amounted to your application to join as a civil party before the Chamber. And you may also express other suffering and injuries that you sustained during that period"). Nil used a similar script for other civil parties. *See, e.g.,* ECCC Case 002 transcript (May 27, 2013), at 10-11, 69.

[325] Four others did not give statements of suffering, because they were not provided the opportunity or lacked adequate notice and came unprepared. As of the end of May 2015, in Case 002/02 nine civil parties have provided statements of suffering. The seven civil parties who were heard only during first victim impact hearing in the case were asked questions by their lawyers in lieu of providing statements of suffering.

[326] Decision on Request to Recall, *supra* note 123, ¶¶ 6, 14-17.

[327] Decision on Request to Recall, *supra* note 123, ¶ 14. For example, after civil party Toeung Sokha described harm she suffered unrelated to the indicted charges, her lawyer asked: "Do you still live with these difficult memories?" Trial Chamber president Nil Nonn quickly intervened, asking counsel to "stop asking civil party to do that because we do not wish to mislead parties to the proceeding and the civil party herself because she would then be offered the opportunity to do so not now but by the end of the testimony." ECCC Case 002 transcript (Dec. 4, 2012), at 52-53. Earlier, a civil party lawyer had asked the Trial Chamber to permit an elderly survivor to take questions on the entire case file due to her possible inability to testify again. The Trial Chamber refused; she could "express her statement of suffering for the entire case file, but the questions should be confined to that segment of the trial only." ECCC Case 002 transcript (Nov. 6, 2012), at 5.

1. Effects on Trauma Survivors

Civil party lawyers welcomed statements of suffering, anticipating that they would provide psychological benefits and thus a form of redress. Allowing victims to relate events in their own words and describe harms they deem most consequential without interruption and adversarial challenges may indeed improve victims' overall experience in giving testimony. Elisabeth Simonneau Fort argued:

> [Civil parties] wish to express their suffering globally, without being asked to cut it into bits and pieces [...] We cannot separate the nightmare of forced transfers and the nightmare of executions. We have mental trauma as a result of executions on the road and other facts. This is global suffering endured by civil parties following a series of events that account of what they are going through today [...] So we should allow them to express their suffering globally and not make them go through this impossible exercise of splitting what they have to say. [328]

Pich Ang argued similarly that uninterrupted statements of suffering are "part of how to heal the wound, how to make their grief be healed. "[329] Moreover, he said other victims would hear them, contributing to national reconciliation and public satisfaction with the court's work.[330]

The Trial Chamber evidently agreed. It did not offer a detailed explanation for why it allowed statements of suffering,[331] but in its primary written decision on the matter, it noted that civil parties may participate as parties and seek collective and moral reparations, which "therefore" led the Chamber to allow them to make statements of suffering.[332] By implication, the judges thus treated the statements as a form of non-material reparation.

Many civil parties who gave statements of suffering in Case 002/01 expressed appreciation for the opportunity to do so. Lay Bony said:

> [T]his is the best opportunity after 30 years I have been living with all the suffering... I have kept this suffering in

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[328] ECCC Case 002 transcript (Oct. 22, 2012), at 5-6.

[329] *Id.* at 15-16. Nuon Chea's counsel pointed out that although "it's very difficult to compartmentalize suffering," Nuon Chea also had been "cut off on several occasions" and "forced to compartmentalize" as the Court imposed "serious limitations" on his participation in these proceedings. *Id.* at 9-10.

[330] ECCC Case 002 transcript (Oct. 22, 2012), at 5.

[331] Deciding on Yim Sovann's request, Trial Chamber judge Jean-Marc Lavergne merely said after a brief caucus that "the Chamber feels it is wise to allow the civil party to express herself on the totality of the suffering that is relevant to Case 002." ECCC Case 002 transcript (Oct. 22, 2012), at 17.

[332] Decision on Request to Recall, *supra* note 123, ¶ 14.

> my heart for a very long period of time, and I would like to thank you, the Chamber, very much for giving me this opportunity to speak it out. [333]

When asked why it was so important for him to make a statement of suffering, Yos Phal explained:

> I bore the suffering and the burden of pain with me for more than 30 years. And I do not know where I can reveal the truth and the suffering, and this is the only chance for me to do so. And I request the Court to find me justice, and closure to my pains. [334]

In general, she and other Case 002 civil parties have not expressed a desire to tell detailed factual accounts pertaining to the specific alleged crimes in the case. Rather, they voiced a desire to share their experiences of suffering after long periods of lacking an official mechanism for doing so.[335] The gratitude many civil parties expressed for the opportunity to give statements of suffering suggests that free-flowing narrative expression may have performed a reparative function beyond that available through normal testimony. Moreover, the absence of contemporaneous defense challenges to their narratives likely lowered the risk of re-traumatization.

Nevertheless, the experience of offering statements of suffering is not without risk of re-traumatization, especially if the defense has the opportunity to respond. That possibility was apparent in one of the first statements of suffering given to the court, when survivor Yim Sovann broke down in tears while testifying about the harm she had endured. Immediately after her statement, Ieng Sary's lawyer Ang Udom interjected:

> [T]he civil party shed her tears, though I do not know exactly the reason for the tears. And it is unfortunate that she has experienced misfortune throughout her life. It does not strictly indicate that such suffering only existed within the regime of Democratic Kampuchea or before—or prior to that regime. It is unclear to me. [336]

The defense teams proceeded to challenge the relevance and possible bias of several elements of her statement. That type of questioning was

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[333] ECCC Case 002 transcript (Oct. 24, 2012), at 59.

[334] ECCC Case 002 transcript (May 27, 2013), at 80.

[335] *See, e.g.,* ECCC Case 002 transcript (Aug. 29, 2012), at 28-29 (with Em Oeum describing it as "the moment" he had waited for many years); ECCC Case 002 transcript (Oct. 22, 2012), at 22 (including Yim Sovann's remark that she had "suffered psychological suffering for so long," finally had "the opportunity to express such suffering," and believed the court would deliver justice and that "the psychological wound[s]" of victims and civil parties "would be cured"). At least a dozen other civil parties expressed similar gratitude.

[336] ECCC Case 002 transcript (Oct. 22, 2012), at 22-23.

appropriate as a matter of due process but may have undermined any therapeutic benefits Yim Sovann derived from telling her story, raising the question of whether the Court—or Yim's own lawyers—would have been wise to insist that her statement be more limited in scope. Instead, the prosecution advocated for defense remarks to be made only after a civil party had left the courtroom "so that they may not be embarrassed."[337] That procedure was followed going forward, and contributed to charges of prejudice against the accused.

2. Effects on the Judicial Process

Statements of suffering, like victim impact hearings, offer numerous potential advantages to the judicial process: adding context for alleged crimes and a sense of their gravity, "highlight[ing] the human impact of the crimes at issue," and advancing broader truth-telling and reparative goals by describing the "grief and suffering of all the victims."[338] Moreover, in a process that tends to use victims mainly as accessories for the prosecution, statements of suffering freely give victims something back. This partial form of reparation may affect the judicial process. Pich Ang asserted that "[i]f they are only limited to only say a few things, like their expression of their suffering is cut into bits and pieces, I'm afraid they will not be encouraged to speak before the Chamber […]."[339] The converse may also be true; free narrative opportunities may encourage otherwise reluctant victims to come forward with information. This effect cannot yet be observed at the ECCC, which made victim impact hearings and statements of suffering available only after the window for civil party applications in Case 002 had closed, but could become apparent if further trials occur.

On the flipside, the addition of uninterrupted narratives opens the possibility for inefficiency, especially in a mass crimes trial featuring myriad victims. Case 002/01 featured testimony from 31 civil parties and 64 other witnesses, most of whom were survivors of the Pol Pot period. The court's effort to ensure efficiency in the first statement of suffering it permitted did not proceed smoothly. After civil party Em Oeun offered a

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[337] *Id.* at 28. *See also* Decision on Request to Recall, *supra* note 123, ¶ 5 (including the Lead Co-Lawyers' request that civil parties be shielded "from comments that may offend their dignity or cause psychological distress" by allowing defense reaction to their statements only after they have left the courtroom).

[338] Civil Party Lead Co-Lawyers' Request for Specification of the Scope of the Civil Parties' In-Court Statements About Their Suffering, Case No. 002/19—9-2007-ECCC/TC ¶¶ 10, 16 (Oct. 30, 2012) [hereinafter LCL Request for Specification] (reiterating arguments that civil parties could not link cumulative trauma and suffering to a single event).

[339] ECCC Case 002 transcript (Oct. 22, 2012), at 15-16. Nuon Chea's counsel asserted that although "it's very difficult to compartmentalize suffering," Nuon Chea had been "cut off on several occasions" and "forced to compartmentalize" as the Court imposed "serious limitations" on his participation. *Id.* at 9-10.

lengthy introduction referencing the pre-1975 period and said he had written down the details of what he encountered, Nil Nonn interrupted brusquely:

> Mr. Em Oeun, you are now allowed to express your suffering, what you encountered during the regime, the harms, the damages you have during the time -- during this period. So please limit your comment or statement to that confined area. You are not allowed to beat about the bush. Now, you have five more minutes to go straight to the point. If you do not wish to make any statement on this, you also can say so. I mean, it is your right not to do that, as well. [340]

Unsure how to proceed, and unaware in advance that a time limit would apply, Em Oeun said only: "Thank you, Mr. President. To cut short, I have no more idea,"[341] truncating his testimony and likely undermining whatever benefit he might have derived from it.

At the next hearing involving a civil party, the Trial Chamber asserted that "the expression of suffering should be concise and should not be excessive."[342] In their ensuing request for guidelines, the Lead Co-Lawyers emphasized that the statements consumed "very little time, no more than 15 minutes" for each civil party and could be prepared with lawyers beforehand to help civil parties feel at ease and communicate clearly and concisely.[343] In fact, the statements of suffering often lasted for less than ten minutes and seldom more than 15. Together, statements of suffering and victim impact hearings consumed only a small share of the 222 days of courtroom proceedings[344]—a modest price to pay in efficiency if a payoff can be demonstrated for survivors.

Still, legitimate concerns of bias remain. When victim accounts stray from the specific allegations against the accused, defendants may become scapegoats for a much broader set of abuses in the minds of observers, even if the formal legal judgment does not reach that conclusion. The fear of emotive, prejudicial victim pleas is a prime source of concern in domestic victim impact statements and may present added concerns when made before a judgment is issued. Even if broad victim statements do not bias the judges, their accounts exacerbate a risk inherent in selective prosecution for mass crimes—that the narrative produced by the trial

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340 ECCC Case 002 transcript (Aug. 29, 2012), at 28-30.
341 *Id.* at 30.
342 ECCC Case 002 transcript (Oct. 22, 2012), at 62.
343 LCL Request for Specification, *supra* note 338, ¶¶ 17-18.
344 *See* ECCC, *Case 002/01 Day-by-Day*, http://www.eccc.gov.kh/en/case-002-01/hearings (last visited June 30, 2015).

process will exaggerate defendants' responsibility for harms suffered by the population.[345]

At times, civil parties did express strong retributive sentiments in their statements of suffering. After a gripping account of how "they"—the Khmers Rouges—had killed his loved ones and led to his enduring misery and economic deprivation, survivor Kim Vandy explained how he had "wanted to take revenge" and asked the court to "punish them…to the harshest degree [] possible."[346] His use of the word "them," referring ambiguously to both the defendants and the regime in which they functioned, epitomizes a potential danger of impact statements. Civil party Pech Srey Pal said similarly, "I urge you to punish them severely," referring to "senior leaders and those most responsible"[347]—a concept including but not limited to Nuon Chea and Khieu Samphan. In Case 002/02, the first civil party to offer a statement of suffering referred to the defendants as "criminals," and both she and the second civil party to testify used a portion of their narrative space to ask pointed questions to Nuon Chea and Khieu Samphan that presumed the latter's guilt.[348] The defendants invoked their right against self-incrimination, but that left the civil parties' accusations hanging in the air, unaddressed.

The introduction of allegations is an important hazard of victim impact statements. Unwittingly, the Trial Chamber may have made this more likely by segregating statements of suffering from the main questioning period. For example, civil party Denise Affonço provided restrained evidence during questioning, but in her statement of suffering at the end of her testimony, she voiced opinions not obviously related to the specific allegations against the accused. For example, she referred to "women who stole some palm sugar and who were stretched out and tied to the ground in the sun," recounted her daughter's tragic death from hunger, and exclaimed: "And let me tell you again and again, if you want to listen to me, that famine was organized and programed … and it was programmed in advance," as was a deliberate denial of medical services.[349]

The Trial Chamber has repeatedly affirmed defense lawyers' right to comment on statements of suffering[350]—an essential safeguard for the

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345 *See* MARK J. OSIEL, MAKING SENSE OF MASS ATROCITY 1-15 (2009) (highlighting the danger of exaggerating individual responsibility for mass crimes).

346 ECCC Case 002 transcript (June 12, 2012), at 28.

347 ECCC Case 002 transcript (Aug. 29, 2012), at 76.

348 ECCC Case 002 transcript (Jan. 26, 2015), at 37-40; ECCC Case 002 transcript (Jan. 27, 2015), at 82-83.

349 ECCC Case 002 transcript (Dec. 13, 2012), at 105-06.

350 *See, e.g.,* ECCC Case 002 transcript (Feb. 7, 2013), at 111 (allowing the parties to "make their remarks or observations regarding the scope of the testimony of the civil party").

rights of the accused[351]—and the relatively brief and bracketed nature of Affonço's statement of suffering appears not to have raised the concerns of the defense, which made no objections. However, the cumulative effect of such statements could be a negative trial atmosphere for the accused, and defense lawyers did demand an opportunity to confront civil party Chau Ny when he used part of his statement of suffering to raise specific new allegations against Khieu Samphan.

Chau alleged that shortly after the April 1975 capture of Phnom Penh by Khmer Rouge forces, two soldiers delivered a letter from Khieu Samphan to Chau's uncle requiring Chau's uncle to return to Phnom Penh. He said that his uncle refused and later disappeared.[352] He then asked accused Khieu Samphan what had happened to his uncle. When Khieu exercised his right to silence, Chau said, "Mr. Khieu Samphan know (*sic*) my uncle very well… and of course, he should know where his skeleton remains is, and he should not refuse to respond to this question."[353]

After Chau finished testifying and the Court dismissed him, Khieu Samphan's lawyer Anta Guissé objected, expressing her "astonishment" and "shock" at the procedure, which had allowed the civil party to introduce new probative evidence about Khieu Samphan:

> [A]part from the fact that this falls outside the scope of 002/1 of this trial, also it raises a problem connected with the rights of the defence because, if my understanding is correct, once a witness' hearing on the facts is completed, we, the Defence, have no longer any right to ask the civil party any questions [... W]e are bound and gagged [...] It's an extreme violation of the rights of the defence[...][354]

After the judges huddled, Trial Chamber Judge Marc Lavergne said the defense indeed had a right to question the civil party on his allegations, although the Court declined to recall Chau that day, since he had already been taken home.[355] Recognizing that the right to comment on Chau Ny's statement was inadequate in this instance, the Trial Chamber later recalled Chau Ny for questioning.[356] Chau also was allowed to make another statement of suffering, but when he veered from his own suffering to

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[351] Similar arguments have been made in the domestic criminal context. *See, e.g.,* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 864, 879 (1995-96) (arguing that the parties should be able to offer reasoned argument about victims' allocution).

[352] ECCC Case 002 transcript (Nov. 23, 2012), at 95.

[353] *Id.* at 98.

[354] *Id.* at 100-02.

[355] *Id.* at 104-05.

[356] The Trial Chamber agreed that the parties could question him on his allegations regarding Khieu's role in his uncle's death. Decision on Request to Recall, *supra* note 123, ¶¶ 19-20.

make additional accusations against Khieu Samphan, the Trial Chamber president again interceded, asking him to "[p]lease mention the actual suffering that you have, which is the [reason why] you are given the opportunity by this Chamber. And do not raise any new fact […] otherwise, you will have to be recalled again and again."[357] His reappearance thus highlighted the challenges that relatively open-ended victim accounts pose to defendants' rights and an efficient trial.

The Trial Chamber tried to address this problem by directing civil party lawyers to help their clients draft their statements and "discourage new allegations being made against the Accused at that stage."[358] That directive was reasonable but largely ineffective. In a subsequent hearing, Trial Chamber president Nil Nonn said with evident frustration:

> [T]he Chamber is trying it best to ensure that no new allegation of fact is made or brought about in the statement of suffering [...] the Chamber has already instructed counsel to also discuss this with their clients so that the suffering statements will be confined to only the old facts […] the new fact keeps occurring every time a civil party is expressing his or her statement of suffering... [359]

When victims of mass crimes that occurred over an extended period of time are allowed to describe their suffering through victim impact-type statements, it may be impossible to confine their statements to harm resulting from the narrow charges at issue.[360] Allowing relatively open-ended statements of suffering during trial poses an undeniable threat to due process in an adversarial proceeding, especially in mass-crimes cases, when the causes for a victim's suffering often extend well beyond the crimes alleged against the individual accused.

Indeed, on appeal from the Case 002/01 judgment, the *Nuon Chea* defense has argued that, despite Trial Chamber's "repeated" assurances that it would segregate information provided in statements of suffering from considerations of responsibility, it has relied "extensively" on such testimony "as material evidence throughout the Judgment[.]"[361] As with

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[357] ECCC Case 002 transcript (May 23, 2013), at 35.
[358] *Id.* ¶ 17.
[359] *Id.* at 40.
[360] *See supra* note 328 and accompanying text.
[361] Nuon Chea Appeal Brief, *supra* note 306, ¶¶ 187, 190 (claiming that such statements were cited "an astonishing 255 times" in the judgment, including as sources of material evidence of the alleged crimes). Relatedly, the defense argues that the judgment relied on untested civil party applications and victim complaints in its findings. For example, in making a finding that "those who refused to leave Phnom Penh or obey orders during the evacuation were 'shot and killed on the spot[,]'" the *Nuon Chea* team asserted that of 26 accounts, 18 are "civil party applications, victim complaints and reports produced by foreign governments." *Id.* ¶ 165.

victim impact hearing testimony, discussed *supra*, the *Nuon Chea* team says that had it known that statements of suffering would be considered for purposes beyond sentencing and reparations, it would have "attempted a proper cross-examination" of each civil party and offered submissions on their statements in its closing brief.[362] Defense lawyers could also have challenged the use of statements of suffering for sentencing and reparations, since they were allowed to go beyond the scope of harms resulting from the crimes charged.

The information in victim statements of suffering may not have affected the verdicts or sentences in Case 002/01, as the Trial Chamber obtained extensive evidence from documents, expert witnesses, and evidentiary testimony from victims. Nevertheless, the Trial Chamber's inconsistent and improvisational management of them left the process open to legitimate defense challenges and set a problematic example of trial management for local courts—a function that hybrid tribunals are intended to perform. Administrators of any future ECCC trials or other mass crimes proceedings to permit expansive forms of victim narrative need to be clearer from the outset about the specific rules that will apply and how testimony will be used.

VI. CONCLUSION

Narrative testimony is an important part of transitional justice processes in which individual survivors and societies come to terms with the past. International and hybrid courts generally grapple with large, complex cases in which numerous survivors have legitimate desires to tell their stories in a respectful and supportive environment. Nevertheless, brief appearances in a courtroom (or before a commission) do not have reliable and predictable effects on victims struggling with the psychological effects of trauma.[363] Short-term victim responses to testifying are mixed, while long-term therapeutic effects are highly uncertain and dependent on victims' broader satisfaction with the accountability process, access to continued therapy, and general health and social welfare.

Mechanisms such as the ECCC's civil party system and ICC's victim participation scheme give victims added opportunities for catharsis and empowerment. However, elevated status and centrality to the proceedings do not change the fact that victims' primary (and essential) role remains an

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[362] *Id.* ¶ 193. *See also* Prosecutor v. Nuon Chea et al., Case No. 002/19-09-2007-ECCC-SC, Nuon Chea's Request Regarding Certain Practices to be Undertaken When Examining Upcoming Civil Party 2-TCCP-271 and Other Case 002/02 Witnesses and Civil Parties Generally, ¶ 12 (Jan. 16, 2015) (restating the arguments).

[363] *See* Wilhelm Verwoerd, *Towards the recognition of our past injustices, in* LOOKING BACK, REACHING FORWARD, *supra* note 49 (emphasizing this point in the truth commission context).

instrumental one—to serve a societal interest in determining the innocence or guilt of the accused. The risk of re-traumatization is always present. The ECCC's experience offers powerful evidence to this effect. Even in a process taking place more than 30 years after the alleged crimes, in which all testifying survivors have been adults and relatively few had ever encountered the accused, evidence of therapeutic effects is mixed, and numerous victims found the process emotionally grueling. Criminal courtrooms simply are not well designed to address victims' therapeutic needs. Rather than emphasizing the healing potential of testimony, victims' advocates and proponents of mass crimes trials should emphasize the difficulty of testifying and focus on promoting rules and policies that help protect victims who take the stand.

Formal rules and protections are sometimes essential for reducing the danger of re-traumatization, but as this article has shown, they are not the only ways to improve victims' experiences. Thoughtful informal management of day-to-day proceedings through civility in questioning and acknowledgement can be similarly important. International and hybrid courts have given only a few special classes of victims special protections such as *in camera* hearings or courtroom screens. That is appropriate. The opportunity of the accused to confront his or her accusers is an important norm of due process that should not be easily overridden. At the ECCC, few formal protections have been granted, but that in no way reflects a lack of need for sensitivity to victims. Instead, the key policies and practices have been set daily in the courtroom, as judges develop strategies for managing questions, acknowledging victims' pain, and thanking them for testifying. All judges appointed to international and hybrid courts should undertake serious training in this regard, and contributions to such training may be among the most impactful opportunities for victims' advocates.

There are also important normative limits on courts' capacity to accommodate survivors' needs. Mass crimes trials consistently have been adversarial in nature and can only be regarded as successful if they meet basic standards of fairness. Efforts to expand the scope for narrative victim testimony through devices such as victim impact hearings and statements of suffering thus need to be managed cautiously. The ECCC's experience with these innovative measures raises at least three questions—whether victim impact statements have a place at all in mass crimes processes, whether they should be included prior to judgment, and whether they should be limited to harm related to the charges.

Answering these questions requires revisiting the objectives of the trial process. To the extent that trials are meant to give victims a voice, the merits of victim impact statements are apparent. They are a form of compensation for trauma survivors who endure the often challenging

experience of testifying. Beyond individual survivors, however, victim impact statements may do the most good for the official agencies, civil society groups, and others who are deeply invested in the process. Victim narratives help official agencies justify the trials they sponsor and support official policies on the importance of condemning the crimes in question.[364] Civil society groups advance the goal of helping victims occupy a more central role in transitional justice proceedings.

Whether victim impact statements reach the broader population of survivors or effectively represent the voices of larger victim populations is much less clear. Relatively few victims attend any given courtroom session or follow the day-to-day proceedings closely in the media, which over the course of a long trial generally reports only the most sensational testimony. Moreover, unlike truth commissions, courts are not geared to produce a final report or set of recommendations that hold the potential (if a potential seldom realized) to communicate victims' stories to broad public audiences. The impact of victim statements beyond the courtroom requires empirical study.

Even as empirical findings become available, normative questions surrounding the goals of the process remain. Brandon Hamber et al. have argued that the South African TRC never clarified the extent to which it prioritized individual healing, social healing, or the promotion of national unity.[365] Criminal trials have a clearer normative anchor. Their primary expressed objectives are—and ought to be—to determine the guilt or innocence of accused individuals, sentence those found responsible, and (where applicable) issue reparations. A trial that strays from these moorings jeopardizes its credibility as a legal process. However, the relative importance of these core objectives and secondary aims of the process remains subject to debate. Assessing the merits of statements of suffering requires assessing their reparative impact and the weight to accord reparation vis-à-vis other core aims of a trial. The ECCC's experience suggests that statements of suffering do have reparative value, but care must be taken to ensure they do not undermine the integrity of the verdict.

This leads to the further question of how and when to include them. Including victim allocution before judgment does have advantages. When victims testify in the main evidentiary hearings, allowing them to provide statements of suffering at the end of their appearance may be more

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[364] *See, e.g.,* ECCC, *Germany Pledges More Financial Support to Maximize Victim's Participation in KR Trials* (June 17, 2010) (quoting the ECCC acting director of administration emphasizing that "[v]ictim's participation is one of the areas in which the ECCC is breaking new ground and setting new standards for courts with international support and involvement").

[365] Brandon Hamber et al, *"Telling It Like It Is"…Understanding the Truth and Reconciliation Commission from the Perspective of Survivors,* 26 Psych. in Soc. 18, 35-40 (2000).

efficient and more conducive to a positive experience than requiring them to return after a verdict. Featuring victim narratives in the trial phase also has potential symbolic value in elevating victims' voice and status, which is difficult to evaluate empirically but central to the expressed goals of allowing such statements at all. Stronger efforts could have been undertaken by the ECCC to preview victims' intended statements to ensure that they did not contain new facts or charges. The Trial Chamber could also have excluded references to such statements from their evidentiary findings. If a court intends to draw from victim impact statements to establish guilt or innocence, due process requires subjecting them to the same kinds of defense challenges as ordinary evidentiary testimony, undermining their unique character—and arguably their purpose.

Conventional due process norms and the practice of domestic courts that allow victim impact statements suggest that the sentencing phase is the most appropriate place for victim allocution. Permitting them before a verdict creates risks for the rights of the accused and is unnecessary when a court seeks simply to inform sentencing and reparations awards—which is the appropriate function of victim impact statements. When such statements are heard before judgment, their content either must be circumscribed or sufficient time for confrontation must be provided to prevent prejudice. Both approaches, however, thwart the aim of providing victims an opportunity to testify free of robust adversarial questioning. These factors suggest that when establishing future mass crimes courts, the best practice would be to provide free narrative victim impact opportunities only after judgment and prior to sentencing.[366]

A final question is whether it is ever appropriate for such narratives to discuss harms going beyond the charges. Although judges, unlike juries, are professionals who may be expected to keep material evidence separate from victim impact evidence, this is not always an easy or clear-cut task—as perhaps exemplified by the ECCC's decision to use victim statements as evidence supporting the Case 002/01 charges. Moreover, in trials addressing mass atrocity, judges cannot be expected to remain wholly dispassionate in the face of harrowing victim accounts. Because so few perpetrators can be tried by international and hybrid courts, those who are brought to justice often become symbols of a larger set of crimes. If victim impact statements create the impression that they are scapegoats, not only will the proceedings themselves be seen as illegitimate, but also

[366] The ECCC legal framework does not provide for a bifurcated trial. Prosecutor v. Kaing Guek Eav, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Case No. 001/18-07-2007/ECCC/TC, ¶ 15 (Trial Chamber, Oct. 9, 2009).

the truth telling and reconciliation aims of such courts will be undermined. Moreover, if it is impossible for victims of ongoing mass crimes to partition their harms by criminal charges—as the ECCC Lead Co-Lawyers have repeatedly emphasized—this further justifies offering victim impact opportunities only after judgment is rendered.

In sum, the innovative procedures developed at the ECCC have positive potential but require substantial refinement to further enfranchise victims without undue sacrifices in due process. More broadly, evidence from international and hybrid courts in recent years suggests that well-crafted rules and thoughtful trial management can reduce the tradeoffs between victims' needs and the demands of a fair trial, even though no set of procedures can resolve that tension entirely. Reconciling the legitimate demands of survivors with liberal legal norms of due process is a fundamental challenge for criminal law at all levels, and striking the best possible balance will remain crucial to the perceived success of mass crimes proceedings going forward.