

Fall 2012

Speechlessness and Trauma: Why the International Criminal Court Needs a Public Interviewing Guide

Philip A. Sandick

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njihr>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Philip A. Sandick, *Speechlessness and Trauma: Why the International Criminal Court Needs a Public Interviewing Guide*, 11 NW. J. INT'L HUM. RTS. 105 (2012).

<http://scholarlycommons.law.northwestern.edu/njihr/vol11/iss1/4>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Human Rights by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Speechlessness and Trauma: Why the International Criminal Court Needs a Public Interviewing Guide

Philip A. Sandick*

“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”

—Rome Statute, article 68(1)

“The ordinary response to atrocities is to banish them from consciousness. Certain violations of the social compact are too terrible to utter aloud: this is the meaning of the word *unspeakable*.”

—JUDITH HERMAN, M.D., *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 1 (1997).

I. INTRODUCTION

¶1

Trauma is a narrative fracture. Psychologically, a traumatic event is defined by its inability to fit within one’s linear meaning structure. Neuroscience teaches that memories of traumatic events are even stored in a different part of the brain from regular, narrative memories. This article looks at how the narrative fracture of trauma influences interviewers, interviewees, and the judicial process at the International Criminal Court (the Court or the ICC). Since interviewing techniques can have positive and negative effects on both the speaker and the listener, this article argues that the ICC has, at the very least, a duty under the Rome System¹ to prevent the negative effects of interviewing to the extent possible within its resources. It concludes by suggesting ways to start that process.

* Candidate for J.D. and LL.M. in International Human Rights, Northwestern University School of Law, 2014. With thanks to David Scheffer, Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern Law, and to my supervisors at the International Criminal Court who deepened my understanding of the issues raised in this article, Didier Preira, Ira Goldberg, and Cyril Laucci, and to the individuals who allowed me to interview them for this piece, Fiona MacKay, An Michels, Michaela Bauer, and Vedrana Mladina. The views expressed herein, as well as all errors and omissions, are my own.

¹ “Rome System” refers to the statutory and regulatory documents of the Court, Counsel, and the Trust Fund for Victims. These include the Rome Statute (ICCSt), the Court’s Rules of Procedure and Evidence (RPE), the Regulations of each of the Organs, and any other documents that have binding effect on operations of the respective entity.

¶2 Much of the recent discussion of victim participation revolves around intermediaries.² Intermediaries are individuals and/or groups on the ground in situation countries that are relied upon by multiple organs and units of the Court and counsel for various reasons. After all, the Court cannot be everywhere at once with its limited resources. The Court also cannot know all of the local customs, languages, and slang. Intermediaries solve these and other problems.³

¶3 Anyone can be an intermediary; no standard training is required—or, generally, offered.⁴ Intermediaries can be friends or family members of victims, or they can be “post-conflict justice junkies”⁵ or local non-governmental organizations (NGOs) that are “devoted to promoting post-conflict justice.”⁶ States themselves can even be intermediaries.⁷ Sometimes the Court has the ability to choose the intermediary, and sometimes it doesn’t, *i.e.*, when a victim says he will only communicate with the Court through a particular interlocutor.

¶4 Many intermediary tasks involve talking directly with victims, but intermediaries often do not know *how* to do so. That knowledge is important because appropriate interviewing techniques have been shown to decrease victims’ Posttraumatic Stress Disorder (PTSD) symptoms and to decrease the likelihood of both victim retraumatization and interviewer vicarious traumatization. Conversely, improper interviewing techniques have been shown to increase PTSD symptoms and cause retraumatization and vicarious traumatization.

¶5 Right now, victims are suffering as a result of the work of the Court. Their harm is sometimes caused by negative experiences in interviews either during investigations or at trial. Other times, it is caused by the procedural reality that a victim’s status, and therefore a victim’s rights, may shift throughout trial. When a victim’s rights shift and they are no longer involved in proceedings, an interview may form the bulk of their interaction with the Court. Some studies show that victims judge the justice they receive more by their treatment during the trial than by the trial’s outcome. Under this theory, better interviewing would result in both less suffering and more perceived justice.

¶6 Intermediaries are also suffering because they do not know how to talk to victims. Two NGOs that regularly work with the Court, the International Refugee Rights Initiative

² See, e.g., Caroline Buisman, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, 11 NW. J. INT’L HUM. RTS. 30 (2013).

³ See Holly Dranginis, *The Middle Man: The Intermediaries of International Criminal Justice*, JUSTICE IN CONFLICT (Aug. 21, 2011), <http://justiceinconflict.org/2011/08/21/the-middle-man-the-intermediaries-of-international-criminal-justice/>.

⁴ The author has personal knowledge that when a training program for intermediaries from a particular situation was held at the seat of the Court, there was no training on how to talk with victims because the organizer was not aware that such training existed or was possible. The author was informed that the organizer would not have hesitated to arrange that training had the organizer known about it.

⁵ Elena Baylis, *Tribunal Hopping with the Post-Conflict Justice Junkies*, 10 OR. REV. INT’L L. 361, 364 (2008).

⁶ Elena Baylis, *Outsourcing Investigations*, 14 UCLA J. INT’L L. & FOREIGN AFF. 121, 126 (2009).

⁷ ICC, Regulations of the Trust Fund for Victims, Regulation 67, ICC-ASP/4/Res.3 (Dec. 3, 2005) (“The Trust Fund may decide to use intermediaries to facilitate the disbursement of reparations awards, as necessary, where to do so would provide greater access to the beneficiary group and would not create any conflict of interest. Intermediaries may include interested States, intergovernmental organizations, as well as national or international nongovernmental organizations working in close proximity with the beneficiary groups.”).

(IRRI) and the Open Society Justice Initiative (OSJI), have written that their intermediaries have “suffered deep trauma as a result of [their work for the court].”⁸ They specifically asked for training “in techniques relating to approaching and handling potential witnesses.”⁹ IRRI and OSJI are not alone in their cries for help, but that help has not been forthcoming.

¶7 The Court is currently in the process of promulgating guidelines governing relations between the Court and intermediaries (the Guidelines).¹⁰ The author worked on these guidelines during his time at the Court in Spring 2012. The Guidelines are largely a response to the problems that arose in the Prosecution’s use of intermediaries in *Lubanga*. As such, the Guidelines rightly cover many fundamental issues, *e.g.*, the definition of intermediaries and the legal and policy framework governing utilization of intermediaries. But the Guidelines do not mention prophylactic psychosocial measures designed to protect intermediaries and victims from unintended trauma.¹¹

¶8 The number of victims involved in proceedings is only increasing,¹² so knowing how to talk to victims on behalf of the Court is becoming a bigger issue by the day. This paper advocates specifically for the adoption of interviewing guidelines for all individuals interacting with traumatized individuals for and on behalf of the Court. A failure to promulgate interviewing guidelines at this crucial moment of guideline advancement is tantamount to the Court neglecting its obligation to protect and support victims, witnesses, and those who are at risk on account of their work for or on behalf of the Court.

II. LEGAL FRAMEWORK

¶9 Multiple provisions of Rome System texts affirm both that victims and others involved in the work of the Court have various rights and that the Court is the corresponding duty-bearer for those rights. In addition, the jurisprudence of the Court shows that rights can shift throughout a given procedure. While the Court’s duty to protect and support the psychosocial well-being of victims and intermediaries exists in the provisions of Rome System texts, the fact that rights and roles shift offers an additional reason to issue meaningful victim interview policies.

⁸ International Refugee Rights Initiative and the Open Society Justice Initiative, Commentary on the ICC Draft Guidelines on Intermediaries, INT’L REFUGEE RTS. INITIATIVE 1, 16 (Aug. 2011), <http://www.refugee-rights.org/Assets/PDFs/2011/iccintermediaries-commentary-20110818.pdf>.

⁹ *Id.* at 21; *but see* Dranginis, *supra* note 3 (arguing that intermediaries generally know how to talk to traumatized individuals, and what they really need is payment for their services).

¹⁰ The author worked on the Guidelines and associated documents during his four-month assignment at the Court from January to May of 2012. The Guidelines were presented to the Assembly of States Parties in December 2012 at its eleventh assembly.

¹¹ OPEN SOCIETY JUSTICE INITIATIVE, INTERMEDIARIES AND THE INTERNATIONAL CRIMINAL COURT: A ROLE FOR THE ASSEMBLY OF STATES PARTIES 1 (Dec. 2011), http://www.soros.org/initiatives/justice/articles_publications/publications/intermediaries-20111212/intermediaries-20111212.pdf (hereinafter “OSJI 2011 Report”).

¹² The average number of participation applications received per month by the Court increased over 300% from 2010 to 2011. This number excludes both applications for reparations as well as representations made under Article 15. Though the data are not yet available for 2012, the number has not decreased. Interview with Soraya Birziki, Victims Participation and Reparations Section, International Criminal Court, in The Hague, Neth. (Mar. 28, 2012).

A. *Protection and Support for Victims*

¶10 The Rome System gives victims rights both at the investigation stage and at the trial stage. At the investigation stage, any person “[s]hall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.”¹³ During the course of an investigation, the Prosecutor “*shall* . . . respect the interests and personal circumstances of victims and witnesses,”¹⁴ and “*may*” take necessary measures to ensure “the protection of any person.”¹⁵ The Pre-Trial Chamber (PTC) may, “[w]here necessary, provide for the protection and privacy of victims and witnesses” and “the protection of persons who have been arrested or appeared in response to a summons.”¹⁶

¶11 At the trial stage, “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”¹⁷ The Trial Chamber (TC) also may “[p]rovide for the protection of the accused, witnesses and victims.”¹⁸ Most importantly with regard to the trial stage, article 68(1) of the Rome Statute (ICCSt) gives “the Court” the mandate to protect victims and witnesses:

[t]he Court *shall* take appropriate measures to protect the safety, physical and *psychological well-being*, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including [age, gender, health, and nature of the crime], in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. *The Prosecutor shall* take such measures *particularly during the investigation and prosecution* of such crimes.¹⁹

¶12 In addition, the ICCSt provides for a Victims and Witnesses Unit (VWU) within the Registry.²⁰ The VWU “*shall* provide . . . counseling and other appropriate assistance for witnesses [and] victims who appear before the Court,”²¹ “*shall* . . . [assist victims and witnesses] in obtaining . . . psychological and other appropriate assistance,”²² and “*shall* . . . [make] available to the Court and the parties training in issues of trauma.”²³ The greater a victim’s involvement with the Court, the greater the rights that victim acquires, and the greater the Court’s duties to respect and protect those rights. The Appeals Chamber has used primarily these statutory provisions to extend protection to non-witnesses and non-victims, including intermediaries.²⁴

¹³ Rome Statute of the International Criminal Court art. 55(1)(b) (Nov. 29, 2010) (hereinafter “ICCSt”).

¹⁴ *Id.* art. 54(1)(b) (emphasis added).

¹⁵ *Id.* art. 54(3)(f).

¹⁶ *Id.* art. 57(3)(c).

¹⁷ *Id.* art. 64(2).

¹⁸ *Id.* art. 64(6)(e).

¹⁹ *Id.* art. 68(1) (emphasis added).

²⁰ *Id.* art. 43(6).

²¹ *Id.* art. 43(6).

²² INT’L CRIM. CT. R. P. EVID. 17(2)(a)(iii) (hereinafter “ICC RPE”).

²³ ICC RPE 17(2)(a)(iv).

²⁴ ICC, Prosecutor v. Germain Katanga, ICC-01/04-01/07-475, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for

B. Protection and Support for Intermediaries

¶13 Texts in the Rome System do not specifically mention intermediaries. However, the texts do mention general classes of persons who may be put at risk on account of the Court’s activities, and the jurisprudence of the Court has found intermediaries to fall into this category. The question is then what rights intermediaries have at what point in the proceeding.

¶14 In *Katanga*, the Appeals Chamber (AC) began the process of expanding protection to include intermediaries. The issue first arose when the AC was asked to discern whether the Court could authorize non-disclosure to the Defense prior to trial of, among other things, the identities of intermediaries contained in witness statements.²⁵ In keeping with equality of arms and a fair trial, the general principle is disclosure to the Defense of evidence that will be presented against defendants.²⁶ As noted above, article 54(3)(f) of the Rome Statute permits the Prosecutor to “take necessary measures . . . to ensure . . . the protection of any person.”²⁷ But the Rule that specifically addresses nondisclosure only allows the Chamber “to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identities.”²⁸ The intermediaries at issue thus did not fall within the Rule (victims, witnesses, and family members), but they did fall within the article (any person). The Appeals Chamber held that the Rule, Rule 81(4), “should be read to include the words ‘persons at risk on account of the activities of the Court’ so as to reflect the intention of the States that adopted the Statute and [RPEs] to protect people at risk.”²⁹

¶15 The AC found that intention in numerous provisions of the ICCSt and the RPE. Article 43(6) creates the VWU, which

*shall provide . . . protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.*³⁰

¶16 Rules 16-18 of the RPE, detailing the affirmative duties of the Registrar and the VWU, each contain the phrase “others who are at risk on account of testimony given.”³¹ Specifically with regard to the duties of the Registrar, she shall inform these other people of their rights and of the “existence, functions and availability” of the VWU, and ensure that they are aware of any decisions that affect their rights.³² The Registrar also may

Authorisation to Redact Witness Statements”, ¶¶ 40–56 (May 13, 2008) (hereinafter “*Katanga*, ICC-01/04-01/07-475”).

²⁵ *Id.*

²⁶ ICCSt arts. 61(3)(b), 61(6); ICC RPE 76(1), 76(4).

²⁷ *Id.* art. 54(3)(f).

²⁸ ICC RPE 81(4).

²⁹ *Katanga*, ICC-01/04-01/07-475, *supra* note 24, ¶ 56.

³⁰ ICCSt art. 43(6) (emphasis added).

³¹ See *Katanga*, ICC-01/04-01/07-475, *supra* note 24, ¶ 50.

³² ICC RPE 16(2)(a)–(b).

negotiate “[a]greements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses, and others who are at risk on account of testimony given by such witnesses.”³³ The AC found that these provisions “are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court.”³⁴

¶17 Duties of the VWU arising out of the RPE have similar reach. The mandate of the VWU extends to “all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.”³⁵ For all of those persons, the VWU “shall” assist them in obtaining “psychological and other appropriate assistance.”³⁶ The VWU is also tasked with “[m]aking available to the Court and the parties training in issues of trauma.”³⁷ Rule 87 affords protection to “another person at risk on account of testimony given by a witness,”³⁸ and Rule 59(2) notes the Court’s duty regarding “the protection of any person.”³⁹

¶18 Partially relying on portions of the above reasoning, the Appeals Chamber held that “the States that adopted the Statute and the [RPE intended] to protect people at risk.”⁴⁰ The Court has upheld—and has never altered—the extension of protection to those “at risk on account of the activities of the Court.”⁴¹ Intermediaries are not barred from this protection.

C. Determining Victims and Those At Risk

¶19 Determination of the appropriate level of protection and/or support begs the question of who is properly termed a victim, a witness, or an at risk person.

¶20 Due to the asymmetry of information at different levels of trial, however, the standards for victim identification differ at the various phases of judicial proceedings. RPE 85(a) establishes the criteria for victimhood at the Court, whether one is a natural or juridical person.⁴² RPE 85(a) states that “[v]ictims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”⁴³ RPE 85(a) has been interpreted to comprise four elements, each of which must be satisfied to obtain the status of victim: the victim 1) must be a natural person who 2)

³³ *Id.* 16(4).

³⁴ *Katanga*, ICC-01/04-01/07-475, *supra* note 24, ¶ 54.

³⁵ ICC RPE 17(2)(a).

³⁶ *Id.* 17(2)(a)(iii).

³⁷ *Id.* 17(2)(a)(iv).

³⁸ *Id.* 87(1).

³⁹ *Id.* 59(2).

⁴⁰ *Katanga*, ICC-01/04-01/07-475, *supra* note 24, ¶ 56.

⁴¹ *See, e.g.*, ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2582, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, ¶ 50 n. 117 (Oct. 8, 2010) (“Although in this appeal the intermediary is neither a victim nor a witness, the Appeals Chamber has previously held that other persons at risk may be considered to fit within the framework established for such protection.”).

⁴² *See* ICC RPE 85(b) (stating that “victims may include organizations or institutions”).

⁴³ *Id.* 85(a).

suffered harm that was 3) caused by actions that 4) make up a crime within the jurisdiction of the Court.⁴⁴

¶21 Prior to the issuance of an indictment, though, it is impossible to know with certainty whether the actions make up any particular crime within the jurisdiction of the Court. Indeed, that is precisely what the PTC determines when deciding whether or not an indictment is merited. Accordingly, when a person applies for victim status at the preliminary stages of the proceedings, the Court will use the same burden of proof for victimhood that it uses to grant procedural rights to those under investigation by the OTP. That is, the ICCSt article 55(2) “grounds to believe” standard will be used to determine if the victims has met the four requirements in ICC RPE 85(a).⁴⁵ The Court has significant discretion in making this determination.⁴⁶

¶22 At the arrest warrant stage, the burden becomes “reasonable grounds to believe.”⁴⁷ After that, at the confirmation of charges hearing, the PTC may very well decide that some or all charges cannot be confirmed against some or all of the accused.⁴⁸ In this third test of the Prosecution’s evidence, the standard is “substantial grounds to believe” a person has committed a specific crime within the jurisdiction of the Court.⁴⁹ When the Prosecutor does not present evidence to meet this higher bar, the PTC does not confirm that charge against the accused. When that happens, victims whose participation was granted based on the unconfirmed crime become non-victims, at least before the Court itself.⁵⁰

¶23 Victims can lose their status in other ways, too. For example, if at any point in the trial new evidence emerges that invalidates the grounds upon which a victim’s application was granted, victim status can be revoked.⁵¹ In its first decision on principles to be applied in reparations proceedings, Trial Chamber I held that the “balance of probabilities”⁵² (akin to the U.S. “preponderance of the evidence”⁵³) standard should

⁴⁴ See ICC, Situation in the Democratic Republic of the Congo, ICC-01/04-101-tEN-Corr, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS4, VPRS 5 and VPRS 6 (Public Redacted Version), ¶ 79 (Jan. 17, 2006). It should be noted that some ICC judges combine elements two and three. See, e.g., ICC, Prosecutor v. Laurent Gagbo, ICC-01/11-01/11-384-Corr, Corrigendum to the Second Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ¶ 24 (Feb. 6, 2013).

⁴⁵ See Situation in the Democratic Republic of the Congo, ICC-01/04-101-tEN-Corr, ¶¶ 99–100, *supra* note 44.

⁴⁶ See Situation in Uganda, ICC-02/04-101, Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ¶13 (Aug. 10, 2007).

⁴⁷ ICCSt art. 58.

⁴⁸ See, e.g., ICC, Prosecutor v. Matthieu Ngudjolo, ICC-01/04-02/12-3-tENG, Judgment pursuant to article 74 of the Statute (Dec. 18, 2012); ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012); ICC, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012); ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, Decision on the confirmation of charges (Dec. 16, 2011).

⁴⁹ ICCSt art. 61(5).

⁵⁰ ICC, Prosecutor v. Katanga, ICC-01/04-01/07-933-tENG, Decision on the treatment of applications for participation, ¶ 11 (Feb. 26, 2009).

⁵¹ *Id.* ¶ 12.

⁵² ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/06-01/08-2904, Decision establishing the principles and procedures to be applied to reparations, ¶ 253 (Aug. 7, 2012).

apply to victims attempting to prove their victimhood. It is difficult—but not impossible—to imagine a situation in which a victim met the “beyond a reasonable doubt” standard at the trial phase but then could not meet the “balance of probabilities” standard at the reparations phase. Evidence spoliation comes to mind. However, the mere fact that there is a bar at all for individuals who already made it through the entire trial as victims is quite telling. One’s status as a victim in front of the Court is always in question.

¶24 On the other hand, it appears that the test for whether someone is “at risk on account of the activities of the Court” does not change throughout proceedings. The Court has held—albeit only at the Trial Chamber level⁵⁴—that the test the VWU shall apply is whether, following careful investigation, a witness “faces an established danger of harm or death.”⁵⁵ While not explicitly endorsing a standard of proof, the TC clarified that “protection shall be afforded to any witness, following careful investigation, if he or she is exposed to (“faces”) an evidence-based (“established”) danger of harm or death.”⁵⁶ The Court went on to state: “an established danger of harm can include physical as well as psychological harm.”⁵⁷

III. SYSTEMS IN PLACE

A. *Victim Trauma Arrangements*

¶25 The Court understands its duties to victims, witnesses, and those at risk on account of the work of the Court. Between the VWU, the Public Information and Documentation Section (PIDS), the Victim Participation and Reparation Section (VPRS), the Office of Public Counsel for Victims (OPCV), and the Trust Fund for Victims (TFV), the Rome System provides specialized avenues for engagement with victims and is now implementing its second strategy in relation to victims. Like the Intermediary Guidelines, the author worked on this Revised Strategy⁵⁸ during his time at the Court.

¶26 The OTP is usually the first organ of the Court to interact with victims. The OTP has set up a separate unit—the Protection Strategies Unit (PSU)—to facilitate and be the focal point for contact with the VWU.⁵⁹ The OTP also contains the OTP Gender and Children Unit (GCU). Vedrana Mladina, who has a Ph.D. in clinical psychology, was the first appointee to the GCU.⁶⁰ Mladina has created a significant system of guidelines and

⁵³ See *id.* ¶ 253 n. 439 (quoting Black’s Law Dictionary in describing “balance of the probabilities” as “sufficient to incline a fair and impartial mind to one side of the issue rather than the other”).

⁵⁴ ICC Trial Chamber decisions are not binding on other chambers.

⁵⁵ ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/06-01/08-1557, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber’s “Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters”, ¶ 27 (Dec. 16, 2008).

⁵⁶ *Id.* (emphasis omitted).

⁵⁷ *Id.* ¶ 29.

⁵⁸ ICC, Court’s revised strategy in relation to victims, ICC-ASP-11/38 (Nov. 5, 2012).

⁵⁹ The PSU’s existence is only publicly evidenced in job announcements. See, e.g., *Team Leader*, EUROPA NU, http://www.europa-nu.nl/id/vii360ztzjyr/team_leader; *Protection Strategies Assistant*, EUROPEAN INFORMATION AND RESEARCH NETWORK ON PARLIAMENTARY HISTORY, <http://euparl.net/9353000/1/j9vvhskmycle0vf/vig68I91v7zt>.

⁶⁰ Interview with Vedrana Mladina, Associate Victims Expert, Gender and Children Unit, Office of the Prosecutor, International Criminal Court, in The Hague, Neth. (Feb. 27, 2012).

protection and support measures for the OTP.⁶¹ Some of the materials that make up the OTP arsenal include:

- guidelines for interviewing victims of SGBV;
- guidelines for interviewing children;
- a child-friendly court introduction;
- the “dos and don’ts” for interviewing victims of SGBV and children;
- a “very detailed” questionnaire to assess SGBV;
- portions of the “OTP Manual” (nicknamed, “The Bible”) that address interviewing; and
- a lessons learned document that was compiled by an “honest and open” review of their work with victims.⁶²

¶27 The one bit of information about the interview process Mladina could reveal was that, in the interview process, “everything starts with free narrative.”⁶³ As is typical in the field, they generally endorse the “cognitive interview” model, which is discussed in Section III below.⁶⁴

¶28 On top of the available materials listed above, Mladina facilitates special trainings for OTP staff members on such topics as how to interview victims of SGBV and how to examine children and SGBV victims in court.⁶⁵ She also teaches a module on psychosocial aspects of interviewing at the Institute for International Criminal Investigations.⁶⁶ Thus, the Organ of the Court that typically has the first interview with victims—after they are put in touch through an intermediary—seems to have robust measures in place to ensure that interviewing traumatized individuals proceeds in a measured and safe way.

¶29 If testimony may compromise a victim, the OTP does not continue with that victim. That is, if the psychosocial assessment done by Mladina or her colleagues evidences that the victim would not be able to testify without further damaging effects, she does not let the OTP continue with that victim. Perhaps remarkably, the OTP listens. “The position of the [former] Prosecutor—and I assume the [current] Prosecutor will adhere to this—has always been he will give up a case, he will lose a case, rather than jeopardize a witness.”⁶⁷

¶30 After a victim is chosen to be a witness, they are handed over to the VWU. The VWU performs its own assessments and “[i]n some cases the VWU is provided with

⁶¹ *Id.* The multiple levels of assessment through which a victim must go, while not the topic of this paper, are quite extensive: an assessment prior to being selected for an interview, a full security and psychosocial assessment prior to the interview itself, the interview, a follow-up assessment, possibly an assessment to determine whether the victim will be able to testify in The Hague, and then a protection assessment.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ INSTITUTE FOR INTERNATIONAL CRIMINAL INVESTIGATIONS, <http://www.iici.info/pages/index.php>.

⁶⁷ Sara Criscitelli, Prosecution Coordinator, Transcript, International Criminal Court, Atrocity Crimes Litigation Year in Review Conference 2011, The Hague, Neth. (Mar. 14, 2012), <http://www.law.northwestern.edu/legalclinic/humanrights/documents/ACL2011ConferenceTranscript.pdf>.

medical records by external health care professionals concerning the witness within the VWU's care."⁶⁸ The VWU also works with the OTP PSU and requests specific information from the GCU as appropriate (such as family history and medical history, which the OTP already would have collected).⁶⁹ However, because the VWU and the OTP are completely independent and have very good reasons not to share information,⁷⁰ information flow is not as fluid as it might be in other organizations.

¶31 When the VWU deems it appropriate, it can request special measures to protect the psychological well-being of victims. To do so, the Chambers and the VWU have established a vulnerability protocol.⁷¹ The protocol includes optional measures such as starting testimony with a free narrative phase and following the pace of the witness.⁷² Thus, like the OTP, the VWU has a system of assessments and victim care that is significantly developed.

¶32 The unit that perhaps has the most interaction with victims who must tell their stories is the VPRS. Because VPRS is primarily responsible for filling out victim applications, workers and intermediaries from this unit have significant interaction with victim narratives.⁷³ These applications come from thousands of victims who seek to be recognized as victims under Rule 85, to participate in the proceedings under article 68, or to be considered for reparations under article 75.

¶33 As of mid-2012, VPRS had five field posts in total. VPRS sometimes trains intermediaries so they can more effectively fill out applications.⁷⁴ On occasions when VPRS is ordered to contact large numbers of victims themselves, they hire a consultant to prepare a methodology for a particular series of interviews.⁷⁵ In the past, they have also asked VWU for help.⁷⁶ When VPRS hires consultants, the resulting training packages become part of the resources of the unit. In that sense, VPRS has interviewing guidelines at their disposal.

B. Widespread Use of Intermediaries Increases Potential for Intermediary Trauma

¶34 As elucidated in the Guidelines and recognized by all who work at the Court, intermediaries come in many flavors.⁷⁷ There are those chosen by the Court, there are those chosen by victims, and there are those who self-appoint. Intermediaries—even a single intermediary—can work with multiple organs and units of the Court and Counsel. Mostly, these include those organs and units mentioned above: the OTP, the OPCV, the

⁶⁸ ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/06-01/08-2166, Victims and Witnesses Unit report on confidentiality of medical records and consent to disclose medical records, ¶ 16 (Nov. 2, 2009).

⁶⁹ Mladina interview, *supra* note 60.

⁷⁰ The VWU may not deal with evidence, and the OTP must protect its prosecutorial independence.

⁷¹ See ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/0501/08-974-Anx2, Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses, 9 (Oct. 25, 2010).

⁷² *Id.*

⁷³ Interview with Fiona McKay, Chief of VPRS, International Criminal Court, in The Hague, Neth. (Mar. 8, 2012).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Guidelines, *supra* note 10, at 6.

VPRS, the PIDS, the TFV, and defense counsel. The VWU, it deserves noting, does not use intermediaries.

¶35 During the preliminary examination and investigation phases, intermediaries ideally act only as the link between the OTP and the victims. In this capacity, they connect the OTP to potential witnesses and/or sources of evidence. Again, in an ideal world, the OTP would then be in touch with the victim directly to start the process of evidence collection.

¶36 As the Trial Chamber found in both *Lubanga*⁷⁸ and *Ngudjolo*,⁷⁹ that is not what happens. Instead, as a defense consultant at the ICC put it, the OTP outsources a great deal of its investigations.⁸⁰

¶37 Having intermediaries investigate is problematic for a number of reasons.⁸¹ First, while intermediaries may help and assist, “they should not be called upon to undertake the core functions of the Court.”⁸² Investigating is a core function of the OTP. Second, this method of evidence is rife with quality and neutrality concerns.⁸³ But most importantly for this analysis, it exposes intermediaries and victims to the risks of vicarious traumatization and retraumatization, respectively.

¶38 The Guidelines recognize that exposing intermediaries to close victim interaction also potentially exposes them to trauma, whether or not the intermediaries are investigating. It deals with supporting traumatized intermediaries in section 4.5, stating, “the Court will, where appropriate, provide referrals to local organizations that provide psychological care and support.”⁸⁴

¶39 The IRR/OSJI commentary on this section of the Guidelines is worth relaying here *in toto*:

During the consultations in drafting this Commentary, the need for psycho-social care for intermediaries working with victims and witnesses was particularly emphasized as a matter that appears to be underappreciated to date. Due to the multiple threats to which intermediaries may be exposed, in addition to stresses and responsibilities created by interacting with victims and witnesses, intermediaries are often acutely in need of psychosocial care and support. While welcoming the ICC’s recognition of the referral role of the ICC, we would suggest in appropriate cases, e.g. where such provision goes to the heart of the effective and safe completion of the requested intermediary task itself or where the intermediary has suffered or is likely to suffer significant

⁷⁸ See ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012).

⁷⁹ See Prosecutor v. Matthieu Ngudjolo, ICC-01/04-02/12-3-tENG, Judgment pursuant to article 74 of the Statute (Dec. 18, 2012).

⁸⁰ See Buisman, *supra* note 2.

⁸¹ *Id.*

⁸² Guidelines, *supra* note 10, at 2.

⁸³ See Buisman, *supra* note 2.

⁸⁴ Guidelines, *supra* note 10, at 14.

psychological harm as a result of fulfilling the tasks assigned to him/her by the ICC, that such care be provided for directly by the ICC.⁸⁵

¶40 In addition to the IRRI/OSJI Commentary, the Victims' Rights Working Group (VRWG) also published a report on outstanding issues in the ICC's Draft Guidelines. The VRWG's report couched its recommendations, like this article, in the obligations of the Court under its Statute: "some identified categories of intermediaries should automatically receive training on preventative protection and basic trauma awareness in view of the Court's obligation to protect victims under Article 68(1) of the Statute."⁸⁶ The VRWG went on to suggest in-house training and training manuals that address "techniques and methodologies for carrying out various tasks in which intermediaries are engaged."⁸⁷ Interviewing trauma survivors is one such task.

IV. THE TRAUMA OF TRAUMA INTERVIEWING

¶41 There are myriad methods used to analyze the effects of testimony. While these methods use different terminology and formulate their respective analyses based on different theoretical underpinnings, all methods point to the same conclusion: interviewing can be helpful and hurtful.

A. Narrative Theory

¶42 In narrative theory, human beings create meaning through narrative.⁸⁸ Practitioners of social constructivist psychology,⁸⁹ narrative medicine,⁹⁰ and other fields⁹¹ who follow this school of thought assert that past events and experiences do not merely exist in an ether of disconnected memories, but are contextualized—narrativized—to give meaning to the overall arch of one's life. That overall arch can vary depending on one's outlook. For example, the same traumatic past can leave one feeling victimized, hopeful for a brighter future, both, or neither. Whatever the story line or particular facts, a narrative creates coherence.⁹²

⁸⁵ IRRI/OSJI, *supra* note 8, at 21.

⁸⁶ VICTIMS' RIGHTS WORKING GROUP, VRWG, INTERMEDIARIES' GUIDELINES: OUTSTANDING ISSUES 3 (Apr. 2011), http://www.vrwg.org/VRWG_DOC/2011_VRWG_Intermediaries.pdf. Of course, as the Court has held, there is a duty to protect intermediaries as well.

⁸⁷ *Id.* at 7.

⁸⁸ See D.P. POLKINGHORNE, NARRATIVE KNOWLEDGE AND THE HUMAN SCIENCES (1988); see also DAVID HERMAN, JAMES PHELAN, PETER J. RABINOWITZ, BRIAN RICHARDSON & ROBYN WARHOL, NARRATIVE THEORY: CORE CONCEPTS AND CRITICAL DEBATES (2012).

⁸⁹ See MICHELE CROSSLEY, INTRODUCING NARRATIVE MEDICINE: SELF, TRAUMA, AND THE CONSTRUCTION OF MEANING 3–10 (2000) (explaining different psychological approaches to the study of self and identity).

⁹⁰ See *id.*; Rita Charon, *Narrative Medicine: A Model for Empathy, Reflection, Profession, and Trust*, 286 J. AM. MED. ASS'N 1897 (2001).

⁹¹ See, e.g., Ronald R. Irwin, *Narrative Competence and Constructive Development Theory: A Proposal for Writing the Bildungsroman in the Postmodern World*, 3 J. ADULT DEV. 109 (1996); JEROME BRUNER, ACTS OF MEANING (1990).

⁹² See CHARLOTTE LINDE, LIFE STORIES: THE CREATION OF COHERENCE (1993).

¶43 Psychiatrist Dori Laub has published widely on massive psychic trauma and survivor testimony.⁹³ Laub, a member of the narrative theory school, believes psychological trauma's main affect can be described as a fracture of one's narrative.⁹⁴ Others who have studied survivor testimony have come to similar conclusions.⁹⁵

¶44 According to Laub *et al.*, the traumatic moment is an incongruous exception to the linear structure of one's internal life story. In short, it is de-narrativized. By telling one's story to another human being, the speaker is able to build bridges across disparate stored events. In this way, autobiographical interviews can allow one to go "from speechlessness to narrative,"⁹⁶ thereby situating this type of interview as an important tool within the holistic toolkit for healing the survivors' "shattered" lives.⁹⁷

1. Witnessing

¶45 Traumatic events are de-narrativized because, Laub asserts, human beings who witness a man-made traumatic event, including most of what would qualify as genocide, crimes against humanity, and war crimes,⁹⁸ witness the collapse of human community. In the human community, Person A should never do that thing to Person B. When Person B cries for her very life, Person A should stop and listen. But Person A does not.

¶46 Under an Object-Relations theory, the victim's unheeded cries for help cause the victim to "reexperie[n]c[e] the earliest childhood imagery of fantasized horrors of helplessness, worthlessness, and castration."⁹⁹ The trauma of witnessing this act, whether as victim or bystander, becomes "unspeakable and unrepresentable and . . . marked by forgetting and dissociation."¹⁰⁰ For the witness to these crimes, there simply is "no empathic companion who is willing to listen and respond to one's needs."¹⁰¹

¶47 The traumatic event becomes "an 'absent' experience because at the core of the executioner-victim interaction all human relatedness is undone."¹⁰² The story of the traumatic event is "never known, told, or remembered. . . . No perception of the event is

⁹³ See, e.g., Dori Laub, *From Speechlessness to Narrative: The Cases of Holocaust Historians and of Psychiatrically Hospitalized Survivors*, 24 LITERATURE AND MEDICINE 253 (2005); see also KIM WORTHINGTON, *SELF AS NARRATIVE* (1996); Allesandro Portelli, *What Makes Oral History Different*, in *THE DEATH OF LUIGI TRASTULLI AND OTHER STORIES: FORM AND MEANING IN ORAL HISTORY* (1991); Mary Marshall Clark, *Holocaust Video Testimony, Oral History, and Narrative Medicine: The Struggle against Indifference*, 24 LITERATURE AND MEDICINE 266 (2005).

⁹⁴ See Laub, *supra* note 93.

⁹⁵ See, e.g., Nanette C. Auerhahn & Dori Laub, *Annihilation and Restoration: Post-Traumatic Memory as Pathway and Obstacle to Recovery*, 11 INT'L REV. OF PSYCHO-ANALYSIS 327 (1984); Stevan Weine & Dori Laub, *Narrative Constructions of Historical Realities in Testimony with Bosnian Survivors of "Ethnic Cleansing"*, 58 PSYCHIATRY: INTERPERSONAL AND BIOLOGICAL PROCESSES 246 (1995).

⁹⁶ See Laub, *supra* note 93.

⁹⁷ See Dori Laub, *Introduction to the English-Language Edition: Survivors' Silence and the Difficulty of Knowing*, in *AT THE SIDE OF TORTURE SURVIVORS: TREATING A TERRIBLE ASSAULT ON HUMAN DIGNITY* xv, xxi (Sepp Graessner, M.D., Norbert Gurriss & Christian Pross, M.D. eds., 2001).

⁹⁸ These three crimes fall within the jurisdiction of the Court per ICCSt article 5.

⁹⁹ Laub, *supra* note 97.

¹⁰⁰ Laub, *supra* note 93.

¹⁰¹ *Id.*

¹⁰² Dori Laub, *Breaking the Silence of the Muted Witness: Video Testimonies of Psychiatrically Hospitalized Holocaust Survivors in Israel*, in *LESSONS AND LEGACIES VIII: FROM GENERATION TO GENERATION* 175, 178 (Doris L. Bergen ed., 2008).

translated into symbolizing words; no narrative is formed. In a very important sense,” Laub writes, “the event has not yet been experienced.”¹⁰³ What is left is a memory without a narrative, an event without meaning, a human being without a community. PTSD results.

2. First Witnessing

¶48 Because the event has not yet been experienced, the interview setting provides fertile ground for narrativizing and creating meaning out of the event for the first time. As Laub explains:

What the giving and receiving of testimony does is to set in motion a dyadic-dialogic process. The listener-companion, in his or her total presence, offers the possibility and the protected holding space, within which the internal other, or Thou, can be reestablished, necessary to face the traumatic event. The story is told both to the listener and to oneself, and the process of narrativization unfolds.¹⁰⁴

¶49 The interviewer, by actively listening and thereby taking part in the process of meaning creation, does not merely record the testimony of the witness to the traumatic event. Rather, she herself becomes a “first witness” to the event. The interviewee literally re-lives the event as the interviewer watches and listens.

¶50 Laub’s paper, “From Speechlessness to Narrative,” contained findings of interviews with twenty-six chronically hospitalized Holocaust survivors.¹⁰⁵ Each interview was between one-and-a-half and two-and-a-half hours long. Extensive psychological testing was performed both before and five months after the interviews. Interviewed individuals showed a decrease of PTSD symptoms “of close to 50 percent. A control group of survivors who had not given testimony showed no decrease of such post-traumatic symptoms after the five-month interval. After this group also gave testimony, [Laub] saw the same results.”¹⁰⁶

¶51 This experiment demonstrates the potential for the positive impact of interviews on interviewees. Studies specific to giving legal testimony, including some specific to war crimes tribunals, have found the same potential for positive effects of giving testimony.¹⁰⁷

3. Caveant Orator et Auditor

¶52 Those same studies and others point also to the possible negative effects of giving testimony, both for the speaker and the listener. In a Canadian study of survivors of childhood sexual abuse, all ninety-three participants responded that giving testimony

¹⁰³ Laub, *supra* note 93, at 257.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 262.

¹⁰⁷ See, e.g., Catherine C. Byrne, *Benefit or Burden: Victims’ Reflections on TRC Participation*, 10 PEACE AND CONFLICT: J OF PEACE PSYCHOL. 237–56 (2004); Ulrika Funkeson et al., *Witnesses to Genocide: Experiences of Witnessing in the Rwandan Gacaca Courts*, 17 PEACE AND CONFLICT: J OF PEACE PSYCHOL. 367–88 (2011).

“disrupted lives and relationships . . . [causing] nausea and vomiting, as well as psychological distress.”¹⁰⁸ Two studies of women who gave testimony in Rwandan domestic Gacaca courts found that the experience had the potential to cause trauma.¹⁰⁹ Countless other studies found the same result.¹¹⁰

¶53 In addition, it was not uncommon for emotions “stirred up” during the course of giving testimony to continue to affect the witness after the trial.¹¹¹ Studies outside of giving legal testimony also demonstrate the possibility for negative impact of interviews on interviewees.¹¹² Still other studies have found that a neutral-impact interview may not exist, at least from the interviewee’s perspective.¹¹³ That is, an investigatory interview can be positive or negative, but not neutral.

¶54 The effect on the interviewer—the First Witness—is also significant. Vicarious/Secondary Traumatization is widely recognized in the psychological literature on trauma interviewers. While “Vicarious Traumatization” was initially coined with reference to psychotherapists who worked with trauma survivors,¹¹⁴ other studies have extended the concept’s application to virtually all persons who assist and work with trauma survivors. These individuals include healthcare providers,¹¹⁵ journalists,¹¹⁶ first responders,¹¹⁷ clergy,¹¹⁸ and, most relevant to this study, attorneys,¹¹⁹ humanitarian workers,¹²⁰ and other professionals within the justice system.¹²¹

¹⁰⁸ Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. OF TRAUMATIC STRESS 159–66 (2003).

¹⁰⁹ Funkeson et al., *supra* note 107; Karen Brounéus, *Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts*, 39 SECURITY DIALOGUE 55–76 (2008).

¹¹⁰ See, e.g., Byrne, *supra* note 107; Trudy de Ridder, *The Trauma of Testifying: Deponents’ Difficult Healing Process*, 6 TRACK TWO (1997), http://reference.sabinet.co.za/webx/access/electronic_journals/track2/track2_v6_n3_a14.htm.

¹¹¹ Funkeson et al., *supra* note 107, at 376.

¹¹² See, e.g., Rebecca Campbell, *What really happened? A validation study of rape survivors’ help-seeking experiences with the legal and medical systems*, 20 VIOLENCE AND VICTIMS 1, 55 (2005) (explaining “police officers and doctors significantly underestimated the impact they were having on survivors. Victims reported significantly more post-system-contact distress than service providers thought they were experiencing.”).

¹¹³ See, e.g., Donna S. Martsloff et al., *A Meta-Summary of Qualitative Findings about Professional Services for Survivors of Sexual Violence*, 15 QUALITATIVE REPORT 3, 489 (2010) (“Findings indicated that qualities of professional service providers and outcomes of professional services were perceived either positively or negatively (rather than neutrally) by survivors, regardless of the provider’s professional discipline. Professionals who work with sexual violence survivors can use these findings to improve their practices.”).

¹¹⁴ See I.L. McCann & Laurie A. Pearlman, *Vicarious Traumatization: A framework for understanding the psychological effects of working with victims*, 3 J. TRAUMATIC STRESS 1, 131 (1990).

¹¹⁵ See Paula A. Madrid & Stephanie J. Schacher, *A Critical Concern: Pediatrician Self-Care After Disasters*, 117 PEDIATRICS 454 (2006).

¹¹⁶ See Siddarth A. Shah, *Mental Health Emergencies and Post-Traumatic Stress Disorder*, in EMERGENCY PUBLIC HEALTH: PREPAREDNESS AND RESPONSE 493 (G.B. Kapur & J.P. Smith eds., 2010).

¹¹⁷ See *id.*

¹¹⁸ See JACKSON H. DAY, ELIZABETH VERMILYEA, JENNIFER WILKERSON, & ESTHER GILLER, *RISKING CONNECTION IN FAITH COMMUNITIES: A TRAINING CURRICULUM FOR FAITH LEADERS SUPPORTING TRAUMA SURVIVORS* (2006).

¹¹⁹ See Andrew P. Levin, M.D. & Scott Greisberg, M.A., *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245 (2003).

¹²⁰ See Siddarth A. Shah, Elizabeth Garland, & Craig Katz, *Secondary Traumatic Stress: Prevalence for Humanitarian Aid Workers in India*, 13 TRAUMATOLOGY 59 (2007); Laurie A. Pearlman & Lisa McKay,

¶55 Laub himself recognized the countertransference of the interviewer. Laub experienced “vicarious traumatization through witnessing to an instance of genocide” which caused a “loss of coherent speech.”¹²² Joan Lansen, another trauma psychologist, described the countertransference and gave reasons why it is more prone to happen in atrocity crime situations:

all intensive work with “man-made disasters” (when humans are tormented by human hand) . . . requires very personal participation by the therapist Naturally, this work does something to us. It can deprive us of our sleep, and it can cause burnout. It can influence our behavior at home and among colleagues; it can turn us into annoying people. We can develop the same symptoms as our patients: tension, depression, and severe anxiety.¹²³

C. Neuroscience

¶56 Neuroscience provides a “harder” explanation for the salience of trauma interviews.¹²⁴ That explanation starts out by noting that memory and stress are intimately interrelated, as first recognized by Yerkes and Dodson.¹²⁵

¶57 The Yerkes-Dodson law shows that some stress is good for memory, while too much stress impedes it.¹²⁶ The physiological reason is widely thought to involve glucocorticoids, which are released by the basal ganglia upon encountering a stressor.¹²⁷ Too many glucocorticoids can effectively paralyze the hippocampus.¹²⁸

¶58 The hippocampus is responsible for working memory and binding/consolidating working memories into long-term episodic memories.¹²⁹ Episodic memories are those autobiographical memories in which we remember ourselves participating in activities.¹³⁰ When the hippocampus is paralyzed by an overflow of glucocorticoids, working memory is impeded, and disparate events are not bound together into coherent episodic memories.¹³¹

Understanding and Addressing Vicarious Trauma, HEADINGTON INSTITUTE (2009), <http://www.headington-institute.org/Default.aspx?tabid=2646>.

¹²¹ See JEAN K. PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 2007: ETHICAL AND PRACTICAL DIMENSIONS (3d ed. 2007).

¹²² Laub, *supra* note 93, at 255.

¹²³ Johan Lansen, *What Does This Work Do To Us?*, in AT THE SIDE OF TORTURE SURVIVORS 198, 198–99 (Sepp Graessner, M.D., Norbert Gurriss & Christian Pross, M.D. eds., 1996).

¹²⁴ See, e.g., Chris R. Bowen, *A cognitive neuroscience account of posttraumatic stress disorder and its treatment*, 39 BEHAVIORAL RES. & THERAPY 373 (2001).

¹²⁵ See Robert M. Yerkes & John Dillingham Dodson, *The relation of strength of stimulus to rapidity of habit-formation*, 18 J. OF COMP. NEUROLOGY AND PSYCHOL. 459 (1908).

¹²⁶ See *id.*

¹²⁷ S.J. Lupien, F. Maheu, M. Tu, A. Fiocco & T.E. Schramek, *The effects of stress and stress hormones on human cognition: Implications for the field of brain and cognition*, 65 BRAIN AND COGNITION 209 (2007).

¹²⁸ *Id.*

¹²⁹ See, e.g., ROBERT M. SAPOLSKY, WHY ZEBRAS DON’T GET ULCERS (1998).

¹³⁰ *Id.*

¹³¹ *Id.*

¶59 The amygdala, however, thrives in situations of increased glucocorticoid concentration.¹³² The amygdala is the part of the brain largely responsible for processing memory and causing immediate emotional reactions.¹³³ It also stores heightened emotional memories.¹³⁴ Metcalfe and Jacobs have called this the “hot” memory system, where the hippocampus-based memory system is the “cool” one.¹³⁵

¶60 Unfortunately, the amygdala is very bad at binding memories together.¹³⁶ This deficiency accounts for the “weapon focus” of those who experience the trauma of being mugged at gunpoint: individuals can remember very clearly and accurately the gun, but their attention is focused and their memory of other aspects of the situation (say, height and weight of the shooter) is severely impaired.¹³⁷ Thus, for a victim of crimes within the jurisdiction of the court (or any other trauma), heightened glucocorticoid concentration will likely have led to ineffective binding of memories and a resulting fracture in the victim’s narrative memory. In those cases, the memory will actually reside in another part of the brain—that is bad at binding.

¶61 Neuroscience has only begun to study the effects of narrativizing one’s traumatic memories. Preliminary research, however, shows that the way an interviewee is asked to relay events can have an effect on the extent of their amygdala activation.¹³⁸ Of course, it is well accepted in cognitive behaviorism that that prolonged exposure to a stressor can reduce the response to that stressor,¹³⁹ so the key is finding a stressor that is not overly burdensome at every exposure. Crucially in this regard, the preliminary research mentioned above found that asking victims of trauma to go straight into talking about the trauma caused the same neurological signals as the trauma itself.¹⁴⁰

D. Investigative Interviewing

¶62 Trauma’s effect on narrative (and *vice versa*) has not gone unnoticed in the investigative interviewing field, either. After lamenting the lack of interview training and theory for investigators, Fisher and Geiselman developed the cognitive interview in the early 1980s.¹⁴¹ The immediate goal was to create a style of interviewing that would assist and enhance recall.¹⁴²

¹³² *Id.*

¹³³ See Benno Roozendaal, Bruce S. McEwen & Sumantra Chattarji, *Stress, memory and the amygdala*, 10 NATURE REVIEWS NEUROSCIENCE 423 (2009).

¹³⁴ *Id.*

¹³⁵ Janet Metcalfe & W.J. Jacobs, *A “hot-system/cool-system” view of memory under stress*, 7 PTSD RES. Q. (2006).

¹³⁶ See Roozendaal et al., *supra* note 133.

¹³⁷ *Id.*

¹³⁸ See Bessel A. Van Der Kolk, *Clinical Implications of Neuroscience Research in PTSD*, ANNALS OF THE N.Y. ACADEMY OF SCIENCES 1 (2006).

¹³⁹ Rachel Yehuda & Joseph LeDoux, *Response Variation following Trauma: A Translational Neuroscience Approach to Understanding PTSD*, 56 NEURON 19, 22 (2007).

¹⁴⁰ Van Der Kolk, *supra* note 138.

¹⁴¹ See RONALD P. FISHER & R.E. GEISELMAN, *MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEW: THE COGNITIVE INTERVIEW* (1992).

¹⁴² See Ulf Holmberg, *Investigative Interviewing as a therapeutic jurisprudential approach*, in INTERNATIONAL DEVELOPMENTS IN INVESTIGATIVE INTERVIEWING 149, 156 (Tom Williamson, Becky Milne & Stephen P. Savage eds., 2009).

¶63 The “cognitive interview” developed into the “enhanced cognitive interview,” which was, in turn, adapted into the “spaced cognitive interview”¹⁴³ (SCI) for victims who showed “anxiety-hindered narration.”¹⁴⁴ The hindrance, as recognized by investigative interviewers, is due to trauma confronted at each attempt to talk about the stressful memory.¹⁴⁵

¶64 SCI deals with confrontation of trauma by spacing out narration. The spacing allows the victim to confront the stressor for a prolonged period of time in a supportive environment.¹⁴⁶ It encourages establishing rapport and asking open-ended questions. By doing so, SCI operationalizes the cognitive behaviorism theory that psychological re-experience through a narrative structure reduces the anxiety that originates from traumatic experiences.¹⁴⁷

¶65 Many studies have been done on SCI to establish whether or not it indeed reduces the anxiety originating from traumatic events. These studies found that the perceived amount of respect an interviewer has for an interviewee has a strong effect on ability and willingness to recall.¹⁴⁸ As one victim put it:

It was easier for me to talk to people who acted properly because people who interview people, they should not punish you, but they can do so just by their way of talking, showing their hate for me as a human being, and at that moment you turn around and return their hate.¹⁴⁹

¶66 This quote shows both the positive and the negative effects of establishing rapport on the attitude of the interviewee and the interviewee’s subsequent desire (and maybe even ability) to recall.

¶67 In an attempt to empirically establish the utility of the cognitive interview, researchers created experiments¹⁵⁰ based on Antonovsky’s concept of “sense of coherence” (SOC).¹⁵¹ According to Antonovsky, one’s SOC comprises three different feelings: comprehensibility, manageability, and meaningfulness.¹⁵² Holmberg elaborates on these three feelings:

[t]he first, the cognitive component comprehensibility, refers to the degree to which individuals perceive information, about themselves and the

¹⁴³ Eric Shepherd & Rebecca Milne, *Full and Faithful: Ensuring Quality Practice and Integrity of Outcomes in Witness Interviews*, in *ANALYSING WITNESS TESTIMONY: A GUIDE FOR LEGAL PRACTITIONERS AND OTHER PROFESSIONALS* 124 (Anthony Heaton-Armstrong, Eric Shepherd & David Wolchover eds., 1999).

¹⁴⁴ Holmberg, *supra* note 142, at 157.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See J.W. PENNEBAKER, *OPENING UP: THE HEALING POWER OF EXPRESSING EMOTIONS* (1997).

¹⁴⁸ Alexander Todorov & John A. Bargh, *Automatic Sources of Aggression*, 7 *AGGRESSION AND VIOLENT BEHAVIOR* 53 (2002).

¹⁴⁹ Holmberg, *supra* note 142, at 160.

¹⁵⁰ See Ann E. Auhagen, *On the Psychology of Meaning of Life*, 59 *SWISS J. OF PSYCHOL.* 34 (2000).

¹⁵¹ See Aaron Antonovsky, *The Sense of Coherence as a Determinant of Health*, in *BEHAVIORAL HEALTH: A HANDBOOK OF HEALTH ENHANCEMENT AND DISEASE PREVENTION* (Joseph D. Matarazzo et al., eds., 1984).

¹⁵² *Id.*

environment, as structured, predictable and comprehensible. The second instrumental component, manageability, refers to whether individuals perceive their personal and social resources as sufficient to cope with demands posed by internal and external stimuli. The third motivational component, meaningfulness, is the emotional counterpart of comprehensibility; it refers to how individuals feel that their lives make sense emotionally and to the extent that they perceive stressful experiences as requiring them to invest time, energy and effort.¹⁵³

¶68 Researchers in this study showed that individuals who experienced a “humanitarian” police interview—one containing open-ended questions and in which rapport was established—had a higher SOC than those who felt themselves less respected by the police.¹⁵⁴ Another study of eighty-three crime victims also found that victims who “perceived a high humanitarian approach from their police interviewer reported a significantly higher SOC than those who perceived a low humanitarian approach.”¹⁵⁵ While these studies can show only correlation and not causality, the correlation is clear: interviewing correlates with emotional response.

¶69 Some victims may even value proper treatment more than a guilty verdict. The seminal study in this field assessed whether victims were more concerned with “decision control” or “process control,” and ended up finding the latter.¹⁵⁶ In the study, “decision control” related to the control a victim had over the outcome of the trial, and “process control” related to the control a victim had over the judicial process, whatever the outcome of that process might turn out to be. The data indicated that victims were willing to forego decision control if it meant they retained process control.

¶70 Subsequent studies corroborated this finding, reinforcing the theory that “procedural justice” is often more important to victims than “distributive justice.”¹⁵⁷ The importance of procedural justice makes sense, given that victims often have no ability to measure their distributive outcome against the outcome of others.¹⁵⁸ Even without any information about others, victims can always measure how they have been treated throughout their own judicial process.¹⁵⁹

¶71 But while judging distributive justice is fairly easy, judging procedural justice is not so easy, at least at first glance. If a victim loses a goat, and the judicial process that convicts a person then orders that person to give the victim a goat or the money to buy a

¹⁵³ Holmberg, *supra* note 142, at 166.

¹⁵⁴ Ulf Holmberg, Sven A. Christianson & David Wexler, *Interviewing Offenders: A Therapeutic Jurisprudential Approach*, in OFFENDERS’ MEMORIES OF VIOLENT CRIMES 355 (Sven A. Christianson ed., 2007).

¹⁵⁵ Holmberg, *supra* note 142, at 168.

¹⁵⁶ JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1976).

¹⁵⁷ E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

¹⁵⁸ It deserves to be noted that other formulations of justice have been suggested, though they will not be considered here. See, e.g., Laura Klaming & Ivo Giesen, *Access to Justice: The Quality of the Procedure*, TISCO WORKING PAPER SERIES ON CIVIL LAW AND CONFLICT RESOLUTION SYSTEMS 14 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091105.

¹⁵⁹ Kees van den Bos et al., *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCHOL. 1034 (1997).

replacement goat, that just seems fair.¹⁶⁰ More fundamentally, because the outcomes of distributive justice—the distributions themselves—are generally either black and white (conviction/acquittal) or monetizable (how much money the victim receives), judging that type of justice is usually straightforward.

¶72 Judging procedural justice is less straightforward. Generally, research shows that, in order for victims to perceive their respective procedures as fair, they want:

- to be treated with dignity and respect;
- to be notified about important developments and informed about their rights;
- to receive victim support;
- to receive protection from the accused;
- to attend and participate in proceedings in order to have their voices heard;
- to receive reparation; and
- to receive legal assistance.¹⁶¹

¶73 The ICC’s participation and reparation regime, coupled with the cognitive interview, has the potential to offer all of the above. Moreover, since victims can become non-victims throughout proceedings, thus becoming ineligible for distributive justice, procedural justice at the ICC is that much more important.

V. FROM HERE TO THERE

¶74 The primary goal in this area should be to do as those at risk asked the Court to do: to help them understanding how to work with traumatized individuals. The ICC has a number of different options in this respect, even within the typical budgetary and logistical constraints.

¶75 Other educational products made available by the Court evidence that some options revolve around the PIDS, the VWU, and the OTP GCU getting together and creating guidelines, a protocol, standards, pamphlets, videos, or similar instruments. The Court already utilizes multiple digital and physical outreach devices, including a YouTube video on “Being a Witness.”¹⁶² Between the work of the VWU and OTP staff, a best-practices guide for interviewing traumatized individuals that is already sanctioned by at least one unit or organ of the Court must exist. The PIDS could then create a video based on the document(s), or simply put the document(s) online. Alternatively, the PIDS could physically publish a single document as it did with its “Understanding the ICC” pamphlet.

¹⁶⁰ That result also comports with general notions of compensatory damages. *See* RESTATEMENT (SECOND) OF TORTS § 906 (1979).

¹⁶¹ *See* Anne-Marie de Brouwer & Marc Groenhuijsen, *The Role of Victims in International Criminal Proceedings*, in *INTERNATIONAL CRIMINAL PROCEDURE: TOWARD A COHERENT BODY OF LAW* 153–154 (Göran Sluiter & Sergey Vasiliev eds., 2009).

¹⁶² TalmonTV, *International Criminal Court - Being a Witness*, YOUTUBE.COM (Jan. 29, 2009), <http://www.youtube.com/watch?v=0U25E4Q2F7M>.

¶76 Training sessions for intermediaries are also an option. It is not uncommon for intermediaries to be trained after they are identified. What is uncommon is for them to be trained in interviewing traumatized individuals. Indeed, it is unprecedented as far as the author can tell.¹⁶³ Of course, training sessions and online or physical material are not mutually exclusive options.

¶77 If creation of a best-practices manual is not a viable option, then the Court should at least point intermediaries to the United Nations High Commissioner for Human Rights Training Manual on Human Rights Monitoring¹⁶⁴ or the Istanbul Protocol.¹⁶⁵ Both of these documents recognize retraumatization and vicarious traumatization and contain suggestions for coping.¹⁶⁶ Another idea is to partner with an outside party—an education or service institution, perhaps—to work alongside intermediaries and help them do the Court’s hard work.

¶78 At the end of the day, the Court has made important advancements in protecting and supporting victims, witnesses, intermediaries, and others who put themselves at risk in order to advance the mission of international criminal justice. At this crucial stage of guideline and strategy promulgation, the Court should take very seriously the results of the expansive consultation process in which it engaged with regard to the Intermediary Guidelines. Intermediaries are asking for help right now. To the extent possible within available resources, the Court should support those who are suffering and who may suffer by offering guidelines for interviewing individuals whose narratives have been fractured by trauma.

¹⁶³ Indeed, a colleague who arranged an intermediary training program in The Hague was unaware that Court employees would be willing to speak with them about interviewing and general communication techniques. Those with the ability to do so suggested that, pending approval, they would be willing, but that they have not been asked.

¹⁶⁴ Office of the United Nations High Commissioner for Human Rights, *Professional Training Series No. 7: Training Manual on Human Rights Monitoring*, U.N. Doc. HR/P/PT/7 (2001).

¹⁶⁵ Office of the United Nations High Commissioner for Human Rights, *Professional Training Series No. 8/Rev.1: Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. HR/P/PT/8/Rev.1 (2004).

¹⁶⁶ *Id.* ¶ 94; Training Manual on Human Rights Monitoring, *supra* note 164, at 465 (“Chapter XXIII: Stress, Vicarious Trauma, and Burn-out”).