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# *Silencing Hearings? Victim-Witnesses at War Crimes Trials*

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## **Abstract**

*It is commonly accepted that war crimes trials should provide a space for victims to tell their stories. A close reading of the transcripts of victim-witnesses' testimonies in the Krstic trial at the International Criminal Tribunal for the former Yugoslavia suggests, however, that war crimes trials effectively silence, rather than hear, victims. In this particular trial, victim-witnesses predictably governed neither the agenda nor the pace of the hearings. More problematically, we argue that incongruously optimistic judicial remarks unnecessarily denied their suffering. On a different plane, victims' testimonies were only vaguely connected to the person of the accused; they related to facts the relevance and proof of which are debatable. This article aims to generate a debate about victim-witnesses' testimonies at war crimes trials. It seeks to identify both the demands that the legal process imposes on victim-witnesses and the tensions that arise out of their participation in it. In the light of the fact that legal proceedings cannot produce the definitive collective memory of the events with which they deal, the article finally stresses the need to foster a variety of collective memories outside the judicial platform.*

Silence: v. ... 1. *Trans.* To cause or compel (a person) to cease speaking ...  
*Shorter Oxford English Dictionary*

Hearing: ... 2. The action of listening ... 3. The listening to evidence and pleadings  
in a court of law ...  
*Shorter Oxford English Dictionary*

I hope your father will come back.  
(Judge Riad to Mr Husic, who testified in the *Krstic* trial)

## **1 Introduction**

At least three tensions, none of which can be resolved satisfactorily, plague the prosecution of international crimes. They are, firstly, the tension between the need to

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focus narrowly upon the person of the accused, while simultaneously establishing a wider historical record of past events; secondly, the tension between adhering to the strictures of the legal process, while attending to the suffering of individual victims; and, finally, the tension between the need to make harrowing past events the focus of the trial, whilst aspiring to contribute to the creation of a more hopeful future. Only the first tension has been widely debated in the literature. This article disputes the frequent — but rarely examined — claim that victim-witnesses benefit from participating in war crimes trials.<sup>1</sup> As such it concentrates on the second tension, but it cannot afford to ignore the other two.

The immediate task of any criminal trial is to establish the guilt or otherwise of the defendant. In the case of a war crimes trial, however, the tribunal must also establish ‘what happened’, leading it to produce something akin to ‘history’. Competition between the dual tasks of establishing individual criminal responsibility and contributing to the development of collective memory<sup>2</sup> gives rise to the first tension, which the tribunal resolves more or less consciously, with more or less satisfactory results. In producing a historical record, the tribunal decides what (event, factor, context) to include and exclude, via ‘framing’ decisions.<sup>3</sup> These involve ‘hard choices’, because no simple and obvious criterion dictates them. They will be both contested and approved, as much by contemporary as by future commentators.

Throughout her book *Eichmann in Jerusalem*, for example, Hannah Arendt reiterates that those prosecuting Eichmann failed to concentrate on the purpose of the trial, permitting victims to recount events not directly related to the indictment. However, she approved of the judgment because it resisted ‘all attempts to widen the range of the trial’.<sup>4</sup> In contrast, in *Mass Atrocity, Collective Memory and the Law*, Mark Osiel opines that a war crimes trial ‘indelibly influence[s] collective memory of the events’ it judges.<sup>5</sup> Given that a war crimes trial cannot be historically neutral, his view is that it may be judicious to compromise the rules that keep the conventional legal concerns of deterrence and retribution at centre stage.<sup>6</sup> At the same time, he calls for the public spectacle of the recounting of administrative massacre to be inscribed in liberal legality in order to foster deliberation.

We agree with Osiel that a war crimes trial cannot avoid contributing to the shaping of collective memory. However, we find his reference to liberal legality either too simplistic or under-argued. And we contend that liberal legality should examine

<sup>1</sup> For a recent and powerful illustration of this trend, see L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001).

<sup>2</sup> By ‘collective memory’, we refer to a memory that members of a group think they share even if they do not, or at least not completely. We share Candau’s view that collective memory is never as collective as it thinks/is presented. Collective memory does not occur in the singular: a group will always foster a plurality of collective memories. J. Candau, *Mémoire et Identité* (1998), at 20–47.

<sup>3</sup> See further Erving Goffman in M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (2000), at 240.

<sup>4</sup> H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963), at 253; see also 9, 19, 225.

<sup>5</sup> Osiel, *supra* note 3, at 2.

<sup>6</sup> *Ibid.*, at 1. Felman also approves of the Prosecutor’s line in *Eichmann*, which allowed ‘for the first time victims [to be] legitimised and validated and their newborn discourse . . . empowered by their new roles, not as victims, but as prosecution witnesses within the trial’: ‘Theatres of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust’, 27 *Critical Inquiry* (2001) 232.

the place reserved for victim-witnesses in war crimes trials; this to date, has attracted little debate.<sup>7</sup>

Typically, the index of Osiel's book does not contain entries for 'victims' or 'witnesses'. Yet, Osiel writes freely about victim-witnesses. He quotes Vezzetti, who supported the policy adopted by the Alfonsín government in Argentina to try the military juntas:

the victims, as witnesses, appeal not only to the judges but implicitly to the community at large. Each victim, finally rescued from oblivion, seeks recognition of the essential humanity that was denied him. For this reason, the trial, as an event in the life of the entire community, not only furthers legal justice but also, at the same time, helps to reconstruct the nation's ethical foundations.<sup>8</sup>

Osiel also quotes Carlos Nino approvingly:

What contributes to re-establishing [the victims'] self-respect is the fact that their suffering is listened to in the trials with respect and sympathy, the true story receives official sanction, the nature of the atrocities are publicly and openly discussed, and their perpetrators' acts are officially condemned.<sup>9</sup>

In our view, the authors of these quotations too easily assume that the legal arena provides a superior platform for victims to recount their stories.<sup>10</sup>

The recounting by victims of their stories is widely perceived to be desirable on humanistic grounds, if not positively necessary to pave the way for collective peace by

<sup>7</sup> The literature contains a few notable exceptions. See for example, Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?', 13 *EJIL* (2002) 697. The trial of M. Papon in Bordeaux in 1997–1998 generated a huge public debate in France about the role of witness testimony. See R. Golsan (ed.), *The Papon Affair: Memory and Justice on Trial* (2000). Another exception is provided by the Report published by the Fédération Internationale des Ligues des Droits de l'Homme entitled 'Entre illusions et désillusions: les victimes devant le Tribunal Pénal International pour le Rwanda (TIPR)' (October 2002, no. 343). Significantly the Report was prompted by the decision of victims' associations based in Rwanda to discontinue their support for ICTR proceedings in Arusha, bringing them close to a standstill. The Report suggests that some, but not all, of the complaints regarding the treatment of victim-witnesses were justified. For a general assessment of the position of the victim in the criminal process, see Doak, 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals', 23 *Legal Studies* (2003) 1.

<sup>8</sup> Osiel, *supra* note 3, at 30.

<sup>9</sup> *Ibid.*, at 273. However, even Osiel acknowledges that witnesses can sometimes find the experience of public testimony degrading. *Ibid.*, at 104.

<sup>10</sup> This assumption was largely absent at Nuremberg, where the Tribunal mainly relied on the paper trail that the Nazis had left behind detailing their crimes. Only 94 witnesses testified. However, the Tribunal did consider reports of national state commissions which had held public hearings that had relied upon live oral testimony: Wald, 'To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings', 24 *Harv. Int'l L. J.* (2001) 535, at 538–539. See further, Wallach, 'The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure', 37 *Colum. J. Transnat'l L.* (1999) 851. For many, including ICTY Judge Wald, the limited use of live testimony at Nuremberg (and Tokyo) has resulted in a 'clouded' legacy (*ibid.*, at 552). By contrast, Wald describes victim-witnesses as the 'soul of war crimes prosecution' at the ICTY: 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court', 5 *Wash UJL & Policy* (2001) 87.

avoiding acts of revenge.<sup>11</sup> In the judicial arena, however, story-telling can only take the form of giving legal evidence. It is constrained by the judicial endeavour to establish a legally authoritative account of ‘what happened’. In pursuit of justice, legal requirements may bypass the individuality of the victims, including their needs as traumatized persons. Thus a conflict may arise between the needs of individual victims and the requirements of collective justice.<sup>12</sup> When this tension is resolved in favour of the requirements of collective justice, the needs of individual victims are overlooked so that ‘justice’ is not done to them and to what they have to say. It may be that they need an entirely different platform. Arendt’s claim that a trial should not promise more than it can deliver becomes remarkably germane.

Victims live in the present. Their immediate concern is ‘tomorrow’, in the literal sense. Even if a war crimes tribunal is inscribed in a more general process of reconciliation (inevitably directed at the future), its immediate focus is necessarily on past events. On this count too, a tribunal cannot be an ideal platform for victims to relate their experiences.

We are aware that there is not one ‘perfect’ platform outside of law for victims to tell their stories. Yet we wonder whether a displacement away from law would improve matters. We say this not because we are unmoved by the narratives of the victims, as Osiel, in our view gratuitously, suggests of Arendt.<sup>13</sup> On the contrary, our reflections are built — we hope — on respect for these victims whom we imagine find testifying distressing or, at least, frustrating.

### A Starting a Debate

We draw upon the transcripts of victim-witnesses who testified for the prosecution in the case against Radislav Krstic before the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>14</sup> Although the *Krstic* case will undoubtedly acquire a prominent place in legal commentaries for its treatment of genocide, our choice is random. We expect that any other ICTY case would illustrate our thesis that the international criminal justice process instrumentalizes individual memory for its own collective ends with unsuspected (or at least unexplored) costs for the individuals and possibly collectivities concerned. This instrumentalization reaches its zenith when

<sup>11</sup> Nancy Wood reports the following views expressed during the *Papon* trial:

One lawyer contended that the simple fact of holding the trial had an ‘assuaging value’ for the civil parties. And one survivor testified in court, ‘We have been survivors, we hope to become living people’ — voicing in vivid terms the hope that transmission would eventually achieve a selfhood released from the singular identity of the survivor. Wood, ‘The Papon Trial in an “Era of Testimony”’, in Golsan, *supra* note 7, at 100–101. See further, First Annual Report of the International Criminal Tribunal for the Former Yugoslavia, A/49/342 S 1994/1007, at para. 15; Second Annual Report of the International Criminal Tribunal, A/50/365 S/1995/728, at para. 110; J. Shklar, *Legalism* (1964), at 158; G. Bass, *Stay the Hand of Vengeance* (2000), at 304–310.

<sup>12</sup> For the way we use the adjective ‘collective’, see *supra* note 2.

<sup>13</sup> Osiel, *supra* note 3, at 62.

<sup>14</sup> *Prosecutor v. Radislav Krstic* Case No. IT-98–33-T, 2 August 2001.

war crimes trials inevitably broaden their focus beyond the person of the accused. Exactly how instrumentalization occurs will differ in each case and should, ideally, be explored across a range of cases. However, the *Krstic* case is as good a place as any other to start a debate on the role and treatment of victim-witnesses in war crimes trials.

Admittedly, transcript evidence ‘flattens out’ what happens in the legal arena and does not allow the reader to ‘taste’ atmosphere. Gestures and visible signs of sentiment are unrecorded and lost, as are silences. The ‘interference’ represented by the necessary presence and work of the interpreters is similarly kept out of the record.<sup>15</sup> We have not interviewed witnesses. Our speculation that some (not all) will have found the experience of testifying negative, either disappointing or painful and, possibly, degrading needs to be confirmed by empirical research.<sup>16</sup> Finally, we are acquainted with the work of the Victims and Witnesses Support Unit only in the most general terms. Our discussion would undoubtedly have been enriched by empirical research into how witnesses perceive their participation in the international criminal justice process and the support they derive from the Tribunal. However, this is not a reason to delay the opening of a debate. The transcripts (which few read) already conserve a great deal of the mood of the proceedings. And they cry out for a debate on the way in which legal stories are fashioned.

### **B A Three-pronged Inquiry**

We pose questions at three levels. The first set of questions arises from our initial responses to the transcripts. We were often disturbed by the way questioning was pursued in examination-in-chief; we were almost invariably shocked by remarks the judges made at the end of victim-witnesses’ testimonies. The questions thus arise: How can the legal process treat traumatized witnesses as humanely as possible? What are the advantages and disadvantages to victim-witnesses of adversarial and inquisitorial procedures?<sup>17</sup> Although the adoption of oral evidence ensures that some (selected) victims are guaranteed their time in court, testifying may also be painful. Can technological developments ensure constructive alternatives to traditional models of collecting evidence?

Our second set of questions seeks to challenge the assumption that victim-witnesses’ testimonies are essential to war crimes trials. The accused is barely

<sup>15</sup> On the difficulties of legal translation before international tribunals, see Moerman, ‘The Search for the Truth’, *Counsel* (2001) 24; on the absence of a common legal culture and language during the trial and at the time of writing judgment, see Wald, ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age’, *supra* note 10, at 87.

<sup>16</sup> Harrowing cross-examination, as reported by the victim-witnesses met by the League of Human Rights enquiry team sent to investigate the Rwandan situation (*supra* note 7, at 8–9), was not in our opinion a problem in the *Krstic* trial. Even without this, however, we believe that testifying was distressing for some victims. While not the case in *Krstic*, trials at the ICTY can be the scene of harrowing cross-examination. This has happened most famously in the *Milosevic* trial, where the defendant conducted his own defence.

<sup>17</sup> For the view that the adversarial procedure is harsher on victims, see Walley, ‘Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole’, 845 *Revue Internationale de la Croix Rouge* (2002) 51, at 69.

mentioned in the testimonies of victim-witnesses in the *Krstic* case. In other words, the testimonies ‘set the scene’. Is this a factual or an emotional scene? If the former, how is the relevance of a particular ‘fact’ determined? Is the hearing of victim-witness testimony either a necessary or reliable method by which to establish this factual scene? As the difference of opinion between Arendt and Osiel illustrates, the distinction between ‘factual’ and ‘emotional’ scenes is not at all clear-cut. What is the purpose of the witnesses’ testimonies?

On a different plane, the aura created by the legal arena generates problems of its own; its ‘authoritative’ judgment is an exercise in omission. Witnesses have far more to say than will ever be heard in court. What place should they be given to tell the parts of their story which do not interest the law? Paradoxically, it is precisely the special quality of the legal arena that prompts some witnesses to testify.<sup>18</sup> Advocating an end to victim testimony because of inherent weaknesses in the legal process may silence victims even further unless new platforms are created where victims can recount their stories in a socially significant way. Is there the political will to provide victims with this opportunity?

There are no easy answers. But these questions need to be asked, if the tensions attendant upon war crimes trials are to be managed responsibly. Contrary to Nino,<sup>19</sup> we question whether the victims are treated with respect and sympathy and whether it is the true story that the judgment sanctions.

## 2 The Fall of Srebrenica and the *Krstic* Case

The *Krstic* case arose out of the events that have come to be referred to as ‘the fall of Srebrenica’. The following brief account of these events is based on the *Krstic* judgment.

At the outbreak of the Yugoslav wars in 1991, the Bosnian town of Srebrenica had about 37,000 inhabitants, of whom 73 per cent were Muslims and 25 per cent were Serbs. In April 1993 the UN Security Council declared Srebrenica a ‘safe area’. Consequently, it was to be ‘free from armed attack or hostile act’. Nonetheless, the Bosnian Serb Army (VRS) started an offensive against Srebrenica on 6 July 1995. By the afternoon of 9 July the VRS was one kilometre away from the town. By the afternoon of 11 July the streets of Srebrenica were empty. The population had fled.

In the hope that they would be safe, between 20,000 and 25,000 Bosnian Muslims congregated inside and immediately around the UN compound at Potocari. Most of them were women, children or the elderly, although there were also between 900 and 1,200 men. Conditions at Potocari were deplorable due to the heat, lack of water and

<sup>18</sup> The report on victim-witnesses before the ICTR suggests that victims were ready to testify if that would result in the accused being convicted, even if this meant being harassed during cross-examination (*supra* note 7, at 16 — but cf. *ibid.*, at 9). Jean Améry was of the opinion that it was necessary for the victim to confront his aggressor: *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and its Realities* (1986).

<sup>19</sup> See *supra* text at note 9.

overriding fear. Crimes took place, including rape and murder. Between 12 and 13 July, the Bosnian Muslim women, children and elderly were taken away from Potocari in buses and trucks.

By the afternoon of 11 July, word had spread that it was not safe for the remaining Muslim men to go to Potocari and that they should take to the woods and try to reach Tuzla. Between 10,000 and 15,000 men formed a retreating column. Those who were captured from this column were taken to Bratunac. From 13 July executions were carried out on the prisoners. Others were bussed further north, where they were detained in empty schools or warehouses and then taken to killing fields in small groups, lined up and shot. An excavator arrived afterwards and buried them. These executions took place between 14 and 17 July.

The fall of Srebrenica has been described as the worst massacre in Europe since the Second World War: 7,000 people disappeared in July 1995. The majority of these are most certainly dead. 25,000 Bosnian Muslims, most of them women, children and elderly people, were uprooted. The 'Srebrenica symptom' is now recognized as a new pathological category, whereby women whose identity depends on marital status do not know with certainty what happened to their husbands.

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Security Council Resolution 827 of 25 May 1993 established the ICTY while the war was still raging. The Resolution mandated it to hold individuals accountable for violations of international humanitarian law; to render justice; to deter further crimes; and to contribute to the restoration and maintenance of peace.<sup>20</sup>

General Radislav Krstic was arrested by SFOR on 2 December 1998 and charged with genocide, violations of the laws and customs of war and crimes against humanity on the basis of command and individual criminal responsibility. Although the Tribunal had already heard charges arising out of the Srebrenica massacre, at the time of his arrest General Krstic was the highest-ranking individual to be indicted and brought before the ICTY. His trial took place before a Chamber composed of three judges: Judge Almiro Rodrigues from Portugal, Judge Fouard Riad from Egypt and Judge Patricia Wald from the USA.<sup>21</sup> It commenced on 13 March 2000 and lasted 98 days. The prosecution called 65 witnesses, the defence called 12 witnesses and the Trial Chamber called two witnesses. On 2 August 2001 the Trial Chamber found General Krstic guilty of genocide, crimes against humanity and violations of the laws and customs of war and sentenced him to 46 years' imprisonment. Both General Krstic and the Prosecution are appealing against the judgment.

<sup>20</sup> SC Res. 827 (1993), UN Doc S/INF/49 (1993).

<sup>21</sup> The ICTY has 16 permanent judges and a pool of 27 *ad litem* judges, said to represent the world's major legal systems. They are elected by the General Assembly from lists drawn up by the Security Council.

### 3 The Judicial, rather than Therapeutic, Purposes of the Legal Proceedings

During the *Krstic* hearings 18 victim-witnesses testified. The Tribunal may thus be seen as having provided what Crocker calls ‘a platform for the victims or their families to tell their stories publicly’.<sup>22</sup> One judge assured a witness: ‘You have come the whole way, and you are entitled to be heard’.<sup>23</sup> It would be naïve, however, to see these words as an open invitation for the victim-witness to tell his or her story, his or her truth, as he or she wished.

As the Tribunal declared at the very beginning of the *Krstic* judgment: ‘The task at hand is a [relatively] modest one: to find, from the evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstic, was criminally responsible, under the tenets of international law, for his participation in them’.<sup>24</sup> This double objective leaves the Tribunal with insufficient time to listen to the victim-witnesses and provides no means to help them grieve.<sup>25</sup>

#### A Time Constraints

The Tribunal frequently interrupts victim-witnesses when their narratives become irrelevant to the purpose of assessing the guilt of the accused.

When Witness J reappeared before the Tribunal on Monday 10 April 2000, the prosecutor, Mr Cayley, clearly wanted to finish his testimony:

Q. Witness, I realise that the trip that you made to Zepa was very difficult and very frightening, but I would just like you to confirm a number of points to the Judges by simply answering yes or no. Otherwise, I think we’re going to be here a very long time, and I know you want to go home to Bosnia tomorrow. So simply answer yes or no. Do you understand?

A. Why should I say yes or no to your questions?

Q. Did you arrive in Zepa on the 26th of July?

A. On the 26th of July, I arrived in Zepa, about 3:00 in the afternoon.

Q. And then I think, on the 29th of July, Zepa fell, you —

A. On the 29th, Zepa fell.

Q. You left Zepa and you spent a long time — Witness, listen to my question and simply answer yes or no to the question. I think you left Zepa on the 29th of July and spent over 40 days

<sup>22</sup> Crocker, ‘Transitional Justice and International Civil Society’, in A. Jokić (ed.), *War Crimes and Collective Wrongdoing: A Reader* (2001) 270, at 275.

<sup>23</sup> Judge Riad to Witness R, at 32311 of the transcripts. The transcripts can be found at <http://www.un.org/icty/inde-htm>.

<sup>24</sup> *Supra* note 14, at para. 2. ‘A trial is presumed to be a search for truth, but, technically, it is a search for a decision, and thus, in essence, it seeks not simply truth but a finality’: Felman, ‘Forms of Judicial Blindness, or the Evidence of What Cannot Be Seen. Traumatic Narratives and Legal Repetitions in the O. J. Simpson Case and in Tolstoy’s *The Kreutzer Sonata*’, 23 *Critical Inquiry* (1997), at 738.

<sup>25</sup> Hirsh shows how difficult, indeed impossible, it is for a witness to tell *his* story in a court of law: ‘The trial of Andrei Sawoniuk: Holocaust Testimony under Cross-Examination’, *Social and Legal Studies* (2001) 529. ‘A court of law is not guided by human feeling, it is guided by its own rules and function’ (*ibid.*, at 535). ‘Blustein wanted to tell his story, but the court wanted to hear “evidence”’ (*ibid.*, at 538).



wandering in Bosnian Serb territory, and then you eventually made your way to the free territory on the 17th of September of 1995. Is that right? Just yes or no.

A. Yes, yes, yes.

Q. Thank you, Witness.

MR CAYLEY: Mr. President, I have no further questions for the witness.<sup>26</sup>

Although he referred to the witness wanting to be back in Bosnia, the prosecutor appeared to have at heart predominantly the interests of a speedy trial rather than those of the victim. Frustration and impatience grew on both sides. The attempt by the witness to rebel against being cut short, which suggests he had not been properly briefed on how the proceedings were to be conducted, was to no avail.<sup>27</sup>

Witness DD was also frustrated in her attempt to recount what happened to her and her children who disappeared on 11 and 12 July 1995:

A. I was going to tell you the whole story from Tuesday to Thursday. Can I do that?

Q. Witness, the Judges have already heard quite a lot of evidence in this case about the events in Potocari, so for the purposes of my examination, I'm not going to ask you questions about those days.<sup>28</sup>

The Prosecutor's reply throws into sharp relief the limitations of victim-witnesses' 'entitlement' to be heard.

This is not the place to criticize the ICTY for trying to do its job in an effective manner. In order that the accused be tried within a reasonable time, the Tribunal must ensure that it adheres to judicially imposed time limits. Concerns about how many witnesses remain to be heard and how long this will take are not only perfectly legitimate; they are positively necessary. But these time constraints tend to lead the Tribunal to overlook the implications of this regulation for victim-witnesses; judicial 'effectiveness' may mean for them that significant events and emotions are glossed over.<sup>29</sup>

## **B Not a Place to Grieve**

In their testimonies, witnesses constantly allude to people whom they lost in the fall of Srebrenica: parents, spouses, siblings, children, friends and neighbours. Obviously, the Tribunal is not interested in hearing in detail about the lives of those who have disappeared. When asked, the witnesses simply mention their names, possibly their dates of birth, their jobs and the date and circumstances of their disappearances in as neutral a tone as possible. The pain of this defies imagination.

<sup>26</sup> *Supra* note 23, at 2474–2475.

<sup>27</sup> Elizabeth Neuffer recounts that witnesses in the *Čelebići* case before the ICTY were similarly disappointed when the judges and advocates placed limits upon their story-telling. E. Neuffer, *The Key to My Neighbour's House* (2002), at 298.

<sup>28</sup> *Supra* note 23, at 5752.

<sup>29</sup> It is partly for this reason that the decision of the Trial Chamber in the *Milosevic* case to restrict the number of prosecution witnesses has proved controversial, see *Prosecutor v. Slobodan Milosevic, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit*, IT-02–54-AR73, decision of 16 May 2002.

Q. Good afternoon, Mrs. Omanovic. Can you hear me?

A. Yes, I can

Q. Would you spell your last name for the record, please?

...

Q. What is your date of birth?

A. I was born on the 15th of April, 1953, in Srebrenica.

...

Q. Do you have any children?

A. I had two children, Dzermina Omanovic, born on the 28th of October, 1977; and Dzermin Omanovic, born in 1981, on the 25th of December. My daughter also married in Srebrenica, and she gave birth to a child in 1985, in March of 1985.

Q. In 1985 or 1995?

A. 1995.

Q. So at the time of the events that you're going to be describing to the Judges, you had a grandchild; is that correct?

A. Yes. My grandchild was born on the 10th of March, 1995.

Q. Did you continue to work in the area of Srebrenica or Potocari after your marriage?

A. Yes. I worked in Srebrenica and Potocari throughout my life there, both my husband and I.

Q. So it would be fair to say that you're quite familiar with the area of Potocari?<sup>30</sup>

Every so often, witnesses shed tears, but the Tribunal is not there to share their pain. Instead it invites them gently (but how gentle is that?) to continue their account. On 22 March 2000, Mrs Omanovic came to the point in her story where her two children are taken away from her. The exchange is recorded in the transcript:

A . . . [W]hen we were not allowed to board the buses ... I knew that something was brewing, something bad. I had the typical instinct of a mother. I wasn't worried about myself. I felt sorry for my children. At that moment, I just jumped out. ... I wasn't brave, I was just trying to use the little force that was left in me in order to save my children. I apologise for crying.

JUDGE RODRIGUES: [Interpretation] Please do calm down. We have profound respect for you and what you have suffered, and you are indeed a brave woman, because you needed a lot of force, a lot of strength to experience what you have been through. We also know you are a brave woman because you have come here to testify. May I continue, Mrs Omanovic?

Q. Yes, Your Honour. Thank you very much.

JUDGE RODRIGUES: [Interpretation] Mrs Omanovic, you described, in very negative terms, Serbian soldiers. I would like to know: What was their image before the war?

A. Let me just have a sip of water and I will tell you.

JUDGE RODRIGUES: [Interpretation] Please relax, Mrs Omanovic.

A. Prior to the war, Serbian soldiers were not behaving that way, or maybe they were simply pretending. We lived together ...<sup>31</sup>

As she recounted the departure of her children, Mrs Omanovic appeared to be grappling with feelings of motherly love and (misplaced) guilt, loss and despair. The reassuring, but also diverting, words of the judge will not, we imagine, have helped her to come to terms with her trauma. Legal proceedings do not offer therapeutic healing.

<sup>30</sup> *Supra* note 23, at 1073–1075.

<sup>31</sup> *Ibid.*, at 1136–1138.

## 4 Procedural Rules in Favour of Oral Evidence

Debates around measures to help witnesses tend to centre on protective measures, such as anonymity.<sup>32</sup> This issue is undoubtedly crucial — not least because it is linked to the protection that must be accorded to the rights of the accused — but it risks obscuring other problems which surface through victim-witnesses' testimony. Before proceeding further in our discussion, it is useful to introduce the rules which govern testifying before the ICTY.

The ICTY Rules of Procedure and Evidence, which were adopted by the Judges of the Tribunal,<sup>33</sup> initially favoured the adversarial model in the presentation of evidence with its concomitant emphasis on live oral testimony.<sup>34</sup> As a result, early attempts by the prosecutor to introduce written evidence and to expand the preconditions for the admission of corroborative affidavit evidence were rejected.<sup>35</sup> By 1999, however, concerns were being expressed at the excessive length of ICTY proceedings,<sup>36</sup> which was attributed chiefly to the numbers of witnesses testifying orally and the time taken to establish the predicate conditions of offences.<sup>37</sup> Consequently, a UN Expert Group was established in 1999 with the task of recommending improvements to the procedure of the ICTY and the International Criminal Tribunal for Rwanda (ICTR).<sup>38</sup> Its recommendations included reducing both the number of witnesses and the length of their testimony.<sup>39</sup> Far-reaching reforms followed, with the result that in December 2000 rule 90A, which had favoured oral testimony, was deleted. Two new rules were

<sup>32</sup> *Prosecutor v. Dusko Tadic*, Case No. IT-94-I-T, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 Aug. 1995; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14, ICTY T. Ch. I, Decision on the Application of the Prosecutor dated 17 Oct. 1996 requesting Protective Measures for Victims and Witnesses, 5 Nov. 1996; Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused', 90 *AJIL* (1996) 235; Chinkin, 'Due Process and Witness Anonymity', 91 *AJIL* (1997) 75. De Francia, 'Due Process In International Criminal Courts: Why Procedure Matters', 87 *Va. L. Rev.* (2001) 1381.

<sup>33</sup> Article 15 of the ICTY Statute, which gave the judges the task of developing rules of procedure and evidence, required them to develop rules protecting victims and witnesses. These came into force in 1994 and have been amended or revised 29 times at plenary sessions of the judges. On the problems which arise from the resulting 'mix' of adversarial and inquisitorial procedure, see Findlay, 'Synthesis in Trial Procedures? The Experience of International Criminal Tribunals', 50 *ICLQ* (2001) 27.

<sup>34</sup> May and Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha', 37 *Colum. J. Transnat'l L.* (1999) 725, at 727. Rule 90(A) stated that, 'Witnesses shall, in principle, be heard directly by the Chambers'. Rule 90(A) was subject to rules 71 and 71 bis, which permitted video-links and depositions in exceptional circumstances. Rule 89 conferred upon the Tribunal discretion to 'admit any relevant evidence' so long as it had 'probative value'; the Tribunal could exclude evidence if its probative value was substantially outweighed by the need to ensure a fair trial.

<sup>35</sup> Wald, 'The Use of Affidavit Testimony', *supra* note 10, at 541. Rule 94 permitted judicial notice to be taken of facts of common knowledge and adjudicated facts or documentary evidence from other proceedings. Rules 94 ter, introduced in 1998 and now deleted, allowed affidavit evidence to prove a fact in dispute in corroboration of a live witness testimony.

<sup>36</sup> In 2001 Wald wrote that the average length of trial before the ICTY was 107 working days, *ibid.*, at 535.

<sup>37</sup> *Ibid.*, at 536.

<sup>38</sup> Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634 (1999).

<sup>39</sup> Wald, 'The Use of Affidavit Testimony', *supra* note 10, at 536.

introduced; rule 89F and rule 92. The former permits the trial chamber to receive evidence either orally or, ‘where the interests of justice allow, in written form’. The latter allows written statements to be admitted so long as they do not go to establishing the actions with which the defendant has been charged.<sup>40</sup>

These measures were taken primarily in order to maximize resources. They may, nonetheless, benefit victims either by encouraging them to testify in cases where they would not otherwise have done so or by eliminating the need for examination in court altogether. But in practice, the effect of the reforms is likely to be limited. The decision as to whether testimony implicates the defendant is liable to be problematic, particularly in cases dealing with command responsibility and crimes of omission.<sup>41</sup> In these cases the offence *may* need to be established by evidence that does not obviously refer to the accused. However, as we shall argue below, even in these cases stories told by victim-witnesses may often appear to set the ‘emotional’ rather than the ‘factual’ scene.

Immediately on their introduction, objections were raised to the reforms on the grounds that they might infringe the right of the defendant to examine witnesses against him.<sup>42</sup> Further reservations were expressed as to the reliability of written statements.<sup>43</sup> As will become clear, our view is that the faith placed in the reliability of oral evidence may also be misplaced, not least because memory may not always be as reliable as is often assumed, nor cross-examination a wholly effective means by which to eliminate errors in witnesses’ recollections.

These reforms indicate that methods of testifying are not fixed and may be contested. This encourages us, later in the article, to call for alternative approaches to testifying. Keeping in mind the requirements of a fair trial, these alternative approaches should take account of the way in which witnesses experience testifying.

We now return to our investigation of the transcripts of the victim-witnesses in the *Krstic* trial. It is noteworthy that this trial was largely devoid of procedural controversy, a feature that makes it particularly suitable to explore how victims *inherently* become instruments of the legal process when they testify.

<sup>40</sup> Rule 92 bis sets out a number of factors that the Chamber shall consider in exercising its discretion. By the time of its adoption, the judges had already amended rule 71 by deleting the requirement for ‘exceptional circumstances’: *ibid.*, at 545.

<sup>41</sup> *Ibid.*, at 550.

<sup>42</sup> De Francia, *supra* note 32, at 1427.

<sup>43</sup> Accordingly, Judge Wald has posed the following question:

‘How do you assess the credibility of a piece of paper? In my time at the ICTY, I have seen countless statements made years earlier by a witness that the same witness repudiates, contradicts, or ignores in his or her courtroom testimony. There is no question in my mind that a very different aura surrounds a witness giving live testimony to the judges in front of the accused and cross-examined by defense counsel than in an interview with a prosecutor (or a defense) representative out of court, not subject to cross-examination.’

Wald, ‘The Use of Affidavit Testimony’, *supra* note 10, at 551.

## 5 Establishing ‘Facts’

In Section 3 we concentrated upon the method by which the legal process adduces evidence from witnesses. This section focuses instead on the *type* of evidence that the legal process collects. The distinction between law and fact underlies law of Western origin.<sup>44</sup> In its simplest form, this distinction means that the law is conceived to be separate from the relevant facts. The theory is that the law is applied to the facts, and that the two are completely distinguishable.<sup>45</sup> Facts may be disputed by the parties or even unknown; if so, they are considered to be a given which happens to have escaped detection rather than perceived as a construction. One task of the legal process is thus to gather evidence in the hope of ‘establishing’ the relevant facts.

Many different kinds of facts exist — of which even the most evaluative may appear objective to the person who reports it — as well as many different ways of conveying facts. For example, Dembour has highlighted three methods that her informants used to convey to her ‘facts’ about the Belgian Congo. The first aimed at meticulous precision and accurate detail in an overall technical and ‘positive’ account; the second consisted in imaginary dialogues which brought to light a general atmosphere without, however, losing sight of details; the third offered general considerations in the hope of ensuring accurate (and in this sense precise) understanding at a much wider level. Dembour needed all these different facts to begin to understand the ‘reality’ of the Belgian Congo.<sup>46</sup>

In contrast to the social sciences and humanities, law understands ‘facts’ restrictedly. The collection of legal evidence privileges ‘positive’ or ‘objective’ facts; it tends to disregard other kinds of facts, however useful they may be to understand ‘what happened’. Lawyers learn to consider as facts only those that are precise, pedantic, quantifiable, thus structured within a true/false dichotomy. Witnesses tend to be asked questions which attract answers that can, in theory, be challenged and subject to cross-examination — the where, when, who, and how of events. These are the questions that lawyers have been trained to ask and are used to hear being asked in a Tribunal. They appear objective. They privilege the sense of sight.<sup>47</sup> Emotions, impressions, general reminiscences, renditions of atmosphere, interrogations of a philosophical or ethical nature carry little authority in the courtroom. The failure of the legal process to take account of these imponderable facts has sometimes led it to be compared unfavourably to other accounts.<sup>48</sup>

<sup>44</sup> As confirmed by T. Andersen and W. Twining in *Analysis of Evidence: How to do Things with Facts* (1991), at xix–xx.

<sup>45</sup> It is a fallacy, however, to suppose that the facts ‘simply’ exist independently from the law, as the Critical Legal Studies movement has shown. Samuel proposes the concept of ‘virtual facts’ to encapsulate the notion that legal facts are not bare facts: ‘Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences’ (forthcoming).

<sup>46</sup> M.-B. Dembour, *Recalling the Belgian Congo: Conversations and Introspection* (2002), at 85–92.

<sup>47</sup> Haldar ‘Acoustic Justice’, in L. Bently and L. Flynn (eds), *Law and the Senses: Sensational Jurisprudence* (1996), at 122–136.

<sup>48</sup> See for example, Douglas, ‘Wartime Lies: Securing the Holocaust in Law and Literature’, 7 *Yale J.L. & Human.* (1995) 367. For further reflections on the legal process through literature see Luban, ‘On Dorfman’s Death and the Maiden’, 10 *Yale J.L. & Human.* (1998) 115.

Witnesses in the *Krstic* trial were not encouraged to give accounts that did not rely on positive facts. Occasionally witnesses would nonetheless try to do this. For example Mrs Ormanovic recounted in her examination-in-chief how she saw her husband for the last time when he took to the forest with other men from Srebrenica, whilst she fled to Potocari with her daughter, son and grandchild. The prosecutor, Mr Harmon, then showed her a video of refugees fleeing and asked:<sup>49</sup>

Q. Mrs Omanovic, do these images that we've been looking at for the last few minutes accurately depict the condition of the refugees as you recall them?

A. Yes, they do. This is exactly how it happened. Only this is just a small excerpt. You have to imagine thousands and thousands of more people coming in; you have to imagine all those voices. The whole thing has to be magnified. This is only one truck that we saw. Now, you have to imagine several thousands of people and the noise being much louder, and you also have to bear in mind that we kept hearing fire and the shells that were falling around us.

Q. What were the weather conditions like on the 11th of July in Potocari?

A. It was a very warm day. It was very hot.

Q. And when you arrived in Potocari, where did you go specifically?<sup>50</sup>

Mrs Omanovic's comments on the video are intended to allow her audience to imagine the atmosphere which existed in Potocari. While she was not cut in her attempt to 'set the scene', the prosecution quickly brought her back to literal facts, as demonstrated by the question on weather conditions and the insertion of the word 'specifically' in the last question.

The focus on literal facts constrains the manner in which witnesses are able to tell their stories and produces a truth that is only ever partially representative. This alone should cast doubts upon the wisdom of attributing too much authority to legal story-telling. Finally, and perhaps most importantly, it can lead to results that verge on the absurd. The following is one example amongst hundreds in *Krstic* that illustrates our misgivings with the legal process's concentration upon 'positive' facts:

Q. If you can recall, could you indicate to the Judges which window it was that you jumped through?

A. I don't know exactly which window now. I can roughly show you.

Q. As best you can remember, Witness.

A. It may have been one of these two [indicates], or maybe this one, the third one. One of these. One of these three or four. I don't know exactly which one it was because I wasn't looking when I jumped. I didn't remember. I didn't turn around to look at the windows.

MR CAYLEY: So let the record show on Prosecutor's Exhibit 8/9 that the witness indicated that the window that he jumped through was one — I think he was most certain about the three small windows on the back of this building, so — this is actually the rear of the warehouse, but as this photograph appears, the witness indicated that he jumped from one of three or four small windows that can clearly be seen on this photograph in the centre of the building.<sup>51</sup>

This dialogue raises three lines of questions. Firstly, does anyone expect the witness

<sup>49</sup> Showing a film can be a powerful tactic, as has been documented in respect to the Nuremberg trials. See further Douglas, 'Film as Witness: Screening "Nazi Concentration Camps" before the Nuremberg Tribunal', 105 *Yale Law Journal* (1995) 449.

<sup>50</sup> *Supra* note 23, at 1084–1085.

<sup>51</sup> *Ibid.*, at 2529–2530.

to recall with accuracy this kind of detail, which is thoroughly insignificant to his own story and consciousness? Secondly, what legal difference does it make whether the witness jumped from this or from that window? In how many war crime trials does this approach actually serve to determine guilt or innocence? And finally, what kind of testimonies, memories, facts, history, does this type of questioning and recording leave out? These questions are explored in the next three sections, which deal in turn with the process of memory, the issue of historical relevance and the importance of fostering multiple memories.

## 6 Reliable Memory: In What Sense?

Memory does not store the past. Memory transforms the past as it uses it; it is as much geared towards the present as it is towards the past.

As psychologist Ian Hunter has noted, '[m]emory seems to have been evolved to deal only incidentally with those rare situations where we are required to give a flawlessly accurate account of the past'.<sup>52</sup> Legal testimony is one of these situations.<sup>53</sup> Understandably victim-witnesses who testified at the *Krstic* trial had not paid attention to many of the details that they were being asked to recall. They knew that they had not stored them in their memory, and often said so.<sup>54</sup> In these cases their credibility was not questioned. The case was different, however, when a witness was unaware that he had not remembered exactly the same thing over a period of time. Although this process is natural and well documented in memory studies,<sup>55</sup> it is generally taken in law to indicate unreliability. Consider for example what Witness H first said in court to the prosecution and how he came under attack during cross-examination:

Q. [by the Prosecution]. . . . how long were you behind the Transport, in this area?

A. Some 10, maybe 15 minutes.

Q. And did you see anything happening nearby?

A. I saw a machine, a tractor or something. I wasn't particularly keen on checking that. And I saw dead, heaped one on top of the other ...

Q. And how many dead did you see?

A. I should say some 20 to 30 pieces.

Q. And could you see any injuries to those dead people?

A. I could see that they were lying one on top of the other, but I could see that they had — that their necks had been slit, cut, behind.

<sup>52</sup> I. Hunter, *Memory* (1957) 152.

<sup>53</sup> *Ibid.*, at 101. For a contrary view see Campbell, 'Legal Memories: Sexual Assault, Memory and International Humanitarian law', 28 *Signs: Journal of Women in Culture and Society* (2003) 149.

<sup>54</sup> Hirsh similarly notes of the main prosecution witness in the *Sawoniuk* trial that his 'characteristic response to cross-examination over detail was "It doesn't matter to me" or "I was not interested in such things"': *supra* note 25, at 538.

<sup>55</sup> See the pioneering work by F. Bartlett who, in *Remembering* (1932), recounts the results of his Method of Repeated Reproduction, whereby a series of individuals are asked individually to recall a (non-traumatic) story over and over again, at intervals of days, weeks or years.

Q. And can you describe, if you recall, what this machine that you've described as a tractor was doing?

A. Well, it looked like a tractor. I wasn't really paying much attention, because when I saw all these dead, it seemed — or perhaps it was an excavator or something like that. It was digging.<sup>56</sup>

This is how the matter was referred to in cross-examination.

Q. [by the Defence] . . . I'm referring to your statement of the 27th of November, 1998. It is your statement, is it not?

A. Yes, it is.

Q. On page 4 of that statement, the third paragraph from the bottom, let me read you the first sentence of this paragraph: 'Near to Gavric I also saw a red-coloured digger, making a hole, and next to this I saw a pile of approximately 40 or 50 dead bodies'.

A. You expect me to answer? Is that a question? Well, it is very difficult for you to understand me. I was terribly afraid. I saw this machine, I saw an excavator, I wasn't sure it was an excavator, and I saw dead bodies, but they were on a pile. At that moment, I panicked and I became sick from that panic and from the fear, and I'm still suffering from the stress that I experienced at that moment. . . .

Q. Witness H, you can distinguish between an excavator and a tractor, can you not?

A. Well, let me tell you, sir, at that moment, I cannot tell you exactly. When I saw the machine, it was a tractor or an excavator. I spent perhaps one minute or two observing those bodies. And immediately after that, I started running away. People were in a panic, they didn't know where to go. There were rumours about slaughters being committed at various places. So people panicked, and we no longer knew where to go.<sup>57</sup>

The attempt by the defence lawyer to destroy the credibility of the witness failed: the judgment refers to this episode.<sup>58</sup> Karen Fields has argued masterfully that there are things that 'one cannot remember mistakenly'.<sup>59</sup> For Witness H, the sight of those bodies was one of them. Exactly by which machine and in which numbers they were piled up he may not remember, but the core event he cannot forget. Memory 'is neither mere fantasy nor reliable testimony'.<sup>60</sup> It tells us something about the past, but not the whole thing.

Some witnesses did learn to talk in the way favoured by law. For example, Witness K, who had been pressed towards identifying the window from which he jumped to evade slaughter, volunteered the following information about the night he spent just outside of the warehouse: '[I was] [h]ere [indicates], perhaps half a metre from the wall, here [indicates], on the grass. To my left was the maize field. My head was turned towards the river, or rather towards Kladnj, and my legs towards Bratunac, shall I put

<sup>56</sup> *Supra* note 23, at 1688–1689.

<sup>57</sup> *Ibid.*, at 1705–1706.

<sup>58</sup> 'In the late morning of 12 July 1995, a witness saw a pile of 20 to 30 bodies heaped up behind the Transport Building in Potocari, alongside a tractor-like machine' (*supra* note 14, at para. 43). From one perspective, the reference to a more or less specific number of bodies is puzzling as we shall never know with certainty whether Witness H saw more than 30 or less than 20 bodies. Presumably the precision that is offered is meant to add to the authority of the judicial account.

<sup>59</sup> Fields, 'What One Cannot Remember Mistakenly', 17 *Oral History Journal* (1989) 44. Even here, however, there may be surprises. The case of victim-witness L, Dragran Opacic, who testified in the *Tadić* trial to the effect that he had seen his father executed, with his own eyes, only for his father to be brought to court the next day for the witness to recognize him, has already become a cause célèbre.

<sup>60</sup> Dembour, *supra* note 46, at 113.



it that way'.<sup>61</sup> Considering that Witness K had not been able to move from this spot for many hours and must all this time have wondered in which direction he should go when the opportunity came, there is very little reason to doubt the accuracy of this particular recollection. One cannot help wondering, however, whether this is the most useful information the legal process can draw from the witnesses.

## 7 Relevant Evidence? The Production of History

While the legal process does not want to hear about the entire range of facts, which it eliminates through its insistence on the gathering of 'objective' facts, it can at the same time appear lax in defining the limits of what can be said in court. Such laxity will typically give rise to disputes over the relevance of the facts introduced, often through the raising of 'objections'. Even when no formal objections are made, the frame of reference adopted in a particular trial may be questionable.

In a criminal case, one expects the evidence to relate to the person of the accused. This, however, is not necessarily the case in a war crimes trial. The name of the accused frequently failed to appear at all in *Krstic*. Some discussion admittedly arose relating to the chain of command leading to General Krstic, such as the description of a badge worn by a soldier, but these occurrences were rare. As a result, one does not get *any* sense of the culpability of General Krstic from the transcripts of the testimony of the victim-witnesses (as opposed to that of the expert witnesses).

In the opening of its judgment, the Tribunal indicates why evidence that does not specifically illuminate the role that General Krstic may have played is sought. The Tribunal says that its first task is to establish what happened in the relevant period of nine days before deciding upon the criminal responsibility of General Krstic.<sup>62</sup> Later, at the close of the section on 'The Take-over of Srebrenica and its Aftermath', it quotes Telford Taylor, Prosecutor at Nuremberg, who had stated that it was 'important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable'.<sup>63</sup> The problem, in the words of Ian Buruma, is that '[w]hen the court of law is used for history lessons, then the risk of show trials cannot be far off'.<sup>64</sup> In *Krstic*, the Tribunal considers it to be 'imperative to document

<sup>61</sup> *Supra* note 23, at 2533.

<sup>62</sup> See *supra* text at note 24.

<sup>63</sup> The Nuremberg trials have not prevented the development of a 'revisionist' movement. They may, however, have contributed to containing this movement. On holocaust denial see D. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (1994). On the strategic dilemmas the movement poses for contemporary legal prosecution, see Kahn, 'Rebuttal versus Unmasking: Legal Strategy in *R. v. Zundel*', *Patterns of Prejudice* (2002) 3.

<sup>64</sup> Quoted in Osiel, *supra* note 3, at 59. As Felman eloquently puts it: '[V]erdicts are decisions about what to admit into and what to transmit of collective memory. Law is, in this way, an organizing force of the significance of history'. She adds in a footnote: 'Law takes up, thus, ... the traditional tasks of historiography. Historiography, however, is inherently a cognitive or constative endeavor, whereas law is, and remains, inherently performative'. *Supra* note 24, at 766. In France a number of historians called to testify as expert witnesses in the *Papon* affair took a different view of the appropriateness of their participation in the trial. See Golsan, *supra* note 7.

these “incredible events” in detail’.<sup>65</sup> This goes beyond the need to establish the offence even in a case of command responsibility where the scale and gravity of the transgressions may be significant in inferring liability. But even if we accept that documenting the fall of Srebrenica was essential for inferring criminal liability,<sup>66</sup> we question whether it was always necessary to rely upon the testimony of victim-witnesses to do this.

In *Krstic* the ICTY documented the fall of Srebrenica through constant reference to victim-witnesses’ evidence, both in the main text of the judgment and in its footnotes. Victim-witnesses provided first-hand knowledge of the fall of Srebrenica; their personal testimony was used to construct the general history. For example, the judgment mentions that it was hot in Potocari on 11 July 1995, a circumstance that added to the prevailing harrowing conditions. The judgment says it was hot because the witnesses said so, not because scientific reports or journalistic accounts were consulted. We have also seen how the judgment repeats the words of Witness H about the ‘pile of 20 to 30 bodies’ that he would have seen heaped up, brushing aside any consideration of possible memory distortion.

While the incorporation in the judgment of victims’ tales through quotations from their testimony may appear as a ‘noble effort’ that acknowledges publicly ‘the private, “subjective” dimension of the victims’ suffering’,<sup>67</sup> it still ignores the problematic aspects of victim-witnesses’ testimony in war crimes trials. If the giving of testimony is an ordeal rather than an empowering process for the witness, one must question whether relying on witnesses is the most efficient and morally justifiable way to establish the judicial facts. Invoking tradition (‘this is the way law has “always” gathered evidence’) is not a sufficient justification. In an age in which technology and communications have evolved beyond recognition, law should consider new ways to fulfil this function.

Moreover, the relevance of the victim-witnesses’ testimony needs to be examined. Interestingly, in the *Krstic* trial, most of the evidence offered by the victim-witnesses was not contested under cross-examination. What they reported was generally known before the Tribunal started its proceedings. The question thus lingers: Why was it necessary to hear victim-witnesses to document the fall of Srebrenica?

The *Eichmann* trial comes to mind. There even more so ‘the facts ... had been established “beyond reasonable doubt”’ well before the trial.<sup>68</sup> Many witnesses appeared to produce stories that were ‘calculated to shock the heart’.<sup>69</sup> These would serve, it has been argued, not so much to decide the guilt of the accused but to

<sup>65</sup> *Supra* note 24, at para. 95.

<sup>66</sup> Wilson remarks that war crimes tribunals are drawn, by their very nature, into writing history: ‘Asserting that [e.g.] genocide took place needs more context than [the proof of an isolated common crime] since it requires the linking of different sites at different times under the same policy of extermination’: ‘How do International Criminal Tribunals Write Histories of Mass Human Rights Violations’, paper presented at the Conference on ‘The “Legalisation” of Human Rights’ held at University College London in April 2003.

<sup>67</sup> Osiel, speaking of *Nunca Mas*, *supra* note 3, at 276.

<sup>68</sup> Arendt, *supra* note 4, at 56.

<sup>69</sup> Segev, quoted in Osiel, *supra* note 3, at 15.

contribute to ‘a national saga that would echo through the generations’.<sup>70</sup> From this perspective the aim of the *Eichmann* trial had less to do with the accused than with the creation of a foundation story for Israel.<sup>71</sup>

Interestingly, Osiel tells us that the exact opposite occurred in the Buenos Aires trials:

[There] military defendants complained that the law’s framing of their conduct was far too narrow to judge it fairly. Defense counsel sought to situate the military’s conduct in a wider context of the collapse of public order during the last years of Peronist rule. On this account, the military’s victims were actually perpetrators and aggressors in the larger conflict. . . . The court employed traditional rules of evidence, however, to prevent this contextualizing effort . . .<sup>72</sup>

The *Eichmann* and Buenos Aires trials show that the spatio-temporal borders established by the court, at the prosecution’s behest, are never a given; unsurprisingly they are often considered to be arbitrary and indefensible.<sup>73</sup>

Osiel points out:

The choice of where to begin the story and where to end it often determines who will play the villain, who the victim. Yet there are no consensual criteria for locating a story’s beginning and end. In fact, sophisticated historians now readily concede that these temporal resting points ‘do not flow from the events but are in fact strategic ruptures chosen for specific purposes’. And people [and, we shall add, courts] differ in their purposes.<sup>74</sup>

In other words, a ‘fact’ is never just a ‘fact’. The objectivity of the tale of a witness who has lost her husband and children in harrowing events suddenly looks more precarious than ever. Whatever it is, the hearing of victim-witnesses is not an objective operation.

## 8 The Tribunal’s Account: One amongst Many

As the words of the Nuremberg prosecutor quoted above indicate, the establishment of facts by legal process carries special authority. However, the judicial account is not and should not be saved from contestation. At the very least, it is important to acknowledge that the Tribunal cannot produce *the* definite account of what happened, even though it may well define the parameters of subsequent historiography and collective memory.<sup>75</sup>

The *Krstic* case, for example, fails to deal with the responsibility of the international

<sup>70</sup> *Ibid.*, at 16; Felman *supra* note 6, at 208.

<sup>71</sup> Wilson, *supra* note 66, has persuasively argued that *national* tribunals and truth-commissions are almost inevitably drawn into ‘futile’ debates about national identity and projects of national reconciliation. He does not see this particular aspect of politics plaguing their *international* counterparts (which remain affected by politics, but in other ways).

<sup>72</sup> Osiel, *supra* note 3, at 64.

<sup>73</sup> *Ibid.*, at 132.

<sup>74</sup> *Ibid.*, at 133.

<sup>75</sup> On the effect of Nuremberg on subsequent writing of history see D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (2001).

community, especially the United Nations, in the fall of Srebrenica. A remark made by the witness Mandzic reveals the poignancy of the issue: ‘when I leafed through that list [of 239 men who were in the UN compound, a list which he had helped to draft on 13 July 1995] . . . I felt a lump in my throat, because these people are no more. And the world watched quietly.’<sup>76</sup> The Prosecutor has refused to investigate allegations that the inaction of the UN and Dutch officials contributed to the Srebrenica massacre. The Tribunal is only concerned with the guilt of the individual before it:

The Trial Chamber leaves it to historians and social psychologist [*sic*] to plumb the depths of this episode of the Balkan conflict and to probe for deep-seated causes. The task at hand is a more modest one: to find, from the evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstic, was criminally responsible, under the tenets of international law, for his participation in them. The Trial Chamber cannot permit itself the indulgence of expressing how it feels about what happened in Srebrenica, or even how individuals as well as national and international groups not the subject of this case contributed to the tragedy. The defendant, like all others, deserves individualised consideration and can be convicted only if the evidence presented in court shows, beyond a reasonable doubt, that he is guilty of acts that constitute crimes covered by the Statute of the Tribunal (‘Statute’). Thus, the Trial Chamber concentrates on setting forth, in detail, the facts surrounding this compacted nine days of hell and avoids expressing rhetorical indignation that these events should ever have occurred at all. In the end, no words of comment can lay bare the saga of Srebrenica more graphically than a plain narrative of the events themselves, or expose more poignantly the waste of war and ethnic hatreds and the long road that must still be travelled to ease their bitter legacy.<sup>77</sup>

The supposedly final account by the Tribunal is limited. Kavan speaks of memories that are worked upon in different platforms.<sup>78</sup> He mentions the political, the legal, the media, the academic and — we add — the artistic platforms. Each platform produces its own memories which complement and contest each other. One platform cannot produce a definitive version of what happened not only because it will never remain uncontested but also because it operates according to its own constraints. Each platform ‘instrumentalizes’ memories, in its own way and for its own ends.

As Brigitte Rauschenbach argues persuasively in the context of contemporary Germany, the last thing one may need is a unifying account, which then acts as a myth. What is required is the recognition that there are different perspectives. It is this very recognition which could then act as unifying principle.<sup>79</sup>

Enormous resources are devoted to the running of the ICTY.<sup>80</sup> It is arguable that

<sup>76</sup> *Supra* note 23, at 1048.

<sup>77</sup> *Krstic* Judgment *supra* note 23, at para 2. On the controversy surrounding the role of historians in cases where the historical circumstances are central to the definition of the crime, such as crimes against humanity, see Wood, *supra* note 11, at 105–111.

<sup>78</sup> ‘Dealing with the Past in Central and Eastern Europe’, paper given in May 2002 to the International Relations Work-in-Progress Seminar at the University of Sussex.

<sup>79</sup> Rauschenbach, ‘La mémoire des traumatismes collectifs et la politique de réconciliation. Variations sur un thème avec accent allemand’, 7 *Revue d’études comparatives Est-Ouest* (2000), at 24.

<sup>80</sup> After an admittedly difficult start the budget of the Tribunal has increased steadily from \$276,000 in 1993 to \$96,443,900 in 2001. See Gustafson, ‘International Criminal Courts: Some Dissident Views on the Continuation of War by Penal Means’, 21 *Hous. J. Int’l L.* (1998) 51.

some of these resources should be diverted to the production of documentaries, feature films, theatre plays, poetry, school textbooks, academic research — including the collection of life stories. We ask whether the creation, using appropriate resources, of a space for the victims to tell their stories in non-legal arenas would not be at least as, if not more, beneficial to them than their participation in the ICTY. Both lawyers and non-lawyers must stop thinking that judicial proceedings are the most important way of remembering war crimes. Witness O was told by Mr Cayley at the beginning of his testimony: ‘This may be the only opportunity that you get to tell this account’.<sup>81</sup> Presumably the remark was intended to emphasize the importance, solemnity and authority of the proceedings. From the perspective of the limited platform that the Tribunal provides for witnesses to express themselves, the remark is, nonetheless, chilling. The work of memory — a real and ongoing work — is far too important to be performed on just one platform.

## 9 Taking Leave of the Victim-witness: Back to the Present and to Larger Concerns

When the victim-witnesses had finished testifying they were usually given the opportunity to add something before the presiding judge thanked them for their testimony. The final remarks made by the victim-witnesses and the comments they attract from the judges have a very different feel to the central testimony. They tend to be inscribed in the present, which is not surprising, given the way that memory is constructed as a tool for living in the present rather than for storing the past. They mainly express how hard it is for survivors to keep on living:

And the 8,000 Srebrenica inhabitants are missing, and we must all know that. We must all know that there must have been children, poor people, between 16,000 and 20,000, and one needs to feed them all to bring them up. There are so many fathers without sons and sons without fathers. I had two sons, and I don’t have them any more. Why is that? And I lived and I worked in my own home, nobody else’s, and that was — that same held true for my father and my grandfather, but what they seized, what they took away, what they grabbed. I had two houses. One they burnt down. It could burn. They burnt it down, but the other one they couldn’t burn, so they came and put a mine to it because the house was new and I hadn’t finished it yet. The roof was still missing, but it was all made of concrete and bricks, so it wouldn’t burn. And I thought. Well, it will survive at least. But no, they came and planted mines, and it just went down; nothing but dust. But, right. Never mind that. I had it, so it’s gone. They took it. They seized it. But why did they have to kill my sons? And I stand today as dried as that tree in the forest. I could have lived with my sons and with my own land, and now I don’t have either. And how am I supposed to live today? I don’t have a pension or anything. Before that, I relied on my sons. They wouldn’t have left me. They wouldn’t have let me go hungry. And today, without my sons, without my land, I’m slowly starving.<sup>82</sup>

Sometimes despair, sometimes anger, sometimes a call for help surfaced through the final comments of witnesses. Although victims can request the ICTY to order

<sup>81</sup> *Supra* note 23, at 2862.

<sup>82</sup> Witness I, *supra* note 23, at 2420–2422.

restitution of property, they are not entitled to compensation for the harm that they have suffered.<sup>83</sup> Judges are not, therefore, in a position to offer them much, if any, concrete help. Instead they tend to convey a message of hope and a call for reconciliation, thus projecting their remarks onto a vague future.

These final exchanges frankly show the judicial process at its weakest and, we believe, most harmful to the witnesses. It is here that the judges most eloquently demonstrate how entirely they fail to hear what the witnesses tell them. For example, witness, Mr Mandzic, said:

Mr. President, Your Honours, about life in Srebrenica between 1992 and 1995, about the suffering of the population, the expulsion, and so on and so forth, one could go on and on. But what I should like to emphasise, and it goes beyond this institution, is how to overcome the effects. In the first place, I have in mind tens of thousands of expelled who lie in Tuzla, Sarajevo, and dozens of other places around the Federation, and most of them have said that they would like to go back to their homes. But for political and other barriers, people are not returning. And they live now as second-rate citizens. They suffer because their life is not worthy of man. But I do know that that is not a subject that is dealt with by this tribunal. But any advice, any recommendation that you might have, I would think would be of great help to other institutions who are responsible for trying to resolve the problems of refugees and displacement as soon as possible, to help those people go back home and live life worthy of human beings.<sup>84</sup>

The reply of Judge Rodrigues:

[interpretation] Very well, Mr Mandzic. We have finished. You have told us about your suffering. Thank you. You showed great courage in coming and testifying here. You have also given evidence of your spirit of tolerance. I believe I speak in the name of my colleagues when I tell you that we all wish you a happy return to your home. Yes, those places were witness to suffering, but they should also be witness to tolerance and peace. Injustice, wherever, shall always be a threat to everybody. Now I believe I must make it up to everybody, and especially the interpreters, and we shall make a half-an-hour break now and we'll resume after the break with another witness. Half an hour, therefore. Thank you and farewell.<sup>85</sup>

Wishing the victim a 'happy return home' contrasts tellingly with the victim's remarks. It is as if the judge had not heard anything that the witness had tried to say. The legitimate concern expressed by the judge about timing only adds to this impression. Judges and witnesses talk past each other:

I have lost a number of relatives and cousins and people who could have helped me, but today I have to help their children, and it's very difficult for me to help anyone. I am barely surviving.

JUDGE RIAD: We are very happy that you have survived.

A. Yes, I was lucky. Yes, that's what I keep telling myself, but what's it worth now? My life has been damaged, my health. When I have to sit for a long time and then when I have to stand up, it's very difficult for me to stand on my right leg from rheumatism.

JUDGE RIAD: Well, I think that will pass with time. You're still a young man.

<sup>83</sup> In contrast, the Rome Statute of the International Criminal Court accords victims a right to reparation. See Jorda and de Hemptinne, 'The Status and Role of the Victim', in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1387, at 1398; Van Boven, 'The Position of the Victim in the Statute of the International Criminal Court', in *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999) 81; Walleyn, *supra* note 17.

<sup>84</sup> *Supra* note 23, at 1067–1068.

<sup>85</sup> *Ibid.*, at 1068–1069.

A. If I were allowed to go back to my land, yes, but they wouldn't let me go back. And lots of criminals are still at large and the world is simply watching, and the world could have helped us.

JUDGE RIAD: The world is listening very carefully to what you are saying, so be fully aware of that.<sup>86</sup>

Perhaps the worst example of discrepancy between what is said by the witness and what is heard by the Tribunal lies in the superficially comforting conclusion by Judge Riad: 'Thank you, Mr Husic. Thank you. I hope your father will come back. Thank you'.

Victims repeatedly report that the worst thing they fear or experience is not to be believed. The inappropriateness of the judge's response to the victim's account is therefore a serious matter. Unfortunately, it was not an uncommon phenomenon in the *Krstic* hearings. It is as though the truth of what the judges heard was too much to take in; they had to deny it.<sup>87</sup> Our contention is that it would be better for judges to keep to their formal role and thus to refrain from making potentially damaging remarks which reveal an apparent lack of empathy with the witness.

## 10 Establishing Individual Guilt whilst Aspiring to Collective Reconciliation

How can a society best deal with its traumatic political history? If the answer involves the establishment of a war crimes tribunal, it is reasonable to consider the trials of individual defendants as a process that contributes to the political process, broadly conceived. Throughout this article, we have stressed that the immediate aim of the Yugoslav Tribunal is to try the defendants brought before it. However, this task is expected to contribute to the realization of larger aims. Security Council Resolution 827 explicitly mentions 'the restoration and maintenance of peace'. In turn the Tribunal considers itself as a 'tool for promoting reconciliation'.<sup>88</sup>

These ideals of peace and reconciliation permeate many of the concluding remarks made by the Judges. We surmise that these ideals prompted Judge Riad, more than once to seek to assess the state of inter-ethnic relationships in present-day Bosnia. The answers he received demonstrated that it was so far beyond the surviving victims to contemplate resumption of these relationships that they could hardly understand the questions asked.

JUDGE RIAD: [Interpretation] Do you still have any relationships with your former Serb neighbours? Have you picked up those relationships, or are you completely separate now?

A [Witness DD]. I have no contact. I never saw them again. I did recognise a neighbour when they took my child away from me . . . I was hoping that perhaps he might have saved my son, because we were so close with all our neighbours, not just them . . . , and I hoped and prayed to find him, but I never managed to get in touch with him.

JUDGE RIAD: [Interpretation] Have your neighbours changed their attitude towards you, or do

<sup>86</sup> *Ibid.*, at 2487–2488.

<sup>87</sup> For judicial analogues see Felman, *supra* note 24.

<sup>88</sup> ICTY Annual Report 1994, UN Doc A/49/342-S/1994/1007, at para. 16.

they still have friendly feelings towards you? I'm talking about your Serb neighbours.

A. You mean up to the time they took my child? You mean the neighbour I recognised?

JUDGE RIAD: [Interpretation] Yes, and the others.

A. I noticed him, and I saw that he could recognise me, too, because he cast a quick glance at me . . . I thought that I should scream out for him to save my child, but then I thought better of it because I had heard from others that the neighbours were doing the worst thing and so I thought maybe my child would [fare] even worse, so I restrained from addressing him.

JUDGE RIAD: [Interpretation] And so you have no Serb neighbours around you; you don't visit one another at all?

A. Probably there are some, but I have no contact with them. Simply we don't communicate. How do I know? I just can't believe that having the kind of life we had, that this could have happened . . .<sup>89</sup>

A similar feeling of disbelief was expressed by many witnesses, including Witness S whose last words to the Tribunal were: 'When you meet somebody in the street every day and say hello and then he turns around and kills you, it's something I find incomprehensible. And I think friendship with those people who did this to me is over forever. That's as much as I have to say'.<sup>90</sup>

Confronted with this kind of remark, Judge Rodrigues often pointed beyond ethnic labels:

THE WITNESS: . . . If I have anything to add? I wanted to say that those people, those Serbs, it is simply beyond me how they could do it. I don't say all of them are like that, but what kind of people are they? . . .

JUDGE RODRIGUES: [Interpretation] Very well, Witness H, but remember that not all the Serbs are like some of them, and I think it holds true of everybody. At any rate, thank you very much for coming here, and I hope that . . . these words that you have on your jacket, 'Happy for life', that it will be communicated to your heart, to your soul, and many other people, *be they Serbs or Muslims or Croats, or whatever*, that they should always try to have it inscribed on their heart, because everything comes from there . . .<sup>91</sup>

This last remark is consonant with the way Judge Rodrigues praised Mr Madzic at the end of his testimony for his 'spirit of tolerance' as quoted in the previous section.<sup>92</sup> Judge Rodrigues repeatedly stressed that witnesses had a 'very good reason to live', namely to 'contribute to a world avoiding a catastrophe of this kind, . . . regardless of who is responsible'.<sup>93</sup>

For him, it seemed clear that the past had to give way to a new future. He thus exhorted Witness K in the following way:

Thank you very much for coming to testify here. We do hope that you will have a long life and that you will be able to change your opinion, what you mentioned here. You said that you had seen a number of horror films and that which you experienced [as all kinds of weapons were fired inside the packed warehouse in Kravica during the night of 13 July] was much worse. We do agree with you, but we also hope that you will be able to find courage to change that perspective in life. Thank you.<sup>94</sup>

<sup>89</sup> *Supra* note 23, at 5765.

<sup>90</sup> *Ibid.*, at 32891.

<sup>91</sup> *Ibid.* at 1725–1726 (emphasis added). See also Judge Rodrigues to Witness M at 2788.

<sup>92</sup> *Ibid.* at 1068 (emphasis added).

<sup>93</sup> This particular quotation is taken from the testimony of Witness P, *ibid.*, at 3010–3011. Further examples include Judge Rodrigues to Witness L at 2730; Judge Rodrigues to Witness O at 2936; Judge Rodrigues to Witness DD at 5768.

<sup>94</sup> *Ibid.*, at 2574.



We find these kinds of remarks patronizing and unhelpful. Such remarks do not recognize that the victims are not yet in a position to forgive — especially where those responsible for the victims' suffering do not accept responsibility for it. In this context, the remarks deny the suffering of the victims. At another level, we find disturbing the implicit suggestion that healing is a matter of interpersonal conduct. Our firm belief is that attention also needs to be given to social processes. In particular, the question of ethnic labels and collective responsibility cannot be brushed aside but must be addressed head-on — although obviously not by the Tribunal.<sup>95</sup>

The continual difficulty by Germany to deal with its Nazi past demonstrates the challenge laid down by a traumatic history and that there is no one solution to the problem of reconciliation.<sup>96</sup> The Tribunal can only hope to contribute to peace and reconciliation in the long term. The best avenue for its judges may be not to refer to these ideals directly and to keep their concluding remarks short.<sup>97</sup>

## Conclusion

The act of testifying may facilitate the process by which some victim-witnesses come to terms with their trauma. However, it is difficult to believe that it has a curative effect for most and for some the experience may be actively injurious. The legal process requires victim-witnesses to give their account in a form which leaves them subject to the pace and interest of those who have the power to ask questions (the Prosecution, the Defence and the Judges). For reasons of 'relevance' witnesses cannot dictate what they are able to talk about, the length of time they take to testify or the terms in which they do so. The consciousness of victims is violated further when they are required to focus upon past events in isolation from their current troubles. Legal proceedings are hardly an ideal space for individuals to deal with their traumatic history. Far from giving the victims a hearing, they may leave them feeling silenced. Attempting to create a space for victims within the legal arena may be misguided.

As regards the creation of a collective story, international criminal justice cannot be

<sup>95</sup> See Cooper, 'Collective Responsibility, Moral Luck, and Reconciliation', in A. Jokić (ed.), *War Crimes and Collective Wrongdoing: A Reader* (2001) 205; Gilbert, 'Collective Remorse', in *ibid.*, 216.

<sup>96</sup> See the excellent article by Rauschenbach, *supra* note 79.

<sup>97</sup> Concluding remarks that we find appropriate include the following: 'We're very glad that you managed to survive those terrible events that you were able to testify to. We wish you a safe journey home and we hope that you will have a life that will give you reason to smile again' (Judge Rodrigues to Witness Q, *supra* note 23, at 3051) and '[T]hank you for coming and sharing your very sad story with the Tribunal. I think it will help us in making our decision' (Judge Wald to Witness DD, at 5768). These remarks have our approval to the extent that they do not seem *to us* to dismiss the suffering of the victims or to raise undue expectations for the future. We acknowledge, however, that sensibilities may vary, both personally and culturally, as to what are considered appropriate responses to grief and suffering. This is a field that would deserve to be included in any research about the treatment of victim-witnesses in the legal process.

expected to produce a conclusive and all-encompassing collective memory of the events with which it deals. Only a partial story is ever deduced from legal (or, for that matter, any other) evidence. The development of the legal narrative depends upon legal personnel selecting ‘relevant’ facts against the backdrop of a constructed historical framework. They make these choices daily, sometimes consciously and sometimes constructed as other decisions. This framing constrains witnesses and influences (possibly damages) the collective story.

In view of this, what do we recommend?

The treatment of victim-witnesses by the international criminal justice process needs further specific attention — and initially research. Judges and other legal staff need, at the very least, to be trained not to make testifying an unnecessarily painful process. The Victims and Witnesses Support Unit must be resourced properly so that it can operate effectively. Finally, witnesses must be put in a position to make an informed decision about whether they wish to testify. It must be explained to them that they are likely to be subsumed within a collective judicial story and that they may suffer pain and distress in recounting their story to an audience not interested in it for its own sake.<sup>98</sup> These reforms are essential and, subject to resources, relatively easy to achieve.

Those devising rules of procedure should take account of the effect on victim-witnesses of the process and means of testifying.<sup>98,99</sup> Lawyers should also critically examine how the legal process comes to consider data as legal evidence and how facts are taken to be proved. This requires hard choices to be made, where various interests, not least those of defendants, are balanced against others.

The legal process enjoys unique authority. Care must be taken to ensure that the privileging of law does not suppress or unnecessarily delay the development of other non-legal narratives. Therefore, the international community should encourage the development of other forms of memory in the wake of mass atrocity and trauma. These should be fostered both at individual and collective levels, for example through therapy, film-making, art production, literature, history research, school textbooks. At the same time, we recognize that the aura law enjoys makes this conclusion problematic, if it leads victims to be deprived of a voice in an arena which is often

<sup>98</sup> On the pain of just retelling one’s traumatic story: Crocker, ‘Transitional Justice and International Civil Society’, in Jokić, *supra* note 95, 270, at 297, note 8; see also the Report on the situation of Rwandan victim-witnesses, *supra* note 7, at 9. ‘The memory of a trauma suffered or inflicted is itself traumatic because recalling it is painful or at least disturbing’: P. Levi, *The Drowned and the Saved* (1988), at 12.

<sup>99</sup> From this perspective we welcome the provisions in the Rome Statute that grant victims the right to participate in proceedings before the International Criminal Court and to receive reparation for injury. Articles 68 and 75, Rome Statute of The International Criminal Court 1998. In practice victim participation at the ICC is likely to be problematic (Jorda and de Hemptinne, *supra* note 83, at 1405–1416). In any case it is unlikely to mitigate the difficulties for victims who testify if, as Jorda and de Hemptinne argue (at 1416), victims should be forbidden from appearing both as witnesses and as parties in the same case.

perceived to be the most authoritative.<sup>100</sup> But in the light of the harm that the legal process may cause both to individuals testifying and to the development of a collective story, we call for this authority to be re-examined.

<sup>100</sup> When asked whether he wanted to add anything, given that he had 'come all the way and [was] entitled to be heard', Witness R said: 'This was my only wish, to have the opportunity to tell about what happened to normal people so that they can feel and see what they did, so that they can remember what they did', *supra* note 23, at 32311.