

Victim Testimony at the ICC: Trauma, Memory and Witness Credibility

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Introduction

Whether a perpetrator commits interpersonal violence domestically or internationally in the context of armed conflict and mass victimization, it can induce severe and long-lasting psychological trauma in victims, their families and, depending upon the context of perpetration, communities and society more widely.²

Whilst trauma symptoms are undoubtedly problematic for the victims themselves, they can also pose challenges for prosecuting authorities in the effective administration of justice. In particular, the nature, quality and content of any evidence victims are able to provide is likely to be affected by the trauma they have suffered. Testimony may be deeply distressing and problematic for these victims. They may comport themselves poorly in or out of court. Their memory of elements of their experiences might simply be unavailable or inaccessible to them, or their recollections may be jumbled, confused and incoherent.³

A victim's psychological symptoms therefore can affect the nature and content of any evidence he or she is able to provide in two discrete ways. First, these symptoms can affect victims' ability to provide a clear, accurate, coherent, chronological and complete account of the events that they either witnessed or experienced. Second, they can affect the way in which victims deliver their evidence. The focus of this article is on the first of these elements.

In practice, trauma in victim witnesses' symptoms can affect not only the degree to which investigators are able to glean complete, consistent and cohesive accounts of events, but also the ability of investigators and judges alike to properly evaluate both the credibility of the witness and the reliability of their evidence.

This article employs the term "trauma" in a broad sense, to refer to an adverse psychological response to an overwhelming violent or catastrophic event or events.⁴ Notably, much of the Court's attention to date in its engagement with issues of trauma has focused on the potential impacts of PTSD. The absence of a PTSD diagnosis does not necessarily mean, however, that

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² Danieli Y, 'Massive trauma and the healing role of reparative justice' (2009) 22(5) *J of Traumatic Stress* 351.

³ Ellie Smith, "Victims in the Witness Stand: Socio-cultural and Psychological Challenges to the Achievement of Testimony" in Kinga Tibori Julia Szabo and Megan Hirst (eds) *Victim Participation in International Criminal Justice* (Springer 2017); Ellie Smith, "Trauma-Impacted Evidence and the Assessment of Witness Credibility", *Global Security and Disaster Management*, <https://gsdm.global/trauma-impacted-evidence-and-the-assessment-of-witness-credibility/>; Herlihy J and Turner S, 'Should discrepant accounts given by asylum seekers be taken as proof of deceit?' (2006) 16(2) *Torture* 81.

⁴ See Cathy Caruth, *Unclaimed Experience: Trauma, Narrative and History* (John Hopkins University Press, Baltimore 1996) (using a similar definition). I adjust the definition here to the specific context.

a victim is symptom free or that they will not experience difficulties in engaging, including with the various organs of the Court and its officers.⁵

This article employs the term “clinical” in the medical sense, to refer, in the specific context, to psychological theory, practice and methods.

The proper and effective assessment of trauma-impacted evidence is essential to the reliability of the International Criminal Court’s (the “ICC” or “the Court”) fact-finding function. In order to properly establish the nature of traumatic symptoms that the Court is likely to encounter, this article begins with (1) an exploration of the formation and complexity of traumatic symptoms for victims of crimes of mass victimization. It goes on to consider (2) the prevalence of trauma in victims appearing as witnesses at the ICC, before examining (3) the various ways in which different trauma symptoms can affect recall and articulation of traumatic events. The article then examines (4) the issue of variance in the quality and nature of memory. It concludes with (5) a brief consideration of the practice of the Court in dealing with trauma-impacted testimony, including potential avenues for enhancing and supporting judicial evaluation of trauma-affected evidence in the future.

1. Crimes of mass victimization before the ICC: formation and complexity of trauma

The Court, in most cases, operates within the challenging context of mass victimization, seeking to pursue an ostensibly retributive mandate whilst simultaneously responding to the wide and sometimes disparate needs of societies in transition, where the reparative needs of substantial numbers of individual victims may compete with the need for collective repair and healing.⁶

The same mass victimization context can also complicate the trauma response in victims, and this complexity can, in turn, exacerbate difficulties for the Court in the elicitation and evaluation of traumatic memory and testimony for victims who appear before it either as witnesses or participants. It is therefore useful here to describe, by way of background and context, the traumatic layering that is in play for many victims who appear to give evidence before the Court.

Mass victimization can engender a complex and interrelated interplay of individual and collective psychological responses in both individual victims and the affected community. At an individual level, trauma arising as a result of international crimes can produce “a metamorphosis of the psyche ... mental decomposition and collapse”,⁷ leading to the deterioration and/or collapse of mental functioning.⁸ Gross violations can profoundly affect the survivor’s sense of self,⁹ engendering identity disorientation and depersonalization.¹⁰ Man-made trauma such as conflict and gross human rights violations may shatter survivors’

⁵ An ICC Trial Chamber in 2016 heard evidence on this point, namely the expert testimony of Dr. Daryn Reicherter during the *Bemba* sentencing hearing. *Prosecutor v. Bemba*, Transcript, 16 May 2016, ICC-01/05-01/08-T-368-ENG ET WT 16-05-2016 1/116 SZ T, at 88, line 15 – 89, line 9.

⁶ Fattah defines mass victimization as “victimization directed at, or affecting, not only individuals but also whole groups. In some cases the groups are very diffuse, the members have nothing or not much in common, and the group is not targeted as a specific entity. More often, however, the acts of victimization are directed against a specific population”. Ezzat Fattah *Understanding Criminal Victimization* (Scarborough 1991) 412.

⁷ Marcelo N. Vinar, ‘The specificity of torture as trauma: The human wilderness when words fail’ (2005) 86 *Int J of Psychoanalysis* 313.

⁸ Henry Krystal, *Integration and Self-Healing: Affect, Trauma, Alexithymia* (The Analytic Press 1988).

⁹ Ibrahim Kira, ‘Torture Assessment and Treatment: The Wraparound Approach’ (2002) Vol. 8, No.2 *Traumatology* 54.

¹⁰ Udo Rauchfleisch, *Allgegenwart der Gewalt*, (Vandenhoeck and Ruprecht 1996).

core beliefs, including their belief that the world is a just place (described as “the existential dilemma”),¹¹ their personal inviolability or their belief in others as trustworthy individuals.¹² Survivors may also experience shame, self-blame and guilt, and a sense of helplessness. Survivors can suffer grief both for others and the self, together with anxiety, depression, emotional numbness and avoidance. They may also experience intrusive phenomena including as flashbacks and nightmares.¹³ Where victims have been subjected to forms of sexual violence, survivors may also experience fear of intimacy, sexual dysfunction and self-loathing, which may in turn lead to self-injurious behaviour.¹⁴

In addition to the psychological harms experienced at an individual level, affected societies may suffer from trauma.¹⁵ Trauma at a societal level can manifest itself in varying forms of community dysfunction. Torture or ethnic violence typically create “an order based on imminent pervasive threat, fear, terror, and inhibition,... a state of generalized insecurity, terror, lack of confidence, and rupture of the social fabric”.¹⁶ Where communities witness the perpetration of abuses such as rape and other forms of violence against their members, they may experience severe collective trauma,¹⁷ including shock, which can be exacerbated by grief for the victim – where the victim has died, or, in the case of rape, is rejected by her family and community.¹⁸

¹¹ See e.g., Herlihy and Turner, *supra* note 3, at 84; Ramsay Gorst-Unsworth and Stuart Turner ‘Psychiatric Morbidity in Survivors of Organised State Violence Including Torture’ (1993) 162 *British J of Psychiatry* 55.

¹² International Rehabilitation Council for Torture Victims, *Psychological Evaluation of Torture Allegations: A practical guide to the Istanbul Protocol – for Psychologists* (2nd ed 2007) 6 – 7 [hereinafter *Practical Guide*]; see also Inger Agger, in *The Blue Room: Trauma and Testimony among Refugee Women – A Psycho-Social Exploration* (Zed Books 1992) 13.

¹³ See e.g., Chris Brewin ‘Autobiographical Memory for Trauma: Update on four Controversies’ (2007) 15(3) *Memory*, 227-28; Lisa Duke and others, ‘The sensitivity and specificity of flashbacks and nightmares to trauma’ (2008) 22 *J of Anxiety Disorders*, 310-20.

¹⁴ See e.g., Kenneth Plummer, *Telling Sexual Stories: Power, Change and Social Worlds*, (Routledge, 1995) 70, 74; Cassandra Clifford, ‘Rape as a Weapon of War and its Long-term Effects on Victims and Society’, Conference paper, 7th Global Conference, *Violence and the Contexts of Hostility*, Budapest, 5-7 May 2008; Sophie Yohani and Kristen Hagen, ‘Refugee women survivors of war related sexualised violence: a multicultural framework for service provision in resettlement countries’ (2010) *Vo. 8, No.3 Intervention*, 208-09; Kristen Hagen, ‘The Nature and Psychosocial Consequences of War Rape for Individuals and Communities’ (2010) *Vol.2, No. 2 Intl J of Psychological Studies*, 19; Pamela Bell, ‘Consequences of Rape for Women’s Health and Well-being, Family and Society’, in Marie Vlachova and Lea BIASON (eds), *Women in an insecure world: Violence against women, facts, figures and analysis*, (DCAF 2005) 115-21, 117-19.

¹⁵ See Jeffrey Alexander, *Trauma: A Social Theory* (Polity Press 2012) (exploring the development of social and cultural trauma). See also Stevan Weine and others, ‘Testimony psychotherapy in Bosnian refugees: A pilot study’ (1998) 155 *Am J of Psychiatry*, 1721; Kira, *supra* note 9, at 55.

¹⁶ See Kira, *supra* note 9, at 54. Although torture is an act perpetrated against individual victims, its effects are intended to be experienced on a broader scale, with the effect that, whether implicitly or explicitly, torture represents a threat to the victim’s wider community and its value systems. See *Practical Guide*, *supra* note 12, at 7.

¹⁷ Hagen K, ‘The Nature and Psychosocial Consequences of War Rape for Individuals and Communities’ (2010) *Vol.2, No. 2 Intl J of Psychological Studies*, 19; Joshua Goldstein, *War and Gender* (Cambridge University Press 2001) 362-63; Christoph Schiessl ‘An element of genocide: Rape, total war and international law in the twentieth century’ (2002) *Vol. 4(2) J of Genocide Research*, 198; Bell P, ‘Consequences of Rape for Women’s Health and Well-being, Family and Society’, in Marie Vlachova and Lea BIASON (eds), *Women in an insecure world: Violence against women, facts, figures and analysis*, (DCAF 2005); Annette Lyth, ‘The development of the legal protection against sexual violence in armed conflicts – advantages and disadvantages’ (2001) available online at <<http://kvinnatillkvinna.se/sites/default/publikationer/rapporter/pdf/development.pdf>.

¹⁸ Yohani S and Hagen K, ‘Refugee women survivors of war related sexualised violence: a multicultural framework for service provision in resettlement countries’ (2010) *Vo. 8, No.3 Intervention*; Hagen K, ‘The Nature and Psychosocial Consequences of War Rape for Individuals and Communities’ (2010) *Vol.2, No. 2 Intl J of Psychological Studies*, 19.

Rather than being experienced discretely, individual and collective/societal aspects of trauma are interlinked and interdependent. Victims experience trauma in multiple and concurrent capacities: individually, as a direct victim; indirectly, as a family member of a direct victim; and as a member of a victimized community or group, indicating a potentially complex array of traumatic experiences and symptoms in those participating in proceedings before the ICC. Clinical literature identifies a “layering” of trauma in such situations, where an individual may experience the first “layer” of trauma with the initiation or increase in repression and persecution of, and violence against, the particular group with which they identify. The second “layering” of trauma arises when the individual personally becomes a victim of serious human rights violations or international crimes.¹⁹

These layers operate interdependently. For example, community affiliation is an aspect of an individual’s personal identity.²⁰ Where perpetrators direct persecutory or abusive actions, such as genocide or ethnic cleansing, at entire ethnic or cultural populations, the sense of allegiance to a group is heightened,²¹ producing mutual support within the group and collective solidarity.²² An attack on the group, or any of its members, disrupts social functioning and identity at both individual and collective levels.²³ In these circumstances, the consequences of an act of ethnic cleansing, such as the destruction of a village or community, amounts essentially to the destruction of the personal point of existential reference.²⁴

Conversely, psychological trauma can affect the individual’s sense of collective attachment and connectedness, and this, coupled with a loss of trust in others, may impact upon familial and social roles – such as parent, spouse, employee, employer, citizen²⁵ - engendering a deterioration in social, educational and occupational functioning.²⁶ This in turn can lead to social withdrawal and isolation, affecting societal and cultural aspects of personal identity.²⁷

Individual and collective trauma responses are seemingly influenced by the specific targeting of abuse and the duration and intensity of the traumatic event(s).²⁸ These factors can, in turn, affect the individual’s perceived threat to life, influencing the consequent trauma response. An individual is more likely to perceive a violation as representing a threat of imminent death when it is individually and directly targeted, compared to longer-term repressive stressors

¹⁹ Dislocation and exile, for those forced to flee violence and seek safety across borders marks the third phase of the traumatization process. See Guus van der Veer, *Counselling and Therapy with Refugees and Victims of Trauma: Psychological Problems of Victims of War, Torture and Repression* (2nd ed, Wiley and Sons 1998) 5.

²⁰ See e.g. Yael Danieli, *International Handbook of Multigenerational Legacies of Trauma*, (New York 1998), at Introduction.

²¹ See e.g. Aroche J and Coello M J, (2004) ‘Ethnocultural Considerations in Treatment of Refugees’, in Wilson J and Drozdek B (eds), *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims* (Brunner-Routledge 2004) 56 [hereinafter *Broken Spirits*].

²² Modvig J and Jaranson J M, ‘A Global Perspective of Torture, Political Violence, and Health’ in *Broken Spirits*, *supra* note 21, at 37.

²³ Joop De Jong, ‘Public Mental Health and Culture: Disasters as a Challenge to Western Mental Health Care Models, the Self, and PTSD’, in in *Broken Spirits*, *supra* note 21, at 165, 168.

²⁴ David Becker, ‘Mental Health and Human Rights: Thinking About the Relatedness of Individual and Social Processes’, paper presented at International conference, *Towards a Better Future: Building Healthy Communities* (October 2003) Belfast.

²⁵ Ron Baker, ‘Psychosocial Consequences for Tortured Refugees Seeking Asylum and Refugee Status in Europe’, in Metin Basoglu (ed), *Torture and its Consequences: Current Treatment Approaches* (Cambridge University Press 1992) 86.

²⁶ *Practical guide*, *supra* note 12, at 7.

²⁷ Kira, *supra* note 9, at 54.

²⁸ Jens Modvig and James Jaranson, ‘A Global Perspective of Torture, Political Violence, and Health’, in *Broken Spirits*, *supra* 21 at 37.

directed at a particular community.²⁹ Significantly, while mass conflict is recognized as having a potentially widespread, psychological impact upon society, the psychological effects are unlikely to be uniform, and instead will depend upon the extent to which specific groups and/or individuals were affected.³⁰

The traumatic response to mass victimization is therefore both layered and complex, presenting particular challenges both for victims appearing before the Court to give evidence, and the Court itself in the elucidation and weighing of trauma-impacted testimony.

Before going on to consider the effect of traumatic symptoms on a victim's ability to produce a complete, accurate, coherent and chronological account of events, it is appropriate to briefly consider the incidence of trauma in victims appearing before the Court.

2. The prevalence of trauma in those appearing before the Court

While some victims appearing before the Court either as participants or witnesses are likely to be experiencing trauma symptoms, it is important to acknowledge here that this will not be the case for all victims. A Court-funded psychologist, in the case of witnesses appearing for the Prosecution, at least, assesses individuals prior to their interviews in order to determine whether they are sufficiently mentally robust to withstand the investigative and judicial process.³¹ Once any witness is physically before the Court, the Victims and Witnesses Section is mandated to provide support to ensure the psychological safety of witnesses.³²

This does not necessarily mean that the ICC will exclude victims with trauma-impacted memory from the judicial process. The assessment and support provided in both cases relate to the psychological safety of the victims rather than the quality of evidence that they are able to offer, and many individuals who have incomplete or disrupted memories of an event may still be sufficiently mentally robust to provide testimony. The prosecution conducts a screening process to ensure mental robustness in potential witnesses. It is worth noting that the duty under Article 68(1) to protect the psychological wellbeing of victims applies only to the Office of the Prosecutor. As a result, the Defense and the Legal Representatives of Victims are not required to replicate such screening in their investigative and preparatory processes.

The precise incidence of active trauma symptoms in victims and witnesses who engage with the Court is unknown. We know, however, that traumatic symptoms in victims endure for many years after the traumatic event(s) experienced,³³ and as a result, and in light of the above, one should anticipate some level of ongoing trauma in victim-witnesses.

²⁹ *ibid.*

³⁰ Aroche and Coello, *supra* note 21, at 57.

³¹ Article 68(1) of the Rome Statute requires the Office of the Prosecutor to take measures to safeguard the victims' psychological well-being during its investigation; see also ICC Office of the Prosecutor, "Policy Paper on Sexual and Gender-based Crimes" (2014), at para. 70, <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

³² Rome Statute, Art. 43(6).

³³ A cross-sectional survey of a population-based sample of more than 1,300 survivors of atrocities committed in the former Yugoslavia ten years after the conflict, for example, found that a third of those who were sampled had suffered from PTSD in the immediate aftermath of conflict. At the time of assessment, 22% of the study sample was still experiencing symptoms of PTSD. See Basoglu M and others, 'Psychiatric and Cognitive Effects of War in Former Yugoslavia: Association of Lack of Redress for Trauma and Posttraumatic Stress Reactions' (3 August 2005) Vol. 294, No. 5, J of the Am Medical Assn 580. A randomized study into the mental health status of 400 Rwandan genocide survivors obtained similar results. In the Rwandan study, researchers found that more than half of the study sample continued to experience PTSD symptoms ten years

In addition, while a significant number of victims and witnesses may have suffered trauma symptoms in the immediate aftermath of the event(s), the intervention of natural recovery responses in them may mean that they are symptom free by the time that they appear before the Court.³⁴ Notably, however, where those individuals suffered a trauma response at the time of the event, it may be that they still encounter difficulties in recalling the episode in its entirety or with coherence. As a result, the Court should consider the impacts of trauma on memory and testimony as a live issue in those instances.

3. The impact of trauma on memory and victim testimony

Having examined the formation of trauma within the context of mass victimization, it is appropriate to consider how specific symptoms might affect the testimony of victims appearing before the Court.

Trauma can affect the memory of victims or witnesses, and this in turn can impact upon their ability to provide a full, accurate, coherent and chronological account of their experiences when testifying. This section briefly describes a number of trauma symptoms, by reference to the potential impact of those symptoms on the survivors and their ability to provide comprehensive testimony. One must acknowledge, however, that while, for the sake of convenience, the focus here is on individual symptoms, in practice, many victims will experience a number of symptoms cumulatively, and so the separation of symptoms here is somewhat artificial.

In addition to symptoms of psychological trauma, other clinical factors that have the potential to affect a victim's memory may also be present, depending on the form and nature of events or abuses suffered. These additional factors are beyond the scope of this article, but may include forms of neuro-psychiatric memory impairment as a result of significant head injury, starvation or vitamin deficiency (particularly relevant where, for example, conflict has disrupted agricultural activity, caused food scarcity or victims are forced to flee their homes).

A number of traumatic symptoms have the potential to negatively affect a victim's recall of events. Where a victim is suffering from involuntary avoidance, for example, they may experience forms of psychogenic amnesia. This in turn will likely entail a disruption of either memory or perception, especially in relation to the traumatic event itself,³⁵ with the result that some or all of the traumatic episode may simply be inaccessible for the victim for as long as he or she continues to experience psychological symptoms of trauma.

Similar challenges arise for victims who dissociated at the time of the event. Dissociation comprises 'a disruption of and/or discontinuation in the normal integration of consciousness, memory, identity, emotion, perception, body representation, motor control, and behaviour'.³⁶

after the event, while 60% suffered from major depression. See Brouneus K, 'The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health' (2010) 54(3) J of Conflict Resolution, 408.

³⁴ See Derek Summerfield, 'The Social Experience of War and Some Issues for the Humanitarian Field' in Patrick J. Bracken & Celia Petty (eds), *Rethinking the Trauma of War*, (Save the Children/Free Association Books 1998) 9, 29 (observing that the preoccupation with therapeutic impact overlooks issues of clinical resilience).

³⁵ See Herlihy and Turner, *supra* note 3, at 85-87.

³⁶ American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 5th edn, (American Psychiatric Publishing 2013) 291.

While dissociation arises as a coping strategy at the time of the event, its effect is to generate a level of amnesia in the victim for some or all of the traumatic event in question.³⁷

Autobiographical memory (alternatively known as declarative or explicit memory) refers to our ability to recall the events in our own lives.³⁸ We are able to store, recall and articulate autobiographical memories chronologically, coherently and voluntarily.³⁹

For victims suffering from autobiographical memory impairment, the normal processes and pathways for the storage of memory essentially fail at the time of the event concerned. As a result, a victim's memory may be fragmentary or non-existent.⁴⁰ In these cases, experts believe that while typical pathways for the storage of memories fail, the body's implicit memory ('implicit memory' relates to our emotional responses, habits or reflexive actions)⁴¹ continues to operate, and so the body retains some form of memory of the traumatic event, albeit one that it difficult for the victim to access. Retrieval of such memories in such circumstances can be complex, and may require expert support. Most notably, these "hidden memories" can arise unpredictably, in response to triggers or reminders of the event. While triggers or stimuli might include smells, sensation or emotional states that are resonant of the event, memories can also arise when someone puts questions to a victim about it. Because of this, different aspects of a victim's experiences may arise depending on the questions posed. Significantly, rather than experiencing the event as something that happened in the past, the unprocessed memory will arise for the victim as if occurring in the present, and so recall is likely to be highly distressing for the victim.

There is a growing consensus in clinical literature that traumatic memories are of a different character.⁴² During deeply traumatic events, it is believed that greatly heightened emotional arousal interferes with the processing and storage of information in explicit memory, and the process essentially fails. As a result, autobiographical memory of the event is fragmentary or non-existent.⁴³

Such memories are accessed through qualitatively different 'pathways', and rather than arising voluntarily or consciously in the victim, respond to triggers or reminders of the event. Significantly, from the point of view of the legal practitioner, these triggers can include being questioned or cross-examined about the event. Because these memories are subject to triggers, different aspects may arise, depending upon the questions posed. As a result, Prosecution and Defence counsel as well as victims' lawyers will require a particularly considered and specific strategy to their questioning. In addition, where victims are able to retrieve memories, these are often not chronological and are fragmented. As a result, testimony may be both incomplete and potentially lacking in coherence.

³⁷ See Weiss, D.S., et al., 'Predicting symptomatic distress in emergency services personnel', *J of Consulting and Clinical Psychology* 63, 361-68.

³⁸ Herlihy and Turner, *supra* note 3, at 86.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, observing that 'when someone is interviewed and asked about an experience that was traumatic, and has only, or largely, memories of this fragmented type, they are unlikely to be able to produce a coherent verbal narrative, quite simply because no complete verbal narrative exists'.

⁴¹ *Ibid.*

⁴² Brewin, C, *Posttraumatic stress disorder: Malady or myth?* Yale University Press (2003), London.

⁴³ Herlihy and Turner, for example, observe that 'when someone is interviewed and asked about an experience that was traumatic, and has only, or largely, memories of this fragmented type, they are unlikely to be able to produce a coherent verbal narrative, quite simply because no complete verbal narrative exists.' Herlihy and Turner 2006, *supra* note 3, p. 86

Where a victim has experienced rape and/or other forms of sexual violence, traumatic sequelae and hence memory retrieval can be additionally problematic for them. Avoidance and dissociation symptoms, for example, are significantly more pronounced in victims of sexual violence than in victims of non-sexual trauma.⁴⁴ Victims of sexual violence also experience a higher PTSD symptom count when compared to victims of non-sexual trauma.⁴⁵

While a number of traumatic symptoms can negatively affect a victims' memory, other symptoms, whilst deeply problematic for the victims, may operate to *enhance* their recollection. Victims who suffer from regular flashbacks of an event, for example, or who have repeated nightmares such that they regularly relive their experiences, are likely to have a better-than-normal memory of the events concerned. Intrusive phenomena, such as flashbacks, however, may arise during testimony, and this in turn will affect victims' ability to concentrate and to provide a coherent account.⁴⁶

The symptoms identified above will pose challenges for the Court in terms of how it elicits and evaluates testimony. This challenge is exacerbated to some extent by variations in memory patterns between witnesses of the same event, with the result that traumatic responses can give rise to disparate testimonies.

4. Variations in the quality and nature of memory

Victims of the same or similar events do not necessarily suffer from the same or similar traumatic symptoms.

In addition to the nature, degree and duration of a traumatic episode, the victim's personality and the extent to which he or she has been able to process the experience will influence the traumatic response. Where, for example, an individual is hypersensitive, he or she would likely be traumatized more readily and would experience an event as more traumatizing when compared to someone who does not easily respond to stimulation.⁴⁷ The degree of resilience a person possesses (i.e. the extent to which a person is able to recover unaided from a distressing event) also influences the persistence of his or her symptoms. One also would anticipate differences in memory and focus between victims with a "fight" response at the time of the event when compared with those experiencing a "flight" response. The mental focus – and hence memory content – in the former would likely relate to the source of the trauma itself, including the attacker, or any weapons used. In the case of the latter, any

⁴⁴ See Van Velsen, C., Gorst-Unsworth, C., and Turner, S., *Survivors of torture and organized violence: demography and diagnosis*, *J of Traumatic Stress* (1996) 9, 181–93, 188.

⁴⁵ Ramsay, R., Gorst-Unsworth, C., and Turner, S., 'Psychiatric morbidity in survivors of organised state violent including torture. A retrospective series', *The British J of Psychiatry* (1993) 5-58; see also Lecic-Tosevski, D., and Bakalic, J., 'Against Torture – The Road to a Healthy Individual and Society', in Spiric, Z., Knezevic, G. And Jovic, V., et al (eds), *Torture in War: Consequences And Rehabilitation of Victims – Yugoslav Experience* (Intl Aid Network 2004) 97.

⁴⁶ Bogner, D, et al. (2007) 'Impact of sexual violence on disclosure during Home Office interviews', *British Journal of Psychiatry* (2007) 191:75–81.

⁴⁷ See *Prosecutor v. Ntaganda*, Transcript, 18 April 2016, ICC-01/04-02/06-T-84-ENG, at 15, lines 5-24; 17, lines 5-25 (transcribing the testimony of prosecution expert Dr. John Charles Yuille as to hypersensitivity and "predisposing and precipitating" factors); see also, Wairagala Wakabi, 'Expert Explains Variance in Memory Among Trauma Victims', Intl Justice Monitor, 18 April 2016, <<https://www.ijmonitor.org/2016/04/expert-explains-variance-in-memory-among-trauma-victims/>> accessed 15 September 2019; Wairagala Wakabi, 'Expert Concludes Testimony on Trauma', Intl Justice Monitor, 22 April 2016, <<https://www.ijmonitor.org/2016/04/expert-concludes-testimony-on-trauma/>> accessed 15 September 2019.

memory would likely focus on possible escape routes, including, for example, the layout of a room or the position of windows or the presence of others.⁴⁸

The degree to which prevailing collective trauma symptoms had already affected the individual also will influence traumatic impacts, and hence memory patterns.

The range of traumatic symptoms experienced by victims can therefore vary considerably. As indicated here, different symptoms of trauma can affect memory in different ways, and as a result, victims can display different corresponding memory patterns, even where they are victims of the same event.

How, then, should the Court go about evaluating victim testimony in these circumstances?

5. Traumatic memory in evidence before the ICC

Because the quality, form and content of memory in victims can vary significantly, this can pose specific challenges for the Court in its assessment of the evidentiary weight of victim testimony. Some victims who are suffering trauma, for example, will be able to provide a detailed and chronological account of what they experienced or saw, while others will have little or no recollection of aspects of an event or the event in its entirety. A gap or incoherence in testimony does not necessarily indicate that a particular witness is lying, but equally does not automatically indicate veracity.

Significantly, the Court is aware that trauma can affect victims' memories of events, and hence, potentially, their ability to produce a complete, chronological and coherent account of the events experienced or witnessed by them, and seeks to recognize this difficulty in the course of its assessment of victim testimony. In the *Lubanga* case, for example, Trial Chamber I noted, in relation to the evidence of a former child soldier, that "witnesses who were children at the time of the events, or who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account".⁴⁹ ICC Trial Chambers have made similar observations in *Katanga*⁵⁰ and *Bemba* judgements.⁵¹

It is clearly a positive thing that the Court is aware that victims' memories may have been affected by trauma, and that as a result, inconsistencies or gaps in their testimony do not automatically equate to a lack of credibility. Significantly, however, the provision by the Court of some degree of "leeway" for potentially traumatized victims has proceeded in the absence of any formal clinical diagnosis of traumatic symptoms in those victims – either current or historic – that might account for difficulties or incoherencies evident in their accounts. Instead, there has seemingly been an assumption by the Court of some non-specific, background degree of trauma that could accommodate some level of inaccuracy in a victim's account.

⁴⁸ *ibid.*, at 18, line 14 – 19, line 2.

⁴⁹ *Prosecutor v. Lubanga*, Judgment, 14 March 2012, ICC-01/04-01/06-2842, at para 103.

⁵⁰ *Prosecutor v. Katanga*, Judgment, 7 March 2014, ICC-01/04-01/07-3436, at para 83 (noting that the Trial Chamber had "made allowance for instances of imprecision, implausibility or inconsistency, bearing in mind the overall context of the case and the specific circumstances of individual witnesses ... some of whom were still children at the time, or were traumatised").

⁵¹ *Prosecutor v. Bemba*, Judgment, 21 March 2016, ICC-01/05-01/08-3343, at para 230 (noting in relation to its evaluation of witness testimony that it "considered the entirety of their testimony, having regard, in particular, to the capacity and quality of their recollection. In this respect, the Chamber took into account... the fact that the charges relate to events that occurred in 2002 and 2003, and that witnesses who suffered trauma may have had particular difficulty in providing a coherent, complete, and logical account.")

Such an assumption is problematic, in part because it proceeds in the absence of clinical evidence, but also because it fails to recognize the great variation in memory that is likely to exist between victims who are suffering or have suffered a traumatic response. As this article hopefully illustrates, the nature of traumatic memory can vary enormously and victims would likely display differing memory patterns depending upon the traumatic symptoms they suffered. It is fair for the Court to assume that victims who have suffered a traumatic response may have difficulties in recalling an event coherently, completely and with clarity. An assumption, however, that *all* victims will experience the same level or degree of difficulty in their recall, however, is unsustainable in practice.

In fact, for the Court to effectively assess both the accuracy and veracity of trauma-impacted testimony, it is essential that it first has a clear appreciation of the quality of the victim's memory, and in particular, whether the memory pattern displayed by the witness is consistent with the trauma symptoms that he or she has experienced and, in some cases, continue to experience.

This process, in turn, will inevitably require significant engagement by the Court with psychological expertise in the evaluation and diagnosis of traumatic symptoms, both past and present and, potentially, the expert production of anticipated memory patterns that such symptoms might precipitate.

The context for further expert psychological engagement is a promising one. The Court is already broadly alert to the psychological impacts of trauma on victims. It already has sought to accommodate victims' needs within its processes and demonstrated a willingness to engage with psychological expertise at various junctures in exercising its judicial functions. As already noted, Article 68(1) of the Rome Statute requires that the Court take "appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses", requiring in particular that the Prosecutor "shall take such measures particularly during the investigation and prosecution of such crimes". The Court is sensitive to the emotional difficulties that witnesses might experience in speaking about their experiences, and has engaged with psychological experts to inform its actions aimed at enabling vulnerable witnesses to provide testimony. In the *Lubanga* case, for example, the Court heard expert evidence on how best it could support and enable the evidence of former child soldiers suffering from trauma.⁵² It heard and received expert psychological evidence of victimhood in individual cases,⁵³ as well as in relation to the form, degree and impact of trauma - for the purpose of determining an appropriate sentence,⁵⁴ and in assessing reparations.⁵⁵

⁵² See *Prosecutor v. Lubanga*, Instructions to the Court's expert on child soldiers and trauma, ICC-01/04-01/06-1671, 9 February 2009.

⁵³ See *e.g. Prosecutor v. Ntaganda*, Prosecution's list of expert witnesses and request pursuant to regulation 35 to vary the time limit for disclosure of the report of one expert witness, ICC-01/04-02/06-560, at 6, 16 April 2015 (instructing, inter alia, Maeve Lewis, a psychotherapist with expertise in working with survivors of sexual violence, with respect to psychological effects of trauma on four prosecution witnesses).

⁵⁴ In the *Bemba* case, for example, the Trial Chamber decided it would hear the evidence of Dr Daryn Reicherter on the "longitudinal and intergenerational impact of crimes", including aspects which had not previously featured in the evidentiary record, for example, the effects of trauma on parenting, intergenerational transmission of trauma, and healing prospects." *Prosecutor v. Bemba*, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, ICC-01/05-01/08-3384, at para. 12, 4 May 2016.

⁵⁵ See *Prosecutor v. Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, ICC-01/04-01/06-2904, 3rd March 2015, paras 189 and 191; *Prosecutor v. Lubanga*, Amended Order for Reparations, 3rd March 2015, ICC-01/04-01/06-3129-

Engagement by the Court with psychological expertise as a means of enabling its assessment of oral evidence, including in terms of accuracy and veracity, is not without its challenges. An accused person has a right to be tried without undue delay.⁵⁶ As a result, recourse to psychological expertise would need to be used relatively sparingly, and the Court should employ psychological expertise early on in order to avoid undue delays. In addition, the ICC Judges are and must remain the sole arbiters of fact in any case before them, including in assessing the weight of evidence and the credibility of those testifying before it. The Court must exercise particular care to ensure that recourse to psychological expertise as a tool for assessing victims' evidence does not usurp its evidence-assessing function.

Conclusion

Crimes of mass victimization, such as those falling within the remit of the ICC, can engender traumatic consequences for victims which they may experience at the individual, familial, communal and societal levels. The incidence of trauma can affect the ability of victims to construct a complete, accurate, chronological and coherent account of their experiences, and this, in turn, presents specific challenges for the Court in its elicitation of victim testimony and assessment of witness credibility. In order to properly assess the credibility, reliability, veracity and weight of testimonial evidence, the Court needs an understanding of the quality and nature of the victim's memory, including in particular the extent to which the victim's memory pattern is consistent with the traumatic symptoms that he or she experienced and may continue to experience.

While effective assessment of evidence will necessarily involve recourse to psychological expertise, it is essential that the Court remains the arbiter of fact in any given instance. The Court, therefore must strike a careful balance to ensure that expert clinical evidence operates to support, inform and enhance the Court's ability to carry out this function, rather than usurp it.

The Court itself is broadly alert to the fact that trauma can affect a victims' engagement with its judicial processes in various ways, and it engages with expert psychological practitioners in order to counter those challenges. The context for further engagement is therefore likely a promising one. Such engagement is also essential if the Court is to effectively assess trauma-impacted testimony.

AnxA, para 58; *Prosecutor v. Lubanga*, Filing on Reparations and Draft Implementation Plan, ICC-01/04-01/06-3177-Red, 3rd November 2015, paras 32, 268 – 270, 273 – 278.

⁵⁶ Rome Statute, Art. 67(1)(c).