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The Therapeutic Turn in International Humanitarian Law:
War Crimes Tribunals as Sites of “Healing”?

by

Diana Elizabeth Anders

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Rhetoric

and the Designated Emphasis

in

Women, Gender, and Sexuality

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Judith Butler, Co-Chair

Professor David Cohen, Co-Chair

Professor Samera Esmeir

Professor Wendy Brown

Fall 2012

The Therapeutic Turn in International Humanitarian Law:
War Crimes Tribunals as Sites of “Healing”?

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Diana Elizabeth Anders

Abstract

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Diana Elizabeth Anders

Doctor of Philosophy in Rhetoric

Designated Emphasis in Women, Gender, and Sexuality

University of California, Berkeley

Professor Judith Butler, Co-Chair

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This dissertation examines the growing tendency to figure international war crimes tribunals in terms of their therapeutic value for their victims. My project documents and questions how the discourse of *juridical healing* emerged from what I term “the therapeutic turn” in international humanitarian law (hereafter, IHL). I analyze this phenomenon in terms of its key features, conditions of possibility, modes of legitimization, and effects, focusing on legal institutions designed to adjudicate crimes such as genocide, mass rape, and torture. My central argument is that the rhetoric of juridical healing, despite its commendable achievements, comes at an important cost, in that the appeal to law can invite new forms of regulation and domination. In short, this novel form of justice produces and authorizes its own forms of violence. It does so in part by obscuring the *political* effects of the law’s promise to heal. To bring this uncomfortable fact into relief is but a first step towards countering such ill effects.

This project focuses on the first two international ad hoc tribunals — the International Criminal Tribunals for the former Yugoslavia and the International Tribunal for Rwanda — as well as the International Criminal Court (hereafter, the ICTY, the ICTR, and the ICC). All were established in the 1990s in the beginning of what has been called the “tribunal era,”¹ which has ushered in an unprecedented emphasis on victims of atrocity. Primarily by means of discourse analysis, I examine court documents and trial transcripts, as well as relevant statements made by diplomats, politicians, court officials, scholars, and non-governmental-organizations. Such analysis aims to chart the expansion of a new norm of justice as healing that has so far largely gone unrecognized.

Chapter One outlines the general problem of the dissertation, introducing the

¹ David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2012), 4.

phenomenon of juridical healing and situating it historically. Although such healing has become a powerful, even normative trope in humanitarian discourse, it has not been well defined. The chapter raises questions concerning what juridical healing can realistically achieve, and how it might constitute a new mode of power that paternalistically regulates the very subjects it pledges to heal. It also examines how the special status of healing discourse as “above reproach” has shielded it from critical scrutiny.

Chapter Two surveys the growing scholarly discourse on juridical healing, arguing that such inquiries tend to uncritically accept the core terms of the therapeutic turn. This work can thus serve to reify the problematic notion of healing promulgated elsewhere. Such thinking holds that tribunals can occasion forms of “catharsis” and “closure,” both for individual victim-witnesses and more broadly. I argue that this belief in “disclosure for closure” forecloses critical reflection on the effects of juridical healing, or on alternatives to this conception.

In Chapter Three, I develop a genealogy of juridical healing in relation to new legal institutions. I analyze how the promise of healing has served as a means of legitimization, even as it has led courts into uncharted legal territory. Even as the tribunals of the 1990s derived their credibility from the Nuremberg and Tokyo tribunals that followed World War II, they also had to distance themselves from the accusation that the latter had only dispensed “victors’ justice.” In an uncanny echo, recent tribunals can be said to have produced forms of “victims’ justice.” I examine how such rhetoric threatens to undermine the same credibility that it otherwise means to establish, even at the cost of the victims it purportedly champions.

Chapter Four considers the tribunals’ adjudication of sexual violence as a war crime. Here I use individual case studies to show the unforeseen costs of such procedures. I examine how the female victim of sexual violence is effectively condemned to victimhood by the very discourse that promises to heal her, but denies her meaningful agency. At the same time, “other” victims of wartime sexual violence—such as men, boys, or women from the “enemy camp”—are marginalized. My analyses of these cases explore how therapeutic-judicial interventions can undermine their avowed aims, while concealing the power relations on which they rely and which they perpetuate.

The final chapter is based on fieldwork that I carried out in 2009 in The Hague, Netherlands, and examines the depoliticizing effects of juridical healing.² Drawing on interviews with ICTY and ICC officials, the chapter outlines the temporal and spatial coordinates of the rhetoric of healing. I focus on the ways in which such rhetoric enacts movements of deferral and displacement, and thus neutralizes potential forms of political activity. As an alternative, I examine Hannah Arendt’s account of politics, which is centered on collective, participatory action and antagonistic debate. Such a view allows us to imagine a more capable subject of politics, one with the potential to recover, resist, and revolt.

The Epilogue evaluates the current and future implications of the rhetoric of healing,

² See Appendix A and Appendix B

exploring alternative responses to extreme violence. I claim that juridical healing can be understood as the latest “last utopia”³ or the least “lesser evil”⁴ in a time when “human rights” and “humanitarianism” have become increasingly wed to military interventions. I proceed to trace additional contradictions in the discourse of juridical healing, in that contemporary IHL also identifies with the ideology of militarized humanitarianism in its endorsement of the UN doctrine of “Responsibility to Protect.” I close by suggesting that juridical healing presents the international community with an aporia that might ultimately be generative, insofar as it produces conditions under which the very politics it stifles might also be aroused. By rethinking and reframing this rhetoric, I hope to indicate avenues for differently imagining and producing the future—a future not destined to repeat or be dictated by the violence, injustice, and pain of the past.

³ Samuel Moyn. *The Last Utopia: Human Rights in History*. (Cambridge, MA: Belknap Press of Harvard University, 2012).

⁴ Eyal Weizman, *The Least of all Possible Evils: Humanitarian Violence from Arendt to Gaza*. (Brooklyn, New York: Verso, 2011), 18.

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In large part, this project grew out of several intellectual “encounters,” which preceded my arrival at Berkeley. Judith Butler’s nuanced and innovative theorizations of gender performativity, the constitutive vulnerability of the subject, and contingent foundations were seminal to my thinking as an activist and gender research coordinator in Europe in the 1990s.¹ Her contributions to these complex philosophical, ethical, but also deeply political topics helped me to situate my political and professional engagements at the time, and—eventually—act on my desire to pursue a graduate degree that would specifically allow me to explore the interdisciplinary problem of political subjectivities occasioned by contemporary global justice projects. In 2000, I participated in a feminist theory graduate seminar given by Rosi Braidotti and Judith Butler at the University of Utrecht in Holland, where I was living at the time. It was this formative experience that placed the Rhetoric Department on my graduate school radar, and supplied the catalyst for my application several years later.

Upon arriving at Berkeley, I was fortunate enough to attend several of Judith Butler’s graduate seminars. These experiences exposed me to new and complex bodies of knowledge, as well as to new modes of critical engagement, wherein I began to test out and refine my own ideas. In time, Judith became my dissertation co-chair, never failing to offer me useful feedback (which often took the form of incisive questions), thoughtful guidance, and plentiful encouragement. I cannot give measure of the formative impact of her thought and teaching on my own intellectual development, though I nonetheless hope to make abundantly clear my gratitude for the exceptional mentorship and support she has provided over the last decade.

¹ I am thinking primarily of these ideas as figured in *Gender Trouble: Feminism and the Politics of Subversion* (1990), *The Psychic Life of Power: Theories of Subjection* (1997) and “Contingent Foundations” in the volume *Feminists Theorize the Political*, coedited by Judith Butler and Joan Scott, (1992).

In 2004, I met Professor David Cohen, also of the Rhetoric Department. I enrolled in a graduate seminar he was teaching on international criminal tribunals—a personal, if minimally explored interest of mine that began to take root in the years that I lived in Holland (the “hub” of international humanitarian law, or IHL). David’s extensive knowledge of IHL, and his ability to capture the political significance of the trials and legal doctrines we studied helped me to establish, over time, a foothold in this burgeoning field. Although it is difficult to say precisely how or when, it was my exposure to this branch of law and my intellectual exchanges with David that helped me to settle upon the general parameters of my dissertation topic. In those early years, David served as an advisor who offered steadfast support of my fledgling ideas and as an interlocutor with whom I had several formative discussions on various contemporary issues within IHL, especially the adjudication of sexual violence as a war crime. The latter served as the gateway issue that brought my work deeper into contemporary IHL territory. David also aided in the process of making contacts in the field, which proved especially helpful for arranging and conducting research in The Hague, Netherlands in 2009. I have substantially benefited from David’s sharp mind, patience, generosity, and enduring interest in this project since its inception.

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² These concepts are primarily laid out in Brown’s essay “Wounded Attachments” in her text *States of Injury: Power and Freedom in Late Modernity* (1995).

³ She theorizes this phenomenon in her recently published book *Juridical Humanity: A Colonial History* (2012).

joined my committee, she has unfailingly given me cogent and generative responses to my work. I greatly admire her ability to immerse herself in her students' work, even in its most preliminary and disorganized phases, and help glean direction and meaning from it (even if that meaning involves substantially revising one's argument or doing more extensive research). I would leave a meeting with her with a sense of clarity and purpose, and would find myself hurrying home to document all of the ideas that came out of our discussion. As with all of my advisors, I truly hope there will be opportunities to continue such fruitful exchanges in the future.

I feel privileged to have been a part of the Rhetoric Department. In addition my aforementioned advisors, my project benefited from classes with and guidance from Kaja Silverman, Marianne Constable, and Pheng Cheah. My cohort provided a consistent sense of intellectual solidarity and camaraderie. And for that, I would like to thank Annika Thiem, Andrew Weiner, Nima Bassiri, Michelle Dizon, Katherine Lemons, Alice Kim, Richard Tran, and Ben Young. I would also like to thank the Graduate Student Affairs Officer Maxine Fredericksen for all her practical help and moral support during the eight years that we overlapped at the Rhetoric department. I would also like to thank Julie Napolin, Amy Rust, Scott Ferguson, Erica Levin, and Jessica Davies for supplying me helpful feedback and motivation as my project began to take gain momentum.

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*

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I dedicate this dissertation to Andrew, and to our son, Luka, without whose immeasurable support, love, and kinship these final acknowledgements and corresponding dissertation could not have been written. The last few years have been filled with unthinkable happiness, especially with the arrival of Luka, whose name means "bringer of light" and whose presence and personality live up to that name. He fills our home life and my every day with radiance. The last several years have also been filled with tragic loss and all-too-frequent reminders of our own vulnerability. There is no way to adequately express my appreciation for the ways in which Andrew and Luka have kept me buoyant despite the latter, and redirected my attention towards the former, the lighter. I am so pleased to embark upon on this next phase of my life with them by my side, and with all the joy, determination, and optimism that warrants. What great satisfaction it gives me to finally provide Luka with an unequivocal and exalted affirmation when he asks the oft-repeated question: "Mommy, are you done with your dissertation yet?"

⁴ This phrase comes from Stephan Landsman's essay "Those Who Remember the Past May Not Be Condemned to Repeat It" (2002).

Preface

With the help of new media technologies, the 1990s witnessed, on a global scale, scenes of atrocity that followed upon the end of the Cold War.¹ The world watched in horror as scenes of Serbian-run concentration camps were televised around the globe, in full defiance of the “never again” pledge uttered in response to the Holocaust a half century earlier.² The harrowing images and stories that came out of the Yugoslavian crisis and the Rwandan genocide of the early 1990s sparked international outrage and served as key catalysts for the establishment of the United Nations international, ad hoc tribunals—the International Criminal Tribunal for the Former Yugoslavia located in the Hague, Netherlands (ICTY, 1993) and the International Tribunal for Rwanda, located in Arusha, Tanzania (ICTR, 1994).³

This project can be traced back to the turn of the new Millennium, when I began to follow closely the news coverage of the youngest member of this new generation of international criminal courts—the first permanent International Criminal Court (or ICC). Living in close proximity to the nerve-center of IHL in 2000 (The Hague, Netherlands), I became acutely aware of the high hopes pinned on the ICC, and particularly attuned to the political controversies and oppositions that slowed down its transposition from ideal to legal reality (especially those related to my home country’s refusal to ratify its founding treaty).

This dissertation was born out of a set of questions that arose from those first encounters. In particular, I wondered what could realistically be expected from this expanding branch of law that had been the object of so much media attention in the 1990s, especially with respect to the first two international “ad hoc” tribunals. Like those temporary courts with limited temporal and geographical jurisdiction, the newest court with “universal jurisdiction” would operate in the name of humanity and would aspire to prevent and punish the gravest offences “against humanity”—a tall order, indeed. But what are the implications of turning to law to solve such overwhelming, disturbing, and escalating

¹ Ruti G. Tietel, *Humanity's Law* (Oxford and New York: Oxford University Press, 2011), 3–6.

² By the early 1990s the United Nations labeled several of these Serbian-run camps populated by emaciated Bosnian and Croat prisoners “death camp” and Human Rights Watch classified several of them as “concentration camps,” including the most infamous—the Omarska and Trnopolje camps near the city of Prijedor (United Nations Security Council, *The Prijedor Report: Final Report of the United Nations Commission of Experts Established Pursuant to Security Resolution 780 (1992)*, S/1994/674/Add.2, <http://www.ess.uwe.ac.uk/comexpert/anx/V.htm>; Human Rights Watch, *The Unindicted: Reaping the Rewards of “Ethnic Cleansing” in Prijedor*, <http://www.unhcr.org/refworld/country>). See also: Kelly D. Askin, “New York Times, October 29, 1995.

³ Argentine Forensic Anthropology Team, “Bosnia: A Mission to Assist with Field and Laboratory Work for the International Criminal Tribunal to the Former Yugoslavia in its Investigation into Human Rights Violations in Bosnia,” *EEAF1999 Annual Report*, 22–30; Stephen Engelberg, Tim Weiner, Raymond Bonner, and Jane Perlez, “Massacre in Bosnia; Srebrenica: The Days of Slaughter: How the Serb's Killing of Srebrenica Unfolded,” *New York Times*, October 29, 1995. Accessible at: <http://query.nytimes.com/gst/fullpage.html?res=990CEFD61F3DF93AA15753C1A963958260&pagewanted=all>

global political and ethical problems? In other words, what might it mean to want so much from this very promising, yet untested and putatively universal law?

As I pondered these questions, I began to notice something else in those news reports coming out of the ICC's earliest years (in that fragile moment between its establishment on paper—the "Rome Statute" ratified in July, 1998—and the official commencement of its work in July, 2002): Media coverage of the court was littered with references (made on the part of diplomats, court officials, and representatives of non-governmental organizations) to the court's responsibility to the victims and to bring restorative justice that would offer "healing" for war-torn communities. This was a legal goal distinct from achieving retributive justice that would punish the worst offenders. This struck me as a novel and curious form of justice and a new sort of political tool for addressing so-called atrocity crimes. I came to understand this development as an emergent international discourse replete with its own governing norms, practices, modes of extension, targets, and effects, and which I have placed under the rubric of *juridical healing*.

At the time, I viewed the creation of the ICC and the proliferation of international criminal tribunals in general as an opportunity for political reflection on how best to respond to and prevent extreme violence. The existence of the ICC's neighbor court (and older sibling)—the ICTY—was a constant and concrete reminder of the possibility for something akin to a global community to come together in the pursuit of justice to punish gross violations of the Geneva Conventions. It also clearly indicated the limited capacity of a legal institution to alter the conditions that give rise to violence and redress the misery and loss that violence produces. The advent of a permanent international criminal court thus felt like a chance for a renewed discussion about how to finally live up to the pledge of "never again" with the help of new resources and increased international support, and how best to respond when extreme violence erupts despite these new safeguards. It offered an opportunity to begin the process of imagining a new global political community in the wake of the Cold War and to reflect critically on the role of political actors within and beyond states in minimizing extreme violence and attenuating its destructive impact. And yet, as I point out in the first chapter of this dissertation, the ascendance of juridical healing has instead entailed a retreat from this sort of critical imagining.

*

I moved to the United States in the summer of 2001 to begin the process of applying to graduate schools. I did so in the months that followed the events of September 11th, 2001, with the aforementioned questions weighing especially heavily on my mind (that is, questions about the viability of the construction of something like a global politics rooted in a deep commitment to breaking cycles of violence in less violent ways, and attenuating the suffering produced by outbreaks of political violence (so often cast in terms of a notion of global responsibility that assumed the ethnic and/or moral superiority of one group to intervene in the affairs of another). Several seminars I took in the early years of my graduate work at the University of California, Berkeley helped me to

crystalize my interest in what I have come to call the “therapeutic turn” in IHL.⁴ IHL's latest incarnation as a form of justice that heals raises important questions about the kind of political community presumed, produced, and made possible when discourses of justice, peace, and democracy are transposed from a national to a global context, powered by the nebulous “international community” with no particular political procedures in place outside of those happened to be in use by UN member state representatives.⁵ In short, it begs the question: What are the possibilities for critique, civic debate, and contestation under these odd conditions? The question becomes all the more pertinent when we realize that that which supposedly shores up this expansive and differentiated public domain—shared universal human rights and a global commitment to justice—is meant to bind us together and heal the psychic wounds some humans inflict on others, proves problematic. It is regarded either as highly impracticable, given such antagonistic geo-political conditions, or is considered so sacred and universal that it cannot be made contingent upon the collective deliberations of a public that has invariably has many points of view.

My dissertation sets out to demonstrate that the extolled model of juridical healing for all may mitigate suffering for some victims, but fails to address the underlying causes of extreme violence, and itself colludes with forms of domination and violence. In the five chapters that comprise this work, I shed light on the ways in which juridical healing functions as a new modality of power that can have deleterious effects not only on victims, but those who subscribe to the project of healing through international justice mechanisms. Focusing on *international* criminal tribunals—namely, the ICTY the ICTR and the ICC—I point to the problematic ways in which the discourse of juridical healing eludes serious reflection on the *political* work that it performs, makes possible, and forecloses, and in particular, the subjects and practices it authorizes, abrades, and alters. In particular, I point to the lamentable strategies of depoliticization associated with juridical healing, quelling the very global political culture based on participation and deliberation that this new justice could be thought to bring about.

⁴ Especially Judith Butler's seminar—jointly listed by the Rhetoric Department and Comparative Literature Departments—entitled "Theories of the Subject" (Fall, 2002); Wendy Brown's "Sovereignty" seminar in the Political Science Department (Spring 2004); and David Cohen's Rhetoric Department seminar on "International Criminal Tribunals" (Spring, 2005).

⁵ According to Edison W. Dick, a member of the UNA/USA-United Nations Association/USA, who spoke at a workshop at the United Nations 50th Anniversary Conference in September, 1995 in Washington, D. C., “More international law has been developed through the UN system during the past fifty years than in the entire previous history of mankind. The UN has been directly responsible for the conclusion of more than 465 multi-lateral agreements covering virtually every area of state interaction and human endeavor from the Law of the Sea to narcotic drug control, from the environment to international trade and copyright law, from arms control to the advancement in women’s rights....The development of international law to the extent we know it today would not have been possible outside the framework of the UN.” I note this as a way to underscore the immense amount of legal but also political power afforded this monopoly on international law, especially IHL, and to point to absence of democratic grounds for political deliberation and participation by “citizens of the world” at the level of the so-called “international community” cited in Joan Veon’s “International Criminal Court—Armageddon Set in Utopia,” <http://www.womensgroup.org/3ICCREPO.html> (accessed April, 2012).

Chapter One situates the general problematic of the dissertation historically and theoretically, arguing that juridical healing has become a hegemonic norm, and that its normative status has shielded its workings from much-needed critical examination as a form of power.

Chapter Two turns to the scholarly literature on the phenomenon of juridical healing. It sets out to establish that scholars tend to take for granted the core terms of the therapeutic turn, proceeding as if there were consensus on their meaning and value. I trace in the chapter the contours of what I call the “disclosure for closure model,” which dominates this burgeoning field, premised on the conception that victims’ narratives of suffering, recounted as testimony, can serve as the cornerstones of truth and the pathway to healing. I maintain that, instead of functioning as a critical resource for the courts, the literature instead seems to reify the reductive accounts of juridical healing promulgated by court officials and diplomats, reflecting a myopic tendency to overlook alternative modes—be they legal, quasi- or extra-legal—of conceiving of, and responding to injury and remedy in post-conflict situations.

Chapter Three pursues the problem of this new form of justice’s credibility as law, using a genealogical approach to illustrate the ways in which this discourse paradoxically represents a means of legitimization for these new courts, while also leading them into uncharted legal territory. The tribunals must seek recourse to their legal precedents (the post-World War Two Nuremberg and Tokyo trials), in order to establish themselves as legitimate members of the IHL family tree, but they must also take distance from those precedents, insofar as the latter are often accused of dispensing “victors” justice.” In tracing juridical healing’s points of emergence, one begins to see that this form of justice produces a “victims’ justice” that is primarily related to securing these new courts’ legitimacy rather than with healing victims.

The penultimate chapter—Chapter Four—turns to specific tribunal cases concretely to demonstrate that IHL’s legal remedies to sexual violence in the context of armed conflict can come with unforeseen costs. For instance, I seek to show how the female victim of sexual violence is confined to her status as victim by the very discourse that promises her healing and emancipation from trauma. To identify these women and girls with their injuries is to deny them agency, leaving little room for the possibility of moving beyond the time-space of trauma. My analyses point to the ways in which the troubling norms of gender justice promulgated by the courts are central to the operation and expansion of juridical healing as a form of power—as something that campaigns of gender justice and these victims cannot do without. These legal interventions at times exceed and undermine their avowed aims, efface the crimes and injuries in question, instrumentalize the victims and injuries they are meant to recognize and palliate, and conceal the relations of power that condition their articulation.

The final chapter stems from fieldwork I conducted in 2009 in The Hague, Netherlands,⁶ and approaches the problem of juridical healing as a form of depoliticization. Drawing on interviews with court officials at the ICTY and ICC, I examine the ways in which court

⁶ See Appendix A and Appendix B

discourse relies on the strategies of deferral and displacement. I argue that the promise of juridical healing constitutes a form of governance that seeks to neutralize political mobilization and dissent. The victim in this scenario passively waits for healing, comforted by court rhetoric that suggests that justice-as-healing is indeed near and will indeed arrive soon. I look to Hannah Arendt's account of politics to show how this form of power forestalls forms of political subjectivity and mobilization in the present that seem necessary for renewing both individuals and societies ravaged by war and producing a shared and peaceful future. Specifically, it precludes a substantive, participatory politics centered on collective action and practices of deliberation in the context of a population that holds divergent views. Arendt's account presumes the subject's potential for resistance and resilience, as well as its need for working in concert with others (what she calls plurality) to produce something new (what she refers to as natality, and which includes revolution).

The Epilogue considers the geo-political significance of juridical healing for the current era, proposing that it represents a last bastion of hope for humanitarianism and for humanity (as a collectivity united in its commitment to peace and non-violence towards itself). I also question the implications of IHL's endorsement of the United Nation's "Responsibility to Protect" doctrine, which authorizes the use of military force, and which brings the humanitarianism of IHL into close proximity to "humanitarian intervention" (that is, armed conflict rationalized with recourse to the ideals of human rights and humanitarian law). I conclude the dissertation with a meditation on the ways in which juridical healing presents the international community with an aporia, and suggest that its aporetic character paradoxically produces conditions under which the very politics it stifles might also be ignited. Short of offering any grand conclusions, this project has sought to shed light on a new juridico-therapeutic modality of power's modes and effects—a first step towards imagining a world in which a global political community can be defined less by its shared horror or victimization and false promises of healing, and more by its ability to actively resist the root causes and harmful repercussions of extreme violence.

Chapter 1

Introduction to the Therapeutic Turn: International Humanitarian Law on a “Mission of Healing”¹

I. Justice and the Project of “Closing Wounds

On May 8, 1998, the secretary-general of the United Nations, Kofi Annan, addressed the Rwandan Parliament. From the outset, Annan made clear that the International Criminal Tribunal of Rwanda (ICTR) was at the center of restoring peace and justice to the country ravaged by genocide just four years earlier. Annan posited yet another tribunal objective beyond peace and justice: to *heal* the traumatized nation and individual victims of genocidal violence. Championing the work of the tribunal, he proclaimed, “The ICTR delivered the first-ever judgment of genocide by an international court. There can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law.”² If we follow the metonymic chain, healing marks the *telos* of the project of justice proffered by this international tribunal and its law. Annan goes on to develop this putatively inextricable link between the rule of law, justice, and healing—and in particular international humanitarian law (IHL) in the form of a UN ad hoc tribunal—when he declares:

*I have come to Rwanda today on a mission of healing—to help heal the wounds and divisions that still torment your nation and to pledge the support of the United Nations. ... But to be complete, justice must be carried out with due process and above reproach, so that it can promote the process of healing that is so vital to Rwanda’s future. ... Justice, however, must also serve a larger purpose—the purpose of closing wounds, of coexistence and of trust between the Hutu and Tutsi communities of Rwanda.*³

So healing becomes the “larger purpose” of justice in this juridico-political scene. Reading Annan’s statement, we find ourselves adrift amidst a dizzying array of medical metaphors of wounded communities and individuals, quasi-religious references to healing missions, even “larger projects” of “closing wounds,” and images of politico-judicial “doctors” whose nostrums are dispensed to those in need of healing wherein the justice that the United Nations prescribes resides “above reproach.” But what kind of healing might victims of genocide expect from the tribunal’s justice? How might an international

¹ A reference to Kofi Annan’s quotation below: Kofi Annan, secretary-general to the United Nations, “Secretary-General, in ‘Mission of Healing’ to Rwanda, Pledges Support of United Nations for Country’s Search for Peace and Progress,” press release, Kigali, Rwanda, May 6, 1998, <http://www.un.org/News/Press/docs/1998/19980506.SGSM6552.html>.

² Ibid.

³ Ibid.

court and the trials it conducts produce the essential conditions for healing predicated on peace and justice? How might we articulate the relationship forged between healing and justice in this discourse? And of what is this justice-as-healing comprised, in the first place?

I contend that Annan's rhetoric of juridical healing is symptomatic of a much broader trend in IHL, its international criminal tribunals, and in the growing field of international "post-atrocity" politics more generally. Over the course of the last two decades, justice that *heals* has increasingly been figured as both grounds for and *telos* of this law, and as a preferred means of bringing about justice in the wake of ethnic and political violence in particular. I call this burgeoning phenomenon, its attendant norms and sentiments, and its concomitant practices "the therapeutic turn" in IHL. I assign it this name not because I presume that it delivers on its promise to provide therapeutic results for those individuals and groups situated in legal and political discourse as "victims" but as a means of capturing the general and unifying presumption on which this collection of practices and rhetoric rest: namely, that IHL can and should have therapeutic effects for the victims it brings into its fold. Justice, according to this view, is not justice if it fails to include this victim-focused, therapeutic dimension. Legal scholar Jose Alvarez's description of the current climate of IHL captures this increasingly common conception of justice

*At a minimum the international criminal process is supposed to afford opportunities for victims to tell their stories, to find psychological comfort through their participation at trial, to rehabilitate their reputations, and to draw comfort from the defendant's shame, punishment, and acts of contrition.*⁴

Note that these restorative aims are not cast here as fringe benefits of the "international criminal process," but as the *minimum* requirements for success. This increasingly prominent account, with its promethean aspirations and its attendant presuppositions about the role of law in the wake of atrocity shapes, directs, and justifies the therapeutic turn, usually in the absence of specification about the constituents of "therapeutic" justice for those in need of healing, or the best means of achieving it.

This first chapter argues that "healing" has become a governing norm of justice in the discourse of IHL such that healing has become a matter of justice. As healing has ventured beyond the confines of medicine and psychology—as it has been folded into justice, such that justice seems to supply the means to the healing, the end—one finds both a valorization of therapeutically oriented justice, as well as a growing expectation that this form of justice will become available. In large part, the justice to which priorities of healing give rise has enjoyed a status as justice "above reproach," both reflecting and fostering ideal conditions for juridical healing's normative sedimentation or naturalization (a process I detail below). This chapter lays out the argument that "juridical healing" has, over the course of the last two decades, attained normative status, and calls

⁴ Jose Alvarez, "Rush to Closure: Lessons of the Tadić Judgment," *Michigan Law Review* 96, no. 7 (1998): 2036–38.

for subjecting this multivalent norm to critical analysis, while also bringing into relief the negative repercussions of failing to do so.

II. Turning Toward the Therapeutic

The final decades of the twentieth century and the first decade of the new millennium witnessed an explosion of international criminal tribunals. The so-called tribunal era commenced with the establishment of the International Criminal Tribunal for the Former Yugoslavia, or ICTY, in 1993, followed by the creation of the ICTR, and several other tribunals since, including the first International Criminal Court (ICC).⁵ David Scheffer, a self-described “carpenter” of these very war crimes tribunals, describes the justice coming out of this period as the “most ambitious judicial experiments in the history of humankind—a global assault on the architects of atrocities.”⁶ This novel and enterprising justice that assaults not only atrocity’s architects but also the suffering that atrocity engenders makes its most impressive and sustained appearance in these contemporary international criminal tribunals whose cases, decisions, programs, rhetoric, and ethos serve as the central objects of this analysis.

A first indication of a new justice that heals “above reproach” is to be found in the fact that healing by means of IHL’s justice is promoted across a wide range of venues, in multiple ways, and to different ends, but without being given a rigorous or clear definition. Matias Hellman of the ICTY’s Outreach program captures this normative shift when he describes therapeutic justice as “some kind of trend” that has become “like the standard” for the international criminal courts, which had “suddenly sprang up during the 1990s.”⁷ He claims that with the proliferation of these courts came a new “fashion”—justice that seeks to heal—and this justice has continued to hold sway.⁸ Yet despite the therapeutic turn’s popularity, prevalence, and multiple manifestations, its central features—its conditions of possibility, modalities, aims, targets, and effects—have not received sufficient attention by its promoters, nor have they been subjected to careful and critical analysis, or been defined by its proponents. In a word, the legal landscape of post-conflict justice that seeks to heal remains both a nebulous and uncharted one, and yet is often treated as a known entity, a given, and a standard practice.

⁵ David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2012), 4. United Nations Security Council (SC), Resolution 808, “Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International humanitarian Law Committed in the Territory of the Former Yugoslavia, February 22, 1993,” www.un.org/Docs/scres/1993/scres93.htm; UN SC, Resolution 955, “The Statute of International Rwanda Criminal Tribunal for Rwanda,” <http://untreaty.un.org/cod/avl/ha/icttr/icttr.html>; UN General Assembly (GA), “Rome Statute of the International Criminal Court, July 17, 1998,” <http://untreaty.un.org/cod/icc/statute/rome.htm> (hereafter, “The ICTY Statute,” The “ICTR Statute,” and the ICC or “Rome Statute,” respectively).

⁶ Scheffer, *All the Missing Souls*, 2.

⁷ Diana Anders, phone interview with Matias Hellman, October 1, 2009.

*Note: The views expressed by all of the individual interviewees in this paper are their personal views only, and do not necessarily reflect the opinions or positions of the institutions with which they are associated (e.g., ICC, ICTY).

⁸ *Ibid.*

In fact, if taken up as a subject of inquiry at all, these queries rarely venture beyond the question of whether contemporary international courts can facilitate healing, proceeding as if the content, terms, and criteria of healing were obvious. The manner in which healing is understood and mobilized with respect to IHL courts is far from a settled, singular, or straightforward matter—as some of the examples of tribunal rhetoric examined below and in chapter 2 are meant to attest. Its normalization has discouraged analyses of its key features or its implications for its objects, subjects, and our current global historico-political moment. Such is the way of the norm.

Judith Butler encourages an understanding of norms as regulatory ideals that “wield enormous power” but are, in effect, “fiction[s] that operates within discourse,” are “discursively and institutionally sustained,” and authorized as truth.⁹ Drawing on Michel Foucault’s account of the norm, her work interrogates the hegemonic installation and calcification of categories of thought and meaning (especially as related to ontological categories, such as male and female, the human) treated as “truth,” as something natural, as opposed to produced—a discursive construct produced through relations of power. Following Foucault, she indicates that the production of truth regulate subjects. Foucault centers his attention on the ways in which norms produce “the arrangement of domains where the practices of true and false can be at once regulated and relevant.”¹⁰ When these conditions of relevance are treated as simply given and true, they obscure the fact that they shift over time and place and are generated from historically contingent valuations—a “truth” that, if exposed, could threaten to disrupt a given normative framework’s authority.

By uncovering veiled presumptions grounding the normative edifice of post-atrocity justice as healing, this dissertation charts and analyzes the key ways in which the promises and practices of juridical healing mark the domains of the admissible and inadmissible in the public sphere, and thus operate as configurations of power. At issue is the question of what precisely this power and its attendant norms *do*, and specifically, the kinds of subjects and cultures it brings into being, authorizes, abrades, or transforms. Following this line of inquiry, I consider the specific ways in which this form of justice legitimizes and extends itself, how the therapeutic promise is central to its reproduction, and thus the neglected and eschewed effects of its workings. The argumentative red thread connecting the different critical analyses found in each chapter is the following proposition: This particular form of justice operating under the guise of a universal, neutral, apolitical, humane justice that heals (with its liberatory connotations) can at times collude with and engender arrangements of domination and regulation. One of the central and forthcoming theses of this analysis is that the discourse of juridical healing forecloses forms of political agency and mobilization for the very populations it sets out to heal, thereby suggesting that contemporary International Humanitarian Law cannot be relied upon to deliver the therapeutic results it promises. This chapter begins the process of

⁹ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 335.

¹⁰ Michel Foucault, “Table Ronde du 20 mai 1978,” in *Dits et Écrits, tome 4: 1980–1988* (Paris: Gallimard, 1994), 20–34.

mapping the emergence of juridical healing as a mode of power, attending to the fact that the law in question does not specifically codify, dictate or enforce “healing,” yet there is force or power involved that is still somehow legal in character while working by way of normative logic.

III. Justice Above and Beyond Reproach’s Reach

Annan’s pronouncements on the topic of healing by way of recourse to law are but the tip of the proverbial juridical healing iceberg, composed of multiple layers and forms of healing-oriented rhetoric and practices, aimed at the alleviation of collective and individual traumas left in the wake of extreme violence. Victim testimony, or “telling one’s story” of trauma in a supportive courtroom setting, is cast as the primary means by which a therapeutic process is set in motion, although reparations, prosecuting war criminals, defendants’ confession of guilt, and setting the historical record straight are also cited as having therapeutic value for victims. But for all the talk of individual “healing,” “catharsis,” and “closure,” and giving victims a “voice”—illustrations of which abound, some of which are supplied below—there exists a deafening silence about the relationship between those terms, the criteria for success, or the effects produced.

When confronted with Annan’s justice “above reproach,” or with similar statements uttered by his successor, UN Secretary-General Ban Ki Moon, it’s difficult to rid oneself of the feeling that one dare not question its universal, ethical precepts or the practices that animate them. Illustrative of contemporary IHL’s reluctance to invite internal or external scrutiny or “reproach” of its courts, the current secretary-general emphasized that the work of the ICC judges was to be “beyond reproach” in his inaugural statement to the judges of the ICC. These proclamations uttered by some of the most influential UN figures spearheading a new form of justice evince that these new courts promulgating therapeutically steeped justice have become the new “sacred cow” in international justice work.¹¹

Justice that operates under the mantle of justice “above reproach” calls out for closer examination, insofar as justice “above” criticism and interpretation of its elements, modes of dissemination, and effects risks running counter to the spirit and goals of justice.¹²

¹¹ This refers to the idea that, in the latter part of the last century, humanitarian aid work, especially as dispensed by the most recognized humanitarian organizations, such as the International Committee for the Red Cross, occupied a position as a “sacred cow”; that is, too politically neutral and too practically and ethically necessary to subject to serious criticism (J. F. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Boulder, CO: Westview Press, 1996). But with the upsurge of “humanitarian intervention” and more politically steeped humanitarian missions, humanitarianism has come under considerable fire. For contemporary accounts of humanitarianism’s move from neutrality, compassion, and aid to an instrument of politics, even war, see, for example: Eyal Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (Brooklyn, NY: Verso, 2011); and David Reiff, *A Bed for the Night: Humanitarianism in Crisis* (New York: Simon and Schuster, 2002).

¹² I focus on Annan’s rhetoric because it indexes a broader culture of a new international justice, but also because he has occupied a privileged place in the international humanitarian imaginary of the 1990s—when the therapeutic turn gained considerable momentum and juridical healing made its most bold appearance to date. Annan stands out as one of the most vocal promoters of juridical healing among high-ranking UN officials, sometimes considered the “father” of contemporary peace and justice. See, for example:

After all, what are the possibilities of justice when it is but an abstract concept articulated from on high, institutionally codified, and cordoned off from those practices that allow for its renewal and reinvigoration, namely critical democratic practices of public deliberation and contestation?

The claim or suggestion that the justice meted out by these courts lies (or should lie) above or beyond reproach seems especially forceful when justice is contingent upon a commitment to healing victims. After all, a critique of this justice and its administrators can easily be dismissed as “against” victims (or worse—sympathetic with perpetrators who are being tried and convicted of abhorrent acts of violence), or as sympathetic with a self-interested, protectionist politics that views international law as a threat to national sovereignty—with the United States serving as one the most obvious examples.¹³ In sum, it appears that, for those supporting these relatively new justice initiatives and their legal apertures, the potential risks of critical reflection seem to outweigh the benefits in the face of proliferating and grave injustices, the colossal task of fighting impunity in the wake of these injustices, and a set of UN-backed laws and institutions whose financial and political positions have been shaky since the first contemporary tribunals were created in the early 1990s.¹⁴ References to justice “above reproach” are of course based on an assumption that its privileged status is afforded solely because of the impeccable and universal standards to which these courts’ functionaries adhere. But the standards themselves hide behind the protection of presumably indisputable norms and impeachable practice, claiming exceptional status as court officials hold forth on the imperative of holding no one above the law. In this paradigm, the law is invested with the power of interpretation and reprove, but that power is not to be turned toward its justice and justices.

Judith Butler’s account of the problematic effects of the foreclosure of critical practices alerts us to the potential repercussions of a novel, highly ambitious, morally saturated,

MacArthur Foundation “Former UN Secretary-General Kofi Annan Receives MacArthur Award for International Justice,” press release, March 20, 2008, <http://www.macfound.org/press/press-releases/former-un-secretary-general-kofi-annan-receives-macarthur-award-for-international-justice>.

¹³ The United States’ refusal to ratify the ICC is a case in point of this kind of exceptionalism: Under President Clinton, the US signed the Rome Statute, along with 139 other countries in 2000. The statute established the ICC. In, 2002, the Bush administration refused to ratify the Rome Statute and nullified its earlier signature, thereby withdrawing its support. In the name of sovereignty, the Bush administration sought to keep US citizens and military personnel exempt from prosecution under this new mechanism of international law. For more on US exceptionalism, the United States’ refusal to support the ICC and its concern for the erosion of sovereignty, see Madeline Morris, “The United States and the International Criminal Court,” *Law and Contemporary Problems* 64, no. 1 (Winter 2001); Michael P. Scharf, “The Politics behind US Opposition to the International Criminal Court,” *Brown Journal of World Affairs* 6 (Winter/Spring 1999): 97; Thomas Nagel, “The Promise of Global Justice,” *Philosophy & Public Affairs* (Spring 2005): 10–16; John Bellinger III, “International Courts and Tribunals and the Rule of Law,” in *The Sword and the Scales: The United States and International Courts and Tribunals*, ed. Cesare P. R. Romano (Cambridge, UK: Cambridge University Press, 2009), 8–9; Tyler Harrison, “Realism, Sovereignty and International Relations: An Examination of Power Politics in the Age of Globalization” (Phd dissertation, University of South Florida, 2006), 46–48.

¹⁴ Rama Mani, “Balancing Peace and Justice in the Aftermath of Violent Conflict,” *International Development* 48, no. 3 (2005): 28; Ralph Zacklin, “The Failings of the Ad Hoc International Tribunals,” *Journal of International Criminal Justice* 2 (2004): 545.

and widely celebrated form of justice situated “above reproach.” Butler makes clear the stakes of foreclosing contestation when she avers:

*The foreclosure of critique empties the public domain of debate and democratic contestation itself, so that debate becomes the exchange of views among the like-minded, and criticism, which ought to be central to any democracy, becomes a fugitive and suspect activity.*¹⁵

Applying this understanding to the question of justice currently promulgated by IHL officials, and the so-called global humanitarian justice that heals, it becomes apparent that its terms are determined within a closed circuit of diplomatic elites, lawyers, and legal scholars, and the influence of a few powerful court-affiliated nongovernmental organizations (NGOs).¹⁶ For the nascent field of IHL and the values of liberal democracy and justice its proponents align with it, the “public domain” is at once everywhere and nowhere in this schema: it is global and universal, yet it transcends what Annan infers is a dangerous and (morally) lower latitude of “reproach” or criticism. What are the justifications for, and implications of this special status accorded to this “new” and more expansive form of legal remedy that heals? And what kind of “public” might come together to deliberate on, or contest the terms and effects of this sacrosanct justice said to heal, and by which means? Recalling that the term “reproach” stems from the old French *reprochier*, to ‘bring back’ or near, I want to reproach or bring back/make nearer the new form of justice Annan outlines—justice as healing—from its hollowed position, even if this exercise risks being dismissed as somehow counter to justice, especially justice for victims.

In contrast to Annan’s account, I am operating here with an understanding of justice that cannot afford to be immune to what Butler calls critique, which is akin to what feminist political theorist Linda Zerilli places under the rubric of “theory.” Theory in this vein constitutes an active, radical imagining of the present as otherwise. In other words,

¹⁵ Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London and New York: Verso, 2004), xx.

¹⁶ The influence of NGOs on international law, especially its humanitarian and human rights branches, has been called “the new diplomacy” (David Davenport, “The New Diplomacy,” Hoover Institution, Stanford University, no. 116, December 1, 2002, <http://www.hoover.org/publications/policy-review/article/8102>). Human Rights Watch, Amnesty International, and the Coalition for the International Criminal Court, for instance, have had significant and sustained influence on outlining and implementing ICC programs and procedures, not to mention garnering support for the establishment of the court in the run up to the Rome Conference of 1998 and after it opened its doors in 2002. A chief mode of influence for NGOs was their expertise, writes Victor Peskin: “States – particularly small ones that lacked diplomatic resources – often looked to NGOs to assess proposals on the design of the future court” (Victor Peskin, “Review of Michael J. Struett’s ‘The Politics Of Constructing The International Criminal Court: NGOs, Discourse, And Agency,’” *Law and Politics Book Review* 19, no. 1, January 2009, 14–20). The Coalition for the International Criminal Court (CICC) is now comprised of hundreds of organizations and has become a formidable lobbying force. In his book, Struett claims that NGOs helped shape the debate in Rome by developing “a normative discourse between nongovernmental organizations, lawyers, academics, international civil servants, and states,” thereby rendering NGOs more influential than states. Considered less swayed by particular state self-interest, Struett argues that the NGO discourse “was morally resonant; consequently they were influential” (Michael Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*, New York: Palgrave Macmillan, 2008), 23.

theorizing in this sense is reflexive and creative—it cannot be done in a vacuum or divorced from collective, political scenes of the production of and authorization of institutionalized meaning. For Zerilli, theory becomes the scene of dynamic contestation of, and ongoing judgments about what is (i.e., established truths) and what could be. “Theorizing” as a practice allows us to imagine alternate potentialities, political sensibilities, subjectivities, and institutional arrangements, or what she calls “figures of the newly thinkable.”¹⁷ With this account of theory as an ongoing critical, collectively inspired practice, the relationship between theory and praxis as mutually exclusive is recast. Theory thereby cuts across and even brings together scholarly inquiries and democratic political projects, departing from understandings of theory as something scholars contrive and political actors either put into practice or oppose.

Zerilli’s account helps to underscore to a key limitation of the therapeutic turn, and one that this dissertation highlights and problematizes; that is: an ethical and political claim cloaked as nonpartisan truth and authorized by a fledgling form of international law, wherein justice by way of IHL is figured as something that can and must heal traumatic injury, and as a good and just development that need not (and best not) be questioned. Both Butler’s and Zerilli’s contributions to the topic of foreclosed contestation challenge us to contest the formal problem of untouchable justice that forestalls critique of its constitutive elements, as well as with the conceits of this particular configuration of justice in contemporary IHL. Zerilli’s understanding of “theory” glossed here provides us with a lens through which to analyze the therapeutic turn, the ways it manifests in contemporary politico-juridical landscapes, as well as imagine what post-conflict justice could be.

Without imposing a definitive account of what justice *is*, I rather propose an understanding of what justice could be. In this vein, justice is imagined as “theoretical” in a Zerillian sense, insofar as it entails a critical and ongoing practice or even struggle whose means and ends are determined through deliberative, collective means—rather than severed from democratic political life and academic critique. Justice on this model—as opposed to the model typically employed in contemporary IHL and its courts, with its highly individualistic interpretation of crimes executed by one individual on another and with its abstracted and universal “truths” “above reproach” far away from the conflicts and cultures they concern themselves with—cannot be abstracted from psychological social, economic, and political nature of the crimes in question, or from the responses and remedies established in the face of those crimes. It is in the spirit of a critical, deliberatory, and collective practice of justice (or justice-making), and in an effort to provide an alternative to the hegemonic form of contemporary juridical healing analyzed here, that I turn to Hannah Arendt’s notion of politics. As elaborated upon in later chapters, Arendt’s understanding of politics is intimately tethered to particular forms of

¹⁷ Zerilli borrows this phrase from Cornelius Castoriadis. These figures are thought to serve as the condition of radical, critical thought. For Zerilli, this mode of thinking or reflection can provide the basis for a new kind of democratic politics of freedom, centered not on identity (who you are), but rather, on collective rituals of shared judgment (Linda Zerilli, *Feminism and the Abyss of Freedom*, Chicago: University of Chicago Press, 2005, 28–29). Zerilli’s work dovetails with, and draws on Hannah Arendt’s account of politics, which will be taken up in subsequent chapters, especially chapter 5.

human activity rooted in collective organization and participation, especially deliberation and dissent. Neither justice nor politics on this model can be severed from the particular historical conditions at hand, or dictated by abstracted rules and established "truths."

IV. Powerful Law

As my claims about the conceits of juridical healing in IHL anticipates, my analysis assumes a particular account of the law, one which takes distance from the following hegemonic presupposition (within IHL discourse): that which functions under the banner of IHL reflects universal rules that attenuate suffering and administer justice essentially uncontaminated by power and politics. Rather, I understand the law to function as a form of politics constituted through relations of power. As such, the operations of power animating this field of law can never be "just" a negation of power or violence; they are always already productive of new forms of power, and their effects inevitably exceed their official and proclaimed aims and dominion. In describing political projects, political theorist Wendy Brown describes this phenomenon in the following, cogent way:

*The nature of every significant political project to ripple beyond the project's avowed target and action, for the simple reason that all such projects are situated in political historical, social, and economic contexts with which they dynamically engage.*¹⁸

In the case of IHL, we see the ways in which the project of justice finds itself deeply immersed in what are at times cast as extra-judicial goals—such as healing war-ravaged communities and individuals, and facilitating political change—even if the avowed target and action are prosecutions, justice, and those features conventionally thought to be internal to a retributive law's scope. With Brown, I draw on Michel Foucault's critique of law, which departs from a common ideal held by advocates of tribunals and advocacy groups more generally; that is, the assumption of (at least this) law's neutrality and external relation to the messy worlds of politics, economics, culture, and their concomitant modes of violence. Foucault turns this assumption—so central to liberal accounts of law, from which IHL springs—on its head when he writes:

*It would be false to think that total war exhausts itself in its own contradictions and ends by renouncing violence and submitting to civil laws. On the contrary, the law is a calculated and relentless pleasure, delight in the promised blood, which permits the perpetual instigation of new dominations and the staging of meticulously repeated schemes of violence. ... Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.*¹⁹

¹⁹ Michel Foucault, "Nietzsche, Genealogy, History," *The Foucault Reader*, ed. Paul Rabinow (New York: Random House, 1984), 85.

Foucault problematizes liberal conceptions of law set in opposition to violence, in which law marks a point of rupture and the disorder of the past is replaced by the ordering function of juridical institutions. When the liberal paradigm of law is applied to campaigns for international justice, we see a tendency to imagine that politics and power can be excised from the domain of the law. This entails a legitimating project of erecting certain boundaries and eliminating others, especially: upholding a firm boundary between justice-as-law on the one hand and politics and violence on the other; expanding law's parameters to include war's victims in addition to its perpetrators. These two moves together work to project an image of this law as a neutral but humane force that the fledgling post-World War ideals of justice and humanity demand.

If, with Foucault, we conceive of the law as “multiple and mobile field of force relations”²⁰ situated squarely within relations of power, then it becomes untenable to hold that law is law when it functions as merely a benevolent force that remedies violence from outside those relations. With the introduction of IHL and its highly mesmerizing promises of juridical healing, truth, reconciliation, peace, justice, and humanity, we often witness what Brown calls the disguised trading of “one form of subjection for another.”²¹ This is not to suggest that law—or specifically IHL—necessarily or unequivocally produces unfreedom or precludes the possibility of personal and collective healing. Rather, like all political projects—recall Brown's quotation from above—its effects are multivariant and not determinable in advance. Hence the need for a critical reading of the burgeoning field of IHL, where the intermingling of therapeutic/psychological norms and vocabularies, restorative justice projects, and retributive legal frameworks has become so naturalized that it has been partially shielded from critical debates. All of this challenges international law's universal pretensions and uncritical celebrations of its apolitical core in opposition to forms of domination and regulation, and suggests that the law can never be fully immune from cooptation, instrumentalization, and/or mutation from its avowed aims. The “solution” cannot be to simply abandon these justice initiatives in search of sources of unadulterated deliverance from violence and suffering. Zerelli's, Brown's, Butler's, and Foucault's contributions allow us to imagine that exposing this new legal armature's regulatory dimensions vis-à-vis critique or “theory” may in fact revitalize abstract and sanctified forms of justice, bringing them “nearer” to their constituents and the historically situated conditions they seek to transform

V. Stagings of the Therapeutic Turn

Although the grand promises and lofty rhetoric associated with these officials' calls for international justice, and specifically therapeutically oriented justice, might easily be dismissed as simply a case of inflated political rhetoric with little bearing on the realities

²⁰ Michel Foucault, *The History of Sexuality: Volume I: An Introduction* (New York: Vintage Books, 1978), 102.

²¹ Wendy Brown, “The Most We Can Hope For”...Human Rights and the Politics of Fatalism,” *South Atlantic Quarterly* 103, no. 2/3 (Spring/Summer 2004): 455.

of the courtroom, the affected parties, or local and international politics, their ubiquity in international human rights and humanitarian discourse and within the tribunals themselves suggest they are not to be reduced to ancillary talk. In other words, a whole discursive field of juridical healing has emerged and, with it, a variety of related norms and practices with very real political, legal, and psychological effects. The proliferating discourse of juridical healing ushered in by the therapeutic turn is bound up with a growing investment on the part of international legal institutions in restorative, less adversarial approaches to justice than has previously been made available to victims of extreme violence.

But to whom is the promise or prospect of juridical healing directed, and from whence is this promise uttered and molded? It behooves us to consider which legal institutions, groups, and subjects identify with and attempt to realize therapeutic justice. One finds an intensification and expansion of scenes of juridical healing with the first two international criminal tribunals since Nuremberg—the ICTY and the ICTR—as well as the first permanent international criminal tribunal—the ICC. These three courts are by far the courts with the most international reach, funding, international support, and popular attention. I have chosen to focus on these courts in the present study precisely because of their common ground of “internationality”—i.e., those that adhere to the same legal doctrine of IHL with no simultaneous adherence to national legal systems—and their key role as purveyors of juridical healing in its contemporary form. These three courts sprang up in the same decade—a time when IHL had come out of Cold War hiding—and provided the testing grounds, breeding grounds, and stagings of this new form of power.

The ICTY and ICTR kicked off what is sometimes called the tribunal era in international law, marked by what David Scheffer—a self-described “carpenter” of war crimes tribunals—describes as the “most ambitious judicial experiments in the history of humankind—a global assault on the architects of atrocities.”²² Several other criminal tribunals have materialized in the last decade, but none has attained the attention, international status, or political reach of the ICTY, ICTR, and ICC.²³ The rhetoric emanating from these courts (their statutes, their rules of evidence, comments and

²² Scheffer, *All the Missing Souls*, 2.

²³ The two international ad hoc tribunals were created to adjudicate crimes committed within specific states, yet they are both financially and politically dependent upon, and answerable to an international body—the UN Security Council, and their “international” aspirations, composition and impact is reflected even in their names. The ad hoc tribunals continue to operate under the international umbrella of the UN with a staff drawn from a wide range of UN member states. The ICC was created by a treaty, not a security resolution. Its signatories must be UN members in order to participate. It is upheld as the most universal/international of the “international” postwar courts. Other courts, notably, the Extraordinary Chambers in the Courts of Cambodia (ECCC or “The Khmer Rouge Tribunal”), The Special Court for Sierra Leone (SCSL), and the newly established Special Tribunal for Lebanon have sprung up in the last ten years, but these are hybrid courts, created through joint agreements between the United Nations and the country in which the violence took place, and are represent very different juridical and political configuration from those international courts in question here. The respective legal foundations to which the hybrid courts adhere are highly particularized, in that each one is unique amalgam of a national and international set of laws. These hybrid and “extraordinary” courts are regarded as exceptional (hence their names), and not fully international in their make-up or mission, given that they apply national law endorsed by the Security Council, rather than international humanitarian law.

speeches made by court officials, staff members, and supporters; court judgments and decisions, and so forth) is shot through with norms of healing. While the therapeutic turn manifests variably in each of these institutions, the following analysis downplays their contextual differences—indexed below—and focuses instead on the most salient shared attributes in attempts to underscore a recurring logic at work across, and even beyond, these courts.

V.a. The First- and Second-born: ICTY and ICTR

The UN Security Council established the ad hoc ICTY in 1993 in response to crimes committed during the conflict in the former Yugoslavia. As the first of its kind, it represents the oldest member of what has now become a new generation of tribunals. In July of 1994, the ICTR was created in response to the genocide of Tutsi and moderate Hutus from April to July of 1994. Both tribunals were established “for the *sole* purpose of prosecuting persons for persons responsible for serious violations,”—such as genocide, crimes against humanity, and grave breaches of the Geneva Conventions—“of international humanitarian law”²⁴ that occurred in the respective territories and within specified timeframes.²⁵ They were the first international war crimes courts since the Nuremberg and Tokyo tribunals. As mentioned above, and documented in detail in chapter 3 these courts are often seen as proof of humanitarian law’s expansion and growing appeal after years of stagnation during the Cold War.²⁶

Of particular importance for this study, the ad hoc tribunals have been celebrated as the first courts to highlight the needs of victims and their human rights and embrace a more restorative justice approach, alongside their retributive loyalties and roots. This view is captured in an emotive declaration by the Hungarian representative of the United Nations to the Security Council in 1993, in which he expressed support of the establishment of the ICTY and argued for its historical significance and contemporary necessity:

*The way the international community deals with questions relating to the events in the former Yugoslavia will leave a profound mark on the future of that part of Europe, and beyond. It will make either easier or more painful, or even impossible, the healing of the psychological wounds the conflict has inflicted upon peoples who for centuries have lived together in harmony and good-neighborliness, regardless of what we may hear today from certain parties to the conflict. We cannot forget that the peoples, the ethnic communities, and the national minorities of Central and Eastern Europe are watching us and following our work with close attention.*²⁷

²⁴ I emphasize the phrase “sole purpose” above to underscore the fact that the stated purpose of these courts does not account for the discourse of juridical healing I’m outlining here (See ICTY and ICTR Statutes).

²⁵ Ibid.

²⁶ Philippe Sands, ed., *From Nuremberg to The Hague: The Future of International Criminal Justice* (New York: Cambridge University Press, 2003).

²⁷ Statement by Madeleine Albright to the UN Security Council, *Provisional Verbatim Record to the 3217th Meeting*, 25 May 1993, UN doc. S/PV 3217.

The ICTY is figured here as a formidable and new force, whose influence will have a considerable impact on the future of Europe “and beyond.” Its success is specifically tethered to its capacity to help “the healing of the psychological wounds,” and, even more boldly, its success or failure marks the difference between easier, more painful, impossible or possible healing.

Moreover, the subtle casting of the ICTY as synonymous with “the international community” identifies its work with a people, even if the constituents of that community are rarely specified. As such, the statement performatively produces both the ostensible collective identity to which it refers and the values that the community is presumed to share. Positioning of the court as the very thing that can precipitate healing for this people/community is the primary means of opening up this juridico-discursive form and norm—a court and modality of law that positions itself as a therapeutic tool for humanity and as representative of an unclearly defined, but inclusive “international community.” This form/norm is unprecedented both because of the *character* of the power it affords itself (justice as inextricably bound up with a project of healing) and owing to the *degree* and *scope* of power it affords itself. As in the statement quoted above, victims, too, are figured in this domain as harnessing a certain form of power: They emerge here and elsewhere as the main justification for the court, but also as the court’s conscience; they are watching its every move. The pressure to set the tone for, and build a solid postwar foundation for the benefit of specific victims (here: from the former Yugoslavia), “the international community,” but also for IHL, cannot be denied when one considers this kind of dramatic statement made at the founding moments of the first of the named family of international tribunals.

As for the ICTR, when it was created a year after the establishment of the ICTY, it was clear from the outset that this new ad hoc would follow the lead of its older sibling. Since the two ad hoc tribunals were designed to prosecute the same crimes, their statutes and rules of procedure and evidence are nearly identical and their structures remarkably similar. (They even share the same appellate court and prosecutor.) Although some differences exist—the ICTR’s has a more limited temporal mandate and geographical jurisdiction, as well as a location, Arusha (Tanzania), that is quite marginal in comparison to The Hague—a common normative thread runs through the discourse of juridical healing in both the courts.²⁸

The only significant exception was the initial lack of an explicit link between the ICTY and the project of national reconciliation found in the ICTR mandate: the language of the resolution and then statute that brought the ICTR into being and defined its mandate

²⁸ The ICTR’s mandate is much narrower than that of the ICTY, given that it is limited to crimes committed within one calendar year (January 1 to December 31, 1994), and to crimes committed within Rwanda’s borders only. Because the Yugoslavian conflict was ongoing when the ICTY was established, its temporal mandate was left open. Moreover, it was authorized to investigate and prosecute crimes committed within all of the territories that made up the former Yugoslavia during the war that raged there in the 1990s. Also, after much deliberation, it was determined that the ICTR would not be located in The Hague, next to its sister institution, the ICTY. Rather, the UN stipulated that the court would be located in Arusha, Tanzania, deemed close enough to Rwanda/the site of the genocide, but not so close that it would reignite violence (ICTY Statute, ICTR Statute).

mirrored the ICTY's in almost every way, but unlike the ICTR, the former's inaugural resolution and statute did not include references to the court's duty to "lead to a process of national reconciliation."²⁹ Yet eventually, in 2004, an ICTY Resolution was passed to add reconciliation to its official mandate. The initial difference between the two courts with respect to reconciliation was bridged—at least rhetorically—in the 2004 resolution that situates both courts' investment in reconciliation as a given, and as something that has always been there for both the ICTY and ICTR, but which bears emphasis: "Commending the important work of both tribunals in contributing to lasting peace and security and national reconciliation and the progress made since their inception..."³⁰ Whatever other issues were in play, the move to include this restorative term in the ICTY mandate was synecdochal of juridical healing and the therapeutic turn.

V.b. IHL's Wunderkind? The ICC as the "Victims' Court"

The normative formulation of IHL's justice-as-healing has been embraced and carried out in its most robust form in the ICC. On July 17, 1998, an international diplomatic conference was held, at which 120 UN member states adopted the international treaty—hereafter the "Rome Statute," which established the ICC. Put into force in 2002, the Rome Statute serves as the ICC's governing document. The ICC is the first and only permanent international criminal court, which opened its operations in mid-2003, in The Hague, Netherlands.³¹ It was created to "help end impunity for the perpetrators of the most serious crimes of concern to the international community."³² Sometimes cast as the ultimate "victims' court,"³³ the ICC marks the most extensive and profound confluence of restorative/victim-centered justice and retributive justice and reflects the most untempered eulogizing of juridical healing to date.

One of the most progressive provisions concerning the centrality of victims in proceedings is outlined by Article 68, which governs the "protection of the victims and witnesses and their participation in the proceedings." The court is obligated, in accordance to this article, to protect the "safety, physical and psychological well-being, dignity, and privacy of victims and witnesses"³⁴ and—in the most bold move to date when it comes to advancing a more victim-centered and restorative approach to IHL—allows victims to "express their views and concerns" at several stages of the proceedings and entitles victims to third-party "legal representation" beyond the representation

²⁹ In the ICTR statute, it reads that the tribunal would "contribute to the process of national reconciliation and to the restoration and maintenance of peace." (See: ICTR Statute).

³⁰ United Nations International Criminal Tribunal for the Former Yugoslavia, "Updated Statute of the International Tribunal for the Former Yugoslavia (September 2009)," http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

³¹ Michael P. Scharf, "Results of the Rome Conference for an International Criminal Court," *The American Society of International Law*, <http://www.asil.org/insigh23.cfm>; International Criminal Court, "ICC at a Glance": <http://www.icc-cpi.int/menus/icc/about%20the%20court/icc%20at%20a%20glance/icc%20at%20a%20glance?lan=en-GB>.

³² International Criminal Court, "About the Court," <http://www.icc-cpi.int/Menus/ICC/About+the+Court>.

³³ Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005), 148.

³⁴ Rome Statute: Article 68 (1).

granted by the office of the prosecutor (OPT).³⁵ How these provisions play out in practice will be taken up in subsequent chapters, but their relevance here lies with their mere existence; they represent the court's unparalleled inclusion of, and concern for, victims with respect to the cases under the court's jurisdiction. On its website, the ICC summarized its victim-friendly approach as follows:

*The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC, not only to bring criminals to justice but also to help the victims themselves obtain justice.*³⁶

Court officials and promoters celebrate this ambitious enterprise as the culmination of all of the restorative efforts undertaken by the ad hocs, and as the possibility to fulfill the dream of universal human rights and justice in the shadow of the exceptionally bloody twentieth-century, sometimes described as a genocidal "age of extremes."³⁷

At the inaugural meeting of the ICC's judges, UN Secretary-General Ban Ki Moon outlined this (literally) global character of the court's project. Addressing the eleven male and seven female judges, he states that they represent "all regions of the world and many different cultures and legal traditions, [making] themselves the embodiment of our collective conscience."³⁸ He goes on to say that the "cause" for which the court struggles" is, no less, "the cause of all humanity," exceeding the confidence of even the ICTY and ICTR that a court can represent a collective humanity, and one which ostensibly possesses a singular identity, "conscience," and "cause."³⁹ He then quickly turns to a fundamental element of this cause in reminding the judges of the ICC's commitment to victims and their healing. He proclaims

To the survivors, who are also the witnesses, and to the bereaved, we owe a justice that also brings healing. And that means that you, the judges, will have to show great patience and compassion, as well as an unfailing resolve to arrive at the truth. There must be justice, not only in the end result, but also in the process. Above all, however, this court is for those who might be victims in the future. If the court lives up to our expectations, they will not be victims, because would-be violators will be deterred. That is why it is so important that you, the judges, and

³⁵ Rome Statute: Article 68 (3).

³⁶ Quoted in Nicola Henry, "Disclosure, Sexual Violence and International Jurisprudence: A Therapeutic Approach" (PhD dissertation, The University of Melbourne, 2005), 103.

³⁷ Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991* (New York: Vintage Books, 1995); Robert Gellately and Ben Kiernan, eds., *The Specter of Genocide: Mass Murder in Historical Perspective* (Cambridge, UK: Cambridge University Press, 2003): 1-3.

³⁸ Secretary-General Ban Ki-moon, "Statement to the Inaugural Meeting of Judges of the International Criminal Court" (presented at The Hague, Netherlands, March 11, 2003).

³⁹ Ibid.

*all the officials of the Court, demonstrate in all your actions and decisions an unimpeachable integrity and impartiality.*⁴⁰

No room is left here for doubt that justice must also deliver healing, such that healing for victims becomes constitutive of justice. Such an understanding implies that justice will be realized only when victims are healed. The secretary-general appeals directly to the judge's sympathetic, affective qualities and links these not, as might be expected, to partial or imbalanced justice, rather to truth and impartiality.

The secretary-general's statement also shows that the project has a strangely expanded temporal scope: he is at pains to stress the importance of protecting and helping not only victims of crimes already committed, but also safeguarding against the possibility of future victims who in fact "will not be victims" if the court achieves its valiant goals of remedying *and* preventing victimization. In a strange temporal interlude between past and future, and which calls out for legal remedy, the court perseveres, against all odds, for the sake of the victims. It is as if no goal were too ambitious, no claim to justice and humanity too bold.⁴¹

This universal ambition for the ICC is given justification through an account of its relation to national law; it defines itself as a court of "last resort," in that:

*[It] will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, for example if formal proceedings were undertaken solely to shield a person from criminal responsibility. In addition, the ICC only tries those accused of the gravest crimes.*⁴²

A fundamental principle upon which the ICC operates is that of "complementarity." According to this principle, the court can only intervene where the relevant national system is unwilling or unable to investigate or prosecute war crimes.⁴³ When it does, the ICC seeks recourse to its "responsibility to protect" civilians.⁴⁴ humanity to new levels, the international criminal court has sought to provide the "missing link in international law," in the words of Dr. Benjamin Ferencz, former chief justice of the Nuremberg Tribunal). In other words, state sovereignty would no longer override the human rights

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² International Criminal Court, "ICC At a Glance."

⁴³ Ms. Fatou Bensouda, "Justice, Reconciliation and the Role of the ICC" (speech given at launch of International IDEA's publication, Brussels, Belgium, February 6, 2008), http://www.idea.int/resources/analysis/upload/080204_Final_version_re_-Justice_-reconciliation_Fatou_Brussels_Feb_08.pdf.

⁴⁴ The United Nations doctrine of the "Responsibility to Protect" is discussed in the Epilogue. One of its main tenets is that international bodies (such as the UN) have a responsibility to intervene in cases of genocide and crimes against humanity when the responsible sovereign nation fails to do so. See, for example: Charles Homans, "Responsibility to Protect: A Short History," Foreign Policy, http://www.foreignpolicy.com/articles/2011/10/11/responsibility_to_protect_a_short_history?page=0,3.

of citizens and noncitizens alike.⁴⁵ The court's unprecedented promotion of victims' rights as human rights, victims' participation in the legal process, and its explicit promotion of global justice along with reconciliation and national healing has earned it a reputation as a steward of human rights norms, and as the privileged mechanism for their fulfillment.⁴⁶ The ICC positions itself as able to succeed where all courts' preceding could not, given its jurisdiction and mandate—that is, to protect humanity from inhumanity anywhere and everywhere, with its permanent power to supersede sovereign states in cases of unpunished crimes against humanity.

The court stresses its unique victim-centered approach and justice as healing, presumably in part because it fails to protect in the manner it aspires to, and can thus highlight its “therapeutic” sides when the “responsibility to protect” invariably founders. (For whatever may be said of its merits or flaws, it cannot be denied that the court exists precisely because it has not been able to protect humanity from extreme violence.) In a sense, juridical healing emerges as a corrective to this failure, but can also be viewed as another way in which the court offers and performs “protection”; victims of inhumanity are now offered “protection” in a therapeutic sense.

ICC's inclusion in this dissertation is critical to establishing the prevalence of the therapeutic turn and considering the broader implications of juridical healing as a regime of power. The ICC can be viewed as the apex of therapeutic jurisprudence.⁴⁷ Given that it is still in its early stages, the question of whether or not the ICC can make good on its grandiose promises to victims through its unprecedented and highly publicized victim participation and reparation programs remains open at this time. All this could make scrutiny of the ICC seem a premature endeavor, but what interests me about its nascent, uncertain status is that it reflects the fact that juridical healing generally is as much (if not more) a normative schema as an active form of power.⁴⁸ Its promises of healing establish a set of ideals and expectations that redefine what it means to realize justice.

⁴⁵ Excerpts from *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese – Interviews and Writings* by Heikelina Verrijn Stuart and Marlise Simons (Amsterdam: Amsterdam University Press, 2009), <http://www.press.uchicago.edu/Misc/Chicago/9789085550235.html>.

⁴⁶ Bensouda, “Justice, Reconciliation, and the Role of the ICC,” 2008.

⁴⁷ For more on the rise of restorative justice and international therapeutic jurisprudence, where the focus of law becomes the victims, see: David B. Wexler and Bruce Winick. *Essays in Therapeutic Jurisprudence*. (Durham, NC: Carolina Academic Press, 1991) The Network of Therapeutic Jurisprudence describes the field as follows: “[it] concentrates on the law's impact on emotional life and psychological well-being. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognized and systematically studied” (International Network of Therapeutic Jurisprudence. Accessible at: <http://www.law.arizona.edu/depts/upr-intj/>).

⁴⁸ What makes juridical healing in the context of the ICC somewhat difficult to examine is the fact that the court has only completed one case, and is adjudicating only one other. With so little case material to work with, my analyses of the ICC's work (unlike my examinations of the ad hoc tribunals) are limited to the aspirational claims of court officials and supporters, the few decisions of the current trials, press releases about the trials, and the ICC statute.

VI. The Paripatetic Therapeutic Norm

In this section, I turn to the normative scheme of juridical healing, show its growing importance and naturalized status within IHL tribunal culture, and sketch some of its common attributes and typical modes and contexts of issuance. In part this will be accomplished by first offering a representative, though far from exhaustive sampling of therapeutic jurisprudential discourse in the context of the ICTY, ICTR, and ICC. Finding one's way amidst assorted, ill-defined, and often ethereal promises of juridical healing and related practices entails coming to grips with the somewhat disorienting and shifting character of the term and the referential terrain from which it emerges. The implications of this discursive landscape's dizzying, disorienting character are explored in depth in Chapter 4. For now, however, my task will be limited to familiarizing readers with this general trend in IHL and its paradigmatic manifestations in the aforementioned courts as a means of advancing my argument that juridical healing has attained naturalized status. Establishing that the norm of healing has taken hold in these distinctly juridical spaces and doctrines requires establishing its prominence across these courts and substantiating that it comes from mouths and sites of authority in the domain in question—IHL.

That Kofi Annan's rhetoric coupling justice and healing gained purchase in international legal and political circles and set an example to be followed required not only that it was he who uttered them, but also that a multitude of others in positions of power had echoed similar words and sentiments. He is not alone in his conviction that the rule of law has the capacity to heal and should do so. As noted above, diplomats, court practitioners, politicians, scholars, and activist alike have lauded the ICTY and ICTR, and especially the ICC for their efforts to help victims psychologically recover from traumatic experiences such as torture, genocide, and campaigns of mass rape. And from the outset, officials from the ad hoc tribunals and ICC made it clear that victims, healing, and reconciliation were part and parcel of their missions.

Official tribunal documents and statements by court staff are peppered with references to this unofficial, expanded mandate to heal individual and collective victims of ethnic violence by way of justice and promoting reconciliation.⁴⁹ For example, in an address to the Security Council, at a meeting held on the topic of the ICTY and ICTR, a UN delegate proclaimed: “[we] continue to believe that the work of the tribunals is a vitally important contribution not only to meting out justice, but also to the healing process in

⁴⁹ In a 2008 interview with a Hironnelle Agency representative, the President of the ICTR, Justice Dennis Byron stated: “The objective of my presidency is to achieve the [ICTR official] mandate, by completing the trials and facilitating the peace and reconciliation process in Rwanda.” This statement situates reconciliation as a means of achieving the official mandate of prosecuting persons for extreme violations of IHL. In chapter 3, I consider the ways in which the vague language of healing gets ushered in with the equally vague language of reconciliation. Sometimes healing is figured as an element of reconciliation, and sometimes this relationship is inverted. At other times, healing is subsumed by “reconciliation” and justice is considered “an essential element of peace and reconciliation.” These shifting and obscure accounts of healing, reconciliation, justice, and peace contribute to the ethereal and yet ubiquitous ethos of juridical healing I’m attempting to track here. See: ICTR Judge Justice Byron, “ICTR Seeks Reconciliation In Rwanda: Great Lakes Region Interview,” Hironnelle News Agency (2008), <http://www.hirondellenews.com/content/view/11061/26>.

both regions [of the Former Yugoslavia and Rwanda].”⁵⁰ In a press release from another UN Security Council meeting meant to encourage dialogue about the ad hoc tribunals, it was reported that the Rwandan tribunal is “active in the process of reconciliation” and that its initiatives will “continue to heal and reconcile the Rwandan nation.”⁵¹ The fact that this reference to the tribunal’s healing capacity lacks a specific, individual source hints at the ambient character of juridical healing discourse—although it is invoked as if it were clearly inscribed in a body of positive law, but it circulates in a diffuse fashion that often makes it difficult to attribute to a particular speaker, a particular practice of the courts, a particular benefactor or object, or a particular result.

Court officials from the registry, the chambers, or the OPT are frequent promoters of juridical healing in its various guises. This is reflected, for instance, in the ICTY registrar’s special address to tribunal staff when he stated: “The ICTR is operating in a region where we are called upon to help heal the profound wounds that the atrocious genocide scars have left on the souls, in the minds, and on the body of the victims in Rwanda.”⁵² The question of “the call” to heal, and from whence it comes is often elided in these kinds of promethean statements, along with the question of how precisely such scars are to best be treated (by way of law or otherwise). Healing is thus simply taken for granted as something these tribunals must prioritize and actualize. But what constitutes these kinds of “scars” and how should these tribunals set about placing healing at the center of its work if left unspecified?

Although court officials are typically vague when it comes to clarifying the best avenues for achieving “healing,” one can track the most common methods they tend to prescribe and/or presume. For instance, Richard Goldstone (the first chief prosecutor for the ICTY, and later, the ICTR) asserts that prosecuting leaders in international courts can, in fact, help to disassociate whole communities from (individual) wrongdoing, a process vital to effective healing.⁵³ Another commonly referenced path to juridical healing is by way of “telling one’s story.” Here, storytelling is an ostensibly therapeutic practice reserved for victims. The tenets of this normative path to cathartic testimony thought to heal are: first, that individual victims can, by putting their traumatic victimization into words before a sympathetic public, experience catharsis and bring closure to the wounds of the past; and second, that individual victims can speak for and to the trauma of their community, and by extension, the healing that cathartic testimony can engender can experientially spread to the affected community in general.⁵⁴ This logic is examined in greater depth in the

⁵⁰ H. E. Ambassador Hasmy Agam, Permanent Representative of Malaysia to the United Nations on the International Criminal Tribunals for ICTY and ICTR, <http://www.un.int/malaysia/SC/SC2Jun00.html>.

⁵¹ United Nations Security Council, “Security Council Holds Interactive Dialogue with Officials from the Tribunals for Rwanda, Former Yugoslavia,” UN press release SC/7227, 4429th meeting, November 27, 2001.

⁵² International Crime Tribunal for Rwanda, “Registrar’s Special Address To Staff Members On Their Ethical Duties And Obligations,” <http://ictr-archive09.library.cornell.edu/ENGLISH/speeches/dieng200505.html>.

⁵³ Richard Goldstone, “Justice as a Tool for Peace Making: Truth Commissions and International Criminal Tribunals,” *New York University Journal of International Law and Politics* 28 (1996), 485, 488.

⁵⁴ Nicola Henry, “Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence,” *The International Journal of Transitional Justice* 3 (January 2009), 122–26.

following chapter, but is flagged here as one of this discourse's key tropes. On the ICTY's brochure, for example, the first of its listed "tribunal achievements" is "bringing justice to victims" and, a bit further down one finds "giving victims a voice."⁵⁵ Wendy Lobwein, support officer and acting chief of the ICTY victims and witnesses unit offers an equally imprecise yet optimistic account of this unofficial aspect of the tribunal's work when she affirms "the positive sides of the huge experience and healing that testifying represents."⁵⁶ Here, she seems to limit those positive sides to individual victims who provide testimony. In the ICTR case *Prosecutor V. Zigiranyirimo*, the defense "characterizes the interests of justice as relating to Rwandans' need to heal, a process that requires open debate through testimony in person" at the tribunal.⁵⁷ The defense in this case shares Lobwein's conviction that testimony can heal, but hints at an implicit causality between personal healing through testimony and collective healing for all Rwandans who "need" to heal. Permeating this discursive paradigm, which has been referred to as the international therapeutic jurisprudence paradigm,⁵⁸ is the understanding that testimony and establishing the *truth* of what happened vis-à-vis a narrative of one's traumatic experience can foster healing and an experience of cathartic closure.⁵⁹ Moreover, although the courts are international, even post-national bodies, intervening in nations when national legal systems founder, they also claim to have the power to heal and unify whole nations, in large part by way of this testimonial, therapeutic approach to post-conflict justice.

Even when court officials are careful to stress the courts' retributive priorities and situate restorative justice goals as secondary or incidental, healing and reconciliation fall within the courts' purview. For instance, when Carla Del Ponte, Goldstone's successor as chief prosecutor of the ICTY and ICTR, insisted that "participating in the judicial process does not always lead to 'healing' or 'closure,'" she implies that there is a felt expectation that the courts will help victims heal and deliver restorative benefits, thereby gesturing to the extent to which a culture of juridical healing has taken hold.⁶⁰ This proviso speaks to the pervasiveness of therapeutic discourse and the common presumption that tribunal justice—at times, but not always—can and should lead to 'healing' or 'closure' in the aftermath of war.

The victim-centered rhetoric of juridical healing is often most pronounced in the context of, and in reference to the ICC—the so-called "victims' court"—as the following statement made by Chief ICC Prosecutor Luis Moreno Ocampo suggests:

⁵⁵ ICTY, The United Nations International Criminal Tribunal for the Former Yugoslavia: *Bringing War Criminals to Justice and Justice to Victims* (ICTY Graphic Unit: Summer 2008).

⁵⁶ Supranational Criminal Law Lecture Series, "Overview,"

http://www.iccnw.org/documents/SCLLseries_WedLectures_JanApr07_Overview.pdf.

⁵⁷ *Prosecutor v. Protais Zigiranyirazo, Judgment*. ICTR-01-73-T (ICTR, 18 December 2008).

*Note: All ICTY, ICTR and ICC court cases can be found on their respective websites: <http://www.icty.org>; <http://www.unictt.org/>; <http://www.icc-cpi.int/menus/icc/>.

⁵⁸ Henry, "Witness to Rape," 124, 116.

⁵⁹ Mark Osiel, "Ever Again: Legal Remembrance of Administrative Massacre," *University of Pennsylvania Law Review* 144, no. 2 (December 1995): 463.

⁶⁰ Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (New York: Other Press, 2008), 376.

*There is a need to heal and ensure reconciliation. This is a challenge for today. The [ICC's] judicial process will put the suffering of the victims in the center of the public agenda. Those women raped and infected with HIV, those wounded, the families of those killed, those who lost their homes, internally displaced persons, should be assisted today.*⁶¹

Spokespersons for the ICC have unabashedly placed victims—both individual and collective—and their healing at the heart of its operations. As Kofi Annan convened the Rome Conference at which the Rome Statute was drawn up and ratified, establishing the ICC, he drew a direct line between the ad hoc tribunals' commitment to victims, the international community's growing awareness of, and desire to put a stop to, extreme violence, and the subsequent creation of the ICC.⁶² Reminiscent of the quotation above (i.e. the reference to “watching”), he told delegates that, “the eyes of the victims of past crimes, and of the potential victims of future ones, are fixed firmly upon us.”⁶³ He recalls this statement in subsequent speeches, exemplifying the ICC's creators' assumptions about, even insistence on the inseparability between the ICC mandate and victim-centered and restorative or therapeutic justice.

It is primarily in relation to the victim of human rights abuses that these processes can be set in motion. For instance, The ICC deputy prosecutor Fatou Bensouda insists, “by offering victims an objective, solemn, and public forum, the ICC offers a solid basis on which a ‘new’ society can take shape.”⁶⁴ She then avers, “Delivery of justice creates conditions which are conducive to reconciliation, and reconciliation is a major building block for a sustainable peace.” Here we have a prime example of court officials' ardent embrace of the ICC's victim-centered approach, and the common link made between victims as the building blocks of a new society and the ICC's justice as a catalyst for reconciliation and peace. This sort of statement underscores the rarely curbed enthusiasm on the part of officials and court advocacy groups for the ICC's pioneering emphasis on victims, their suffering, and their stake in the judicial process, in addition to its forays into what are often thought of as more “political” projects of reconciliation and restorative or transitional justice. As suggested above, one of the major innovations of the ICC statute is the ability of victims to *participate* in proceedings, “not only as

⁶¹ The Honourable Kenneth Marende, “Kenya National Dialogue and Reconciliation Two Years On: Where Are We?” (speech given at The Crowne Plaza, Nairobi, Kenya, December 2, 2010), <http://kofiannanfoundation.org/newsroom/speeches/2010/12/kenya-national-dialogue-and-reconciliation-two-years-where-are-we-statement>.

⁶² He noted that the terrible, genocidal events in the former Yugoslavia and Rwanda, where “the international community failed to take decisive and forceful action to protect the victims... did however, shock the world into action. Ad-hoc tribunals were set up to bring those responsible to justice. The Rome conference in 1998 agreed to establish an International Criminal Court to help end the global culture of impunity” (Kofi Annan, “Justice vs. Impunity,” *New York Times*, May 30, 2010).

⁶³ “Kofi Annan addresses the First Review Conference of the Assembly of States Parties to the Rome Statute of the International Criminal Court” (speech given at Kampala, Uganda, May, 2010), <http://kofiannanfoundation.org/newsroom/speeches/2010/05/review-conference-assembly-states-parties-to-rome-statute-international>.

⁶⁴ Bensouda, “Justice, Reconciliation, and the Role of the ICC,” 8.

prosecution witnesses but also as independent parties with an interest in the outcome.”⁶⁵ As noted above, a repeated invocation within this discourse of victim-centered justice that seeks to heal the wounds of mass violence is that the “voices of the victims” should be “heard” by the court. But especially with respect to the ICC, it takes on literal as well as figurative meanings, insofar as victims are invited to provide testimony and present “their views and opinions” at many stages of the proceedings as a means of helping to transmit and amplify a victim-centered truth.

The proclivity to tender justice that heals as a highly innovative and improved form of justice is echoed in the ICC’s brochure for its office of public counsel for victims, entitled *Helping Make Victims’ Voices Heard*, which reads:

*For the first time in the history of international criminal justice, the negotiators of the Rome Statute placed victims at the heart of proceedings, recognizing in the second paragraph of the preamble that States Parties were mindful that during [the last] century millions of children, women and men have been victims of unimaginable atrocities that deeply shocked the conscience of humanity.*⁶⁶

The ICC, and restorative or therapeutic approach, is rendered unprecedented here and elsewhere within the court discourse. Its victim-centeredness is a key way in which court officials and promoters attempt to distinguish the ICC and draw attention to its evolved status, relative to its precursors. In this context, evolution or progress is taken to be synonymous with the court’s capacity to help heal victimized communities subjected to “unimaginable atrocities” and its inclusion and attention to victims. The ICC is cast here as “the first” to take victims and their suffering seriously, and the first to genuinely act on the “shocked conscience of humanity” that it speaks for. Those courts that came before and were “mindful” of the inhumanity, did not reserve a central place for victims to the extent described here, and, as such, serve as the “other” of this evolved form of IHL. In other words, juridical healing and victim-centered proceedings have become the normative benchmarks by which court officials and others rate these courts’ humanity, progress, fairness, and the quality of justice they mete out.

The naturalized status of the multivalent norm of healing comes to the fore in the context of certain of the ICC’s “victim-centered” programs (which were not part of the ad hoc tribunals) and the rhetoric justifying and explaining them. The ICC is the first international court to offer reparations to victims—the court can order particular convicted persons to pay reparations to specified victims, or reparations can be paid through the ICC’s trust fund for victims. The rationale behind the trust fund is that it will provide “concrete

⁶⁵ See Article 68(3) of the Rome Statute and Section III of the Rules of Procedure and Evidence. See also the ICC’s Victim Rights Working Group homepage: <http://www.vrwg.org/home/home>, “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2,” ICC-01/04-135-tEN, March 31, 2006.

⁶⁶ International Criminal Court, *Helping Make Victims’ Voices Heard*, Office of Public Counsel for Victims (OPCV), ICC, 2010, 1.

means to heal and rebuild [victims'] lives and communities.”⁶⁷ Yet the perhaps not-so-concrete activities of the fund include “rehabilitation and reinsertion of victims, socio-economic reintegration, healing of memories, support for victims, . . . holistic healing, . . . victim empowerment, livelihood support, and more.”⁶⁸ This therapeutically oriented and victim-centered rhetoric of healing is not at all exceptional in this discursive arena, and provides a prime example of the mutable, manifold and often nebulous concepts and terms associated with the discourse of juridical healing and its governing norms. Note that the description above is dominated by a therapeutic lexicon and points to what we might call symbolic reparation, with no specific references to what kind of concrete economic or other “support” might be included in this reparative scheme.

VII. Conclusion: A Critical Turn

An overarching aim of this dissertation is to understand the normative shift from a geopolitical time and space, configuration of thought, and signficatory domain in which international criminal law did not yet have its robust restorative valence (specifically its focus on victims, their injuries, and therapeutic remedies for them) to a time, configuration of thought, and signficatory domain wherein this law has taken upon itself the task of healing victims, and where juridical healing has become an institutionalized norm. As this introductory chapter has attempted to lay out, the sedimentation and reification of this normative arrangement have hindered considerations of its discursive ramifications (on this branch of law, the tribunals, the affected communities, individual victims, and regional and international political cultures, for example), and has hampered discussions about whether and how justice or healing might be done otherwise. If it is hard to think juridical healing (because, as a regulatory ideal, it surrounds its subjects with an almost invisible, atmospheric presence), then it is even harder to think beyond it. The treatment of juridical healing as simply obvious, as a natural outcome of historical progress, as truth, as humane, as what is and what should be, can blind us to some of its regulatory repercussions, and foreclose conversations thereof. . . . Such is the way of the norm.

This is not to say that norms are somehow “bad” or that we should or could do away with them. Instead, far from a call to suspend normalization or valuation (what would this even mean?), or even a Nietzschean reevaluation of values, my intervention calls for a dissection of those values and shibboleths that, in a particular discursive field, have become untouchable and protected from critique or problematization.⁶⁹ As such, we

⁶⁷ International Criminal Court, “Prominent International Figures Elected to the Board of Directors of the ICC Victims Trust Fund,” ICC Press Notice, September 12, 2003, www.victimtrustfund.org.

⁶⁸ Heikelina Verrijn Stuart, “The ICC Trust Fund for Victims: Beyond the Realm of the ICC,” *Radio Netherlands Worldwide*, April 2, 2009, <http://cdn.radionetherlands.nl/international-justice/article/icc-trust-fund-victims-beyond-realm-icc>.

⁶⁹ This understanding of the norm as it relates to the contemporary usurpation of democratic (especially left) politics by “legalism” leans heavily on Wendy Brown and Janet Halley’s collaborative work: *Left Legalism/Left Critique*, eds. Wendy Brown and Janet Halley (Durham, NC: Duke University Press, 2002).

might think of normalization as producing—often in a subtle and covert fashion—forms of regulation and domination that it manages to dissimulate in an almost autoimmune fashion.

As the norm of healing has further penetrated this novel and expanding field of law, the interrogation of its construction, modalities, means of circulation and extension, and effects becomes all the more necessary. With an understanding of law as a normative field that produces and governs subjects, bodies, and acts, it can become apparent that the therapeutic turn both does *less* than it says it will, in that it falls short of its oft-stated goals to heal and protect individuals, whole communities, and even humanity, and also does *more* than it avows, insofar as it can produce and collude with configurations of dominance and regulation while claiming to simply liberate and heal. This is not all it does, of course, but this mechanism of power demands closer examination. It demands critically turning our attention toward ILH's therapeutic turn in order to establish the contingent and impossible ideal of justice as comprehensive healing and the foreclosure of political response and agency that this turn entails.

Chapter 2

Healing Happens: Current Debates on IHL's Therapeutic Potential

I. Calculi of Cathartic Justice

Emir Suljagić was a teenager when he and his family fled campaigns of ethnic cleansing in the Drina Valley of the former Yugoslavia in 1992. He survived the Srebrenica Massacre of 1995 and began working as a journalist at the ICTY after the war. He also authored *Postcards from the Grave* in 2005, a firsthand account of the Srebrenica Massacre and his life as a Muslim refugee in the besieged enclave in Bosnia before the UN “safe area” fell to the Bosnian Serb army. He told trial journalist Tim Juda about his personal reaction to the confession of the Accused, a Bosnian Serb intelligence officer named Momir Nikolić, in the *Prosecutor versus Momir Nikolić* trial.¹ Nikolić confessed to the ICTY that he played key role in the massacres and Suljagić reacted as follows:

I was crying in court. When he said ‘I plead guilty,’ I ran downstairs and locked myself in the toilet and cried my eyes out. It was a genuine relief to hear someone like him saying, ‘Yes, we killed seven thousand or eight thousand people.’ Multiply this reaction by a million, amongst all the victims across the former Yugoslavia and over all the different cases, and now try to claim the tribunal has failed.²

Suljagić found the trial, but especially the confession of guilt—the publicized, verbalized acknowledgment of the crime and responsibility for it—to be profoundly moving, even cathartic. This sort of poignant, triumphant story must be music to the court officials’ ears, especially those who have most vocally endorsed victim-centered or therapeutic justice. Suljagić operates here with a certain calculus, or synecdochic logic, whereby he presumes that his particular feeling of relief brought on by publicizing victim testimony will in turn be experienced by millions of victims as the emotive force of the judgment ripples across the former Yugoslavia.

I cite Suljagić because his statement so aptly captures the flavor and form of the discourse of juridical healing circulating within the walls of the courts but also rippling outside them (like Suljagić himself, who is both a court outsider—a victim, and representative “voice” of a victim community—and an insider, in his capacity as court

¹ International Criminal Tribunal for the Former Yugoslavia, “Summary of The Judgment in the Case the *Prosecutor v. Momir Nikolic*,” news release, December 2, 2003, doc. CT/P.I.S/806e.

² Tim Judah, “The Fog of Justice,” *New York Review of Books* 51, no. 1 (2004): 23–25, <http://www.nybooks.com/articles/16875>.

journalist). His presumptions and aspirations mirror those of juridical healing advocates more broadly, both from within the tribunals themselves and from the broader, loosely knit transitional justice community populated by scholars, activists, diplomats, and international lawyers.³ A prime illustration of this is found in ICTY Judge Schomburg's dissenting opinion in the ICTY Deronjić case in 2003, where he challenged the majority decision that sentenced Serbian war criminal Deronjić to only six years in prison. Quoting a statement made by one of Deronjić's victims, the judge reminded the court:

*The victim said that his guilty plea 'can heal the wounds' that the Bosniak community in eastern Bosnia still feels—'provided that he is punished adequately.' According to the victim, 'a mild punishment would not serve any purpose.'*⁴

Invoking the victim's voice, but also the idea that the court can in fact produce the conditions for healing for both the individual victim on the stand and, by extension, the whole community he belongs to and is thought to represent, Schomburg bestows institutional authority upon this veiled calculus. Here we have two cogent illustrations not only of how individual victims' accounts of healing get incorporated into official court discourse, where the victim's word is held up as the authentic truth of the matter, but also of the dominant yet oblique presumptions upon which much healing discourse is premised.

The two-pronged dominant understanding of juridical healing can be summed up as follows: First, the conviction that a publicized international criminal trial has the potential, under the right conditions and by way of the revelation of the truth, to occasion "catharsis" and facilitate psychological "closure" for individual victim-witnesses (who are thought to both occasion and symbolize healing), and, second, that it can trigger a similar therapeutic response in many other victims (whether individual or collective) who have no personal interaction with the court.⁵ These are the central maxims undergirding the therapeutic turn, and yet, very little critical work has been done to account for how individual victim's experiences like Suljagić's may or may not be generalizable to other individuals and so-called "traumatized" communities, or precisely what is meant by truth-telling, catharsis, closure, and healing. Addressing these issues would require contending with the following questions: By which standards are we to measure and assess injury, healing, and justice? What are the premises upon which these processes of healing are based? One is hard pressed to track down accounts that move beyond the anecdotal, or that scrutinize uncritical celebrations of individual healing for victims, wholesale dismissals of law as a healing agent, and/or hidden calculi wherein whole societies can be traumatized and healed like individuals by way of a multiplication effect. Seen from this perspective, healing appears to simply, almost magically *happen* once a victim testifies to

³Alvarez, "Rush to Closure," 2031.

⁴Sense Tribunal, "Ten Years in Prison for Miroslav Deronjić," March 30, 2004, http://www.sense-agency.com/icty/ten-years-in-prison-for-miroslav-deronjic.29.html?cat_id=1&news_id=8520.

⁵On the central role of "truth-telling" in the ad hoc tribunals and its presumed contribution to "closure" and "healing processes," see: Sandra Hodgkinson, "Are Ad Hoc Tribunals and Effective Tool for Prosecuting International Terrorism Cases?" *Emory International Law Review* 4 (2010): 517-19.

the truth of his or her injury and suffering in the context of a sympathetic, juridical setting, and once the crime in question is publically recognized as morally wrong and punishable by law. Why these events should have such an effect is rarely stated; their power is most often simply presumed as fact, and each has therefore attained the status of a shibboleth well protected from the kind of critique described in the last chapter. For those in favor of juridical healing, the common inclination is to treat juridical healing less as a discursive mode of power or politics and more as moral virtue that—with IHL’s stamp of approval, and with the help of legal institutions—benignly heals victims and ripples out to whole communities.

Without wanting to discredit the personal experiences of either Suljagić or others who have found these courts and the justice they dispense to be therapeutic in some way, this chapter takes as its point of departure the problem raised in the last chapter. Namely, reflections upon, and critical examination of, post-atrocity healing by way of international tribunals are in short supply in the context of these courts and IHL. Statements like those cited above abound, and are even used as “evidence” that the therapeutic turn has produced beneficial results for individual and collective victims. If the project of healing through IHL justice mechanisms is discussed or debated in any depth in this legal domain, those discussions have not made their way into court documents, trials, or public statements made by court representatives. But that does not mean that such discussions are not occurring elsewhere. In fact, over the last few decades, a sizable group of scholars have become immersed in the topic of juridical healing and one must thus look to this discursive terrain in order to get a fuller picture of current debates on law’s therapeutic potential.

What I will argue here is that scholarly inquiries into this multifaceted and burgeoning field frequently fall prey to similar problems sketched above in reference to the tribunals and their supporters: namely, scholars writing on the subject tend to take for granted the core terms of the therapeutic turn—healing, trauma, injury, catharsis, justice, reconciliation, and so forth—proceeding as if there were consensus on their meaning and value. Thus instead of functioning as a critical resource for the courts, the bulk of the literature instead seems to echo and reify the etiolated and unreflective accounts of juridical healing promulgated by court officials and diplomats. A certain uncritical standpoint seems to serve as common ground for the diplomats that established the tribunals and the “relevant epistemic community of international lawyers” as well as the scholars.⁶ Specifically, the latter are prone, as I will show, to anemic theorizations of what constitutes healing and how it is precipitated, reductive accounts of how the healing of one individual engenders the healing of many/the community, dodging the issue of variability among communities and among different individuals, and sidestepping the question of the translatability of psychological/psychoanalytic remedies to individual trauma and injury to legal scenes of post-conflict justice and reconciliation. It is as if the ardor of these scholars for the cause blinds them to the pitfalls and complexity of what they are trying to achieve.

⁶ Alvarez, “Rush to Closure,” 2031.

More precisely, I will argue that across the pro- and anti-judicial healing divide, if you will, much of the scholarly work skips over these fundamental questions, moving directly to the secondary, pre-reflexive question of whether courts heal or not and identifying with one or the other “side” of this ostensible issue. These scholarly interventions rarely concern themselves, that is, with the norms and intellectual presumptions governing this discourse, or with the critical question of what else, besides “healing” or its opposite, the discourse might enable, or disable. For example, what relations of power does it authorize, engender, and foreclose that the “does it heal or not?” question cannot address the “does it heal or not?” question and these scholars’ responses to it tend to preempt, that is, explorations of what Wendy Brown and Janet Halley call the “deep constitutive causes of injury” as well as supplant the question of “what occasions the urgent need” for juridical healing at this particular historico-political juncture.⁷ In sum, the now-hegemonic understanding of IHL that thereby emerges is framed in terms of whether it either adheres to a recipe for healing or fails in this regard, and the rush to this particular judgment neutralizes critical examinations of the “recipe” or accepted criteria for healing, and precludes deeper investigation into precisely the character of the injury juridical healing is summoned to repair. Side-stepping the question of the actual effects of this discourse, these scholars have failed to recognize the specific ways that the therapeutic turn has “turned out” to be deleterious--something that this inquiry brings to light.

II. International Criminal Tribunals as “Therapy Centers”?⁸

The bulk of the literature pertaining to the healing potential of post-conflict justice comes out of the field of transitional justice. Recently, a growing number of liberal legal theorists have begun to focus primarily on the extent to which justice initiatives (in the forms of courts and truth commissions) contribute to peace, reconciliation and healing, and the optimal form this takes. Brandon Hamber contends that the subject of truth commissions (transitional justice’s institutional arm and poster child) has gradually become “a field of study in its own right” over the last few decades.⁹ So although few scholars have, as Brandon Hamber puts it, “examined the restorative potential of retributive models of justice for victims of mass violence,” (the model to which the international criminal tribunals belong) those that have quite often identify as part of the transitional justice field or are highly sympathetic with its goals.¹⁰

Another, sometimes overlapping portion of the literature that takes up the problem of legal healing spreads across a number of fields and can be grouped under the umbrella category of interdisciplinary humanities, especially performance studies, psychoanalysis, trauma studies, Holocaust studies, political philosophy, and cultural studies. These academic contributions tend to mine what Ravit Reichman calls the “affective life” of law, as well as its dramatic or performative dimensions, attending to questions of

⁷ Brown and Halley, *Left Legalism/Left Critique*, 19.

⁸ Henry, “Witness to Rape,” 124.

⁹ Brandon Hamber, “Are Lessons Transferable? The Importance of Research for Policy on Transitional Justice Mechanisms.” Paper presented at the Empirical Research Methodologies of Transitional Justice Mechanisms Conference, Stellenbosch, South Africa. July 3, 2003.

¹⁰ Henry, “Disclosure, Sexual Violence and International Jurisprudence,” 8.

collective memory and various means of affectively coming to grips with atrocity's psychological, ethical, ontological, cultural, and political repercussions.¹¹ Broadly speaking, these contributions often stress the importance of testimony as a path to healing, but bypass providing transparent accounts of their premises, robust theorizations of how healing happens, and explanations of how approaches to individual healing may or may not apply to healing in a public setting (such as trials or truth commissions) and to entire communities.¹²

Cutting across the transitional justice and humanities fields, those in favor of using war crimes trials to engender “healing” view these trials as opportunities not only for punishing odious crimes and for deterring future mass violence, but also for “giving victims the satisfaction of seeing justice done and thereby producing a sort of “collective catharsis” and individual healing. Catharsis is applied to individuals and collectives alike, but with little explanation of what it concretely involves. Transitional justice scholar Kingsley Moghalu's understanding of catharsis provides a taste of this tendency, as when he states:

*When justice is done, and seen to be done, it provides a catharsis for those physically or psychologically scarred by violations of international humanitarian law. Deep-seated resentments—key obstacles to reconciliation—are removed and people on different sides of the divide can feel that a clean slate has been provided for.*¹³

Much guesswork is required to try to figure out what justice and catharsis consist of here, or the causal relationship they share with each other, not to mention reconciliation and resentment. “Catharsis” comes across as given, as a generally understood concept in statements like this one, where conviction that catharsis “happens” when justice is done substitutes for clarity or elaboration. At times, it seems as if justice is thought to produce catharsis, while at others, catharsis seems to signal and produce true justice for victims.

Similar to catharsis, psychological “closure” figures largely in this discursive domain, where “closure” for both individual and collective victims is often figured as the ultimate reflection of a just trial. Legal scholar Jose Alvarez maintains that “the model of closure ... has provided the single, coherent rubric to justify the international tribunals.”¹⁴ On this model, the absence of trials is frequently rendered an impediment to closing the wounds left in the wake of political violence and to, as legal scholar Mark Osiel states, “the individual's and the society's healing process.”¹⁵ But from these accounts, one can

¹¹ Ravit Reichman, *The Affective Life of Law: Legal Modernism and the Literary Imagination* (Stanford, CA: Stanford University Press, 2009).

¹² Michael Ignatieff, “Articles of Faith,” *Index On Censorship* 5/96 (September, 1996 [abridged]), <http://archive.niza.nl/uk/publications/001/ignatieff.htm>.

¹³ Kingsley C. Moghalu, “Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions,” in *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, eds. Ramesh Thakur and Peter Malcontent (New York: United Nations University Press, 2004), 216.

¹⁴ Alvarez, “Rush to Closure,” 2036–38.

¹⁵ Mark Osiel, “Ever Again,” 463, 486–88.

discern little more than the following: the individual and social are presumed to be isomorphically related and the constituents of cathartic closure are treated as givens. These terms and tropes crisscross this burgeoning field, but the frequency with which they are used is highly disproportionate to efforts to make clear sense of them. Stumbling through this unmarked and confusing rhetorical landscape of shifting referents and numerous valences, only one thing is certain: the dominant meanings of these terms and related processes are far from being as settled.

In Marie Benedicte Dembour and Emily Haslam's words, "it is now commonly accepted that war crimes trials should provide a space for victims to tell their stories,"¹⁶ and commonly understood that trials can bring about catharsis, closure, and healing. Not all scholars working on the topic of atrocity-engendered traumas and the legal responses to them bestow praise on this new endeavor.¹⁷ Nicola Henry matter-of-factly sums this view up with the statement: international tribunals are not "therapy centers."¹⁸ Those who have voiced criticisms of juridical healing predominantly point to the lack of empirical evidence for claims that justice can heal, but forego in-depth critical analysis and theorization of the operative concepts and terms. Ifi Amadiume views this leap of faith in courts' healing powers as a reflection of contemporary arrogance and simplicity.¹⁹ Jose Alvarez dispenses with the notion that international criminal tribunals can provide a forum for "group therapy" based on societal consensus, given what he called the "enflamed ethnic passions" and mass violence that produced the need for adjudication in the first place.²⁰ Joanna Shapland adds that victim-centered trials and the "victims' rights movement" have "largely been built not on established facts and comprehensive studies," but instead on "premature and potentially dangerous" presumptions on the part of "other people" about what "victims want or should want."²¹ While in and of itself laudable, the focus of these scholars on the paucity of empirical evidence to support the promissory claims of juridical healing initiatives has shifted critical discussions of this phenomenon away from more fundamental (however daunting) questions pertaining to how healing and injury are currently understood by promoters and critics alike, not to mention explorations of healing that exceed the standardized options.

¹⁶ Gerard Mekjian and Mathew Varughese, "Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court," *Pace International Law Review*, 17 (2005): 13, n46.

¹⁷ R. B. Clifford and J. Scott, "Individual and Situation Factors in Eyewitness Testimony," *Journal of Applied Psychology* 63 (1978): 352–58. See also: Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, MA: Harvard University Press, 2002).

¹⁸ Henry, "Witness to Rape," 124.

¹⁹ Ifi Amadiume, "The Politics of Memory: Biafra and Intellectual Responsibility," in *The Politics of Memory: Truth, Healing, and Social Justice*, eds. Ifi Amadiume and Abdullahi An-Na'im (London: Zed Books, 2000), 38–55.

²⁰ Alvarez, "Rush to Closure," 2085.

²¹ Joanna Shapland, in *Victims in the Criminal Justice System*, eds. Joanna Shapland, Jon Willmore and Peter Duff (London, UK: Gower), 2.

III. Disclosure for Closure: Holocaust Trials and Traumas

The dominant schema of juridical healing has as an essential feature the act of giving testimony. Telling one's story of suffering in this legal setting is often thought to help heal the wounds of war and bring about "closure" for victims on both personal and collective levels.²² On this model, disclosure seems to facilitate psychological closure. Transitional justice scholar Naomi Rhot-Azzaria operates with a therapeutic understanding of storytelling. She, like many proponents of the legal healing trend in question, places storytelling squarely in the context of post-conflict justice measures. She avers, "The public airing of victims' stories serve important psychological and therapeutic ends."²³ In this vein, "telling one's story" is thought to counter painful memories that fester and fragment communities and individuals alike. But precisely how do we give meaning to our sorrows in order to overcome them? How might this work in a public, juridical setting? What are the precise means of these "important psychological and therapeutic ends"? And, is it not possible that returning to, and repeating our tales of suffering only intensifies and prolongs our suffering? As the analyses below are meant to attest, many who write on the healing power of witness testimony, and subscribe to what I called the disclosure-for-closure model of juridical healing, fail to wrestle with these exigent and thorny questions.

*

Shoshana Felman, who works at the crossroads of legal studies, Holocaust studies, psychoanalysis and literature extols legal storytelling for its therapeutic potential. She argues in *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (2002) that trials and traumas within recent history are as increasingly linked, referencing "historical" trials such as the post-Second World War Nuremberg trials. Such trials, she contends, are organized by new paradigms of justice that go far beyond meting out punishment. Trials of this sort work to perform a "symbolic exit from the injuries of traumatic history."²⁴ Using Holocaust trials as her paradigmatic example, and noting that the twentieth century has been one of collective and individual traumas, trials, and an explosion of trauma theories, Felman characterizes the courtroom as a theater of justice. The trial becomes the privileged stage upon which the public can witness the dramatic transformations of private traumas (of individual victim-witnesses) into collective and public narratives. The latter, for Felman, are meant to help acknowledge, make sense of, and contain the ghostly traumas of past atrocities. The content of the narratives are subordinated in this model to the theatrical, embodied form through which they acquire therapeutic significance.

²² See, for instance: Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge, UK: Cambridge University Press, 2012), 171, 177; Naomi Rhot-Arriaza, *Impunity and Human Rights in International Law and Practice* (Oxford, UK: Oxford University Press, 1995); Felman, *The Juridical Unconscious*, 1.

²³ Rhot-Arriaza, *Impunity and Human Rights in International Law and Practice*, 21.

²⁴ Felman, *The Juridical Unconscious*, 1.

Felman asserts that all trials “are related to an injury, a trauma for which it compensates and that it attempts to remedy and overcome.”²⁵ Remedy in this schema applies not only to juridical injuries, but can also be combined with remedies for trauma. Seen in this light, judicial remedy is dilated to include not only the more conventional ingredients of punishment of legal and socially recognized wrongs, but also psychological and social remedies for the wounds left in the wake of campaigns of political violence. The new protagonist of this juridical drama is the victim-witness—not the defendant or the crime/s committed against “the social order,” which had for centuries served as the focal points of Western legal systems.²⁶

In this schema the victim-witness’s performance of her memories (through testimony) symbolically reconstitutes the past scene of trauma within the present temporality of the courtroom. This process provides the material and affective conditions required for individual and collective healing, per Felman, where healing involves coming to terms with the traumatic past in order to make way for the possibility of a future not imprisoned by that past. Moreover, public airing of traumatic truths, if received sympathetically, can pave the way to liberation from the isolation and torment caused by buried, painful memories that wreak havoc on the psyche in the absence of registering and working through them. Felman describes the conditions for this conversion as follows:

*The [historic] trial articulates its legal meaning through ... the unconscious body of the witness within the courtroom speaks beyond the limits of speech. It is because the body of the witness is the ultimate site of memory of individual and collective trauma—because trauma makes the body matter and because the body testifying to the trauma matters in the courtroom in new ways—that these trials have become not only memorable discursive scenes, but also dramatically physical theaters of justice.*²⁷

Within this paradigm, the trial becomes the stage on which the therapeutic process becomes animated vis-à-vis the body-voice of the survivor of atrocity. This body on the witness stand is the “site of” and occasion for publicizing individual trauma and memory, as well as the representation of the “traumatized community” to which it belongs. It augments, even authenticates the witness’s speech in order that listeners might bear witness to the horrors of the persecuted, which she describes as the historically “expressionless.”²⁸ Such animations pave the way to a cathartic cleansing by way of a truthful, affecting narrative. Testimony serves as the conduit for dramatic performances of justice and healing for both individuals and collectives. Justice is done primarily because the victim’s story is given life through the witness’s embodied enactments of a symptomatic sort, thereby bearing witness to the truth of the horrors of the past and giving them a place in history. Making present that which was previously silenced or

²⁵ Ibid., 60.

²⁶ For more on the gradual turn in Western European and North American law that viewed crime as a social offence—as an affront to a given social order or state, and its values and interests—to crime as an affront to an individual or collective victim, see Robert Elias, *The Politics of Victimization: Victims, Victimology and Human Rights* (Oxford, UK and New York, Oxford University Press, 1986).

²⁷ Felman, *The Juridical Unconscious*, 9.

²⁸ Ibid., 14

hidden brings the festering, repressed memories that haunt the individual and collective unconscious to the surface, granting the unrepresented yet representable a place in collective systems of meaning.

This account of historical trials as theaters of justice and as the privileged sites in which cathartic drama can unfold is echoed in Felman's collaborative work with psychoanalyst and Holocaust scholar Dori Laub. Their work, as documented in their 1991 text *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History* provides a window onto a large segment of the academic discourse on juridical healing. Armed with the conviction that testimony allows the traumatized survivor of genocide to heal through mnemonic externalization of "the evil [trauma] that affected and contaminated [her],"²⁹ Felman and Laub operate with the multipronged conviction that healing happens for individual and collective victims when the story of trauma is "performed" publicly in the context of a sympathetic audience, that individual healing is isomorphic with or even somehow achieves communal healing, and that psychotherapeutic methods of healing (here: psychoanalytic understandings of the unconscious) can, without alteration, be applied to whole communities and can extend into nonclinical settings and subjects, such as the courtroom and the academic archive.³⁰ So, if the story is performed, it becomes part of a social performance of healing.

Felman and Laub unreservedly embrace the "contamination" of the clinical by the testimonial and juridical and vice versa, as evidenced in Laub's statement: "I find the process ... set in motion by psychoanalytic practice and by testimony to be essentially the same, both in the narrator and in myself as a listener."³¹ The particular power dynamics within clinical, academic and politico-legal scenes have little bearing on testimony's therapeutic "essence" on this model. Although Felman and Laub pay heed to what Felman deems law's "oppressive" sides, and to the problem of trauma's "unrepresentability," they both nevertheless give considerable weight to the power of legal testimony to repair "private but also collective historical injustices."³² Therapeutic disclosures aimed at psychological closure require a sympathetic audience and a survivor willing to reconstruct her traumatic narrative in its most harrowing details.

The example of Felman and Laub's work indicates the increasingly normalized union between therapeutic and legal "remedies" across the humanities—especially Holocaust studies, trauma theory, and memory studies, which saw a real boom in the last decades of the twentieth century³³—but also within the expanding field of international transitional justice literature. Moreover, it signals the migration of psychoanalytic research, vocabularies, and practices from the clinic to the courtroom. What it brings into relief for our purposes is an inviting but reductive account of how healing through disclosure in

²⁹ Shoshana Felman and Dori Laub, *Crises of Witnessing in Literature, Psychoanalysis, and History* (New York: Routledge, 1992), 68.

³⁰ This is a reference to the Yale Video Archive, spearheaded by Laub: <http://www.library.yale.edu/testimonies>.

³¹ Felman and Laub, *Crises of Witnessing*, 70.

³² *Ibid.*, 12.

³³ Ana Douglas and Thomas Vogler, *Witness and Memory: The Discourse of Trauma* (New York: Routledge, 2003), 6.

courts functions. One sees an assumption on the part of the authors that these social-legal scenes of healing operate like individual therapy, but on a public scale. The variability of experiences of trauma and healing is glossed over, and one sees a sort of legalized talking cure at work, in which putting words to one's repressed traumas produces therapeutic effects in a sort of automatic, instantaneous, and magical way, regardless of whether one finds oneself in a therapist's office or on a witness stand.³⁴ Although this may be the case for some victims, the precise conditions under which this happens, the fact that this does not always happen, and the link between the individual on the stand and the community that she is thought to represent are not made clear or theorized by Felman or Laub. They are participants in what Henry Greenspan calls a "modern crusade" to collect and distribute survivor testimony in the greatest possible quantity.³⁵ The enchanting, spectacular scenes of healing these thinkers describe and exalt are made less so when their veiled precepts and oversights are laid bare. Is telling one's story in this public, legal context necessarily the most conducive path to healing? How is one to know healing when one sees it? And is it advisable to use the same metric for gauging healing different individuals and groups? Do forgetting and silence necessarily run counter to healing? Are historical traumas of the sort Felman and Laub address best dealt with in a trial, and if so, which trials are most amenable to healing? What are the implications of rendering "Holocaust" trials paradigmatic of all post-atrocity trials? Do whole communities experience trauma in ways that are analogous to individual trauma? What are the risks of affording legal institutions this power to heal, and how might practices of victimized storytelling backfire? These questions are skirted in this corner of the scholarship on traumas and trials, which stands out in its attempts to examine historical trials through literary and psychoanalytic lenses as a means of remedying traumatic histories.

All these occlusions could seem to result from the extent to which Felman and Laub's work draws from fields not indigenously part of law. The work of legal scholar Lawrence Douglas evinces many of the same problems—especially apropos the healing power it accords to Holocaust trials. Douglas, whose work we will now turn to, represents one of the most outspoken promoters of therapeutic justice and didactic trials coming from the field of transitional justice. These trials are the exclusive focus of his book of 2003, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, where he conceives of international criminal law as containing a powerful didactic and therapeutic (in addition to its more conventional juridical) goal of prosecuting criminals.

More specifically, the historical trial—such as the Nuremberg trials of the postwar period, or the Israeli trial of Adolf Eichmann in 1961—represents an occasion, according to Douglas, for "captur[ing] the incomprehensible" insofar as it can yield new idioms for

³⁴ "The talking cure" is a treatment developed by Freud's colleague Josef Breuer in the 1880s, and coined by a patient of Breuer's, "Anna O." On this model, symptoms caused by earlier, repressed and pathogenic memories are ameliorated once the traumatic events and their accompanying emotions are verbally expressed, a process Breuer and Freud also referred to as the "cathartic method," and which some have regarded as the foundation of psychoanalysis (Peter Gay, *Freud: A Life for our Time*, London: W. W. Norton, 1988, 65). See also: Sigmund Freud and Josef Breuer, *Studies on Hysteria* (New York: Basic Books, 2000 [originally published in 1895]).

³⁵ Douglas and Vogler, *Witness and Memory*, 5–6.

understanding and reconciling with traumatic history.³⁶ Douglas avers that such trials can help achieve objectives that go far beyond legal formalism's goal of imposing the rule of law vis-à-vis convicting and punishing criminal wrongdoing and those behind it. He outlines broader, grander objectives, such as producing a lasting historical record, reconstituting the law that was breached, enabling victims to achieve "collective catharsis" and creating "heroic memory," which pays tribute to the victory of human spirit.³⁷ The didactic, historical trial is figured as a "necessary episode in working through the traumatic history of the Holocaust, providing correction and closure to individual and collective narratives of unredeemed horror" that had been "secreted away" and "denied public or private expression."³⁸ As such, Douglas renders legal proceedings the most reliable means of achieving reconciliation and of providing a "salve to traumatic history."³⁹

He also thereby leaves unaddressed the same issues that Felman does. When survivors give voice to their repressed, silenced, and traumatic memories, replacing private grief with public expressions of suffering, the trauma, according to Douglas, can be "comprehended" and "mastered."⁴⁰ Such a formula for mastering trauma is the basis for a notion of "narrative jurisprudence," according to which survivor testimony can occasion both national and personal healing, but, once again, the specifications of these processes, and the relationship between individual and collective catharsis, mastery, and healing are not made clear. He avidly promotes the idea that disclosure in the court setting brings "closure," while sidestepping the questions of: How do we know this approach works? Does it always work in this way? And how might it not only fail in some instances, but also produce its own set of problems for victims of atrocity? Douglas acknowledges that the didactic trial risks distorting conventional legal justice, he is convinced that this is a risk worth taking.

It should be noted that Douglas, a professor of law, jurisprudence, and social thought at Amherst College, has given lectures at both the ICC and the ICTY. Although best known for his aforementioned book, he was invited by the ICTY's prosecutor's office to discuss his book *From Eichmann to Milosevic: Reflections on Perpetrator Trials* in a 2004–5 lecture series meant to bridge the gaps between academic scholarship on the topic of trials and traumas and practitioners in the fields of IHL and postwar politics.⁴¹ Douglas's close ties to these key contemporary war crimes courts underscore the permeability of IHL's boundaries and the incorporation of a certain popularized trauma theory and transitional justice scholarship in its expanding, surprisingly elastic domain. A new jurisprudential genre, as we will see in subsequent chapters, is on the rise—one that blurs at both the institutional and discursive levels the boundaries between the

³⁶ Douglas Lawrence, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT: Yale University Press, 2001), 5.

³⁷ *Ibid.*, 6, 109, 128, 154.

³⁸ *Ibid.*, 109, 154.

³⁹ *Ibid.*, 2.

⁴⁰ *Ibid.*, 4–6, 109.

⁴¹ Amherst College, "Amherst College Professor Lawrence Douglas Addresses International Criminal Court," press release, Feb. 15, 2005, https://www.amherst.edu/aboutamherst/news/news_releases/2005/02_2005/node/9628.

psychotherapeutic, the political, the legal, and the academic, and subscribes to the disclosure-for-closure approach to trials adjudicating mass violence. As Douglas's and Felman's and Laub's interventions exemplify, when healing and justice are on the line, one finds an excess of exuberant conviction that trials can heal the traumas of atrocity (regardless of context), coupled with a dearth of carefully executed analyses that substantiate and situate the very terms and maxims upon which the pro-trial position rides.

IV. Narratives of Political and Personal "Redemption"⁴²

We can find this same unspecified faith articulated even in the work of legal scholars not as distant from the actual practice of urgent humanitarian law as the US scholars we just examined. While also situated at the crossroads of academia and criminal law, the Argentine legal theorist and presidential advisor Carlos Nino, for example, takes an even more active political stance through his ardent support of the trial as a (politically) transitional and (personally) therapeutic form. He played a major role in shaping the legal and political policies of the president after the fall of the military junta in 1983. His book *Radical Evil on Trial* provides a firsthand account of political developments in Argentina during the 1980s.⁴³ On the basis of his proximity to these historic events, that the trial is the optimal means of bringing about human rights and healing in the wake of political violence: the adversarial trial of the junta in the 1980s, he says, provided "a deeply divided society with a cathartic theater" for victims to come to grips with their own experiences of "fear, silence, and death."⁴⁴ On the basis of his experience with this example, he stresses that a publicized, criminal trial is much more effective than a truth commission in being both a dramatization of truth, and thus a tool for "emphatic public disclosure" and galvanizing public support.⁴⁵ The kind of profound public impact that a dramatic, historical trial offers, Nino argues, can not only pave the way for a broad-based collective catharsis, but also foster the political and ethical solidarity needed for democratic reform.⁴⁶ Like other critics of truth commissions, he tries to unmoor the work of truth from that of justice, arguing that "truth-telling, followed by neither reparations nor prosecutions, appeared to render victims' accounts," and thereby claims to justice, meaningless, especially when amnesty was offered to perpetrators in the name of truth and the establishment of shared national memory."⁴⁷ Truth-telling/testifying in this vein is opposed to true justice, insofar as victims are asked to relive their painful stories, but are robbed of the cathartic satisfaction of seeing those responsible for their pain legally apprehended. Many in this pro-trial camp aver that prosecuting perpetrators is the sole means of bringing justice to a community fragmented by political violence.⁴⁸

⁴² This is a reference to Mark Osiel's work, discussed below. See: Osiel, "Ever Again," 275.

⁴³ Carlos Nino, *Radical Evil on Trial* (New Haven, CT: Yale University Press, 1996), 146.

⁴⁴ Osiel, "Ever Again," 471.

⁴⁵ Osiel, "Ever Again," 472; Nino, *Radical Evil on Trial*, 146.

⁴⁶ Osiel, "Ever Again," 462–63.

⁴⁷ Naomi Roht-Arriaza and Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century*, (Cambridge, UK and New York: Cambridge University Press, 2006), 8.

⁴⁸ Henry Rousso's characterization of the 1983 trial of Klaus Barbie in France is emblematic of this position: "Nothing but a trial could satisfy the victims' need for justice...And their statements after the trial

As for the less enthusiastic and more overtly critical legal scholars, they, too, (in a pattern whose repetition I wish were not present) leave this massive “concept” of healing and its ostensible mechanics unspecified. Transitional justice scholar Mark Osiel, for example, similarly sees trials in the aftermath of what he calls “administrative massacre” (large-scale, organized, state-sponsored campaigns of violence) as opportunities for war-torn communities to begin to understand their collective victimization,⁴⁹ wherein understanding may engender forms of healing. Similar to the aforementioned authors, Osiel regards legal trials as theatrical, and thus as prime venues for the “poetics” of “legal storytelling.”⁵⁰ The courtroom drama is cast as a “theater of ideas” where “questions of collective memory and national identity are engaged.”⁵¹ At the same time, however, Osiel thinks that trials alone cannot bring about individual, private catharsis; only by weaving together private accounts with public narrative can it offer a generally therapeutic “metanarrative of liberal redemption” for survivors and those who have sought recourse to the courts in order to punish perpetrators.⁵²

Such a qualification would seem to indicate that Osiel is ready to elaborate further on what this complex kind of private/public legal “healing” consists in, but his work shies away from such an account just when it seems most ready to offer one. Like Nino, Osiel instead turns his attentions to the trial’s political potential and relation to justice while leaving in the same move “the therapeutic” and its presumed content aside. Specifically, he places emphasis on the trial’s capacity to “stimulat[e] democratic deliberation” and solidarity based not on fantasies of consensus, but on what he calls “civil dissensus”—the necessary starting point for democracy in modern pluralistic society.⁵³ Adversarial debate is the heart of justice and democracy for Osiel, and the courtroom is one place that can facilitate a culture of tolerance and regulated dissensus, or contestation based on community members’ inevitably different standpoints and frames of reference. As for the relation of the production of dissensus to the project of healing, Osiel offers this caveat: “What makes for a good ‘morality play’ tends not to make for a fair trial. And if it is the simplification of melodrama that is needed to influence collective memory, then the production had best be staged somewhere other than in a court of law.”⁵⁴ So for even this avid supporter of the trial as “a monumental spectacle” and “transformative” shaper of collective affect and memory, the risk of failure is not far off, given that legal rules of procedural fairness and individual culpability can easily be co-opted by ruling powers in transitional societies.⁵⁵

made it clear that this was what they felt too.” Henry Rousso, *The Vichy Syndrome: History and Memory in France Since 1994*, trans. Arthur Goldhammer (Cambridge, MA: Harvard University Press, 1994), 215.

⁴⁹ Osiel, “Ever Again,” 144, 470.

⁵⁰ Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Piscataway, NJ: Transaction Publishers, 1999), 3.

⁵¹ *Ibid.*, 3.

⁵² Osiel, “Ever Again,” 676.

⁵³ *Ibid.*, 704.

⁵⁴ Osiel, *Mass Atrocity*, 59.

⁵⁵ Osiel, “Ever Again,” 505-7.

Now Osiel stands out from the group of scholars I've described as "pro-judicial-healing" insofar as his work provides a fuller account of the risks involved with turning to trials in the wake of political violence and to the extent that he attempts to theorize what he sees as the political and social requirements for achieving a healed society (which, for him, is synonymous with a liberal democratic society). His work opens on to a critical and oft-avoided question in this literature; namely, what kinds of politics such legal procedures might promote and foreclose. He does not, however, extend his critical reflections to the content of the kind of "healing" and "therapeutic" activity his work presupposes, or the potential consequences thereof. Even while it problematizes blind celebrations of judicial healing for individuals, his account conceives healing as something that can occur for whole collectives *as if* they were individuals and *as if* consensus had been achieved on the contents of healing in the first place. By stating that trials can enable private accounts of suffering that "unburden" survivors to be "woven together into a larger," cohesive "metanarrative" of communal suffering that becomes "etched into the public memory" and thereby provides a "new myth of national founding,"⁵⁶ Osiel ends up ignoring the difference between individual and collective experiences of trauma and deploying a conception of social solidarity that covers over the very kind of social fractures that render it, from his perspective, necessary. Dissensus, as we saw, is what by Osiel's reckoning international criminal proceedings productively effectuate; but he also believes that once dissensus has been brought to the surface, it should be neutralized in the political consensus and solidarity achieved in the posttraumatic metanarrative. In other words, dissent, plurality, and divergent views can be opened and resolved in the trial setting if the health of social solidarity—and thus justice and peace—begin to emerge and take hold there.⁵⁷ Osiel, then, turns out to be surprisingly proximate to a disclosure-for-closure model of healing, and his goal of opening debate and dialogue among dissenting parties about issues of what it means, in his own words, to "com[e] to terms" with "collective mourning" and "melancholia" in the wake of administrative massacres.⁵⁸

V. Healing Beyond the Courts

As Osiel's work portends, the disclosure-for-closure model's entrenchment is thrown into vivid relief when one ventures into the literature of those who distance themselves from the notion that international criminal courts can provide healing for victims. Even this group of scholars tends to assume that the problem lies in its incapacity to deliver healing—not in the normative conception of legal healing itself, which they presume. Illustrative of this position is the work of three legal scholars, including one legal anthropologist, who subscribe to the ideals of judicial healing, but believe courts are unable to supply it.

First, a notable study that touched upon the topic of war crimes courts and their capacity to offer victims a venue for closure and healing was undertaken by Marie-Benedicte Dembour and Emily Haslam in 2004. The scope of their research was limited to analyses

⁵⁶ Ibid., 676.

⁵⁷ Ibid., 486–99.

⁵⁸ Ibid., 463, 522.

of victim-witness testimonies at the ICTY in one case—the Krstic trial. Their work highlights the incongruity between pervasive, optimistic, yet sweeping statements about the beneficial impact of giving testimony for victims on the one hand and the actual impact of war crimes trials on victims on the other. Extrapolating from their findings in one trial, they contend that, instead of providing a safe place for victims to recount their stories of victimization and become unburdened by the painful and festering memories of the traumas they endured, the legal procedure adopted by the ICTY instead “silenced” and patronized victims.⁵⁹ Their overall thesis—that the international criminal justice process instrumentalized individual (victim) memory for its own collective ends at the expense of those victims’ well-being—leads them to call for fostering a variety of memories outside judicial platforms.⁶⁰

In their close readings of trial transcripts, Dembour and Haslam cite numerous occasions in which judges interrupted witnesses and made insensitive and inappropriate remarks, and they suggest that “telling one’s story” in the judicial arena can, at best, take the form of supplying legal evidence. For these reasons, they proclaim, adversarial criminal trials should not be expected to provide a forum for victims to be “heard” and their suffering to be acknowledged in a meaningful way.⁶¹ They center their attention on what the project of legal healing can silence and leave out, suggesting that healing, as difficult as it may be to positively define, is unlikely to take place in an adversarial context that silences witnesses’ stories and builds up their expectations, only to let them down.

Dembour and Haslam were some of the first to offer cogent critiques of the ad hoc tribunals when it comes to facilitating healing for victims, to shed light on the unexamined precepts at the center of juridical healing discourse, and—in their words—“open the debate” on witnesses’ actual experiences when participating with the courts.⁶² Pointing to several instances in the Krstic trial in which judges and lawyers from the prosecution were insensitive, even rude, as victim-witnesses testified before the court, Dembour and Haslam determine that “legal proceedings do not offer therapeutic healing.”⁶³

However, their argument is grounded in their presumption that healing is contingent upon a certain kind of memory work and storytelling, and that the absence of this kind of storytelling nullifies the healing process. A key aim of the study is to outline particular ways that the trial setting, and specifically the language of court officials, can harm victims on the witness stand, where harm and robbing victims of “a voice” is equated. But with the study’s interest in the court’s failure to heal, one expects it to provide some sort of critical examination of what healing might comprise. By situating healing in vague and negative terms—as that which the courts *cannot* supply to victims—these authors’ claims come across as being as unpersuasive and weak as the unfounded celebrations of

⁵⁹ Marie-Benedicte Dembour and Emily Haslam: “Silencing Hearings? Victim-Witnesses at War Crimes Trials,” *The European Journal of International Law* 15, no. 1 (2004): 151.

⁶⁰ *Ibid.*, 151.

⁶¹ *Ibid.*, 151–77.

⁶² *Ibid.*, 155.

⁶³ *Ibid.*, 160.

juridical healing they set out to problematize. Healing and healing's opposites simply function in their work as vague but monolithic entities that behave according to fixed rules and apply universally. Instead of interpretation, they simply deploy a sequence of stated "truths"—the truth of victim testimony and trauma and the truth of their claims about trauma's remedy. As a result, Dembour and Haslam jettison critical questions about healing's causes, contingency (how it may not function according to a singular and predictable logic in every case), as well as explorations of healing that may not conform to the disclosure-for-closure model they hold so dear.

A more moderate position than Dembour and Haslam is adopted by legal scholar Eric Stover, who calls for striking a delicate balance between recourse to law as a system of rules and procedures erected to prosecute criminals and condemn wrongdoing on the one hand, and the law as a vehicle for satisfying restorative goals on the other. Stover stands out as one of the few scholars whose work directly examines witnesses' experience of testifying before a contemporary tribunal. His 2005 book entitled *The Witnesses: War Crimes and the Promise of Justice in The Hague* does not focus on the question of the potential cathartic effect on victims per se. Early on he even makes known that he "dispenses with the tropes that justice can be 'healing' for survivors of mass violence" or offer a forum for "national therapy,"⁶⁴ proffering that "a primary weakness of writings on justice in the aftermath of war and political violence is the paucity of empirical evidence to substantiate claims about how well criminal trials achieve the goals ascribed to them," especially "healing," "coming to terms with the past," and cathartic "closure."⁶⁵ Combining empirical research with historical, political, and legal accounts of the ICTY and ICTR, and the respective conflicts that led to both, he instead makes a tempered endorsement of war crimes tribunals as a means of responding to war-torn societies and mass violence, where legal remedy can—but does not always, he is clear—have a "positive impact" on victims participating with the court in question.

Stover conducted interviews with eighty-seven witnesses who testified at the Yugoslavian tribunal as a means of gauging the experience of witnesses and challenging the notion that participation with the courts can "heal." His findings suggest that the majority of ICTY witnesses he interviewed experienced the process of giving testimony in a "positive" manner, though he at the same time warns against viewing the tribunals as "some kind of panacea for righting past wrongs or as a 'magic bullet' for 'healing' victims of war-torn societies."⁶⁶ In other words, he states, victims' "positive experiences" with the tribunal should not be viewed as synonymous with individual and communal "healing" or "closure." For that reason, he continues, the ad hoc tribunal's overly ambitious mandates and often well-meaning intentions to help victims heal by way of tribunals tend to raise victims' expectations and result in victims' disappointment and detract from the main goals of the trial. Stover thus advocates treating the more conventional goals of war crimes trials as their chief purpose (i.e., the prosecution of criminals and the creation of a factual historical record of the events in order to discourage denial on the part of perpetrators and their sympathizers), which can in turn

⁶⁴ Stover, *The Witnesses*, 4.

⁶⁵ *Ibid.*, 11.

⁶⁶ *Ibid.*, 16, 134.

provide a clearer delimitation of the extent to which they can acknowledge to victims their suffering.⁶⁷

Upon close examination, we nonetheless find that Stover's empiricism does not protect him from falling into a trap. Stover suggests that the main reason the courts cannot heal is because they cannot offer a suitable venue for victims to "tell their stories" and be empathically heard (offering Dembour and Haslam's study above as evidence for this claim).⁶⁸ In other words, he too makes the assumption that the disclosure-for-closure model analyzed heretofore is *the* formula for healing, but does not offer grounds for his position. His account of narrative healing, moreover, is not derived from his empirical work, which offers a rich overview of how individual, fluid, and complex the experience of testifying is for different people. Rather, with respect to the question of healing, Stover swiftly moves to judgment (i.e., courts do not heal) while sidestepping interpretation of and critical reflection on healing and trauma's constitutive elements. To complicate matters further, he proclaims that criminal justice mechanisms can never by themselves "suture the lesions of individual and collective trauma," since justice and healing require "more fundamental changes to the social order which made possible the original trauma."⁶⁹ Instead of specifying what those changes involve, he simply states (borrowing from the legal theorist Kirsten Campbell) that justice is yet "to come."⁷⁰

One sees similar limitations with feminist theorist Katherine Franke's work on therapeutic witness testimony for victims of wartime sexual violence. She unequivocally positions healing tout court outside the legal domain and avers that "healing the witness is not and cannot be the court's concern"⁷¹ and is at pains to convey that "the presentation of the injured self in legal fora does not necessarily produce a healed self, for the treatment of witnesses is by its very nature appropriative."⁷² Thus, she concludes, we must look elsewhere if we intend to promote meaningful collective and individual healing in the wake of politicized violence.

Franke presents trials as a singular entity with a "nature," citing Dembour and Haslam to support her argument that this nature is "appropriative" and thus not conducive to healing.⁷³ She elaborates on the ways in which the entity consumes and appropriates the memory of others (and by this she is referring to the memories of victims who testify): "To bear witness requires that victims pose themselves and their memories in a way that

⁶⁷ Ibid., 32.

⁶⁸ Ibid., 128, 7–10.

⁶⁹ Ibid., 15.

⁷⁰ Also "to come" or absent in Stover's account is an exploration or explanation of what these fundamental changes might look like, or how this amorphous and partial account of healing is related his understanding of the requirements of therapeutic storytelling that he tells us the law cannot accommodate. One might expect that Stover's critique of juridical healing's overwrought promises of healing would include a critical and sustained examination of the dominant model of healing promulgated by the courts. Instead, he presumes and preserves this disclosure-for-closure model, prematurely eliding the nuances of possible routes to healing as he pursues his empirical study of victims' perspectives.

⁷¹ Katherine Franke, "Gendered Subjects of Transitional Justice," *Columbia Journal of Gender and Law*, 15, no. 3 (2006): 821.

⁷² Ibid., 821.

⁷³ Ibid.

allows them to be harvested by judicial actors in the service of larger goals of justice.”⁷⁴ Her intervention is ostensibly concerned with two kinds of justice—more or less Nancy Fraser’s concepts of retributive justice and recognition-based justice—and the potential for these kinds of justice in the ICTY, ICTR, and ICC. Yet without a clear explanation of precisely how juridical healing might relate to either of those forms of justice, why healing (or the failure to heal) is an expectation we have of justice at all, and why healing happens (solely) in the context of testimony, she maintains that these institutions cannot heal. Healing once more emerges as an uninterrogated good that this law (IHL) cannot deliver. Franke, again like Dembour and Haslam, seems to equate a law that *does* “not necessarily” heal and a law that *necessarily cannot* heal. Whereas the former does not presume in advance what constitutes the essence of law or healing (does not presuppose their “nature,” to cite Franke) and what healing effects the law may or may not produce, the latter reflects an a priori understanding of healing and law wherein the concepts are known and opposed; that is, IHL law and healing have fixed meanings that can be applied as a rule to all cases. She refrains from a more supple and sustained analysis of healing and why it has, over time, become a matter of transitional justice in the first place. In short, healing is for Franke a yardstick by which to measure the success of the tribunals, but one is expected to understand what it is, why it is, where it comes from, and how it works. The closest she comes to elaborating on her own understanding of healing is to quote Shoshana Felman and Dori Laub (who draw very different conclusions about law’s healing power than Franke does), stating, as if it were an uncontested fact, that “bearing witness in the service of healing requires an empathic listener, someone to hear and affirm suffering”⁷⁵ and that “this kind of empathic listening is not the listening of a judge.”⁷⁶ Instead of critically reflecting on these terms, or parsing the normative approach to healing they subtend, Franke chooses to reinforce her position by simply restating her point, concluding: “Law is generally ill-suited to the kind of empathic listening that would transform the speaking self into a healing self.”⁷⁷

In short, Franke’s work runs into the same problems as those whose theories and fieldwork she criticizes. Healing is treated as a known entity, and so are the courts and the effects they “necessarily” have. In this respect, when Franke states that “healing the witness is not and cannot be the court’s concern,” she obscures the fact that these courts are in fact extremely “concerned” with “healing,” and that the discourse of healing has, like it or not, gained considerable normative traction.⁷⁸ Insisting that it simply cannot be is tantamount to wishing it away, and steers one towards a moral valuation of this law as “bad” for victims while leaving untouched the questions of how it works discursively, how it (despite its most obvious failures to fully deliver on its ambitious goals of healing) manages to attract supporters and extend itself as a form of power bent on giving the impression of itself as profoundly concerned with healing.

⁷⁴ Ibid.

⁷⁵ Ibid., 821–22.

⁷⁶ Ibid., 821.

⁷⁷ Ibid., 825.

⁷⁸ Ibid., 821.

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Dembour, Haslam's and Franke's scholarly interventions are symptomatic of a growing number of scholars and legal practitioners who have been critical of the migration of the therapeutic to the legal domain.⁷⁹ These three scholars are among those who have argued that the courtroom is a hostile place to tell one's story, resulting in potential "retraumatization" of the victims on the witness stand.⁸⁰ Many with such views conclude that these issues could be better addressed through recourse to history, literature, psychoanalysis, religious or communal rituals, or truth commissions.⁸¹ Of these options, truth commissions have become the most touted alternative to trials in the wake of political and racial violence.⁸² In the 1980s and 1990s, truth commissions became an alternative to trials in countries such as Chile, Argentina, and South Africa and other political environments in which trials were thought to be too destabilizing. There have since been over twenty truth commissions established around the world—throughout Latin America; Eastern Europe; Asia, including the former Soviet Union; and Africa.⁸³ All of them have placed a premium on public truth-telling as a means of segueing from state-sponsored violence, civil war, or foreign rule to what human rights and transitional justice scholar Helena Cobban calls "a significantly more rights-respecting situation,"⁸⁴ as well as a means of bringing about "reconciliation and healing" for communities divided by animosity and violence.⁸⁵

Brandon Hamber represents a prominent transitional justice scholar who has taken distance from the trial-centered approach to healing, and instead turned his attention to the question of healing by way the quasi-legal forum of truth and reconciliation commissions. Hamber sees the requirements of a trial and the requirements of healing as in tension, though not necessarily opposed. He avers, "Despite little research and empirical evidence, the ability of processes of recovering truth to contribute to healing and reconciliation with the past has been ubiquitously asserted."⁸⁶ He cites as a prime

⁷⁹ See: Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan* (New York: Plume, 1994); Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2002).

⁸⁰ See: Priscilla Hayner, *Unspeakable Truths* (2002) and Robert Elias's *The Politics of Victimization* (New York: Oxford University Press, 1986). Elias notes: "Although sometimes even a grueling trial may help a few victims achieve some psychological release, most victims gain little from being involved and routinely suffer from further harms. . . . The sexual assault victim must bear the usual costs and problems that face all victims in the criminal process, plus an extra dose of publicity, insensitivity, and degradation, not to mention to have to relive the victimization" (169). This insight seems particularly germane to the ad hoc tribunals, insofar as they have made a concerted effort to ensure that sexual violence victims are recognized, heard, and protected by the Tribunals, as discussed in chapter 4 of this dissertation.

⁸¹ Douglas, *The Memory of Judgment*, 4.

⁸² Roht-Arriazia and Mariezcurrena, *Transitional Justice in the Twenty-First Century*, 1–14.

⁸³ Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2002), 3.

⁸⁴ Helena Cobban, "Notes on the Development of Transitional Justice since 1945" 2005, <http://justworldnews.org/archives/Notes%20on%20the%20development%20o%20fTJ.htm>.

⁸⁵ Sierra Leone Truth and Witness Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, vol. 1 (The Sierra Leone TRC, 2004): 2. Available at: <http://www.sierraleonetrc.org/>.

⁸⁶ Brandon Hamber, *Transforming Societies After Political Violence: Truth, Reconciliation and Mental Health* (New York: Springer 2009), 70.

example of this assumption the South African Truth and Reconciliation Commission's (hereafter TRC) references to the "healing potential of storytelling, of revealing the truth before a respectful audience and to an official body."⁸⁷

Hamber takes issue with two features of the dominant model of healing, wherein testimony/truth telling is thought to provide the pathway to individual and collective healing. First, he draws his readers' attention to the obvious but oft-ignored fact that "forgiveness, healing, and reconciliation are deeply personal processes, and each person's needs and reactions to peacemaking and truth-telling may be radically different."⁸⁸ He situates individuals and communities on different timetables and personal and collective healing in a complementary relationship to one another, apparently to avoid the sort of problems he sees with the TRC discourse in which these distinctions are glossed over.

Offering his own, highly precise criteria for healing, Hamber proposes that the issue is not so much a choice between two public fora—that is, between truth commissions or the justice of the tribunals. Rather, healing for Hamber depends upon whether a given environment offers a secure space for a particular kind of public storytelling. Producing those conditions, he states, must be as much a national and international priority as truth commissions and justice through the courts.⁸⁹ Only on the condition that a victim can be "heard" and "every detail of the traumatic event" can be "re-experienced in a safe environment" can healing happen.⁹⁰ For Hamber, the performance can be "successful" in a variety of contexts, as long as the audience offers the performers the sympathetic and supportive reception required for cathartic, painstaking storytelling and empathetic listening.

So although Hamber begins with a cogent critique of the conceits of the TRC and its presumption that truth-telling under the right conditions can heal, and although he points to the highly personal, contingent nature of healing (i.e., what heals one person will not necessarily heal another, or an entire community) as he makes sure to distinguish individual and collective healing, Hamber himself seems to fall back on a similarly formulaic, uninterrogated understanding of healing that is even more rigid in its requirements than the one he criticizes.⁹¹ This pathway to healing is presented as a fixed prescription that, if administered correctly, will remedy individual traumas. And so, although Hamber's work at times calls into question the reductive and homogenizing understandings of collective and individual healing promulgated by the TRC and those

⁸⁷ Brandon Hamber, Dineo Nageng, and Gabriel O'Malley, "Telling it Like it Is' ... Understanding The Truth and Reconciliation Commission from the Perspective of Survivors," *Psychology in Society* (PINS) 26 (2000): 35.

⁸⁸ *Ibid.*, 2.

⁸⁹ Brandon Hamber, "Do Sleeping Dogs Lie? The Psychological Implications of the Truth and Reconciliation Commission in South Africa." Paper presented at Seminar No. 5, 1995, The Centre for the Study of Violence & Reconciliation, Johannesburg, South Africa, July 26, 1995, 26.

⁹⁰ Brandon Hamber, "Does Truth Heal?" A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence, in *Burying the Past: Making Peace and Doing Justice*, ed. Nigel Biggar (Washington, DC: Georgetown University Press), 2.

⁹¹ Hamber, Nageng, & O'Malley, "Telling It Like It Is," 1.

who promote narrative healing vis-à-vis testimony, he ultimately resorts to an equally untenable, static, and oversimplified account of how healing happens for individuals. And by failing to acknowledge this tension at the heart of his attempt to “deal with the legacy of political violence,” he disavows the complexity of this project, chiming in with the chorus of scholars who have shielded the disclosure-for-closure model from the perils of critique.

In sum, by proceeding as if healing were settled and fixed, the studies considered in this section stymie critique and contestation of the reified norms of healing circulating in IHL and transitional justice discourse. Although these authors cast aspersions on the courts for silencing victims and failing to deliver healing, they also (along with the projudicial healing camp of Felman, Laub, et al.) seem to participate in their own forms of silencing: The complexity, contingency, and contestability of healing in the wake of mass violence is to some extent censured from and by these thinkers’ narratives.

VI. Nontalking Cures

Approaches to and experiences of healing in the wake of extreme violence that do not conform to the purportedly universal therapeutic benefits of verbally remembering one’s traumatic injury in a public setting (be it in a courtroom, by way of a testimony archive, or during a truth commission hearing) can marginalize and even supplant alternative reparative approaches. In other words, the monopoly that the disclosure-for-closure model enjoys impacts the extent to which efforts to bring justice, healing, and reconciliation “take” in various contexts. For instance, anthropologist Rosalind Shaw draws critical attention to the ways in which Sierra Leone’s Truth and Reconciliation Commission (hereafter TRC, 2000–2004)⁹² valorized a sole form of “memory practice”; that is, “truth telling, the public recounting of memories of violence.”⁹³ She contends that Sierra Leone’s TRC’s promotion of this model (which falls squarely within what I have called the disclosure-for-closure paradigm) based on the healing powers of “truth,” discounted widespread and deeply rooted “local understandings of healing and reconciliation.”⁹⁴ Allegiance to this one model has impeded the process of reconciliation, she avers, insofar as it did not resonate with its constituents’ preferred means of coping

⁹² The Truth and Reconciliation Commission’s mandate was to “create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Rome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered” (“The Truth and Reconciliation Commission Act 2000, Parliament of Sierra Leone, 2000,” Truth and Reconciliation Commission, <http://www.sierra-leone.org/Laws/2000-4.pdf>).

⁹³ Rosalind Shaw, “Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone,” *United States Institute for Peace Special Report*, no. 130 (Washington DC, February 2005): 1–2.

⁹⁴ *Ibid.*

with past violence, and failed to attain popular support.⁹⁵ The popular approach she refers to is what she calls a “forgive and forget” approach to social recovery. She examines this alternative to truth telling to highlight the fact that Sierra Leone, but also communities in Mozambique and South Africa have longstanding traditions of forgetting—not remembering—in the wake of violence. Remembering or revisiting the painful past is believed by many in Sierra Leone’s to ignite violence, and is at odds with the cultural memory practices employed by the TRC and other international transitional justice mechanisms. Shaw stresses that this hegemonic practice is imported to the aforementioned countries and arose from the following conditions

*... specific historical processes in North American and Europe, originating, perhaps in the redemptive significance of confession in church, and developing more recently through Freud’s ideas about repressed memories, the psychiatric construction of the increasingly dominant concept of Post-traumatic Stress Disorder and its treatment through verbal processing, and the place of the Holocaust as the paradigmatic modern atrocity that must be remembered in order to prevent recurrence.*⁹⁶

Shaw refers to several of this model’s conditions of possibility, and a sort of “talking cure” that proceeds and surpasses Freud.⁹⁷ In shedding light on the hegemonic, ethnocentric character of the memory practice in question—one which is consistent with the model upheld by the international criminal courts and scholars of juridical healing discussed here—Shaw points to the unsavory consequences of preceding as if the essence of healing and justice are beyond a doubt, and as if a singular model or generic calculus of juridical healing can be applied universally. I bring in Shaw’s ethnographic work, and her critique of the dominant model of healing employed by international justice mechanisms in Sierra Leone and beyond, not because I am convinced “local practices” of healing and peace are always the most authentic and best. Instead, her work simply helps to give pith to my claim that the dominant, universalizing discourse of juridical healing at issue (mobilized by international criminal courts, but also TRCs) cannot accommodate other, existing, or not-yet-devised modes of reparation in the aftermath of war and its traumas.

Like Shaw, Allen Feldman’s work on post-apartheid memory politics in South Africa, especially as promulgated by its TRC, figures the “truth-telling” method under discussion as a “current cultural predilection for confessional trauma narratives.”⁹⁸ He likens these techniques of memory that operate under the auspices of transitional justice to contemporary “talking cures” that function as “Enlightenment stand-ins” and coopt the post-terror narrative by means of decontextualization: this approach to reconciliation, peace, justice, and healing “emplots” a particular therapeutic narrative on the

⁹⁵ Shaw’s research involved interviews with local citizens about the SLTRC and its “truth-telling” memory politics. She notes that a minority of people she interviewed supported the TRC’s approach, and that few people wanted to participate and “remember” (ibid., 4–8).

⁹⁶ Ibid., 7.

⁹⁷ Ibid., 104.

⁹⁸ Allen Feldman, “Memory Theaters, Virtual Witnessing and the Trauma-Aesthetic,” *Biography*, 27, no. 1 (Winter 2005): 167.

communities it claims to heal and liberate.⁹⁹ For Feldman, the trauma trope operates as a universal narrative of victimhood and social and individual recovery that is imposed upon survivors.¹⁰⁰ He turns his critical lens on the Commission, who—by virtue of their entrapment in the individualizing, confessional trauma narrative paradigm—“fetishiz[ed] ... [and] atomized biographical narratives” and “talking cure models” at the expense of grassroots approaches to healing.

Although the final TRC Report did not always account for it, Feldman notes that, in fact, the human rights violation hearings that were held in local communities throughout South Africa, included large segments of the local community. Community members came together to testify to the violence they endured for decades, drawing on what Feldman identifies as a specifically South African mode of remembrance and healing linked to kinship and community.¹⁰¹ This approach entailed victim-witnesses of color who took the stand as a means of speaking from and for the community—not simply as individual sufferers—and in public performances of memory that moved forward and attained authentication by way of call and response.¹⁰² Testimony of this sort can be thought of as collective speech.¹⁰³ What emerged from these hearings, and from the narratives of socially embedded violence Feldman calls to his readers’ attention was not a singular metanarrative of trauma and healing. Rather, the hearings produced occasions for multiple, sometimes divergent and contested narratives that disrupted official narratives and occluded histories of institutional violence that shaped the hegemonic memory politics of the commission itself, and which Feldman lays bare.¹⁰⁴

Healing on this grassroots model does not happen by way of individual narratives of suffering made public. Instead, healing is understood in the context of economic development and social reparation and as “a long-term process,” not a singular event effecting individuals who testified at the hearings.¹⁰⁵ Feldman maintains that the form of healing that emerged in the TRC hearings was “intimately tied to social movement notions of disability rights, societal reintegration, and economic empowerment.”¹⁰⁶ Individuals came together in these scenes of public memory to give voice to their experience of suffering and subjugation, but in the context of the violence carried out against their communities and families. Like the institutionalized racial, political, and economic violence that was part and parcel of apartheid, Feldman avers that efforts to “heal” individual and collective victims will prove futile if they are excised from the particular historical conditions that produced those victims in the first place.

Moreover, Feldman is keen to show that those who testified as victims did not appear in these memory public and collective “performances” as disabled or simply traumatized resources for the commission to exploit; and the Commission understood them to be

⁹⁹ Ibid., 168–70.

¹⁰⁰ Ibid., 169.

¹⁰¹ Ibid., 174–75.

¹⁰² Ibid., 176–77.

¹⁰³ Ibid., 177.

¹⁰⁴ Ibid., 181.

¹⁰⁵ Ibid., 179.

¹⁰⁶ Ibid., 180.

valuable resources that prove essential for reconciling the fragmented country and bringing sustainable peace.¹⁰⁷ Crude, reified and generic understanding of how “truth telling” and healing universally “happen” by way of public “talking cures” will not only obscure alternative juridical and quasi-judicial therapeutic narrative paradigms (such as the one Feldman attempts to lift out of the TRC’s human rights hearings), and “silence” nontalking cures (such as the “forgive and forget” model described above), they also collude with Orientalism, insofar as they “confuse[] the individual testifying voice—whether in a truth commission form from a South African black community, or from a Guatemalan Indian Collective, or from many other postcolonies—with the juridical monadic subject of the West.”¹⁰⁸ The South African example that Feldman describes is one grounded in communal filiation, wherein testifying in public is not about bearing one’s emotional scars in public, but about a social and political act that is meant to set the historical record straight in opposition to imposed secrecy and disinformation about recent histories of state violence.¹⁰⁹

Again, in sketching Feldman’s work on memory politics, I seek not to point to a better approach to healing in the wake of extreme violence, but to begin to carve out critical spaces that are not wholly immersed in what Shaw and Feldman call the “talking cure” paradigm and what I’ve referred to as the “disclosure-for-closure” model, which is presumed by its many promoters in the field of IHL and transitional justice scholarship to be *the* formula for healing for victims of extreme violence in general. This intervention is in part an attempt to initiate questions and debates that displace the “does law heal?” question guiding so many scholars in the field—questions like the ones Shaw and Feldman take up in their respective analyses. I am thinking especially of their critiques of the veiled power effects of the dominant model of healing (i.e., their implication in forces of domination such as ethnocentrism and paternalism), and their rich accounts of potentially divergent and manifold ways that healing and justice are understood by those persons and groups that transitional justice is meant to serve. I look to these two authors because their work helps to displace the “does the law heal?” debate, and opens up another possibility; specifically, the possibility of post-terror politics not subsumed by law.

VII. Conclusion: Closing Questions

This outline of the various sets of scholarly positions illustrates that the discourse of juridical healing has become so pervasive as to have entered the very sites of critical inquiry that would ordinarily assess its hidden presuppositions and continuity with norms and forms of power. Nearly every analyst examined above is in a hurry to settle and close what human rights scholar Michael Ignatieff insists is an “open question,” which is “whether justice or truth actually heals on either the individual or collective levels.”¹¹⁰ In other words, there has been sparse debate among scholars and/or practitioners about what qualifies as trauma, healing, and juridical-therapeutic “success,” only thin theorizations

¹⁰⁷ Ibid.

¹⁰⁸ Ibid., 179.

¹⁰⁹ Ibid.

¹¹⁰ Ignatieff, “Articles of Faith,” 1996.

of how individual healing and collective healing may or may not be linked, scant research to support the notion that justice heals, and even more limited attempts to account for the power of this ascendant norm and its naturalization. Ignatieff (in a rare show of perspicacity in this domain) puts his finger on the tenuousness of the precepts upon which much of the literature on juridical healing is grounded, challenging the interlinked notions that, “a nation has one psyche, not many;” that the truth of testimony is authentic and “certain, not contestable”; and when this truth is “known by all, it has the capacity to heal and reconcile.”¹¹¹ Yet, nearly all of the scholars reviewed here proceed as if healing were transparent and known, and that the aim of current scholarship should be to figure out how to arrive at it, not wrestle with its complexity or trouble its prescribed and hegemonic status—as if the work of critically suspending closely held tenets about apparent facts or truths were not worth the cost of the intellectual and political disorientation that often follows. An opportunity to productively suspend our assumption that we know *what* we know, and that we know *that* we know is squandered. Also lost is the chance to begin to conceive of alternative critical frameworks through which juridical healing’s normative character and effects could be queried. Assuming that “disclosure brings closure” and then asking of the law “does it or doesn’t it heal?” leaves one far from such a critical project.

Returning to Emir Suljagić, the Bosnian victim of war crimes who was first a witness and then a journalist before the ICTY and with whom we began will underscore this one last time as well as remind us of the contingency and precariousness of the scaffolding of legal healing. Years after Momir Nikolić’s confession during ICTY trial proceedings brought Suljagić to (cathartic) tears and led him to make triumphant proclamations about the therapeutic effects of the ICTY, he reversed his assessment of the ICTY, stating that he no longer believed “that any court, including the ICTY could be “cathartic.”¹¹² He characterized his original hopes for the ICTY, which shares much in common with the scholarly understandings of healing analyzed above, as “naive.”¹¹³

¹¹¹ Ibid., 1.

¹¹² Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Institute, 2010), 79.

¹¹³ Ibid., 63.

Chapter 3

Ambivalent Attachments and Bastardized Pedigrees:

A Genealogical Account of the Therapeutic Turn

I. Victims'—not Victors'—Tribunals: Specters of Nuremberg

When the United Nations passed the resolution to establish the ICTY in 1993, the US ambassador to the United Nations, Madeline Albright, made a dramatic and widely publicized speech to the Security Council. Albright seized the opportunity to emphasize the path-breaking character of, and essential need for, the tribunal. She went to great lengths in her speech to establish a clear link between the justice of the tribunal, truth telling, and victims' healing, when she declared

This will be no victors' tribunal. The only victor that will prevail in this endeavor is the truth ... and it is only truth that can cleanse the ethnic and religious hatreds and begin the healing process ... to the victims we declare by this action [of establishing the tribunal] that your agony, your sacrifice, and your hope for justice have not been forgotten.¹

Appropriating the language of “cleansing” used by the very criminals the tribunal sought to punish, Albright’s resignificatory work tethers sanitization instead to truth. The cleansing function of the tribunals is meant to stand in stark contrast to the “ethnic cleansing” campaigns that the law of the tribunals is designed to condemn. Albright also distinguishes this truth from the so-called truth and justice of “victors,” which, for her, can be neither just nor true, given its inherent partiality. These rhetorical moves, in quick succession, position the tribunals on the side of truth, healing, and justice and figure the work of the tribunal at the crossroads of judicial, ethical, and psychological registers. Albright puts forward an ethics opposed to ethnic hatreds and violence, victors’ justice, and “for” truth and healing for victims. As we see elsewhere in the discursive domain of juridical healing that comes out of the therapeutic turn in IHL, the new generation of war crimes tribunals, and the particular forms of truth they promulgate, are situated here as the agents and sites of individual and collective healing.

Albright likens the act of telling the truth (of one’s victimization) to a purifying ritual that can set free, where freedom travels via the *logos*. Her message, specifically addressed to victims, posits as one and the same the tribunal’s establishment (“this act”) and the solemn declaration to victims that their suffering will “not be forgotten.” She goes on to say that “the voices of the groups most victimized will be heard by the tribunal.” It follows, then, that the victim/her suffering is not simply remembered and her voice heard

¹ Madeleine Albright to the UN Security Council, *Provisional Verbatim Record to the 3217th Meeting*, 25 May 1993, UN Doc. S/PV 3217.

(with the implication that earlier, similar courts have failed to do so). Albright's rhetoric also suggests that the act that established the tribunal is a constitutive element of this institution and the victim-centered jurisprudence it proffers. Here and elsewhere, we see the subtle ways that the language of victims and healing forms the core of the ad hoc tribunals' operations and grounds for legitimization, not merely an augmentation of law and justice.

But what is the "before" of this new breed of tribunals that emerged in the 1990s? The elephants in the UN Security Council "room" are the postwar Nuremberg and Tokyo military tribunals. The Nuremberg Tribunal, and—to a much lesser extent—its sister tribunal, the Tokyo Tribunal,² are largely viewed in international legal circles as the only other earlier war crimes tribunals akin to the contemporary ad hoc tribunals and the ICC. Albright's invocation of victors' justice points to the fact that the ad hoc tribunals are positioned as the present-day legal successors of the World War II trials.³ Especially the Yugoslavian ad hoc tribunal—the first of its kind—has been portrayed as the direct descendant of the Nuremberg Tribunal.⁴ David Hirsch asserted that "the Nuremberg process was given life by the young idealistic lawyers who made it work, and who, as far as was possible, strove to use it to leave a set of precedents of cosmopolitan criminal law in place."⁵ It is to this current of "cosmopolitan" criminal law—specifically its IHL incarnation—that the ICTY, ICTR, and ICC are thought not only to belong, but also to occasion and crystallize.⁶ The standard genealogy of contemporary IHL is aptly summed

² The Nuremberg trials—in contrast with the Tokyo trials (the International Military Tribunal of the Far East, or IMTFE)—are much more commonly cited as the privileged precedent for, and origin of the ad hoc tribunals of the 1990s. Aside from the obvious fact that Nuremberg preceded Tokyo, a key reason for Nuremberg's position as the authoritative precedent can be traced back to the fact that the latter is most often credited with the inauguration of crimes against humanity—a legal category has come to be seen as a pillar of contemporary IHL. Tokyo has often been billed as the exception to the rule of IHL, whereas Nuremberg has been commonly viewed as the standard by which subsequent tribunals and fora of IHL should be measured. The Tokyo tribunal's particularly negative reception in Japan, its explicit reliance on natural law, and its decision to downplay the legal category of crimes against humanity even more so than in the case of the Nuremberg Tribunal made it a less adequate model for the international tribunals to come. See: L. J. Van den Herik, *The Contribution of the Rwandan Tribunal to the Development of International Law* (Ledinen, The Netherlands: Brill Academic Publishers, 2005), 3, 68, 72; Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA and London, England: Harvard University Press, 1964); Teitel, *Transitional Justice*, 2000; Antonio Cassese, *The Human Dimension of International Law, Selected Papers* (Oxford, UK and New York: Oxford University Press, 2008).

³ Sheri Rosenberg, "The Nuremberg Trials: A Reappraisal And Their Legacy An Introduction," *Cardoza Law Review* 27, no. 4 (2006): 1550; Aryeh Neier, "The Nuremberg Precedent. A Response to: Misjudgment at Nuremberg from the October 7, 1993 issue of *New York Review of Books* 40, no. 18 (1993): Letters.

⁴ The Nuremberg-ICTY link has persisted, despite the fact that no other war crimes court had been convened by the United Nations Security Council prior to the establishment of the ICTY, and despite the fact that the mandate of the ICTY departed from Nuremberg's mandate, with its new emphasis on peace and reconciliation in the region. See, for example: Ruti Teitel, "Bringing the Messiah Through the Law," in *Human Rights in Political Transitions: Gettysburg to Bosnia*, eds. Carla Hesse and Robert Post (New York: Zone Books, 1999), 177-93. The ICTY was the first international legal body authorized to prosecute war crimes since the Nuremberg tribunals of a half-century earlier.

⁵ David Hirsch, *Law against Genocide: Cosmopolitan Trials* (London: Cavendish/Glasshouse, 2003), xvii.

⁶ The following quotation exemplifies this portion of the standard account of the ad hocs' pedigree, but also underscores the common tendency to use the terms "cosmopolitan law," "international law" or

up by Stephan Landsman's bold proclamation: "Nuremberg is the seminal event in post-World War II international criminal justice. It is the precedent upon which all ensuing developments are based."⁷ In other words, in accordance with this account, Nuremberg succeeded in this particular regard, insofar as "all ensuing developments" are overwhelmingly thought to owe their existence to it, for better or worse. This provides the backdrop for Albright's articulations of the mode of truth and justice to be dispensed by the newly established ICTY, which were—even if not explicitly—laden with a complex and fraught history of IHL in the twentieth century.

Alongside her tacit acknowledgment of the ICTY's indebtedness to the post-World War II tribunals, Albright takes pains to distinguish the contemporary court in one important respect from the war crimes courts that preceded it: namely, she provides the assurance that the ICTY will not deliver one-sided or "victors' justice," the most common accusation of the Nuremberg and Tokyo trials.⁸ The infamous Hermann Goering, a National Socialist leader captured by the Allies at the end of World War II and brought to Nuremberg to stand trial, said of the Nuremberg trials: "The victor will always be the judge and the vanquished the accused." Other Axis leaders echoed this indictment, though such opprobriums were not limited to Axis leaders and those on the losing side of the war. During and after trial, heated debates about victors' justice and the related question of both postwar tribunals' legal legitimacy ensued among leaders and lawyers of the Allied powers as well. As British Historian Richard Overy plainly states:

*[T]hat the [World War II] war crimes trials ... were expressions of a legally dubious 'victors' justice' was [a point raised by] ... senior Allied legal experts who doubted the legality of the whole process. ... There was no precedent. No other civilian government had ever been put on trial by the authorities of other states.*⁹

So with the unprecedented postwar trials as its precedent, the first international criminal tribunal since the 1940s had little to fall back on and very much to prove. As transitional justice scholar Ruti Teitel recognized, the ICTY was "consciously patterned after Nuremberg," yet went beyond it insofar as it was designed not only to mete out justice and punish criminals, but also—for the first time—charged with "restoring peace and

"international criminal justice," and "international humanitarian law" interchangeably when discussing especially contemporary war crimes tribunals and legal responses to atrocity: "The 1990s have witnessed the greatest advance of international humanitarian law since the end of the Second World War. The creation of the [ICTY] and the [ICTR] represents significant advancements in the interpretation and implementation of international law" (Steven Roper and Lilian Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights*, Burlington, VT: Ashgate, 2006, 349).

⁷ Stephan Landsman, "Those Who Remember the Past May Not Be Condemned to Repeat It," *Michigan Law Review* 100 (2002): 1571.

⁸ See, for example: Richard Overy, "Making Justice at Nuremberg, 1945-6," BBC History, http://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml.

⁹ *Ibid.*, 1.

reconciliation” in an ongoing conflict, not simply bringing justice in the aftermath of peace.¹⁰

Albright has sometimes been referred to as “the mother of all tribunals,” due to her pivotal role in the establishment of the ICTY and the ICTR.¹¹ She endeavored in her cogent speech at the inauguration of the ICTY to fill out the contours of the novel form of justice that the tribunal was to dispense. Victims’ justice not only substitutes for victors’ justice here, but it also guards against it, insofar as victims’ justice is equated with truth and truth is figured as the remedy to injustice (equated with victors’ justice). In a sort of circular, symbiotic exchange, victims’ truth supplies legitimacy for the contemporary tribunal (i.e., they are meant to signify that this tribunal is more just than the post–World War II trials, because truth, not revenge, keeps bias in check), and the court in turn bestows legitimacy upon those victims’ experiences/narratives by rendering them the cornerstone of international justice (as truth). Moreover, this truth, when legitimized by the tribunal, can deliver justice as/and healing to victimized communities and individuals. Albright’s account paints a picture of justice that does not have to sacrifice its fairness in its turn toward victims because it simply delivers the truth. As such, she draws a veil over the contested and situated character of “truth” and implies that there is no justice lost here, only an augmented and evolved justice.

This chapter seeks to chart the therapeutic turn’s select points of emergence, focusing on the first two members of this new generation of courts—the ad hoc ICTY and ICTR—frequently cast by the diplomats and international lawyers who established them and drafted their statutes as the “greatest advance of IHL since the end of the Second World War.”¹² The chapter examines the ways in which recourse to an ideal of truth predicated on “the truth” of victims’ recollection and verbalized account of their victimization grows out of a range of disciplines and movements, many of which lie outside the parameters of established legal fields in even a broad sense.¹³ Scrutinizing the historical conditions of the turn and the events through which it came about will make it clear that the law of the courts in question has been, as Michel Foucault said more generally of such institutions, “fabricated in a piecemeal fashion” from “alien forms” and “accidents” external to what

¹⁰ As mentioned in previous chapters, the ad hoc tribunals, unlike their post-World War II precedents, were created as—according to the Security Council resolution that established the ICTY—“peacemaking measure[s],” wherein justice as punishment, and justice as peacemaking and reconciliation were co-extensive (Teitel, *Human Rights in Political Transitions*, 177, 179). In Resolution 827 of May 1993, wherein the statute of the ICTY was adopted, the ICTY is tasked with “restoring peace and security,” in addition to prosecuting criminals (UN SC Resolution: S/RES/827, “Statute of The International Criminal Tribunal for the Former Yugoslavia, UN doc. S/25704, 1993).

¹¹ See, for example: Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), 262; Heikelina Verriijn Stuart and Marlise Simons, *The Prosecutor and the Judge* (2009); Richard Goldstone, *For Humanity, Reflections of a War Crimes Investigator* (New Haven, CT: Yale University Press, 2000), 78.

¹² Respectively: Alvarez, “Rush to Closure,” 2032; Roper and Barria, *Designing Criminal Tribunals*, 349.

¹³ I attempt to map some of the key tributaries of the therapeutic turn elsewhere. This will be a central theme in “The ‘Responsibility to Protect’ and ‘The Responsibility to Heal:’ The Discourse of Healing Humanity by Way of International Criminal Tribunals,” (Diana Anders, in progress). This chapter limits itself to those tributaries that draw on a similar model of truth described by Albright above—a truth based in victims’ stories of suffering.

is conventionally understood as the “proper” or officially outlined realm of IHL. In this vein, my analysis seek to throw into relief the cross-pollination, heterogeneity and unlikely bedfellows that make up what is conventionally thought to be the unified and linear story of IHL’s triumphant ascendance in the twentieth century.¹⁴ Troubling the standard historical account, this genealogy suggests that the legal identity of the contemporary ad hoc tribunals’ justice is much more ad hoc, uncertain, improvisatory, and eccentric than its supporters and representatives have been willing to admit.¹⁵

This inquiry will expose a certain paradox at the core of contemporary humanitarian law when it takes as one of its primary interests the suffering and (human) rights of human beings. I argue, somewhat counter-intuitively, that the turn toward victims and their healing in part seeks to legitimate the courts’ legality by way of normative frameworks and practices somewhat external to IHL’s legal doctrine. The justice these tribunals mete out bears strong resemblances to the 1961 Israeli Eichmann trial and the South African Truth Commission of the 1990s—two very different institutions at two very different historical moments whose legal status might be described as uncertain or marginal, albeit for very different reasons. Not unlike these “black sheep” relatives, an essential part of the ad hoc tribunals’ identity formation is bound up with—even constituted through—an ongoing struggle to stake out a position on this side of legally dubious and juridically ambiguous missions of healing victims, while avoiding the specious victors’ justice associated with Nuremberg. At times, the tribunals’ mobilization of a restorative model of truth, and the discourse of juridical healing it props up, seems to be a strategy to augment and lift the legalistic truth of documentation and factual, material evidence from its lifeless, arid, and abstracted existence—to dramatize and humanize it and thereby attract greater public support and international attention. Yet, the victim-centered discourse of juridical healing, in drifting from a strictly retributive legal platform, and in borrowing from a range of quasi- and non-judicial approaches, functions as a sort of Derridian “dangerous supplement.” By pointing out the inconsistent and even incompatible versions of justice mobilized by the tribunals, I attempt to demonstrate that, although the turn toward victims and their truths seek to perform the work of legitimization, this move can at the same time threaten to destabilize these courts’ credibility. Moreover, what emerges from my analysis is that this form of justice produces effects that are not primarily concerned with healing. Juridical healing seen from this vantage point reveals itself to be principally about augmenting and securing these new courts’ legitimacy and power.

The juridical healing paradigm partially unmoors the contemporary tribunals from the approach adopted by its already controversial postwar precedents, and situates the tribunals in an uncharted and turbulent sea somewhere between an ideal of humanitarian law and its others. This will come into relief when we chart these contemporary tribunals’ “ambivalent attachments”¹⁶ both to their avowed legal precedents and unavowed extra- or

¹⁴ Foucault, “Nietzsche, Genealogy, History,” 78.

¹⁵ UN Security Council, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Postconflict Societies* (August 23, 2004): 10, doc. S/2004/616.

¹⁶ I am drawing a loose analogy here between Judith Butler’s work on “subjection” as described in *The Psychic Life of Power: Theories in Subjection* (Palo Alto, CA: Stanford University Press, 1997), 2, 6–11,

quasi-legal tributaries. Because the Nuremberg and Tokyo trials constitute part of who these new tribunals are thought to be (insofar as, without them, these new courts are rendered external to the legitimate family of IHL), these courts cannot fully sever ties with their legal moorings, however contentious and tenuous they might be. In essence, victors' justice cannot simply be traded for victims' justice without risking the charge of bias towards victims—another form of unjust justice and unlawful law.

II. The Ad Hoc Tribunals' Juridical Mission: Filing "Rule of Law Vacuums"¹⁷

In the mid-1990s, the United Nations and its member states were having to come to terms with the fact that, despite the promise at the inauguration of the ICTY of "never again" allowing something like the Holocaust to happen on their watch, they had continued to passively stand by as atrocities consumed the Balkans and Rwanda: the most extreme, flagrant, and disturbing incidents being the massacre of approximately 7,500 Bosnians by Serb forces in the UN-designated "safe area" of Srebrenica in 1995,¹⁸ and the genocide of an estimated 800,000 moderate Hutus and Tutsis by Hutu extremists in Rwanda in April of 1994.¹⁹ As the former chief prosecutor of both ad hoc tribunals, Richard Goldstone stated, "The hope of 'never again' became the reality of again and again" by the mid-1990s.²⁰ All of this less than two years into the ICTY's existence, which had not yet

84, and the ad hoc tribunals' attitude to their own (avowed and disavowed) conditions of possibility. In Butler's text, subjects depend upon relations of power for their existence; power activates and forms subjects. This relationship of dependence produces an ambivalent attachment to that which potentially injures us and yet secures our existence. I use this phrase—ambivalent attachments—to underscore the ways in which the ad hoc tribunals' intelligibility depends in part upon powers that (by association and incorporation) may prove detrimental to the courts' legitimacy and thus existence (especially its "parent" court—the Nuremberg tribunal, the Israeli Eichmann trial, and the South African TRC).

¹⁷ This is a reference to one of the key priorities linked to the ad hoc tribunals and outlined by the UN secretary-general Kofi Annan in 2004, discussed below (UN SC "Report of the Secretary-General: The Rule of Law and Transitional Justice," 1–2, 10).

¹⁸ Mostly Bosnian men were targeted in the Serb's ethnic cleansing campaign led by Ratko Mladic in Srebrenica. Their bodies were thrown into mass graves. Srebrenica is situated in Serbia, and in 1995, was a Bosnian enclave in the care of the Dutch and French governments. The Srebrenica massacre was one especially dark moment in the ethnic cleansing campaign carried out by Serbian troops and paramilitaries. The massacre is summarized on the following website, based on the accounts and information provided by Peace Pledge Union (PPU) Organization: "Bosnia Genocide 1995," Peace Pledge Union, http://www.ppu.org.uk/genocide/g_bosnia1.html. See also: Human Rights Watch, *Under Orders: War Crimes in Kosovo*, HRW: Washington DC, 2001; and Adam Jones, *Genocide, War Crimes and the West: History and Complicity* (Zed Books, New York, 2004).

¹⁹ Over the course of only 100 days, roughly 800,000 people were killed when the Rwandan Patriotic Front (RPF) instituted a systematic attack on all Tutsis and to any fellow Hutus who were not anti-Tutsi. The RPF is accused of shooting down a plane carrying the Rwandan President (a Hutu who had signed a peace agreement in the previous year to share power with Tutsis)—an event that marked the beginning of the genocidal campaign. See, for example: United Human Rights Council, "Genocide in Rwanda," http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm (1999); Human Rights Watch, "Leave No One to Tell the Story: Genocide in Rwanda," <http://www.hrw.org/reports/1999/03/01/leave-none-tell-story>; BBC, "Rwanda: How the Genocide Happened," <http://www.bbc.co.uk/news/world-africa-13431486>.

²⁰ Cited in Cherie Booth, "Prospects and Issues for the International Criminal Court: Lessons from Yugoslavia and Rwanda," in *From Nuremberg to the Hague: The Future of International Criminal Justice*, ed. Philippe Sands (Cambridge, UK: Cambridge University Press, 2003), 157.

brought any of its thirty-four indicted defendants into custody.²¹ As a result of both a longer and more recent history of missions to prevent and punish atrocity, there was considerable, lingering pressure on both the fledgling tribunals to fulfill the goals laid out by Nuremberg, while also avoiding the trap of victor's justice, "cleansing" the reputation of international war crimes tribunals sullied by the still audible victors' justice incantation, reviving IHL after years of Cold War dormancy, and pursuing "peacemaking" and "reconciliation" alongside the more legalistic, retributive aims of prosecuting criminals.²² The question of whether or not the tribunals could fulfill their mission (as stated on their website)—especially "spearheading the shift from impunity to accountability" and "strengthening the Rule of Law"—was very much in doubt in their early years, and many would say remains so today.²³ Somehow the new tribunals would need to convince the international community that they could bring justice to these regions, fulfill their shared judicial mandates, as well as demonstrate to a jaded international public that this time "the suffering of ... victims [will be] acknowledged and not ignored."²⁴ But how does this last goal, specifically targeting victims, square with the more conventional legal goals of fighting impunity and strengthening the rule of law named above and elaborated upon below?

The legalistic model to which IHL officially adheres places a premium on the retributive priorities of punishing criminals, due process, the right to an expeditious trial, and balancing the rights of the accused and the rights of the victims.²⁵ These priorities have been associated with the United Nations' basic project of establishing and strengthening "an international order based on the rule of law,"²⁶ which has been described as filling "rule of law vacuums"²⁷ produced by extreme violence and crippled and/or corrupted legislative frameworks and directly linked to the work of the ad hoc tribunals.²⁸ The ICTY and ICTR websites do not explain precisely what is meant by the phrase "the Rule of Law"²⁹ so pervasive in their official documents and websites, or specify how it relates to the victim-centered goals of giving victims a "voice." However, in attempts to "articulate a common language" for the United Nations and its various organs, including the aforementioned courts, Kofi Annan, the UN secretary-general at the time, described the rule of law in the following way

²¹ Roper and Barria, *Designing Criminal Tribunals*, 86.

²² Alvarez, "Rush to Closure," 2036–38; Naomi Roht-Arriaza, "Punishment Redress, and Pardon: Theoretical and Psychological Approaches," in *Impunity and Human Rights in International Law and Practice*, ed. Naomi Roht-Arriaza (Oxford, UK and New York: Oxford University Press, 1995), 13–23.

²³ Beyazit H. Akman, "Tribunal vs. Truth: ICTY and TRC in the Case of the Former Yugoslavia," *HUMSEC Journal* 2 (2008): 125–132,

http://www.humsec.eu/cms/fileadmin/user_upload/humsec/Journal/Akman.pdf.

²⁴ On the "Basic Information" page of the ICTY website, one finds an outline of the Tribunal's main goals, which include fighting impunity, strengthening the "Rule of Law," "establishing the facts"—as mentioned above—as well as "giving victims a voice" (UN/ICTY, <http://www.un.org/icty/glance-e/index.htm>).

²⁵ See: *ICTY Statute*, *ICTR Statute*, respectively. See also: Alvarez, "Rush to Closure," 2038–40.

²⁶ UN SC, *Report of the Secretary-General: The Rule of Law and Transitional Justice*, 13–16.

²⁷ *Ibid.*, 10.

²⁸ *Ibid.*, 13–16.

²⁹ This phrase is often capitalized in court documents, but not always.

*The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.*³⁰

The tribunals have been charged with helping the United Nations to advance and serve this mode of governance through punitive means, and symbolize the justice purportedly inherent in this project.³¹ Justice—according to Annan—must spring from fairness, specifically balancing “the rights of the accused, . . . the interests of victims, and . . . the well-being of society at large.”³² According to this official UN account, justice and the rule of law are meaningless if they do not work together,³³ and the supremacy of *this* rule of law (specifically international law as embodied by the United Nations) is deemed just and legal because of its roots in internationally agreed upon norms and standards of equality and fairness. But the norms and standards the secretary-general lists as part and parcel of the “rule of law” and identified with the tribunals’ justice are not wholly consistent with the victim-centered language of justice predicated on victims’ truth mobilized by Annan on other occasions³⁴ and Albright above (as well as many others working with and for the tribunals). Perhaps this is why Annan’s “articulations of a common language of justice,” places a specifically “victim-centered” mode of truth telling and justice in the category of truth commissions and transitional justice, which is distinct from the interrelated definitions of the “rule of law” and “justice” he provides and

³⁰ Ibid., 3.

³¹ Amanda Beltz, “Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victims’ Rights with the Rights of the Accused,” *Journal of Civil Rights and Economic Development* 23, no. 1, (Spring 2008): 4.

³² UN Security Council doc. S/2004/616, 13–16.

³³ In a follow-up report in 2005, the secretary-general reiterated the connection between justice and the rule of law, and the key role that the international criminal tribunals were continuing to play in the pursuit of justice: “Justice is a vital component of the rule of law. Enormous progress has been made with the establishment of the International Criminal Court, the continuing work of the two ad hoc tribunals for the former Yugoslavia and Rwanda, and the creation of a mixed tribunal in Sierra Leone and hopefully soon in Cambodia as well” (UN SC doc. A/59/2005, “Report of the Secretary-General: In Larger Freedom: Towards Development, Security and Human Rights For All,” March 21, 2005, 36).

³⁴ Cited in the first pages of this dissertation, the statement by Annan below to the Rwandan Parliament on the topic of the ICTR and the UN’s failed response to the Rwandan genocide of 1994 captures his embrace of a therapeutic and victim-centered approach to justice. Chapter 1 situates Annan as a driving force behind the therapeutic turn in IHL. Moreover, his statement suggests that—at moments—the discourse of juridical healing places the rule of law and justice as healing in the same register, and as mutually dependent and reinforcing: “I have come to Rwanda today on a mission of healing—to help heal the wounds and divisions that still torment your nation and to pledge the support of the United Nations. . . . But to be complete, justice must be carried out with due process and above reproach, so that it can promote the process of healing that is so vital to Rwanda’s future. . . . Justice, however, must also serve a larger purpose—the purpose of closing wounds, of coexistence and of trust between the Hutu and Tutsi communities of Rwanda” (UN press release, SG/SM/6552, 1998).

links to the tribunals.³⁵ The norms and standards of truth commissions and other transitional justice mechanisms are rendered “complements”³⁶ to the tribunals’ work, not dimensions of it (much less “vital” to it).³⁷ Annan’s “articulations” suggest a tension at the heart of the tribunals’ project of delivering justice as healing (for victims vis-à-vis their truths). The latter threatens to undermine the fundamental requirements of the rule of law and justice he himself lays out and to which the tribunals are expected and obligated to subscribe. But precisely in what ways might these priorities collide?

To stray from a retributive, rule of law approach poses several risks for these tribunals and their legitimacy (or perception thereof) under international law, which must adhere to international standards of due process and the rights of the accused and those of the victim(s): primarily, focusing on victims and their suffering can abrogate (and be seen to abrogate) the rights of the accused and thus compromise the possibility of a fair trial.³⁸ The most common and concrete way this occurs is through the inclusion of numerous prosecution witnesses in the trial process—what ICTY Judge Patricia Wald refers to as the ICTY’s “lavish use of witness testimony,” which contributes to what she deems an “endemic conflict” between the rights of the accused and the rights of the victim and which taint the integrity of a given trial and the new branch of law to which they belong.³⁹ The tribunals place their credibility on the line when victims are given privileged status, particularly when their testimony has little or no relevance to the crimes in question.

It is especially in this context that aspects of a transitional or restorative paradigm are criticized for eclipsing and derailing a retributive one based on the “Rule of Law” and what Richard Goldstone described as a primary goal of the tribunals: “to ensure that those indicted would enjoy fair processes and procedures.”⁴⁰ Along these lines, an ICTR judge stated, “If a person committed a crime, we don’t need to hear a hundred witnesses.... He

³⁵ UN Security Council doc. S/ 2004/616.

³⁶ For example, Annan states: “But while tribunals are important, our experience with truth commissions also shows them to be a potentially valuable complementary tool in the quest for justice and reconciliation, taking as they do a victim-centered approach and helping to establish a historical record and recommend remedial action” (UN SC, “Report of the Secretary-General: The Rule of Law and Transitional Justice,” 2). When defining “transitional justice” and victim-centered justice, the secretary-general failed to discuss to the relationship between “victim-centered” transitional justice and the “rule of law” justice and how the two may or may not come together in the justice meted out by the tribunals (ibid., 2).

³⁷ Ibid., 8.

³⁸ Amanda Beltz critically engages this tension in terms of the tribunals’ commitment to protecting victim-witnesses’ identities as specified in the statutes and rules of procedure and evidence (especially for victims of wartime rape who wish to remain anonymous witnesses) and honoring the due process right of the accused to “confront the witnesses against him” (“Prosecuting Rape in International Criminal Tribunals,” 2008).

³⁹ Patricia M. Wald, “Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal,” *Yale Human Rights & Law Development Law Journal* 5 (2002): 217, 219, 224. Wald notes that the statistics support the “crucial nature” of victim-witness testimony at ICTY trials, where—from January 1, 1998 to July 1, 2001—nearly a thousand victim witnesses came to The Hague to testify (at a cost of 16,000 USD per witness).

⁴⁰ Richard J. Goldstone, *For Humanity*, 123.

who proves too much ends up proving nothing. That is quite relevant here.”⁴¹ Also departing from a victim-centered approach, ICTR Defense Counsel Diana Ellis declared the victim-centered approach “appalling,” proclaiming:

*In a courtroom you have the maximum speed of proceedings that is consistent with fairness. The proceedings here should be much sharper and more precise! They should make it Defendant-focused. People need to understand that one good witness is better than 20 poor witnesses... I find these tribunals are a way to NO reconciliation....*⁴²

Ellis expresses a recurrent internal and public response to the tribunals’ recent emphasis on victims, their traumas, and their testimony. Yet, to venture beyond a conception of the tribunals as “corrective, punitive forums” may be necessary to grant these new tribunals another sort of legitimating (moral and political) edge—an undertaking that showcases the ways in which the contemporary trials have evolved since the Nuremberg days of victors’ justice and (as we will see below) marginalized victims.⁴³

With the therapeutic turn in IHL, *nomos* and pathos converge in the tribunal discourse of juridical healing in unprecedented and unpredictable ways, producing an untested and still fragile form of justice: a new norm of healing may help to humanize and dramatize this law and victim-witnesses by way of recourse to those victims’ “truths” of suffering (as opposed to victors and their desire for revenge), but this move invariably arouses feelings of outrage, sympathy, sadness, and so on (pathos) and *a priori* privileges the victim’s perspective, marking it as truth. As such, the defense, not the prosecution, bears the burden of proof in a given case and courts risk being viewed as courting partiality and straying from its “rule of law” doctrine committed to impartially “establishing the facts.”⁴⁴ The invitation of pathos that emphasizes victims and their truths may expose this law as inadequately neutral to fairly adjudicate the crimes on trial. As such, the therapeutic turn represents a potentially perilous one for this novel form of justice, one that these courts continue to take. At issue is the extent to which a victim-centered justice based on victims’ harrowing “truths” of suffering, in all of its pathos, will be viewed as compatible with a *nomos* expected to remain true to the values of fairness, due process, and the impartial pursuit of truth.

⁴¹ Statement by ICTR Judge Ostrovsky (Helena Cobban, “Healing Rwanda: Can an International Court Deliver Justice?” *Boston Review: A Political and Literary Forum* (December 2003/January 2004): 8, <http://bostonreview.net/BR28.6/cobban.html>).

⁴² This criticism was made in reference to the “Media Trial,” but points to general tribunal practices that—per her account—sacrifice justice for slow, victim-centered proceedings. Helena Cobban, *Amnesty After Atrocity? Healing Nations After Genocide and War Crimes* (Boulder, CO: Paradigm Publishers, 2006), 209.

⁴³ Address by Diego Arria, Delegate to the UN Security Council from Venezuela, to the UN Security Council, May 25, 1993, S/PV.3217.

⁴⁴ See “Achievements,” ICTY webpage, <http://www.icty.org/sid/324>.

III. Nuremberg and the Negation of “The Affirmative Human Aspect”

When practitioners and experts in IHL like Albright, situate victims’ truth as the truth of the tribunal (and even as the truth of justice), they of course do not do so without an account of why borrowing from the realm of the moral, the affective/psychological, and the therapeutic in order to carry out law would be required and warranted. Again and again, the refrain one hears is “Nuremberg.” Even Nuremberg’s most ardent supporters have recognized that the trial was extremely limited when it came to victims, and sparing with its use of its crimes against humanity. Much to the chagrin of its authors, this new category of crime failed to be the Nuremberg trial’s *pièce de résistance*.⁴⁵ The Nuremberg and Tokyo Tribunals made known their commitment to one overarching and orthodox aim only: trying and convicting those responsible for the war. The victims of the “war of aggression” carried out by Germany and Japan were marginalized in the trials and considered extraneous to the task at hand. The few attempts that were made to focus the prosecutions’ case on victim testimony and victims’ suffering—or, in the words the Nuremberg prosecution chief’s first deputy, “an affirmative human aspect”—were quickly thwarted because the latter was viewed not only as irrelevant to the case, but also, as potentially threatening to this new branch of law, insofar as it heightened affect and departed from an understanding of law as a neutral mechanism of justice.⁴⁶ With this legalistic understanding of retributive law, the better documented, the drier, and the less contaminated by volatile emotions, the more truthful and just this law is thought to be. In the words of legal professor Kenneth Anderson, Nuremberg reduced atrocities “of a global scale to the bland and deliberately affectless scope of a courtroom, attempting to give its findings the most scientific and indisputable valence possible.”⁴⁷

Over the last half century IHL—conceived of as the human rights branch⁴⁸ of international law concerned with “limiting the effects of armed conflict for humanitarian reasons”—has struggled to negotiate its position and secure its authority as protectors and advocates not only of “justice,” but also of humanity, and the humane.⁴⁹ With the “affirmative human aspect” occluded in Nuremberg and Tokyo, the contemporary project of a specifically humanitarian international law lies in making that law more attentive to humans and humanity, or at least appearing to do so. One way this branch of law has chosen to demonstrate its increased attentiveness to the very population and principles

⁴⁵ Alvarez, “Rush to Closure,” 2036–38.

⁴⁶ Douglas, *The Memory of Judgment*, 17.

⁴⁷ Kenneth Anderson, “The Rise of International Criminal Law: Intended and Unintended Consequences,” *European Journal of International Law* 20, no. 2 (2009): 337.

⁴⁸ Thomas Buergenthal, *International Human Rights in a Nutshell*, 2nd ed. (St. Paul, MN: West Publishing, 1995), 249.

⁴⁹ This definition of the IHL is found on the International Committee for the Red Cross website: <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm>. There, the ICRC positions itself as the “guardian of the Geneva Conventions and the various treaties that constitute international humanitarian law.” It states that the ICRC “cannot, however, act as either policeman or judge. These functions belong to governments, the parties to international treaties, who are required to prevent and put an end to violation of IHL. They have also an obligation to punish those responsible of what are known as ‘grave breaches’ of IHL or war crimes.” This reflects a more general understanding in the human rights and IHL community that tribunals and ICC in question are charged with bridging the gap between these IHL laws, and their implementation and protection on the part of states.

Nuremberg neglected is to emphasize its “altruistic”⁵⁰ side by taking victims (which represent the crimes against not just individuals but against humanity as such) under its protective judicial wings.⁵¹ Somewhat surprisingly, this law will do this by giving it a project foreign to the principles of the rule of law outlined above.

Making room for this account of humanity and the humane, victor’s justice can no longer be conceived as the sole, or most fundamental problem that the contemporary tribunals must overcome. By the time the ad hoc tribunals of Yugoslavia and Rwanda were established nearly a half a century after the post–World War II trials, the Nuremberg model appeared both antiquated and inadequate for dealing with the core crimes within these new courts’ jurisdiction—namely, the ethnically motivated crimes that constituted crimes against humanity and genocide. Though the former was codified for the first time in the Nuremberg charter, the crimes within its purview were sidelined by the prosecution’s emphasis on the crimes against peace and the crime of waging an aggressive war.⁵² As for genocide, it was not even on the law books at the time of the post–World War II trials. Since both genocide and crimes against humanity attend to the systematic victimization of particular groups, their implementation initiated an entirely new emphasis on the destruction of the victim. Detailed below, the so-called “new” international criminal law that these courts are thought to embody, had certainly not been “coherently and solidly codified” when the ad hoc tribunals were established in the 1990s, as some of its proponents would have it.⁵³

Additionally, the postwar tribunals were authorized to issue death sentences—a power they exercised many times. Human rights law as it is now understood was barely getting off the ground in 1945. Since then, much of international criminal law, especially IHL, has been imbued with legal principles derived from international human rights law,

⁵⁰ Kenneth Anderson describes contemporary international criminal law as “mostly an exercise in altruism” wherein wealthier, more “stable” countries of the world provide a symbolic service of “protection” and “security” to the “unstable” parts of the world. He sees through the universal pretensions of this law as universal and as “one global law for everyone” and points out the supply and demand logic undergirding the ostensibly altruistic and universal justice promulgated by the UN courts and their supporters. Kenneth Anderson, “The Rise of International Criminal Law, 333.

⁵¹ Akman, “Tribunal vs. Truth,” 128–29.

⁵² Aryeh Neier states: “At Nuremberg, only the charges of war crimes—such as killing prisoners of war—clearly involved the application of established international law that was known before the crimes were committed to be binding on the parties to the conflict.” He describes crimes against humanity as “a totally novel crime,” though he grants that it had “certain antecedents” (Aryeh Neier, “The Nuremberg Precedent,” *The New York Review of Books*, November 4, 1993, para. 2). The extent to which any of the crimes were actually within the court’s jurisdiction and based in previously established international law remains a contested topic, as outlined below.

⁵³ The “new” IHL is concerned solely with the crimes of genocide, crimes against humanity, and war crimes. The definitions of these three crimes in the ad hoc statutes—which paved the way for the Rome Statute—were derived from a patchwork of treaties and customary international law, though for the most part they had not been applied to an individual case by an international court when the ad hocs were established. A glaring illustration of the IHL’s underdeveloped character and still unstable foundation at the time of its supposed “resurgence” and “peak” is the fact that although the crime of genocide was defined in the 1948 Genocide Convention, no one was charged with the crime until 1998, in the ICTR “Akayesu” case (discussed in chapter 4). See Van den Herik, *Contributions of the Rwandan Tribunal to the Development of International Law*, 3–4.

including human rights law's emphasis on the social rehabilitation of prisoners and its objection to capital punishment. International humanitarian law tends to boast of its human rights orientation, with which capital punishment is inconsistent.⁵⁴ As William Schabas notes, the postwar military judgments did not include "a word about reformation and social rehabilitation in the post-World War II judgments," and made such scarce mention of human rights⁵⁵ that "the human" appears conspicuously absent at the moment of the development of international *humanitarian law* and at the inauguration of crimes against *humanity*. The so-called new humanitarian law therefore needed not only to demonstrate that it would attend to more victims than its predecessors had, but also distance itself from their inhumane ways. Without the power to issue death sentences, one could speculate that these new institutions needed to compensate with another kind of force ... a *moral force*, and the turn to victims enabled this conversion to credibility. They needed a supplement, as the following statement by Hassan Jallow, Chief Prosecutor of the ICTR, so succinctly conveys: "Legal responses are absolutely necessary, but do not adequately address all concerns. We must supplement [them] with preventive justice and with restorative justice."⁵⁶ The absolutely necessary here (IHL's legal responses) "must" rely on forms of justice usually relegated to other, quasi- and non-legal bodies.

To add to the pressure on these new tribunals, a cluster of issues raised questions both during Nuremberg and thereafter about its efficacy and moral legitimacy. The earlier tribunals failed, of course, to live up to the "never again" pledge. The architects of the Nuremberg tribunals claimed, above all else, that they would command such individual responsibility for crimes against humanity that these might never again be perpetrated; deterrence lay at the heart of the Nuremberg project and its justification for existence.⁵⁷ This stance is articulated in Nuremberg's Chief Justice Jackson's now legendary opening statement: "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."⁵⁸ The mere existence of the ad hoc tribunals monumentalizes the failure of IHL to live up to its inaugural pledge.

The West's decision not to intervene during the ethnic cleansing in the Balkans and genocidal violence in Rwanda in the early 1990s constituted embarrassing reminders of the emptiness of the "never again" axiom adopted by Nuremberg's architects on behalf of the "international community" that it sought to marshal and consolidate. The creation of the ICTY and ICTR cannot be but linked to what Helen Cobban refers to as a "tsunami of guilt that washed over the Security Council," and its North American and European

⁵⁴ The majority of nations have since abolished the death penalty (William Schabas, "Sentencing by International Tribunals, A Human Rights Approach," *Duke Journal of Comparative & International Law* 7 (1997): 464.

⁵⁵ *Ibid.*

⁵⁶ "ICTR Prosecutor Calls For Preventive Justice To Avert Human Tragedies," *Hirondelle International Justice*, <http://www.hirondellenews.com/content/view/5835/310>.

⁵⁷ Sheri Rosenberg, "The Nuremberg Trials," 1550; Teitel, "Bringing the Messiah Through the Law," 180.

⁵⁸ Justice Robert Jackson, "Second Day, Wednesday, 11/21/1945, Part 04" [opening statement for the Prosecution], *Trial of the Major War Criminals before the International Military Tribunal*, vol. 2, Proceedings: 11/14/1945-11/30/1945 (Nuremberg, Germany: IMT, 1947), 98-102.

members in particular. Something markedly “humane” would have to be done if IHL was to rescue its credibility as a humanitarian field of international law, (re)gain the moral high ground, and exonerate several UN members from accusations (and their own plaguing suspicions) that they were implicated in the carnage they failed to interrupt by either political or military means.⁵⁹

As noted above, another unresolved conundrum that Nuremberg passed down to its descendant tribunals was related to its strategy for establishing its legal credibility. Chief Justice Jackson embraced an approach that sought to prove “incredible events with credible evidence,” where credibility was tied to documentation.⁶⁰ The court’s recourse to voluminous documentation was used as a means to establish the systematic and widespread character of the crimes in question. This approach grew out of his concern that the testimony of survivors and other witnesses to Nazi crimes could be dismissed as unreliable or biased. Copious documentation, which the chief prosecutor attributed to the “Teutonic penchant for meticulous record keeping,” became a key means of garnering international approval and controverting allegations that the tribunals were “show trials” meting out one-sided “victors’ justice”; it supplanted subjective testimony with “objective facts.”⁶¹ Oral testimony was used mostly in the service of authenticating documents.⁶² However, this documentary strategy had at least one serious drawback: It demoted the victims and the “human aspect.”⁶³ It was not long, as the 1961 Israeli Eichmann trial made evident, before the Nuremberg documentary model of truth was seen as not “working” for IHL, due to its marginalization of victims.⁶⁴

By the 1990s, the post–World War II tribunals were not only criticized for their marginalization of victims of the Holocaust and war victims in general,⁶⁵ but also of sexual violence victims in particular.⁶⁶ The ad hoc tribunals’ image of themselves as

⁵⁹ “Interview with Helen Cobban: Rwanda Today: The International Criminal Tribunal And the Prospects for Peace and Reconciliation,” *Frontline: Ghosts of Rwanda* March 4, 2004, <http://www.pbs.org/wgbh/pages/frontline/shows/ghosts/today>. See also: Teitel, “Bringing the Messiah Through the Law,” 179; Wald, “Dealing with Witnesses in War Crime Trials,” 218.

⁶⁰ Some 3,000 tons of documents, photographs, film footage, and artifacts were presented at the first Nuremberg Trial alone (Sara Bloomfield, “Nuremberg, Eichmann Trials Challenge Us,” *Jewish Standard*, May 13, 2011, http://www.jstandard.com/content/item/nuremberg_eichmann_trials_challenge_us/18586).

⁶¹ Telford Taylor, *The Anatomy of the Nuremberg Trials*, (New York: Knopf, 1992), 136–48.

⁶² Starkly contrasting from the tribunals fifty years later, with their victim-centered approach, there were very few witnesses who took the stand at Nuremberg, and of those that did, twice as many were called by the defense than by the prosecution (Wald, “Dealing with Witnesses in War Crime Trials,” 217–18.)

⁶³ Allied countries also feared that too much emphasis on victim testimony would undermine the prosecution’s case, should stories of particular Jews’ cooperation with the Nazi officials surface in the process (Stover, *The Witnesses*, 18–19).

⁶⁴ Leora Bilsky notes that this approach distorted the Jewish story of the Holocaust, because the documents used in court were those of the perpetrators. The victim’s voices were but a faint whisper relative to the immense quantity of Nazi documentation utilized by the prosecution to convict Nazi leaders (*Transformative Justice: Israeli Identity on Trial*, Ann Arbor, MI: University of Michigan Press, 2004, 102).

⁶⁵ Alvarez, “Rush to Closure,” 2038.

⁶⁶ For example, it was in this decade that public outrage reached its peak that “comfort women” never got their day in court and that Japanese officers and soldiers were never charged with crimes of sexual slavery for forcing an estimated 200,000 of them into prostitution and sexual slavery (Yoshiaki Yoshimi, *Comfort*

purveyors of a more humane modality of law has hinged upon on their attitude towards sexual violence crimes, as discussed in chapter 4. The operative presumption being the greater the commitment to sexual violence crimes, the more humane and advanced the form of justice provided will be. The ICTY legal officer of gender issues, Patricia Sellers Visieur, declares, “The intent to follow through [on sexual violence crimes] is precisely what distinguishes the Second World War trials from the current ad hoc tribunals.”⁶⁷ Reports of the mass rape campaigns in the Balkans served as a catalyst for the establishment of the ICTY, and means for this law to distinguish itself as “new.”⁶⁸

All these problems cast doubt on the very possibility of IHL at the moment of its resurgence in the 1990s, and it was thus clear that it needed a new image if it was to succeed this time. This is to say that a conventional legalistic paradigm—retributive IHL in this case—would need supplementation and innovation: it would need to augment itself with a power both therapeutic and humane drawn from fields outside its conventional parameters.⁶⁹ Antonio Cassese, the first ICTY president and an ICTY judge, underscored this supplemental need when he likened the first international war crimes tribunal since the World War II trials to “a giant who has no arms and legs”—a colossal institution lacking the means of realizing the monumental aspirations and objectives it laid out for itself. He added: “[t]o walk and work, he needs artificial limbs,” thereby pointedly—if inadvertently—indexing the eccentric, prosthetically dependent character of this nascent, hobbled law.⁷⁰

Echoing the often implicit message emanating from the ad hoc tribunals’ promoters and key architects, such as Albright, Aryeh Neier said: “despite all its defects...the tribunal for the former Yugoslavia would build on those virtues of Nuremberg” (such as holding some perpetrators accountable) while steering clear of its shortcomings.⁷¹ Yet, there existed a palpable fear that the embryonic ad hoc tribunals would nevertheless be associated with Nuremberg’s foibles, or worse—outright show trials, which serve as the black sheep of the IHL family tree.⁷² This haunting anxiety became an impetus for the contemporary courts’ strategies of disassociation from Nuremberg vis-à-vis recourse to

Women: Sexual Slavery in the Japanese Military During World War II, trans. Suzanne O’Brien, New York: Columbia University Press, 2002). The sexual violence victim, and her role in the discourse of legal healing, is explored in detail in the following chapter.

⁶⁷ Sara Sharratt, “Interview with Gabrielle Kirk McDonald, President of The International Criminal Tribunal for the Former Yugoslavia,” *Women and Therapy* 22, vol. 1 (London: Routledge, 1999): 32. http://dx.doi.org/10.1300/J015v22n01_03

⁶⁸ Amanda Beltz, “Prosecuting Rape,” 177.

⁶⁹ To illustrate the specific link between the image of the tribunals as augmented and improved versions of their predecessors, where improvement was linked to the incorporation of humanitarian and therapeutic goals into the justice of the courts, Phillip Kearney, former member of the prosecution team at the ICTY praised the ad hoc tribunals and the ICC for their role in advancing victim-centered jurisprudence. He viewed the ICTY as “number one,” and he tethered his evaluation to the fact that he “definitely saw healing” and “closure” for victims while working there. (Diana Anders, interview with Philip Kearney, San Francisco, CA, September, 25, 2009).

⁷⁰ Antonio Cassese, “Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, to the General Assembly of the United Nations,” United Nations, New York, Nov. 6, 1995.

⁷¹ Neier, “The Nuremberg Precedent,” para. 9.

⁷² Teitel, “Bringing the Messiah Through the Law,” 180–81, 186.

victims as the “affirmative human aspect.”⁷³ From their early days, the ad hoc tribunals thus found themselves in the curious position of having to repeatedly pay homage to their predecessors and simultaneously move beyond them. This double movement—characterized by an almost frenetic shuttling between past and future, and retributive and restorative justice frameworks—constitute a legal experiment, or what Cassese calls “*une magnifique aventure morale et juridique*.” Indeed, the unfolding of the tribunals’ work has proven to be not simply a juridical adventure, but also a moral one, which, with its turn to victims, has shaped this young and pliant law in unprecedented and unpredictable ways. He goes on

*If we kill ... [the] “magnifique aventure morale et juridique” ... if we go home now, then we will never establish this precedent, and we will never know if we can apply international criminal justice. ... I strongly felt that our failure would also mark the end of any international criminal justice.*⁷⁴

The legal and the moral have become irreversibly and magnificently (as in elaborately) intertwined, and, for Cassese, to attempt to untangle them now would mean the end of this adventure, but also the end of a law that prides itself both on its morality/its humanity insofar as it finally gives victims “a voice”, and on its adherence to universal juridical principles.

Akin to Albright, his dramatic proclamation tethers this moral-juridical adventure to a precedent to be made, and to the survival of this branch of justice altogether. Although the stakes are high and the legal territory uncharted and potentially hazardous, failing to embark on the named adventure could mean the demise of IHL tout court. But could a body of law with an international reach imbue itself with a moral, therapeutic project and mode of reasoning for the purpose of making up for Nuremberg’s flaws alone?

IV. Eccentric Legality

Although the above discussion of the way these problems with the postwar tribunals opened up a need for the therapeutic turn is not false, it concerns only one part of the genealogy of “the therapeutic turn” posited by actors within the field of IHL. Looking past and beneath this reckoning of the turn in fact turns up a more profound condition that led to it: a crisis of *legal* legitimacy. The ad hoc tribunals may not be, as a number of legal scholars have remarked, the *de facto* descendants of the Nuremberg and Tokyo trials. Foundationless at its core and without first principles on which to draw, IHL may therefore be exactly the kind of law that would need to go outside itself to find its “legal” basis.

⁷³ Alvarez, “Rush to Closure,” 2036–38.

⁷⁴ Stuart and Simons, *The Prosecutor and the Judge*, 47.

If, when Gary Bass declared Nuremberg “legalism’s greatest moment of glory,” he meant that the IHL had prevailed as a default response to social and political problems (especially those produced by war) *in spite of* its specious legality, then he would be in sync with several key liberal legal scholars’ assessment of Nuremberg and the legal order to which it ostensibly subscribed.⁷⁵ As we’ve already seen, the latter is most commonly criticized for promulgating victors’ justice levied by those who defeated the Axis powers, but also from within the ranks of the Nuremberg tribunal itself. But Nuremberg’s legitimacy has been challenged on a number of fronts. The most common objection of this sort was that it subverted the rule of law altogether by violating the principle of *nullum crimen sine lege* (no crime without law).⁷⁶ In other words, defendants were being held accountable for acts that were not designated as illegal in advance of the crimes’ execution. The Allies were thereby left in what Richard Overy describes as “the legally dubious position of having to execute retrospective justice,” which of course fails to meet the basic requirements of justice.⁷⁷ According to this account, Nuremberg was driven by the Allies’ political interests parading as the rule of law.⁷⁸

In a similar vein, Sara Kendall examines the legitimating discourse mobilized by Nuremberg’s named decedents: the ICTY, ICTR. She concludes that they are “strictly speaking, without precedent. Each emerges *sui generis*, yet attempts to ground itself within a preexisting international legal field.”⁷⁹ This is echoed by the numerous prominent legal theorists who cast serious aspersions not only on Nuremberg, but also on the courts’ progeny.⁸⁰ Yet, the ad hoc tribunals’ “fragility” (to use Ruti Teitel’s term) has meant that Nuremberg is called upon to provide the contemporary courts’ grounding, even if it never managed to attain this for itself.⁸¹ One strategy for dealing with this inherited legal precariousness is to idealize the post–World War II tribunals and the

⁷⁵ Bass, *Stay the Hand of Vengeance*, 203.

⁷⁶ Sharon Healey, “Searching for Justice in an Unjust World,” *Human Rights and Human Welfare* 2 (Spring/Summer 2002): 6.

⁷⁷ “What the Allied powers had in mind was a tribunal that would make the waging of aggressive war, the violation of sovereignty, and the perpetration of what came to be known in 1945 as ‘crimes against humanity’ internationally recognized offences. Unfortunately, these had not previously been defined as crimes in international law” (Overy, “Making Justice at Nuremberg,” 1).

⁷⁸ Even Sir Norman Birkett, a British judge who presided at the Nuremberg Tribunal, explained in a private letter in April 1946 that “the [Nuremberg] trial is only in form a judicial process and its main importance is political” (Werner Maser, *Nuremberg: A Nation on Trial*, New York: Scribner’s, 1979, 281, 282).

⁷⁹ Kendall’s work includes the Special Court of Sierra Leone. See Sara Kendall, “Contested Jurisdictions: Legitimacy and Governance at the Special Court for Sierra Leone” (Phd dissertation, UC Berkeley, Dept. of Rhetoric, 2009), 32.

⁸⁰ Helen Cobban acerbically states, for example: “[The ad hoc tribunals’] grounding in any legitimate international legislative process is totally nonexistent. There is no international legislative process. There is just the fiat of the Security Council, which is made up of a random group of 14 nations, many of them highly undemocratic” (*Ghosts of Rwanda*, 2004). She also describes the ICTR as another “victors tribunal” (Cobban, “Healing Rwanda,” 8). For this reason, István Deák concludes that, “the lesson of the Nuremberg trials is that there should be no other trials following the model of the Nuremberg trials (“Misjudgment at Nuremberg” in *New York Review of Books*, October 7, 1993, <http://www.nybooks.com/articles/archives/1993/oct/07/misjudgment-at-nuremberg>). See also: Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA and London: Harvard University Press, 1964), 160.

⁸¹ Teitel, “Bringing the Messiah Through the Law,” 160.

expansion of IHL that the contemporary courts are thought to symbolize, precipitate, and solidify. Sharon Healey observes, “The passage of time seems to have diminished past criticisms of the Nuremberg Tribunal, while the advances in humanitarian law that occurred as a result of the tribunal have been exalted.”⁸² Yet, those criticisms and the problems it indexes linger, in an ambient yet tenacious fashion, and continue to infiltrate and inform the direction and composition of the ad hoc tribunals.⁸³

The precedent for the law of the contemporary tribunals rests on *jus cogens*, defined as a collection of peremptory, because ostensibly universal, norms from which no derogation is permissible. According to the logic of *jus cogens*, law is law because it is a universal norm. The creators of the ICTY and ICTR deemed this law “beyond any doubt part of customary law.”⁸⁴ Yet this law has not, in fact, been agreed upon by usual legal means. According to Cherif Bassiouni, the former UN High Commissioner for Human Rights and former Chairman of the ICC Rome Conference, “There is no clear agreement regarding precisely which norms are *jus cogens* nor how a norm reaches that status.”⁸⁵ This form of law was enforced for the first time during the Nuremberg Trials, which—given Nuremberg’s unprecedented and thus specious legal status—simply brings one back to the same problem of illegitimacy.⁸⁶ Fraught grounds of this sort could certainly lead the courts erected upon them to emphasize the therapeutic potential of the law as a means of exorcising the ghosts of its illegality and their own *sui generis* status, which is indeed the case. The essential question thus becomes: How did the therapeutic turn come to fill this inherited vacuum of legitimacy, and what might this mean for the project of healing it ushers in?

Nuremberg was meant to be the pivotal moment in which the loose strands of an embryonic body of law were to come together and constitute a legal precedent. Yet, it fell short of this goal; the paradox at its core was never resolved, even if it faded in memory over time. Rather than obviating the need to return to these troubling questions in later, similar trials, Nuremberg’s dubious legal legacy made the Israeli *Eichmann* trial, and then the ad hoc tribunals and ICC nearly a half century later, its uneasy inheritors.

⁸² Healy, “Searching for Justice in an Unjust World,” 26.

⁸³ Michael Biddiss avers: “The Nuremberg Trial continues to haunt us...It is a question also of the weaknesses and strengths of the proceedings themselves. The undoubted flaws rightly continue to trouble the thoughtful” (Michael Biddiss, “Victors’ Justice: The Nuremberg Tribunal,” *History Today* 45, May 1995); see also: Alvarez, “Rush to Closure,” 1998, 2039–41.

⁸⁴ ICTY Statute: UN SC Resolution 827, UN SCOR, 48th Session, UN doc. S/25704, para 34.

⁸⁵ M. Cherif Bassiouni, “International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes,’” *Law and Contemporary Problems* 59, no. 4 (Autumn 1996): 68.

⁸⁶ Unlike customary law, which has traditionally required consent by states by way of treaties, peremptory or *jus cogens* norms, which serve as the foundation for the IHL, cannot be violated by any state “through international treaties or local or special customs or even general customary rules not endowed with the same normative force” (“Prosecutor vs. Furundzija, International Criminal Tribunal for the Former Yugoslavia,” *International Law Reports* 121, 2002, 213.). This legal clarification is provided in a pivotal ICTR case—“Furundzija”—which sheds light on the fact that, in IHL, hegemonic norms often stand in for, or parade as consensually agreed upon laws (Bassiouni. “International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes,’” 68).

V. The Eichmann Trial: Never Again, Once Again

Although well known for the pivotal role it played in the emergence of IHL and Hannah Arendt's account of it in *Eichmann in Jerusalem: A Report on the Banality of Evil*, what is not always understood about *The State of Israel Versus Eichmann* is that it marks the initial emergence of the notion that international law, and the trials it engenders, can be a vehicle for healing victims and collective trauma in the wake of atrocity. The trial—which, it should be remembered, was broadcast internationally--was followed by a good part of the world and viewed by many as the first real collective acknowledgment of the Holocaust. Some of juridical healing's key features later adopted by the TRC, ad hoc tribunals, and ICC emerge and crystallize for the first time during the course of the Eichmann trial. These include the turn to the victim as perhaps the chief concern of law; the central role accorded testimony not having immediate or obvious evidentiary value; the reliance on psychological experts and clinical research as a means of verifying the “truth” of the Holocaust in general and the victims and their suffering in particular; and the trial as a pedagogical political tool by which the world can be made to remember that heinous, mass acts of political violence indeed transpired so that they “never again” will. The latter is premised on the belief that bringing the truth of the Holocaust into the open, and thus producing historical, collective memory (as opposed to denying its existence or allowing it to remain sequestered in the space of private or individual memory) will serve as a moral lesson that will safeguard humanity from resorting to, or permit genocidal violence in the future.⁸⁷ All these interrelated aspects of what will come to be IHL finally get bound together in the course of *Eichmann* to constitute the vague and diffuse but now nonetheless omnipresent notion in IHL that a trial itself can create the conditions for (if not directly effectuate) catharsis and healing. In short, law takes a therapeutic turn when the prosecution deploys the understanding that victims on the witness stand can serve as representatives for a wounded social body and provide closure through testifying to the violent event of its injury.

All this takes place, in part, because the legitimacy of the trial was called into question as soon as it had begun. Eichmann's 1960 seizure from hiding in Argentina by Israeli intelligence and police and his swift transport to Israel were sticking points for the defense, which argued that the crimes committed outside Israel and prior to its establishment were entirely beyond the court's jurisdiction. Their objection was based on the position that Israel's extradition of Eichmann constituted a breach of international law and abrogated Argentine sovereignty.⁸⁸ (Forwarding such a damning criticism nonetheless did little to prevent chief defense lawyer Robert Servatius from declaring the trial a “spiritual achievement.”) To circumvent the problem of legitimacy, the Eichmann court stated that Israel was a “member of the family of nations” acting as a delegate of the international political and legal community they form. Although a reach by many standards, the Eichmann court attempted to establish such delegate status by pointing to Nuremberg as its legal precedent, the basic principle being that it was the Nuremberg

⁸⁷ See, for example: Landsman, “Those Who Remember the Past May Not Be Condemned to Repeat It,” 1564.

⁸⁸ See Bilsky, *Transformative Justice*, 133–34; Sidney Liskofsky, “The Eichmann Case,” in *American Jewish Yearbook*, Morris Fine and Milton Himmelfarb, eds. (Philadelphia: The Jewish Publication Society Of America) vol. 7 (1961), 198–208, www.ajcarchives.org/ajc_data/files/1961_7_international.pdf.

Charter that first codified “crimes against humanity” and the Nuremberg tribunal that first convicted an individual of it (for crimes against Jews).⁸⁹

Perhaps more profoundly, the court based its authority to undertake extraterritorial jurisdiction on the principle of passive personality (then more firmly established in different countries), according to which a nation’s jurisdiction is justified if the crimes in question show a “special relation to victim,” regardless of location. The logic being that passive personality constitutes a claim to universal jurisdiction and situates the trial as part of the international war crimes family tree (since the principle was designed to operate in the context of a domestic trial, which granted much more flexibility than international legal requirements would have—a best-of-both-worlds scenario as far as the trial’s engineers were concerned).

Clarifying the very issue of Nuremberg’s legitimacy, the Eichmann trial’s bid for legitimacy ended up defining the eventual character of IHL by making the victim (in this context, significantly, the Jewish people *writ large*) a constitutive element of the trial in a fashion until then unseen in any remotely paradigmatic legal context. Had it only concerned jurisdiction, this shift to the victim would not have been likely to go a step further by introducing the therapeutic into the domain of law. But like the ad hoc tribunals (which have basically followed suit on this point), the Eichmann prosecution found profoundly disturbing and inadequate the role accorded victims and their testimony in the very tribunals it attempted to base itself on.⁹⁰ As mentioned above, Nuremberg’s engineers relied primarily on evidentiary documentation in an attempt to indemnify the tribunal’s objectivity and deflect accusations of Allied bias or “victors’ justice.” Moreover, perpetrators and their crimes of aggressive war had been, for the same reasons, the central focus, with victims and crimes against humanity a mere “sidebar.”⁹¹ For many Jews, however, the prosecution and elected officials guiding and directing them, this legalistic approach silenced and distorted the Jewish story insofar as the documents elided the experience of millions of victims—especially Jewish victims—who suffered at the hands of the Nazis.⁹² If the Eichmann trial was to be superior to the postwar trials it took as its predecessors, it would have to give victims a voice of a new kind: unless private stories of victimization were made public, future generations of Jews would neither know nor remember the bitter reality of the Holocaust, and the present one would never recover from it.

Other purposes of the trial that arose were to consolidate Israel’s embryonic national and Jewish identity (seen as one and the same)⁹³ and to invalidate the accusations that the Jews had either collaborated with the Nazi’s, or had gone “like lambs to slaughter” to the gas chambers and concentration camps. By showing, in full thespian fashion, the horrors of the Holocaust by means of an onslaught of victim testimony, the prosecution ventured

⁸⁹ Bilsky, *Transformative Justice*, 102.

⁹⁰ Alvarez, “Rush to Closure,” 2036–40.

⁹¹ Deborah Lipstadt, *The Eichmann Trial* (New York: Schocken Books, 2011), 192.

⁹² Leora Bilsky, *Transformative Justice*, 102–3.

⁹³ Idith Zertal, *Israel’s Holocaust and the Politics of Nationhood* (Cambridge, MA: Cambridge University Press, 2005), 104–5.

to demonstrate that the crimes in question—and the extreme conditions of suffering they produced—rendered the possibility of resistance nonexistent. From this line of reasoning, to resist under such absurdly inhumane conditions would be inhumane and absurd, insofar as the victims did not have the means or physical wherewithal that resistance would demand, and thus, resistance would be the equivalent of a self-signed death warrant. “Painting a picture” of the Holocaust for Hausner meant detailing the traumatic story of radical cruelty, unthinkable persecution and wide-scale misery—a tactic meant to lend credibility to his rendering, but also to dispel speculation about the Jewish conspirators and make plain the strength and resilience of Jews faced with unfathomable atrociousness. So while the trial and its turn to victims functioned as a means of legitimating the embryonic state of Israel and forging a unified, national identity, it also, (somewhat paradoxically) served as a means of legitimating its law with recourse to doctrines of international criminal law such as crimes against humanity and universal jurisdiction⁹⁴ Moreover, it sought to construct an archival edifice of targeted campaigns of violence against Jews that no revisionist could possibly challenge.

It was really the prosecution’s commitment to these intersecting goals that first pushed international law into the distinctly therapeutic terrain it now occupies. The chief means by which it did this—arguably one of the most important legacies of the trial—was the inclusion of over one hundred Holocaust survivors on the witness stand. Taking as its underlying assumption that justice could not be fulfilled without returning to the scene of trauma by giving expression to the voices of survivors, these witnesses were given an extraordinary role in the proceedings. This move has been reproduced in some way in nearly every IHL trial since.

In short, the entire trial was constructed as a vehicle for survivors to tell their stories of suffering.⁹⁵ Attorney General and Chief Prosecutor Gideon Hausner, under clear instructions from his superior, Prime Minister David Ben Gurion, relaxed the rules of procedure, and the judges for the most part permitted him to do so. Much less emphasis was placed on the standard question/answer format, so that the countless prosecution witnesses called to the stand could reconstruct their personal experiences, in all their grisly details, without interruption from either the judges or the prosecution. For this single, middle-ranking Nazi official, there were approximately 1,400 documentary exhibits (many of them thousands of pages long), 121 prosecution witnesses and ten months of hearings.⁹⁶ To say that the number of witnesses was a new addition to the post-trial would be a gross understatement, and would miss the paramount point here: this trial, officially meant to try Eichmann, whose guilt no one doubted, served as a privileged, but previously untested means of telling the entire history of the Holocaust from the point of view of survivors, for the sake of the survivors’ psychological and communal survival, and for the first time in history.⁹⁷ Even as it became clear that in the majority of instances victim-witness testimony was unrelated to the question of Eichmann’s guilt—the documentary evidence Hausner introduced would alone have been

⁹⁴ See Bilsky, *Transformative Justice*, 11–16; 133–134.

⁹⁵ Lipstadt, *The Eichmann Trial*, 192

⁹⁶ Stephan Landsman, “Those Who Remember the Past,” 1564.

⁹⁷ *Ibid.*

sufficient to prove him guilty—the prosecution continued to focus on what the judges in fact deemed detracting “psychological questions.”⁹⁸

The therapeutic project of what was thus not entirely a legal strategy came to the fore in Hausner’s peculiar framing of the status of victim testimony. Intent on “shaking the hearts” of the audience, he did not hold back when it came to courtroom theatrics and high drama, and used the macabre stories of survivors as the means by which anti-Semitism throughout history and in the particular instance of the Holocaust could be put on trial, alongside—and some might say instead of—the accused.⁹⁹ The goals for the prosecution “clashed with traditional notions of relevance” and created a notable rift between the court/the judges, which ostensibly sought traditional judicial goals, and the prosecution, which, according to Stephan Landsman, “labored mightily to tell the whole Holocaust story.”¹⁰⁰ Hausner’s melodramatic opening statement sees him boldly appointing himself the voice of the silenced and slaughtered six million Jewish victims of the Holocaust. He states:

*I am not standing alone. With me are six million accusers. But they cannot rise to their feet to point an accusing finger towards the glass booth and cry out at the man sitting there, “I accuse.” For their ashes are piled up on the hills of Auschwitz and fields of Triblinka, washed by the rivers of Poland, and their graves are scattered the length and breadth of Europe. Their blood cries out, but the voices cannot be heard. I, therefore, will be their spokesman and will pronounce, in their names, their awesome indictment.*¹⁰¹

Extraordinary for this fledgling and fragmented body of postwar law, Hausner manifestly identifies with the victims while positioning himself as a chosen victim who will both cry out, in prophetic fashion, for those lost and provide in a quasi-therapeutic fashion, a public scene in which survivors can reenact their traumas, set the historical record straight, and receive a sort of legally sanctioned redemption. In the course of this, he basically conceives of himself as what Archbishop Tutu of the South African TRC calls a “wounded healer.”

The Holocaust had never been front page news to the same degree nor a trial internationally televised (thousands of viewers tuned in to follow its dramatic unfolding), and Hausner was not about to let the historical moment pass without seizing the (geo)political and moral opportunity it offered. With the help of Rachel Auerback at Yad Vashem of Israel’s Holocaust archive and memorial, he set out to make this “a large, historical trial,” that was to capture and document the “full extent and unique nature of

⁹⁸ Between a half and “one third of the proof had nothing to do with Eichmann at all” (ibid., 1576).

⁹⁹ Lipstadt, *The Eichmann Trial*, 192.

¹⁰⁰ Landsman, “Those Who Remember the Past,” 1564.

¹⁰¹ *Attorney General of the Government of Israel v. Eichmann, Judgment*. Case no. 40/61 (District Court of Jerusalem, 11 December 1961), 7. (Mimeographed unofficial transcript prepared by the Israeli Government for the convenience of the public).

the destruction of the European Jews”¹⁰² and thereby ensure that violence of this scale would indeed “never again” happen.

The distinctly psychological character of the therapeutic dimension of the trial becomes fully evident in the way the guilt of the accused was established. As Arendt famously emphasized in her report on the trial (later made into the book *Eichmann in Jerusalem: A Report on the Banality of Evil*), establishing Eichmann’s intention to do wrong was—frequently treated as a necessary ingredient for understanding the nature of and judging the crimes on trial.¹⁰³ To do this, his psychological state was scrutinized before the court by several psychiatrists whose opinions formed the heart of the trial’s repeated, protracted discussions about what it meant for a seemingly “normal” man to carry out atrocious acts. Arendt, surely one of the most outspoken critics of the trial, labeled this concern with Eichmann’s motives and psychological state the “subjective factor,” which she contended detracted from the real issue—whether or not Eichmann indeed committed the crimes of which he was accused, regardless of his intentions or mental state.¹⁰⁴ The primary argument of her controversial text was condensed into the following claim: “The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes ... can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.”¹⁰⁵ Arendt would likely be dismayed to learn that this psychological element has persisted and expanded into so many legal and quasi-legal venues discussed here, especially the ad hoc tribunals and ICC, which now regularly employ psychiatrists as expert witnesses and which place considerable emphasis on the psychology of the perpetrator and victim alike.

Thus began the therapeutic turn, for reasons that that were neither purely legal nor even political or nationalist. The healing project evident in Eichmann stitches law to an endeavor of healing that is conceived in manifestly psychological (specifically psychotherapeutic) terms: narrative testimony is treated as the fulcrum by which the truth and reality of a violent and traumatic historical event can be forced into the light so that “justice” can somehow be served and catharsis and healing attained. While such a project is an understandable response to an event like the Holocaust (I have sympathies with the therapeutic, even psychoanalytic dimensions), this history has not unfolded in some sort of linear, teleological fashion. Rather, using the lens of the therapeutic turn to track an alternative genealogical tree of IHL brings into relief the highly eclectic and eccentric character of this law—a story of bastardized legal kinship and cross-pollination that the standard history does not allow. The filial relations between these seemingly disparate legal apparatuses (the national trial of Eichmann and the international ad hoc tribunals) troubles the standard history of IHL. The latter draws a direct line of decent from the

¹⁰² Rachel Auerback placed her department’s vast collection of survivor statements available to the prosecution. She and Hausner shared very similar views about the stakes of and necessary structure of the trial as a far-reaching and historical, and were equally comfortable with the “irrelevant” status of the witness testimony selected when it came to Eichmann’s crimes (Deborah Lipstadt, *The Eichmann Trial*, 52–53).

¹⁰³ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963), 25–26.

¹⁰⁴ *Ibid.*, 277–78.

¹⁰⁵ *Ibid.*, 233.

post–World War II trials to the ad hoc tribunals, thereby skipping over an entire half century, excluding Eichmann and—as we shall see—another alienated, yet key figure of the alternative family tree proposed here: the South African TRC.¹⁰⁶

VI. Revealing Is Healing: The South African TRC

The stakes of the paradox of illegality at issue here will only come to the fore after what could perhaps be viewed as the second step or moment in the therapeutic turn. The establishment, in 1995, of the South African TRC is the moment when the current, “properly” therapeutic mode of justice appears in stark, no-longer ambiguous form: the overall purpose of the commission (which is commonly referred to as the TRC) was, as chairman of the commission Archbishop Desmond Tutu put it, to provide a forum for national healing through bearing witness to the testimony of victims of apartheid and, in some cases, offering reparations and rehabilitation to them, as well as considering amnesty applications from those guilty of committing human rights violations. Although these three distinct projects were its purpose—and the TRC was accordingly composed of three committees that each held purview over one area—public hearings centered on narrative and ostensibly cathartic testimony were the means by which the TRC carried out its work, with even perpetrators (not just victims) being given the opportunity to come forward to be heard both by the commission and fellow citizens. The scale of this project becomes evident when we note that the commission received over 7,000 amnesty applications (of which a few hundred were granted) and heard testimony from a staggering 20,000 victims.¹⁰⁷ But what makes the TRC the initial crystallization of contemporary juridical-healing is its robust commitment to both a “legal” theory and practice in which acts of remembering (as opposed to forgetting), truth telling, and healing are central. As Archbishop Tutu—who identifies himself and the commission as the “wounded healers” of South Africa—famously put it:¹⁰⁸

There were [some] who urged that the past should be forgotten. ... This option was rightly rejected because such amnesia would have resulted in further victimization of victims by denying their awful experiences. ... The past refuses to lie down quietly. It has an uncanny habit of returning to haunt one. “Those who forget the past are doomed to repeat it” are the words emblazoned at the entrance to the museum in the former concentration camp of Dachau. They are words we would do well to keep ever in mind. However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the

¹⁰⁶ The rationale for this temporal leap has often been explained with reference to the Cold War, seen as responsible for driving the nascent international legal apparatus that sprung up in the 1940s into latency as a result of new, more pressing geopolitical concerns and priorities during this period.

¹⁰⁷ Greg Barrow, “South Africans Reconciled?” BBC News, http://news.bbc.co.uk/2/hi/special_report/1998/10/98/truth_and_reconciliation/142673.stm.

¹⁰⁸ Desmond Tutu, *Forward, Final Report of the South African Truth and Reconciliation Commission*, TRC, vol. 1, ch. 1 (October 20, 1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>.

*sake of the future.*¹⁰⁹

Given the obvious and commendable ethical and political project at stake here, care should be taken not to reduce Tutu's appeals simply to psychological or quasi-psychoanalytic discourse (primarily concerned with curing *individual* psychic suffering). Nonetheless, a manifest group of interlinked therapeutic concepts becomes evident here: the individually and socially repressed memories of the victims of political violence; the revictimization of victims said to result from maintaining repression; the likelihood of a veritable, presumably chaotic, and "uncanny" return of the repressed; a therapeutics of memory aimed at staving off this possibility by healing the wounds that caused the repression in the first place; and underlying it all, the assumption that truth via personal, narrative testimony can heal. The TRC's official public motto, in fact, was "revealing is healing."

With this motto in mind, it is easy to lose track of the fact that the TRC is often referred to, and sees itself as a juridical institution, albeit a peculiar one. Truth commissions have often been organized according to a court model, placing justice at the center of their work, yet none has full judicial powers. The TRC enjoyed "broad investigative powers, such as subpoena power,"¹¹⁰ as well as "search and seizure" power. And, although it did not carry out prosecutions under its roof, individual perpetrators of human rights violations who refused to confess at its hearings, or whose "crimes were deemed not to be political in motivation" would be subject to prosecution before the national courts.¹¹¹ Thus, the TRC's work in fact determined in large part who would be granted amnesty and who would be subject to prosecution. And so, there was a legal valence to the TRC's work and proclamations, and each of its three commissions—especially the one tailored to judge amnesty pleas—adhered to a court model in many respects. Nevertheless, from the outset and true to its restorative aims, it has taken distance from conventional, adversarial legal processes, in large part in an effort to foster an environment that would give rise to revelatory healing.

The South African TRC has occupied the position of the most high-profile, far-reaching, and ambitious of the truth commissions that emerged in the 1980s and 1990s, and—I argue—marks a distinct point of emergence for the therapeutic turn in IHL. To identify the TRC in this way is not to say that it assembled this form entirely of its own accord. The field of transitional justice has gained considerable momentum and purchase in the last few decades and provided the TRC its general conditions of possibility. Transitional justice is most often understood, as Ruti Teitel has said, as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."¹¹² "The term "transition" has come to mean (in the parlance of contemporary liberalism) change in a "liberalizing

¹⁰⁹ Tutu, *Truth and Reconciliation Commission of South Africa Report*, 1999.

¹¹⁰ Teitel, *Transitional Justice*, 81.

¹¹¹ Robert B. Horwitz, "Truth Commissions, Nation-Building, and International Human Rights: The South African Experience and Reflections on the Politics of Human Rights Post 9/11," in *Toward a Political Economy of Culture: Capitalism and Communication in the 21st Century*, eds. Andrew Calabrese and Colin Sparks, (Lanham, MD: Rowman & Littlefield Publishers, 2003), 111–130.

¹¹² Teitel, *Transitional Justice*, 69.

direction.”¹¹³ Although transitional justice began to gain footing as a concept in response to political events in the post–World War II period, it made its big debut in the 1980s, a decade when numerous military dictatorships and totalitarian regimes (such as in Argentina and Chile) were overthrown in the name of freedom and democracy.

Where transitional justice has most contributed to the therapeutic turn is in the fact that it is typically perceived as having, as Catherine Cole puts it, its “most notable impact via truth commissions.”¹¹⁴ Cole suggests that truth commissions are designed to “grapple with the ultimate failure of traditional jurisprudence in the face of contending demands for justice, reparation, acknowledgment, mourning, healing, reconciliation, and the promulgation of public memory.”¹¹⁵ As discussed in chapter 2 of this dissertation, the ascendance of both transitional justice and the truth and the reconciliation commissions it engendered has thus involved what Njabulo Ndeble deems the “triumph of narrative,” where what amounts to the same mode of testimony we saw at work in the Eichmann trial—telling one’s story in a public, especially in juridical or quasi-judicial setting—is rendered the chief method for attaining individual and collective healing.¹¹⁶

This move toward legal healing in transitional justice is seen as having found its greatest realization in the TRC. Given both that South Africa is one of the most celebrated examples of state transformation from authoritarian to democratic rule in the last century and the TRC’s emphasis on narrative healing, the TRC has been consistently pointed to as the concretization of transitional justice theory. But what makes the TRC itself the most precise expression of a therapeutic jurisprudential approach that will come to shape the ad hoc tribunals, the ICC, and similar courts that arose at the turn of the last century is that it effectuated for the first time an almost complete collapse of therapy and justice.

The TRC’s discourse of healing via testimony certainly went further in its confidence about the efficacy of such acts than any other expression of the therapeutic turn before and perhaps since. But the singular project of the TRC—post-apartheid national reconciliation undertaken with wide participation and broad popular support—meant that those responsible for directing it were willing to vest an otherwise extra-judicial endeavor with juridical status and vice versa, even if—as mentioned above—the juridical or legal in this case is more loosely construed than in a criminal tribunal. And where conventional judicial procedure and concepts, moreover, could only fall short of these goals, the TRC was willing and this time (unlike the Eichmann court) legally able to alter them to fit its ends. In a word, the TRC was not—and here it broke with previous truth commissions—prepared to accept the role of second best to criminal prosecutions, and it created a novel and unorthodox juridical/therapeutic hybrid as a result.

¹¹³ Ibid., 5.

¹¹⁴ Catherine Cole, *Performing South Africa's Truth Commissions* (Bloomington, IN: Indiana University Press, 2009), x.

¹¹⁵ Ibid.

¹¹⁶ Njabulo Ndeble, “Memory, Metaphor and The Triumph of Narrative,” in *Negotiating The Past: The Making of Memory in South Africa*, eds. Sarah Nuttall and Carli Coetzee (Oxford, UK: Oxford University Press, 1998), 19.

There were several reasons for this, some ethico-political-therapeutic and others stemming from pragmatic difficulties presented by the courtroom. On the one hand, as Archbishop Tutu made clear from the outset in the TRC's final report (which is his fullest expression of the larger significance of the commission), both the enormity of the crimes and violence of apartheid and the international significance they acquired with respect to issues of race, postcolonial politics, and justice meant that *this* truth commission would need to stand above all others and even be "unique in the annals of history." It would have to offer "a new way of living for humankind" and is regarded internationally as a "benchmark against which the rest are measured."¹¹⁷ If such massive aims were to be attained, reinventing the purpose and format of the public legal forum ordinarily understood as the trial would obviously be required.

Yet, the conventional legal trial, given its narrow scope and primary concern with the guilt or innocence of a given party, could not, in any case, sufficiently capture the nuances adherent in this particular regime of violence and its aftermath. Above all, the TRC was intended as a space for the rehabilitation of all the parties affected by apartheid and the overt political violence of the South African state: the victims, the perpetrators, as well as the broader society and respective communities from which both came. Certain aspects of the hearings had, from the perspective of the TRC and its supporters, to be reshaped and/or suspended if this wide rehabilitative goal was to be achieved. Punishment, for instance, had to be foregone in order to "stay the hand of vengeance," as Chief Justice Robert Jackson of the Nuremberg trials famously pronounced in his opening address at the Nuremberg Trials.¹¹⁸ Amnesty was offered to some perpetrators on the grounds that punishing entire sectors of Afrikaaner society would fatally undermine the possibility of national healing. But this gesture was also intended to open up the possibility for perpetrators and victims alike to establish the truth of the past, in order to live in peace in the present and future.¹¹⁹ Likewise, the TRC felt that it would have to free itself from the confines of strict procedures and cross-examinations if it was to foster the sort of supportive and open environment in which victims and (when possible) perpetrators could be healed by publically performed articulations of the truth. Finally, the expanded focus it attained by not concerning itself exclusively with legally defined crimes allowed it to track wider—institutional and historical—patterns of violence than a conventional trial/tribunal.

The most radical modification to the juridical domain that the TRC presented, however, lies in the remarkable (and in many respects commendable) fact that it actually redefined what it understood by truth as it deployed four intermeshed notions of it. There was "factual" or "forensic" truth, which meant the truth established by and pertaining to the decisions of the amnesty committee; a "personal and narrative" truth provided by individual testimony; a "social" truth, which entailed "a truth of dialogue obtained

¹¹⁷ Tutu, *Truth and Reconciliation Commission of South Africa Report*, 1.

¹¹⁸ Robert Jackson, "Opening Statement before the International Military Tribunal," Robert H. Jackson Center,

<http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal>.

¹¹⁹ Rhot-Arriaza and Mariezcurrena, *Transitional Justice*, 4–5.

through the process of confrontation or verbal exchange between victims and tormentors”; and finally, a “healing” and “restorative” truth.¹²⁰ Far from a situation where the latter three modalities of truth were mere supports to the first (forensic) kind, all four were regarded as inextricably related and as equally paramount to the work of the commission such that no one form could be compromised without jeopardizing the TRC’s entire mission. In effect, no firm distinctions were drawn between storytelling, healing and delivering justice to the South African people. Rather, healing and storytelling produced the conditions of possibility for justice and peace. As we shall see, a similar causality is adopted (often tacitly, or unknowingly) by the ad hoc tribunals, and by way of its avowed commitment to the truth of victims, their stories, and reconciliation.

VII. The Inescapable Truth-Justice-Healing Nexus

Whatever its merits as an ethical project, the TRC’s conception of justice-as-healing is underwritten by a set of contradictions that undermine its de facto status as a forum responsible for exercising a kind of law: justice as a mixture of retributive and restorative justice vs. justice as truth; truth as forensic fact vs. truth as narrative and social fact; and, ultimately, law-as-law vs. law-as-therapy. But it should also be repeated that advocates of the commission were neither willing to concede that it represented law in a previously recognized sense nor entirely willing to assign all the functions of law to it. Moreover, the TRC’s theoreticians attempted to contend with the thorny issue of truth by dividing truth into the veridical types noted above. But where these contradictions require a poignant critical response to the most recent moment of the therapeutic turn: contemporary IHL. In addition to being profoundly influenced by the thinking subtending the TRC, the contemporary courts are staffed, administered, and led by the some of the very people at the core of the commission’s work. The courts I am concerned with throughout this dissertation—the ad hoc tribunals and the ICC—have made the body of ideas and procedures developed by the TRC central to their project and thus, along with them, the therapeutic/psychological discursive background that emerges with Eichmann.

Given that IHL’s representatives do not at all relinquish this law’s claim to being law—in fact, they would like, ultimately, to have final legal and moral say over “crimes against humanity”—nor in principle avow that it is also something else (something between law and collective therapy), their general confidence about its legitimacy and its tendency to seek out a place where its validity is at greater risk of being undermined, strikes me as significant. The fact that the boundaries of law/legality suggests a paradox that may be constitutive to all IHL (where law must go depart from legal protocol to legitimize itself); a paradox that, if recognized and finally contended with, might force this law to be rethought as far as what it is and what it does.

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¹²⁰ Barbara Cassin, “‘Removing the Perpetuity of Hatred’: on South Africa as a model example,” *International Review of the Red Cross* 862 (2006): 240.

The primary way that legal “healing” was ushered into the work of the tribunals was vis-à-vis the conception of justice as based in and equivalent to truth (victims’ truth). From the outset of the first court’s work, the refrain was, more often than not, the same as the TRC’s. This is not to say that the equation was not up for debate: even while—as we saw above—Madeleine Albright, Kofi Annan, and Archbishop Tutu unequivocally tethered truth to justice, others insisted on the mutual exclusivity of these two ideals. Ironically, in even what is considered to be a “victims’ court” par excellence—the ICC—there persists a palpable sense that the “truth” of truth commissions like the TRC, with its focus on victims and their testimony of trauma, can run counter to the basic tenets of *criminal* justice. Consider, for example, the ICC’s Fabricio Guariglia’s reservations about a hybridized approach to justice, where justice and truth are rendered synonymous and mutually reinforcing—what he calls “the truth commission style:

*When I started seeing the way some people were approaching the whole thing of victim participation ... you know sort of “truth commission” style ... I really got scared. I was like, ‘What are we doing here?’ This is a criminal court, and of course we... It’s a criminal court that has opened a door to victims ... to some victims—not all victims!*¹²¹

The “truth versus justice” debate thus lives on and can be traced back to the South African TRC’s very literal influence on the tribunals, later inherited by (and intensified in) the ICC. And—using Guariglia’s comment above as an index of the internal perception of the truth versus justice issue—it is clear that the truth commission “style” can be perceived as a threat to the court and its mandate to try criminals, not “open a door” to “all victims” and a victim-centered form of justice.

Although it is not always easy to pinpoint the ways in which the truth commission “style” migrated and settled into to the ad hoc courts, and later amplified at the ICC, we can locate—on a small scale—a literal mode of embodiment of this migration by following the contributions of a highly influential actor who worked closely with the TRC in South Africa and then structured the ad hoc tribunals’ juridical approach in their early, critical days: In 1994, South African Richard Goldstone was named the first chief prosecutor of both the ICTY and (a few months later) of the ICTR. Goldstone had served from 1990 to 1994 as a Justice of South Africa’s Constitutional Court, which was entrusted with supervising the country’s transition into democracy and writing the new constitution in the wake of apartheid. He has been described as “arguably the most indispensable arbitrator in South Africa’s turbulent transition to democracy.”¹²² Goldstone is credited with having helped pave the way for the establishment of the TRC in 1995.¹²³ He also chaired the eponymous Goldstone Commission from 1991 to 1994, which worked on strategies for defusing the political violence so central to apartheid so that the country

¹²¹ Diana Anders, interview with Fabricio Guariglia, July 5, 2009, The Hague, Netherlands.

¹²² John Battersby, “Safety Valve for S. Africa Tension,” *The Christian Science Monitor*, February 10, 1993.

¹²³ As a result of Goldstone’s commitment to both the Goldstone Commission and the TRC, Archbishop Tutu commented that Goldstone had made an “indispensable” contribution to the peaceful democratic transition in South Africa (Challiss McDonough, “SAF/GOLDSTONE [L-O],” *Voice of America*, October 10, 2002).

could more easily move toward its first democratic elections.¹²⁴ Although Goldstone never had an official role in the TRC itself, he was determined to structure the Yugoslavian and Rwandan tribunals on a notion of “reconciliation based in truth” that took inspiration from the TRC.¹²⁵ Victims would be central to this project, and to ignore them—in Goldstone’s eyes—“would be a recipe for escalating enmity” between warring groups.¹²⁶

So Goldstone’s understanding of the truth-justice nexus was crucial in shaping the ICTY and ICTR’s course of action. Indeed, Goldstone likened the tribunals’ indictments of war criminals to national truth commissions, insofar as they both helped to “avoid the attribution of collective guilt to any nation or ethnic group.”¹²⁷ In his memoir, *For Humanity, Reflections of a War Crimes Investigator*, one finds repeated endorsements of what I have been calling juridical healing. For instance, he stated that, after speaking with a victim of apartheid who had testified before the TRC and who had found it to be profoundly cathartic, “any doubts I had [regarding] the effect of the public acknowledgment of the suffering of victims were resolved at that moment.” He immediately goes on to say that his “experience at The Hague taught [him] that the same healing effect can also come about through a credible judicial process,” and proceeds to share an anecdote about ten “depressed” ICTY victim-witnesses who, after testifying, went home “a happier and more united group of people.”¹²⁸

Goldstone’s formidable influence on the culture and prosecutorial strategies of the ad hoc tribunals is undeniable, and his tenure there made it clear that his “great admiration for the awesome task [the TRC] performed” was carried into his work as the tribunals’ first chief prosecutor.¹²⁹ In this way, Goldstone’s vision for both tribunals incorporated all of the benefits of the TRC, while overcoming the usual obstacles of a trial: the ad hoc tribunals could offer the definitive judgment authorized by law as well as prioritize reconciliation and catharsis for victims.

In fact, South African Madame Justice Navanetham Pillay, who served from as the president and judge of the ICTR between the years of 1999 and 2003, extended the tribunal’s reliance on truth-as-justice. Like Goldstone, she was also a member of the

¹²⁴ The Goldstone Commission was formally known as the “Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation.” Goldstone was appointed to investigate political violence and intimidation that occurred between July 1991 and the 1994 general election that ended apartheid in South Africa (Lawyers for South Africa, *Goldstone Commission of Inquiry*, Johannesburg, South Africa, 1992).

¹²⁵ Goldstone called his relationship to the TRC “tangential,” but he was a key figure who pushed for its creation and attended, with, among others, his friend Aryeh Neier (the head of the George Soros Open Society Fund) the seminars that preceded its establishment. It turned out that his connection to Neier, and their shared values about how to best promote human rights and transitional justice, proved helpful when Goldstone arrived at the ICTY, insofar as George Soros was a huge support (financially and otherwise) of the ICTY and its work. See Goldstone, *For Humanity*, 84.

¹²⁶ *Ibid.*, xxiii.

¹²⁷ *Prosecutor v. Nikolic*, IT-94-2-I, Rule 61 Hearing: Opening Statement by Justice Richard Goldstone (ICTY, Trial Chamber, 9 October 1995).

¹²⁸ Goldstone, *For Humanity*, 65–66.

¹²⁹ *Ibid.*, 72.

South African Constitutional Court, and as a lawyer, she defended many opponents of apartheid and was deeply involved, both professionally and personally, with the reconciliation process.¹³⁰ Pillay averred that her experiences from the apartheid era and her involvement with transitional justice initiatives directly impacted her work in the ICTR.¹³¹ She claims that Rwanda represents an example of “a post-conflict society that is using several transitional justice measures, in concert, to carve out a path between retributive and restorative justice.”¹³² One such “measure” is the Rwandan tribunal.

Pillay characterizes the Rwandan tribunal as “a beacon of hope in a new legal order” that is capable of striking a “delicate balance between Rwandan retributive and restorative justice.”¹³³ She also cites the TRC for inspiration as she navigates the restoration/retribution divide in her tribunal work, praising it for making “public truth-telling an essential component of the healing process” since it was “only through public and collective acknowledgment of the horrors of past human rights violations [that] South Africans [were able] to establish the rule of law and a culture of human rights.”¹³⁴ For Pillay, then, that “new legal order” that the ICTR was meant to embody was one wherein retributive and restorative norms and practices—the “rule of law,” a “culture of human rights,” and “truth-telling” that leads to “healing”—would not only coexist, but would become mutually reinforcing. Her particular impact on the ICTR, in terms of her resolve to incorporate restorative justice and TRC-inspired truth-telling in (at least officially) a retributive setting paved the way for her transition to the ICC and, later, her role as the UN human rights commissioner charged with promoting and protecting global human rights for all.¹³⁵ The brand of *humanitarian* law mobilized under Pillay’s term at the ICTR, like that of Goldstone, was a far cry from Nuremberg, insofar as it affirms the “human aspect” in such a way that rendered this “aspect” a constitutive component of its operations and the basis of what was to become an entire juridico-therapeutic discursive paradigm and attendant ethos.

We see in the influence of these two pivotal figures on the ad hoc tribunals a direct link between their emphasis, on the one hand, on notions of restoration/healing, truth, and reconciliation that owe much to the TRC and, on the other, their promotion of an

¹³⁰ David Fuller, speech at the presentation of Her Excellency Judge Navanethem Pillay with the degree of Doctor of Civil Law, Durham University, England, June 27, 2007.

¹³¹ Judge Navanethem Pilla[y]: “I can understand the emotions and sensitivities of the Rwandan people...I come from South Africa, suffered under apartheid and emotionally we would hate to see someone not tried” (BBC World Debate on the establishment of the ICC, “Should There Be One Court for the World?”, BBC World Service, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/debates4.shtml).

¹³² Judge Navanethem Pillay, President of the ICTR, “The Rule of Law and the Role of the Individual in the Pursuit of Human Rights,” speech presented on the occasion of the Friedrich-Ebert Stiftung 2003 Human Rights Award, awarded to The International Criminal Tribunal for Rwanda (Berlin, Germany, May 20, 2003).

¹³³ *Ibid.*, 7.

¹³⁴ *Ibid.*, 5.

¹³⁵ Tellingly, Pillay went on to serve as a judge at the ICC from 2003–2008 and currently holds the position as the UN High Commissioner for Human Rights (UN Office of the High Commission of Human Rights, <http://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx>).

expanded juridical mandate not forced to choose between the work of truth or justice, law or politics, and law or healing/reconciliation. For Goldstone and Pillay, all of these ideals, practices, and projects have a place once more, underneath the same, greatly widened juridical umbrella. But this most recent step in the genealogy of IHL of course did not transpire through Goldstone and Pillay's work alone, as there has been a wider dissemination of what was originally TRC discourse into IHL. This general influence can be seen in the way the TRC has conditioned the approach the tribunals take to the issues of juridical truth and expanded justice.

Some of the tribunals' trial decisions and opening statements—those moments when the chambers are most likely to make room for reflection of the tribunals' purpose and define their role—clearly evince the influence of the TRC's quadripartite notion of truth. A key moment, for instance, of the judges' statement in the ICTY *Prosecutor vs. Erdemovic* Judgment, reads:

*The degree of suffering [of the victims] cannot be overlooked. ... The international tribunal, in addition to its mandate to investigate, prosecute, and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation, and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process. ... On the other hand, the international tribunal is a vehicle through which the international community expresses its outrage at the atrocities committed in the former Yugoslavia...and it must not lose sight of the tragedy of the victims and the sufferings of their families.*¹³⁶

In this prime example of the increasingly naturalized interpenetration of juridical and therapeutic idioms, we can also see a reference to each of the four categories of truth recognized by the TRC discussed above (factual, social, restorative, personal): a “factual” or “forensic” truth evident in the chamber's reference to investigations and prosecutions; the “social”/collective truth-making and thus truth facilitated by the tribunal in order to bring about reconciliation; the closely related (and perhaps here indistinguishable) “restorative” truth capable of “cleansing the ethnic and religious hatreds and beginning the healing process”; and, finally, the “personal” truth acknowledged by the tribunal in its invocation of the “tragedy of victims and the suffering of their families.” All of this points to the close links between the models of justice, truth, and healing in the TRC and the ad hoc tribunals.

The tribunal's most ardent legal healing advocates rarely show signs of humility or intimidation by the monumental task set before them. Instead, the judgment passage above captures the aspiration of the tribunal to offer a multilayered, expanded form of

¹³⁶ ICTY, “Drazen Erdemovic Sentenced to 5 Years of Imprisonment,” press release, CC/PIO/299-E, The Hague, Netherlands, 5 March 1998, <http://www.icty.org/sid/7686>.

justice and thereby again evinces the strong influence of the TRC. All of the above truth-seeking activities and aspirations are grouped under the rubric of the tribunal's "judicial functions," which effectively renders the distinctions between the courts' judicial functions and its healing/reconciliation project meaningless. To cite Cassese, once again: "You go beyond the black letter of the law because you look at the spirit of law."¹³⁷ In short, the so-called "spirit" of what he calls "innovative law," in going beyond its "black letter" self, inherited some of the drawbacks of this pioneering and specifically restorative-friendly "retributive" justice that we saw in different ways in the Eichmann trial and in the TRC; they have simply deepened and congealed in contemporary IHL.

One problem raised by this thorough intermixing of healing and law is not simply that it makes the latter epistemically uncertain and possibly illegitimate but that it also opens up a novel discursive field in which international law depends for its legitimization on fields external to it. This becomes evident when we turn away from the "advocates" of the complete equation of law, healing, justice, and truth, and toward those who wish to maintain a fine separation between them. As transitional justice scholar Roht-Arriaza points out, these two dominant responses to political violence—truth and justice—are often seen by IHL practitioners as a distinct but "intertwined set of obligations."¹³⁸ The trick to executing law proper hinges upon balancing the needs of "persuasive storytelling and normative requirements for legal judgment."¹³⁹ At certain moments, indeed, this seems to operate as the tribunals' *modus operandi*, while at other moments the tribunals (perhaps strategically) identify with only one side of the truth/justice divide.

Yet even for those who adamantly situate truth and healing on one side and justice on the other, it seems these terms are starting to persist in their entanglement, as exemplified by a statement made by Hans Holthuis, the registrar of the ICTY.¹⁴⁰ At a 2001 ICTY conference in The Hague (entitled, ironically, "In Search of Truth and Responsibility"), Holthuis attempted to extricate in a definitive fashion "truth-seeking" from the criminal proceedings that exemplify the justice of the tribunals. He states in his conference address:

*Truth-seeking mechanisms ... work against the very principles upon which the criminal process is based and must therefore be avoided. Those projects which aim to foster mutual respect and forgiveness between communities play an important role, but they often bypass criminal justice in that they involve decriminalization, granting forgiveness upon confession, amnesty, etc.*¹⁴¹

¹³⁷ Stuart and Simons, *The Prosecutor and the Judge*, 53.

¹³⁸ Roht-Arriaza, *Transitional Justice*, 8.

¹³⁹ Osiel, "Rush to Closure," 507.

¹⁴⁰ The registrar is the legal department responsible for the management of the tribunal, and services the chambers, the office of the prosecutor, and the victims and witness section (see also, chapter 1 of this dissertation).

¹⁴¹ Hans Holthuis, "Address By The Registrar Of The ICTY, Mr. Hans Holthuis." Lecture given at: In Search Of Truth And Responsibility: Towards A Democratic Future conference, The Hague, Netherlands, May 22, 2001, CC/P.I.S./592-E (<http://www.icty.org/sid/7984/en>).

It is quite strange to see an official vested with the power to oversee all of the bodies of the tribunal so vehemently opposing “truth-seeking” as part of the tribunal’s work, given that the law emptied out of truth—or pretense thereof—is scarcely recognized as legitimate. But assuming that Holthuis is taking distance solely from the truth of truth commissions rather than from truth-seeking in the legalistic, fact-finding sense outlined by Annan above, we can easily infer that he has in mind a more tailored set of aims for the tribunal. Departing from the position taken by Goldstone and Pillay, Holthuis is attempting to foreground the limitations of the tribunal as a mechanism for forgiveness, reconciliation, and healing. Such an avowal of the difficulty of carrying out justice once justice has been migrated into a restorative project as vague as “healing in an international courtroom” is laudable, given how rarely one encounters internally reflective or critical statements about the basic project of IHL.

At the same time, however, it seems the therapeutic component of the IHL discourse has taken hold to such a degree that it is unclear whether even skeptics in the field (such as Holthuis) can effectively dispense with it. Immediately after presenting his criticism, Holthuis states that arresting and trying criminals is an act of truth that amounts to “reconciliation itself” and thereby inadvertently reunites under the same (legal) rubric the very ideals of truth, justice, reconciliation, and healing that he previously attempted to segregate.¹⁴² We end up, in effect, with a perplexing, vexed account of the tribunal’s relationship to truth inasmuch as truth and healing are exiled from the law of the tribunals only to be immediately reincorporated into its criminal justice project. “The criminal judicial process,” Holthuis continues

*may be compared with a precision surgical instrument designed and aimed to work only in respect of parts of the body and in respect of certain ailments. As we all know, there is a great need, and a lot of room for further healing once the surgical wound has been stitched up and closed. But those further healing processes should not reopen the wound and negate the painstaking work of the surgeon.... [and in addition to the international tribunal] national initiatives are pivotal if the patient is ever to fully recover his health.*¹⁴³

No sooner does Holthuis avow that healing and reconciliation are external to the tribunals’ mandate than he resorts to a (rather puzzling) sequence of medical metaphors in order to characterize the court’s work. No matter how incidental this statement might seem, it indicates a nearly intractable reliance on the language of healing for both those who promote juridical healing and those who attempt to “surgically” separate the legal and the therapeutic, the restorative and the retributive. Holthuis even falls back on the language of healing to distinguish the work of the (ostensibly nontherapeutic) justice of the court, from *other* and further “healing processes” such as “national initiatives” that could reverse the “painstaking work” of the “court surgeon.” His reference to “further healing” once the law has “stitched up” said wound imputes to the law the power to heal, even if he acknowledges it cannot cure all of the war-torn community’s ailments.

¹⁴² Ibid., 4.

¹⁴³ Ibid.

If Holthius attempts in this way to eject the project of healing from the law's ambit while at the same time circling back to the rhetoric of healing and thus preserving it under the purview of criminal law, it is precisely because of the extreme degree to which the therapeutic, in its broadest sense, has seeped from clinical and scholarly discourses pertaining to the psyche into the IHL courtroom. This species of "law" is no longer entirely understood by those practicing it in wholly legal terms; the psycho-medical discourse that has entered it is also something of an infectious agent—one so virulent that attempts to rid the law of it end up deploying and thus strengthening it, in an autoimmune fashion.

VIII. Conclusion: Something Other Than Law?

The unorthodox genealogy of contemporary IHL offered here—brought into relief through the lens of the therapeutic turn as it emerged in the last six decades—is a tale of illegitimate ancestors and misbegotten offspring, and one that tribunal practitioners and advocates have wanted to bury. As such, they have failed to give an account of a widespread "contamination" of a persistent, if repeatedly overturned, ideal of legality by that which is meant to be external to it, or excised from it. Lacking the demarcations that would allow their proper institutional domain to be clear has made it difficult for the ad hocs and, later, ICC to clearly articulate and secure their specific role in the international juridical and political landscape, especially with regards to more recent project they have claimed as their own—reconciliation, healing, and closure.¹⁴⁴ Although this certainly can be construed as a political, legal, or empirical problem, it may be consequential for humanitarian law more generally.

As Arendt's account of the Eichmann trial augurs, mixing the rhetoric of helping, even healing victims, or combining reconciliation with what is essentially "criminal prosecutions which actually mainly revolve around the accused person and not really around the victim" may prove to be risky as a strategy of legitimization: it brings the justice of the courts closer to victims' justice, to norms and practices it calls legal as it simultaneously strays from the rule of law norms of due process, neutrality, and judging all parties fairly and equally. My investment in pointing to IHL's bastardized pedigree and ambivalent attachments to both its officially recognized and disavowed precedents should not be read as a lamentation for a previously purer law's "contamination" by that which is external to it. Rather, my selective genealogy is meant to suggest that this law has never been as purely "legal" as it has claimed to be. My motives were not to simply call this law's bluff and expose contradictions and competing loyalties, but to bring to light the following: because the discourse of contemporary IHL refuses to recognize and contend with what might be understood as a constitutive tension, it limits discussion about its priorities, the extent to which those priorities might clash, and the lengths to

¹⁴⁴ Ralph Henham claims that this tension has had very concrete effects on those involved in the trial process. He notes that the tribunals have struggled to develop appropriate sentencing norms and procedural guidelines in the face of the divergent demands of truth-focused and justice (or prosecution)-focused institutions (Ralph Henham, *Punishment and Process in International Criminal Trials*, Aldershot, UK: Ashgate, 2005, 23–24).

which the courts would or should go to compromise one set of priorities for the sake of another. In other words, it shuts down potentially fruitful, if potentially threatening, reflections on and debates concerning the ability of IHL to deal with events with such enormous, historical, political and psychological implications—topics that Hannah Arendt and philosopher Karl Jaspers controversially raised in 1960 with respect to the Eichmann trial, but which have not gained traction in contemporary juridical healing discourse.

In 1960, Jaspers wrote to Arendt that the events for which Eichmann was on trial “stand outside the pale of what is comprehensible in human and moral terms” and that “[s]omething other than law is at stake here—and to address it in legal terms is a mistake.”¹⁴⁵ The contemporary ad hoc tribunals and their spokespersons have shied away from engaging these questions directly and critically, and thus, from considering how “healing” traumatic injury engendered by extreme violence by way of law might be “a mistake” or involve otherwise dissimulated trade-offs. What counts as “law” and its “other[s]” when this law is constituted through practices and norms that it repeatedly situates outside of its boundaries? Reluctant to probe these difficult issues, and proceeding as if these models of justice and truth are necessarily compatible—as if incorporating a victim-centered justice is simply additive, not potentially threatening to the credibility of IHL as just law. The officials brandishing this purportedly evolved form of law (as compared to Nuremberg, but also to the Eichmann trial and to quasi-judicial truth commissions) forego the opportunity to evaluate this modality of justice’s effects on the cases it adjudicates and the communities it aims to serve, including the nebulous “international community” upon whose support it depends, individual and collective victims, and those responsible for the crimes in question.

Also muted in this scenario are the issues of the optimal division of labor and preferred methods when it comes to responding to and attempting to “repair” the destructive effects of extreme violence. As a result, the following questions seem to get marginalized in the IHL discourse of juridical healing: which kind of institutions (international, national, local, legal, clinical/psychological, political, social, etc.) are to be held responsible for, and are best equipped to deal with, the various challenges engendered by mass campaigns of violence? Which problems are to be given priority (for example, continued ethnic tensions, a weak judiciary, rigged elections, lack of mental health facilities, a hobbled economy, poor or nonexistent health care, to name a few of the very real problems faced by both Rwandans and people in the Balkans)? Which approaches to those prioritized problems work best, and by which standards? And which functions are to be attached to which programs/institutions? In Holthius’s vernacular, this might read as: What precisely is to be “operated” on? Which cases are to be “triaged”? Which “doctors” are to perform which “surgeries”? And finally, how are the “wounds” to be treated such that they do not “reopen”?

Stepping to the side of the juridical healing paradigm, one can begin to consider, for example, the extent to which the failure of the Yugoslav Truth and Reconciliation

¹⁴⁵ Lotte Kohler and Hans Saner, eds., *Hannah Arendt – Karl Jaspers: Correspondence 1926–1969*, (New York: Harcourt Brace Jovanovich, 1992), 410.

Commission (which was disbanded a year after it began its operations and before it could hold hearings) may in part have been related to the fact that an international tribunal had to some degree already taken on the role of a truth commission,¹⁴⁶ and whether part of the over two billion dollars spent on operating the ad hoc tribunals thus far might have been better spent on local and national initiatives.¹⁴⁷ Pursuant to the Security-Council-endorsed “completion strategies,” both the ICTY and ICTR are obligated to complete all of their trials in the next two years. Thus, the questions of who is most qualified and able to step in and to what end, cannot be pushed aside much longer.

The chapters that follow set out to consider some of the ways in which the discourse of juridical healing entails particular “mistakes”—to use Jasper’s term—or rather, unintended or disavowed effects that might give one pause before fully endorsing the form of justice Albright described at the inauguration of the ICTY. It seems true that, as ICTY chief prosecutor Benjamin Ferencz avers, “In the end, you certainly don’t get perfect justice; it’s imperfect no matter what you do, but it’s better than no justice.”¹⁴⁸ But this truth must not mean that we treat this imperfect and—as we have seen, fragile and unstable—justice (that aims to heal and is grounded in victims’ truth) as if a more candid recognition of its eccentric and even paradoxical status might topple it, or represent an injustice to it or to those it aims to help.

¹⁴⁶ See, for example: Timothy Garton Ash, “A Nation in Denial,” *The Guardian*, March 6, 2002, <http://www.guardian.co.uk/media/2002/mar/07/comment.yugoslavia>; Dejan Ilic, “The Yugoslav Truth and Reconciliation Commission: Overcoming Cognitive Blocks,” *Eurozine*, April 23, 2004, <http://eurozine.com/pdf/2004-04-23-ilic-en.pdf>; United Institute of Peace, “Truth Commissions: Serbia and Montenegro,” <http://www.usip.org/publications/truth-commission-serbia-and-montenegro>.

¹⁴⁷ The 2009–2010 budget for the ICTY, for example, was approximately \$173.7 million per year. The 2008–2009 budget for the ICTR was approximately \$133.7 million per year. See: ICTY Weekly Press Briefing, January 16, 2008, <http://www.un.org/icty/briefing/2008/pb080116.htm>; “Rwanda: UN Approves 267 Million Dollars ICTR Budget,” *World News Journal*, January 17, 2008, <http://africanewsanalysis.blogspot.com/2008/01/un-approves-267-million-dollars-ictr.html>; Bellinger, “International Courts and Tribunals and the Rule of Law.”

¹⁴⁸ Stuart and Simons, *The Prosecutor and the Judge*, 44.

Chapter 4

Exclusive Gender Inclusions:

The Adjudication of Sexual Violence in the Ad Hoc Tribunals

Rape has been used as a weapon of war [] in the Former Yugoslavia, and for the first time, it is specifically listed as a crime. [The Tribunal] should treat it like any other new weapon. If there was a new rocket that was devastating in its destructive capacities, wouldn't we want to focus on it and make sure that we stopped it before people started using it all the time?

—Judge Kirk McDonald (ICTY President)¹

I have survived... I can do anything.

—survivor of Congolese mass rape campaign.²

If the [Rwandan] tribunal does not change its approach to give value to women, then it's not worth it for us to work with them. Women have so many other things to worry about. Why should we waste our time with the tribunal?

—Rwandan survivor of genocidal rape³

I. Sexual Violence as a Crime of War

As outlined in previous chapters, one finds a growing tendency to figure international war crimes trials in terms of their therapeutic value for victims, with a focus on the power of IHL and its various apparatuses to alleviate psychological suffering produced by extreme

¹ Sara Sharratt, "Interview with Gabrielle Kirk McDonald," 32.

Judge Kirk McDonald was one of two women of the original ICTY elected judges who has pushed to get sexual violence crimes investigated and prosecuted.

² Jeffrey Gettleman, "Rape Victims' Words Help Jolt Congo into Change," *New York Times*, October 17, 2008, accessed January 20, 2010, <http://www.nytimes.com/2008/10/18/world/africa/18congo.html>.

³ Binaifer Nowrojee, "Your Justice is Too Slow: Will the ICTR Fail Rwanda's Rape Victims?" *UN Research Institute for Social Development* (Geneva, Switzerland, 2005): 17, <http://www.unrisd.org/publications/opgp10>.

violence. The ad hoc criminal tribunals, followed by the ICC have become sites of the intensification of a hybridized discursive terrain on which the juridical and the therapeutic merge. Diplomats, scholars, and activist alike have lauded the international tribunals for expanding their mandate to include a “mission of healing” and for helping to “close the wounds” of war-torn communities and individuals.⁴ The prevailing belief held by practitioners and supporters of these courts and the body of law from which they have sprung is that justice and healing are ineluctably linked, and that legal instruments and procedures that fail to account for the psychological needs of (especially previously overlooked) victimized individual and communities, are unduly compromised at best and unjust at worst.

One place where the therapeutic turn in IHL is most evident is in the case of sexual violence as a war crime. Extending the juridical healing paradigm to victims of sexual violence, the jurisprudence of the tribunals concerning sexual violence understands justice as—in Kirsten Campbell’s words—“that which can suture the subjective and collective trauma of rape” and other forms of sexual violence.⁵ The ad hoc international criminal tribunals for Yugoslavia and Rwanda⁶ have been championed by court officials, diplomats, and numerous feminists and human rights advocates as indisputable markers of progress in the fight to end impunity for perpetrators of sexual violence during war, as milestones for international struggles aiming to combat the oppression of women and girls, and as one step closer to eradicating “gender blindness” in international law.⁷ In fact, the establishment of the ICTY was in part as a result of the public outcry precipitated by reports on the Balkan crisis that documented widespread rapes of Bosnian women by Serb forces.⁸

⁴ For example, Patricia Wald, who served as a judge at the ICTY from 1999 to 2003, states that she was “strongly motivated by the thousands of victims who looked to us for vindication and some kind of closure in their lives” (M. Marshal, “Wald Sees International Tribunals Evolving Toward ‘Hybrid’ Courts,” Virginia Law School, April 12, 2005, http://www.law.virginia.edu/html/news/2005_spr/wald.htm). Such therapeutic tendencies are well represented within legal scholarship as well, as chapter 2 is meant to attest.

⁵ Kirsten Campbell, “The Trauma of Justice: Sexual Violence, Crimes Against Humanity and The International Criminal Tribunal for the Former Yugoslavia,” *Social and Legal Studies* 13, no. 3 (2004): 337. The jurisprudence of the tribunal concerning sexual violence understands justice as—in Kirsten Campbell’s words—“that which can suture the subjective and collective trauma of rape” and other forms of sexual violence.”

⁶ Given that sexual violence crimes have not yet been prosecuted by the International Criminal Court, and given the fact that the other courts with which this project is concerned—the international ad hoc tribunals of Yugoslavia and Rwanda—were the first to prosecute sexual violence crimes as crimes of war, this chapter will be limited to analyses of the latter; specifically, my arguments are advanced in reference to particular ICTY and ICTR cases involving sexual violence charges.

⁷ In the last few decades, a number of feminists have charged the ostensibly “universal” law of human and humanitarian law with “gender blindness” and androcentrism, drawing attention to the gap that exists between rights for the “human” of this legal discourse and rights for “women.” See: Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Perspective* (Huntington, NY: Juris Publishing, 2000); J. S. Peters & Andrea Wolper, *Women’s Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995); Kelly D. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, Netherlands: Martinus Nijhoff Publishers, 1997); F. T. Pilch, “Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court,” *Michigan Journal of Race and Law* 8, (2003): 503–527.

⁸ Several reports in the early 1990s reported on “gross violations of humanitarian law...including evidence of widespread or systematic rape to further policies of ‘ethnic cleansing’ wherein women were gang-raped

The tribunals were the first to prosecute rape and sexual violence as war crimes, crimes against humanity, grave breaches of common Article Three of the Geneva Conventions, and as genocide. Many involved with the cause celebrated this new, “gender-friendly” approach to IHL, insofar as it secured a central place within its domain for prosecuting crimes committed disproportionately against women and girls in times of war, such as sexual enslavement and rape.⁹ Gender-justice advocate and legal officer on gender issues at the ICTY, Patricia Viseur-Sellers, even boasted, “Sexual assault has never been so thoroughly investigated and assiduously prosecuted as in [the ICTY].”¹⁰

Rape and related acts of sexual violence have almost always been part of war. Until the 1990s, such acts were seen primarily as an unfortunate, but permanent facet of armed conflict.¹¹ Limited attention was paid to wartime sexual violence in earlier international criminal tribunals.¹² During the conflicts in Rwanda and the territories of the former Yugoslavia in the 1990s, rape and other forms of sexual violence that occurred on a massive scale spawned an outcry from international women’s rights and human rights groups, and paved the way for the establishment of the tribunals and the institution of “gender sensitive” programs and provisions.¹³ The statutes of the ICTY and ICTR

while being taunted with racial and ethnic slurs” (Amanda Beltz, “Prosecuting Rape in International Criminal Tribunals,” 122).

⁹ See, for example, Askin, *War Crimes against Women*, 1997; Danise Aydellot, “Mass Rape during War: Prosecuting Bosnian Rapists under International Law,” *Emory International Law Review* 7, vol. 2 (1993): 585–633; Rhonda Copelon, “Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law,” *McGill Law Journal* (November, 2000): 217–40; Theodor Meron, “Rape as a Crime Under International Humanitarian Law,” *American Journal of International Law* 87, no. 3 (1993): 424–26.

¹⁰ Patricia Viseur-Sellers, in an interview with Eric Sterner Carlson. See “The Hidden Prevalence Of Male Sexual Assault During War: Observations On Blunt Trauma To The Male Genitals,” *British Journal of Criminology* (April 2005): 2, bjc.oxfordjournals.org/cgi/reprint/azi041v1.pdf.

¹¹ For an historical account of the evolution of sexual violence in international law, see: Kelly Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (The Hague, Netherlands: Martinus Nijhoff Publishers, 1997); Caroline Moser and Fiona Clark, eds., *Victims, Perpetrators or Actors?: Gender, Armed Conflict and Political Violence* (London: Zed Books, 2001).

¹² With the Nuremberg and Tokyo (International Military Tribunal for the Far East, or IMTFE) trials, for example, the problem laid not so much with the existing laws, or with the absence of international laws needed for prosecutions, but rather with enforcing the law’s prohibitions, combined with the longstanding marginalization of crimes against women domestically and internationally. The Nuremberg War Crimes Tribunal neglected the issue of widespread sexual violence committed by German soldiers and military leaders during WWII. With both the Nuremberg and Tokyo tribunals, emphasis was consistently placed on convicting leaders of waging an aggressive war, as opposed to crimes against humanity or peace. The IMTFE did, in fact, convict some Japanese officers of rape, but these crimes were mentioned only in conjunction with/as evidence for other crimes—not as independent crimes in and of themselves, and were thereby eclipsed by what were seen as more serious war crimes. Relatively little attention was paid to sex crimes in the Tokyo Judgments. The extensive system of sexual slavery established by Japanese officials (sometimes referred to as the “Comfort Women” system, in which hundreds of thousands of women from throughout Asia were forced to serve as sexual slaves to Japanese soldiers) was not prosecuted by the Tokyo tribunal, despite ample evidence of the crimes. See, for example, Yoshimi, *Comfort Women*, 2002. See also: Askin, *War Crimes Against Women*, 1997; Copelon, “Gender Crimes as War Crimes,” 2000.

¹³ See: Moser and Clark, *Victims, Perpetrators or Actors?*, 2001; Binaifer Nowrojee, “Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath,” A Human Rights Watch/Africa, Women’s Rights Project, September 1996; M. Cherif Bassiouni & Marcia McCormick, *Sexual Violence:*

(ratified in 1993 and 1994, respectively) included provisions specifically meant to encourage the involvement of female lawyers, representatives, and so-called gender experts in the adjudication process, and to facilitate the investigation of and prosecution of sexual violence crimes.¹⁴ The pervasive use of sexual violence as a tool of war began to be taken seriously and perpetrators of violence against women qua women (not as male property) were finally being brought to justice. The remarkable efforts of the ICTY and ICTR (or ad hoc tribunals) to impose criminal responsibilities on leaders and others responsible for carrying out sexual violence represents a significant shift in international law and should not be taken for granted.¹⁵

Achieving legal recognition of wartime sexual violence is in many ways an encouraging development, insofar as sexual violence is finally recognized as a fundamental human rights violation and international war crime. As important as it is to recognize the noteworthy advances of the ad hoc tribunals in particular, and of international gender-justice campaigns in general, this chapter seeks to bring to light some of the more troubling ways that sexual violence has been limned in some of the ICTY and ICTR trials, suggesting that these legal reforms may not be as unproblematic as their promoters have suggested.¹⁶

Invisible Weapon of War in the Former Yugoslavia (Chicago: International Human Rights Law Institute, 1996); Vesna Nikolic-Ristanovic, *Women, Violence and War: Wartime Victimization of Refugees in the Balkans* (Budapest: Central European University Press, 2000).

¹⁴ Campbell, "Legal Memories," 156. One place that the tribunals' commitment to sexual violence crimes is made evident is in the Rules and Procedure of Evidence of both the ICTR and ICTY, where victims' rights and protection were elaborated and codified, especially Rules 69, 34, 40, 69, and 75. For the impact this has on women, see Astrid Aafjes, *Gender-Based Violence: The Hidden War Crime* (Washington DC: Women, Law & Development International, 1998); Linda Ohman, ed., *Voices from the Field: About Prosecution of Sexualised Violence in an International Context* (Stockholm, Sweden: Kvinna till Kvinna Foundation, 2004), http://kvinnatillkvinna.se/sites/default/files/File/Rapporter/voices_from_the_field.pdf. The actual statutes can be found on the ICTY's and ICTR's websites, <http://www.icty.org/sid/135> and <http://www.unict.org/Legal/StatuteoftheTribunal/tabid/94/Default.aspx>, respectively (The Statute of the International Criminal Court for the former Yugoslavia, S.C. Res 827. UN Doc. S/Res/827, May 25, 1993; The Statute of the International Criminal Court for Rwanda, S.C. Res 955 UN Doc. S/Res/955, Nov 8, 1994; hereafter ICTY Statute, ICTR Statute).

¹⁵ M. Cherif Bassiouni notes that "rape has not been prosecuted internationally [because] acts which primarily harm women have not been viewed by men who make policy decisions as violations of those women's human rights. Furthermore, rape and sexual assault are often viewed as private aberrational acts, not proper subjects for international public forum." Bassiouni notes that "rape has not been prosecuted internationally [because] acts which primarily harm women have not been viewed by men who make policy decisions as violations of those women's human rights. Furthermore, rape and sexual assault are often viewed as private aberrational acts, not proper subjects for international public forum" (M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge, UK: Cambridge University Press, 1996, 425, n338).

¹⁶ Although one can point to divergences between the two tribunals' histories and records with respect to the adjudication of sexual violence, this paper is primarily concerned with a select few of the most prevalent problems pertaining to both institutions. The ICTY and ICTR have been chosen as my focus for this chapter because of their significant and unprecedented contributions to the prosecution of wartime sexual violence.

II. Gender-justice “Success”

“Feminists invested in “integrating”¹⁷ gender crimes within the jurisdiction of the ad hoc tribunals have been a highly influential force with respect to the ICTY and ICTR’s investigation of and adjudication of sexual violence crimes.¹⁸ During the last two decades, and in tandem with the ascent of contemporary IHL and the discourse of juridical healing, one can witness the emergence and expansion of a coalition¹⁹ of feminist activists, NGO representatives, lawyers, and scholars²⁰ committed to international gender justice, whose specific focus has been the adjudication of wartime sexual violence.²¹ Together, they have managed to get numerous gender-justice proposals

¹⁷ For more on strategies of “integration,” see: Rhonda Copelon, “Gender Crimes As War Crimes: Integrating Crimes Against Women Into International Criminal Law,” *McGill Law Journal* (November 2000): 217–240.

¹⁸ See, for example: K. L. Koo, “Confronting Disciplinary Blindness: Women, War and Rape in the International Politics of Security,” *Australian Journal of Political Science* 37, vol. 3 (2002): 525–536; Catherine Mackinnon, “Rape, Genocide, and Women’s Human Rights,” in *Violence Against Women: Philosophical Perspectives*, eds. Stanley French, Wanda Teays, and Laura Purdy (Ithaca, NY: Cornell University Press, 1998), 43–56; Kelly Askin, *War Crimes Against Women* (1997); Caroline Moser and Fiona Clark, eds., *Victims, Perpetrators or Actors?: Gender, Armed Conflict and Political Violence* (London: Zed Books, 2001); Ronit Lentin, ed., *Gender and Catastrophe* (London: Zed Books, 1998).

¹⁹ Janet Halley offers an account of the coalitional style of international feminist justice campaigns in the 1990s that targeted the ad hoc tribunals’ treatment of wartime sexual violence, arguing that this coalition was nearly devoid of internal conflict and embraced a consensus view of an updated radical feminism, the consequence of which will be discussed below (Janet Halley, “Rape at Rome: Feminist Inventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law,” *Michigan Journal of International Law* 30, 2009, 2).

²⁰ Of particular importance for this inquiry is the segment of this broader coalition that has worked directly with the ad hoc tribunals—those who have served as “gender experts,” “legal advisors,” “consultants,” and/or submitted reports and amicus curiae briefs (“friend of the court briefs”) to the ad hoc tribunals on issues of sexual violence carried out in the Rwandan and the Balkan crises. Many of these activists represent a growing pool of nongovernmental organizations (NGOs) that have, since the early 1990s, established what has been referred to as “a ‘loose’ coalition of women’s rights and human rights organizations concerned with or working on different issues related to the status and rights of women in conflict situations” (Women’s Rights Coalition, *Women’s Human Rights in Conflict Situations Newsletter* 1, vol. 1, July 1997, para. 4, http://www.womensrightscoalition.org/site/publications/vol1no1_en.php). They include, for example: Human Rights Watch’s Women’s Rights Division, Amnesty International’s Women’s Rights Division, and The Coalition for Women’s Human Rights in Conflict Situations. Several of these groups have submitted amicus curiae briefs and letters signed by up to eighty women’s rights organizations to the prosecutor of the ICTR and ICTY in order to include sexual violence charges in particular cases, or to point out legal errors and unfair rulings in particular tribunal cases involving sexual violence. The impact of these group submissions has been significant in several instances. On the role of feminists activists and scholars on the procedures and rulings of the ICTY and ICTR, see also: Copelon, “Gender Crimes as War Crimes,” 2000; Karen Engle, “Feminism and its [Dis]contents,” 2005; Campbell, “Legal Memories,” 2002; Janet Halley, “Rape in Rome” 2009; and “Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict,” *Melbourne Journal of International Law* 9, vol. 1 (2008): 78–124.

²¹ The prominence and influence of figures such as Kelly Dawn Askin, Rhonda Copelon, and Binaifer Nowrojee signify the consolidation of this coalition and the uptake of international gender justice principles and goals in the ad hoc tribunals’ work: Kelly Dawn Askin authored one of the most comprehensive studies to date of sexual violence as war crimes and worked as the Legal Advisor on gender issues to the judges of the International Criminal Tribunal for the former Yugoslavia and for Rwanda (2000–2002). Her book—*War Crimes Against Women: Prosecution in International War Crimes Tribunals* (1997)—helped to consolidate this emergent field of international legal studies focused on sexual violence as a war crime. Rhonda Copelon, before serving on the Steering Committee for the Coalition for the International Criminal

adopted during the tribunals' respective statutory processes, affecting the rules of evidence "under which rape and other crimes of sexual violence would be prosecuted, the form the indictments of sexual violence crimes would take,"²² and the strategies and legal argumentation made at both the trial and appellate levels."²³ The focus of these high-profile campaigns has been on what Nicola Henry calls the law's substantive issues—focusing on particulars of court decisions, on the ways evidentiary rules and procedures can accommodate victims, and the legal status of rape and other gender crimes as serious violations of IHL.²⁴ For the most part, these efforts are grounded in the assumption that gender justice "happens by means of law" and that the goal is to tweak and expand this law in order to have it dispense the recognition and reparations that gender justice demands.²⁵ According to this conception of law, the more expansive, inclusive and far-reaching the law becomes, the more just and humane and progressive it will be.²⁶

Women's rights scholar and activist Hilary Charlesworth has argued that the recognition of sexual violence as a crime against humanity, and a war crime and even as genocide "was the result of considerable work and lobbying by women's organizations."²⁷ Joanne Barkan contends that "[f]rom the start, most observers considered the [ICTY] a sop to human rights and feminist activists who wanted intervention. . . . Almost no one expected it to succeed. And yet to some extent, at least for women, it did."²⁸ Prosecutor of the ICTY and ICTR Richard Goldstone also observed the considerable impact of feminist

Court, cofounded the Women's Caucus for Gender Justice, which filed several amicus briefs in cases before the ICTY and ICTR in the name of recognizing rape as a crime of genocide and torture (Coalition for the ICC: "Note on the Passing of Rhonda Copelon, Champion of Human Rights," www.iccnw.org/documents/CICC_NoteOnRhondaPassing.pdf). Binaifer Nowrojee, who authored "Shattered Lives"—a Human Rights Watch report that first documented sexual violence as a tool of the Rwandan genocide and brought increased attention to the extreme and widespread nature of these crimes—has served as an expert witness and gender expert in several ICTR cases involving charges of sexual violence. These are but a few women at the forefront of gender justice campaigns who have lobbied for and spearheaded many of the tribunals' gender justice provisions and trial decisions.

²² For example, as a result of the amicus curiae brief filed by a group of women's and human rights NGOs in May 1997, the prosecutor of the International Criminal Tribunal for Rwanda amended the indictment against Jean-Paul Akayesu to include sexual violence charges (a case analyzed below).

²³ Engle, "Feminism and its [Dis]contents," 778. See also, Halley, "Rape at Rome" (2009).

²⁴ Nicola Henry, "Disclosure, Sexual Violence and International Jurisprudence," 8–13.

²⁵ Brown, *Left Legalism*, 7, 9.

²⁶ See, for example: Askin, *War Crimes against Women*, (1997); Nowrojee, "Your Justice is Too Slow," (2005); Sara Sharratt, "Interview with Gabrielle Kirk McDonald" (1999); Rebecca L. Haffajee, "Prosecuting Crimes Of Rape And Sexual Violence At The ICTR: The Application Of Joint Criminal Enterprise Theory," *Harvard Journal of Gender and Law* 29, (2006); Aafjes, *Gender-Based Violence* (1998); Human Rights Watch, *Shattered Lives* (1996); Christine Moeller, "The Significance of the Ad Hoc Tribunals for the Establishment of a Permanent International Criminal Court: Prosecution of Sexual Violence in War and Armed Conflict," *International Society for Human Rights* (2004), <http://www.ishr.org/activities/campaigns/icc/iccmoeller.htm>; Mackinnon, "Rape, Genocide, and Women's Human Rights," (2006); Gabi Mischowski, "How Effective Is the Tribunal for Balkan Rape Survivors," *Off Our Backs* 28, no. 1 (January 1998): 5–6; Valerie Oosterveld, "Gender-Sensitive Justice and the International Criminal Tribunal For Rwanda: Lessons for the International Criminal Court," *New England Journal of International and Comparative Law* 12, vol. 1 (2005): 119–133.

²⁷ Hilary Charlesworth, "Feminist Methods in International Law," *American Journal of International Law* 93 (1999): 379, 387.

²⁸ Joanne Barkan, "As Old as War Itself: Rape in Foca," *DISSENT* (Winter 2002): 60, 62.

lobbying campaigns on the statutes and cases involving sexual violence crimes at both tribunals when he declared: “Certainly if any campaign worked, this one worked...”²⁹ Consensus has emerged from a growing, albeit “loose coalition” of gender-justice advocates from within and without the tribunals that the gender-justice campaigns have been successful, even path-breaking.³⁰ At face value, this seems hard to quarrel with, given that, by some estimates, nearly half of all charges brought against defendants in ICTY and ICTR cases have involved sexual violence.³¹ In addition, several landmark cases—many of which are analyzed below—have, for the first time, prosecuted rape and other gender-based violations of international law as among the most serious of international crimes.³² But which metric of success determines whether these legal innovations are necessarily beneficial for women or instantiations of gender justice?

By pointing out the self-congratulatory character of IHL’s gender-justice campaigns, I do not mean to suggest that gender-justice advocates have refrained from criticizing the tribunals’ handling of sexual violence crimes. Far from it—the tribunals have been challenged on a number of fronts.³³ For instance, many have lamented the fact that the number of sexual violence convictions account for only a small fraction of cases in the ICTY and ICTR, and that the number of rape acquittals is twice the number of convictions.³⁴ Moreover, the tribunal prosecution teams and senior staff members have been taken to task for insufficient gender-sensitivity training for prosecution teams, “shoddy” investigative work, a general lack of political will, treating victims like “cogs in

²⁹ Richard Goldstone, “The United Nations’ War Crimes Tribunals: An Assessment,” *Connecticut Journal of International Law* 12 (1997): 227, 231.

³⁰ Engle, “Feminism and its [Dis]contents,” 780.

³¹ Nowrojee, “Your Justice is Too Slow,” 21.

³² See, for example: The ICTY Kunarac, Furundzija, and Delalic cases and the ICTR Akayesu and Kajelijeli cases.

³³ The tribunals have also been faulted for inconsistent charging practices in sexual violence cases due in part to imprecise provisions for victims and deficient procedural guidelines required for effective and consistent implementation (Oosterveld, “Gender-Sensitive Justice,” 125–130). The Registrar of the ICTY, Theo Van Boven, maintains that the provisions on reparation to victims, for example, were included in the Rules and Procedures of Evidence as a “symbolic afterthought rather than being expected to produce concrete results” (Sam Garkawe, “Victims and the International Criminal Court: Three Major Issues,” *International Criminal Law Review* 3, vol. 4, 2003: 345, 362–363). Also, several watermark cases withdrew or failed to include sexual violence charges in their indictments, despite overwhelming evidence that sexual violence crimes were linked to defendants. For example, in the ICTY *Prosecutor v. Lukic* case, wherein several prosecution witnesses testified to the defendants’ role in sexual violence crimes, the judge’s suggestion that the prosecution amend the indictment to include these crimes was not heeded in time; widespread sexual violence took a back seat to other crimes. See also: *Prosecutor v. Kajelijeli, Judgment and Sentence*, ICTR-98-44A-T (ICTR, 1 December 2003), and *Dissenting Opinion of Judge Arlette Ramaroson in Prosecutor v. Kajelijeli*. Another criticism of the courts is linked to the fact that neither of the ad hoc tribunals has granted financial reparations to those who have undergone the legal process. Gender justice advocates have pushed for such provisions to be put into action, but to no avail (as reflected by the fact that the limited services made available to victim-witnesses have not even succeeded in keeping all sexual violence victim-witnesses safe). See Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerp, Belgium and Oxford, UK: Intersentia (2005); Binaifer Nowrojee, “Your Justice is Too Slow,” 2005. These are but a few of the many recriminatory claims directed at the ad hocs on the basis of their (mis)handling of sexual violence crimes within their jurisdiction.

³⁴ Nowrojee, “Your Justice is Too Slow,” 8.

the machine,” and alienating witnesses and conflict-affected communities by failing to provide information on court procedures and the progression of cases.³⁵ Yet, the mounting criticisms have not deterred gender-justice advocates from looking to IHL for gender justice. The solutions offered to rectify these problems have been consistent with the strategy of continuing to hammer away at the law until it adequately “includes” gender issues in its purview.³⁶ The tenor of the dominant gender-justice paradigm is consistent with what Janet Halley coins “carceral feminism,” which focuses its attention on “criminalizing, indicting, convicting and punishing perpetrators of sexual violence.”³⁷ For these legal loyalists, IHL and its new institutions represent our greatest feminist hope.³⁸ But the question remains: *which* sexual crimes (and victims thereof) are recognized, how are they interpreted and prosecuted, and what are the implications this has for particular individuals and groups? Finding answers to these questions requires much more than simply “adding women [to the legal edifice in question] and stirring.”³⁹ It calls for a more sustained, critical engagement with this emergent enterprise, especially when branding the legal changes it authorizes as necessarily beneficial for womankind and humankind.

I turn in this chapter to specific tribunal cases to demonstrate that IHL’s legal remedies to sexual violence in the context of armed conflict sometimes come with unforeseen costs. For instance, these so-called therapeutic juridical interventions are prone to exceeding and undermining their avowed aims, effacing or displacing the crimes and injuries in question, instrumentalizing the victims and injuries they are meant to recognize and palliate, and concealing the relations of power that condition their articulation. Operating under the auspices of justice, these practices of juridical healing at times seem to exacerbate the psychological injuries they aim to attenuate or even cure. This discourse at times seem to eclipse the injuries in question, rendering certain bodies and subjects unintelligible/unworthy of legal recognition, and at times denying victims of agency and resiliency. These are not the only implications of this form of gender justice, and I admit that I am, in fact, deeply committed to the basic goals of this movement and have supported gender-justice initiatives aimed at altering the culture of impunity associated with wartime sexual violence. But this commitment demands another, related obligation, namely to subject these almost “untouchable” and—by now—naturalized claims to, and method of, achieving gender rights as human rights to sustained critique.⁴⁰

The aim of this chapter is to highlight the ways that the tribunals may engender their own forms of (gendered) violence, without dismissing the described project of gender justice in toto, and without denying altogether the possibility of some sort of cathartic experience

³⁵ *Ibid.*, 2–11.

³⁶ The dominant discourse of gender justice in relation to the ad hocs and the ICC is one of inclusion and integration of “gender” and “sexual violence” and “gender platforms.” (See, for example, Rhonda Copelon’s discussion of the “inclusion” of gender in the ICTY and ICC in her 2000 article “Gender Crimes as War Crimes.”)

³⁷ Halley, “Rape in Berlin,” 2.

³⁸ Halley, “Rape at Rome,” 4–5.

³⁹ Charlotte Bunch, “Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights,” *Human Rights Quarterly* 12, no. 4 (November 1990): 486–498.

⁴⁰ *Ibid.*

for the victims who undergo this legal process. In doing so, I hope to disrupt some of the reified conceptions gender and gender-related crimes mobilized in this field, opening up a space for the possibility of democratic feminist justice projects that do not presume legal reform is the best or sole means of achieving just ends. With reference to specific cases, I attempt to substantiate a two-pronged argument. First, I demonstrate how, despite IHL's commitment to adjudicating all crimes that fall under their jurisdiction, the discourse of juridical healing pertaining to sexual violence crimes produces hierarchies of victimization, such that modalities of violence and injury that do not conform to what I call the sexual subordination model are rendered unintelligible or less worthy of juridical recognition and prosecution (and thus the tribunals' offerings of juridical healing).⁴¹ In other words, certain victims are not given the benefit of having the crimes committed against them fully recognized or recognized at all, and thus are unable to reap the purported rewards this law has to offer. One can understand this problem as one of *exclusion*. The second problem I highlight is one of *inclusion* and raises questions about the merits of inclusion or intelligibility in this paradigm in the first place, insofar as intelligibility within discursive domain can sometimes come with unfortunate and unforeseen costs; specifically, the pathologization of the victim by way of ethnocentric and androcentric representations of the victims' identities and the injuries they've suffered from. In other words, the second part of my argument suggests that intelligibility in this branch of law reflects a double-bind for feminist struggles for international gender justice, insofar as it opens its victims to modes of regulation, thereby begging the questions: Are struggles for gender justice best directed at international criminal courts? And, if intelligibility comes with these costs, is it worth it?

But what is the relevance of these analyses for therapeutic turn? In short, the aforementioned, regulatory gender norms are central to juridical healing's functioning, not simply side-effects of its operations. By rendering victims of sexual violence crimes as reducible to their injuries, this form of power is able to position itself as that which these victims (and gender justice) cannot do without. In this vein, justice as healing is most needed for what Albright will call the "most victimized victims."

III. The "Most Victimized" Victims

On countless occasions, trial staff and advocates have made explicit reference to sexual violence as the most serious of offences and sexual violence victims as the most vulnerable of all victim groups—as those most desperate for the healing administered by the tribunals.⁴² For example, in an ICTY Bulletin, sexual violence crimes are deemed

⁴¹ I borrow this term from Jane Halley, who argues that gender justice advocates in the 1990s formed a unified and powerful coalition that embraced a consensus view of an updated version of radical feminism, "strongly committed to a structuralist understanding of male domination and female subordination" (Halley, "Rape at Rome," 2).

⁴² References to survivors of sexual violence as emotionally and socially "dead," "shattered," and "destroyed" run through much of the legal discourse and feminist human rights literature on sexual violence in armed conflict. See, for example: Human Rights Watch, "Shattered Lives," 1996; Moeller,

“the most heinous crimes.”⁴³ Patricia Viseurs-Sellers, the legal officer on gender issues for the ICTY, situates sexual violence as the kind of violence that—unlike what she calls “romanticized violence” bound up with notions of heroism, such as defending the homeland—can never have romantic or heroic underpinnings. Sexual violence serves as a sort of limit case when she declares, “When part of violence incorporates sexual violence, one really has to question the validity of any violence whatsoever, no matter how romantic.”⁴⁴ She places sexual violence far away from other forms of violence on a violence spectrum of sorts, positioning sexual violence as more extreme and hideous than other forms of violence.⁴⁵

Special tribunal victim and witness units or sections (hereby VWU) have been established to protect and provide services for tribunal victim-witnesses of all kinds, but it has been clear from the start that such measures were primarily a response to the unprecedented number of sexual violence victims within the territories of the former Yugoslavia and Rwanda. A significant part of the VWU’s mandate is to “foster an environment in which testifying can be experienced as a positive, strengthening, and enriching event.”⁴⁶ The VWUs were set up in accordance with the respective tribunals’ statutes’ rules and procedures of evidence (rules 69, 75, and 34). Rule 34 states:

*(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to: (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and (ii) provide counseling and support for them, in particular in cases of rape and sexual assault. (B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women [my emphasis].*⁴⁷

Such protections, combined with greater opportunities for victims to provide (ostensibly cathartic) witness testimony, and convictions of the perpetrators of sexual violence, were thought to help female victim-witnesses piece together their “shattered lives” and allow the process of recovery—for the women and their communities—to commence.⁴⁸ The establishment of the VWUs was seen as a means of putting an end to the marginalization

“The Significance of the Ad Hoc Tribunals,” 1994; Shanks and Schull (2000); Stiglmyer (1994); Sara Sharratt, “Assault on the Soul” (1999). Below, I trouble this rhetoric in my analysis of the ICTR Akayesu case.

⁴³ *ICTY Bulletin*, No.7, 1998.

⁴⁴ Sara Sharratt, “Interview with Patricia Viseur-Sellers, Legal Officer on Gender Issues,” Sara Sharratt and Ellyn Kaschak, eds., *Assault on the Soul: Women in the Former Yugoslavia* (New York, London, and Oxford: The Haworth Press, 1999), 53-78.

⁴⁵ Sharratt, “Interview with Patricia Viseur-Sellers,” 59.

⁴⁶ “Information Booklet for ICTY Witnesses,” The International Tribunal for the Former Yugoslavia, United Nations, ICTY Victims and Witness Section, The Hague, Netherlands, 2007, http://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf.

⁴⁷ “Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia. Rule 34,” IT/32/Rev. 34, February 22, 2005, 24. Accessible at: <http://www.icty.org/sid/136>.

⁴⁸ See, for example: Human Rights Watch, “Shattered Lives,” 1996; Moeller, “The Significance of the Ad Hoc Tribunals,” 2004; Leslie Shanks and Michael Schull, “Rape in War: The Humanitarian Response,” *The Canadian Medical Association Journal* 163, vol. 9, (2000): 1152–56; Alexandra Stiglmyer, ed., *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Lincoln, NB: University of Nebraska Press, 1994).

of female victims of wartime sexual violence, of better protecting witnesses from intimidation and danger, and of avoiding, or at least mitigating, the risk of re-traumatization that can result from retelling one's story/testifying. As two of the ICTY VWU's officers, Wendy Lobwein and Monika Naslund, stated, "It is the goal of the VWU to strive toward facilitating the experience of testifying to be one that is strengthening and healing for victims and witnesses."⁴⁹ These units have been cited as the most concrete proof of the tribunals' serious commitment to gender justice.⁵⁰

The ICTY even identified "giving victims a voice" as one of its core achievements, setting the tone for its tenure, and for the ICTR as well.⁵¹ This commitment to gender justice was also to be reflected in the trial chamber's handling of the first case tried at the ICTY: In the ICTY *Prosecutor vs. Tadić* trial, the trial chamber recognized that "rape and sexual assault often have particularly devastating consequences [and] traditional court practice and procedures have been known to exacerbate the victim's ordeal during trial."⁵² Quite remarkably, the chamber marks the importance of being particularly sensitive in cases involving alleged sexual violence victims, noting that hostile courtrooms have made victims feel as if they had "been raped a second time."⁵³

Putting aside questions of the success of the VWUs and the success of the first, and thus highly influential, trial (discussed below), it should be clear that the victim has emerged as the focal point of the tribunals' projects of justice vis-à-vis this therapeutic turn. What is perhaps less obvious is that the sexual violence victim frequently operates as the victim par excellence.⁵⁴ Her body and speech frequently serve as overdetermined sites of ideal victimhood, the symbol of the community's wounds, and the prime target of legal healing. Madeline Albright's widely publicized speech to the UN Security Council at the inauguration of the ICTY in 1993—and discussed at length in the previous chapter—exemplifies this tendency in the expanding discursive space of IHL's version of gender justice. She begins her speech by ensuring all victims that they "will be heard by the tribunal," and then gradually narrows the scope of her point, pledging, "the voices of the groups most victimized [will be] heard by the tribunal."⁵⁵ She goes on to specify that, the category of "the most victimized" refers "in particular to the female victims of systematic rape" carried out during the war in the former Yugoslavia.⁵⁶ Like many others, Albright

⁴⁹ Henry, "Disclosure, "Sexual Violence and International Jurisprudence," 99.

⁵⁰ *Ibid.*, 95–99.

⁵¹ The other core achievements included: spearheading the shift from impunity to accountability, establishing the facts, accomplishments in international law, and strengthening the rule of law. "The Tribunals Five Core Achievements," International Criminal Tribunal for the Former Yugoslavia, *Bringing Justice to the Former Yugoslavia*, ulm.katholikentag.de/data/kt_aktuell/manuskripte/3732.doc

⁵² *Prosecutor v. Dusko Tadić, Decision on the Prosecutor's Motion Requesting Protection for Victims and Witnesses*. IT-94-1 (ICTY, 10 August, 1995), para 46.

⁵³ *Ibid.*

⁵⁴ One interesting point of comparison would be to consider this figuration of the ideal victim alongside the ICC's discourse surrounding child soldiers, whose victim status trumped sexual violence victims in the first and very high-profile ICC case—the Lubanga trial, discussed in chapter 5. Given that this case is still ongoing, and given the scope and time limits of this dissertation, this sort of comparative analysis will be something I hope to pursue at a later juncture.

⁵⁵ Albright, *Security Council Provisional Verbatim Record, 10 May 1993*.

⁵⁶ *Ibid.*

links the sexual crimes to the silencing of the victim's pain and to the loss of their dignity.⁵⁷ Speaking on behalf of the Yugoslavian tribunal, she claims that "gender will be duly represented" and suggests that the juridical process will accordingly restore dignity and voice to those victims in particular. In other words, with recourse to testimony and legal protection this legal instrument is cast as possessing the will and power to help these victims "cleans[e]" their reputations, dignity, and silenced memories. The female rape victim becomes the ultimate victim in this victim-focused narrative of legal healing, and thus the ultimate justification for the tribunals' work. The repercussions of this framing of victims of sexual violence will be explored below with reference to particular tribunal cases.

IV. Whose Gender? Whose Justice?

How is one to understand what is meant by "gender" in these calls for gender justice, or in provisions designated as beneficial for female victims? Upon closer evaluation of the ways in which gender and sexual violence is figured in the ad hoc tribunals' case law, one quickly notices some problematic tendencies: the slippage between "gender" and "females" has become so naturalized that it's easy to overlook. So often, thinking about the ways gender plays into conflict-based sexual violence means thinking about how femininity and being female is the cause of victimization and how masculinity and being male is the cause of criminality, violence, and domination. Janet Halley refers to this schema as the "sexual subordination" model, wherein women are always relegated to the subordinate position and men are always in the dominant position—"on top."⁵⁸ I contend that many of the wartime sexual crimes cannot be fully explained or accommodated by this model, which is grounded in an understanding of sexual violence as the exemplary and extreme instance of gender subordination.

The limitations of this approach become abundantly clear when we consider the case of sexual violence committed against males during armed conflict. For the most part, these crimes are outside the ambit of the aforementioned gender-justice initiatives. One gender-mainstreaming official of the UN high commissioner for refugees acknowledged, "I recognize our [gender] discourse is a bit outdated, but it's very difficult because as soon as you stop talking about women, women are forgotten. Men want to see what they gain out of this gender business, so you have to be strategic."⁵⁹ This admission underscores a troubling strain of the gender-justice discourse both targeting and espoused by UN bodies such as the ad hoc tribunals of Yugoslavia and Rwanda. As the cases discussed below suggest, there is very little "talking about" men as victims of sexual violence; they are "forgotten" in the gender justice dispensed by these courts.

It is true that, in both war and peace, men are predominantly the perpetrators of sexual violence, and women and girls are the primary victims of such acts, but sexual violence during war does not always conform to this model: though much ignorance and silence

⁵⁷ Ibid.

⁵⁸ Halley, "Rape at Rome," 82–87.

⁵⁹ R. Charli Carpenter, "Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations," *Security Dialogue* 37, no. 1 (2006): 99.

on the topic remains, women's role as perpetrators of war crimes has received increased attention in the last decade.⁶⁰ This, coupled with a growing awareness and documentation of widespread sexual violence committed against males in the former Yugoslavia and other conflicts, has begun to present formidable challenges to the deeply entrenched sexual subordination paradigm, wherein men are only thought to occupy the position of sexual violence perpetrators in a violent scene thought to represent the ultimate instantiation of *women's subordination by men*.⁶¹

Sexual violence crimes committed against men are often referred to as “the hidden war crimes” or “the last taboo,” due to the fact that they are rarely made public and bring with them what Sandesh Sivakumarman calls the “taint” of homosexuality and passive, victimized, “feminine” positions.⁶² In other words, even when coercion is involved, these victims are often associated with homosexuality. Given the pervasiveness of homophobia, these crimes are often misunderstood and marginalized in international law and juridically focused gender-justice campaigns. Pauline Oosterhoff describes wartime sexual assault against men as an “open secret,” based on research that indicates that these crimes are often carried out in public and in the presence of witnesses, but rarely acknowledged.⁶³ The problem of silence and mystification is, in part, attributable to the fact that male survivors are often hesitant to come forward given the cultural stigmas attached to male rape (even taking into account the variable ways that homophobia manifests in different cultures).⁶⁴ Male victims often fail to understand the abuse they've endured as sexual, because it does not coincide with normative conceptions of sexual assault.

Yet it seems there are additional factors contributing to the problems of blindness, obfuscation, and silence on this issue when it comes to the ICTY and the gender-justice initiatives it has endorsed. Its operative gender norms at times fail to accommodate the variety of victims and sexual crimes involved insofar as only female morphologies register as penetrable and sexually violable. Crimes and bodies incompatible with the sexual subordination model sometimes fail to be interpreted as gender crimes in the court's decisions and laws. To cite a specific example, “blunt trauma to male genitals” (or, BTMG) is a specific form of sexual violence confirmed to have been widespread in the conflict of the former Yugoslavia, yet it has not been granted attention in the ICTY trials or investigations. Frequently, the absence of permanent physical damage, such as scars or castration, is interpreted as the absence of proof of sexual assault.⁶⁵ Thus, an

⁶⁰ See: Julie Allison and Lawrence Wrightsman, *Rape: The Misunderstood Crime* (Newbury Park, CA: Sage Publications, 1993).

⁶¹ See: Carlson, “The Hidden Prevalence Of Male Sexual Assault During War,” (2006); Sandesh Sivakumarman, “Male/Male Rape and the ‘Taint’ of Homosexuality,” *Human Rights Quarterly* 27, no. 4 (2005); R. Charli Carpenter, “Recognizing Gender-Based Violence Against Civilian Men and Boys,” 2006.

⁶² Sivakumarman, “Male/Male Rape and the ‘Taint’ of Homosexuality,” 1274; Adam Jones & Augusta del Zotto, “Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?” Paper presented to the International Studies Association Annual Conference, New Orleans, LA, March, 24–27, 2002, 1.

⁶³ Pauline Oosterhoff, Evert Ketting, and Prisca Zwanikken, “Sexual Torture of Men in Croatia and Other Open Conflict Situations: An Open Secret,” *Reproductive Health Matters* 12, no. 23 (2004): 75.

⁶⁴ *Ibid.*, 73–76.

⁶⁵ Carlson, “The Hidden Prevalence Of Male Sexual Assault During War,” 7.

array of sexual assaults committed against men fall outside the sexual subordination model framework, which counts evidence of vaginal penetration or visible marks of physical trauma as proof of sexual violation.

Perhaps the most convincing illustration of the form of gender-justice blindness at issue is the dearth of convictions for sexual violence against males: although several ICTY judgments explicitly refer to the sexual violence crimes—including rape—committed against men in prison camps, there have been no indictments or convictions of these crimes as sexual crimes.⁶⁶ Even in the few cases in which these crimes are acknowledged, there's a tendency to desexualize them and/or fit them into preexisting understandings of sexual violence against women.⁶⁷ The ICTY “Celebici” case,⁶⁸ for example, convicted three defendants with “willfully causing great suffering or serious injury to body or health” (GB) and with “cruel treatment” (WC) for sexual acts that were carried out by their subordinates, such as genital mutilation and forcing two prisoners (who were brothers) to perform fellatio on each other.”⁶⁹ Not only does this depart from the male-perpetrator/female-victim paradigm because the victims are male, but we also have multiple victims and perpetrators as well as a “victim-perpetrator” who was forced to sexually violate his brother. These crimes are “tainted” by both their homosexual and its incestual dimensions, and when specifying the charges, the chamber shies away from making explicit the sexual nature of the acts committed. The chamber's few references to the sexual character of the crimes are thus undermined by the vague and sexually neutral language of the charges (one of which was ultimately dropped on appeal). The trial chamber noted towards the end of its judgment that the forced fellatio “could constitute rape for which liability could have been found if pleaded in the appropriate manner.”⁷⁰ Because it was not pleaded in this manner, however, the case became another missed opportunity to convict perpetrators of sexual violence against males as a war crime.

Similarly, in the ICTY's first case, Serb defendant Dusko *Tadić* was cumulatively convicted for the crimes of forcing two Muslim prisoners of the Omarska detention camp to perform oral sex on a third prisoner and then bite off his testicles. Tadić was convicted under the following categories: “inhumane acts,” “cruel treatment,” “willfully causing great suffering or serious suffering or serious injury to body or health,” and “torture or

⁶⁶ Ibid, 9.

⁶⁷ For instance, leading researchers on the topic of male-male rape during war, such as Sivakumaran (2005) and Hauge (2005), have described the rape of males in the former Yugoslavia as processes of “feminization.” In the same breath, Sivakumaran himself concedes: “the traditional view of the power dynamic, of two strata with men at the top and women at the bottom, is too polarized in its conceptions of masculinity and femininity [and] should be adjusted to reflect more accurately the fact that these [two] concepts are neither uniform nor truly bipolar” (Sivakumaran, “Male/Male Rape and the “Taint” of Homosexuality,” 1282). See also: Euan Hauge, “Rape, Power and Masculinity: The Construction of Gender and National identities in the War in Bosnia-Herzegovina,” in *Gender and Catastrophe*, ed. Ronit Lentin (London: Zed Books, 1997), 50–63.

⁶⁸ “Celebici” refers to the area/camp where the incidents took place. The official trial name is: *Prosecutor v. Delalic et al.*

⁶⁹ *Prosecutor v. Rasim Delic, Judgment*. IT-04-83-T (ICTY, 15 September 2008) para 24.

⁷⁰ *Prosecutor v. Delic*, para. 1086.

inhumane treatment.”⁷¹ Although the sexual aspect of the crimes was acknowledged at points during the proceedings, the rhetoric of the judgment reflects the dissimulative tendency to downplay this dimension of the crimes.

It is difficult to predict exactly how a rape or sexual violence conviction might have impacted the Celbici or Tadić sentences differently,⁷² how it may have affected the victims of these crimes, or how it may have helped to bring about greater public and legal awareness of the problem of the sexual assault of men in conjunction with armed conflict. That said, the fact that the prosecutions did not attempt to define the acts as such, and the fact that the gap between the estimated number of male rapes and the paucity of convictions remains, suggests that sexual violence committed against males is rarely treated as a priority or seen as a true “gender” crime in ICTY cases. The victims of these crimes may be recognized as victims, but not as the “right” kind of victims for sexual violence convictions. One can infer that the prosecutions’ hesitation to include rape in the indictments was—at least in part—due to the fact that rape as a war crime is still associated with penile penetration of the vagina. Male rapes and other forms of sexual assault are, more often than not, perceived in this legal universe as aberrations, and, if recognized at all, are defined as humiliating, degrading, cruel manifestations of physically injury or torture.

Placing sexual violence crimes against men under the rubric of torture is particularly illustrative of this circumlocution. Categorizing sexual crimes against men as torture or as sexual torture, even when the crimes do not fit the legal definition of torture,⁷³ is a common practice in the current literature on the prevalence of male-male rape, and—as mentioned in reference to the cases above—occurs in the decisions of the ICTY tribunal itself.⁷⁴ The crime of torture has the potential to abstract from the “mess” of sexual violence and align these acts with the less “tainted” and more familiar crimes of violent interrogation techniques and beatings. Surviving torture is often associated with patriotism, heroism, and robust masculinity, all of which may work to “cleanse” sexual crimes of their “feminizing” associations, and the shame that entails. Such figurations eclipse the sexual constituents of the crime and suggest that males are, to some extent, viewed as sexually inviolable under tribunal law. Within these restrictive frameworks for interpreting and categorizing sexual crimes, males are always already the penetrator-perpetrators of sexual violence, and are intelligible as victims only insofar as they are victims of nonsexual crimes. This heuristic leaves the aforementioned “taboos” firmly in place and removes hosts of gender crimes from view. Moreover, as both the Celebici and Tadić cases attest, the line between victim and perpetrator is not reliably stable or clear,

⁷¹ Tadic Case: The Judgement Of The Appeals Chamber,” press release, TH/ P.I.S./419-e15, ICTY, The Hague, Netherlands, July 15, 1999, para 2, <http://www.icty.org/sid/7749>.

⁷² Charging and ultimately convicting the accused of rape would have made it easier to figure the crime as a crime against humanity, which is considered to be one of the most serious violations humanitarian law.

⁷³ The essential elements of torture in international law, as adumbrated in the *Convention Against Torture* are: “The infliction of severe mental or physical pain or suffering; By or with the consent of acquiescence of the state authorities; For a specific purpose, such as gaining information, punishment or intimidation” (*UN Convention Against Torture*: Article 1, <http://www.hrweb.org/legal/cat.html>).

⁷⁴ See: Michael Peel, ed., *Rape As a Method of Torture* (London: Medical Foundation for the Care of Victims of Torture, 2004); Oosterhoff, Zwanniken, and Ketting, “Sexual Torture of Men,” (2004).

and the gender of those involved does not automatically locate them on one side of the victim/perpetrator binary. In both the Rwandan and Balkan conflicts, there are numerous documented cases of females committing or facilitating sexual assaults against men of the enemy camp.⁷⁵

The neutralizing and abstracting moves examined thus far could indeed be construed as a clever strategy for turning marginalized crimes and victims into legible subjects of law, insofar as the association with the crimes of torture and grave breaches of the Geneva Convention is thought to accentuate the severity of the crime, and place it in more familiar legal terms.⁷⁶ Yet, if social, scholarly, and legal intelligibility of wartime sexual violence committed against males is contingent either upon vague or desexualized descriptions (i.e., “cruel treatment”), or upon its formulation as a more “noble”/less “tainted” category of crime (i.e., torture), there is a greater risk of reifying the stigmas attached to sexual violence, and, in particular, the shame of disclosing and seeking treatment for it. Moreover, this approach threatens to reproduce the stifling gender stereotypes buttressing the descriptions in question, especially the all-too-familiar classifications of women as penetrable, passive victims of sexual violence, and men as either necessary perpetrators, as victims of nonsexual crimes only, or as “tainted” victims of sexual assault. Interpretations of this kind only work to reinscribe essentializing, unyielding gender norms, and fall short of grasping the diverse power relations subtending various criminal scenarios in different cultural contexts. This ossified model of gender relations assumes in advance the forms of agency and resistance made available, or foreclosed (for all parties) in the context of the crime and in its aftermath. For these reason, efforts to provide victims with gender justice that are informed by the described schema will be compromised from the outset when it comes to adjudicating and interpreting sexual violence against men.

None of the ICTR cases address the sexual abuse of men in conjunction with the Rwandan genocide, and my efforts to locate studies on this issue have been in vain. As the above examples suggests, the absence of such information does not indicate that sexual violence against men did not occur in the context of the 1994 genocide. Anne-Marie De Brouwer states that Tutsi men were attacked sexually, albeit “only seldom” during the genocide, but she does not support her claim with reference to empirical data or elaborate on the topic further.⁷⁷ Compared to the Yugoslavian case, the silence shrouding these “gender crimes” and their general occlusion in scholarly, social, and

⁷⁵ See, for example: M. Cherif Bassiouni & Marcia McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia*, Occasional Paper No. 1, Chicago: De Paul University/IHRLI (1996); Carrie Sperling, “Mother of Atrocities: Pauline Nyiramasuhuko’s Role in the Rwandan Genocide,” *Fordham Urban Law Journal* 33, vol. 2 (2006): 99–127.

⁷⁶ The elevated status reserved for the crime of torture outlined above is corroborated by the case law of the ICTY and ICTR with respect to trials involving sexual violence committed against females. In several ICTY and ICTR cases, the chambers aligned sexual violence against women with torture, noting that rape, for example, could be the *actus reus* of torture (*ICTY Prosecutor v. Delalic*, *ICTR Prosecutor v. Akaysu*, *ICTY Prosecutor v. Kunurac*). This interpretation has been applauded by many gender justice advocates because it places sexual violence crimes on the same level as nonsexual crimes that have a longer history in international law and are regarded as extreme violations of human rights and humanitarian law. See: Oosterhoff, “Sexual Torture of Men,” 2004; Kelly Dawn Askin, “Gender Crimes Jurisprudence in the ICTR: Positive Developments,” *Journal of International Criminal Justice* 3, no. 4 (2005).

⁷⁷ De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, 12.

legal discourse appears to be even more extreme in the Rwandan context. Recent reports of the prevalence of male-on-male rape in the Democratic Republic of Congo (DRC) on the part of both Hutu and Tutsi militias (members of which were part of the genocide and fled Rwanda after the genocide) suggest that this kind of assault may have been utilized as a tool of war in Rwanda in the 1990s. Yet this brand of crime—and investigations thereof—has not been incorporated into the gender-justice initiatives adopted by the ICTR.

One high-profile ICTR case underscores the inadequacy of the sexual subordination model, wherein women are always victims and men are default perpetrators. It also suggests that the ICTR may be expanding its understanding of what constitutes a gender crimes and who qualifies as their victims and perpetrators: the case—*Prosecutor v. Nyiramasuhuko and Ntahobali, et al.*—suggests that the ICTR’s understanding of “gender crimes” can, at least in some circumstances, move beyond the rigid categories that the sexual subordination model assumes, insofar as it puts a female on trial for genocide and sexual violence crimes. In this case, a former female cabinet minister of the interim government of Rwanda, Pauline Nyiramasuhuko, and her son Arsene Shalom Ntahobali, were charged with the genocide and crimes against humanity for, among other things, ordering and perpetrating the rapes of Tutsi women during the Rwandan genocide in the Spring of 1994.⁷⁸ Charged with eleven counts, including genocide, crimes against humanity, and war crimes, she is the only woman to be charged with such crimes in the history of international criminal law. Nyiramasuhuko held the office of minister of family and women’s development in the interim government. Her son served as the prefect of the Butare commune at the time of the genocide. The prosecution mounted evidence to prove that Nyiramasuhuko and her son were personally responsible for inciting and participating in the campaign of genocide directed at Tutsis, which involved the abduction, rape, and murder of Tutsis in the southern region of Butare by the Hutu paramilitaries or *Interahamwe*. Although Nyiramasuhuko was never accused of carrying out the genocidal rapes herself, the doctrine of command responsibility authorized the court to hold her legally accountable for them. She was charged with ordering her subordinates of the *Interahamwe* to carry out rapes of Tutsi women. She could be held responsible for them, insofar as she occupied the position of a superior and “knew and failed to prevent” the rapes.⁷⁹ Her son was charged with carrying out rapes that his mother ordered at the Butare prefecture office, for raping Tutsi women on other occasions, as well as ordering other *Interahamwe* soldiers to rape Tutsis.⁸⁰

The peculiar circumstances of this case are many. Not only does it exceed normative understandings of gender roles in relation to the crimes of sexual violence and genocide, but it lies at the crossroads of private or familial dynamics and public, official relations of power in the context of armed conflict. Nyiramasuhuko’s role as the head of the Rwandan family and women’s department, and her role as the mother of, and superior to,

⁷⁸ *Prosecutor v. Nyiramasuhuko & Shalom Ntahobali, Amended indictment*. ICTR 97-21-I (ICTR, 1 March 2011) 28–45.

⁷⁹ *Prosecutor v. Nyiramasuhuko, Judgment*. ICTR-98-42-T (ICTR, 24 June 2011) para. 6088.

⁸⁰ *Ibid.*, para. 6093–94.

a man accused of genocide and rape strikes at the foundations of conventional accounts of maternity characterized by nonviolence, an emphasis on the “private” as opposed to the “public” sphere, and protectiveness (especially when it comes to other women and children, be they one’s own or another’s). Ronit Lentin claims that, “the involvement of women in the genocide and murder of Hutu political opponents failed to attract national and international attention [in Rwanda], precisely because of the construction of women as the universal victims of that particular catastrophe.”⁸¹ She goes on to say that the tendency to describe “women and girls as the principal victims of the genocide ... obscured their roles as aggressors.”⁸² The facts of the Nyiramasuku case fly in the face of this particular construction and the presumptions upon which it depends. Legal scholar Carrie Sperling points out that media coverage of the trial has focused so much on Nyiramasuhuko’s gender, and the question of how a woman could commit such heinous crimes, that the prosecution of the crimes and the crimes themselves faded into the background.⁸³ The multidefendant trial was held up repeatedly since it began in 2001. One of the longest ICTR trials, *Prosecutor vs. Nyiramasuhuko et al.* lasted for a decade, with the final judgment handed down in 2011.⁸⁴ The chamber found both Pauline Nyiramasuhuko and her son, Arsène Shalom Ntahobali, guilty of conspiracy to commit genocide, genocide, the crimes against humanity of extermination, rape, and persecution, and the war crimes of violence to life and outrages upon personal dignity. They were both sentenced to life imprisonment, the most severe sentence imposed by the ad hoc tribunals.

Prosecutor Holo Makwaia, who led the prosecutions team in the case, could not hide her excitement. She said, “I am very happy because according to the law even when a woman commits offenses like rape could also be convicted and sentenced.”⁸⁵ ICTR’s record suggests that although men cannot be regarded as victims of sexual violence crimes, women can be regarded as perpetrators of those same crimes, even if they did not commit the acts that conventionally meet the requirements of sexual violence. What the case lays bare, however, is that the sexual subordination model does not hold up when confronted with the complex and multivariant realities of sexual violence that takes place in the course of armed conflict.

Nyiramasuhuko et al., Celebici, Tadić, and other sexual violence cases that defy the sexual subordination model illustrate the need for more nuanced understandings of what gender-based crimes signify in particular conflict situations. Rape, for example, can no

⁸¹ Lentin, *Gender and Catastrophe*, 12–13.

⁸² Ibid.

⁸³ Sperling, “Mother of Atrocities,” 1.

⁸⁴ “The Judgment comes 10 years after the commencement of the trial on June 12, 2001, 16 years after the arrests of some of the accused and more than two years after the case was officially closed. The parties presented a total of 189 witnesses, 913 exhibits were admitted, comprising of almost 13,000 pages. The proceedings have produced more than 125,000 transcript pages, and the Judgment is expected to be around 1500 pages in length.” Deirdre Montgomery, “ICTR Butare Trial Judgment—Accused Found Guilty of Genocide, Crimes Against Humanity and War Crimes.” International Criminal Law Bureau, June 24, 2011, <http://www.internationallawbureau.com/blog/?p=2908>.

⁸⁵ “Rwanda: ICTR Prosecutor Welcomes Judgment Against Nyiramasuhuko,” All Africa.com (Hirondelle News Agency), June 24, 2011, <http://allafrica.com/stories/201107042152.html>.

longer be seen as exclusively involving a predetermined set of body parts belonging to a male perpetrator and female victim respectively. As the aforementioned cases confirm, the line between victim and perpetrator is not always a stable or clear one, and one's gender does not automatically put a person on one side of the victim/perpetrator binary in question. In the absence of legal definitions that can apply to a range of victims, perpetrators, genders, and sexual violations, the ad hoc tribunals have failed to address many of the sexual crimes that fall under their jurisdiction. The cases discussed above demonstrate that only a limited set of gendered performances of victimhood and perpetration are fully recognized in the very legal domain extolled for its gender fairness, sensitivity, and inclusivity. Sexual crimes committed against males and sexual crimes carried out by females can easily get subordinated within the sexual subordination paradigm, which only registers women as penetrable victims and men as penetrating perpetrators of sexual violence. And with this being the case, entire groups of wartime sexual violence victims are denied access to this form of justice, as well as the chance to put IHL's pledges of justice as healing to the test.

V. Gender and/ or Ethnicity in the Spotlight

One can see another form of gender blindness at work in several tribunal cases adjudicating ethnically motivated sexual violence as crimes against humanity and/or genocide. It is clear that only certain (bodily, cultural, ethnic) differences come to matter in this highly restrictive rhetorical field, where multiplicity and specificity take a back seat to homogenizing, reductive accounts of gendered subjectivity, and cultural identity. In these instances, the tribunals jettison the legal principle of specificity (*nullum crimen sine lege stricta*), thereby erecting and perpetuating normative victim hierarchies, wherein one group is marked "victim," the other "perpetrator," and its members and their attributes are assumed in advance. Unfortunately, the ad hoc tribunals' unprecedented recognition and prosecution of the ethnic and gender dimensions of the sexual violence crimes has, in certain instances, come with racist and androcentric stereotypes about "Muslims" and "women," for example.

Establishing the ethnic component of a given act is essential for meeting the chapeau requirements of both crimes against humanity (CAH) and genocide.⁸⁶ To establish a given crime as either a CAH or genocide is to accord it the status of the most serious of offenses and most radical of human transgressions. For these reasons, advocates for gender justice have set their sights on articulations of sexual violence as either CAH or genocide in hopes of putting such crimes on par with the most heinous and severely

⁸⁶ In the ICTY and ICTR statutes, the crime of genocide is defined as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group." Crimes against humanity are crimes "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: a) Murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape; h) Persecutions on political, racial and religious grounds; i) Other inhumane acts" (ICTY Statute, 1993; ICTR Statute, 1994).

punished acts. Also, because rape is explicitly listed as a CAH in the tribunals' respective statutes—which is not the case for genocide—convictions on this basis are frequently sought. In certain tribunal cases involving mass rape or ethnically based sexual violence, however, we are forced to question the advantages of this strategy and its underlying assumptions. These cases point to several troubling potential effects of tethering sexual violence to these relatively new species of humanitarian law: emphasizing the gender component of the crime at the expense of the ethnic component, and vice versa; rendering sexual violence committed against women or girls (not to mention men) outside the ethnically “targeted” community inferior and/or invisible; falling back on ahistorical and homogenized understandings of a given ethnic community; and relegating certain ethnic groups to the category of always already vulnerable, passive victims, and others to the category of villainous perpetrators. In the Yugoslavian context, Muslims occupy the former and Serbs the latter, and in the Rwandan context, Tutsis are deemed the necessary victims and Hutus the perpetrators. But much is left out of these overly formulaic understandings of wartime sexual violence.

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Unlike the sexual violence cases that preceded it, the ICTY Kunarac case charged Serbian defendants with crimes committed against Bosnian Muslim women.⁸⁷ The case brought attention to the systematic sexual violence committed by Serbs against Muslim women. The chamber found that the crimes of rape and enslavement of the Bosnian women met the requirements for crimes against humanity (as a wide or systematic attacks against any civilian population, which, in this case, was Bosnian Muslim). This was heralded by many as a victory for the cause of gender justice and as a beacon of far-reaching reform in humanitarian law. In the judgment, the trial chamber at times emphasized that the crimes were directed at the victim-witnesses in question because they were Muslim, and “for no other reason,” with the effect of displacing the gender component of the crime.⁸⁸ Figuring the crimes as acts against the specified ethnic/civilian population has the potential to overshadow the fact that their gender was also a significant factor in the perpetrators' selection of targets for these atrocious crimes, and that sexism and racism come together to form a lethal weapon of war.

To overcorrect in the other direction fails to get us out of the aforementioned either/or trap (i.e., where either a victim's ethnicity or gender is recognized as the motivations for a given crime). In the Celebici case, for instance, the trial chamber emphasized the fact that the rape on trial was directed at a particular Serbian woman “because she is a woman.”⁸⁹ The chamber presumably stressed the latter point due to the fact that Serbs were not regarded as primary targets in the conflict and thus obviated the need to meet the ethnicity-focused chapeau requirements of CAH or genocide. Even if overlooked in the judgment, the Celebici case unquestionably involved ethnic-based sexual crimes. The

⁸⁷ The defendants in the so-called “Celebici” case (ICTY *Prosecutor v. Delalic et al.*) were Bosnian Muslim men convicted of raping Serbian women detained at the Celebici prison camp. In *Furundzija*, the accused was a Croat, charged with the rape of a Muslim woman.

⁸⁸ *Prosecutor v. Kunarac*, para. 577.

⁸⁹ *Prosecutor v. Delalic*, para. 493.

difference between this case and cases like Kunarac lies with the ethnic background of the perpetrators and victims. The victims in the Celebici case were Serbian—usually relegated to the perpetrator position—and the perpetrators were members of what was identified as the “victim” group (Muslim). Outside the parameters of these two legal categories, the ethnic dimension of the crime falls by the wayside and the chamber limits its focus to gender only.

The Kunarac and Celebici cases suggest that there is little room in this discursive paradigm for recognition that the rapes in question were perpetrated against particular individuals because they were females perceived as part of an “ethnic enemy” camp. Neither of these judgments fully acknowledged that, albeit in different ways, both gender and ethnic identity were essential dimensions of the crimes on trial. With so much attention paid to the requirements of the “most severe” crimes (CAH and genocide), the tribunals fell short of integrating and balancing the multiple identity-related factors informing the particular sexual assaults on trial. If the legal remedy provided here is premised upon reductive, incomplete, and thus inaccurate understandings of the crimes committed and injuries sustained, then the event of injury—its historical, political, cultural, and psychological meanings and related effects—gets eclipsed and a prime opportunity to further understand the multifaceted character of the crime at issue is thus lost. Rather than countering the rigidified representations of ethnicity and gender that grounded the crimes themselves, the courts promulgate in a symbolic and much subtler fashion their own stereotypes and essentialist identities.

Although the majority of victims in the conflict in the former Yugoslavia were Muslim and the perpetrators Serbian, there is reliable evidence of atrocities committed on all sides and victims are represented in each group. Circling back to Kunarac, we discover yet another fallout from the practice of embedding sexual crimes in the framework of either crimes against humanity or genocide. Stressing that the “sole reason” for the rapes came down to the victims’ Muslim identities runs the risk of inadvertently demoting the rapes of non-Muslim women. Vesna Nikolic-Ristanovic claims that Serbian or Croatian rapes—of which there were many—were moved into the category of “lesser” rapes relative to those committed against the officially recognized “targeted community.”⁹⁰ The latter were recognized as victims of crimes to which the standards for crimes against humanity and genocide could be met, whereas the “lesser” rapes failed to fall under the legal categories most widely utilized to prosecute sexual violence in the context of armed conflict. Therefore, not only is there a potential obfuscation of the gendered *and* ethnic dimensions of the rape in the Kunarac ruling, but in addition, the rapes of women from other communities are at risk of being legally effaced and rendered socially, politically, and historically invisible. This hidden group of subjects serves as the “other” of the sexual violence crimes in the legal spotlight, which performs the job of shoring up the identities in the spotlight. The conditions for intelligibility governing the named categories rest on a rigidified, regulatory ideal of the “most victimized victims” (in Albright’s terms) and the cost of falling outside of this restricted category is clear: the rapes of women and girls from “other” ethnic communities are rendered unworthy of the labels of CAH or genocide and simply invisible.

⁹⁰ Nikolic-Ristanovic, *Women, Violence and War*, 80–83.

In the context of the Rwandan tribunal, both gender and ethnicity have been recognized as contributing to the perpetration of sexual violence crimes committed against Tutsi women during the genocide.⁹¹ One reason we may not see the reductive “either gender *or* ethnicity” accounts of contributing factors of sexual violence found in some of the ICTY trials is that, in the Rwandan case, there has been very little effort to expand the “pool” of possible victims outside the Tutsi community. In other words, in the ICTR discourse, we see a slightly different, yet acute form of the invisibility for sexual violence victims who are not Tutsi: although trial documents often acknowledge the targeting, abuse, and murder of Hutu moderates by Tutsi extremists during the Rwandan genocide, and although the chambers have consistently recognized the role that both gender and ethnicity play in sexual violence crimes committed against Tutsis, to date there have been no trials involving Hutu victims of sexual or other types of crimes. According to Eugenia Zorbas, the ICTR, as well as domestic courts, have focused on punishing Hutus, rather than recognizing Hutus as potential victims.⁹² Given that there has been considerable evidence that Tutsis and Hutu moderates alike were targeted in the genocide, and given the central role of sexual violence played in the conflict, it is not unreasonable to surmise that there exist a marginalized population of Hutu sexual violence victims that the ICTR has failed to recognize. Members of this group fall outside the “the most victimized victims” category.⁹³ The ICTR may consistently recognize the imbricated status of ethnicity and gender in the sexual violence crimes adjudicated by the ICTR, but since this discursive paradigm operates with a monolithic victim/perpetrator binary in which only one group can be identified as victim and a separate group identified as perpetrator, then it follows that only Tutsis come to “matter” as victims with the consequence that all Hutu victims, and the potential gender and/or ethnic norms that may inform certain crimes committed against them—are left unaccounted for and without redress.

In certain cases involving systematic violence against women of a so-called “targeted” ethnic community, and in related determinations of whether a given (sexual) crime can constitute either a crime against humanity or genocide, one comes across yet another set of discursive hazards. These two crimes—conceived of as, according to Kirsten Campbell, “traumatic violation[s] of both the subject of rights and of universal humanity” (i.e., as an individual rights-bearer and as a member of a given community such as “Muslim” but also of humanity)—women and girls from a so-called targeted community are readily reduced to their victim status. As such, they are reduced to their personal injuries, or to the “injuries” inflicted on the ethnic groups they are part of.⁹⁴ Feminist legal scholar Karen Engle calls attention to the fact that this move not only denies these women’s agency, but masks the extent to which females are often implicated in war, the frequency with which women and men from “warring camps” consent to having intimate

⁹¹ For example: *Prosecutor v. Akayesu*, para. 732; *Prosecutor v. Semanza*, para. 324; *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, para. 1079.

⁹² Eugenia Zorbas, “Towards Justice And Reconciliation In Rwanda: Taking Stock,” Pambazuka News 150, no. 1 (April 2004), http://www.peace.ca/aftowards_justice_and_rec_rwa.htm.

⁹³ I was unable to find statistics on the actual numbers of Hutu victims of the genocide (and of sexual violence victims of the genocide), despite the fact that it is widely known that the Tutsi-led Revolutionary Patriotic Front (RPF) committed human rights abuses against Hutus.

⁹⁴ Campbell, “The Trauma of Justice,” 329.

relationships, and the many types of sexual violence victims and perpetrators produced in the Yugoslavian and Rwandan campaigns of violence.⁹⁵ Participation in the discursive production of the ideal victim runs the risk of naturalizing a given woman's and group's status as helpless and necessarily innocent, which easily dovetails with ethnocentric claims about that community's character, as if it were a singular, internally coherent, and fixed entity untouched by a range of historical, political, economic and cultural forces.

Engle points to the work of one of the most vocal and widely read legal theorists on the topic of sexual violence as a war crime, and to the former ICTY gender expert Kelly Kelly Dawn Askin to illustrate the troubling and common tendency to figure women and girls from the "targeted community" as inherently passive and as the "true" victims of the gender crimes committed during the Yugoslavian war.⁹⁶ In her work on the tribunals, for example, Askin resorts to monolithic and essentialized stereotypes of the passive, raped Muslim woman and repressive Muslim men/Muslim culture. Askin maintains that "Muslim culture's" emphasis on women's honor makes it such that rape for a Muslim woman is "particularly severe."⁹⁷ She offers no analysis of this sweeping claim and, as Engle notes, fails to consider the possibility that some Muslim women and men may not agree with her reductive characterization. In other words, for Askin, there is just one "Muslim culture," and the singular meaning of rape within the culture is treated as an indisputable fact. This tendency to portray certain ethnic groups, and the females within them, as inherently docile and thus "more victimized" can be found in much of the discourse surrounding both the Rwandan and Yugoslavian contexts and informs the trials under examination here.

Brandishing juridical remedies, the tribunals set themselves up as the authoritative and ever-humane "doctors" prepared to heal the wounds of those vulnerable communities ravaged by genocide, ethnic cleansing, and (especially) mass rape. If the tribunals are to at least give the impression of doing good on their promises of neutrality, justice, and even healing, they—along with those working to create greater awareness of gender-based crimes—will have to work harder to make room for the contingency and complexity not only of the various crimes being adjudicated, but also for the identities of those involved (including the identities of those on the bench and codifying laws). Again, these instances demonstrate the ways in which particular differences (be they ethnic, bodily, or cultural) fail to matter in the tribunals' homogenizing, reductive accounts of gendered subjectivity and cultural identity. As a result, the tribunal discourse reinforces ethnic and gender stereotypes, wherein, similar to the sexual subordination model analyzed above, one group is marked "victim," the other "perpetrator," and its members and their "nature" are assumed in advance. What should be abundantly clear by now is that these unidimensional and restrictive understandings of gender violence crimes make the lofty promises of legal healing and gender justice outlined above seem all the more out of reach for many of the victims of these crimes, and that recourse to the tribunals may not be the optimal (or even suboptimal) means of producing either justice

⁹⁵ Engle, "Feminism and its [Dis]contents," 806–14.

⁹⁶ *Ibid.*, 791–92.

⁹⁷ Askin, *War Crimes against Women* (1997).

specifically attuned to “gender” or to some form of healing from “gender crimes.” The hegemonic norms of gender violence are not simply unfortunate effects of the discourse juridical healing. They constitute a central part of its operations.

VI. Woman as Ideal Victim: the Dis-integrated and the Destroyed

The sexually violated female body on the witness stand sometimes operates as the quintessential symbol of traumatic shattering in this juridico-therapeutic discursive scene. In the healing discourse in question, healing regularly involves recovering the psychic, bodily, and narrative “integrity” ostensibly lost via trauma. Such integrity is identified with “closure” and opposed to the shattering or dis-integration typically thought to characterize trauma, as reflected by trauma theorist Judith Herman’s claim that, “trauma, by definition, shatters the inner schemata . . . of the self and the world.”⁹⁸ As noted in chapter 2 “the model of closure . . . has provided the single, coherent rubric to justify the international tribunals,” according to Jose Alvarez.⁹⁹ This produces a double-bind: while this dis-integrated, female subject-body is rendered the most in need of healing and “closure” insofar as she is held up as the “most victimized” victim, it/she is also, as I hope to show, sometimes the least likely to attain it. She emerges as the incarnation of openness, vulnerability, invasion, and contamination, and her chances of breaking free from this role are substantially limited. It does not seem like a stretch to tether the depreciation and marginalization of these body-subjects to the production of hegemonic gender norms that situate the feminine as that which is broken, shattered; she has “holes.” I limn here the implications of these gendered figurations in two tribunal trials—one from the ICTY and one from the ICTR. The final case studies analyzed here illuminate specific ways in which certain bodies come to “matter” in this legal discursive space, and the potential costs of mattering in this way. Judith Butler poignantly describes the vexed status of being a subject when she writes, “We sometimes cling to the terms that pain us because, at a minimum, they offer us some form of social and discursive existence.”¹⁰⁰ In other words, we are not determined by, but are constituted through and thus constrained by, the linguistic terms under which we become legible as subjects (for example as a woman, a victim, or a member of a particular ethnic group). The same words that bring us into symbolic existence and grant us recognition (here: legal recognition as a particular kind of victim) can also limit our possibilities for agency, bar alternative dimensions of our identities, and involve considerable, additional pain.

Vla. The Dis-integrated Victim

In the 1998 ICTY case *Prosecutor vs. Furundzija*, a Croatian MP commander was charged with violations of humanitarian law, including rape, during the armed conflict in the former Yugoslavia. The trial turned upon the prosecution’s sole witness, witness A—a Muslim woman raped during detention and harsh interrogation by her Croat captors. Witness A had visited a therapy clinic in Bosnia-Herzegovina in 1995 after her sexual assault, a fact that the prosecution had not found relevant to the case and had thus chosen

⁹⁸ Judith Herman, *Trauma and Recovery* (New York: Basic Books, 1997), 41.

⁹⁹ Osiel, “Ever Again,” 19.

¹⁰⁰ Butler, *Psychic Life of Power*, 26.

not to disclose. When the defense came by this aspect of her medical history, it used it to challenge the reliability of witness A's memory and the accuracy of her testimony. Because witness A received a PTSD diagnosis by doctors at the clinic (several years earlier, and following her detention and alleged rape), the defense maintained that her memory had been "contaminated."¹⁰¹ The said contamination was portrayed as a chronic and irreversible problem that rendered her psychologically unstable.¹⁰² The trial chamber considered the failure to disclose this information an instance of "serious misconduct" on the part of the prosecution team. As a result, the defense was allowed to invite expert witnesses in the field of psychiatry to testify. All of the expert witnesses maintained that PTSD impaired memory and thus compromised witness A's reliability as a witness. The issues of the reliability of the clinic's PTSD diagnosis, the question of the reliability of the expert witnesses' "medically substantiated" claims, the many years that had past since witness A had sought brief treatment at the clinic, what constitutes "psychological treatment" (i.e., do a few visits constitute psychotherapy?), and the potential invasion of privacy that the defense's motion entailed, were not subject to examination in the course of the trial.

Feminist legal theorist Kirsten Campbell, in her adept analysis of *Furundzija*, points out that the defense's conception of memory "relies on the assumption that there is a relationship between bodily, ... psychic, and [mnemonic] integrity, "where the ideal of integrity is gendered masculine."¹⁰³ In other words, the defense's model held that the breach of bodily integrity (rape) was causally linked to her psychological "crack-up," thereby compromising the integrity of her memory, and ultimately, her credibility as a witness. It's as if the violent penetration effectuated her "shattered" self. Drawing on Campbell's analysis, we see how, relegated to the far side of truth, witness A's testimony was exiled from the juridico-discursive parameters in which truth is thought to suture the wounds of atrocity-induced traumas, and where the conversion from trauma to cathartic closure transpires via victim testimony. Due to her putative pathology, she was denied the "key" that unlocked the law's healing powers. What emerges from the defense's account of witness A's "condition" is a model of sexual violence and trauma as shattering—a model mentioned above and one which finds its way into many of the tribunals' formulations of sexual violence in particular. In this paradigm, the "shattering" associated with the trauma of rape mirrors, and is the material precipitate of, the shattering of the self and of one's mental coherency or integrity. The raped woman becomes the quintessential, shattered self.

The ICTY statute explicitly states that, in cases of sexual assaults, no corroboration of the victim's testimony shall be required.¹⁰⁴ This rule was not honored, however, and the trial chamber gave the defense free rein to assail witness A's character and psychological stability. Moreover, the defense was permitted to bring in an expert witness to legitimate

¹⁰¹ *Prosecutor v. Furundzija*, para. 102.

¹⁰² *Prosecutor v. Furundzija*, para. 676–85.

¹⁰³ Campbell, "Legal Memories," 170.

¹⁰⁴ Rule 96 of the ICTY and ICTR "Rules of Procedures and Evidence" states that in cases of sexual assault, (1) no corroboration of the victim's testimony is required, (2) prior sexual conduct of the victim is inadmissible evidence, and (3) consent is not a defense in situations in which the victim was subjected to or reasonably believed she was subjected to the threat of violence to herself or another.

its flimsy reasoning with regard to the “domino effect” of dis-integration ascribed to witness A. Although the prosecution contested the defense’s claims, the chamber allowed the prosecution to launch a protracted and ad hominem attack on witness A and her alleged corrupted integrity. This constituted a breach of the tribunal’s statute and rules of procedures and evidence, and, according to Kelly Dawn Askin, represents an unequivocal invasion of privacy. This criticism was mirrored in the amicus brief addressed to the Furundzija chamber, signed by several women’s human rights legal scholars (including Joanna Birenbaum, Valerie Oosterveld and Rhonda Copelon) and non-governmental organizations. The amicus brief submitted:

*(1) gender discrimination fundamentally informs requests for disclosure of confidential records in cases of sexual violence; (2) requests for disclosure are most often founded upon irrelevant and prejudicial rape myths and discriminatory attitudes toward women who are victims of sexual assault; (3) the cross-examination of survivors of sexual violence risks unwarranted and severe intimidation and revictimization of these witnesses, thus jeopardizing both their mental and physical integrity; and (4) the disclosure of counseling records profoundly affects (a) women’s equal rights to access to justice; and (b) the goal of bringing perpetrators of sexual violence in armed conflict before the two international criminal tribunals.*¹⁰⁵

Despite these very clear admonitions and their obvious connection to the treatment of witness A in the case, the chamber failed to take these concerns seriously. The harm done to witness A by the prosecution’s tactics and revelations about her confidential records, and the discriminatory nature of these tactics, were never mentioned, much less recognized as a possibility in the court proceedings. Eventually, the trial chamber reversed its original position and discarded the defense’s theory of memory “contamination,” wherein limited medical/psychological assistance and an experience of sexual assault itself were taken to undermine one’s trustworthiness as a witness. In the judgment the chamber conceded: “even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a persona with PTSD cannot be a perfectly reliable witness.”¹⁰⁶ Furundzija was convicted of war crimes (of torture and of rape as an “outrage upon human dignity”) for the acts committed against witness A.¹⁰⁷ While it might appear that justice was served in the end, this does not change the fact that it was witness A’s psychological state and credibility—not the accused—that was put on trial for a good portion of the proceedings.

¹⁰⁵ Birenbaum, Oosterveld, Copelon, et al., “Amicus Curiae Brief Respecting The Decision And Order Of The Tribunal.” Re: *Prosecutor v. Anto Furundzija, In The Trial Chamber Of The International Criminal Tribunal For The Former Yugoslavia*. IT-95-17/1-T (ICTY, 16 July, 1998) para 5.

¹⁰⁶ *Prosecutor v. Furundzija*, para 109.

¹⁰⁷ Furundzija was the local commander of the Jokers, a special military unit of the Croatian Armed Forces. Furundzija was held responsible for aiding and abetting the torture and sexual assaults inflicted on Witness A. (ibid., 281–83).

The ruthless interrogation tactics of the defense were discriminately reserved for witness A (thereby revealing the gender bias at work in the trial) and are reminiscent of the all-too-familiar tendency to pathologize and even blame the victim in many rape cases.¹⁰⁸ Although Campbell offers a valuable and original analysis of gendered narratives of integrity and memory in the trial, she refrains from leveling a more radical critique against the legal enterprise as a purveyor of gender justice. Although she proposes “a radical refiguring of legal memory” vis-à-vis what she calls “an ethics of legal memory” as a means of “answer[ing] the address of memory to the law to give justice,” her intervention falls short of fundamentally questioning the (improved) law’s capacity to answer (traumatized, gendered) memory’s call for justice.¹⁰⁹ We are not told of this ethics’ constitutive features and the reader is left to speculate about what the radical refiguring would consist of and require. Again, we see feminist legal scholars’ and tribunal officials’ inclination to presume that, if only certain changes were made (i.e., if a new model of legal memory was adopted), gender justice can and will be achieved.

Similarly, Birenbaum and Oosterveld, whose amicus curiae brief draws much-needed attention to the gender biased nature of many sexual violence trials (Furundzija in particular), worked on the assumption that gender justice could be realized if only the gender-friendly rules already in place (here: the statutes and the rules of procedure and evidence) were consistently honored and implemented. Even if the tribunals were to be less discriminatory and more inclusive when it comes to various forms of sexual violence and victims thereof, Furundzija and the other cases explored here suggest that this faith in the institution of law to adequately address the traumas wrought by wartime sexual violence may be unmerited, or at least overstated. When certain female subjects are reduced to their victimhood and their healing process rendered as resistant to “closure”—as always already penetrated and “dis-integrated”—and when the promise of closure is saturated in hegemonic fantasies of gendered subjectivity and embodiment, are we confident that legal “remedy” is worthy of promotion and extension to men and women alike?

My intention here is neither to provide an answer to this question nor to dismiss the potential of juridical healing altogether, but rather to highlight the ways these questions get elided in analyses of the tribunals’ adjudication of sexual violence. In the case of witness A, one sees very clearly the double-bind that can come with “mattering” in this legal discursive terrain; As a sexual violence victim, she is reduced to the trauma she endured and temporarily rendered unreliable as a witness precisely because of her status as a victim of this sort. Legal recognition as a victim of sexual violence in this instance comes at a significant cost. There is little room in this scenario to occupy the space of both victim *and* credible witness whose identity exceeds her trauma. In raising critical questions about the tribunals’ performance in this regard, we can attempt to open up more

¹⁰⁸ For more on this phenomenon, see: Lee Madigan and Nancy Gamble, *The Second Rape: Society's Continued Betrayal of the Victim* (New York: Lexington Books, 1991); Carole Goldberg-Ambrose, “Unfinished Business in Rape Law Reform,” *Journal of Social Issues* 48, no. 1 (1992); Gregory M. Matoesian, *Reproducing Rape: Domination Through Talk in the Courtroom* (Chicago: University of Chicago Press, 1993); Robert Elias, *The Politics of Victimology: Victims, Victimology and Human Rights* (Oxford, UK and New York: Oxford University Press, 1986).

¹⁰⁹ Campbell, “Legal Memories,” 176.

spaces for contestation of the law's power to deliver remedial benefits and gender justice—a move that has yet to gain traction in this area of legal scholarship and practice.

The Furundzija case suggests that the variety of justice and/as healing proffered by the tribunals may be less benign or progressive than it appears to be at first glance. The remedies that the court doles out may provide some benefits to victims, but they also carry the risk of harming those who operate as the other of proper legal subjects. In this case, we might say the “most victimized” (to use Madeline Albright's expression) has been victimized once again by the court. Although Furundzija was convicted in the end, it is hard to imagine that the legal drama in which witness A “starred” offered her cathartic closure, or left her with the feeling that gender justice had been served. Such juridical dramas offer a stage upon which problematic gender and ethnic norms are reenacted and reinforced via the body of the victim *qua* victim. These theatrics distinguish themselves from other discursive productions; their status as *legally authorized* acts in the name of justice, peace, healing, and universal human rights renders them a socio-symbolic force to be reckoned with. My analysis prompts us to consider how these psycho-juridical “stagings” of gender and ethnic norms perform their own forms of violence, and how they might have been staged differently.

Vlb. The Destroyed, Symbolic Victim

In the watershed ICTR case *Prosecutor vs. Akayesu* of 1998, rape was defined for the first time in international law and Jean-Paul Akayesu was charged with rape as genocide—another first for international law. Akayesu was bourgmestre of the Rwandan commune Taba. He was convicted of numerous counts of genocide, direct and public incitement to commit genocide, crimes against humanity (which included torture, extermination, rape, and murder), and “other inhumane acts.”¹¹⁰ Given these successful convictions and the unprecedented attention given to sexual violence in the trial,¹¹¹ this case has been heralded by gender-justice advocates as the benchmark by which to measure the sexual violence cases tried by the two tribunals.¹¹²

Above I explored the problem of ethnicity “trumping” gender, and vice versa, in the ICTY case law. In the ICTR Akayesu case, we see how these tensions intersect with yet another setback for female victim-witnesses; that is, the problem of the group/community (that a rape victim belongs to) “trumping” the individual victim. The latter also dovetails with the unsettling tendency on the part of the tribunals to figure rape as something that “destroys” the victim, defining and canceling her whole being. ICTY Judge Gabrielle Kirk McDonald, for instance, states that “rape does not only destroy women, it destroys the family.”¹¹³ Departing from this stance, and with ICTR judge Nusreta Siva, who notes that marking “a raped woman as if [she] had no other characteristic, as if that [was her]

¹¹⁰ *Prosecutor v. Akayesu*, para 4.

¹¹¹ That is, once the sexual violence charges were added to the Indictment. Factors contributing to the case's landmark status include: the detailed legal analysis of issues related to sexual violence as a tool of war, the broad and progressive definitions of sexual violence and rape, and the Court's recognition of the sensitivity of the issue and the difficulties facing witness/victims.

¹¹² Nowrogee, “Your Justice is Too Slow,” 16.

¹¹³ Sharrat, “Interview with Gabrielle Kirk McDonald,” 32.

sole identity,” my analysis seeks to draw attention to the ways representations of sexual violence can hurt the very women these courts are attempting to help.¹¹⁴ Unlike the brute violence the ad hoc tribunals are charged with prosecuting, my analytic lens considers more subtle forms of subjugation and regulation that can be thought of here as symbolic violence. Symbolic violence constitutes forms of domination that work by way of actions and speech that have injurious meanings or implications.¹¹⁵

I will briefly flesh out my argument here with reference to specific aspects of the Akayesu judgment, wherein rape was held to constitute genocide. The chamber made room in its final judgment to reflect on sexual violence as a weapon of war, and its disastrous effects on women from a particular ethnic group—a highly unusual move. Granting this degree of attention to the subject, and figuring rape as genocide for the first time, Akayesu has earned the status of a “watershed” and “landmark” case by many working in the field gender justice.¹¹⁶ Especially the following passage of the judgment stands out in this respect

*The rapes resulted in physical and psychological destruction of the Tutsi women, their families, and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to the destruction of the Tutsi group as a whole. The rape of the Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them.*¹¹⁷

One of the most troubling features of the judgment is the way rape is figured as the equivalent of the full-scale destruction of the raped women (even those that survived the rapes and various forms of abuse). Rape is thus in some way equated with murder, insofar as it is tendered as a social and psychological “death.” The language of destruction found in this passage and other parts of the judgment is, at least in part, borrowed from the legal definition of genocide outlined in the ICTR and ICTY statutes: acts committed “with the specific intent to destroy, in whole or part, a particular group.”¹¹⁸ Although the destructive element is central to proving a given act is genocidal, to claim that even surviving rape victims are “destroyed” suggests that a raped woman is a ruined woman, and as the wound that cannot be healed. As noted above, the tendency to equate rape with destruction of the self and with death is surprisingly common in the

¹¹⁴ Halley, “Rape in Berlin,” 37. For an in-depth analysis of the perils of tethering one's identity to one's status as injured or as a member of an oppressed group, see Wendy Brown's “Wounded Attachments,” chapter 3 of her book *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ, Princeton University Press, 1995). The analysis proffered here is deeply indebted to Brown's work on this topic.

¹¹⁵ This concept is based in part on Michel Foucault's understanding of discourse and Pierre Bourdieu's concept of symbolic violence. Bourdieu's later work situates gender domination as the “the paradigmatic form of symbolic violence.” Pierre Bourdieu and Loïc J. D. Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992), 170. Michel Foucault, *The History of Sexuality*, Vol. 1 (New York: Penguin Press, 1980).

¹¹⁶ Kelly Dawn Askin, “Gender Crimes Jurisprudence in the ICTR: Positive Developments,” *Journal of International Criminal Justice* 3, no. 4 (2005); Nowrojee “Your Justice is Too Slow,” (2005); Haffajee, “Prosecuting Crimes Of Rape And Sexual Violence At The ICTR” (2006).

¹¹⁷ *Prosecutor v. Akayesu*, para. 731–32.

¹¹⁸ ICTR statute: Article 2; ICTY statute: Article 4.

discourse on the adjudication of sexual violence as a war crime, which robs the survivor of agency and resilience and dismisses the possibility of transformation. The rape victim in the rhetoric of the ICTR Akayesu case is reduced to her rape and the trauma it precipitates. Of course it is essential to describe the particulars of the case (i.e., the fact of the rapes, the victims, the malicious intent behind the rapes that fulfill the chapeau requirements of the crime, etc.), but describing the events and their effect on victims in this manner risks exacerbating the very ideologically laden accounts of female purity and impurity framing the crimes in question: for the rapes of one side to have the desired, destructive effect on the “enemy” camp, members of both groups (here Hutu and Tutsi) must share the understanding purity and impurity, wherein a raped woman is understood to be contaminated and destroyed. In a sense, legal figurations of the raped woman as destroyed dangerously echo representations of women in the very discourse blamed for inciting the mass rapes carried out by Hutu militias.¹¹⁹ If it is true that, as Nikolic-Ristanovic claims, the social stigmatization in the aftermath of rape—not the rape itself—constitutes the deepest trauma for victims, or even a significant contributor to the trauma, then the court’s rhetoric of destruction can be seen as perpetuating that stigmatization and the trauma it produces.¹²⁰

Describing the trauma endured by a genocidal rape victim in terms of *her* destruction is only a short metonymic step away once she is rhetorically established as the symbol of the community targeted for destruction. In the passage cited above the rapes of the Tutsi women are, by extension, represented as the “rape” or “destruction” of “all Tutsi women” and the entire “Tutsi group as a whole.” Here we see how the crimes committed against the raped women become easily overshadowed by attention to what they mean for the community to which she “belongs”, or for “Tutsi women” as a group; the individual victims are lost amidst the collectivities invoked here. Elsewhere in the judgment, the chamber avers that the raped Tutsi women were “subjected to the worst public humiliation, mutilated, and raped several times, often in public” and directly links this to the “destruction” of Tutsi women. Kelly Dawn Askin applauds the chamber for drawing attention to the fact that Tutsi women “were presented as sexual objects”¹²¹ when they discussed the link between “sexualized representations of ethnic identity”¹²² and the targeting of Tutsi women.

At first glance the chamber’s acknowledgment of women as sexual objects seems to reflect a positive development for the adjudication of sexual assaults as war crimes, and

¹¹⁹ The ICTR has charged several Hutus with the crime “Incitement to Genocide.” In the so-called “Media” Trial, the Court acknowledged that vitriolic speech acts or publications can be inextricably linked to acts of genocidal violence: Three Hutu extremists were charged in the case with “Incitement to Genocide” based on their radio broadcasts and publications that figured Tutsis as “cockroaches” to be killed off by Hutus. In its Judgment, the Chamber declared: “Without a firearm, machete or any physical weapon, [Nahimana] caused the deaths of thousands of innocent civilians.” And with specific reference to the crimes of genocidal sexual violence, the judges asserted that these hateful and violent forms of speech “articulated a framework” in which the Tutsi woman was portrayed as a “femmes fatale” and were marked as “seductive agents” of the enemy camp, leading directly to the genocidal crimes in question. (*Prosecutor v. Nahimana et al.*, 2003, para. 1099 and 118, respectively).

¹²⁰ Nikolic-Ristanovic, *Women, Violence and War*, 41–78.

¹²¹ Askin, “Gender Crimes Jurisprudence in the ICTR,” 1012.

¹²² *Prosecutor v. Akayesu*, para. 731–32.

for spreading awareness of the ways sexual violence is used as a weapon of war, yet the chamber's emphasis on the public dimensions of the crime that ultimately "destroys" (i.e. "public humiliation . . . in public") comes with considerable disadvantages: the chamber attempts to legally redress the crimes committed against the community, but the violations to which the individual women were subjected are not treated as discrete crimes worthy of their own legal penalties outside the communal context. The female bodies operate as metonyms for the violence done to the whole community and to "all women" within that community. In the judgment, nameless raped women come to stand in for the material, mortal body vulnerable to destruction, whereas the collective, communal body and the order therein is implicitly gendered male.

To function as a symbol is to lose one's specificity as an in-the-flesh individual subject with a particular experience of trauma, a personal process of recovery, and highly singular expectations of, and claims to, justice. Yet, we should be careful in presuming that this role—as a very particular kind of victim—is somehow peripheral to the tribunal's discursive, normative operations. "Her" body operates as the key site upon which the chamber performs its curative rituals and presents itself as the humane, inclusive, and just redeemer of these devastated and damaged peoples. The legal order carves out its position as the authority that can remedy and restore (at least symbolically) the communal vitality that was lost or depleted. One might even say that this rhetorical performance takes on a sacrificial valence, insofar as the victims of genocidal rape are invoked as the protagonists of the cathartic drama, only to be fixed in the time and place of traumatic "destruction"—that is, the horrific past. While she remains anchored in this time-space of trauma, encapsulating in her body the destruction of the communal body, the community that discursively supplants her is presented with another chance at revitalization, recovery, and the possibility of a future.

The problem lies less with the fact that these victims are not given the chance to be healed by way of the tribunal's justice (for I have expressed my skepticism that inclusion in this legal process is necessarily a therapeutic, even just thing, given its otherwise concealed and overlooked regulatory dimensions). Rather, I want to draw attention to the fact that the performative conversion from trauma to closure to future *for the community* relies upon another conversion—one that transposes the living, breathing body-subject of the individual female rape victim into an expedient symbol, such that acknowledgment of the fact that the community and the individual were grossly injured, yet still remain becomes impossible. The inclusion of one side of this situation of injury and survival (community) necessitates the pathologization and performative destruction/exclusion of the other (raped woman). Thus, the former conversion necessarily represses the latter, less seemly conversion at its core: her specificity, her future, and her resiliency must be symbolically sacrificed to carve out the possibility of the group's resiliency and future. To understand rape in this manner is—drawing on Kirsten Campbell's analysis of rape as crimes against humanity against an ethnic community (with the female body functioning as a symbol of the destroyed property of that community)—is to "conceive of it within the very categories of identity which ethnic cleansing sought to fix."¹²³ Juridical healing meted out to the victims of genocidal rape has some noxious side effects.

¹²³ Campbell, "The Trauma of Justice," 329–50.

VII: Conclusion: Justice Is Never Done

Not all formulations of rape or sexual violence as crimes against humanity or genocide employ the problematic language of the ICTR and ICTY cases discussed above. However, these examples underscore the importance of examining the ways “gender justice” and sexual violence crimes are discursively figured in particular legal instances in which the promise a particular kind of (gendered, therapeutic) justice produces unanticipated, unavowed, and veiled effects on the victims it includes and excludes; or rather, the categories of victimization it produce by means of techniques’ inclusion and exclusion, marking the domain of the visible and the sayable in IHL. What is holding gender-justice advocates and feminist scholars back from troubling these forms of symbolic violence? With Halley, I too wonder if wartime sexual violence “is so sacrosanct that it has unnerved opposition” or critique of its figurations and manifestations.¹²⁴

Some may find it too risky or even distasteful to interrogate aspects of these ostensible legal breakthroughs for gender justice, yet contestation of this nascent politico-judicial domain and the forms of regulation and domination it perpetuates, need not be foreclosed in the face of the gravity of the crimes in question. Contesting the manner in which certain sex crimes are sometimes figured in this discourse should not be mistaken with efforts to dispense with legal responses to gender violence altogether. Rather, in mapping and scrutinizing particular points on the tribunals’ shifting grids of intelligibility (and the elisions, marginalizations, and disavowals they engender), we can perhaps disrupt and rearticulate their operative terms in order to expand the possibilities for recognizing, understanding, and responding to the victims, crimes, and traumas in question. At stake are not only the violent acts and repercussions of war, but also the violence of this juridical discourse vis-à-vis the deployment of certain norms as “givens”—as incontestable or universal truths of victimhood and wartime sexual violence. Careful analysis of this kind steers clear of equating the violent acts *on* trial with the violence *of* the trial. Such analyses are intended to lay bare the (historical, cultural, political) specificity and contingency of the diverse modalities of sexual violence prosecuted by the Yugoslavian and Rwandan tribunals, and oppose instances in which their jurisprudence echoes and reifies the kind of sexist, ethnocentrist, and racist stereotypes that inform but do not constitute the crimes in question.

I have no alternative feminist program to put forth that could guarantee the absence of these regulatory dimensions, but putting all our feminist justice “eggs” in one basket (IHL) and turning a blind eye to its power effects leaves particular forms of gender injustices to parade in the mantle of gender justice. My hope is that this kind of critical intervention might inspire people working in international law and the ad hoc tribunals, as well as feminists activists, scholars, and others pursuing “gender justice,” to rigorously problematize the ways “gender justice” is performed by and within the tribunals, and critically assess the legal remedies made available and denied to victims of these crimes.

¹²⁴ Halley, “Rape at Rome,” 122.

Given that both of the ad hoc tribunals are scheduled to complete their casework within the next two years, perhaps the greatest value of this kind of analysis will be with respect to the adjudication of sexual violence crimes at the permanent ICC.

International legal institutions promoting “gender justice,” such as the ICTY and ICTR, serve as contemporary battlegrounds for determining what counts as gender, gender-based crimes, and a form of justice that does justice to these crimes and their victims. Representations of sexual violence in particular are saturated in gender norms which “stick like glue” to what Janet Halley calls the “event” of sexual violence.”¹²⁵ “Gender justice” that seeks to disrupt, “unstick” and reconfigure deeply entrenched grids of gender intelligibility and thus normativity demand the cultivation and protection of ongoing, critical engagements with the forms of regulation and domination engendered by legal remedies to sexual violence in armed conflict—what I referred to as “justice” in chapter 1 of this dissertation. Justice on this model is a political process and critical practice that is never “done” in the sense of finished.

¹²⁵ Halley, “Rape in Berlin,” 34.

Chapter 5

Waking the Tiger of Politics:

The Hague Tribunals and the (A)Politics of Law that Aims to Heal

I. Waking The Proverbial Tiger

Responding to a fieldwork interview question, an Officer of the International Criminal Court of the former Yugoslavia's Victims and Witnesses Section (VWS), likened her unit's work to helping victims "wak[e] the tiger."¹ The unit is tasked with supporting and protecting victims who provide written and/or verbal testimony for a given tribunal case. Upon returning home from The Hague, and reviewing my interview transcripts, I realized I was unsure about the meaning of the Officer's reference, and wrote to her for clarification. With her reply, I learned that she connected the notion of "waking the tiger" to managing traumatic events in a way that can lead to "empowerment."²

Waking the Tiger, I discovered, is the name of a popular psychology book about human trauma and healing.³ It was to this model of healing that the Officer was referring.⁴ Taking inspiration from animal behavior, the book aims to help readers, therapists, and "healers" awaken and tap into a purportedly innate but frequently overridden ability of the human animal—"letting go" of trauma. Like the tiger that twitches to physically release tension from a perceived or actual threat, before trauma can be "stored up," the author argues, humans have the potential to constructively deal with trauma and the havoc it wreaks, physiologically and psychologically. This is achieved through the retroactive release of tension by recalling the traumatic event (waking the "tiger" of trauma, but also reawakening the animal side of the self that can more readily metabolize stress). According to this approach, only when the traumatic event is narrativized is the mind and body freed from the destructive stress it previously carried in it, and only then can true healing take place.⁵

¹ Diana Anders, interview with Officer of the Victims and Witness Section (anonymous E), July 5, 2009, The Hague, Netherlands.

² Email to Diana Anders from Officer of the Victims and Witnesses Section (anonymous E), January 26, 2011.

³ Peter Levine and Ann Frederick, *Walking the Tiger: Healing and Trauma. The Innate Capacity to Transform Overwhelming Experiences* (Berkeley, CA: North Atlantic Books, 1997).

⁴ Email to Diana Anders from Officer of the Victims and Witnesses Section (anonymous E), January 26, 2011. In the email, the officer explained that, in the courtroom, victims are reminded of the traumatic event they endured when they testify: "[The victim-witness] may experience the same feelings of fear and powerlessness of the past. One of our interventions to help a person through this painful situation is to empower him/her, i.e., to help the victim to get renewed access to these mechanisms in order to regain control." To "wake the tiger" then, can be understood as a reference to leading the victims through this delicate, potentially "wild" process of regaining control, presumably because their traumas have rendered them somewhat out of control (and thus especially in need of this kind of assistance).

⁵ Several aspects of this approach resonate with Sigmund Freud's early trauma theory based on "the talking cure" (Freud and Breuer, *Studies on Hysteria*, 1985). And yet, it is unclear to what extent "waking the

Behind this understanding of trauma and recovery, once more, lies the assumption that international criminal courts' increased attention to victims can have an emotionally liberatory and thus therapeutic effect on victims of extreme violence, such as genocide and mass rape. But the Officer's statement to me at the same time captures a further dimension of the therapeutic ethos of contemporary international criminal tribunals. By figuring the ICTY Victims' Section as a tool for "training" victim-witnesses to return to, excavate to, but also "let go of" their traumas in a supportive and public environment, namely, the judicial scene of witness testimony, her comment also serves as a metaphor for what I will argue is a key, albeit oft-overlooked effect of the new form of juridico-therapeutic power that pertains to "the therapeutic turn" in International Humanitarian Law more generally; that is, a novel operation of power that seeks to produce what might be considered domesticating effects at the level of political activity and political subjectivity for juridical healing's supposed beneficiaries. Specifically, these techniques are aimed at limiting the potentially "untamed" activities of political participation and mobilization.

By figuring politics (and its agents) as a wild animal to be tamed, and as the cause of the crimes on trial and the traumas they produce, the courts set up the framework for their techniques of depoliticization. Kofi Annan claimed that "the less political input there is in the justice process of the international tribunals, the better. Justice should follow its own course."⁶ However, tribunal architects and officials seem averse to conceding that the contemporary tribunals were, in United Nations Representative Ivan Simonovic's words "created due to the existence of a critical mass of political will, for identifiable political reasons, and their performance produces political effects."⁷ In other words, the tribunals are saturated in politics, even as many of their representatives frantically attempt to obscure this fact. Moreover, as I will show here, the tribunals' aspirations and related disavowal of their own political origins and aims has strong depoliticizing effects on their constituents that run contrary to its manifest aims, especially, "deter[ring] future crimes" and "contribut[ing] to the restoration and maintenance of peace in the region."⁸ The necessarily political projects of fostering sustainable, meaningful peace and deterring future political violence in the affected regions seem untenable in the absence of political changes and political mobilization within those communities.

As previous chapters have detailed, justice that heals has been figured as both grounds for and *telos* of international humanitarian law, defined as the human rights component of the

tiger" maps onto the "untamed" side of the subject (the unconscious, where traumatic memories are "stored," if you will), which is partially reconfigured with recourse to speech and in order to relieve emotional/somatized suffering. See note 35 in chapter 1 (p. 15) on Freud and Breuer.

⁶ "Kofi Annan addresses the First Review Conference of the Assembly of States Parties to the Rome Statute of the International Criminal Court," speech given at Kampala, Uganda, May, 2010, <http://kofiannanfoundation.org/newsroom/speeches/2010/05/review-conference-assembly-states-parties-to-rome-statute-international>.

⁷ Ivan Simonovic (UN Representative to Croatia), "The Role of the ICTY in the Development of International Criminal Adjudication," *Fordham International Law Journal* 23 (1999-2000): 440.

⁸ See ICTY website, "About the ICTY" (<http://www.icty.org/sections/AbouttheICTY>) and "Mandate and Jurisdiction" (<http://www.icty.org/sid/320>).

laws of war.⁹ This phenomenon and its concomitant practices reflect an expansion of conventional legal reparations in international humanitarian law, and, as I argue here, reflect a new and multivalent form of power. This chapter turns to the depoliticizing dimensions of this power within two international war crimes courts in The Hague, Netherlands: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC). Both serve as instantiations of the rise of transitional justice and therapeutic jurisprudence,¹⁰ with their emphasis on restorative justice, as well as what Gary Jonathan Bass calls the vigor of “international legalism” and what Otto Kirchheimer describes as the trend to “increase the effectiveness and enlarge the domain of post-conflict political action by resorting to international courts in the aftermath of war.”¹¹ If judicial proceedings help to “authenticate and limit political action,” as Kirchheimer also contends, then what kinds of *political* actions (or inactions) do these courts make possible, authenticate, or limit with respect to their therapeutic promises and proclivities?

Based primarily on interviews with ICTY and ICC court officials (judges, lawyers from the Office of the Prosecutor and Defense, heads of units, etc.) during the summer of 2009, as well as on analyses of legal documents and public statements, the present chapter will argue that the modality of power associated with juridical healing is at once *political* and *depoliticizing*.¹² This law reflects an operation of administrative or bureaucratic power marked in part by a culture of apoliticity and techniques of depoliticization aimed at the *neutralization* of political mobilization and participation in the wake of conflict. This neutralization effect refers to the courts’ avowed aim to stop continued violence or “revenge,” but also takes place through more subtle techniques that seek to tame potentially rebellious political constituencies (especially victims from the affected communities) and fend off political activity on international, national, and local levels more broadly. This form of power works through an unavowed reliance on a regulatory ideal of victimized subjects as a means of justification and extension, though it also *produces* particular forms of etiolated and isolated subjectivity, which represent a retreat from political agency and collective political action.

This chapter is organized into two parts, both probing different modes of depoliticization employed by the two Hague tribunals. First, I consider the ways in which—through a diffuse promise never quite arrives—an ethos of inaction and docility seems to crowd out robust political subjectivities and collective participatory projects that seek to address and move beyond political violence (“Depoliticization Part I”). I will advance these claims first by considering how the promise works primarily by way of techniques of deferral, displacement, and distancing. This justice “is” a future that never arrives and a site of healing that is perpetually displaced. The time and place of juridical healing perpetually fails to coincide with the time and place of victims. Juridical healing’s highly mutable

⁹ Thomas Buergenthal, *International Human Rights in a Nutshell*, 249.

¹⁰ Rhot-Arriaza and Mariezcurrena, *Transitional Justice*, 2006.

¹¹ Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, NJ: Princeton University Press, 1961), 18.

¹² See: Appendix A: “Fieldwork” and Appendix B: “Questions.”

and multiple instantiations allow it to easily slip into various guises, and into temporal and spatial horizons that are purportedly proximate, but never appear in the present.

In the section “Depoliticization Part II,” I consider the ways in which the interpretive framework mobilized by these two courts produces a figure of the human as a discrete and passive individual stripped of attributes that could be viewed as too inflammatory or “political.” I attempt to trace the contours of a field of visibility and audibility that segregates victims, perpetrators, court officials, and the broader public in ways that forestall opportunities for political inter-action in a shared space-time.

In a cogent critique of human rights discourse, political theorist Wendy Brown argues that contemporary human rights “carries implicitly anti-political aspirations for its subjects—that is, casts subjects as yearning to be free of politics and, indeed, of all collective determinations of ends.”¹³ Drawing on Brown, my critique aims to show that human rights’ lesser known “cousin”—international humanitarian law—also carries anti-political aspirations, suggesting as well that it not only casts its subjects as “yearning to be free of politics and collective determination of ends,” but as needing this freedom from politics for the sake of their healing and protection from further injury.¹⁴ The need for freedom from politics thus seems to eclipse the possibility of a need for it, even if certain political forms could provide the tools for collaboratively building a new and more peaceful future.

Below I demonstrate the ways in which this ascendant discourse of juridical healing is exemplified by the ICTY and ICC, showing the unfortunate implications this discourse has for war-torn communities and for their members’ political relations to “each other and to things.”¹⁵ It would appear that a discourse that impedes the subject’s relations to others, and limits subjects as vulnerable and docile, risks impeding possibilities for rapprochement between groups and individuals—especially in communities already suffering from a decline in the public sphere with a dearth of safe avenues for freely and publically engaging with each other across differences, and across and beyond histories of violence. As such, prospects for peace, justice, and even healing seem as remote from the tribunals as the tribunals are from those they are supposed to serve.

II. Politics and Arendt’s *vita activa*

But what precisely do I mean when I say that the promise of juridical healing is depoliticizing? In tracing the effects of this discourse, I came to see the ways in which it neutralizes a particular view of political action, which, according to Hannah Arendt, is crucial for political life. I draw on Arendt’s work on politics to support an understanding of human action as inexorably tied to forms of collective interaction essential to the work of freedom and justice. And yet, human action and collective interaction are precisely

¹³ Brown, “The Most We Can Hope For,” 465. See also: David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanism* (Princeton, NJ and Oxford, UK: Princeton University Press, 2004).

¹⁴ Brown (ibid.).

¹⁵ Michel Foucault, *Technologies of the Self*, Luther Martin, Huck Gutman, Patrick Hutton, eds. (Amherst, MA: University of Massachusetts Press, 1988), 217.

what the discourse of juridical healing in the aforementioned courts manages to redirect, dilute, and enervate. Arendt understands the *vita activa*—that is, the life of action and speech—as the foundation of political life. Her work on politics was shaped by what Eric Wainwright calls her deep “admiration for the city-states of antiquity, in which a direct, participatory democracy took place in the mode of [face-to-face] discussion and persuasion” not only on a large scale, but also in smaller units.¹⁶ Politics for Arendt is meaningless absent human action, specifically political beings’ capacity to change existing conditions and produce something new in concert with others.¹⁷

Freedom is intimately bound up with action; for Arendt, specifically, freedom to begin something anew—what she calls *natality*. Without the right to collective deliberation to make something new with others, there can be no freedom for Arendt. For her, freedom in its political form is neither reducible to individual freedom to choose one path as opposed to another, nor to an individual’s right to be free from constraints on action imposed by others (the model of freedom promulgated by the discourse of juridical healing in question). Rather, political freedom has as its condition of possibility the plurality that characterizes the public space. After all, she states, “men, not Man, live on earth and inhabit the world,” and plurality is the basis of human action “because we are all the same, that is human, in such a way that nobody is ever the same as anyone else who has ever lived, lives or will live.”¹⁸ Thus, according to Arendt, plurality serves not only as the “*conditio sine qua non*,” but also, “*the conditio per quam*” of politics, not the demise of politics.¹⁹ It is only through interaction—deliberating with others, airing one’s views—that human relationships and communities are sustained. Politics happens *in the world*—in public forums—wherein manifold political positions and opinions are tested and debated as a means of reaching decisions affecting the community. Political work, for Arendt, is never finished once and for all.

An Arendtian framework opens up new ways of imagining sustainable peace and basic freedoms as requiring not only the protection of individuals from harm, but also the protection and cultivation of shared spaces of deliberation and collective decision-making. The courts in question have only sought to protect and prioritize the former, while neglecting, even obstructing the latter. Freedom seen in this (Arendtian) light emerges from communicative interaction on the part of various actors who, invariably, are different in their perspectives and experiences. So *vita activa* without the acknowledgement by and of others in all their plurality ceases to be meaningful political activity, and can threaten the fabric of political community, as the Holocaust or the ethnic cleansing campaigns in Bosnia can attest. By viewing action as a modality of human togetherness-in-difference or collective action rooted in plurality (even in the form of

¹⁶ Eric Wainwright, “The Vita Activa of Hannah Arendt,” *Politikon: South African Journal of Political Studies* 16, no. 2 (1989): 22.

¹⁷ Hannah Arendt, “Lying in Politics,” in *Crises of the Republic: Lying in Politics, Civil Disobedience, On Violence: Thoughts on Politics and Revolution* (San Diego, CA and New York: Harvest/Harcourt, Brace & Co. 1972), 5. See also: Hannah Arendt, *The Human Condition* (Chicago and London: University of Chicago Press, 1958), especially 177–200; Hannah Arendt, *On Revolution* (London: Penguin Group, 1977), 21.

¹⁸ Arendt, *The Human Condition*, 7–8.

¹⁹ *Ibid.*, 7.

feverish disagreement and deep-seated hatreds), one begins to see the correlation between Arendt's *vita activa* and contemporary political projects aimed towards a shared and (potentially) peaceful future.²⁰ Arendt's theorization of the political opens onto a conception of participatory democracy that eschews the detached bureaucratized and elitist forms of politics characteristic of post-conflict judicial proceedings, and its discourses of juridical healing in particular.²¹

Part III. Depoliticization, Part I. The Time of Elsewhen and the Space of Elsewhere

IIIa. Techniques of Deferral and "Elsewhen" Temporality

And there is a lot of hypocrisy, because we say, "well, the victims can come," but at the same time we don't do what we should do in order for victims to come.

-Gilbert Bitti, ICC Senior Legal Advisor²²

The nameless man of Kafka's allegory "Before the Law" seeks admission to "the Law," but the gatekeeper will not grant him entry through its gate "at the moment."²³ The gatekeeper tells the man that perhaps he'll be allowed in later, "but not now."²⁴ Moreover, the gatekeeper informs the man that countless gatekeepers—more powerful than him—reside beyond the outermost gate of the Law. The man decides to wait for permission to be allowed in. The years pass and, due to his perpetual state of waiting, and as a result of having to "spend everything" to "win over the gatekeeper," "his body

²⁰ Although "a peaceful future" is not something Arendt's work attends to directly, it is something that I incorporate here, because: first, I contend that conditions of peace—and thus, by extrapolation, the possibility of a peaceful future—can flourish only when the kind of plurality, reciprocity, and solidarity she describes as essential to politics are securely in place; moreover, the more robust conception of participatory politics I gesture towards in this chapter by way of a critique of the therapeutic turn's (a) political effects seeks to open up the possibility of a future, one that may include peace. If, crudely put, the juridico-therapeutic temporality critically engaged below occasions political inactivity in the present and waiting for a promised future that never arrives, then my approach situates collective political action in a present that is aimed precisely at safeguarding or leaving open the possibility of a peaceful future.

²¹ Arendt criticized the "politics" of the modern era in general for its bureaucratic and elitist character. For a comprehensive summary and bibliography of her work, see, for example: *Stanford Encyclopedia of Philosophy*, "Hannah Arendt," accessed June 2, 2011, <http://plato.stanford.edu/entries/arendt/>

²² Diana Anders, interview with Gilbert Bitti, The Hague, Netherlands, July 13, 2009. (*Bitti wanted to make clear that the views expressed in his interview were solely his personal views and should not be taken to reflect in anyway the views of the ICC.)

²³ Franz Kafka, *The Complete Stories*, ed. Nahum N. Glatzer (New York: Schocken Books, 1946), 3.

²⁴ *Ibid.*, 3.

stiffens and his senses fail him.”²⁵ And yet he clings to the hope that the Law is just and is “surely accessible at all times to everyone.”²⁶ When the gatekeeper announces, “this gate was made only for you. I am now going to shut it,” it is clear that the law’s promise (in terms of potential or expectation) to admit, recognize, and help and redeem the subject has not been, and will never be honored. Not only is the gateway to “the law” not open “to everyone” (the universal human), but it will never be open for the particular man at any point in the future. It is as if the sole function of the gatekeeper, as representative of the law, was to delude and exclude this particular man, and nothing else. The man and his suffering fail to move the gatekeeper to allow the man inside. The gatekeeper recognizes the man’s misery, only to enhance it, in an almost sadistic fashion. In the end, the man from the country is left in a depleted, morbid state as a result of his passive pining for entry into the law’s guarded gate and for a moment that can never arrive. He is utterly alone in his wretchedness and there is no energy, no struggle left in him to change the conditions in which he finds himself.

The depoliticizing effects of the new form of power that characterize juridical healing effectively contribute to a Kafkaesque “Before the Law” scenario. Victims of the crimes deemed the most egregious in humanitarian legal doctrine are those thought to be most in need of expanded legal remedy, and represent the cause célèbre of IHL. Mahmoud Cherif Bassiouni (sometimes called the “Father of international criminal law” and recipient of the Nobel Peace Prize for his contribution to international justice, and for his central role in creating the Statute for the International Criminal Court) has called victims the “lifeblood” of international criminal tribunals.²⁷ Yet, reminiscent of Kafka’s “man,” membership in this group (victims) can come at a cost to the subjects it aims to help, insofar as the promise of juridical healing can engender its own forms of regulation, dependence, and suffering. The promise of juridical healing is not an “empty one,” (a concern of the president of the ICTY and the Preparatory Commission for the ICC, Judge Gabrielle Kirk McDonald); rather, it productively fills space and time with a promise of justice and healing that never arrives producing passive subjects in-waiting and at a distance.²⁸

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What became increasingly clear to me over the course of the interviews I conducted in 2009 was justice as healing was a vague, highly mutable, yet pervasive regulatory ideal. Its ubiquity was equal only to its promiscuity and ethereality; “it,” in its various guises, was actively promised and denied, celebrated and disavowed, pronounced dead and

²⁵ Ibid., 4.

²⁶ Ibid.

²⁷ M. Cherif Bassiouni, “Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights,” *Post-Conflict Justice* 38 (2001): 53.

²⁸ Judge Kirk McDonald announced her commitment “to ensure[ing] that the ICC is more than an empty promise,” to the Preparatory Commission for the International Criminal Court: “Remarks made by Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the former Yugoslavia, to the Preparatory Commission for the International Criminal Court,” UN ICTY news release, July 30, 1999, JL/P.I.S/425, <http://www.icty.org/sid/7745/en>.

announced as on the way, recognized as part of, yet outside the courts' jurisdiction, viewed as a missed opportunity and as an ideal to strive for, cast into a future that never quite arrived or appeared. When it made an appearance—for example, if an official pointed to a specific practice or decision to illustrate therapeutic jurisprudence—then it was often couched in either conditional or relative terms, or figured as but one small part of a much larger effort to rebuild the societies in question.”²⁹ Defense Counsel Karim Khan of the ICTY offered a particularly elaborated account of the court's healing capacities, one that nevertheless bespeaks the contingent, mutable, and relative character of “healing” in this discursive terrain:

*There is no one answer to what heals...this is a factor of the infinite variety of humanity. Some find it cathartic to tell their story. Others may find it traumatizing. One witness may not care if a commander is convicted, but another may find it hellishly important to have the architect of violence punished. They might find it more meaningful to use money for the tribunal to get a local clinic instead. It depends on context... The main purpose [of the ICTY] is a very large hammer to smash a nut if the nut is the rehabilitation of victims. The court is not designed for that. Truth Commissions, rapprochements are more likely to be conducive to healing. ...It requires a mosaic of different measures that will mend the risk in society and the scars that remain.*³⁰

Kahn's statement refracts the unsettled status of the question of juridical healing in IHL, and points to the ways in which officials circle back to it, even when it is placed outside of the courts' “main purpose.” The passage not only highlights the inexorable character of the “therapeutic” in contemporary IHL discourse—in all its nebulosity—but also helps to underscore the difficulty of pinning down and critically analyzing its modes and effects.

Part of the difficulty of grasping the phenomenon of juridical healing in humanitarian law is related to those spatial and temporal logics that I describe as “elsewhereness” and “elsewheness,” wherein justice-as-healing is figured as not quite, or not yet happening, or something that will happen “just around the corner.” “Elsewhen” refers to a temporal logic in which the event of juridical healing is perpetually situated in a time other than the present, and “elsewhere” connotes a spatial logic in which “it” is never present in the present. These logics seem to provide fertile grounds for an incipient and supple form of power, wherein a diffuse promise is continually deferred and redirected elsewhere.

²⁹ An ICC “Outreach” representative, Claudia Perdomo, for instance, did not hesitate when she declared that information about the ICC that had been distributed to members of the affected communities has helped victims to feel empowered and hopeful. But, qualifying her statement, she then stated that the court's reconciliatory and healing effects cannot be “known until the end of the ICC's [involvement] in a country (Diana Anders, interview with Claudia Perdomo, July 16, 2009, The Hague, Netherlands).

³⁰ Diana Anders, phone interview with Karim Khan, October 15, 2009. Claudia Perdomo, furthermore, did not hesitate when she declared that information about justice and its merits (provided by the court/the ICC to members of the affected communities) helps victims to feel empowered; it “gives them hope.” But then, she immediately qualified her statement and said that “it” [referring to its reconciliatory effects, including deterrence] will not be “known until the end of the ICC's [involvement] in a country” (Anders, interview with C. Perdomo, 2009).

Samera Esmeir has linked this logic to what she calls the time of the indefinite present—“a present that does not dissipate”—which frames operations of power aimed at depoliticization, specifically the neutralization of political struggle.³¹ This power’s power, so to speak—its force—stems from the positing of a promised, potential arrival that never fully materializes, but is perpetually forecasted and expected.³² Its anticipatory structure occasions a certain withdrawal from the present in which political action takes place. This paradigm, I argue, takes on an anti-democratic valence in that it fails to accommodate the sort of active participation and plurality that Hannah Arendt regards as essential to politics.

In a word, the bureaucracy that goes hand in hand with the legal institutions in question also seems to be structured by the promise, especially its future orientation. *Deferral* is integral to criminal court functioning. Although legal decisions are made and cases are ultimately closed, the ad hoc tribunals are always approaching their end dates; the law as benefactor of expanded legal remedy exists in a temporal universe steeped in the “to come.” Concretely, these legal behemoths move along at a painfully slow pace and much remains undecided.³³ In my interviews, the vast majority of comments about the courts and their capacity to help individual and collective victims “heal” referred to resolution as forthcoming. In the ICC, this often took the form of a reference to pending decisions on victim participation or protection, or a future case that would more directly attend to certain victims’ experiences, or victim-related measures under Appeal.³⁴ For instance, one ICC official that works with victims and who asked not to be named stated that much about the victims’ participation scheme is yet to be determined and “would be clearer in

³¹ Samera Esmeir, “Times of Engagement: International Strategies of Rule and Liberation” in *Temporalities of Struggle* (paper presented at the Department of Rhetoric, University of California, Berkeley, CA, May, 2010), 3.

³² Esmeir also sees correlations between the indefinite present she describes and Walter Benjamin’s conception of the “empty and homogenous” time of the concept of progress, which stifles the (for him, revolutionary) activity of the “here and now.” Esmeir ties this temporality not only to revolution, as Benjamin does, but to her conception of political struggle (Esmeir, “Times of Engagement,” 1–5). She’s citing Benjamin’s “On the Concept of History,” in *Walter Benjamin: Selected Writings*, vol. 4, eds. Marcus Bullock and Michael Jennings (Cambridge, MA: Harvard University Press, 1996) 389–400.

³³ The Nuremberg and Tokyo trials were much more expedient. For example, the Nuremberg trials began only six months after the German surrender in the autumn of 1945 and were completed within a year. The most high-profile ICTY case—the aborted Milosevic case—underscores the incredibly drawn-out character of cases tried by both the ad hocs; unfortunately, this case does not necessarily operate as the exception to the rule when it comes to the courts’ failure to meet the expediency requirements laid out in their respective statutes. See: Gillian Higgins, “The Impact of the Size, Scope, and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY,” *Northwestern University Journal of International Human Rights* 7, vol. 2 (Summer 2009), <http://www.law.northwestern.edu/journals/jihr/v7/n2/3>; also, Bruce Wallace, “Prosecution in Milosevic Trial Rests Case Early,” *Los Angeles Times*, February 26, 2004, <http://articles.latimes.com/2004/feb/26/world/fg-milosevic26>. The ICC is following suit (see discussion of Lubanga case below). As Raushenback and Scalia suggest, the time of healing is rarely in sync with the time of international criminal justice (Mina Rauschenbach and Damien Scalia, “Victims and International Criminal Justice: A Vexed Question?” *Justice, Peace and the ICC in Africa* 65, March 2008, 452).

³⁴ An anonymous official who had previously worked at the ad hoc tribunals, made a similar comment about the ICC victim participation scheme: “And the whole mechanical part of that work is completely still unsettled until each and every case goes through for the first time...” (Diana Anders, interview with former ICTY and ICTR Official [anonymous C], July 8, 2009).

the future.”³⁵ Similarly, Nicole Samson of the ICC OPT noted: “In the future, other cases will be better served if the victims and witnesses understand the process a bit more, and the statute...and it’s coming”³⁶

The “wait and see” line was not limited to representatives of the ICC. For example, many of my interviewees at the ICTY also considered it “too soon to tell” whether or not victim-centered measures were effective, and whether they came close to achieving what they were designed to achieve.³⁷ But of course, the element of futurity offers a better foothold for the ICC than the ICTY. The ICC is a novel, immense, and permanent court with universal jurisdiction—one of a kind. Its youth and unprecedented mandate to include and help victims have meant that it is more readily let off the hook for falling short of its articulated objectives to help victims heal. It was generally thought by my interviewees that it needs time to iron out the kinks of such procedures. One court official even spoke quite forgivingly of the “growing pains” of the confusing and yet-to-be-determined victim participation and reparations scheme.³⁸ Making a promise is much easier to do when it is vague, abstract, and multivariant, but also when it is tethered to a protracted and confusing process that—in both courts, but especially the ICC—continues to take and change shape.

More specifically, this issue of futurity was at work in the talk surrounding one glaring “kink” in the court’s most high profile and first case—the Lubanga DRC (Democratic Republic of Congo) trial,³⁹ which has been in the works for six years. The actual trial phase began in January of 2009 and it has been plagued by delays ever since. This first and incredibly important case for the ICC was at risk of derailing before it could begin to gain momentum, due in part to the fact that, early on, prosecutors refused to turn over potentially exculpatory evidence to the defense. The Defense, in turn, requested a permanent stay of the trial in late 2010, which was denied by the Chamber in March of 2011. To further complicate matters, the defense accused the prosecution of abuse of process for putting bogus victims on the witness stand, which resulted in the Chamber deciding, in the name of fairness to the accused, to make certain victims’ and

³⁵ Diana Anders, interview with ICC Official (anonymous D), July 16, 2009.

³⁶ Ibid.

³⁷ Diana Anders, interview with ICTY official (anonymous B), July 15, 2009, The Hague, Netherlands.

³⁸ Nicole Samson and others from the ICC talked about the courts’ “growing pains” with respect to its confusing and yet-to-be-determined victim participation and reparations scheme, but in a way that was quite forgiving (Anders, interview with F. Guariglia, 2009).

³⁹ This is the first ICC trial and only one of two that have made it to the trial stage. There has been an incredible amount of public attention directed at this first, thus precedent-setting international trial, especially since it involves a top militia leader from the DRC conflict and involves widespread, harrowing crimes. Lubanga is charged with the conscription, recruitment, and use of child soldiers as commander of the Patriotic Forces for the Liberation of Congo (FPLC) that waged war in the Democratic Republic of Congo (DRC) from 1999 to 2003, leaving at least 50,000 people dead in the Ituri district. An estimated four million people have died throughout the DRC between 1998 and 2003 in what has been called Africa’s “world war” (Judith Armatta, “Written Decision Explains Why Trial Will Go Forward,” The Lubanga Trial at the International Criminal Court [ICC], <http://www.lubangatrial.org/2011/03/04/written-decision-explains-why-trial-will-go-forward>).

intermediaries' identities public.⁴⁰ Given that extreme violence continues in the DRC, anonymity for victims (or those who claim to be victims) who choose to come forth, can mean the difference between life and death.⁴¹ Despite the lip service paid by the court, then to the empowering and cathartic possibilities of therapeutic jurisprudence and victim participation, these very procedures produced new safety concerns for the victims. In effect, the efforts to provide the possibility for closure and empowerment for these actual victim-witnesses in an actual case were trumped by the court's expressed allegiance to a pillar of retributive justice—one proved to be incompatible with a restorative or therapeutic justice paradigm.⁴² Restorative justice for these victims would thus be chronically “to come.”

Deferral of this sort was also manifest in another part of the Lubanga case. Quite early on, the prosecution decided to leave sexual violence crimes out of the indictment, despite the fact that “witness after witness testified that young girl soldiers were repeatedly raped by [Lubanga's] commanders.”⁴³ The Prosecution team decided that the first case needed to be focused on one kind of victim only—child soldiers—since there was “too much evidence” which purportedly threatened to overwhelm the trial.⁴⁴ The legal representatives of sexual violence victims attempted to trigger a court regulation in order to recharacterize the facts in the trial to include sexual crimes, but to no avail. The appeals chamber rejected their request. Thus, these “other victims”—of crimes just as numerous and brutal—would have to wait for their day in court.⁴⁵ Sexual violence

⁴⁰ In its December 2010 submission to the court, following months of hearings, the defense accused the prosecution of rendering a fair trial impossible due to “serious and irretrievable prejudice to the judicial process of seeking and establishing the truth” (Armatta, “Written Decision Explains Why Trial Will Go Forward”). The trial's detour into hearing evidence on alleged abuse of process was initiated when witness 15, presented by the prosecution as a former child soldier, dramatically reversed his testimony, claiming that he lied after being coached by an intermediary for the prosecution. The prosecution, however, argued that witness 15—a previously alleged child soldier—recanted his testimony because he was “responding to threats and the climate of fear in Bunia,” DRC, where he's from (Judith Armatta, “Witness Testifies in Closed Session on ‘Climate of Fear,’” in *The Lubanga Trial at the ICC*, December 1, 2010, <http://www.lubangatrial.org/2010/12/01/witness-testifies-in-closed-session-on-%E2%80%98climate-of-fear%E2%80%99/>). The prosecution used intermediaries to locate potential witnesses during the time that war was raging and prosecution investigators were unable to travel in the DRC. This situation foregrounds the fact that “the court” (as a site of ostensible “healing” for victims) is many steps removed from victims. Not only is it located on another continent and thousands of miles away from the DRC, but it also has had to rely on various middlemen to locate and involve victims from the region. This supports my argument in the next section in relation to the courts' promise of legal healing as always already “elsewhere.”

⁴¹ See: Elisabeth Baumgartner, “Aspects of Victim Participation in the Proceedings of the International Criminal Court,” *International Review of the Red Cross* 90, no. 870 (June 2008): 416.

⁴² The Chamber “pointed out its dual and sometimes conflicting obligations to protect the safety of victims and witnesses and to assure the accused receives a fair trial” (Judith Armatta, “Court Orders Disclosure of Victims' Information,” *The Lubanga Trial at the ICC*, February 14, 2011, <http://www.lubangatrial.org/2011/02/14/court-orders-disclosure-of-victims%E2%80%99-information/>).

⁴³ Lisa Gambone, “Failure to Charge: The ICC, Lubanga and Sexual Violence Crimes in the DRC,” *Foreign Policy Association, War Crimes blog*, July 22, 2009, <http://warcrimes.foreignpolicyblogs.com/2009/07/22/failure-to-charge-the-icc-lubanga-sexual-violence-crimes-in-the-drc/>.

⁴⁴ *Ibid.*

⁴⁵ The limited focus on child soldiers reflects a hierarchization of victimization within the ICC. In this discursive terrain, those deemed most innocent—children—are understood as having been sullied by the

victims were called upon to postpone their hope of recognition, closure, and healing until the “right” case came along. Paolina Massidda, the Principal Counsel of the ICC’s Office of the Public Counsel for Victims hoped that:

*there would still be a possibility that the facts of sexual violence will be recognized at the end of the [Lubanga] trial, meaning there is a possibility that in the judgment the judges might acknowledge that during the recruitment, young girls were also raped and obliged to be sexual slaves.*⁴⁶

Massidda also conceded that this recognition would not in any way affect the charges against Lubanga or somehow enable the sexual violence victims to participate. The best they could hope for with respect to the trial was the limited moment of recognition Massida describes, which would seem to offer little consolation to those victims, and certainly falls short of the participatory promise held out in the Rules of Procedure and Evidence.

Sure enough, when the long-awaited Lubanga judgment was handed down in March 2012 (in which he was convicted of the war crime of conscripting and enlisting child soldiers for the purposes of waging war),⁴⁷ the trial chamber was “precluded from taking allegations of sexual violence into consideration.”⁴⁸ The Chamber stated that, “given the prosecution’s failure to include allegations of sexual violence in the charges [...] this evidence is irrelevant for the purposes of [the Decision].”⁴⁹ The chance for sexual violence to be incorporated into the trial as a charge worthy of conviction had been missed early on, though—deferring the promise of juridical healing for sexual violence victims yet again—the chamber announced in the Judgment that it would consider “in due course” whether sexual violence evidence “ought to be taken into account for the purposes of sentencing and reparations.”⁵⁰ The promise of juridical healing was thus elsewhere, either as a lost opportunity (when charges were initially drawn up), or as a potential opportunity in the indefinite future. As noted by the Women’s Initiative for Gender Justice, “[t]he Chamber explicitly deferred making any decision on whether evidence of sexual violence” would be “accounted for” in the last phases of the trial—sentencing and reparations.⁵¹ No decision has been made on this point as of yet. Legal

crimes figured as most transgressive (because of their target). For a cogent analysis of the figure of the child soldier in contemporary humanitarian discourse, see Liisa Malkki’s essay “Children, Humanity and the Infantilization of Peace,” in Ilana Feldman and Miriam Tiktin’s edited volume, *In the Name of Humanity* (Durham, NC: Duke University Press, 2010), 58–86.

⁴⁶ Wairagala Wakabi, “Interview: Most Victims in Lubanga Trial Are Not After Reparations, They Just Want Their Stories Told,” *The Lubanga Trial at the ICC: Commentary Trial Reports*, May 30, 2010, <http://www.lubangatrial.org/2010/05/30/interview-most-victims-in-lubanga-trial-are-not-after-reparations-they-just-want-their-stories-told/>.

⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo, Judgment*. ICC-01/04-01/06 (ICC, 14 March, 2012).

⁴⁸ *Ibid.*, para 896.

⁴⁹ *Ibid.*

⁵⁰ *Prosecutor v. Lubanga*, para 631.

⁵¹ Women’s Initiatives for Gender Justice, “Trial Chamber I Issues First Trial Judgment of the ICC: Analysis of Sexual Violence in the Judgment,” *The Lubanga Trial at the ICC*, <http://www.lubangatrial.org/2012/06/06/trial-chamber-i-issues-first-trial-judgment-of-the-icc-analysis-of-sexual-violence-in-the-judgment>, June 6, 2012.

healing for sexual violence victims had, once again, been placed in the time of an indefinite present that has not dissipated and of juridical healing to come.

As the Lubanga trial suggests, the “logic” of deferred futurity is often bound up with reparations—something that many of my ICC interviewees tethered to healing (reparations are not made available to victims of crimes tried by the ICTY). The ICC has been lionized for its cutting edge reparations scheme, given that, for the first time in history, an international criminal court has been “granted the power to order a criminal perpetrator to pay reparation to a victim who has suffered as a result of the perpetrator’s criminal actions.”⁵² Unfortunately, it seems that this particular pathway to healing is once again placed in an indefinite present or in a future that is yet to arrive. Reparations in the context of the ICC are meant to happen at the end of a case, though only the Lubanga case has handed down its judgment, and only a few other cases have commenced. Reparations procedures are still being hashed out by ICC lawyers. Trial-dependent reparations have never been granted, and there seems to be much confusion about the division of labor between the Trust Fund for Victims and the court-ordered reparations to be paid by those convicted of crimes in the ICC.⁵³ Gilbert Bitti also faults the reparations scheme for its “weakness,” which he sees as stemming from the fact that “most of the people prosecuted here do not have a penny.”⁵⁴ Given that “most of the persons prosecuted will be indigent,” he concludes, the judge’s power to order convicted war criminals to pay reparations to victims will be rendered meaningless.⁵⁵ Susana SáCouto, Director of the ICC War Crimes Research Office, made clear that, “very little is known about the reparations scheme in practice;” much remains “to be determined.”⁵⁶

⁵² From the ICC Reparations webpage: <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Victims/Reparation/Reparation+for+victims.htm>.

⁵³ “Pursuant to article 75 of the Rome Statute, the ICC may lay down the principles for reparation for victims, which may include restitution, indemnification and rehabilitation. The Court has the option of granting individual or collective reparation, concerning a whole group of victims or a community, or both. If the Court decides to order collective reparation, it may order that reparation to be made through the Trust Fund for Victims and the reparation may then also be paid to an inter-governmental, international or national organization” (see “Reparations for Victims,” ICC website, <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Victims/Reparation/>). I found the role of the TFV to be very confusing. It is apparently meant to step in and provide reparations and rehabilitation when a convicted person does not have adequate resources to pay reparations himself, and yet, it also can offer certain forms of “support” (technically not considered “reparations”) to family members and other community members somehow related to the victim of the crimes in question. The latter has apparently already been carried out in a few instances and is not contingent upon conviction. Tracking down more specific information about the TFV, its obligations, and the “support” it has already made available to “victims” (broadly construed) in both the DRC and Uganda has proven to be surprisingly difficult. I know that the TFV has already sponsored some projects in these regions, but could not find any specific information about their beneficiaries or their content. See: Wakabi, “Most Victims in Lubanga Trial Are Not After Reparations,” *The Lubanga Trial at the ICC* (<http://www.lubangatrial.org/2010/05/30/interview-most-victims-in-lubanga-trial-are-not-after-reparations-they-just-want-their-stories-told>).

⁵⁴ Anders, interview with G. Bitti, 2009.

⁵⁵ Ibid.

⁵⁶ “Kampala Launch of ICC Reparations Report,” *IntLawGrrls*, <http://intlawgrrls.blogspot.com/2010/06/kampala-launch-of-icc-reparations.html>, June 7, 2010. See also: Baumgartner, “Aspects of Victim Participation in the Proceedings of the International Criminal Court,” *International Review of the Red Cross* 90, No. 870 (June 2008).

As for the ICTY, its recourse to a future in which victims would benefit from legal healing extends beyond the courts' tenure, given its upcoming target cessation date and given that it is unlikely to take on any new projects or cases as a result of its already overburdened staff and facilities.⁵⁷ This temporality of a future that is unlikely ever to arrive is exemplified by the so-called Project 5000 initiative, which I learned about from the heads of the Victim and Witness Unit at the ICTY. When I conducted my interviews in 2009, the unit heads said this project was aimed at assessing the extent to which over 5000 victim-witnesses who had worked with the court had found court participation and testifying to be cathartic or helpful in some way. It was the hope of its architects that the project findings could help the ICTY to develop "best practices" for its own uses and for similar courts, with an eye towards closure and empowerment for those deemed most vulnerable. Yet, when I later followed up on the status of the project and its findings, I learned that it had yet to get off the ground, apparently for lack of funding and political will. Noticeably absent was any discussion of attempts to resuscitate the project; resignation had set in. A therapeutically-oriented project, rooted in a not-so-implicit therapeutic legal promise was once again pushed into the future, but one that will likely never materialize, given the fast-approaching ICTY completion date.

Although less common, there is a tendency for some interviewees to point to a time *before* when it seemed more likely that the therapeutic "goods" promised would be delivered. There was a quality of lament to these accounts in which legal healing was portrayed as a missed opportunity. This can also be grouped as a phenomenon consistent with the elsewhere temporality of juridical healing that began to emerge in my interviews. A few interviewees referred to a more victim-friendly and healing-conducive time at the ICTY, which came to an end with the judgment of the Blaskic case in 1999.⁵⁸ The category of victims at the ICTY was, from the outset, much narrower than its counterpart at the ICC. The ICTY Blaskic decision sought to narrow the kind and number of victims qualified to participate in court proceedings and clarify the scope of their participation. This shift in approach reflects the court's desire to conduct speedier trials in response to criticism for its protracted trials in its earlier years. Concretely, as a result of this

⁵⁷ The following was pulled from the ICTY website's "Completion Strategy" page. It quickly becomes clear that deferral and the temporality of the seemingly endless indefinite present have plagued the court for years. Here is a summary of the court's every changing completion strategy: "The second target date was the completion of all trials by the end of 2008. The Tribunal's president informed the Security Council that the majority of trials will be completed during 2009 and that, due to the late arrests of accused and the sheer complexity of certain cases, a small number will continue into the first part of 2010. Estimates as of November 2010 suggest that of the ten cases in the trial or pre-trial stage, four will be concluded in 2011, and five are anticipated to conclude in 2012. The case of Radovan Karadžić is expected to finish at the end of 2013. All appeals are scheduled to be completed by the end of 2014, although the recent, unavoidable delays in the Karadžić case suggest that this date will have to be re-assessed at an appropriate time" (ICTY Completion Strategy, <http://www.icty.org/sid/10016>). In other words, the court completion date has been pushed back *at least six years* (of the 20 or so it will be in operation). The high-profile Karadžić case is liable to defer this revised schedule once more, and a great deal rides on its success, given the much-criticized Milosevic case. See: Judah, "The Fog of Justice," 23–25.

⁵⁸ *Prosecutor v. Blaskic, Decision on the Application of the Prosecutor: Requesting Protective Measures for Victims and Witnesses*. IT-95-14-T (ICTY, 17 October 1996).

precedent, fewer witnesses came to “tell their stories.”⁵⁹ Instead, witness statements increasingly replaced oral presentations in court, and the few witnesses who did have their “day in court”—the ostensibly crucial moment for juridical healing—were simply invited in to confirm that their written statements were true before cross-examination by the Defense. So, fewer witnesses were pulled into the process, fewer “stories” were told, and those stories that were “told” either took the form of a brief written statement, or were limited to oral statements relevant to the “facts” of the case that were then subject to cross-examination. This emphasis on “the rule of law” as well as the more adversarial dimensions of law in particular resulted in fewer opportunities for the promissory juridical healing to be tested. The moment for healing had, according to this account, come and gone.⁶⁰ With these mournful histories in which legal healing’s glory days are deemed too soon and too short-lived, comes an ambient resignation.

IIIb. Promises Emanating from Elsewhere

At present, ICC outreach field-staff have limited capabilities on the ground. Consequently, in-country activities are poorly equipped to respond to unfolding political developments. In all situation countries, a common remark has been that Court is not present. ’ [my emphases]
-Mariana Goetz⁶¹

⁵⁹ Johanna Pozen, “Justice Obscured: The Non-Disclosure Of Witnesses’ Identities In ICTR Trials,” *International Law and Politics* 38 (2006): 281–322.

⁶⁰ A few of my ICC interviewees pointed to a more victim-friendly moment in the ICC’s past, or even its prehistory: One reference to such a time applied to a moment during negotiations of the Rome Statute at the so-called Rome Conference: According to Gilbert Bitti of the ICC’s OTP (who was also a member of the French delegation to the Rome Conference and a consultant on victims’ issues when the ICC opened) there was a “window between 1991–2001 when we would make a better world,” when “victims could score some points,” and “at least there was a possibility to make a step forward [for victims].” But, he added, after that period, and now, there was “a step backwards; we are not in a good time” (Anders, interview with G. Bitti, 2009). The other was a reference to the period before the parameters of the category “victim participant” had been legally interpreted and specified. The provisions in the Rome Statute and the Rules of Procedure and Evidence that pertain to victims and their participatory rights are very few and very broad; they are open to interpretation. This has caused considerable confusion and generated many debates about the actual and ideal parameters for victim participation in the ICC. See, for example: Anders, interview with “Officer of the OPCV” (anonymous), July 16, 2009; Anders, interview with N. Samson, July 5, 2009; Anders, interview with Gabriella Rivas, July 15, 2009. For a comprehensive account of the victim participation scheme and the extent to which its substantive details are far from being settled and clarity is still “to come,” see: Baumgartner, “Aspects of Victim Participation in the Proceedings of the International Criminal Court,” 409–440; Mekjian and Varughese, “Hearing the Victim’s Voice,” 1–46; Wakabi, “Most Victims in Lubanga Trial Are Not After Reparations,” <http://www.lubangatrial.org/2010/05/30/interview-most-victims-in-lubanga-trial-are-not-after-reparations-they-just-want-their-stories-told/>.

⁶¹ Marianna Goetz, “The International Criminal Court and Its Relevance to Affected Communities,” in *Courting Conflict? Justice, Peace and the ICC in Africa*, eds. Nicholas Waddell and Phil Clark (London: Royal African Society, March 2008), 65–72.

With Goetz's quotation as our starting point, we can begin to fathom the elsewhere-ness of legal healing "at present," and the political potentialities it makes possible as well as those it preempts. If the court itself is "not present" at present (geographically or otherwise), then the healing it purportedly dispenses and sets in motion is also doomed to remain elsewhere, outside the here and now. We have already considered the ways in which promises of legal healing are never quite present in temporal terms. In this section, I will consider this promise's spatial coordinates, which could be understood as reflecting the spatio-temporal logic of proximity or "close by," but still and always elsewhere.

Two ways in which the elsewhere-ness of juridical healing manifested in my research in the summer of 2009 were the polyvocality (multiple voices) and polylocality (multiple discursive sites) from which the "therapeutic" discourse emerged within the legal discursive spaces in question. In other words, not only was juridical healing articulated by multiple voices and figures, it emanated as well from a number of different sites within the institutions. Certain patterns emerge, clearly linking particular kinds of utterances and positions on juridical healing to particular institutional roles. For instance, there was a marked difference between the ways juridical healing was figured by UN and court-related officials at different levels of the UN hierarchy. More often than not, the most grandiose "promises" of healing came down from on high. In other words, UN diplomats—removed from the day-to-day operations of the courts both geographically and in terms of their professional positions—were responsible for the bulk of the more ambitious utterances and promises of juridical healing (as much of the citations throughout the previous chapters attest). For example, at the UN Security Council deliberations that led to the establishment of the Yugoslavian Tribunal, the Hungarian delegate drew a direct correlation between the tribunal's policies and "healing of the psychological wounds" produced by the conflict.⁶² This general view was echoed by leading members of the ICTY, most notably by its first president, Antonio Cassese, who figured the ICTY as an instrument of reconciliation, and linked reconciliation to "the human dimension of international law" and—with the help of truth—to closure.⁶³ This approach set the tone for the ICTR and later, the ICC. The more explicit and bold rhetoric of legal healing from "on high" is even more pronounced with respect to the ICC,⁶⁴ captured by Kofi Annan's recent statement:

[B]ringing to justice those responsible for the post-election violence is essential to help Kenya heal its wounds, and prevent such crimes from being committed again.... [The ICC's work] is about bringing individuals to account for crimes

⁶² *Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting*, U.N. SCOR, 3175th mtg., at 12-13, U.N. doc. S/PV.3175 (22 Feb. 1993): 19–20.

⁶³ Janine Natalya Clark, "Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation," *European Journal of International Law* 20, vol. 2 (2009): 415.

⁶⁴ For example, at the the United Conference on the Establishment of an International Criminal Court, Paskal Milo, Minister of Foreign Affairs of Albania at the United Nations stated: "Albania favors the establishment of an International Criminal Court to re-establish justice, and rehabilitate victims," UN press release, June, 17, 1998, L/ROM/10.

*they may have committed and ensuring that the victims receive justice. After all, justice is an essential component of the process of healing.*⁶⁵

I encountered this brand of inflated and especially vague diplomatic speech less frequently among court practitioners. High-ranking officials enjoy the benefits of making grandiose pledges that those lower down on the totem pole are expected to convert to felicitous outcomes. And holding the head of the UN, a politician, or UN diplomat accountable for this highly politicized and predictably magniloquent rhetoric is complicated by the fact that their promises are hard to attach to specific practices or programs, and these figures are far removed from the courts *and* the affected communities, and thereby somewhat shielded from criticism coming from within or outside the courts. If these more awe-inspiring declarations and promises can be attributed to anyone or anything at all, it is to the abstract figure of the “court,” but not to those who made the promises. Under these conditions, such inflated rhetoric of juridical healing continues to roll off the tongues of UN diplomats and others who are similarly shielded from popular and institutional accountability. The sources of these more sweeping pronouncements are as difficult to track down as the promises they engender.

Another form of the elsewhere logic I came across applied exclusively to the ICTY. On several occasions, my ICTY interviewees downplayed the Yugoslavian tribunal’s restorative jurisprudential investments, while pointing to the ICC as the “victims” court. The message went something like this: “*That* kind of thing happened ‘across town,’ at the international court, but *here* we practice real law...” The ICTY interviewees at times emphasized that the “rule of law,” deterrence, and ending impunity through prosecutions constitute the main mission of the ad hoc tribunals. Nevertheless, there was a palpable atmosphere of therapeutic justice at the ICTY, and its normative ideals regularly surfaced during my interviews and in key tribunal publications.⁶⁶ This indicates a heightened tension between the court’s retributive and restorative commitments, as indicated in the very first lines of text on the ICTY homepage:

*The International Criminal Tribunal for the former Yugoslavia (ICTY) is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990’s. Since its establishment in 1993 it has irreversibly changed the landscape of international humanitarian law and provided victims an opportunity to voice the horrors they witnessed and experienced.*⁶⁷

⁶⁵ Kofi Annan, “Statement Issued by Mr. Kofi Annan, Chairman of the African Union Panel of Eminent African Personalities,” Kofi Annan Foundation, press release, April 5, 2011, <http://kofiannanfoundation.org/newsroom/press/2011/04/statement-issued-mr-kofi-annan-chairman-african-union-panel-eminent-african-p>.

⁶⁶ Karim Khan, Defense Counsel at the ICTY, very matter-of-factly said that when the ICTY was created, it was clear that it was not simply an instrument of “justice, international peace and security, but also to get justice for victims.” He pointed out that its architects operated “with the view that justice and international accountability help to heal the wounds [and] put the past to rest.” (Anders, phone interview with K. Khan, 2009). See also: “Information Booklet for ICTY Witnesses,” ICTY, 2007, http://www.icty.org/x/file/About/Registry/Witnesses/witnesses_booklet_en.pdf.

⁶⁷ “About the ICTY,” <http://www.icty.org/sections/AbouttheICTY>.

Here, the attention to victims and their traumas—the focus and key impetus for restorative justice—is placed front and center and rendered coterminous with the work of a “court of law.”

Alongside a therapeutic impulse, and woven between the therapeutic rhetoric of telling one’s story and reconciliation, one could also trace patterns of dismissive, derogatory characterizations of victim-centered justice. For example, an ICTY judge described the more comprehensive approach to victim participation at the ICC a legal “disaster,” insofar as it produces conflicts of interest between victims, the prosecution, and the defense.⁶⁸ He added that he believes the ICC should follow the ICTY’s footsteps and “distinguish what is best practically and jurisprudentially, as opposed to focusing on the more political issues of what is good for humanity.”⁶⁹ So although something akin to restorative or therapeutic jurisprudential approaches were advocated and referenced in numerous ways by numerous court officials, their instantiations were much harder to locate in the ICTY context. The ICTY interviewees tended to be much more strategic about their court’s therapeutic practices and priorities, often disavowing or minimizing the therapeutic dimension at moments when it could be construed as preferential treatment for victims at the expense of the rights of the accused.⁷⁰ According to some, healing was a key priority for the ICTY, but others preferred to draw clear lines of demarcation between the courts’ “core mission” to administer justice and its subsidiary concern for victims and healing. Matias Hellman from ICTY Outreach articulates this approach:

It’s problematic to mix the rhetoric of helping victims, or bringing reconciliation with what is essentially criminal prosecutions... But, indeed, [reconciliation] has been talked about from the tribunal’s perspective, but it’s quite tricky because the court has to focus on its core tasks, which is to hold efficient and fair trials on the basis of all the evidence presented to the court and it cannot try people in the court with the expectations of the healing process or the effects in the societies or communities in the region. So, I would say that the tribunal simply has to do its core job as well as possible--to prosecute, and try and adjudicate these cases in a court of law. And whether, then, that has a wider positive effect in the region of healing or peace building or reconciliation...that is largely beyond the tribunal’s control.⁷¹

⁶⁸ Diana Anders, interview with Judge (anonymous A), July 2, 2009, The Hague, Netherlands.

⁶⁹ Ibid.

⁷⁰ Also, several of my ICTY interviewees asked me not to cite them or have their names appear anywhere in my research, which I took to be a reflection of the especially sensitive question of the ICTY’s therapeutic inclinations. According to my anonymous interviewees, any statements they made about the court’s restorative endeavors could come back to haunt them, either because: they could be understood as casting aspersions on the very court they are meant to represent, thereby incurring professional risks; or, because, if they spoke too enthusiastically, they could jeopardize the ICTY’s standing in the eyes of victims and affected communities (by raising hopes and fostering disappointment) or the international community (by threatening the court’s credibility as a fair and powerful institution that prioritizes retributive justice over the less established restorative model).

⁷¹ Anders, phone interview with M. Hellman, 2009.

From this perspective, healing, peace building, and reconciliation might be fringe benefits of fair and efficient trials, but it certainly does not qualify as an ICTY core concern or responsibility. With respect to its “core concerns,” juridical healing is elsewhere.

Not surprisingly, the ICC officials were, as a rule, much more outspoken on this topic than ICTY officials, given their different mandates when it comes to victim participation and restorative justice measures.⁷² And yet, the general temporal and spatial schematic patterns outlined here were manifest in both courts, albeit in somewhat different ways. When my ICTY interviewees directed me to the ICC—across town—to learn about a true “victims” court, I was, upon arrival, once again, sent on various wild goose chases in search of the much-touted, but ever-elusive “therapeutic” mechanisms and outcomes the ICC was said to offer. The one consistent message I took from the so-called victim’s court was that much of its victims’ participation scheme was “to be determined” and there was significant disagreement and confusion on the part of court officials and victim representatives about which kinds of victims to include and what inclusion should entail. As an ICC Senior Legal Advisor, Gilbert Bitti, recognized, “[t]here is a lot of resistance in this institution for victims. You have the former President of the court saying we should revise what we are doing for victims... Very simply, there is no agreement on this issue either inside of the court or outside of the court.”⁷³ In other words, court officials, victims, their representatives and I were all equally disoriented by the question of juridical healing, whose status can be described as predominantly elsewhere and elsewhere. Fabricio Guariglia raises the critical but still unresolved question, “Now [the ICC] is a more victim friendly court *in theory*, but what does that mean in practice?”⁷⁴

⁷² Unlike the ICTY, the ICC mandate explicitly invites victims to present their views and concerns at appropriate stages of proceedings (based in part on the civil law notion of *partie civile*, “where civil parties can be enjoined into criminal proceedings with a view to claiming damages”); can be granted legal aid to ensure their representation; and can claim reparations for psychological and other injuries incurred (see Articles 68(1), 68(3), 43(6), 75, and 79 of the Rome Statute and Rules 92(3) and 16 (1)(b) of the ICC’s Rules of Procedure and Evidence. See also: Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 (*Redress: Justice for Victims. The ICC’s Reparations Mandate*, London: Redress Trust, May, 20, 2011), 1, http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf. The ICTY’s mandate is much more limited with respect to victims. See, for example: Mercedeh Momeni, “Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia,” *Howard Law Journal* 41, vol. 1 (1997): 155, 164.

⁷³ Anders, interview with G. Bitti, 2009. Bitti stressed tension within the courts and its different departments on the issue of its treatment of victims and the extent of their inclusion in the trial process. In part, he said this was a tension born of the civil versus common law traditions from which the lawyers of the court and the diplomats who drew up the Rome Statute come. There is also the issue of the balance of power in the courtroom. Prosecutors, he stated, want to take credit for “helping victims” but they also do not want to deal with the fallout from upsetting local leaders (i.e., stirring “political problems”), or compete with a third party (i.e., wherein the victims becomes their own, third party, in addition to the traditional defense and prosecution). He stated: “I would not say that the openness to victims is complete hypocrisy; there is a part of hypocrisy...there is a part of real effort to do something...there is a lot of resistance, but there is also some willingness...it’s all in one...it’s all there. There are a lot of struggles there. There is an everyday fight about ‘are we going to accept victims? Do we not?...What are we going to do?’”(ibid, 8–9). See also: Anders, interview with F. Guariglia, 2009.

⁷⁴ Anders, interview with F. Guariglia.

Arendt's theorization of the political allows us to mark the critical shortcoming of the current IHL program with respect to its ostensibly palliative modality: it breeds a certain inactivity and retreat from political action in the here and now and instead seeks refuge in individualizing psychological and/or moral registers. Moreover, Arendt's claims about the necessary plurality of politics may be in line with IHL's legal doctrine of crimes against humanity and genocide, wherein these crimes entail as a systematic plan to annul plurality in the name of a dominant monoculture, but her intervention highlights the fact that justice for the affected communities will have limited success if it throws the (Arendtian) political and plural baby out with the bathwater.

IIIc. Promises Going to Elsewhere

The promise of juridical healing "in practice," with regard to the logic of elsewhere-ness, and the dispersal of responsibility it facilitates becomes especially apparent in a key discursive site. I am referring to how the *object* of the promise of legal healing is construed, namely, victims. The wide variety of juridical healing "promises" I encountered in both my interviews and in the literature were often directed at an amorphous and shifting category of "victims" affected by a specific conflict. At turns, "victims" applied to individual victims of individual crimes, solely to victims who appeared as witnesses before either of the courts, to those who had "a personal interest" in the crimes being adjudicated, to whole communities and nations, even to "humanity."⁷⁵

The legal definition of "victim" employed by the ICTY is much narrower than the ICC definition. As discussed above, the ICTY victim is always and only also a material witness in a case, and participation for the ICTY victim since the aforementioned Blaskic case is even further limited, insofar as: fewer witnesses are selected to participate in the trial; fewer opportunities exist for giving oral testimony; and all testimony must now be subjected to a "streamlining" test meant to ensure fairness to the accused. With both the ICC and the ICTY, some victims who apply to participate in court proceedings and then—sometimes months and years later—are finally "approved" by the court, are later informed that they are no longer needed or do not meet the requirements of victim "this time." They are, in Fabricio Guariglia's words, "expelled from the procedure."⁷⁶ Hopes

⁷⁵ "Article 68.3 [of the ICC's Rome Statute] says that when the *personal interests of victims are concerned*, the court shall permit the *views and concerns of victims* to be heard in a manner which is not prejudicial toward or contrary to the interest of the defense and a fair trial" (Wakabi, "Most Victims in Lubanga Trial Are Not After Reparations," <http://www.lubangatrial.org/2010/05/30/interview-most-victims-in-lubanga-trial-are-not-after-reparations-they-just-want-their-stories-told/>).

⁷⁶ Anders, interview with F. Guariglia, 2009. This also happens at the ICC with respect to victims who are approved for participation at the so-called "situation" stage of trial proceedings and the "case" stage, which comes later (incidentally, these participants are distinct from the victim-witness, though technically, one victim could serve as both a participant victim and a victim-witness). "Situation" victims constitute a broader category, which pertains to participation in the period before there is a case against the accused. Victims applying for the latter status are subject to more stringent guidelines, given that these "case" victims must prove a direct link to the specific crimes adjudicated in a given case. Rauschenback and Scalia ("Victims and International Criminal Justice," 2008) point out that if a victim is in fact lucky enough to meet the requirements of victim participant status in the "situation" phase (which is no small feat, given the lack of information available to victims in affected communities, the complicated applications procedures, and requirements of identification), there is no guarantee she will be recognized as a victim participant in

are thus raised, only to be dashed, and opportunities to “tell one’s story” or try out the much-touted cathartic experience of “recognition” are lost irreversibly. The victims are often elsewhere when these trials are thought to perform their most triumphant acts of healing.

Moreover, the strategy of both courts has been to find a few representative stories of victimization meant to “cover” a range of victim’s experiences and symbolically represent whole classes of victims vis-à-vis one victim-witness on the stand. The ICC’s Gilbert Bitti and others chalked this up to the realities of conducting a fair and speedy trial. Karim Khan of the ICTY Defense team summed this up as follows:

*You have sometimes hundreds of thousands of victims, but the prosecution will select only a small portion of them. You are representing a class when you are invited to be a witness. Countless others who have suffered crimes can’t be involved with the court.*⁷⁷

Not even a small fraction of “victims” in the most narrow sense will be granted the opportunity to participate in court proceedings, and so there has been a pragmatic attempt to create a “typology” of victimization, so that in a given case, a certain “type” of victim and her story is expected to cover large numbers of victims and capture their (presumably shared) experience, purportedly allowing them all—through group identification and extrapolation—to enjoy the cathartic benefits of legal recognition and participation.⁷⁸ This is part of the “ripple effect” approach embraced by both courts resulting from the sheer number of victims and the limited resources and time available for including victims in more comprehensive and meaningful ways. By various means, and one by one, victims are “in practice,” and not unlike the man from the country in Kafka’s parable, removed further from the “gates” of the law that promise healing by way of participation, storytelling, and legal recognition of one’s suffering.

This tactic of distancing is further evidenced in the way victim-witnesses are in fact affected by the courts’ policies concerning them. Any perceived political involvement on the victim-witnesses’ part—especially organized actions that involve protest in one’s home country, or even speaking up about the court’s shortcomings related to victim-

the “case” phase. “This fact alone brings the risk of great frustration among those initially attributed victim status at the situation stage and then who, from one day to the next, find themselves barred from participation in the process” (Baumgartner, “Aspects of Victim Participation in the Proceedings of the International Criminal Court,” 454–55). Baumgartner attempts to clarify these highly confusing terms and attendant roles and rights in the following way: The differentiation between “situation” and “case” level, although not explicitly mentioned in the ICC’s constitutive documents, emanates from the structure of the statute. Whereas a “situation” is broadly defined in terms of temporal and territorial parameters and may include a large number of incidents, supposed perpetrators and thus potential indictments, “case” refers to a concrete incident with one or more specific suspects occurring within a situation under investigation. It entails proceedings following the issuance of a warrant of arrest or a summons to appear (Baumgartner, 454).

⁷⁷ Anders, phone interview with K. Khan, 2009.

⁷⁸ “You make a typology of the conflict and you say... I’m going to try to have a prosecution which is fairly representative of the victimization.” He adds: “You are not going to prosecute all crimes, but you are going to, at least try to prosecute all types of crimes” (Anders, interview with G. Bitti, 2009).

centered practices—could prove logistically challenging and incredibly risky.⁷⁹ The vast majority of victims live far away from The Hague; they often lack the financial and emotional resources to do more than simply get by. Moreover, disclosure of their identities, or political or ethnic associations could be perilous for them, their families and associates. For the short period of time that they are in proximity to the courts, they are usually alone and exhausted by their personal trials as well as their legal ones. These victims' identities are sometimes protected, and—especially in The Hague, they are without their usual support networks.⁸⁰ In other words, a certain atomistic and abstracted apoliticality is a condition of possibility for becoming the right kind of victim-witness for the courts. Recalling Arendt's concept of "the new" or "natality,"—which refers to the human ability to bring new ideas, communal relations, institutions, and conventions into the present to produce new beginnings—one can begin to see how participation in proceedings as a victim-witness can give rise to a suspension of alternate forms of participation and engagement. Specifically, forms of political activity geared towards producing new beginnings with others, by and for oneself and a larger community.

These victims must often wait, alone, and hope for healing to be made available to them by the courts. Opportunities to "try out" the potentially cathartic empowerment of the victim are in large dependent upon how the court handles a given case, and more often than not, victims are not given as much time or recognition as they had hoped for.⁸¹ At best, their activity and agency is often reduced to providing individual testimony and narrating one's personal story of victimization. To have a voice in this context is severed from the notion of having a political voice and achieving political representation. Rather, "voice" here—if it is admitted and heard at all by this "Law"—is often reduced to a dry recounting of facts relevant to the case or to a truncated, individualized tale of frailty and injury. The conditions of legibility and audibility governing this discursive arena thwart the possibility of criticism of the court, active participation, as well as interaction and dialogue (between victim and court and between victim and others in her community). So most victims are not only elsewhere relative to the courts offering therapeutic and empowering outlets for victims, but are also elsewhere with respect to their communities and anything deemed "political" in the Arendtian sense.

⁷⁹ Philip Kearney, formerly of the ICTY prosecution team, talked about one trial he was involved with, in which a victim-witness equated participation with the tribunal with a "death wish," given that—despite the fact that his testimony was "anonymous"—his identity was known by the accused and his posse. The victim was sure the latter were going to try to kill him and his family (Anders, interview with P. Kearney, September 25, 2009).

⁸⁰ The lack of, or diminished support networks available to victims extends beyond their stay in The Hague. The disintegration of family and other networks of support is a reality in the day-to-day lives of many victims who make their way to the courts in question. See: Goetz, "The International Criminal Court and Its Relevance to Affected Communities," in *Courting Conflict?* 2008); Baumgartner, "Aspects of Victim Participation in the Proceedings of the International Criminal Court," *International Review of the Red Cross*, 90, no. 870 (2008); Rauschenbach and Scalia, "Victims and International Criminal Justice: A Vexed Question?" in *Justice, Peace and the ICC in Africa* 65 (March, 2008).

⁸¹ Baumgartner, "Aspects of victim participation in the proceedings of the International Criminal Court," 416.

At the ICC, victim participation is codified and takes a variety of forms.⁸² Given the broad and unprecedented rights made available to victims, one could easily be under the impression that a significant portion of victims will have their cathartic “day in court,” the ostensible gateway to juridical healing. As Nicole Samson states:

There is a certain amount of feeling that [after participating with the ICC], “maybe now [the victim] can move forward. That, although it may be limited, it is something that you could consider to be a healing process, being the natural evolution of your feeling and experience.... That, I suspect will be exceptional to witnesses (the victims that have come as witnesses).”⁸³

Given that individual victims often fail to meet the requirements established for the “right” kind of victim for a given case, it becomes especially difficult to determine whether “victims” find participation with the court to be therapeutic or not. Further complicating matters, an ICC official that works as a victims’ advocate conceded that, “no one seems to know exactly what [the rules] are, and even the Rules and Procedures of Evidence are not always so helpful in terms of clarification about who is eligible for participation as a victim, and what the parameters for participation might be.”⁸⁴ For the majority of victims selected to participate, “participation” usually involves the following mode of distancing and displacement: after having gone through a complicated and drawn-out application and selection process, victims obtain the status of “participant,” and are then represented by a legal representative. These “participants” very rarely step foot in the courtroom or participate in the trial in an active way.⁸⁵ Participation in this reduced and relatively passive and indirect manner (via a court-appointed representative) abstracts from the victim’s experiences. Again, the victim is elsewhere where and when juridical healing is meant to do its work. Not surprisingly, Samson mentioned that she has an even harder time saying whether anonymous victim-witnesses or those who work by way of proxy find the courts to be “healing”: “For the ones who remain anonymous or shielded behind a legal representative... I don’t know if they feel any better [after participating] because I don’t even know who they are.”⁸⁶ Thus, the ways in which legal

⁸² The Rome statute contains specific provisions concerning the rights and interests of victims, especially 68(3), which provides that victims whose personal interests are affected can present their views and concern to the court at those stages and proceedings that it determines are appropriate, and in a manner that is not prejudicial to or inconsistent with the right of the accused and a fair trial. This is a highly unique, nascent, and, in the International Center for Comparative Criminology Jo-Anne Wermmers’ words, “fragile phenomenon” (Jo-Anne Wermmers, “Reparations and the International Criminal Court: Meeting The Needs of Victims: Report of the University of Montreal Workshop Held January 28th, 2006,” Research Group Victimology and Restorative Justice, International Centre for Comparative Criminology, University of Montreal, June 2006, 17, 22). The ICC’s Rules of Procedure provide for victim participation as well as reparation. The court can order that offenders pay reparations for victims, or, select victims can receive reparations from the Trust Fund for Victims. “Rehabilitation” is code for healing and falls under the definition of reparation that the ICC adopted. Reparation comes in the following forms: financial compensation, restitution or rights and property, rehabilitation by way of medical and psychological care and legal services, etc.

⁸³ Anders, interview with N. Samson, 2009.

⁸⁴ Diana Anders, interview with ICC Official (anonymous D), July 16, 2009.

⁸⁵ Goetz, “The International Criminal Court and its Relevance to Affected Communities” (2008), 67, 70.

⁸⁶ *Ibid.*, 4.

representation and participation might enable healing or “shielding” a given victim and victims’ group from further injury remains very much in question.

Another means by which victims’ experiences are abstracted and divorced from the particularities of their experience is related to the fact that the public airing of “their stories” in the courtroom is expected to do the work of telling many more stories and—by association—providing catharsis for the many others who were not selected by the courts, but who are still grouped together in the same victim “camp.” Obviously the courts cannot invite everyone who has suffered to come to share their “views and concerns,” but with such unprecedented and broad criteria for victim participation, it seems crucial that the ICC clarify its approach to victim participation and correct its misleading promise of healing through “participation.”

To summarize: participation is hard to come by for “victims” and—when made available—is whittled down to a sliver of suffering, presented by a (legal) representative as a synecdoche for communal suffering. The ICC professes its deep commitment to victims—too all victims in need—and yet it cannot come close to fulfilling this promise. And so it advances a victim participation scheme that is so all encompassing that it dissipates in its abstraction, leaving both individual victims and communal victims little opportunity for meaningful and actual participation in or identification with the proceedings. Even if one appreciates the impossibility of knowing in advance what the requirements for healing would be for a given individual or community, it is clear that the victim is often elsewhere with respect to the healing that supposedly accompanies court participation and recognition. The ICC, like Kafka’s “Law,” publicizes law that is “accessible at all times to everyone.”⁸⁷ But for many victims hopeful that recognition (of their particular injuries) and participation await them (as promised), the “gateway” to healing that was ostensibly tailored to their needs (“made just for you,” in the gatekeeper’s words), is perpetually obstructed. And so, like the man from the country before the gates of the Law, it is unclear whether, when, and for whom the gate will be opened and what entry into the Law’s radiant gates might entail.

IIId. Close, but Still Elsewhere: Redirection to Other Departments

Yet another common form of displacement/elsewhereness observable at both courts takes place when victims are told that juridical healing is situated in “other departments” under the same roof. My interviewees frequently referred me to departments and programs they considered to be more responsible or appropriate sites for carrying out the job of legal healing. The labyrinthine organizations of both courts lend themselves to this polylocal tactic of displacement, wherein “healing” was the business of the department “a few floors up” or in the “other wing of the building.” The units most expected to carry out “healing duties” in their many permutations were the Victim and Witness Units (VWU) and the Outreach Units at both courts, as well as the Trust Fund for Victims (TFV) and Office of Public Counsel for Victims (OPCV) at the ICC.⁸⁸ The responsibility for

⁸⁷ Kafka, *The Complete Stories*, 4.

⁸⁸ The VWUs (alternately called “Victim and Witnesses Sections, or VWSs) were set up in accordance with the respective Tribunals’ Statutes’ *Rules and Procedures of Evidence*. Both the ICTY and ICC have a

following through on promises of juridical healing was frequently said to be located elsewhere by those working in the “central” departments of the court (e.g., Chambers, Registry, and Office of the Prosecutor). Representatives from these core departments often located the court’s more therapeutic, restorative work in those departments and programs situated at the margins of the courts, mentioned above (Outreach, VTF, VWU, etc.).⁸⁹

The example of Outreach illustrates this particular production of the perpetual elsewhere-ness of juridical healing. “Outreach” in both courts are semi-autonomous court programs designed to serve as liaisons between the court and the affected communities/victims. Although Outreach is tasked with interaction with, and securing court participation of victims in affected communities, something crucial for the survival of the courts and necessary for something like healing and reconciliation to take root, it has been treated like the poor stepchild in both courts.

An ICTY Outreach Program did not exist until seven years after the court’s establishment. The Outreach Program does not even appear on the ICTY organizational

statutory mandate to provide protection, support, and other appropriate assistance to witnesses and victims who appear before the Court. This includes: recommending and providing protective measures for victims and witnesses (including, in extreme cases, relocation); providing information debriefings prior to and following testimony, and providing medical and psychological care, when necessary. The emphasis in both cases is placed on protection of witnesses: “Protection aims to minimize and manage any risk that may be faced by witnesses and victims who appear before the Court resulting from their interaction with the Court” (“Victims and Witnesses Unit, Protection,” ICC website: <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm>, para. 5). Although the ICC and ICTY Victim and Witness Units emphasize that part of the unit’s mandate is to help avoid retraumatization and “foster an environment in which testifying can be experienced as a positive, strengthening, and enriching event,” they also tended to downplay this aspect of their work when questioned about it, emphasizing their commitment to “neutrality” and to carrying out practical duties, such as helping victims obtain travel visas and getting childcare for witness’s children while they testify in the Hague. See, for example: Anders, interview with “ICC Officer” (anonymous F), July 16, 2009; Anders, interview with “Officer of the VWS” (anonymous E), July 5, 2009. Comments such as “yes, [the court] is helping healing the wounds of some victims who come to testify” are followed by statements such as “but I cannot give you any figures or hard facts;” “we are not providing therapy here;” and “this [unit] is a judicial tool” (D. Anders, Interview with “Officer of the VWS” [anonymous E], 2009). This adds weight to my argument that even the departments specifically designed to attend to victims’ needs invoke, then retreat from and qualify more ambitious pledges to offer “healing.” See also: “Information Booklet for ICTY Witnesses”; and the ICC Office of the Public Counsel for Victims’ brochure, “Helping Victims Make their Voices Heard” (<http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/pr587?lan=en-GB>).

⁸⁹ For example, in an interview, an anonymous official of the Special Court for Sierra Leone, who previously worked with the ICTY and the ICTR, stated that “the jury is still out” as to whether the ICC can “pull it off” (that is, attend to victims’ need for closure and healing while still carrying out its mandate to prosecute criminals in a fair and expeditious manner). But, he praised the ICC for “really [taking] the extra step” by establishing the Victims’ Trust Fund. He saw this unique program, which is not part of the core court departments and relies on donations from private individuals, foundations, corporations, and other entities, as a means to ease the tension between retributive and restorative justice being played out at the ICC, insofar as “healing” can be relegated to this separate, semi-autonomous wing of the court. Here we have another example of the ways in which the responsibility for legal healing is outsourced “elsewhere” (Diana Anders, interview with former ICTY and ICTR Official (anonymous C), July 8, 2009).

chart, underscoring its precarious and second-class status. Like the Outreach program at the ICTR, the ICTY Outreach Program relies entirely on voluntary funding procured primarily through European Commission fundraising campaigns, and is seen as having a “none core” function.⁹⁰ According to the former ICTY deputy Prosecutor, David Tolbert:

*The [ICTY] Outreach Program has never received funding from the United Nations and has had to rely exclusively on donations, which illustrates the view that the tribunal's impact on the region in general, let alone on the region's justice systems, is of marginal interest to UN policymakers.*⁹¹

Representatives from this marginal space repeatedly stressed their limited power to carry out the healing mandate broadly construed, and suggest that lack of funding, institutional support, and political will were largely to blame for the gap between the courts’ expressed therapeutic goals and the actual capacity of the courts to help victims “heal.”

Like the ICTY, the ICC was without a viable Outreach program for the first several years of its work. Finally, in 2007, and due to mounting pressure from NGOs, the member states adopted an outreach component in the court’s annual budget. There has been a marked improvement in the court’s outreach activities in several countries since 2007, and yet, in-country activities are not adequately equipped to deal with ongoing and volatile political situations, such as in the DRC or Uganda. The “real work” of reconciliation and healing are ideally supposed to be organized by the court’s Outreach Program, but actually *transpiring* “over there” (i.e., in the affected communities themselves). I spoke to representatives of the respective Outreach programs to see if I could point to more concrete instances of therapeutic jurisprudential practices and outcomes, only to find that these programs were the most resentful since they understood themselves to be left to “pick up the tab”—and the responsibility—for the bulk of the courts’ restorative work.⁹²

It was in fact in my interviews with representatives from Outreach programs that I heard the most clearly defined and delimited goals when it came to the interrelated projects of “reconciliation and healing.” Recalling the argument advanced above about the polyvocality of the promise of legal healing by which UN diplomats tended to make the most grandiose and comprehensive pledges to help “wounded communities” and individual victims heal by way of the courts, perhaps we can deduce that, those who work more closely with the victimized communities in question are less likely to make bold and overly ambitious claims about the court’s restorative impact. For example, Claudia Perdomo of the ICC’s Outreach and Public Information and Documentation Section described the objectives of the unit as “very realistic” and related this to the fact that

⁹⁰ Goetz, “The International Criminal Court and Its Relevance to Affected Communities” (2008), 65.

⁹¹ David Tolbert, “The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings,” *The Fletcher Forum of World Affairs* 26 (2002): 13.

⁹² Matias Hellman of the ICTY Outreach Program made it clear that “the ICTY is a criminal court so I think it’s really important to also be clear about whose job it is to look at these different aspects of transitional justice.” He stressed the need to be clear about the limited, juridical nature of the ICTY’s mandate and to recognize the danger in raising expectations of victims too high; “It may backfire.” (Anders, phone interview with M. Hellman, 2009).

“we’re working in a conflict situation...situations that are ongoing.... So in this context you have to have your feet on the ground and realize that you cannot do much.”⁹³ She stated that, “‘reconciliation’ is too big a word for [the victims] at the moment. They have more practical things that they need at the moment...now!” and added that the communities they have reached out to were disappointed because they were expecting “food or clothes or water,” not information about the ICC.⁹⁴ This more pragmatic account can be read as a direct result of the realities with which the officials in these departments must contend on a daily basis. The respective courts’ Outreach programs are not at liberty to ignore the limits of the courts and the necessarily adversarial justice methods they employ (from afar) when it comes to tangible reconciliation and healing “on the ground” or “in practice.”

Also, in light of their relatively greater exposure to the limits of law when it comes to fostering reconciliation and healing in a comprehensive and lasting way, my interviewees from ICTY and ICC Outreach programs made several references to the importance of looking to other transitional justice mechanisms and avoiding a “one-stop solution” to transitional and restorative justice. For example, Matias Hellman, who worked as an ICTY Outreach Coordinator and then became the court's Legacy Officer, felt that:

*[The ICTY] has to be very careful to make sure we don't neglect any segments of what is today called 'transitional justice,' and that we don't put all eggs in one basket. I think sometimes there was a bit of a tendency on the part of the international committee to put too much on expectation on the ICTY to basically be the main 'engine' to solve the post-conflict issues in the former Yugoslavia when it comes to the atrocities...and perhaps at the price of slightly neglecting some of the other aspects.*⁹⁵

He advocates a multipronged approach to post-conflict justice, which involves “a combination of criminal proceedings, truth telling, public recognition of the crimes, memorials, compensation schemes ... and that is what, hopefully, in the future we will see in any future conflicts.”⁹⁶ As for truth and reconciliation, he suggest that “it may well be that someone else has to look at those things ... I think that’s very important so we don’t put too much expectation on the courts.”⁹⁷ In other words, in the context of the two courts’ Outreach programs, there was greater emphasis placed on the importance of honoring a well-defined division of labor between international, national, and local actors who could ideally work in parallel towards peace, security, and reconciliation—what Claudia Perdomo of the ICC called “combining synergies of all these actors who are present on the ground,” of which the courts represent only one.⁹⁸ So responsibility for “healing” and “reconciliation” was deflected in these instances when it was argued that restorative activities should primarily take place elsewhere; that is, not in the courts in

⁹³ Anders, interview with C. Perdomo, 2009.

⁹⁴ Ibid., 14–15.

⁹⁵ Anders, phone interview with M. Hellman. 2009.

⁹⁶ Ibid., 7.

⁹⁷ Ibid., 8.

⁹⁸ Anders, interview with C. Perdomo, 2009.

question.⁹⁹ The goal of bringing reconciliation and healing to affected communities is out of the reach of the Outreach departments.

If the majority of court officials believe that “*that work*” (of juridical healing) is being taken care of elsewhere by other court departments, then there is less incentive to take stock of the therapeutic jurisprudential approach itself, to lobby for funding and expanded programs, or to put pressure on those who would presumably have more power to lessen the gap between rhetoric and reality. The shifting and experimental organization of these bureaucratic juridical beasts provide fertile grounds for this kind of displacement and distancing, leaving us with unsatisfying answers to the following questions: From where are these diaphanous promises emanating? Who is hearing them? And who is responsible for translating them into results or stepping in when the “promise” fails to materialize?¹⁰⁰

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It is now safe to say that, ultimately, legal healing—its sources, its targets, its means of extension and execution—is predominantly structured by temporal and spatial circuits of power that posit healing as already somewhere else and/or pending and as not-yet. What we can deduce from this analysis of the rhetoric of juridical healing is a pattern of promises emanating from labyrinthine institutions that, for all intents and purposes, lack mechanisms for accountability when it comes to implicit and explicit promises of legal healing. This displacement of healing to other locales and times, however, is not just an abandonment of accountability; it also effectively forecloses political action. The elsewhere and elsewhere quality of these courts and their promises of healing help to give the *impression* of activity directed at healing, which seems to foster an ethos of complacency on the part of the courts’ key actors (and perhaps their key donors and supporters), despite the fact that participation and recognition are repeatedly pushed further out of reach, an effect further intensified by an increasingly restrictive category of “victims.” These movements would also seem to risk cultivating indifference or anticipatory docility on the part of its supposed beneficiaries—the victims—who are left to wait on the sidelines and hope for the (perceived) all-powerful court to heal their wounds. Meanwhile, the courts continue to call attention to their commitment to providing justice-as-healing for victims, and to operate with the hubristic assumption that “everyone strives to reach the Law.”¹⁰¹

⁹⁹ An outreach representative of the ICTY succinctly expressed her conviction about this issue when she said: “Should it be a judicial institution that is taking care of that broader support for victims? Our answer, again, is ‘no.’ It should be left in the hands of NGOs and, frankly, local authorities” (Anders, interview with M. Spalinski, 2009).

¹⁰⁰ See, for example: Anders, interview with F. Guariglia, 2009; Anders, interview with N. Samson, 2009. Also: Judah, “The Fog of Justice,” 23–25.

¹⁰¹ Kafka, Franz, “Before the Law,” 4.

IV. Depoliticization Part II. When Politics Fails

IVa. Politics Against Justice

As suggested above, these courts are conceived of as institutions that take over when politics fails. As such, politics, and political struggle in particular, have become that which these courts must defend against and clean up after. “Politics” inside and the outside the court is viewed as undermining justice, neutrality and peace—all that (new and improved) law “with a heart” promises to provide and protect. Defense Counsel Karim Khan of the ICTY notes that there is growing concern that the courts have become “too political.”¹⁰² Both courts in The Hague must continually set themselves apart from that which is deemed “political”—in its many incarnations—as a means of buttressing their legitimacy as fair and neutral purveyors of justice.¹⁰³

As Claudia Perdomo of the ICC insists: “We are not a political body, we are a traditional body ... and being a traditional judicial body means that you cannot play in to that political game.”¹⁰⁴ The interlinked regulatory ideal of justice and humanity thus rely on a fantastic tradition that discursively excludes that which is taken to be “political.” The distance between the normative categories of “politics” and “violence” is very short—and sometimes nonexistent—in this discursive framework, and thus, being mired in, or even close to one, is being mired in or close to the other. The political is for these courts a liability and little more. We shall consider some of the implications of these infelicitous and troubling discursive distinctions and non-distinctions below with regard to the ICTY website, especially its neatly divided design into pages dedicated to “Voices of the Victims” and “Statements of Guilt.” But before we consider these representations of victimhood and guilt and their political and therapeutic import, it is important to back up a bit in order to provide some necessary historical contextualization; specifically, the ascendant and related norms of individualism and apoliticality that have served as conditions of possibility for the etiolated, atomized subject “before the law” presumed by, and produced by the discourse of juridical healing under investigation.

IVb. The Triumph of the Individual Over the Collective

Since the Tokyo and Nuremberg trials, there has been an effort to emphasize individual responsibility for war crimes on the part of contemporary international criminal tribunals.¹⁰⁵ The collective punishment approach has increasingly been perceived as a much more politically and legally fraught one, especially in countries where violence is ongoing, as with the DRC and Sudan. To focus on individual “perpetrators” and—along

¹⁰² Anders, phone interview with K. Khan, 2009.

¹⁰³ IHLs, as well as humanitarianism's conceit of neutrality and apoliticality has been exposed as impossibility and a fiction by numerous legal and social theorists. See, for example: Liam O'Hagan, “Life, Death and Aid: Humanitarian Organisations and International Politics,” *Irish Studies in International Affairs* 10, (1999): 31–41; Frits Kalshoven, “Impartiality and Neutrality in Humanitarian Law and Practice,” *International Review of the Red Cross* 29 (1989): 516–35.

¹⁰⁴ Anders, interview with C. Perdomo, 2009. See also: Anders, interview with M. Spalinska, 2009.

¹⁰⁵ David Cohen, “Beyond Nuremberg: Individual Responsibility for War Crimes,” 53–92.

with them—individual “victims” and their wounds serves as a means of anticipating accusations of “taking sides” and challenging detractors who associate such tribunals with “victors tribunals.” So, a key means of demonstrating judicial neutrality and fairness has been to demonstrate a given court’s political neutrality. Part and parcel of this project has been to dispel myths and harmful stereotypes about certain nations or communities as “aggressors.” The ad hoc tribunals’ first chief prosecutor, Richard Goldstone, for example, stressed the need for “individualizing” guilt for war crimes in order to bring about justice and healing, and in order for diverse peoples to live together peacefully.¹⁰⁶ He elaborated:

*Specific individuals bear the major share of the responsibility, and it is they, not the group as a whole, who need to be held to account through a fair and meticulously detailed presentation and evaluation of evidence, precisely so that the next time around no one will be able to claim that all Serbs did this, or all Croats...so that people are able to see how it is specific individuals in their communities who are continually endeavoring to manipulate them in this fashion. I believe this is the only way the cycle can be broken.*¹⁰⁷

The individualizing approach is directly tethered to the cessation of cycles of violence, but also seems to function as a shield against the chaos of politically sensitive issues (e.g., Serbs versus Croats) and even “politics” in general, where the categories of victim and perpetrator are rarely seamlessly separated.¹⁰⁸ So one problem for the courts then becomes avoiding “guilt by association” where—in David Cohen's words—“the mere fact of belonging to a particular organization,” nation or community would be grounds for generalizing and attributing criminal responsibility, while at the same time accounting for “the relevance of the larger collective, administrative or bureaucratic contexts” in which the crimes took place and from which to assess liability.¹⁰⁹ The figure of the isolated, abstracted, apolitical and acultural individual with his or her personal story/psychological narrative—of either guilt or innocent victimization—appears to hold out the promise of a safe haven for these courts, so fearful of being viewed as “political” or biased in favor of one group or another. In this paradigm, to promote connection and

¹⁰⁶ Lawrence Weschler, “Inventing Peace,” *New Yorker*, November 20, 1995, 56–60.

¹⁰⁷ *Ibid.*

¹⁰⁸ The ad hoc tribunals, as well as the ICC have worked hard to distinguish themselves from the accusation against the Nuremberg trials of being “victor’s justice.” This has been a persistent worry for all of these courts, especially since they must all be very selective when it comes to very limited numbers of crimes and criminals they can try, all the while demonstrating that their choice to prosecute one person instead of another, or investigate one massacre and not another is a fair one, and does not prejudice a particular group over another. See: Rosemary Byrne, “Promises of Peace and Reconciliation: Previewing the Legacy of the International Criminal Tribunal for Rwanda” 14, *European Review* (2006): 485–498; Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Durham, NC: Carolina Academic Press, 1997), xiii-xvii; Anders, interview with G. Bitti, 2009.

¹⁰⁹ David Cohen, “Beyond Nuremberg: Individual Responsibility for War Crimes,” in Carla Hesse and Robert Post, eds. *Human Rights in Transition* (Zone Press, 1999), 54–55.

community by way of recourse to political or cultural values and histories is thought to stoke or reignite violence.¹¹⁰

As argued above, politics and violence are often collapsed in this discursive paradigm. Politics surfaces as part of the “cause” of the violence the courts are charged with “remedying.” And since these institutions are expected to deliver neutral, apolitical decisions, and since they are, as Gilbert Bitti, ICC Senior Legal Advisor, states, “weak institutions” insofar as they do not have police forces or military support and depend upon state support, they must, in part, repeatedly perform their distaste for, and distance from “politics” by emphasizing their ethics and humaneness as the grounds for their legitimacy.¹¹¹ The ethical domain is here produced with the help of techniques of hyper-individualization according to which extreme and widespread crimes emanating from political and ethical violence are, at times, reduced to isolated crimes carried out by an individual (inhumane, bad) perpetrator and inflicted on a (humane, innocent) victim. These tidy divisions are meant to dissimulate highly sensitive, political issues, and the difficult choices they call upon the courts to negotiate—such as which persons to charge with a crime, which crimes to charge, who qualifies as a perpetrator and victim, which victims to include in a given case, and what kind of sentences or reparations to impose.¹¹²

The emphasis on individual culpability is but one instantiation of IHL’s accentuation of individual members of a community as victims or persecutors over and against larger social units. This mode of turning away from collective responsibility in the IHL has gained footing with the establishment of the ad hoc tribunals, and even more so with the ICC.¹¹³ Although Nuremberg and Tokyo placed individual accountability at center stage, conspiracy and attributing criminal wrongdoing to collective entities represented a portion of Nuremberg convictions (especially with regard to organizations such as the SS, the Nazi Party, The Gestapo, the SS –*Schutzstaffen*—and certain industries that supported the war effort, such as the Krupp armament company).¹¹⁴ Fifty years later, Antonio Cassese declared that collective responsibility is “no longer acceptable” in the context of

¹¹⁰ The collection of individualizing tactics I’m highlighting in this discursive frame is most often ushered in with reference to the individualization of guilty parties in particular, though I maintain that it extends beyond that and also encompasses ‘victims’ as well.

¹¹¹ Echoing accounts proffered by ICTY officials, Gilbert Bitti of the ICC sums up the problem with the following example, “You can try to prosecute the rebel forces, but if you try to prosecute the governmental forces, then you kill your cooperation with the court” (Anders, interview with G. Bitti, 2009).

¹¹² Gilbert Bitti of the ICC stated the silent but obvious fact that victims are bound to wonder why the court is “prosecuting that guy and not this guy....prosecuting them and not them.” But sometimes, he admits, “it’s for very political questions...very political reasons” (Anders, interview with G. Bitti, 2009).

¹¹³ Although some of the ICTY and ICTR cases involved Joint Enterprise Theory, and although there were multi-defendant cases wherein certain accused criminals were tried together (examples), and even a radio station was put on trial, these cases did not attribute collective guilt (to a state, a group, a corporation, for example), and only individuals were charged and convicted. See: Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge, UK: Polity Press, 2006), 67; Rebecca Haffajee, “Prosecuting Crimes Of Rape And Sexual Violence At The ICTR,” 212–16.

¹¹⁴ Simpson, *Law, War and Crime*, 67; Andrew Clapham, “Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the International Criminal Court,” in *From Nuremberg to The Hague: The Future of International Criminal Justice*, ed. Phillip Sands (Cambridge, UK and New York: Cambridge University Press, 2003), 34–44.

the new generation of international war crimes courts.¹¹⁵ This doctrinal shift is codified in the Rome Statute, which refers solely to “natural persons” and “individual responsibility” and reflects a more general turn away in IHL from the politically incendiary issues of state or collective liability.¹¹⁶ How one answers the question of “who is responsible?” has direct implications for who or what gets indicted, how blame is attributed, and who serves sentences.

Yet it is not only by holding only individuals guilty of war crimes that contemporary the IHL has veered from understandings of the subject as fundamentally social, as political and interactive, and as invariably shaped by shifting historico-political forces. In fact, in following IHL discourse closely, one can witness the simultaneous emphasis on ostensibly depoliticized, “narrowly psychological” issues of guilt “pared down to an investigation of one person’s mental state” as well as victimization pared down to a depoliticized individual’s experience of injury.¹¹⁷ The historically specific, political, cultural, and invariably social dimensions of the human subject oddly becomes that from which IHL retreats in its promotion of a universal humanity in need of protection, as if humanity’s humaneness boils down to the negative liberty of leaving other individuals alone as one pursues one’s individual human life. Must this “humanity” sacrifice connection and political interaction (to collectively determine and contest how the “we” is to be determined and the norms it adheres to in a given time and place) for the sake of peace and non-violence? A contradiction arises here, by which guilt and pain are individualized at the same time that the courts are meant to offer collective healing. Additionally, the narrow path to healing promulgated by the courts distinctly impedes collective modes of engagement aimed at non-violent political transformation and reconfigurations of communal relations.

IVc. Virtual Time-Spaces of Community: The ICTY Website

By turning to the ICTY’s website pages “Statements of Guilt” and “Voices of the Victims,”¹¹⁸ I hope to demonstrate in a very concrete way how the courts depoliticize power, aided by an organization of the intelligible that entails emptying universal humanity out of what, per Arendt, makes it most vital—its capacity for political activity. These pages were described in one of my ICTY interviews as a “one of the most important projects” of the court, which the court was “very proud of.”¹¹⁹ They were intended to “personalize” the “bureaucratic” and dry legal process for victims in particular. It was designed to “show the individual experience [...] and give respect to victims and survivors.”¹²⁰ Paradoxically, the court’s attempt to excise “the political” vis-à-vis the individual is performed through the publication of highly choreographed objects

¹¹⁵ Cited in: Andre Nollkaemper, “Systemic Effects of International Responsibility for International Crimes,” *Santa Clara Journal of International Law* 8, no. 1 (2010): 323.

¹¹⁶ Article 25, Rome Statute.

¹¹⁷ Simpson, *Law, War and Crime*, 67.

¹¹⁸ ICTY, “Voice of the Victims,” <http://www.icty.org/sid/105>.

¹¹⁹ Anders, interview with M. Spalinska, 2009.

¹²⁰ *Ibid.*

in a politically “saturated field of visibility.”¹²¹ The politics of visibility and invisibility becomes obscured by the interpretive schema employed, which directs draws our gaze away from the political, historical, and cultural conditions from which the crimes, individuals and suffering sprung and redirects them towards individuals, affect, personal stories, and moral questions of wrong and right. In keeping with the “typology” approach described in the previous sections, it seems as if, by making visible this handful of singular stories of guilt and innocent victimization, the court hoped to heal the many others outside its purview, while evading engagement with the potentially inflammatory and immensely complex politico-cultural histories attendant to the violence and subsequent efforts to rebuild society from the ground up and—in the case of the tribunals—top down.

On one ICTY webpage we find seven rows and three columns of a total of nineteen defendants’ “Statements of Guilt” frames or “boxes” in the form of separate, still images. These images become individual videos of confessions once the “play” icon is clicked on. Underneath each still image is the name of the accused and the name of the place that the crimes were committed (usually a prison camp, such as: “Damir Došen, Keraterm Camp”). There are no references to the country or larger region in which the camps or crimes were committed (e.g., Bosnia, Croatia, etc.). This information is accessed only if a viewer/computer user clicks on a particular individual’s frame.¹²² The minimal visual presentation can be viewed as a first obfuscation of national or ethnic distinctions considered “politically charged.” We are left alone to witness these individual criminals who—at first glance—come from nowhere. Their framed images hover in cyberspace, and we can choose to press “play” to learn more about their crime and watch a short¹²³ recording of a segment of their confession, or we can move on. The frozen image of each perpetrator is “captured” by and in the box framing it, separated from the other perpetrator’s boxes, as if each were in their own jail cell.

A quick mouse-click away, we can find twenty-three “Voices of the Victims” frames. Like the “Statements of Guilt” page, each individual victim is granted her own frame, which includes a still image, a name (or, in the case of anonymous witnesses, a witness number) and an associated video that can be played. But unlike the “Guilt” page, each of these twenty-three frames of individual headshots are accompanied by a few lines of text which describe the crimes and the violence they were subjected to followed by several lines of text from their in-court testimony—often the most harrowing and graphic, apparently for extra emotional effect. For example: “Witness 50, a teenage rape victim

¹²¹ I am drawing here on Judith Butler’s account of the Rodney King video and verdict in 1992, where she performed an analysis of “racially saturated field of visibility” that perversely rendered the black male body being beaten by police officers “as a signifier for danger to the law.” In David Pagnia, *The Political Life of Sensation* (Durham, NC: Duke University Press, 2009), 13.

¹²² Once you click on an individual “confessor’s” frame, you are given opportunities to read more about him, where he comes from, his role in the violence, and so forth, but this information is not included on this first page. Accessing that more contextual information requires a bit more work for the viewer/computer user. There were some instances where a given region was referenced under a given accused person’s frame/picture, but this was only when the region itself was the sight of a massacre, such as Srebrenica.

¹²³ The videos on both the “Guilt” and “Victims” pages were quite short, usually lasting approximately two minutes, though some were only a few seconds and one was fourteen minutes long.

from Foča (prison camp).” The textual snippet under her pixilated photo reads: “He finished raping me ... and said that he could perhaps do more ... but that I was about the same age as his daughter.”¹²⁴ Also departing from the format of the “Guilt” page, the victims’ “Play” button has the following text next to it: “Video and story.” The guilty confessors have no “story” in this field of intelligibility; they simply have portions of their “statements of guilt” in a short video and a few lines of text, with a short description of their role in the war and the crimes for which they were held responsible.

Recall that, within this general discursive arena, storytelling and voice are regarded as both signs of and pathways to healing and humanity. Victims are expected to come forth, share their stories of horror, experience catharsis and a certain restoration of the humanity taken from them. Although subtle, the fact that the guilty are “given” voice only insofar as they confess their guilt outside the framework of a “story” suggests that, in this framework, their membership in the category of humanity is less certain than those ethically upstanding victims with “voices” and “stories” to tell. The perpetrators that achieve inclusion in this visual field are those who confess and show adequate remorse for their crime. Those who fail to do so are even further away from possessing a voice, much less a story. The ethical and criminal wrong and its confession crowd out the highly sensitive issues of political affiliation and one’s personal-political history. The communal nature of the violence and the political context from which the crimes and criminals sprung are glossed over in a tightly organized, highly selective grid of intelligibility with a depoliticizing slant. Each criminal has his own “box,” which is separated from the others by the white margins of the webpages, and the victims are featured on a separate page, also separated from one another. The “community” of guilty individuals is internally segregated into individuals, just as the “community” of internally segregated victims is broken down into its individual members. Although the only common ground for any of these individuals is their membership in either the victim or perpetrator “community,” their responsibility is always individual.

If we venture into one of the victim “Video and Story” pages, we can read through a detailed, often gruesome account of the personal situation in which a given victim found herself when she was captured and/or violated in some form. Although one can locate there direct references to the political situation and to the regions in which the crimes took place, this information is a further “click” away. The first “layers” of the “Voices” webpage and its links highlight the personal, the horrific, the sensational, and psychological. In the context of this therapeutic jurisprudential paradigm, token “poor victims” are legible, but only insofar as they are recognized as needing help—especially the court’s help—and as deserving of “our” sympathy and recognition. Victims’ testimony is meant to somehow represent or capture the nature of the vulnerability and traumas the violence produced. And yet, the few selected victim narratives are given very little time and space, and the actual recordings are prone to stalling, thereby interrupting

¹²⁴ ICTY, “Voice of the Victims.” There are many examples of this tendency to select the most disturbing and graphic of testimonial moments as the “caption” below the individual victims’ frames. Such as: “ ... I was once beaten up so badly, I spent the next four days in a coma. I was thrown out onto a heap of corpses, and found there by one of my comrades” (<http://www.icty.org/sid/198>).

possibilities for a more comprehensive, nuanced, or continuous account of experience. One is left to wonder: is this what the big moment of representation and recognition for these “selected” victims comes down to?

So who are the subjects who emerge from this discursive production of ethical and not-so-ethical subjects? Which categories of humanity are made available through these frames of intelligibility? On the one side we have the courts and the putative humanity of their laws tailored to protect humanity, but also to restore “it” to itself, embodied by individual victims. The coordination of these visual and auditory schemas works to underscore the court’s fairness, balance, and benevolence, conveying that the court knows right from wrong, distinguishes between perpetrator from victim, and even gives the former a place—albeit restricted—in its humanitarian scheme. In short, it emerges as a humane court that protects humanity from inhumanity.

Apart from the benevolent court, we have humanity as a vulnerable and suffering group, a class of humans who need the legal humanitarians’ protection and healing. And then there is the audience expected to interact with these webpages—the international community, or perhaps the humanity who unifies on the basis of its “shared moral horror?”¹²⁵ Somewhere on the margins of this happy marriage of human benefactor (of healing and humanity), human beneficiary of humanity and healing (victims), and human consumer (of healing and humanity as it is framed here—the computer user that could be anyone from anywhere or nowhere) lies the strange and precarious place reserved for the confessing criminals; they are human enough to appear in court and be granted a fair trial (thereby helping to demonstrate the court’s humanity and commitment to universal rights) and, ironically, they are made even more human by way of their “confessions” of the atrocious crimes for which they are being held responsible. But this particular ilk of perpetrator also serves as a limited case or point of constitutive exclusion for the human at issue here: the other groups must dis-identify with this figure if they are to be included in humanity in its broadest sense here. “We” need this liminal character (guilty by law but also—at least purportedly—guilty by conscience) before us in order to turn away from it and differentiate ourselves from it. Additionally, the perpetrator “headshots” and videos give evil and the anger it engenders a (depoliticized cyber) place—lodging it within an individual body image/voice on the computer screen. The fantasy here might go something like this: These “bad guys” are safely contained there (behind bars, but also within these frames of guilt); victims’ (individual and communal) violent feelings can be directed at them; and onlookers can recoil in horror and feel a sense of connection to a shared (if imagined) community of humanity with a similar sense of values

¹²⁵ Judith Butler points to the fact that our responses to violence and war are always already shaped and produced through frames of interpretation or grids of intelligibility. As such, she cautions against presuming that our shared “moral horror” reflects “a sign of our humanity,” insofar as doing so obscures the fact that “the humanity in question is in fact implicitly divided between those about whom we feel urgent and unreasoned concern, and those whose lives and deaths simply do not touch us or do not appear as lives at all.” Judith Butler, Grinnell College Commencement Address, Grinnell, IA, May 19, 2008 (<http://www.grinnell.edu/offices/confops/commencement/archive/2008/butler>).

So this particular orchestration of the visible and audible framework for understanding victims and persecutors does plenty of work. Ideally this cyberspace target of anger can supplant revenge or other forms of inter-communal violence. Moreover, according to the doctrine of juridical healing previously discussed, confessions of guilt are a key means by which reconciliation and healing are thought to take place. So, these webpages mediate affect and offer safe, cheap, and easy strategies of shoring up the figure of humanity in a time of much inhumanity, demonstrating that someone is “in charge” in a time of global evacuations of responsibility, and carving pathways to justice and reconciliation by “bringing together” confessors and victims in a depoliticized cyberspace “populated” by individuals-as-sound bites-and-image that are meant to represent whole groups of “guilty” and “victimized” people. And “we”—the witnesses of this cyber “exchange” between the benevolent and just law/legal healer, the perpetrators and the victims—can watch from afar, but feel good knowing that something is being “done” to further peace, reconciliation, and healing for those distant, but heart-wrenching war-torn victims. This motley community of humans are “freed” in this scenario from what Wendy Brown calls “the difficult work of freedom—work that is risky in its transformative relation with the past, its encounter with power, and its venture into making an uncontrollable future.”¹²⁶ From an Arendtian perspective, this form of “freedom” signals a withdrawal from and suppression of political activity—the very essence of our common humanity and the possibility of our freedom to produce something new in concert with one another in and for the future.

If something like humanity must rise from the ashes of atrocity, the image of human community proffered by the courts is not one that includes democratic processes or individuals actively working together to bridge and negotiate differences towards the construction of a more peaceful future for *all humanity*. This sort of strategy is apparently too risky for these precariously positioned courts to embrace. Instead, the emphasis on *individuals* (as either perpetrators or victims) and, with it, a turn away from political issues to psychological questions that ground the ethical, places the processes of restoration and remedy in a vacuum. What we are left with is an imagined community of humans who “come together” remotely in their shared but distant “horror;” humans who—through their confessions—provide a limit or line of demarcation from which “humanity” can negatively define itself; and humans to which “crimes” have been committed—a category composed of sovereign individuals whose common ground is their shared experience of injury. The implied ethics of the community are set negatively (they are not to injure one another), engendering a highly reductive form of “engagement” between different classes of humans that is out of time and out of (common) space. No shared or overlapping presence of the court, victims, perpetrators, or onlookers is required. This is the ethical and political community of the lowest common denominator ... an anemic and depressing version of humanity predicated on the denial of a form of freedom without which there can be no political life. In essence, what is depoliticized is the sense of politics implied by collective world making. One must ask what the prospects of “healing” individually and collectively are under such conditions.

¹²⁶ Wendy Brown, *Politics Out of History* (Princeton, NJ and Oxford, UK: Princeton University Press, 2001), 46.

The construction of this virtual community is presumably meant to foster peace and community and lift us all above our differences and disagreements, and yet, in the process it extracts the human from all that is communal in its aversion to history and political activity. This hierarchized humanity does not get us any closer to understanding and moving on from the fragmentation that spawned the violence in the first place. In other words, humanitarian law's attempt to universalize and heal wounds in the name of humanity is also an appeal to universal norms and a new, corresponding form of citizenship. Yet, this form of citizenship is emptied of civil society or political activity in the Arendtian sense detailed above. Participation in this community is reduced to a highly individualized, bureaucratic logic, both apolitical and acultural, where "representation" and "participation" is either rendered unavailable or reduced to the kind of elsewhere and elsewhere "interaction" between the categories of docile human subjects that I have described above

V. Conclusion: Politics as Victim?

I have attempted here to map certain unmarked operations of power linked to the therapeutic turn in two criminal courts located in The Hague—the ICTY and the ICC. I have been careful to steer clear of implying that these modalities of power *necessitate* a particular, unfavorable result across the board; that is, a retreat from political action "in the world" in an Arendtian sense. I have sought to highlight the discursive production of a depoliticized ethos that limits (but does not determine) the scope of activity and possibility for creating something new/towards freedom, both with respect to the culture of the courts and those it includes in its discursive parameters—especially victims. Moreover, I have tried to suggest that the international humanitarian justice system "crowds out... other possible approach[es] that societies or governments might address the legacies of communal violence,"¹²⁷ where politics is tacitly identified with violence. "Crowding out" as I use it here is not the same as a complete foreclosure or the successful elimination of alternative approaches. This crowding out becomes acutely true when the courts foreground their therapeutic tasks, holding out the cruel (thus inhumane), and impossible offer of a one-stop, highly attractive package of justice-as-healing, but without having to get its "hands" dirty with the difficult, collaborative, and potentially explosive political issues that reconciliation and reconstruction demand.

What if court officials and supporters were to consider the possibility that the communities and individuals they aim to "heal" are suffering not from politics, but rather, are to some extent suffering from overall depoliticization?¹²⁸ What if the challenge is to awaken the "tiger" of politics from its slumber, without arousing its violent potential? I suggest that a top priority for repairing war-torn communities must be to help cultivate politicized, participatory *inter-action* between and within fragmented and war-torn nations, communities and individuals, and international actors consistent with the

¹²⁷ Helena Cobban, "The Legacies of Collective Violence: The Rwandan genocide and the limits of law," *Boston Review* 27, vol. 2 (April/May 2002) para 4.

¹²⁸ Boris Buden, "Truth and Reconciliation Are Not What We Really Need," in *Experiments with Truth, Documenta11_Platform2* (Ostfildern, Germany: Hatje Cantz Verlag (2003), 78.

Arendtian model described here. A challenge facing international juridical institutions like the ad hoc tribunals and the ICC is to support modes of participatory democracy without appropriating and thus quashing them, while also preventing campaigns of political violence and genocide to overtake the agonistic and ongoing process of collective world making.

As opposed to an extreme domestication or eradication of politics presumed always to be divisive and violent, perhaps a reinvigoration of political activity aimed at constructing new forms of political solidarity *amidst plurality* could, in Boris Buden's unminced words, help us to "build[] bridges towards each other and over the mass graves and ruins."¹²⁹ And building bridges here would not be grounded in a quest for homogenous unification of "communities" composed of atomized and ahistorical individuals, but rather, would prioritize political and social exchange, contestation and forms of communality that seek to preserve and negotiate difference, and articulate freedom in a specifically political sense.

If members of the human community or humanity (what the IHL is charged with protecting) must shed their specificity and political engagements to attain legibility in the ever-powerful discourse of contemporary IHL, then this law explicitly designed to prevent and adjudicate genocide and "Crimes Against Humanity" has failed to help facilitate conditions under which plural and collective deliberation of shared futures can take root and thrive. IHL has not managed to secure the negative rights upon which it is premised (protection for "humanity" from atrocity, from state-violence, etc.), nor promote and protect—in Wendy Brown's words—"rights of individuals as political actors," much less recognize "collective determinations of ends" as part of the aims of international justice.¹³⁰

My analysis has attempted to show that perhaps politics in the Arendtian sense has been an unrecognized victim of the victim-centered discourse of juridical healing. A universal humanity composed of docile, isolated, and abstracted individual humans stands in for political actors and collective/political action and transformation. Juridical healing thus begs these questions: To what extent can this body of law and its institutions be relied upon to "heal" the "injuries" to political culture that extreme violence engendered? And how might legal institutions go about trying to achieve its aims without supporting transformations within political culture? As we know, the "therapeutic" goal cannot be to return a wounded polis to the state of things prior to the outbreak of violence, since it was that very state of things that brought violence about.

¹²⁹ Ibid.

¹³⁰ Brown, "The Most We Can Hope For," 465.

Epilogue:

Risking Justice and Seizing Aporetic Opportunities

It is possible to see the ICTY as a stop in an inevitable process towards international order and human rights. The story of humanitarian law and human rights is one of constant progress, banishing the darkness of inhumanity from the bright new modern cosmopolitan civilization. The law has been written; it is in place. Finally, the world is in a position to deal with those who seek to deny others the status of human beings.
- David Hirsh¹³¹

For the majority of Rwandans, the ICTR is a useless institution, an expedient mechanism for the international community to absolve itself of the responsibility for the genocide and its tolerance of the crimes of the [Rwandan Patriotic Front].
-International Crisis Group¹³²

I. Something Must Be Done

Something clearly must be done to address systematic and widespread abuses of basic human rights and crimes against “the human status” as such.¹³³ But what, exactly? It seems misguided to dismiss as “useless” International Humanitarian Law’s efforts to counter impunity and provide more extensive and plentiful modes of legal redress to victims of extreme ethical and legal transgressions such as mass rape, genocide, and forced migration. Even if this form of justice fails to live up to Hirsh’s claims for it as an “inevitable process towards international order *and* human rights,” as proof of “constant progress” and as that which delivers humans from the “darkness of inhumanity,” it does constitute a concerted and much needed effort (albeit a fraught one) to confront the overwhelmingly complex and disturbing problems of how to best “deal with those who seek to deny others the status of human beings.”¹³⁴ It is hard to quarrel with

¹³¹ David Hirsh, *Law Against Genocide. Cosmopolitan Trials* (New York: Glasshouse Press, 2003), 92.

¹³² International Crisis Group, *International Criminal Tribunal for Rwanda: Justice Delayed*. African Report. No. 30, July 7, 2001, iii. Accessible at: <http://www.crisisgroup.org/~media/Files/africa/central-africa/rwanda/International%20Criminal%20Tribunal%20for%20Rwanda%20Justice%20Delayed.pdf>.

¹³³ Hannah Arendt, *Eichmann in Jerusalem... , page*

¹³⁴ Hirsh, *Law Against Genocide*, 92.

contemporary IHL's most obvious achievements, especially affirming that such extreme acts of violence are justiciable wrongs in international law, and establishing crimes such as sexual violence crimes as worthy of prosecution, not simply as collateral damage of armed conflict. And yet, claiming that this novel form of justice is indisputably progressive is also problematic, given that turning to law--and specifically an increasingly powerful legal apparatus and doctrine that boasts of its healing powers and universal jurisdiction-- also invites new forms of regulation and domination (and not only for victims, but for those who endorse, promote and carry out the project of juridical healing). Though this form of justice might mitigate suffering produced by violence, it also engenders its own forms of violence that must itself be countered or mitigated.

The analyses offered in this thesis have sought to bring into relief some of the perils associated with contemporary attempts to legally redress atrocity-based injury and injustice in both individual and whole communal registers through forms of juridical healing. The perilous dimensions of juridical healing present us with several conundrums that deserve further attention, though they cannot be adequately explored here. For example: If the contemporary discourse of juridical healing maintains contact with both repressive and emancipatory potentialities, then what can or should be done about it? What might the rise of juridical healing say about the current global geopolitical moment? What follows represents a preliminary attempt to meditate on these questions, and speculate about the significance and implications of the therapeutic turn in IHL, though a fuller consideration will have to wait for another occasion.

II. Hazardous Healing

First, the hazards associated with the therapeutic turn in contemporary IHL include the following: "healing" is rarely defined by those who advocate juridical healing; they have failed to adequately accounting for how "healing" might be achieved through juridical means. Healing has become a new and powerful norm of post-conflict justice and its promoters have failed to subject it to scrutiny and consider its effects--including the extent to which it might heighten the courts' paternalistic powers, exacerbate the very "wounds" and "traumas" it sets out to heal, produce bureaucratic monuments to victims and justice that defer any possible realization of healing and prolong suffering for the victims indefinitely, as well as depoliticize individual victims, potential politically mobilized groups, and "affected communities." That is to say, the discourse in question cannot simply be described as uncritical; it also produces deleterious effects in the name of healing, humanity, victims, emancipation, peace, justice-- and sometimes (as we saw in the South African and Eichmann cases)--national unity.

The preceding analyses have also sought to point to the ways in which establishing the truth of victims' voices becomes a technique of legitimization for these courts, whose tenuous legitimacy is chronically at risk of evaporating. Thus, this discourse produces effects that are not primarily about healing, but are rather about augmenting and securing the courts' own legitimacy and power. The tenuous character of this legitimacy follows from the basic paradox that as much as these courts must rely on international legal precedents to legitimate their judgments, they break with these precedents as well,

thereby entering into uncharted legal territory where the credibility of their trials, as well as the justice they dispense, is called into question. Additionally, when these courts do seek recourse to the precedents of the Nuremburg and Tokyo trials, they rely on a version of “victor’s justice” that contradicts the operative presupposition that the truth of the *victim’s* voice leads to healing and to the legitimation of the trials and the courts themselves. With these courts and the TRC, we see the emergence of a public forum that does not always resemble established forms of the trial or the court, defining itself as a juridical entity, nonetheless. Ironically, the jettisoning of legal protocol and established forms of truth-finding (in the name of humanity, and national healing and reconciliation) provides alternatives to criminal law and criminal trials in the wake of extreme violence, at the same time that it produces a form of law that is not always recognizable as law, thereby exacerbating the problem of its own legitimization.

Moreover, the curious form of law in question forestalls political responses to extreme violence and operates with a model of victimization that figures power solely in terms of subordination and domination, leaving little room for individual and communal resiliency and political agency to alter existing conditions. The troubling character of this move becomes especially evident in those scenarios in which women's agency and resistance is at stake. Paradoxically, the female victim of sexual violence is confined to her status as victim by the very discourse that promises her healing and emancipation from trauma and suffering. This constitutes yet another way that juridical healing deflects from the possibility of political mobilization, resistance, and collective change.

What seems abundantly clear is that to establish access to the courts on the basis of victim status, and to be recognized and “represented” as such by that court, does not--despite the vow of “never again” and the explicit mission of preventing future atrocities--challenge the conditions under which violence and injury occur, even if it offers some small portion of victims a sense of justice, protection, closure and catharsis. But that is not all: Juridical healing's regulatory effects can *foreclose* possibilities for countering violence of an extreme and widespread sort, and for attenuating the suffering that such violence produces. Thus, not only does the model of justice mobilized by this new generation of courts fail to live up to its pledge to prevent victimization from occurring, it also foils, even precludes certain, potential routes to collective and individual justice and recovery (especially those routes predicated upon a figure of the victim over and against a socially situated, politically active subject whose condition is not reducible to her injury or to the vicissitudes of an individual psyche).

I have been in these pages less concerned with making the law more “legal” in a formalist sense, than with showing that the model of juridical healing in question impedes a substantive, participatory politics and political subjectivities centered on collective action in an Arendtian sense. Although drawing on Michel Foucault's conception of critique has allowed me to demonstrate that juridical healing has attained a normative status and forms that needs to be troubled, his theory falls short of providing a framework for advancing the kind of politics that the dominant model of juridical healing forestalls, and which seems necessary for renewing individuals and societies ravaged by war. For that purpose, a form of action is needed that would be rooted in participatory practices of

deliberation and the production of a common world and shared future. I looked to Arendt to supply this account of politics, which presumes the subject's potential for resistance and resilience, as well as its need for working in concert with "other" others (plurality) to produce something new (natality, if not revolution). My critique has predominantly focused on the effects of the aforementioned depoliticization on subjects and communities occupying the category of victims in need of healing, and centered on the ways that an international discourse of juridical healing propped up by international institutions seeks to defuse potential modes of democratic political activity *in the affected communities*. It has also simultaneously brought to the surface the potentially depoliticizing effects it might also have on an international level. As such, the problem of juridical healing produces yet another pressing quandary: How might we transpose an Arendtian-like conception of political activity onto an international politics of justice, and how might something like the so-called international community organize itself in ways that could confront the regional effects of depoliticization, and foster forms of political mobilization with the power to address the situation? Furthermore, how might Foucault's analytics of power—especially its notion of governmentality, which seems to share many features with the discourse of juridical healing—link to an Arendtian account of politics, and to what extent is Arendt's model an adequate means of understanding and responding to the contemporary modality of juridico-therapeutic power associated with the therapeutic turn in IHL? I am only gesturing here to what a broader theoretical account of the politics foreclosed by juridical healing might entail. Although the questions raised here cannot be addressed fully in this context, it has been possible to focus on one aspect of this larger problem, namely, the depoliticizing thrust of the therapeutic turn in the context of contemporary discourses of legal and non-legal humanitarianism.

III. The Flight from Politics: Towards the Last Bastion of Humanitarianism?

With a clearer sense of the stakes of juridical healing's emergence and of its implications, one cannot help but wonder *why* the therapeutic turn has occurred in the first place, and what is the significance of its ascendancy at this particular historical juncture? I confess that I do not have a coherent or all-encompassing theory that can explain all the reasons why this particular phenomenon has taken hold at this historical juncture in its current form. Yet, a common—if unflattering—way that the establishment of the ad hoc tribunals and the International Criminal Court has been understood is as a means of expiating western guilt for failing to intervene as massacres were transpiring. For instance, Helena Cobban avers that,

[I]n November 1994, there was an absolute tsunami of guilt that washed over the whole of the Security Council. They knew they had let down the people of Rwanda. The court was established on the crest of that wave of guilt, maybe partially as a substitute for any real self-evaluation as to what the international community had done wrong.... I wrote once that having failed to deploy troops to

Rwanda at a time when they might have made a difference, they now decided to deploy an army of prosecutors instead”¹³⁵

Even if Cobban is right, and even if guilt was the primary impetus for the establishment of the tribunals, I wonder if the need to expiate western guilt can adequately explain the proliferation of international tribunals in general over the last two decades. To what extent can guilt explain the establishment of the ICC? My guess is that the ICTY and ICTR were not only—as Cobban points out—partial “substitutes for any self-evaluation as to what the international community had done wrong” at that time with respect to the Yugoslavian and Rwandan crises, but that they also foreshadowed a burgeoning trend in which the turn to trials displaces critical evaluations on the part of governments and international institutions of how best to “do right” by various communities before violence escalates, as it begins to unfold, as it persists, or once it has ceased. Perhaps it is simply easier to create, and gather support for, a court that promises justice as healing than it is to open up debates on these complex and politically incendiary issues. One danger of this trend is that the mere existence of these courts may produce a general sense that something is already being done, a response has been taken (sometimes too little too late, but still better than nothing).

When the establishment of a tribunal can be pointed to as evidence of action, concerned members of the public, humanitarians, diplomats and international justice officials can feel satisfied enough with the measures already taken to respond to mass atrocity crimes, while becoming desensitized to, and further removed from, the human suffering that those crimes engender and the political challenges they pose. This can have the effect of stemming further political mobilization, such that justice becomes less about an ongoing project of collective engagement with its terms, as I described in Chapter 1, and more about acts of constitution and the decisions of lawmakers. As a result, one finds few checks on the system of justice are set in place (the norms are fabricated as they are applied), limited opportunities for deliberation about existing and alternative approaches to the problem of injustice, and restricted possibilities for transformation. The tribunals, in other words, can provide an excuse for setting aside the more difficult questions: how appropriate and effective are these courts in responding to injustice and human suffering of the sort in question? What is the responsibility of governments and the so-called international community to those countries plagued by violence and suffering? Once a court has been established, those questions are treated as if they have already been settled; the courts become the *de facto* response when governments and other international entities have failed to act. Seen from this vantage point, the turn to these courts for justice can be understood as something of a quick political fix in the absence of substantive, broad-based political action and diplomacy, and without engaging in a consideration of the wisdom of various forms of intervention and the effects they produce. And if an “army of prosecutors” are sent in instead of actual troops (as if the

¹³⁵ Interview with HC “Rwanda Today: The International Criminal Tribunal And the Prospects for Peace and Reconciliation. March 4, 2004. Frontline: Ghosts of Rwanda. <http://www.pbs.org/wgbh/pages/frontline/shows/ghosts/today/>

option for action is one or the other),¹³⁶ then I would add that one of this army's key "weapons" (that is, means of extending its power, rationalizing its work, and legitimizing its operations) is to offer not only justice instead of more violence, but also justice that is equated with healing for victims. In a word, its therapeutic promise has become one of its chief weapons in the fight to shore up its own legitimacy.

To better understand how the move towards the therapeutic and the move away from forms of democratic, participatory political activity hang together, it is important to recognize that IHL's therapeutic turn has come into its own in an age when—in Michael Barnett's words—"compassion is seen as a virtue, so much that it has become a status symbol, and individuals, organizations and states compete to be recognized for their generosity."¹³⁷ Miriam Ticktin's work takes this observation further, arguing that humanitarianism's performances of compassion reflect a new and expanding form of governance—a "politics of compassion."¹³⁸ Mahmood Mamdani's work on the "Save Darfur" campaign alerts us to the growing tendency of international justice projects to emphasize a shared humanity and morality as both a means of uniting various parties (states, NGOs, diplomats, and so forth), regardless of political orientation and in the face of a potentially divisive political issues, and as a means of displacing the organization of potentially rebellious and/or critical constituencies.¹³⁹ A common, if thin, moral common ground (based on a shared conviction no more specific than extreme violence is inhumane and should be stopped) is surely less risky, less daunting, and less difficult than negotiating differences among humans, cultures, states, and agreeing on what to do beyond sending humanitarian relief and convicting those responsible for a handful of egregious offences. "Intervention" of this sort suggests that there exists a profound and widespread collective desire for global unity, and that this desire exceeds the desire to risk enmity and conflict for the sake of transforming the conditions under which violence occurs and improving upon existing responses to it. These claims would seem to situate the discourse of juridical healing in a broader political-moral economy centered on the avoidance of political friction and a currency of compassion with the aim of neutralizing political activity. Whatever the precise reasons for the rise of this moral economy,

¹³⁶ Certainly it is much less risky for the international community and Security Council to establish tribunals than it is to send in military troops. And although international tribunals are costly,¹³⁶ the monetary and human costs of military intervention are usually far greater. So tribunals espousing juridical healing have become a safer, default alternative to armed conflict, and they enjoy an ethical "edge," thanks to their policy of non-violence, but also thanks to their "compassionate," healing sides. (On the economic costs of running a tribunal, see Helena Cobban's article "Amnesty Out of Atrocity?", where she states that the average cost of trying one perpetrator at the ICTR came to \$42.3 million, the average cost of processing each accused atrocity perpetrator in the South African Truth and Reconciliation Commission was \$4, 290, and the cost of demobilizing and reintegrating into society each former fighter from the civil wars in South Africa and Mosambique (many of whom had committed atrocities) was under \$1,100.) Helena Cobban. *Amnesty after Atrocity? Healing Nations after Genocide and War Crimes*, Helena Cobban. (Boulder, Colorado: Paradigm Publishers, March 200), 192,

¹³⁷ Michael Barnett. *Empire of Humanity: A Short History of Humanitarianism*. (Ithaca: Cornell University Press, 2011), 220.

¹³⁸ Miriam Ticktin. "Where Ethics and Politics Meet: The Violence of Humanitarianism in France." *American Ethnologist* Volume 33 Number 1 February 2006, 34.

¹³⁹ Mahmood Mamdani, *Saviors and Survivors. Darfur, Politics and the War on Terror*. (New York: Pantheon Books, 2009), 60-61.

occupying the sanctimonious high ground and speaking out in a united voice against violence, evil, and suffering has proven to be an advantageous enough strategy--perhaps even a necessary one for survival--for contemporary IHL; it has endured, even expanded over the last two decades, faring better in many ways than its humanitarian "cousins."

Juridical healing has come about at a time when humanitarian organizations such as the International Committee of the Red Cross (ICRC), Doctors without Borders, Human Rights Watch and the United Nations' UNHCR have increasingly moved from more neutral, relief-based platforms to incorporating human rights norms into their work in the field, focusing on social reconstruction, and participating in so-called peace-keeping missions.¹⁴⁰ As David Reiff notes, more and more, this has meant arming and training humanitarian workers in the laws of war, such that humanitarianism has become a rationale for domination and violence.¹⁴¹ Eyal Weizman calls the new humanitarianism "social work with guns"--a new "technique of governing" those communities and individuals who are treated as suffering wards in need of rescue and protection.¹⁴²

Contemporary humanitarian organizations have tended to embrace a logic of the "lesser evil," while relinquishing the more conventional stance of political neutrality and the primary mission of supplying aid and relief to areas afflicted by human suffering.¹⁴³ At the same time that humanitarianism has ventured into the ethically murky terrain of politics (and even armed conflict), governments and militaries have progressively made recourse to human rights and humanitarianism to justify the use of force, as captured by Tony Blair's description of the shelling of Kosovo as "humanitarian bombing."¹⁴⁴ Within this climate, the tribunals, along with the discourse of legal healing they authorize, can emerge as the lesser evil than the evil of humanitarian organizations and governments who subscribe to a doctrine that sanctions bombing in the name of humanitarian ideals. Judicial institutions espousing rights for humanity are not authorized or expected to use military force. As such, they stand to more persuasively claim moral superiority (and thus uncompromised justice) relative to states and other UN arms directly supporting the neologistic "humanitarian interventions." They espouse the sanctity of these rights they seek to defend through military means even as they violate them through military means for ostensibly humanitarian reasons.¹⁴⁵ The humanitarians who support the international tribunals of International Humanitarian Law (often far removed from the conflict at hand) do not have to get their own "hands" dirty as do their counterparts engaged in humanitarian intervention. Instead, they have the liberty of championing in public their humane service to victims, condemning evil, proclaiming their compassion, political neutrality, and proper authority to convict evil-doers *from afar*.

¹⁴⁰ UNHCR stands for the United Nations high Commissioner for Refugees.

¹⁴¹ Reiff, David. *A Bed for the Night. Humanitarianism in Crisis*: (New York: Simon & Schuster 2003) 22.

¹⁴² Eyal Weizman, *The Least of all Possible Evils: Humanitarian Violence from Arendt to Gaza*. (Brooklyn, New York: Verso, 2011), 18.

¹⁴³ Moyn, Samuel. "Road to Hell" in *Bookforum*. Vol 18. Issue 5. [Book Review of Eyal Weizman's "The Least of All Possible Evils..."] New York: Art Forum. Feb/March: 2012: 40..

¹⁴⁴ Ticktin. "Where Ethics and Politics Meet..." 34.

¹⁴⁵ On the relationship between human rights, US and European foreign policy, and so-called humanitarian intervention in the 1990s and early 2000s, see especially: "A Solution from Hell. Inhumane Interventions" in *n+1*. Keith Gessen, Mark Greif, et. al.(eds), No. 12, Fall 2011: 2-9

As a result, we might understand the significance of juridical healing in this historical moment as occupying the role of the latest "last bastion" of hope--the hope that truly humane international justice, peace, and healing can persist in the face of the extreme violence and suffering of our times. It rushes in to soften the blow, or even derealize the loss of a humanitarian ideal from the interventionists; that is, of a form of humanitarianism that would deliver justice, remain to one side of politics, and challenge--not inhabit--modes of violence. Perhaps this is one way to more fully comprehend what this phenomenon means in our current era. As we have learned, its moral valence has been central to the goal of precluding a more comprehensive critique—a regrettable fact, given its Janus-faced character and the deleterious effects it has produced.

One curious and new development within contemporary IHL that seems to be inching dangerously close to the new humanitarianism “with guns” model is its commitment to the "responsibility to protect" doctrine (or R2P). The ICC has pledged its allegiance to the United Nations initiative, which was unanimously approved by member states at the U.N. World Summit in 2005.¹⁴⁶ The doctrine is based on the following three core principles or “pillars:” states have a responsibility to protect their citizens from “mass atrocity crimes;”¹⁴⁷ the international community has a responsibility to assist states in fulfilling their primary responsibility; and finally, if states fail to protect their citizens from these crimes, then the international community has the responsibility to intervene “through coercive measures such as economic sanctions” and—as a last resort— through “*military interventions*” (my emphasis)¹⁴⁸

R2P has been heralded as a guiding principle for preventing, but also responding to mass crimes, though the exact meaning of what forms of military and other forms of intervention are appropriate for various international bodies such as the UN Security Council and the judicial body of the ICC remains ill-defined. How might the International Criminal Court’s endorsement of R2P jeopardize its “compassion collateral,” and to what extent does this move draw an uncomfortably clear line between the “protection” associated with IHL’s official missions to “protect peace” and “protect humanity” from the worst possible inhumanities, the protection associated with the unofficial project of juridical healing (which seeks to protect victims from trauma and from further suffering) and the militarized protection that R2P affords to the United Nations Security Council and General Assembly? What does it mean for the ICC to subscribe to a doctrine that has the power to authorize military invention even as it claims political neutrality and strives to demonstrate its non-violent, unprecedented “humane” approach to providing justice

¹⁴⁶ For a short history of R2P, see: Homans, Charles. "Responsibility to Protect. A short History", Foreign Policy Website. November 2011.

http://www.foreignpolicy.com/articles/2011/10/11/responsibility_to_protect_a_short_history?page=0,3.

¹⁴⁷ United Nations: Office of the special adviser on the prevention of genocide. “Mission Statement”.

<Http://www.un.org/en/preventgenocide/adviser/index.shtml>

¹⁴⁸ “2005 World Summit Outcome.” United Nations General Assembly, Sixtieth session: Agenda items 48 and 121 of the provisional agenda. A/60/L.1, 15 September, 2005, para 38-9; “Follow-up to the Outcome of the Millennium Summit, Implementing the Responsibility to Protect: Report of the Secretary General. United Nations General Assembly, Sixty-third session: Agenda items 44 and 107. A/63/677. January 12, 2009, para 56.

and healing to victims? And since R2P arises in the absence of state institutions that are able to protect (that is, states that are thought to be lacking in sovereign power), then how might healing function as both a means of fortifying an evolving international power (associated with institutions such as the UN and the ICC, for example) *and* as a means of regenerating national unity and thus state sovereignty? At issue here is the relationship between the objective of healing and the objective of protecting humanity, between juridical healing and geopolitics, and the price of this form of protection for humans.

Curiously, it was human rights scholar Michael Ignatieff who suggested the phrase “responsibility to protect” as a means of steering clear of more interventionist doctrines such as “the right to intervene” at the moment of what might be considered R2P’s conception—the 2000 first meeting of the Canadian International Commission on Intervention and State Sovereignty.¹⁴⁹ And yet, invoking the language of protection (as with the language of justice, peace, and healing) cannot protect “the international community,” the permanent International Criminal Court, or contemporary IHL in general from the reality that they are constituted by and deeply embedded in relations of power, and—as such—represent a perpetual, potential source of domination, regulation and (now) outright political violence (insofar as they embrace the doctrine of R2P). This troubling development should be reason enough to galvanize international efforts to make explicit the ways in which juridical healing and the branch of law from which it derives collude with forms of violence and domination, and to prioritize the task of establishing forums for public critique that would espouse an Arendtian politics whose main task would be the transformation of these emergent international relations of power to support forms of democratic political action and change.

IV. Unsatisfying Opportunities

What if the troubling aspects of the therapeutic turn could somehow be used as an opportunity for mobilizing otherwise anemic or non-existent political constituencies on local, regional and international levels? In lieu of a conclusion, I would like to propose here that juridical healing can be understood as something of an aporia—as an impasse or internal contradiction—and that its aporetic status paradoxically also produces conditions under which the very politics it stifles might also be ignited. Although Wendy Brown’s essay “Suffering the Paradoxes of Rights,” pertains to contemporary rights discourse, we can understand juridical healing as similar to the kind of paradox she describes—as that which we “cannot not want” (that which we cannot afford to simply oppose and dismiss as hopelessly useless or categorically detrimental to justice projects), but also as “that which ensnares us in the terms of our domination.”¹⁵⁰ Brown recognizes that paradoxes are far from straightforward or especially comfortable as political projects; we must “suffer” them.¹⁵¹ In line with her characterization, I find that proposing as I do here that juridical healing is an aporia is itself highly unsatisfying, even a cause for suffering. And yet, it is difficult to understand this phenomenon—this mode of power—in any less

¹⁴⁹ Haines, Steven; Kassimeris, George, ed. (2010), “Humanitarian Intervention: Genocide, Crimes Against Humanity, and the Use of Force. (Burlington, VT: Ashgate Publishing Ltd, 307–329).

¹⁵⁰ Brown, Left Legalism/Left Critique, 430.

¹⁵¹ Ibid, 420.

equivocal or more satisfying way. But perhaps, despite the sense of defeat and frustration that aporias entail, one might also view this aporetic form of justice and the legal forums from which it operates as constituting a political potential to pursue, that is, as a call to the very form of political mobilization, action, and transformation that it seeks to shut down. After all, if my analyses prove persuasive, they have made evident that this justice cannot be left alone and expected to do its “inevitably” progressive or reliably beneficial work, as Hirsh imagines. Given that this model of juridical healing can hold out the possibility of protection and even qualify as one means of mitigating suffering for some, and *even if* it is also a source of regulation and domination, its ambivalent effects provide the occasion for the kind of political activity and culture of contestation I have suggested here, one that would open the debate on how best to respond to such injuries without exacerbating them. In this vein, a task of international justice projects would be to somehow come to terms with the fact that they can never fully eliminate the risk of producing further injustices in the pursuit of justice.

It is true that the law has been written and is "in place" (in Hirsh's words), insofar as what it "is" is set of rules and decrees, but--as demonstrated throughout the thesis--the juridico-therapeutic discourse in question which operates under the auspices of law instead functions predominantly by way of the norm. The norm of juridical healing is presented as if it were immovable and firmly "in place" and "inevitable," despite its malleable and contingent character, and despite the fact that, as truth codified in law, it always demands interpretation (which attests to its incompleteness). And thus, this law becomes alive only to the extent that *humans* actively “move it” in unpredictable and multiple ways for a variety of purposes—one of which could itself be the (re)invigoration of a more robust international political community focused on possibilities for social and political transformation. Perhaps this law is brought closest to justice when it makes room for this kind of work or struggle, which places a premium on questioning that which operates under the sign of the inevitable.

If recognizing the aporetic character of juridical healing is in some sense a provisional acceptance of its partial and potential value (and even an acknowledgment that doing away with it, or opposing it absolutely would not do away with the unpleasant fact that *all* political projects have the potential for colluding with configurations of domination and regulation), then part of what can be taken away from this analysis is that those committed to international justice must both work from within the strictures of this juridico-therapeutic framework, as well as perpetually venture to see beyond them. The latter would entail locating alternative strategies and sites for political engagement committed to altering the underlying power relations upon which injustice and suffering are predicated, and in the direction of substantial political action and self-determination.

In considering the international courts and the growing legal doctrine of juridical healing that animates them as aporetic, it is important not to forget that they jointly constitute only one of many possible modes of redress. As I hope to have argued, this model has increasingly exhausted the horizon of possibility for international justice projects, often eclipsing alternative approaches, both legal and extra-legal in character even as it expands the domain of what counts as legal beyond recognizable precedents. As such, the

political issues of *what to do* with the form of redress as it exists now, and what other forms of redress and transformation (beyond this model, even beyond "the legal") we might desire, expect, strive for, and produce in the pursuit of justice, have not yet been given due justice.

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Appendix A. Fieldwork Description

Much of the material I drew upon for describing and advancing arguments about the “therapeutic turn” in International Humanitarian Law (especially with respect to the ICTY, ICTR, and the ICC) was to be found online, primarily in the form of court decisions, press releases, and published interviews with court officials. Nonetheless, I determined that my project would benefit from speaking with actual court officials, particularly those charged with implementing victim-centered provisions and programs. I did not have the resources or time to travel to both Rwanda and The Netherlands, so I decided to limit my fieldwork to two tribunals located in the same geographical spot—“The Hague tribunals:” the ICTY and the ICC.

Upon gaining approval to conduct my research from the Committee for the Protection of Human Subjects (CPHS) at the University of California at Berkeley in May 2009, I began to plan my research trip to The Hague, which is located in The Netherlands. I spent the month of July (2009) meeting with and interviewing a range of court officials from both the ICTY and ICC. Using the two court websites as my primary sources, I collected names and contact information with the intent to secure interviews with as many court officials as possible while visiting The Hague. I specifically targeted officials who would presumably have an opinion on, and a role in carrying out victim-centered programs and therapeutic goals outlined by the respective courts. I focused my attention on members of the Victim and Witnesses Units, Outreach programs, and the Office of the Prosecutor. The interviews were open-ended and centered around their experiences with, and their opinions on juridical healing as a phenomenon and trend, especially as pertaining to victim-focused provisions in the Statutes and Rules of Procedure and Evidence, and with particular cases. I was also lucky enough to be put in touch with one judge, who asked to remain anonymous. I included a description of my research project in my initial email correspondence, as well as several sample interview questions (see appendix B). Approximately a third of my 15 emails were answered, and of those, three court officials agreed to be interviewed upon my arrival in The Hague.

Once I had established contact with a few key people in each of the courts, they were able to put me in touch with others from the Registry, The Office of the Prosecutor, and the chambers of the two courts. Many of the officials I attempted to meet with were traveling, although some of them agreed to speak with me over the phone in the months that followed. In total, I conducted 20 interviews, 12 of which were recorded (based on the interviewee's preferences). Only one of the three phone interviews I conducted in the fall of 2009 was recorded, and I took detailed notes during the other two. I also interviewed a former ICTY official living in San Francisco in September 2009. Ten of my interviewees asked not to be named. I conducted 11 interviews with ICTY officials, one with a former ICTY official, one with an official from the Special Court for Sierra Leone who previously worked for the ICTY and ICTR, 7 from the ICC, and 1 with an official of the Special Court for Sierra Leone who had previously worked for both the ICTY and ICTR.

My interviews averaged 50 minutes long. Some interviewees were very willing to use my questions as points of departure for longer accounts of the courts' victim-centered approach and casework, while others would respond with short answers to my questions (some of which were prepared, while others were in response to the interviewee's comments).

Several of my interviewees asked to review my dissertation draft prior to submission. In July 2012, after sending them my draft as agreed, several of them asked me to make slight changes to references in material from their interviews, and one of them asked that I delete the passages attributed to her (such that her opinions not be confused with official court positions on a given issue).

The unpublished transcripts and notes from all of the interviews conducted that year are on file with this author.

The vast majority of my interviews were highly informative and provided me with rich and detailed material from which to frame my analyses. Chapter five includes this material to the greatest degree.

I am very grateful to all those who helped facilitate my fieldwork, and especially to those court officials who agreed to be interviewed.

Appendix B

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April 12, 2009

To whom it May Concern:

My name is Diana Anders. I am a Ph.D. Candidate in the Department of Rhetoric and am affiliated with the War Crimes Center at the University of California at Berkeley. My faculty advisor, David Cohen, is the Head of the War Crimes Center and a consultant to the courts in Sierra Leone, Cambodia (ECCC), and East Timor. I am currently in the process of writing my dissertation, which is based on empirical research and textual analysis on several war crimes tribunals and courts. I will be traveling to The Hague this summer specifically to conduct interviews for this purpose.

I would like to invite you to take part in my research study, which concerns the role of international criminal proceedings in bringing about some form of restoration, “closure” or “healing” for victimized individuals and groups that have been targeted in armed conflict (see sample questions below). Specifically, I examine and chart the extent to which the ICTY, the ICC, the ICTR, and the ECCC have been conceived as one means of helping individual and collective victims heal from the atrocities and resultant traumas of armed conflict, as reflected in Kofi Annan’s statement in 1998 in regards to the ICTR’s work:

...to be complete, justice must be carried out with due process and above reproach so that it can promote the process of healing... Justice must serve a larger purpose—the purpose of closing wounds. (May 8, 1998: Address of former U.N. Secretary General Kofi Annan to the Rwandan Parliament).

It is not hard to find similar references to justice as healing and U.N.-backed war crimes courts as a salve for the open and deep wounds left in atrocity’s wake. Yet how does this discourse of healing relate—if at all—to the actual goals and practices of the court? In other words, does this “therapeutic justice” approach resonate with the workings of the court? If so, how? And if not, how might we account for this gap between the actual work of the court and the model of juridical healing espoused by some court officials, diplomats, the news media and politicians?

My project considers what I call the “therapeutic turn” in international humanitarian law, and its potential legal, political, social, and psychological implications. I am interested in the ways these various courts have paid increased attention to victims’ needs, and have designed programs and units to encourage victims’ involvement in the legal process and broader project of bring justice to war-torn countries. The relation between this increased attention to victims’ needs and participation, and the therapeutic turn in question, is central to my inquiry.

I am planning to interview various court officials, including judges, members of the Office of the Prosecutor, heads of units (especially victim-focused units), etc. Ideally, I would like to conduct approximately ten to twelve interviews with people who play a variety of roles in each of the court’s operations. My exploration of this phenomenon in these different legal sites is solely meant for academic purposes and the material from the interviews would only be used with the interviewee’s written consent.

Would you be interested in participating in this study? If so, please contact me via email at: danders@berkeley.edu. I would be greatly appreciative if you were to take the time to meet with me and speak with me about your experiences at the court that pertain to the named topic. The interviews will be informal and relatively short (from one half hour to an hour). I plan to be in Holland in late June and the first three weeks of July. Please let me know if this would be a convenient time for you. I have included some sample questions below. All interviewees will be asked to sign a consent form prior to their interviews. The option to remain anonymous will be made available to each participant.

I am happy to address concerns or questions you might have about my dissertation project or my research. Thank you in advance for your time and consideration.

Best regards,

Diana Anders

Sample Interview Questions for court officials:

1. For how long and in what capacity have you been working with the court?
2. Describe the division for which you work at the court (structure, constituency, history, size, objectives) and the kind of work you do in it.
3. In what ways and to what extent has the court attempted to serve and support victims, and integrate them into the process? Have these efforts been successful? If so, how? If not, why not?
4. What are your views about the main goals of the court?
5. In your opinion, should the court limit its work to the punishment of criminals or should it embrace a more expansive mandate to include restorative measures that—in some way—help individuals and communities heal from the traumas of war?
6. What would such “healing” entail, do you think, and how might justice provided by the court contribute to this process?
7. To what extent do you feel like participation with the court, and the proceedings themselves actually help victims—both individual and collective/communal—to experience some sort of closure?
8. Are there ways in which you think the court could improve its treatment of victims? Please specify.
9. How do you see the relationship of retributive and restorative justice when it comes to the operations of the court? What is the role of the former and what is the role of the latter?

10. Do you agree with the following quote by Kofi Annan? And how does this rhetoric relate—if at all—to the actual goals and practices of the court?

