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## Reintegration of Female Rape Survivors: The Overlooked Priority of Transitional Justice in the Face of Mass Wartime Rape

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# REINTEGRATION OF FEMALE RAPE SURVIVORS: THE OVERLOOKED PRIORITY OF TRANSITIONAL JUSTICE IN THE FACE OF MASS WARTIME RAPE

## ABSTRACT

While mass wartime rape has become a core characteristic of modern armed conflict, transitional justice mechanisms have continuously failed to bring about successful achievement of justice, reconciliation, and truth for female survivors.<sup>1</sup> The abuse, exile, and humiliation of large numbers of female rape survivors by their families and communities leaves entire societies destabilized and susceptible to prolonged instability and state failure, thus obstructing attempts by transitional justice mechanisms to usher in long-lasting peace and stability.<sup>2</sup> To achieve more successful post-conflict reconstruction, transitional justice mechanisms situated in the aftermath of wars marked by mass rape must first focus on the reintegration of rape survivors. Positive reintegration can lead to greater success in transitional justice as a whole through greater survivor participation, a greater chance for restoration of survivor and community dignity, and an increase in survivor and community trust in the process as a whole, eventually leading to a domino effect on the success of subsequent goals of the mechanism and the mechanism itself.<sup>3</sup>

## INTRODUCTION

- I. MASS WARTIME RAPE'S OBSTRUCTION OF POST-CONFLICT RECONSTRUCTION: EFFECTS ON THE INDIVIDUAL, THE FAMILY, AND THE COMMUNITY
- II. THE CURRENT GOALS OF TRANSITIONAL JUSTICE IN THE FACE OF MASS WARTIME RAPE
  - A. *An Overview of Transitional Justice*
  - B. *Transitional Justice and Mass Wartime Rape*
    1. *Rwandan Ad Hoc Criminal Tribunal*
    2. *Sierra Leone's Truth and Reconciliation Commission and the Special Court for Sierra Leone*
    3. *Guatemala's Tribunal of Conscience*

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1. See *What is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/about/transitional-justice> [<https://perma.cc/4CXQ-WH3T>].

2. See Cassandra Clifford, *Rape as a Weapon of War and Its Long-Term Effects on Victims and Society*, 7TH GLOBAL CONFERENCE ON VIOLENCE & CONTEXTS HOSTILITY (May 2018), [https://www.peacewomen.org/sites/default/files/vaw\\_rapeasaweaponofwar\\_stop\\_modern\\_slavery\\_may2008\\_0.pdf](https://www.peacewomen.org/sites/default/files/vaw_rapeasaweaponofwar_stop_modern_slavery_may2008_0.pdf).

3. See *What is Transitional Justice?*, *supra* note 1.

### III. REINTEGRATION AS THE OVERLOOKED GOAL OF TRANSITIONAL JUSTICE

- A. *Effects of Reintegration on Transitional Justice*
- B. *Two Sides of the Same Coin: Greater Participation or Stagnant and Declining Participation*

### IV. WHICH OUTCOME IS MORE LIKELY IN FUTURE CASES?: THE CASES OF SYRIA AND SOUTH SUDAN

- A. *Syria*
  - 1. *Overview of Wartime Rape Amidst the Syrian Conflict*
  - 2. *Post-Conflict Syria and Future Reintegration*
- B. *South Sudan*
  - 1. *Overview of Wartime Rape Within the South Sudanese Conflict*
  - 2. *Post-Conflict South Sudan and Future Reintegration*

### CONCLUSION

## INTRODUCTION

While transitional justice traditionally prioritizes adjudication, the end to impunity, reconciliation, truth, and justice for female survivors of mass wartime rape, it overlooks the immediate need for survivors to be reintegrated back into their families and communities.<sup>4</sup> Critiques of transitional justice—as they relate to mass wartime rape—attack such mechanisms for lack of effectiveness, lack of justice for survivors, lack of training of legal staff in gender sensitivity and trauma-informed advocacy, and lack of effective individual and societal healing in the face of societal norms regarding rape, subsequently stifling the participation of survivors in transitional justice and ultimate post-conflict change in views on rape and sexual violence.<sup>5</sup> However, where transitional justice mechanisms prioritize the reintegration of female rape survivors into post-conflict society prior to other goals, there is a greater chance for successful prosecutorial or non-prosecutorial processes, post-conflict reconstruction, and long-term peace and stability.<sup>6</sup>

This Note seeks to advance the adoption and prioritization of the overlooked goal of reintegration of female rape survivors in post-conflict society by transitional justice mechanisms following conflict

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4. *See id.*

5. *See* CATHERINE TURNER, *Transitional Justice and Critique*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 1, 52–53 (Cheryl Lawther et al. eds., 2017).

6. *See What is Transitional Justice?*, *supra* note 1.

marked by mass wartime rape.<sup>7</sup> Namely, if the reintegration of female survivors of mass wartime rape is the first and initial goal in transitional justice procedures, two possible outcomes will emerge. In the first case, where societal response to reintegration is positive, reintegration of survivors may lead to a surge in the percentage of survivors participating in transitional justice procedures on sexual violence, and ultimately, a greater chance for restoration of their human and civil dignity, as well as their trust in the procedures.<sup>8</sup> The second possible outcome emerges where societal response to reintegration is negative, thus inhibiting participation, dignity restoration, and ultimate trust in the procedure.<sup>9</sup>

The focus of this Note is not the process by which such reintegration will come about, but rather its necessity and the possible consequences for transitional justice and post-conflict reconstruction if such a goal is adopted. Part I of this Note will first discuss the post-conflict consequences mass wartime rape imposes on the individual female survivor, her family, and her community, and thus, on the post-conflict reconstruction process as a whole, which cumulatively serve as barriers to effective transitional justice.<sup>10</sup> Part II will present an overview of current goals of transitional justice before focusing on how those goals have failed to be achieved within procedures in Rwanda, Guatemala, and Sierra Leone, which were specifically designed to review, in part, instances of wartime rape and sexual violence.<sup>11</sup> Part III establishes the reasons why reintegration of female survivors back into their families and communities can lead to more successful transitional justice, and ultimately, post-conflict reconstruction. Part III will also describe the two possible outcomes of reintegration prioritization and their ability to meet the needs of female survivors, before predicting in Part IV which outcome is most likely to occur if transitional justice mechanisms prioritize reintegration in future post-conflict Syria and South Sudan.

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7. See Paul Seils, *The Place of Reconciliation in Transitional Justice*, INT'L CTR. FOR TRANSITIONAL JUST. (June 2017), <https://www.ictj.org/publication/reconciliation-transitional-justice> [<https://perma.cc/TR84-YYYT>].

8. See *What is Transitional Justice?*, *supra* note 1.

9. See Nicola Jones et al., *The Fallout of Rape as a Weapon of War: The Life-Long and Intergenerational Impacts of Sexual Violence in Conflict*, OVERSEAS DEV. INST. (June 2014), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8990.pdf>.

10. See Jeanne Ward & Mendy Marsh, *Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources*, SYMP. ON SEXUAL VIOLENCE CONFLICT & BEYOND (June 2006), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8990.pdf>.

11. See *What is Transitional Justice?*, *supra* note 1.

I. MASS WARTIME RAPE'S OBSTRUCTION OF POST-CONFLICT  
RECONSTRUCTION: EFFECTS ON THE INDIVIDUAL, THE  
FAMILY, AND THE COMMUNITY

Mass wartime rape is an obstacle to successful post-conflict reconstruction process.<sup>12</sup> Post-conflict reconstruction has been placed under the jurisdiction of transitional justice mechanisms established in the aftermath of armed conflict since the 1990s in response to atrocities seen in Sierra Leone, Rwanda, Liberia, South Africa, Guatemala, and the former Yugoslavia, to name a few.<sup>13</sup> Following war marked by such large-scale sexual violence, female survivors are impeded by cultural stigmas, practices, and beliefs concerning rape from retaining their place as the foundation of their families and communities, and rather face exile, ostracization, rejection, and abuse.<sup>14</sup> These responses ensure that such fractured communities can never truly be repaired in post-conflict reconstruction without a proper legal response that prioritizes their reintegration.<sup>15</sup>

Mass rape is defined as “a systematic form of warfare carried out on the female body for strategic ends by both rebel groups and state forces; where [on] a massive scale, women and girls are subjected to sexual, physical invasion under coercive circumstances.”<sup>16</sup> Female survivors of mass wartime range from infants to the elderly, and can be civilians, refugees, or abducted soldiers.<sup>17</sup> However, mass wartime rape exhibits far-reaching effects beyond the individual female survivor: to assault and fragment their family and community.<sup>18</sup> It is not a crime against the individual woman, but a targeted and deliberate crime against her community for the purpose of assaulting and destabilizing it.<sup>19</sup> The systematic use of rape is a tactic of modern armed conflict meant to terrorize and destroy a population, “break up families, destroy communities, and, in some instances, change the ethnic make-up of the next generation.”<sup>20</sup> Transitional justice mechanisms within reconstruction processes play a crucial role in

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12. See Layla Abi-Falah, *Silent No Longer: Reintegrating Female Rape Survivors in Post-Conflict Society*, PROJECT ON INT'L PEACE & SEC. 1, 3 (2017).

13. See Outreach Programme on the Rwanda Genocide and the United Nations, *Background Information on Sexual Violence Used as a Tool of War*, U.N., <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8990.pdf> [hereinafter *Background Information on Sexual Violence*].

14. See Jocelyn Kelly et al., *Experiences of Female Survivors of Sexual Violence in Eastern Democratic Republic of the Congo: A Mixed-Methods Study*, 5 CONFLICT & HEALTH 1, 4 (Nov. 2011) [hereinafter Kelley et al., *Experiences of Female Survivors*].

15. See Ward & Marsh, *supra* note 10.

16. See Abi-Falah, *supra* note 12, at 3.

17. See Ward & Marsh, *supra* note 10.

18. See *id.*

19. See *id.*

20. See *Background Information on Sexual Violence*, *supra* note 13.

trying to reverse or ameliorate these effects in order to usher in long-term peace and stability.<sup>21</sup>

Female survivors experience continued suffering and consequences long after their rape.<sup>22</sup> While the sources of such suffering and consequences vary, this Note will focus on the particular consequence of familial and communal rejection, as this is the ultimate goal of mass wartime rape.<sup>23</sup>

Rape survivors are rejected, exiled, ostracized, and abused by their family and community due to societal norms and attitudes against rape such that survivors are rejected from their husbands' and/or parents' homes.<sup>24</sup> In fact, the men within a survivor's family—including fathers, brothers, sons, and husbands—are considered indirect victims of rape, and are prioritized in post-conflict reconstruction for their loss of honor, while survivors' loss of personal security is dismissed.<sup>25</sup> These men are traditionally seen as the protectors of their families tasked with the social duty and responsibility of preventing the rape of their wives, daughters, sisters, and mothers.<sup>26</sup> Thus, the rape of such female family members leads to an intense sense of failure—an illustration of the destructive ability of this war tactic to dominate the targeted community and underline its supposed inadequacy.<sup>27</sup> Faced with such failure, these men rationalize the rejection of rape survivors as justified, exemplifying the debilitating societal norms that underline rape which punish female survivors and coddle male indirect victims.<sup>28</sup>

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21. See *What is Transitional Justice?*, *supra* note 1.

22. See generally Jones et al., *supra* note 9.

23. See *Background Information on Sexual Violence*, *supra* note 13.

24. See Kelly et al., *Experiences of Female Survivors*, *supra* note 14, at 4; see also Aryn Baker, *The Secret War Crime*, TIME (Mar. 10, 2016), <https://time.com/war-and-rape> [<https://perma.cc/2BJY-U4HQ>].

25. See Mary V. Carter, *Exile and Reintegration among Rape Survivors in the Democratic Republic of Congo: Factors Influencing Rejection and Acceptance*, UNC SCH. NURSING 16 (2011), <https://nursing.unc.edu/files/2012/11/Exile-and-Reintegration-Among-Rape-Survivors-in-the-Democratic-Republic-of-Congo-M-Carter.pdf>; see also Jones et al., *supra* note 9, at 6.

26. See Susan Bartels, *Now the World Is Without Me: An Investigation of Sexual Violence in Eastern DRC*, HARV. HUMANITARIAN INITIATIVE 5 (Apr. 2010), <https://hhi.harvard.edu/publications/now-world-without-me-investigation-sexual-violence-eastern-democratic-republic-congo> [<https://perma.cc/6TF9-BD7N>]; Megan Mackenzie, *Securitizing Sex? Towards a Theory of the Utility of Wartime Sexual Violence*, 12 INT'L FEMINIST J. POL. 202, 208 (May 2010); see also Megan Bradley et al., *Preventing and Responding to Sexual Violence in Conflict: Next Steps in a Global Struggle*, BROOKINGS INST. (Oct. 2013), <https://www.brookings.edu/events/preventing-and-responding-to-sexual-violence-in-conflict-next-steps-in-a-global-struggle> [<https://perma.cc/G6CV-CBKE>].

27. See Bartels, *supra* note 26, at 5, 28; Mackenzie, *supra* note 26, at 208; Bradley et al., *supra* note 26.

28. See Jocelyn Kelly et al., *If Your Husband Doesn't Humiliate You, Other People Won't: Gendered Attitudes Towards Sexual Violence in Eastern Democratic Republic of*

A survivor of gang rape in the Democratic Republic of Congo was quoted to have said:

Your husband will say he cannot keep a woman who has been raped by the whole battalion, and he will repudiate you. When you go to your parents' house, they will ask you why you have destroyed your marriage. . . . Your husband is the first person to reject you [after rape], and then comes your family.<sup>29</sup>

The ripple effects do not cease there, as women and girls are subsequently subjected to communal rejection.<sup>30</sup> Survivors are severely ostracized by fellow community members such that they are forced to leave the community.<sup>31</sup> In some cases, leaving the community is even necessary to avoid honor killings meant to restore familial and communal honor, which is significantly tied to the control of female sexual activity.<sup>32</sup> Women are viewed as impure as a result of having sex outside of their marriage, thus bringing misfortune to their home and community, leading some to perceive them as collaborators with enemy attackers.<sup>33</sup> The chances for such rejection are increased significantly for survivors who bear children of rape, who become widows or are abandoned by their husbands, or who were captured or gang-raped.<sup>34</sup> Health effects—such as the contraction or fear of contraction of HIV/AIDS, the inability to reproduce, the gut-wrenching smell of torn fistulas, and the lessened ability to conduct laborious agricultural or domiciliary tasks from physical or mental wounds—worsen the response of family and community members.<sup>35</sup> For example, husbands fear HIV/AIDS “contamination” from wives, regardless of the

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Congo, 7 *GLOBAL PUB. HEALTH* 285, 291–92 (Mar. 2012) [hereinafter Kelley et al., *If Your Husband Doesn't Humiliate You*]. See also Baker, *supra* note 24.

29. Kelly et al., *Experiences of Female Survivors*, *supra* note 14, at 5.

30. See *id.*

31. See *id.*

32. See Madrespeaks, *Women Confronting ISIS: How Can We End Rape as a Weapon of War?*, YOUTUBE (Mar. 2015), <https://www.youtube.com/watch?v=GzIBPKwbPJM> [<https://perma.cc/4566-BG3N>] [hereinafter Madrespeaks, *Women Confronting ISIS*].

33. For example, women who become pregnant following their rape are seen as collaborators in the sense that they are harboring a child whose father attempted to destroy the community. See Clifford, *supra* note 2; Mackenzie, *supra* note 26, at 212–13; Kelly et al., *Experiences of Female Survivors*, *supra* note 14, at 4–5; Kelly et al., *If Your Husband Doesn't Humiliate You*, *supra* note 28, at 290; Carolyn Nordstrom, *Rape: Politics and Theory in War and Peace*, 11 *AUSTL. FEMINIST STUD.* 147, 152–53 (1996); *Sexual Violence as a Weapon of War*, UNICEF (1996), <http://www.unicef.org/sowc96pk/sexvio.htm> [<https://perma.cc/52H3-8Z2L>]; see also LaShawn R. Jefferson, *In War as in Peace: Sexual Violence and Women's Status*, *HUM. RTS. WATCH* (2004), <https://www.refworld.org/pdfid/402bac094.pdf>.

34. See Carter, *supra* note 25, at 10–14.

35. See *id.* at 10; Jones et al., *supra* note 9, at 2–3; Kelly et al., *Experiences of Female Survivors*, *supra* note 14, at 5–6; Baker, *supra* note 24; see also Bartels, *supra* note 26, at 41–43.

lack of empirical data to support such a fear.<sup>36</sup> Thus, as a result of cultural stigma, women who were once the foundation of their community are rejected, exiled, abused, or even killed, and the community subsequently becomes unstable—an undeniable illustration of the power of rape as a strategic weapon of war.<sup>37</sup>

In summary, prior to the start of transitional justice processes established in the aftermath of conflict marked by mass wartime rape, transitional justice mechanisms face a society that has been torn apart on the individual, familial, and communal levels by sexual violence—an overwhelming and seemingly insurmountable barrier to effective justice, reconciliation, and long-term peace and stability.<sup>38</sup>

## II. THE CURRENT GOALS OF TRANSITIONAL JUSTICE IN THE FACE OF MASS WARTIME RAPE

The international regime regarding transitional justice, specifically regarding the prosecution of gender-based crimes within transitional justice, is still in its infancy, claiming only three decades of substantial progress since the early 1990s.<sup>39</sup> However, since the early nineties, the world has seen a dramatic increase in the use of various transitional justice mechanisms from reparations payments, to international criminal courts and tribunals, to intrastate institutions in response to grave violations of human rights, including mass wartime rape.<sup>40</sup>

### A. *An Overview of Transitional Justice*

Transitional justice refers to the process nations undergo upon emerging from armed conflict or repression to respond to and address widespread violations of human rights.<sup>41</sup> It can take on many forms, both prosecutorial and non-prosecutorial, including criminal prosecutions, truth commissions, reparations programs, reform of national laws and regimes, and memorialization efforts.<sup>42</sup>

Ruti G. Teitel, professor at law at New York Law School and specialist in the area of international law and transitional justice, speaks of a genealogy of transitional justice, moving from Phase I—or

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36. See Carter, *supra* note 25, at 10; Jones et al., *supra* note 9, at 2; Kelly et al., *Experiences of Female Survivors*, *supra* note 14, at 5–6; Baker, *supra* note 24; see also Bartels, *supra* note 26, at 42–43.

37. See Clifford, *supra* note 2; Ward & Marsh, *supra* note 10.

38. See *supra* Part I.

39. See Brownwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 98–99 (2008); see also *What is Transitional Justice?*, *supra* note 1.

40. See RICHARD J. GOLDSTONE, *The Pursuit of International Justice*, in INT'L ORG. & GLOB. GOVERNANCE 481 (Thomas G. Weiss & Rorden Wilkinson eds., 2014).

41. See Seils, *supra* note 7; *What is Transitional Justice?*, *supra* note 1.

42. See *What is Transitional Justice?*, *supra* note 1.



post–World War II conceptions of transitional justice—to Phase II—or post–Cold War transitional justice—to, finally, Phase III, and current conceptions of transitional justice.<sup>43</sup> Phase I post-war mechanisms focused on the goal of justice, retribution, and punishment through prosecutory forums such as the Nuremberg Trials.<sup>44</sup> However, Phase II, following the “impasse on the question of transitional justice” during the Cold War, saw such mechanisms play a key role in the accelerated democratization of Latin America, Africa, and Eastern Europe, as it focused on “construct[ing] an alternative history of past abuses,” leading to the emergence of truth commissions.<sup>45</sup> No longer was the goal of such mechanisms justice, but rather peace, reconciliation, and forgiveness by victims and society.<sup>46</sup> Thus, Phase II mechanisms were victim-centered; a mode by which victims could “reconcile and recover from past harms” through dialogues with their perpetrators mediated by mechanism authorities.<sup>47</sup> Over time, transitional justice has been said to purport the goals of ending impunity for massive human rights violations and promoting accountability and redress, recognizing the dignity of victims of human rights violations, promoting truth-telling, and preventing future human rights violations.<sup>48</sup> This has led to a debate within transitional justice literature and practice over the employment of restorative justice—as seen in truth commissions—versus retributive justice—as seen in tribunals and hybrid courts, or courts that exhibit a mixture of international and domestic legal elements.<sup>49</sup> Ultimately, the goal and type of mechanisms is context-specific.<sup>50</sup>

### *B. Transitional Justice and Mass Wartime Rape*

In the post–World War II era, the Nuremberg and Tokyo tribunals exacerbated and perpetuated global silence around the issue of gender-based sexual violence during war as they “failed to adequately

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43. See Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 70 (2003) [hereinafter Teitel, *Transitional Justice Genealogy*]; Ruti G. Teitel, N.Y.U., [https://www.nyls.edu/faculty/faculty-profiles/faculty\\_profiles/ruti\\_g\\_teitel](https://www.nyls.edu/faculty/faculty-profiles/faculty_profiles/ruti_g_teitel) [https://perma.cc/LR3T-TR35].

44. See Teitel, *Transitional Justice Genealogy*, *supra* note 43, at 72–74.

45. The stalemate that marked nearly all actions within Cold War era politics also froze the progress of transitional justice. *Id.* at 70–78.

46. See *id.* at 77–78.

47. *Id.* at 80.

48. See Seils, *supra* note 7; see also *What is Transitional Justice?*, *supra* note 1.

49. See BETH VAN SCHAACK & RONALD C. STYLE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS* 8 (Robert C. Clark et al. eds., 3d ed. 2007). See generally Raquel Aldana, *A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities*, 5 J. ON HUM. RTS. 107 (2006).

50. See Ivan Simonovic, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses*, 29 YALE J. INT'L L. 343, 345–50 (2004).

address and prosecute sexual violence, and no victims of rape were called to testify at these proceedings.”<sup>51</sup> However, this quickly changed at the start of the 1990s, in response to the novel and systematic use of rape as a tactic to destroy the Tutsi population in the Rwandan Genocide and the former Yugoslavia.<sup>52</sup>

The elevation of rape as an international crime demanding prosecution has several theoretical implications. First, the prosecution of rape “contributes to the preservation of post-conflict collective memory by establishing a historical record of rape as a war crime.”<sup>53</sup> Additionally, it signals rape’s new-found status as a war crime or grave violation of humanitarian law, and consequently, a theoretical end to its impunity.<sup>54</sup> Finally, the process is a victim-centered approach, addressing the needs of survivors of mass wartime rape.<sup>55</sup> By speaking their truth on traumatic experiences, survivors are able to alleviate their “psychological burden of silence and repression” on an individual and communal level.<sup>56</sup>

According to existing literature, the overall success of transitional justice’s prosecution of mass wartime rape can be measured by whether the mechanism encourages female survivor participation; whether the mechanism restores survivor dignity; and whether participants have trust in the mechanism.<sup>57</sup> These three measurements align with the reality of post-conflict individuals, families, and communities impacted by mass wartime rape, as participation in these mechanisms, restoration of dignity, and trust in the mechanism respond to the needs of these three levels of society.

First, to encourage participation, mechanisms need to overcome the factors that limit female participation, which include: restricted mobility, lack of resources, fear of retaliation, fear of bringing shame to family and community, feelings of complicity, and ultimately, fear of further rejection and ostracization from their families and communities.<sup>58</sup> Second, to restore rape survivors’ human and civil dignity, procedures must be victim-centered, responding to the needs of the women, namely, whether they desire a process surrounding

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51. Nicola Henry, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence*, 3 INT’L J. TRANSITIONAL JUST. 114, 115 (2009).

52. Melissa Jeltsen, *A Look Back At the Trial that Made Rape a War Crime*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/rwanda-genocide-rape\\_n\\_5602108](https://www.huffpost.com/entry/rwanda-genocide-rape_n_5602108) [<https://perma.cc/N4ZD-8K5W>].

53. Henry, *supra* note 51, at 115.

54. *See id.*

55. *See id.*

56. *Id.* at 117.

57. *See id.* at 119.

58. *See id.* at 120.

truth and reconciliation or retribution and punishment.<sup>59</sup> Finally, mechanisms must encourage trust or faith in the “promise of the law as an ethical force capable of restoring . . . equilibrium . . . .”<sup>60</sup> However, since the beginning of gender-based violence prosecution in the 1990s, transitional justice mechanisms have had mixed results in meeting these three goals through their various procedures.<sup>61</sup>

### 1. *Rwandan Ad Hoc Criminal Tribunal*

For example, the Rwandan *ad hoc* international tribunal, established by the United Nations Security Council in November 1994, represents the commencement of several judicial precedents in the field of gender-based criminal prosecution, as it was deemed the trial in which rape became genocide, where its goal was adjudication, justice, and punishment.<sup>62</sup> The guilty verdict of former mayor Jean-Paul Akayesu, who was found to have encouraged and ordered the rape and murder of Tutsi women by Hutus in a cultural center, marked the first judgment for the crime of genocide under international law.<sup>63</sup> However, such progress was short-lived as further indictments failed to include sexual violence charges, and the process was marked by a lack of coordinated or consistent efforts to pursue rape prosecutions.<sup>64</sup> Participation of survivors was limited by the fact that the tribunal was located in Tanzania, and in the face of stigma against sexual violence, survivors had to overcome psychological, social, and economic obstacles to testify.<sup>65</sup> While the results of the *Akayesu* verdict may have provided survivors who did participate or those contemplating future participation a sense of restored dignity and trust, the reality of the further cases did not.<sup>66</sup> A rape survivor from Rwanda who “initially cooperated with the International Criminal Tribunal for Rwanda (ICTR) later refused to participate ‘because she had no faith in their protection efforts and she did not like the way she was treated during her encounters with tribunal staff.’”<sup>67</sup> Additionally, in such international criminal tribunals, survivors were forced to describe their rape within the confines of legal language or discourse that merely confirmed legal facts and elements rather than

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59. Henry, *supra* note 51, at 121.

60. *Id.*

61. For example, the situations in Rwanda, Sierra Leone, and Guatemala. *See infra* Sections II.B.1–3.

62. Jeltsen, *supra* note 52.

63. *Id.*

64. *See* Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone’s Rape Victims*, 18 HARV. HUM. RTS. J. 85, 99 (2005).

65. *See* Henry, *supra* note 51, at 121.

66. *See* Jeltsen, *supra* note 52.

67. Henry, *supra* note 51, at 121.

the survivors' emotional truth, thus failing to restore their dignity and dis-incentivizing their participation in the process.<sup>68</sup>

In May 2008, genocide-related rape cases were transferred to the *gacaca* courts—"traditional communal conflict resolution system[s] used to resolve disputes in Rwanda"—and all three objectives of survivor participation, dignity restoration, and trust in the mechanism continued to see failure.<sup>69</sup> Within these informal proceedings, public participation in public forums was used to accuse perpetrators of genocide.<sup>70</sup> The goal of this mechanism was to "encourage reconciliation and diffuse animosity amongst Rwandans by employing a traditional mechanism that involve[d] the entire community in the prosecution of the perpetrators."<sup>71</sup> However, the public nature of these proceedings, coupled with judicial incompetence and the Rwandan Code of Criminal Procedure's approval of the identification of survivors, only served to exacerbate the public ridicule faced by survivors and solidified their ostracism, thus undercutting participation, trust, and dignity.<sup>72</sup> Additionally, *gacaca* courts were deemed a failure in achieving their stated goal of reconciliation and unity, as community-wide participation did not reconcile and unify the community.<sup>73</sup> In fact, the experience of *gacaca* highlighted the difficulties transitional justice mechanisms face in incorporating rape and gender-based violence into their proceedings.<sup>74</sup> Women felt skeptical of participating in such a community-based process to share their story that would only lead to their further rejection and fetishization as rape survivors, as well as further suffering from being forced to publicly "declare the trauma" they experienced.<sup>75</sup>

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68. For example, during the Foča trial at the International Criminal Tribunal for the Former Yugoslavia (ICTY), the following questioning took place between the prosecutor and a rape survivor:

Q: When you say 'rape' what exactly do you mean?

A: I don't understand your question.

Q: You said that this 40—this elderly man raped you. What exactly did he do?

A: He forced me onto the bed to take my clothes off and then he raped me, he attacked me and raped me.

Q: Does it mean he put his penis into your vagina?

A: Yes.

*Id.* at 122, 125.

69. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 514 (4th ed. 2015); Brittany A. Olwine, Note, *One Step Forward, But Two Steps Back: Why Gacaca in Rwanda is Jeopardizing the Good Effect of Akayesu on Women's Rights*, 17 WM. & MARY J. WOMEN & L. 639, 651 (2011).

70. See Olwine, *supra* note 69, at 651–52.

71. *Id.* at 653.

72. See *id.* at 654–55.

73. See *id.* at 656.

74. See DUNOFF ET AL., *supra* note 69, at 514; Olwine, *supra* note 69, at 655.

75. Olwine, *supra* note 69, at 655.

## 2. *Sierra Leone's Truth and Reconciliation Commission and the Special Court for Sierra Leone*

However, such critiques do not always apply, as was the case of transitional justice in Sierra Leone, marked by two mechanisms: the Truth and Reconciliation Commission (TRC) and the Special Court for Sierra Leone.<sup>76</sup> In May 2003, the TRC held hearings on violence against women for three days.<sup>77</sup> Unlike the *gacaca* court's imprisonment of perpetrators as dictated by law, the Lomé Peace Accord, which established the TRC, provided a blanket amnesty to all combatants, thus ensuring that the goal of the mechanism was truth-telling and reconciliation in response to the needs of the victims and society, rather than adjudication.<sup>78</sup> Unlike the untrained judges of the *gacaca* courts, the TRC hired and incorporated gender-trained psychologists and women's rights non-governmental organization (NGO) members, while also training their staff in gender-based violence awareness and designating two experienced female investigators to sexual assault investigations.<sup>79</sup> Rape survivors were given the option to speak at public hearings and be shielded by a screen or to speak openly, thus allowing survivors to choose how public or private their testimony would be, again, in stark contrast to the *gacaca* procedure.<sup>80</sup> There was a strong political will to effectively address sexual violence, and the result was greater participation, greater restoration of survivor dignity, and greater trust in the process.<sup>81</sup>

## 3. *Guatemala's Tribunal of Conscience*

Not all truth-telling commissions see the same level of success as Sierra Leone, as was the case in the two-day procedure that was Guatemala's "Tribunal of Conscience for Women Survivors of Sexual Violence during the Armed Conflict in Guatemala."<sup>82</sup> The Tribunal aimed to create a "public space for women survivors to tell their truths and be heard by their fellow citizens and the state."<sup>83</sup> During the Tribunal, survivors sat behind a curtain to conceal their identities due to retaliatory safety concerns.<sup>84</sup> This led to doubts by community

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76. See Nowrojee, *supra* note 64, at 88.

77. See *id.* at 86.

78. See *id.* at 92.

79. See *id.* at 100.

80. See *id.* at 94.

81. See *id.* at 93–100.

82. Alison Crosby & M. Brinton Lykes, *Mayan Women Survivors Speak: The Gendered Relations of Truth Telling in Postwar Guatemala*, 5 INT'L J. TRANSITIONAL JUST. 456, 457 (2011).

83. *Id.* at 470.

84. *Id.*

members that real survivors were actually speaking rather than rehearsed recordings, leading the organizers to shine a spotlight from behind the curtain to show the women's silhouettes.<sup>85</sup> Ultimately, this was a loss to the "dialogical nature of the truth-telling processes between . . . survivors," investigators, judges, and psychologists, as all were present behind the curtain and hidden from the community.<sup>86</sup> The reality of these proceedings defeated the ultimate purpose of communal unity and reconciliation, and failed to allow for trust in the process and restoration of dignity for the survivors.<sup>87</sup> Additionally, participation was low, marked by only eight women.<sup>88</sup>

With Sierra Leone as the outlier, these examples illustrate how current transitional justice mechanism goals of adjudication, truth, reconciliation, and justice do not allow for a successful achievement of participation, dignity restoration, or faith in female survivors, their families, and communities during the prosecution of wartime rape.<sup>89</sup> Moreover, even in the case of Sierra Leone—following transitional justice and post-conflict reconstruction—rape survivors continue to remain at the periphery of their community, thus leaving each nation in a prolonged space of insecurity and illustrating the ultimate failure of the current goals of transitional justice.<sup>90</sup>

### III. REINTEGRATION AS THE OVERLOOKED GOAL OF TRANSITIONAL JUSTICE

Modern mechanisms of transitional justice prioritize goals of accountability and an end to impunity through the establishment of the rule of law, justice, truth, and reconciliation for victims of human rights violations, generally, and victims of mass wartime rape, specifically.<sup>91</sup> However, in the narrow case of mass wartime rape prosecution, an overlooked goal of transitional justice mechanisms is the reintegration of female rape survivors into post-conflict society. Literature and practice fail to provide a clear answer for the lack of such prioritization previously.

Female rape survivor reintegration refers to the process by which female rape survivors are welcomed back into their families and communities in a manner that ensures a return to normal life following stigma-induced reactions against the survivor by the family

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85. *Id.*

86. *Id.* at 471.

87. *Id.*

88. Crosby & Lykes, *supra* note 82, at 457.

89. *Supra* text accompanying notes 62–88.

90. See Bintu Conteh & Regina Pratt, *Sierra Leone: Seeking Justice for Rape Survivors*, INST. FOR WAR & PEACE REPORTING (2016), <https://iwpr.net/global-voices/sierra-leone-seeking-justice-rape-survivors> [<https://perma.cc/W4VT-RQG3>].

91. See *What is Transitional Justice?*, *supra* note 1.

and community.<sup>92</sup> The word “integration” (and not “inclusion”) is used because transitional justice should reflect a victim-centered approach, and “integration” refers to willingness by the survivor “to belong and integrate” within her family and society.<sup>93</sup> “Inclusion”, on the other hand, is “external” to the survivor’s will and agency.<sup>94</sup>

### *A. Effects of Reintegration on Transitional Justice*

Transitional justice mechanisms suffer from the “first, then” syndrome, where the current goals of justice, adjudication, reconciliation, and truth, for example, are prioritized over reintegration, with the belief that the results can lead to overall community unity—which hypothetically includes survivors—but only after justice has been achieved.<sup>95</sup> However, prioritizing initial reintegration serves to foster greater success in subsequent goals of transitional justice—including truth, justice, reconciliation, and adjudication—as it can foster a procedure where greater female survivor participation, trust, and dignity restoration are successfully obtained.<sup>96</sup>

In ignoring the necessity of reintegration, current transitional justice goals seem to ignore the reality on the ground.<sup>97</sup> Because of social stigmas described previously, even with the realization of the current goals of transitional justice, the breakdown of the family and community unit are never truly repaired, as female rape survivors still remain on the periphery of their societies, thus ensuring future instability.<sup>98</sup> By placing reintegration of survivors as a first goal of transitional justice—prior to adjudication, truth, or justice—such mechanisms will allow for a more successful procedure and a greater likelihood for successful post-conflict reconstruction and long-term stability.

If transitional justice mechanisms do not account for initial survivor reintegration, testimony of survivors may only serve, on the one hand, to exacerbate their ostracization, thus undermining any success

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92. See NIDAA ABU AWWAD, RE-INTEGRATION OF WOMEN SURVIVORS OF GENDER-BASED VIOLENCE: COMBATING VIOLENCE AGAINST WOMEN IN PALESTINIAN SOCIETY 1, 14 (2016) (ebook), accessed at: <http://iws.birzeit.edu/sites/default/files/2017-02/Book%20Eng.pdf>.

93. *Id.*

94. *Id.*

95. Cathy Russell, *What’s the Problem with Women, Peace and Security?* COUNCIL ON FOREIGN REL. (Oct. 2015), <https://www.cfr.org/blog/whats-problem-women-peace-and-security> [<https://perma.cc/9SKE-ST2D>]; see Cristina Posa & Swanee Hunt, *Iraq’s Excluded Women*, FOREIGN POL’Y (Oct. 2009), <https://foreignpolicy.com/2009/10/27/iraqs-excluded-women> [<https://perma.cc/9NY7-5GPF>].

96. See *infra* Section III.B.

97. See *supra* Part I.

98. See Olwine, *supra* note 69, at 655.

the mechanism can have by perpetuating post-conflict instability.<sup>99</sup> On the other hand, delaying survivor reintegration could also ensure the lack of survivor participation in the first place, and thus, the eventual failure of the mechanism that currently plagues transitional justice.<sup>100</sup> If reintegration is not prioritized as the initial goal of transitional justice mechanisms, post-conflict societies risk facing state failure, as these women may turn to criminal networks to find community and acceptance.<sup>101</sup> Such networks may include terrorist cells, prostitution rings, and drug trafficking.<sup>102</sup>

*B. Two Sides of the Same Coin: Greater Participation or Stagnant and Declining Participation*

Where survivor reintegration is prioritized, two future scenarios emerge: (1) greater participation of mass wartime rape survivors in transitional justice mechanisms; or (2) stagnant and declining participation of mass wartime rape survivors in transitional justice mechanisms.

Reintegration naturally and inherently encompasses the transitional justice measurements of participation, dignity restoration, and trust.<sup>103</sup> With each possible outcome, a societal response to reintegration determines if the measurements as a whole come out as low or high.<sup>104</sup>

Societal responses to reintegration can either be negative or positive.<sup>105</sup> Positive societal response is seen where, after being welcomed home, reintegration induces a “shift in deeply rooted social attitudes towards rape and rape survivors.”<sup>106</sup> Such a shift emerges due to the “extreme” scale of mass rape, which induces a “window of opportunity, or a turning point” for normative beliefs regarding rape.<sup>107</sup> Negative

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99. “In fact, a 2002 study conducted by the Rwanda Unity and Reconciliation Commission revealed that women were more than [60] percent less likely to testify to the events of rape because of the intimate nature of the crime and the associated stigma.” *Id.* at 654.

100. *Id.*

101. See Corin Bailey, *Exploring Female Motivations for Drug Smuggling on the Island of Barbados: Evidence From Her Majesty’s Prison, Barbados*, 8 FEMINIST CRIMINOLOGY 117, 129 (2013); Katharina Von Knop, *The Female Jihad: Al-Qaeda’s Women*, 30 STUD. CONFLICT & TERRORISM 397, 400 (2007); Bartels, *supra* note 26, at 44; *The Rise of Femicide and Women in Drug Trafficking*, COUNCIL ON HEMISPHERIC AFF. (Oct. 2011), <http://www.coha.org/the-rise-of-femicide-and-women-in-drug-trafficking> [https://perma.cc/RR69-6TNJ] [hereinafter *Rise of Femicide*].

102. See Bailey, *supra* note 101, at 130; Bartels, *supra* note 26, at 44; Von Knop, *supra* note 101, at 400; *The Rise of Femicide*, *supra* note 101.

103. See Henry, *supra* note 51, at 119.

104. See Olwine, *supra* note 69, at 655.

105. See Jones et al., *supra* note 9; Madrespeaks, *Women Confronting ISIS*, *supra* note 32.

106. Madrespeaks, *Women Confronting ISIS*, *supra* note 32.

107. *Id.*



societal response to reintegration is seen where survivors continue to be silenced and shamed by cultural norms regarding rape as there has been no shift in such beliefs.<sup>108</sup> Survivors fear continued abuse, social ridicule, and ostracization.<sup>109</sup>

In the first case, where societal response to reintegration is positive, a survivor's acceptance back into her community and family could provide her with the support needed to encourage participation and willingness of victim testimony within transitional justice mechanisms.<sup>110</sup> Without familial and community support, the additional threat of insecurity stemming from intimidation, threats, and killings of survivors who come forward as witnesses could serve to silence survivors and ensure the failure of the mechanism.<sup>111</sup> Positive reintegration, therefore, helps to overcome the factors that limit female participation, such as: fear of retaliation, fear of bringing shame to the family and community, feelings of complicity, and fear of further rejection and ostracization.<sup>112</sup>

However, in the second case, where societal response to reintegration is negative, the reintegration of survivors may lead to the prioritization of unified communities at the expense of subsequent goals, such as truth-seeking and reconciliation.<sup>113</sup> Women reintegrated into their communities may no longer wish to speak their truth after finally being accepted into their families, thus stifling other goals of transitional justice by failing to encourage participation. Thus, negative reintegration cannot help overcome factors that limit survivor participation, as fear of retaliation, bringing shame, feelings of shame, and fear of further rejection and ostracization still exist within this scenario and ultimately silence survivors.<sup>114</sup>

As a result, the effect of reintegration on the success of transitional justice mechanisms can only be discerned in the former case: where positive societal response to reintegration fosters greater participation.<sup>115</sup> The remainder of this Section of the Note will focus on the effects that follow greater participation in regards to dignity restoration and trust in the mechanism.

The restoration of survivors' dignity emerges out of the "re-establish[ment] [of] their self-respect" due to the "fact that their suffering is listened to . . . with respect and sympathy."<sup>116</sup> Though this

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108. *Supra* Part I.

109. *Supra* Part I.

110. *See What is Transitional Justice?*, *supra* note 1.

111. *See* Olwine, *supra* note 69, at 654, 660.

112. *See supra* note 58 and accompanying text.

113. *See* Jones et al., *supra* note 9, at 2.

114. *See* Henry, *supra* note 51, at 120.

115. *See supra* Section III.B.

116. Henry, *supra* note 51, at 121.

element requires structural remedies to transitional justice mechanisms that are outside the scope of this Note—e.g., the end of hostile questioning of survivors or the training of judges and prosecutors in gender-sensitivity—reintegration’s ability to change societal perceptions of rape can act as an accountability measure upholding survivor dignity in the face of prosecutorial or judicial failure to do so.<sup>117</sup> Moreover, when more survivors participate in response to their empowerment through reintegration, the likelihood that their perpetrators will be held accountable increases, resulting in a condemnation by the mechanism.<sup>118</sup> Such a condemnation of the perpetrator’s actions carries great consequences in “lessen[ing] feelings of complicity and self-blame.”<sup>119</sup> Thus, positive reintegration can create a mutually reinforcing cycle where greater participation can lead to greater accountability, and ultimately, restoration of civic and human dignity.<sup>120</sup>

Similarly, trust and faith in the ability of the mechanism to “restor[e] the moral equilibrium” following mass wartime rape can similarly be bolstered by greater participation’s effect on accountability of mechanism authorities.<sup>121</sup>

#### IV. WHICH OUTCOME IS MORE LIKELY IN FUTURE CASES?: THE CASES OF SYRIA AND SOUTH SUDAN

Mass wartime rape is not a historical problem only to be seen in past cases such as Bosnia, Rwanda, Sierra Leone, Liberia, and Guatemala.<sup>122</sup> It is a tool of modern war that plagues many of the world’s nations engulfed in violence and conflict today.<sup>123</sup> Currently, wartime rape is being carried out in approximately ten nations: Syria, Iraq, Myanmar, Nigeria, Kashmir, Burundi, South Sudan, Democratic Republic of the Congo, Yemen, and the Central African Republic.<sup>124</sup>

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117. *Id.*

118. *Id.* at 115.

119. *Id.* at 121.

120. *Id.* at 119.

121. *Id.* at 121–22.

122. See Robert Fisk, *Bosnia War Crimes: ‘The Rapes Went on Day and Night’: Robert Fisk, in Mostar, Gathers Detailed Evidence of the Systematic Sexual Assaults on Muslim Women by Serbian ‘White Eagle’ Gunmen*, INDEP. (Feb. 8, 1993), <https://www.independent.co.uk/news/world/europe/bosnia-war-crimes-the-rapes-went-on-day-and-night-robert-fisk-in-mostar-gathers-detailed-evidence-of-1471656.html> [<https://perma.cc/ZZ8A-RWEV>]; Jones et al., *supra* note 9, at 4; *supra* text accompanying notes 62–88.

123. See *Rape: Weapon of War*, U.N.O.H.C.H.R., <https://www.ohchr.org/en/newsevents/pages/rapeweaponwar.aspx> [<https://perma.cc/EBZ4-H2Y2>].

124. See Christian Caryl, *Rape is Still Being Used as a Weapon of War. Right Now. Today.*, WASH. POST (Nov. 21, 2017), <https://www.washingtonpost.com/news/democracy-post/wp/2017/11/21/rape-is-still-being-used-as-a-weapon-of-war-right-now-today> [<https://perma.cc/MZ6T-G9MQ>]; Randi Nord, *Is What’s Happening in Yemen Really Genocide*, MINT PRESS (June 4, 2018), <https://www.mintpressnews.com/yemen-genocide/243247> [<https://perma.cc/BHU4-WVRD>]; Ewelina U. Ochab, *Sexual Violence As a Weapon of*

With the eventual end of hostilities in each of these conflicts will come the need for transitional justice mechanisms to face the realities of the conflict. Reintegration should be made the first goal of such future transitional justice mechanisms in each of these ten conflicts, as they face the task of unveiling the truth of the use of mass wartime rape during the war. The remainder of this Note will provide a hypothesis for such a process to be carried out in post-conflict Syria and South Sudan.<sup>125</sup>

The reintegration of rape survivors into post-conflict society is a relatively new phenomenon that has seen only limited attempt and success in its lifetime: first in RPF-run Rwanda in the aftermath of the Tutsi Genocide, and now amongst the Yazidi populace of Iraqi Kurdistan.<sup>126</sup> Predicting the outcome of future reintegration in Syria and South Sudan based on such limited examples proves difficult.<sup>127</sup> However, certain factors regarding community values—as defined by each nation’s legal system—combined with the reality on the ground, can predict the most probable result for survivors and transitional justice.<sup>128</sup>

These two cases were chosen due to greater indications of political will by international authorities to begin such processes of transitional justice in each of these situations.<sup>129</sup> For example, since 2015, United Nations war crimes investigators have called for a special tribunal to prosecute the perpetrators of international crimes in

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*War: The Story of Daesh and Boko Haram*, FORBES (Mar. 2, 2017), <https://www.forbes.com/sites/ewelinaochab/2017/03/02/sexual-violence-as-a-weapon-of-war-the-story-of-daesh-and-boko-haram/#6bc962bb6a17> [<https://perma.cc/VVW9-WCYV>]; Rebecca Ratcliffe, *Rape is an Instrument of War in Central African Republic Conflict, Finds Study*, GUARDIAN (Oct. 5, 2017), <https://www.theguardian.com/global-development/2017/oct/05/rape-instrument-of-war-central-african-republic-conflict-study-sexual-slavery> [<https://perma.cc/29KP-CBXC>]; Nina Wilen & Bert Ingelaere, *War-Torn Congo Has Been Called the 'Rape Capital of the World.' Here Is How Fighters Think About Sexual Violence*, WASH. POST (Aug. 31, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/28/what-do-rebels-think-about-sexual-violence-in-congo-we-asked-them> [<https://perma.cc/KLQ6-2Y3U>].

125. See *infra* Sections IV.A–B.

126. See Susannah George, *Yazidi Women Welcomed Back to the Faith*, UNHCR (June 15, 2009), <https://www.unhcr.org/en-us/news/stories/2015/6/56ec1e9611/yazidi-women-welcomed-back-to-the-faith.html> [<https://perma.cc/8XQQ-VX57>]; Swanee Hunt, *The Rise of Rwanda’s Women: Rebuilding and Reuniting a Nation*, FOREIGN AFF., May/June 2014, at 156, <https://www.foreignaffairs.com/articles/rwanda/2014-03-30/rise-rwandas-women> [<https://perma.cc/K6QB-T54K>]; Madrespeaks, *Women Confronting ISIS*, *supra* note 32.

127. See Ward & Marsh, *supra* note 10.

128. See Hunt, *supra* note 126, at 155.

129. See Akira Tomlinson, *UN Urges South Sudan Government to Create a Hybrid Court for War Crimes*, JURIST (Sept. 19, 2018), <https://www.jurist.org/news/2018/09/un-urges-south-sudan-government-to-create-a-hybrid-court-for-war-crimes> [<https://perma.cc/R3NV-KYWD>]; Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps into the Breach*, 15 J. INT’L CRIM. JUST. 231, 232 (2017), <https://academic.oup.com/jicj/article/15/2/231/3605019> [<https://perma.cc/N65X-77ZG>].

Syria.<sup>130</sup> The U.N. Commission of Inquiry on Syria has already compiled a war crimes suspect list.<sup>131</sup> However, the greatest indicator of will to prosecute Syrian war crimes comes from the U.N. General Assembly's passing of Resolution 71/248 in December 2016, which establishes the "International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011"—otherwise referred to as the IIIM.<sup>132</sup> This marks "the first time that the General Assembly has established such a body to assemble and analyze evidence of international crimes to a prosecution standard, with the benefit that the evidence could be preserved for a future tribunal."<sup>133</sup>

Similarly, alongside the international community, the U.S. has urged the government of South Sudan to establish a hybrid tribunal in the wake of both a peace agreement between its warring factions and a declaration of amnesty by the President of South Sudan for all "those who waged war against the government."<sup>134</sup> The peace agreement specifically provides for the creation of a hybrid court consisting of international and South Sudanese judges to begin transitional justice processes.<sup>135</sup> However, there has been no government cooperation thus far, as both sides continue perpetrating human rights violations, such as wartime rape.<sup>136</sup> In the face of failure for such prosecutorial methods of transitional justice, attention is turning to reconciliatory non-prosecutorial forms of transitional justice.<sup>137</sup>

## A. Syria

### 1. Overview of Wartime Rape Amidst the Syrian Conflict

In March 2011, during the wake of the Arab Uprisings, protests erupted in Syria after young school boys were detained, tortured, and

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130. Julian Borger, *Call For Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, GUARDIAN (Mar. 17, 2015), <https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria> [<https://perma.cc/A428-QBMZ>].

131. *Id.*

132. Whiting, *supra* note 129, at 232.

133. *Id.*

134. Kevin J. Kelley, *US, Human Rights Watchdog Urge Hybrid Court for South Sudan*, EAST AFRICAN (Aug. 14, 2018), <https://www.theeastafrican.co.ke/news/ea/US-human-rights-watchdog-hybrid-court-south-sudan/4552908-4712272-1kblvzb/index.html> [<https://perma.cc/2A9S-QTU7>]; see Dimo Silva, *South Sudan Government Objects to War Crimes Court*, VOA (Oct. 3, 2018), <https://www.voanews.com/archive/south-sudan-government-objects-war-crimes-court> [<https://perma.cc/93G4-UHSN>]; Tomlinson, *supra* note 129.

135. Kelley, *supra* note 134.

136. *See id.*

137. *See* Silva, *supra* note 134.

killed in response to their show of support for the uprisings occurring in Syria's neighboring countries of Tunisia and Egypt.<sup>138</sup> The country soon after became engulfed in a civil war that has claimed the lives of more than 465,000 Syrians, injuring over a million, and displacing over twelve million—based on numbers from April 2018.<sup>139</sup> Amongst those killed, injured, and displaced are the thousands of women and girls—Christians, Yazidi, Kurdish, Arab, Armenian, and Muslims alike—whose bodies have been used as a battlefield by rebel groups, President Bashar al-Assad's government forces, and Islamist terrorist forces such as the Islamic State (IS) and Al-Nusra or Jabhat Fatah al-Sham.<sup>140</sup> While exact numbers of rape and sexual violence are nearly impossible to determine due to the silence surrounding this crime in general, and the difficulty of wartime documentation specifically, it is undeniable that sexual violence against women and girls has been a “core component of the armed groups' ideology and economic strategy in . . . Syria.”<sup>141</sup>

## 2. Post-Conflict Syria and Future Reintegration

Since 2015, Yifat Susskind, Executive Director of MADRE, an international women's human rights organization, has spoken of a “subtle but critical shift” in cultural norms surrounding rape and rape survivors on the ground in Syria and Iraq as a result of the “sheer number of women who have suffered sexual violence.”<sup>142</sup> A “tipping point” could thus emerge within Syrian and Iraqi societies, she argues, leading to the rejection of cultural stigmas towards rape.<sup>143</sup> Yanar Mohammed, an Iraqi women's rights activist, reasons, “[i]t's harder to blame a woman for having been raped when it's happening to so many.”<sup>144</sup>

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138. *Syria's Civil War Explained from the Beginning*, AL-JAZEERA (Apr. 14, 2018), <https://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html> [https://perma.cc/4Z3U-K4XQ].

139. *Id.* (numbers based on March 2019 estimates).

140. See generally Human Rights Council, “*I Lost My Dignity*”: *Sexual and Gender-Based Violence in the Syrian Arab Republic*, U.N. Doc A/HRC/37/CRP.3 (Mar. 8, 2018), [hereinafter Human Rights Council, *I Lost My Dignity*].

141. *Investigating Conflict-Related Sexual and Gender-Based Crimes—Lessons from Iraq and Syria*, UN WOMEN (Oct. 26, 2017), <https://www.unwomen.org/en/news/stories/2017/10/news-event-wps-investigating-conflict-related-sexual-and-gender-based-crimes> [https://perma.cc/T2JL-VB3C].

142. Yifat Susskind, *What Will It Take to Stop ISIS Using Rape as a Weapon of War?*, GUARDIAN (Feb. 17, 2015), <https://www.theguardian.com/global-development/2015/feb/17/disarm-isis-rape-weapon-war> [https://perma.cc/STT4-LKJH]; see *Meet Madre*, MADRE, <https://www.madre.org/meet-madre> [https://perma.cc/4TDX-DV4X]; Madrespeaks, *Women Confronting ISIS*, *supra* note 32.

143. Susskind, *supra* note 142.

144. *Id.*

Such change is currently undeniable within Iraq's Yazidi community where IS has carried out mass abductions, forced conversions, and rape of Yazidi women and girls.<sup>145</sup> In response to these deliberate and targeted attacks, Yazidi spiritual leader, Khurto Hajji Ismail—"Baba Sheikh"—issued an edict instructing Yazidi families and communities to welcome and accept rape survivors, namely those abducted by IS and forced into a sex slave trade where they were converted to Islam—a formerly unpardonable sin in the Yazidi faith.<sup>146</sup> This measure effectively ended the practice of ostracization, rejection, and honor killings in response to rape within the Yazidi community upon survivors' return.<sup>147</sup> Such a phenomenon mirrors post-genocide Rwanda, where the "critical mass of [rape] survivors triggered" new national norms on gender-based violence and women's rights.<sup>148</sup>

While Susskind's prediction of a change in cultural response to rape implicates the entirety of Iraq and Syria, supporting evidence seems to only point to Yazidi progress.<sup>149</sup> However, Yazidis are not the only demographic within Syria affected by mass wartime rape.<sup>150</sup> IS and other extremist groups have similarly targeted Christian populations around Aleppo, Damascus, and Northeast Syria, while government forces have raped women and girls during house raids in opposition territory, within detention centers, and at checkpoints.<sup>151</sup> Rape thus has affected the whole of the Syrian female populace: Christians, Yazidis, and the majority-Muslim populace.<sup>152</sup>

With Muslims accounting for eighty-seven percent of the population, the Islamic faith and its views regarding rape are an important lens through which to predict the Syrian people's response to reintegration of rape survivors.<sup>153</sup> Islam denounces six shameful practices, or *fahisha*, collectively known as the *hudud*.<sup>154</sup> Unlawful sexual conduct, or *zina*, is one of the shameful practices that Islam condemns.<sup>155</sup> Rape is also included in this category of unlawful sexual conduct—comprising both the rapist *and* the survivor as perpetrators of such

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145. *See id.*

146. George, *supra* note 126; Madrespeaks, *Women Confronting ISIS*, *supra* note 32.

147. George, *supra* note 126; Madrespeaks, *Women Confronting ISIS*, *supra* note 32.

148. Susskind, *supra* note 142; *see* Hunt, *supra* note 126.

149. *See* George, *supra* note 126; Susskind, *supra* note 142.

150. *See* Human Rights Council, *I Lost My Dignity*, *supra* note 140, at 4.

151. *Id.* at 5, 13–14.

152. *See generally* Human Rights Council, *I Lost My Dignity*, *supra* note 140.

153. U.S. DEP'T ST. BUREAU DEMOCRACY, HUM. RTS., & LAB., JULY–DEC., 2010 INT'L RELIGIOUS FREEDOM REP. (2011), [https://2009-2017.state.gov/j/drl/rls/irf/2010\\_5/168276.htm](https://2009-2017.state.gov/j/drl/rls/irf/2010_5/168276.htm) [<https://perma.cc/79KC-NVKX>].

154. *See* HINA AZAM, SEXUAL VIOLATION IN ISLAMIC LAW: SUBSTANCE, EVIDENCE, AND PROCEDURE, 68, 70 (Cambridge Stud. Islamic L., ed., 2015).

155. *See id.*

a shameful act.<sup>156</sup> Syrian Muslim social norms against rape thus stem from such an understanding of rape within the context of *zina*, which has traditionally led to the prevalence of norms against rape survivors.<sup>157</sup> These beliefs can escalate to the point of honor killings of survivors or of forced marriages to survivors' rapists.<sup>158</sup>

This reality is further reflected in Syrian laws, where the definition of rape set forth in the Syrian Penal Code resembles the definition of *zina*.<sup>159</sup> While the rape or sexual assault of a survivor below the age of twelve can result in a minimum nine years of hard labor and a maximum twenty-one-year conviction, Article 508 establishes that the rape of an adult woman can effectively go unpunished if the perpetrator and survivor marry and do not divorce within five years' time.<sup>160</sup> Article 508 is thus a codification of the social pressure felt by female Syrian survivors of rape to enter into forced marriage.<sup>161</sup> However, within the context of civil war, such an option may not even be possible as the chaos of conflict moves offenders to new battle-fronts.<sup>162</sup>

In 2017, documentary director Manon Loizeau released *Syrie: La Guerre Silencieuse*, or *The Silent War*, compiling the stories of Syrian women raped by government forces during the ongoing strife.<sup>163</sup> One woman describes the situation of Syrian women, particularly Muslim Syrian women, as being "trapped between traditions on one side

156. *See id.* at 170.

157. Comm. to End All Forms Of Discrimination Against Women (CEDAW), *Rep. on Women's Human Rights Violations in Syria Before and During the Conflict*, [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SYR/INT\\_CEDAW\\_NGO\\_SYR\\_17381\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SYR/INT_CEDAW_NGO_SYR_17381_E.pdf).

158. *See id.*

159. *Compare* قانون اقرار تابق عل نوناق /مقر تا بوق عل نوناق /148/ ماعل /1949, [LEGIS. DECREE NO. 148 of 1949, arts. 489, 490] (Syria), *with* Quran, Al Isra 17:32, Al-Nur 24:2–4, <https://quran.com/17> [<https://perma.cc/BY9J-NY8J>] and <https://quran.com/24> [<https://perma.cc/LV3M-MX2C>]. *See also* Joseph Williams, *Justice for Syria: A Human Rights Review of the Syrian Penal Code*, 34 (Dec. 2013), <https://law.vanderbilt.edu/academics/academic-programs/international-legal-studies/Justice-for-Syria-Project.pdf>.

160. LEGIS. DECREE NO. 148 OF 1949, arts. 489–90, 508 (Syria); Williams, *supra* note 159; U.S. DEP'T ST. BUREAU DEMOCRACY, HUM. RTS., & LAB., 2005 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: SYRIA (2006), <https://2009-2017.state.gov/j/drl/rls/hrrpt/2005/61699.htm> [<https://perma.cc/WFQ8-3P5S>]; Rebecca Murray, *Syria: Getting Away Legally With Assaulting Women*, INTER PRESS SERV. (Dec. 10, 2010), <http://www.ipsnews.net/2010/12/syria-getting-away-legally-with-assaulting-women> [<https://perma.cc/U82H-MDMS>].

161. *See* Comm. on the Elimination of Discrimination Against Women (CEDAW), *Report on Concluding Comments: Syrian Arab Republic*, U.N. Doc. CEDAW/C/SYR/CO/1 (2007), <https://undocs.org/CEDAW/C/SYR/CO/1> [<https://perma.cc/4QB8-UEQU>]; Nadia Muhana, *Syria: Sexism in the System*, WOMEN LIVING UNDER MUSLIM LAWS (Mar. 10, 2011), <http://www.wluml.org/node/7052> [<https://perma.cc/ZAY3-VK9G>].

162. *See* Human Rights Council, *I Lost My Dignity*, *supra* note 140, at 5.

163. *Silent War: How Rape Became a Weapon in Syria*, AL JAZEERA (June 11, 2018), <https://www.aljazeera.com/programmes/witness/2018/06/silent-war-rape-weapon-syria-180611071447939.html> [<https://perma.cc/9SYQ-GHJA>].

and the regime on the other.”<sup>164</sup> Testimonials such as these seem to hint towards a lack of change in norms regarding rape outside the Yazidi community.<sup>165</sup> As a result, the current reality facing survivors seems to predict that Syria is more likely to experience the second outcome, as described above, in the face of future reintegration attempts where, assuming survivors are reintegrated, societal response will nonetheless be negative, thus inhibiting successful transitional justice procedures as they relate to mass wartime rape by obstructing possible participation, dignity restoration, and trust.<sup>166</sup>

## *B. South Sudan*

### *1. Overview of Wartime Rape Within the South Sudanese Conflict*

Following its independence from Sudan in 2011, friction emerged between the governing authorities of the new nation and their respective ethnic groups when President Salva Kiir, an ethnic Dinka, suspected his deputy, Riek Machar, an ethnic Nuer, of a plot to overthrow him in a coup, sending the nation into civil war in 2013.<sup>167</sup> A report published by the London School of Hygiene & Tropical Medicine places the death toll at 383,000 people in the five years of the conflict.<sup>168</sup> Pramila Patten, U.N. Special Representative on Sexual Violence and Conflict, described the use of rape in this conflict as a “lethal tactic of war” that has effected thousands of women and children.<sup>169</sup> A shocking U.N. Human Rights report states 232 civilians were killed and 120 women and girls raped during an offensive against forty villages by government forces and allied militias between April 16, 2018 and May 24, 2018 in Unity state, an opposition-held region.<sup>170</sup> Moreover,

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164. *Id.*

165. *See id.*

166. *See id.*

167. *See South Sudan: What is the Fighting About?*, BBC (May 10, 2014), <https://www.bbc.com/news/world-africa-25427965> [<https://perma.cc/88ZV-EEK6>].

168. Megan Specia, *383,000: Estimated Death Toll in South Sudan's War*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/world/africa/south-sudan-civil-war-deaths.html> [<https://perma.cc/J9DF-HKMV>] (numbers reflect calculations from December 2013 until April 2018).

169. *Hearing 'Horrific' Testimonies from Rape Survivors in South Sudan, UN Envoy Says They Yearn Only for Peace*, U.N. (July 12, 2018), <https://news.un.org/en/story/2018/07/1014501> [<https://perma.cc/652H-3KVM>].

170. Peter Beaumont, *Mass Rape and Killings in South Sudan May Constitute War Crimes, says UN*, GUARDIAN (July 10, 2018), <https://www.theguardian.com/global-development/2018/jul/10/south-sudan-government-forces-accused-potential-war-crimes-horrific-acts> [<https://perma.cc/4MCM-WGC4>].



in the first half of 2018 alone, nearly 2,300 cases of sexual assault were reported with 20 percent of cases involving children.<sup>171</sup>

## 2. *Post-Conflict South Sudan and Future Reintegration*

Like nearly all African nations, South Sudan exhibits a pluralist legal system based on a mixture of statutory and customary law.<sup>172</sup> In the case of South Sudan, customary law, as an “expression of the customs, beliefs, and practices of the people,” provides a lens by which to measure the effectiveness of reintegration in post-conflict society due to its functionality as not just “legal protocol” but “social convention.”<sup>173</sup>

Regardless of the existence of a formal, statutory legal system, the informal, customary legal tradition has been the “principal source of social order . . . [and] law in contemporary [South] Sudan” with more than ninety percent of disputes handled by traditional authorities practicing customary law, such as tribe chiefs.<sup>174</sup> The core tenants of this legal tradition are reconciliation between the “wronged and wrongdoer,” and cohesion and stability of the community over which it governs—sometimes at the expense of truth and justice.<sup>175</sup> Prioritization of reconciliation in this way devalues the rights of the individual, particularly for women and girls, in the face of the good of the family and society.<sup>176</sup>

For example, during times of peace, when a woman or girl is raped and the case appears before traditional authorities under the customary system, it is often “talked through”<sup>177</sup> as a problem between families that should be settled through money transfers, provision of goods or services such as “medical care and compensation

171. *South Sudan: UN Says Over 150 Women, Girls Raped in 12 Days*, AL-JAZEERA (Dec. 4, 2018), <https://www.aljazeera.com/news/2018/12/south-sudan-150-women-girls-raped-12-days-181204074727376.html> [<https://perma.cc/JK8B-W4L9>].

172. See Tiernan Mennen, *Lessons from Yambio: Legal Pluralism and Customary Justice Reform in Southern Sudan*, 2 HAGUE J. ON RULE L. 218, 221 (2010); Gabriel Mading Apach & Garang Geng, *Update: An Overview of the Legal System of South Sudan*, GLOBALEX (Sept. 2018), [https://www.nyulawglobal.org/globalex/South\\_Sudan1.html](https://www.nyulawglobal.org/globalex/South_Sudan1.html) [<https://perma.cc/H26G-CMXT>].

173. Justice Aleu Akechak Jok, Robert A. Leitch, et al., *A Study of Customary Law in Contemporary Southern Sudan*, WORLD VISION INT’L 1, 6, 11 (March 2004), <https://www.southsudanpeaceportal.com/repository/study-customary-law-contemporary-southern-sudan> [<https://perma.cc/U38Y-DSWP>].

174. Jok et al., *supra* note 173, at 6; see Apach & Geng, *supra* note 172; Mennen, *supra* 172, at 219–20.

175. Jok et al., *supra* note 173, at 16; see Apach & Geng, *supra* note 172; Mennen, *supra* 172, at 241.

176. Mennen, *supra* 172, at 241–42; Jok et al., *supra* note 173, at 31; Apach & Geng, *supra* note 172.

177. Freida McCormack, *Prospects for Accessing Justice for Sexual Violence in Liberia’s Hybrid System*, 7 STABILITY: INT’L J. SECURITY & DEV. 4, 10 (2018).

for economic loss,” or even apologies to the family.<sup>178</sup> Such traditions can be inconsistent with human rights norms generally, and women’s rights specifically, as they can be “considered . . . mechanisms to control and manage women.”<sup>179</sup>

The civil war in South Sudan, however, encompasses strife between members of different communities, tribes, and groups, such that customary law may prove less useful and successful, as a soldier who rapes is usually from a different community than the survivor.<sup>180</sup> Without the ability to follow traditional protocol of reconciliation in response to the survivor’s rape,<sup>181</sup> it becomes possible that South Sudan could be left with no other alternative than reintegration. Nonetheless, it is more likely that within a customary system where community unity is shattered due to rape, and a woman is no longer able to fulfil her role of cementing family ties through marriage and reproduction as a result of her rape, societal response may be negative towards her reintegration.<sup>182</sup> This theory is further bolstered by noting the lack of change in community response to rape and rape survivors following the conflict between the Sudanese government forces from Khartoum and those of southern Sudan during the over twenty-year civil conflict that engulfed the nation of Sudan prior to the creation of the state of South Sudan in 2011.<sup>183</sup>

Thus, like the norms of Islamic communities, customary law refuses to acknowledge a criminal wrong has been perpetrated.<sup>184</sup> Rather, it continues to see survivors as a mechanism for community, and therefore, values destruction.<sup>185</sup> Mirroring post-conflict Syria, South Sudan’s negative reintegration can lead to stifling survivor participation, dignity restoration, and ultimate trust in transitional justice mechanisms.<sup>186</sup>

## CONCLUSION

While the predictions set out for Syria and South Sudan leave a bleak hope for the success of future transitional justice mechanisms in unveiling the realities of mass wartime rape during conflict

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178. Stephen Lubkemann et al., *Unintended Consequences: Constraint of Customary Justice in Post-Conflict Liberia*, in CUSTOMARY JUSTICE AND THE RULE OF LAW IN WARTORN SOCIETIES 223 (Deborah Isser, ed., 2011).

179. M’Cormack, *supra* note 177, at 4.

180. *See* Specia, *supra* note 168.

181. *See* Mennen, *supra* note 172, at 241.

182. *Id.*; Jok et al., *supra* note 173, at 7; Apach & Geng, *supra* note 172.

183. *See* Jok et al., *supra* note 173, at 7, 26–29.

184. *See* Mennen, *supra* note 172, at 241; Apach & Geng, *supra* note 172.

185. *See id.*

186. *See supra* Section IV.A.2.

and achieving justice for survivors, it is important to recall three points. First, conflict in both nations has not ceased.<sup>187</sup> As a result, these predictions can be difficult to make with absolute certainty. Second, as mass wartime rape continues in these conflicts, the possibility for Susskind's believed turning point becomes more likely to emerge, as mass wartime rape tragically encompasses a greater percentage of women and girls with each passing day.<sup>188</sup> Finally, prior to the beginning of post-conflict reconstruction and the onset of transitional justice, it remains possible to alter negative community reactions into positive ones through the work of global and local leaders, advocacy networks, and non-governmental organizations changing the culturally accepted narrative and understanding surrounding rape and rape survivors.<sup>189</sup>

While this Note maintains that reintegration must be prioritized in order for transitional justice mechanisms to be more successful, reintegration is not the only factor that can ensure the success of such mechanisms,<sup>190</sup> but is rather an overlooked one that this Note seeks to highlight. International law authorities should continue to ensure that each mechanism provides a safe environment and is supportive to survivors willing to share their story through means such as gender-trained judges, lawyers, and officials, options for *in camera* testimony, and much more. Reintegration is merely the first step of many that the international community must begin to take to provide survivors and their communities with effective transitional justice, reconciliation, and truth.

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187. Zeina Karam, 'Forgotten' War: Syria Conflict a Footnote at UN Meeting, AP (Sept. 25, 2019), <https://www.apnews.com/776a7d73f73b4c7da2f96b59067c19f7> [<https://perma.cc/Z97A-EFQE>].

188. See Susskind, *supra* note 142.

189. See, e.g., Abi-Falah, *supra* note 12, at 7–11.

190. See Margot Wallström, *Introduction: Making the Link Between Transitional Justice and Conflict-Related Sexual Violence*, 19 WM. & MARY J. WOMEN & L. 4, 4–5 (2012).

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