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Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice

Edited by **Rudina Jasini** and **Gregory Townsend**

Funded by the UK Economic and Social Research Council (ESRC)



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Introduction

Rudina Jasini*

Justice for victims has often been claimed as the *raison d'être* and the rallying call of international criminal justice mechanisms. This noble goal has been at the heart of the work of hybrid and ad hoc international criminal tribunals, as well as of the International Criminal Court (ICC), and yet criticism has been levelled at these tribunals for not doing enough for victims of mass atrocities.¹ The main challenge for these mechanisms lies in the ambiguity as to what justice for victims means and what form it takes within international criminal justice. Understanding the role and scope of substantive and procedural rights afforded to victims has been a significant issue with which virtually all international criminal tribunals have struggled, and the ICC especially. Compared to other tribunals, the development and the application of the victim participation regime at the ICC have been more horizontal and decentralised in character, depending on the number of situations and, within a given situation, cases in which each individual pre-trial and trial chamber has had to demarcate the boundaries of victim participation according to the requirements of each case and situation. More broadly, given the nature of international criminal trials, including subject-matter limitations, the structure and composition of international criminal tribunals, as well as the magnitude of cases and the nature of mass victimisation – distinguishing them in significant ways from domestic criminal proceedings – victim participation in international criminal proceedings has posed some unique and specific questions and themes, which in turn have given rise to complex answers and challenges. Undoubtedly, victim participation is still in its nascent stage in international criminal justice, and its *sui generis* nature has characterised its whole application in practice.

The research on victim participation to date has shown that there is a critical need for well-developed common standards, at both a legal and a normative level, as well as common standards of practice to guide the application of victim participation. This was indeed confirmed by the findings of my own study into the role, scope and implications of the participation of victims as civil party at the Extraordinary Chambers in the Courts of Cambodia, in addition to the need to address the fundamental question: what role ought victim participation to play in proceedings in international criminal justice? The research particularly argues that, whilst victim participation may lead, at least in theory, to the realisation of the aspiration of restorative justice for victims, the manner in which victim participation has been crafted and interpreted has raised important issues and questions regarding its role and impact with respect to the functionality of court proceedings, the rights of the accused and, most significantly, the rights of victims themselves.²

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¹ M. Cherif Bassiouni, 'International Recognition of Victim's Rights' (2006) 6 Human Rights Law Review 203.

² R. Jasini, 'Victim Participation and Transitional Justice in Cambodia: the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)', report prepared for Impunity Watch, April 2016.

See <https://www.impunitywatch.org/victim-participation-and-transition>

Guided by the research on victim participation and with a view to advancing the impact of victim participation at the ICC, the Centre for Criminology at the University of Oxford Faculty of Law and the International Criminal Court Bar Association (ICCBA)³ embarked on a joint project, *'Advancing the Impact of Victim Participation at the International Criminal Court: Developing Avenues for Collaboration'*, which was funded by the UK Economic and Social Research Council.⁴ The aim of the project was to create a platform for exchanging knowledge and co-designing resources for the education and training of legal practitioners at the ICC. The emphasis was on jurisprudential and normative developments of victim participation, especially regarding implications of such participation for the functionality of court proceedings, the rights of the accused, and the rights of victims themselves. As part of this project, on 31 May and 1 June 2018, the Centre and the ICCBA hosted a workshop and training session on victim participation at the ICC in The Hague.⁵ This event brought together distinguished scholars and practitioners, and offered a forum for intellectually engaging discussions on the role and implications of the victim participation mechanism at the ICC. On 4 October 2018, a one-day expert workshop on victim participation was held in Oxford at the Bonavero Institute of Human Rights, Mansfield College. The workshop focused on specific aspects of victim participation, including theoretical and jurisprudential developments on reparation, presentation of evidence, as well as the ethical, psychological, and practical considerations concerning victim testimony at the ICC.⁶ All participating scholars and practitioners offered insightful and thought-provoking views on the future of reparations for victims, and on recent developments of presentation of evidence by victims' legal representatives at the ICC. The presentations and discussions highlighted inter alia calls to untether reparations for victims from the conviction of the accused, as well as the need for better assessment of victims' trauma in eliciting testimony and evidence.

The impetus for this publication grew out of this successful and productive collaboration. This professional publication is the first of its kind to bridge the gap between research and practice in the area of victim participation in international criminal justice. As such, it brings together the knowledge and experience shared by practitioners and scholars. It is designed to spell out the problems faced by the ICC, examine critically how ICC jurisprudence and rule-making have defined the scope and impact of participation, and assess whether the current reality on the ground lives up to the normative framework that victim participation seeks to espouse. Legal practitioners, and particularly legal representatives of victims at the ICC, will benefit greatly from a publication that offers up-to-date analysis of the theoretical and jurisprudential developments of victim participation. In addition, this publication will create a platform for discussion on effective processes of legal representation of victims, and will pave the way for a valuable contribution to the strengthening of the ICCBA's institutional capacity and its work with training legal representatives of victims at the ICC. Furthermore, the publication will go

³ The ICCBA is an independent, professional association established in July 2016. On 6 December 2019, the ICC Assembly of States Parties (ASP) to the Rome Statute formally recognised the ICCBA as an independent representative body of counsel in accordance with Rule 20(3) of the ICC Rules of Procedure and Evidence. See ICC-ASP/18/Res.6, Strengthening the International Criminal Court and the Assembly of States Parties, para. 80.

⁴ From 2018 to 2020, Dr Rudina Jasini and Professor Carolyn Hoyle led the Economic and Social Research Council (ESRC) Impact Acceleration Award (IAA) project on *'Advancing the Impact of Victim Participation at the International Criminal Court: Developing Avenues for Collaboration'*.

See <https://www.law.ox.ac.uk/research/advancing-impact-victim-participation-ICC-collaboration>

⁵ See <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/advancing-impact-victim-participation-international-criminal>

⁶ See <https://www.law.ox.ac.uk/news/2018-10-30-watch-workshop-advancing-impact-victim-participation-international-criminal-court>

beyond the confines of The Hague and Oxford. It will offer a great opportunity to encourage a wide range of people to engage with the issues raised by victim participation. This publication is particularly important and timely in view of the evident trend among all international criminal tribunals which have followed the ICC's establishment, and which may yet be created, of incorporating some form of victim participation.

Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions

Megan Hirst and Sandra Sahyouni*

Introduction

At the International Criminal Court (ICC) and across the other international and hybrid criminal courts, victims who wish to participate in judicial proceedings must generally do so through lawyers. This makes meaningful participation by victims almost entirely dependent on the nature and quality of their legal representation. And yet, the ICC—like most other international tribunals which allow victim participation—has few mechanisms in place to ensure that victims’ legal representation is effective. This subject has also received relatively little attention in the numerous discussions about improving the quality of victim participation at the Court.¹ This article attempts to contribute some thoughts on the subject by exploring the question of effective legal representation as it applies to victim participation at the ICC.² It begins by defining the principle of the right to legal representation, and tracing how it can be transposed into the context of victim participation. In doing so, it argues that since legal representation is a requirement for victim participation, it must be *effective* and not merely symbolic. It then identifies and examines some of the structural and day-to-day challenges which impede effective legal representation for victims. Lastly, it makes proposals in three areas as solutions for the way forward.

The principle: the right to effective legal representation

1.1 Origin and meaning

The right to legal representation derives from the broader right to a fair trial, which is enshrined in all major international human rights instruments, as well as being part of customary international law.³ It is most frequently considered in relation to defendants in criminal

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¹ Some notable exceptions include: Redress, *Representing Victims before the ICC: Recommendations on the Legal Representation System* (April 2015); Human Rights Watch, *Who Will Stand for Us? Victims’ Legal Representation at the ICC in the Ongwen Case and Beyond* (August 2017) 8; Amnesty International, *Independent Panel of experts report on victim participation at the International Criminal Court* (July 2013) <<https://www.amnesty.org/download/Documents/16000/ior530012013en.pdf>> accessed 19 June 2020. Most of the literature on the topic of legal representation has focused instead on issues related to legal aid and the selection and appointment of legal representatives.

² Throughout this article, we use the right to legal representation, the right to legal assistance and the right to counsel interchangeably to refer to the same concept.

³ Universal Declaration of Human Rights (1948) UNGA Res 217 A (III) (Universal Declaration) art 10-11; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14; European Convention for the Protection of Human Rights and

proceedings, for whom the absence of legal assistance can be highly consequential. In recognition of this, key human rights treaties identify the right to legal representation as a ‘minimum guarantee’ in the determination of any criminal charge.⁴

The right to counsel is not limited to criminal cases.⁵ The African Commission on Human and Peoples’ Rights includes the ‘entitlement to consult and be represented by a legal representative’ as one of the essential elements of any fair hearing, criminal or otherwise.⁶ The European Court of Human Rights (ECtHR) has similarly recognised that the availability of legal representation, in civil as well as criminal proceedings, is central to the concept of a fair trial, in order to allow litigants to present their case effectively and enjoy equality of arms with the opposing side.⁷ In line with this, the ECtHR has equated the denial of legal aid in civil proceedings in some instances to a denial of the opportunity to present a case effectively before a court, and therefore a violation of the right to a fair trial.⁸

The right to legal representation must be allowed to be exercised in a way that goes beyond mere symbolism or formality. In the words of the ECtHR, it must be practical and effective, rather than theoretical and illusory.⁹ There is no question that this holds true beyond the European context: the right to legal representation inherently carries with it the intention and need for that legal representation to be effective.¹⁰ In short, the right to counsel, where it exists, is the right to the *effective* assistance of counsel.¹¹

How do we define ‘effectiveness’ in concrete terms? On a practical level, many of the features of effective legal representation relate to the person of the counsel herself and to her conduct.

Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (entered into force on 4 November 1950) ETS 5 (European Convention) art 6; African Convention on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1981) (1982) 21 ILM 52 (African Convention) art 7; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention) art 8 and 25. On the status of the Universal Declaration in public international law and as customary international law, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 57; *United States v Iran* (Judgment of May 24) [1980] ICJ Rep 3, 42; Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1995-1996) 25 Ga J Intl & Comp. L. 287; Nigel S. Rodley, ‘Human Rights and Humanitarian Intervention: The Case Law of the World Court’ (1989) 38 Intl & Comp L Q 326, 333.

⁴ International Convention on Civil and Political Rights (ICCPR) art 14(3)(d); European Convention on Human Rights (European Convention) art 6(3)(c); American Convention on Human Rights art 8(2)(d) and (e). Although the African Charter does not use the same formulation on ‘minimum guarantees’, it states that the right to have one’s cause heard comprises the right to defence, including the right to be defended by counsel of one’s choice. See art 7(1)(3).

⁵ IBA, *Legal Representation, Fairness and Access to Justice in Hybrid Tribunals and Specialised Chambers* (2018) 26.

⁶ Principles and guidelines on the right to a fair trial and legal assistance in Africa, DOC/OS(XXX)247, art 2(f).

⁷ *Steel and Morris v UK* App no 68416/01 (ECtHR, 15 February 2005) paras 59-61; *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979) paras 20-28.

⁸ *Steel and Morris v UK* App no. 68416/01 (ECtHR, 15 February 2005) para 72; *Muscat v Malta* App no 24197/10 (ECtHR, 17 July 2012) paras 46 and 56.

⁹ *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008) para 51; *Staroszczyk v Poland* App no 59519/00 (ECtHR, 22 March 2007) para 122; *Imbrioscia v Switzerland* App no 13972/88 (ECtHR, 24 November 1993) para 38.

¹⁰ *Case of Cabrera García and Montiel Flores v Mexico* (IACtHR, 26 November 2010) Series C No. 220, para 155; *Dexter Lendore* (Trinidad and Tobago) (IACtHR, 20 March 2009) Report 28/09, case 12.269, paras 45-47; *Case of Chaparro Álvarez and Lapo Íñiguez v Ecuador* (IACtHR 21 November 2007) Series C No. 170, para 159.

¹¹ See eg *McMann v Richardson*, 397 US 759, 771 n14 (1970).

She should be competent, diligent, and meet minimum standards of professional knowledge and skill;¹² independent and ethical in the discharge of her duties;¹³ and loyal to the client's interests.¹⁴ There is, however, also an important institutional facet to effective legal representation, in that the overarching framework in which counsel operates must not restrict or frustrate her ability to carry out her duties in the manner described above.

Where the right to legal representation is being exercised in proceedings before a national court, state authorities have a responsibility to ensure the effectiveness of the legal assistance provided to a litigant. Simply assigning counsel or making one available does not necessarily fulfill their obligation in this regard.¹⁵ While shortcomings on the part of a lawyer are generally not imputable to the public authorities—given the wide latitude granted to lawyers in the exercise of their professional judgement—states can nevertheless be held accountable if these shortcomings are manifestly incompatible with the interests of justice or were otherwise brought to the court's attention during judicial proceedings.¹⁶ These obligations on states raise the important question of whether, and if so to what extent, international criminal courts have equivalent obligations.

1.2 *In the context of defence work at the international criminal courts*

The right to legal representation was recognised in international criminal courts from the outset as a due process right of suspects and accused persons. The statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) on this point mirror article 14(3)(d) of the ICCPR, and that language has been subsequently replicated in the statutes of all the other international and hybrid courts.¹⁷

Despite the statutory recognition, effective defence representation historically faced challenges of a structural nature from the very beginning of the ICTY and ICTR's existence. The most

¹² UN Basic Principles on the Role of Lawyers (1990) principle 14; *Dexter Lendore* (Trinidad and Tobago) (IACoHR, 20 March 2009) Report 28/09, case 12.269, paras 46-47; *Roberto Moreno Ramos* (United States) (IACoHR, 28 January 2005) Report No. 1/05, Merits, paras 56-57; *Whitley Myrie* (Jamaica) (IACoHR 12 October 2004) Report 41/04, case 12.417, merits, paras 62-63.

¹³ UN Basic Principles on the Role of Lawyers (1990) principle 14.

¹⁴ *ibid* principle 15.

¹⁵ *Sialkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007) para 100.

¹⁶ *Muscat v Malta* App no 24197/10 (ECtHR, 17 July 2012) para 46; *Sialkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007) paras 99-100; *Case of Cabrera García and Montiel Flores v Mexico* (IACtHR, 26 November 2010) Series C No. 220, para 155; *Case of Chaparro Álvarez and Lapo Ñiñez v Ecuador* (IACtHR 21 November 2007) Series C No. 170, para 159; *Dexter Lendore* (Trinidad and Tobago) (IACoHR, 20 March 2009) Report 28/09, case 12.269, paras 45-47; The Human Rights Policy Seminar, University of North Carolina School of Law, *A Basic Human Right: Meaningful Access to Legal Representation* (June 2015) 135-36; Open Society Justice Initiative, *International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions* (April 2013)

<<https://www.justiceinitiative.org/uploads/d4a5fd83-2158-4f5a-9bf4-7d9dd2fed055/digests-arrest%20rights-human-rights-committee-20130419.pdf>> accessed 10 July 2020.

¹⁷ On the rights of the accused, see ICTY Statute art 21(4); ICTR Statute art 20(4); Mechanism for International Criminal Tribunals (MICT) Statute, art 19(4); Rome Statute art 67(1); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as amended, art 35 new; Special Tribunal for Lebanon (STL) Statute art 16(4); Law no 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office, art 21(4). On the rights of suspects, see ICTY Statute art 18(3); ICTR Statute art 17(3); MICT Statute, art 16(3); Rome Statute art 55(2)(c); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as amended, art 24 new; STL Statute art 15(3); Law no 05/L-053 on the Specialist Chambers and Specialist Prosecutor's Office, art 38(3)(c).

obvious of these concerns the amount of resources afforded to lawyers funded through legal aid¹⁸—a recurring source of criticism regarding both *ad hoc* tribunals, where an overwhelming majority of defendants benefited from legal aid,¹⁹ and an ongoing issue at the ICC.²⁰ Moreover, defence counsel were neither always able to secure state cooperation in their investigative activities, nor even to have their privileges and immunities recognised by public authorities.²¹ In addition, for reasons which appear to have gone beyond the structural challenges identified above the *ad hoc* tribunals’ initially struggled with the quality of the legal representation being provided to accused persons. Often individual defence counsel did not have the necessary years of experience to act in trials of that length and complexity.²² The fact that there existed no regulatory and monitoring body to create and implement standards when it came to professional qualifications, performance and ethics, compounded these weaknesses.²³

The case law of the ICTY and ICTR reveals a number of examples of ineffective representation symptomatic of the difficulties identified above (though the high threshold required to prove counsel incompetence, combined with judicial reluctance to openly criticise counsel meant that not all were found to have occasioned a miscarriage of justice):²⁴ defence counsel who did not understand the concept of a guilty plea, much less explained it to his client;²⁵ counsel who, in two years of acting on behalf of an accused, was alleged to have had only one hour’s consultation with his client;²⁶ inexplicable and recurring absences by counsel from the courtroom during trial hearings, which on appeal were found to amount to gross and manifest

¹⁸ See eg IBA (n 5) 29, 44; Élise Groulx, ‘“Equality of Arms”: Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System’ (2010) *Revue québécoise de droit international*, 21-38; David Tolbert, ‘The ICTY and Defense Counsel: A Troubled Relationship’ (2002) 37 *New England L Rev* 975; Kate Gibson, ‘Defence Counsel in International Criminal Trials’, in Cesare P. Romano et al. (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 707-08; Masha Fedorova, ‘The Principle of Equality of Arms in International Criminal Proceedings’, in Colleen Rohan and Gentian Zyberi (eds), *Defense Perspectives on International Criminal Justice* (Cambridge University Press 2017) 208.

¹⁹ At the ICTY, by December 2013, 121 out of 133 accused received legal aid.

See <<https://www.icty.org/?q=en/about/registry/legal-aid>> accessed 8 July 2020. At the ICTR, all the accused received legal aid (information on file with the authors).

²⁰ Richard J. Rogers, *Assessment of the ICC’s Legal Aid System* (Global Diligence 2017) <<https://www.icc-cpi.int/itemsDocuments/legalAidConsultations-LAS-REP-ENG.pdf>> accessed 8 July 2020, paras 12, 16-24.

²¹ Gibson (n 18) 706-07; ICTY, *Prosecutor v Bagosora et al.*, ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010.

²² Fiana Reinhardt and Lisa Feirabend, *The Development of the Defence at the ICTY from an Institutional Perspective: Lessons Learned with Regard to Counsel’s Qualification, Remuneration and Participation* (ICD Brief 24, September 2018) <<http://www.internationalcrimesdatabase.org/upload/documents/20181011T154007-Reinhardt%20und%20Feirabend%20The%20Defence%20before%20the%20ICTY.pdf>> accessed 8 July 2020, 6; Mark S. Ellis, ‘Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel’, (1997) 7 *Duke J of Comp and Intl Law* 514, 524-27.

²³ Tolbert (n 18) 975, 977, 985. The ICTY’s Association of Defence Counsel was only created in 2002, nine years after the creation of the ICTY: <<https://www.adc-ict.org/about-us>> accessed 8 July 2020.

²⁴ Sonja B. Starr, ‘Ensuring Defence Counsel Competence at International Criminal Tribunals’ (2009) 14 *UCLA J of Intl Law and Foreign Affairs* 169, 171. For an appeal alleging incompetence of trial counsel to succeed, an appellant must rebut the presumption of competence of counsel by demonstrating that there was gross professional misconduct or negligence which occasioned a miscarriage of justice. See *Prosecutor v Tadić*, IT-94-1-A, Decision on appellant’s motion for the extension of the time-limit and admission of additional evidence, 15 October 1998, paras 46-50; *Prosecutor v Nahimana et al.*, ICTR-99-52-A, Appeal Judgement, 28 November 2008, para 130; *Prosecutor v Akayesu*, ICTR-96-4-A, Appeal Judgment, 1 June 2001, para 77.

²⁵ See *Prosecutor v Erdemović*, IT-96-22-A, Appeal Judgment, 7 October 1997, and separate opinion by Judge McDonald and Judge Vohrah.

²⁶ *Prosecutor v Kambanda*, ICTR-97-23-A, Appeal Judgment, 19 October 2000, paras 28, 67.

professional misconduct;²⁷ and instances where counsel's submissions were incoherent, illegible or immaterial.²⁸

Over the years, following trial and error, judicial intervention, and external expert reviews,²⁹ both institutions progressively sought to address and prevent such shortcomings. A code of conduct for counsel was adopted;³⁰ directives on the assignment of counsel were refined; and minimum required qualifications were spelled out in order for a lawyer to be included on the list from which indigent accused could select a lawyer.³¹ In addition, through the initiative of counsel, professional associations were eventually established at both the ICTR and the ICTY, which became involved in disciplinary proceedings, standard-setting, training, and policy development efforts regarding the conduct and competence of counsel.³²

1.3 *In the context of victim participation at the international criminal courts*

Transposing the right to (effective) legal representation from the context of defence work to the context of victim participation is not straightforward. International courts which establish victim participation regimes through their statutes do not explicitly articulate a 'right' to legal representation for victims *per se*. Such a right must instead be extrapolated from the fact that victims are allowed to present their views and concerns in judicial proceedings, in the same way that human rights courts have extrapolated a right to legal representation in civil proceedings. In order to give meaningful effect to victims' ability to participate in judicial proceedings and be heard, it therefore becomes crucial that they be represented by counsel.³³

In this respect, it is significant that international courts have, through their legal texts or practice, *de facto* rendered legal representation a *requirement* for victim participation. The STL's Rules of Procedure and Evidence treat legal representation for victims as the default regime, only allowing a derogation from this for exceptional reasons.³⁴ The Kosovo Specialist Chambers (KSC) Statute takes an even more restrictive approach by expressly prohibiting any kind of victim representation, including self-representation, other than through counsel

²⁷ *Prosecutor v Nahimana et al*, ICTR-99-52-A, Appeal Judgement, 28 November 2008, paras 139-57.

²⁸ Starr (n 24) 174-88; See Matthew Catallo, 'Fixing the Problem of Incompetent Defense Counsel before the International Criminal Court' (2020) 41 Michigan J of Intl Law 417.

²⁹ Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, A/54/634, 1999.

³⁰ In 1997 at the ICTY, and 1998 at the ICTR. See Till Gut, *Counsel Misconduct before the International Criminal Court: Professional Responsibility in International Criminal Defence* (Hart, 2012) 43.

³¹ ICTY Rules of Procedure and Evidence (IT/32/Rev.50) Rule 45(B); ICTY Directive on the Assignment of Defence Counsel (IT/73/Rev.11) art 14 (A); ICTR Rules of Procedure and Evidence (13 May 2015) Rule 45(A); ICTR Directive on the Assignment of Defence Counsel (15 June 2007) art 13(i); Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, A/54/634, paras 209-10.

³² Tolbert (n 18) 985; Fedorova (n 18) 220. In 2016, with the ICTY and ICTR transitioning into a joint residual mechanism, the Association of Defence Counsel Practising before the International Courts and Tribunals (ADC-ICT) took over as the representative body for counsel at both The Hague and Arusha branches of the MICT. The ADT-ICT appoints a member to disciplinary mechanisms of the *ad hoc* Tribunals (see Constitution of the ADC-ICT, Article 8(4)) but also has its own disciplinary procedures (see Constitution of the ADC-ICT, Part V).

³³ A similar point was recently made by victims' lawyers at the ECCC: Case no 004/2/07-09-2009-ECCC-TC/SC, Civil Party Lawyers' Request for Necessary Measures to be Taken by the Supreme Court Chamber to Safeguard the Civil Parties' Fundamental Right to Legal Representation before the Chamber in Case 004/2, E004/2/5, 10 July 2020, para 29.

³⁴ STL Rules of Procedure and Evidence, Rule 86(C)(ii).

provided through the Registry's Victims Participation Office.³⁵ As for the Extraordinary Chambers in the Courts of Cambodia (ECCC), its Internal Rules require that, from the end of the judicial investigation, civil parties must be represented by a lawyer.³⁶ Moreover, where a civil party is represented by a lawyer, 'his or her rights are exercised through the lawyer',³⁷ meaning that civil parties are not permitted to address the Court directly unless they have been called to testify.³⁸ ICC practice has similarly tended to require that victim participation must be through a legal representative.³⁹ As a matter of course, unrepresented victims are assigned a lawyer without discussion or explanation, indicating that the need for legal representation is assumed.⁴⁰ The only time a participating victim made a request to self-represent, the Pre-Trial Chamber rejected it.⁴¹

What transpires from this overview is that victim participation can, in effect, only occur through legal representation. Putting aside the question of whether it has become recognised as a right, legal representation for participating victims in international criminal courts has in practice become a requirement. In that light, it becomes even more essential for it to be effective, failing which the very purpose of ensuring that victims are heard, might be jeopardised.

Challenges in ensuring effective representation of participating victims

There is no doubt that lessons learned at the *ad hoc* tribunals concerning effective defence representation can be relevant to ensuring effective representation of participating victims. Much of the regulatory framework for defence counsel has been replicated at the ICC, not only for defence counsel, but also for those representing victims. The advent of victim participation (and hence victim representation), however, has given rise to a whole host of novel and unique challenges and issues, many of which the framework inherited from the *ad hoc* tribunals could scarcely have anticipated.

³⁵ Law on the Specialist Chambers and Specialist Prosecutor's Office art 22(5).

³⁶ ECCC Internal Rules, Rule 23ter(1).

³⁷ *ibid*, Rule 23ter(2).

³⁸ Even before amendments to the Internal Rules introduced these express provisions, the ECCC Pre-Trial Chamber had ruled a number of times in Case 002 that civil parties may not represent themselves. See Decision on Preliminary Matters Raised by the Lawyers for the Civil Parties in Ieng Sary's Appeal Against Provisional Detention Order, C22/I/46, 1 July 2008, para 8; Written Version of Oral Decision of 1 July 2008 on the Civil Party's Request to Address the Court in Person, C/22/I/54, 3 July 2008; Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person, C22/1/68, 28 August 2008; Directions on Unrepresented Civil Parties' Right to Address the Pre-Trial Chamber in Person, C/22/I/69, 29 August 2008.

³⁹ Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: A Practitioners' Handbook* (Springer 2016) 115-116; IBA (n 5) 36.

⁴⁰ See eg *Prosecutor v Abu Garda*, Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, ICC-02/05-02/09-255, 19 March 2010, para 30; *Prosecutor v Banda and Jerbo*, Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, ICC-02/05-03/09-89, 29 October 2010, para 57; *Prosecutor v Ongwen*, Decision on Contested Victims' Applications for Participation, Legal Representation of Victims and their Procedural Rights, ICC-02/04-01/15-350, para 21.

⁴¹ *Prosecutor v William Samoei Ruto, Henry Kipsono Kosgey and Joshua Arap Sang*, Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 Requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta CHANA for All Victims, ICC-01/09-01/11-314, 31 August 2011, paras 26-27; *Prosecutor v William Samoei Ruto, Henry Kipsono Kosgey and Joshua Arap Sang*, Decision on the "Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 Requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal representative Sureta Chana for All Victims", ICC-01/09-01/11-330, 9 September 2011, para 18.

1.4 Institutional obstacles

Several factors influencing effective representation stem principally from the institutional framework within which counsel operates.

1.4.1 Insufficient induction, training and support for new counsel

Frequently, counsel representing victims before the ICC have no previous experience at international criminal tribunals. They are often lawyers from the victims' country, with a domestic legal practice and context expertise rather than a background in international criminal law.⁴²

The challenges facing new counsel who litigate at the ICC for the first time are considerable. The Court's jurisprudence is difficult to navigate, and numerous practices and conventions exist which are not found in any texts. Obtaining services can be difficult without personal connections to Registry officials and is even harder where new counsel might not even know which offices provide which services, or even what kinds of services are available. Those IT tools which are made available to counsel in some proceedings (for example for accessing disclosure or transcripts, case mapping, or searching court records) are likely to be unfamiliar and are difficult to use without significant training.

New counsel therefore have considerable needs at the beginning of their work in terms of a meaningful induction process, which should include training, familiarisation, and ongoing support. Current arrangements fall well short of meeting these needs. In principle, the provision of these types of services is divided between two sections of the Registry. Services relating to legal aid and of an operational nature, such as IT, travel, court records, and facilities, are dispensed through the Counsel Support Service ('CSS'). Those relating to substantive legal work—for example assisting counsel in understanding jurisprudence and practice—are meant to be provided by the Office of Public Counsel for Victims ('OPCV').⁴³

The divided nature of these support roles within the Registry has been identified as a source of confusion and poor coordination.⁴⁴ Moreover, neither CSS nor the OPCV offers a structured induction process for new counsel. New counsel do not even receive a list of contact persons or sections within the Court. While these difficulties affect all counsel to some extent (not only those representing victims) the difficulties are somewhat more marked for victims' counsel owing to the strained relationship between the OPCV and external victims' counsel. Like the Office of Public Counsel for the Defence, the OPCV was established with the primary aim of

⁴² In one instance, the Registry appears to have considered this when arranging common legal representation and approved two counsel to work together: one from the region where the victims' resided, and one with international criminal law expertise: see *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 26 August 2011, para 21. This approach was also taken in the first case at the STL, with victims represented by an experienced international criminal law practitioner and two Lebanese counsel without experience in international criminal law: see *Prosecutor v Ayyash et al*, Designation of Victims' Legal Representatives, 16 May 2012, para 12. Such an approach is, however, generally not possible at the ICC, because legal aid is provided for only one counsel. Two or more counsel can therefore typically only work together where they agree to be paid part-time and divide the fees for one counsel. While this enables a combination of experiences, it deprives the team of a dedicated and focused leader who can be present in all hearings and is familiar with all aspects of the case.

⁴³ ICC Regulations of the Court, Regulation 81(4)(a).

⁴⁴ ICC Registry ReVision Project, *Basic Outline of Proposals to Establish Defence and Victims Offices* (2014) 3.

‘reinforcing the capacity of external legal representatives’.⁴⁵ Since then, however, the OPCV’s role has expanded, including through the amendment of the Regulations of the Court,⁴⁶ with the consequence that the OPCV is now primarily focused on *itself* fulfilling the role of victims’ representative.⁴⁷ This has created a structural difficulty: the OPCV is effectively in competition for scarce representational opportunities with the external counsel whom it was intended to assist. As a result, its interests are no longer to assist external counsel achieve maximum effectiveness in their work, and an atmosphere of ‘competition and tensions’ between external counsel and the office which was designed to support them has instead taken root.⁴⁸ This may explain why OPCV offers little assistance to new counsel; and counsel are likewise reluctant to seek assistance from the OPCV.

1.4.2 Procedural uncertainty

A significant challenge for victims’ counsel is the lack of settled case law and legal clarity concerning victims’ role in the judicial proceedings. Victim participation at the ICC is a *sui generis* process that does not replicate domestic civil law systems, and it remains relatively novel. As a result, the procedural framework within which it takes place has not yet fully matured, and there is continuing variance and uncertainty on fundamental questions related to how victims participate. This inevitably affects the efficiency with which lawyers can carry out their work, makes litigation strategy more difficult to develop, and affects the reliability of the advice they can provide to their clients. We highlight three relatively recent examples here.

First, it is unclear whether victims need to complete an application process in order to participate in proceedings which are not related to an active case.⁴⁹ In proceedings relating to Bangladesh/Myanmar and to Palestine, Pre-Trial Chamber I allowed victims to make submissions despite the fact that those victims had not yet been admitted to participate through a formal application process.⁵⁰ In contrast, Pre-Trial Chamber II in the Afghanistan situation stated that any victim who has not undergone the application process is only a ‘potential victim’ and has no standing.⁵¹ This shifting case law means it is still impossible to ascertain at which point victims can actually begin participating in ICC proceedings.

⁴⁵ Former Registrar Silvana Arbia, in *Helping victims make their voice heard: The Office of Public Counsel for Victims* (2010)

<<https://www.icc-cpi.int/NR/rdonlyres/01A26724-F32B-4BE4-8B02-A65D6151E4AD/282846/LRBookletEng.pdf>> accessed 30 September 2020, 3.

⁴⁶ See FIDH, *Five Myths About Victim Participation in ICC Proceedings* (December 2014) <<https://www.fidh.org/IMG/pdf/cpi649a.pdf>> accessed 30 September 2020, 20.

⁴⁷ See the discussion of OPCV’s current representational roles in *Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report* (30 September 2020) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf> accessed 30 September 2020, para 870.

⁴⁸ As recognised in the ICC Registry *ReVision* Project (n 44) 3; see also Rogers (n 20) paras 277, 279.

⁴⁹ We use the term ‘active case’ here to refer to cases where a suspect has appeared before the Court, rendering confirmation of charges and trial proceedings possible. In contrast, we use the term ‘dormant case’ to refer to a case which is not progressing because of the absence of a suspect. In addition to active and dormant cases, victims may also wish to participate in proceedings which relate to a situation under investigation, rather than to a specific case within that situation.

⁵⁰ Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, 6 September 2018, para 21; Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14, 28 January 2020, paras 13-14.

⁵¹ *Situation in the Islamic Republic of Afghanistan*, Decision on the Prosecutor and Victims’ Requests for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, ICC-02/17-62, 17 September 2019, paras 17-26.

Second, uncertainty persists as to the meaning and scope of victims' 'personal interests'—a significant lacuna considering that the concept determines the issues on which victims may present their views and concerns. For instance, some early ICC decisions—including from the Appeals Chamber—held that victims' interventions need not be limited to harm they have suffered and that victims can be heard on the individual criminal responsibility of the accused.⁵² Part-way through the *Ongwen* trial, however, Trial Chamber IX ruled that victims could not make submissions on individual criminal responsibility, essentially restricting their contribution to the issue of 'harm'.⁵³ This fundamental change in the range of matters on which victims could be heard occurred during trial, and must have, one would assume, required a fundamental rethink of counsel's case strategy.

Lastly, even eighteen years into the Court's life, it remains unclear if and when victims are entitled to appeal decisions.⁵⁴ In a recent majority opinion, the Appeals Chamber appeared to hold that victims can, in some instances, be a 'party' with the right to seek an appeal under article 82 (1) of the Statute. The majority declined, nevertheless, to specify when this would occur, ruling only that this was not the case in article 15 proceedings.⁵⁵ A powerfully voiced dissent reinforced this uncertainty, with the dissenting judge stating that 'victims should keep bringing their appeals to the Appeals Chamber under their internationally recognised human rights to do so.'⁵⁶

These, and other areas of uncertainty, inevitably render it difficult for counsel to plan their work and case strategy, or provide straightforward legal advice to their clients.

1.4.3 *A culture that sidelines participating victims*

One possible explanation for this procedural uncertainty is a prevailing wariness of victim participation, stemming from the view that it burdens proceedings or undermines defence rights. This culture of scepticism exists well beyond predictable opponents of victim participation (such as the defence), appearing even to colour some judicial decisions.

⁵²*Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, paras 3-4, 94-98; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, paras 35-36, 41-42; *Prosecutor v Jean-Pierre Bemba Gombo*, Decision (i) ruling on legal representatives' application to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, ICC-01/05-01/08-1729, 12 September 2011, para 15.

⁵³ *Prosecutor v Ongwen*, Oral ruling on Defence objection, ICC-02/04-01/15-T-65-Red-ENG, 4 April 2017, 54-6.

⁵⁴ Article 82(4) of the Rome Statute expressly guarantees the right to appeal decisions on reparations. The possibility of a general right of appeal by persons other than the prosecutor or defence was rejected in early decisions, but that approach appeared to be contradicted by later decisions permitting appeals to states parties. See *Prosecutor v Dyilo*, Decision on two requests for leave to appeal the "Decision on the request by DRCDO1-WWWW-0019 for special protective measures relating to his asylum application", ICC-01/04-01/06-2779, 4 August 2011, paras 11-12; but subsequently: *Prosecutor v Al Bashir*, Decision on Jordan's request for leave to appeal, ICC-02/05-01/09-319, 21 February 2018.

⁵⁵ *Situation in the Islamic Republic of Afghanistan*, Reasons for the Appeals' Chamber's oral decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, ICC-02/17-137, 4 March 2020, para 21.

⁵⁶ *Situation in the Islamic Republic of Afghanistan*, Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Majority's decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, ICC-02/17-137, 5 March 2020, para 4.

One illustration of the constraining role judges have played is in the number of witnesses they allow victims' counsel to call. For example, in the *Ongwen* case, the trial lasted more than three years and saw some 123 *viva voce* witnesses called by the prosecution and the defence.⁵⁷ Victims' evidence, in contrast, was only allowed over eight days. The Trial Chamber issued a detailed decision regarding the 13 witnesses which the two groups of participating victims sought leave to call, concluding that it would allow only seven of them to testify.⁵⁸ The argument by victims' counsel that expert testimony on trauma has typically been presented in other cases before the Court was rejected.⁵⁹ The Chamber further limited counsel's questioning time to between one and a half and three hours for each witness.⁶⁰ In contrast, some prosecution and defence witnesses were questioned for more than a day by the calling party.

A similar tendency to limit victims' role in proceedings is reflected in the levels of access to confidential case material that different chambers have granted to victims' counsel over the years. Most Pre-Trial Chambers have prevented victims' counsel from accessing any confidential documents in the case file.⁶¹ At the trial stage, victims' counsel have been required, in some instances, to file individual requests demonstrating how specific confidential documents affect the personal interests of victims in order to obtain access to them.⁶² While in recent times a more positive trend has emerged, with victims' counsel increasingly permitted general access to confidential material,⁶³ it remains open to any Chamber in the future to depart from it, whether consciously or unwittingly. Indeed, this is precisely what seems to have happened recently in the *Banda* case.

On 29 March 2020, victims' counsel in *Banda* discovered on the website of the Court that Trial Chamber IV had held a confidential status conference five months earlier, and had subsequently invited and received submissions from the prosecution and defence on whether the accused could be tried in *absentia*.⁶⁴ It appears that victims' counsel were neither invited

⁵⁷ ICC, 'ICC Trial Chamber IX to deliberate on the Ongwen case', press release <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1519>> accessed 14 July 2020.

⁵⁸ *Prosecutor v Ongwen*, Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, ICC-02/04-01/15-1199-Red, 6 March 2018.

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ See eg *Prosecutor v Blé Goudé*, ICC-02/11-02/11-83, Decision on victims' participation in the pre-trial proceedings and related issues, 13 June 2014; *Prosecutor v Ntaganda*, ICC-01/04-02/06-211, Decision on the victims' participation at the confirmation of charges hearing and in the related proceedings, 15 January 2014; *Prosecutor v Bemba*, ICC-01/05-01/08-320, Fourth Decision on Victims' Participation, 12 December 2008; *Prosecutor v Bemba*, ICC-01/05-01/08-349, Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of the Public Counsel for Victims, 8 January 2009. For a comparative analysis of the practices across cases and chambers, see Caroline Walter, 'Victims' rights and obligations as regards the case file: access, disclosure and filing submissions', in Tibori-Szabó and Hirst (n 39) 213-15.

⁶² For example: *Prosecutor v Ruto and Sang*, ICC-01/09-01/11-460, Decision on victims' representation and participation, 3 October 2012; *Prosecutor v Kenyatta*, ICC-01/09-01/11-498, Decision on victims' representation and participation, 3 October 2012; *Prosecutor v Banda*, ICC-02/05-03/09-545, Decision on the participation of victims in the trial proceedings, 20 March 2014; Walter (no 61) 215.

⁶³ For example: *Prosecutor v Al Hassan*, ICC-01/12-01/18-289-Red-tENG-Corr, Decision on Principles Applicable to Victims' Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings, 20 March 2019; *Prosecutor v Al Mahdi*, ICC-01/12-01/15-97-Red, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', 8 June 2016; *Prosecutor v Ntaganda*, ICC-01/04-02/06-449, Decision on victims' participation in trial proceedings, 6 February 2015.

⁶⁴ *Prosecutor v Banda*, Version publique expurgée : « Observations sur un procès *in absentia* dans la perspective des victimes » (ICC-02/05-03/09-687-Conf), 10 juin 2020, ICC-02/05-03/09-687-Red, 19 June 2020; *Prosecutor*

to attend the hearing, nor notified of the subsequent order inviting written submissions (even in its public redacted form). The failure to notify victims' counsel appears to have violated Rule 92(5) of the Rules of Procedure and Evidence, which requires victims' legal representatives to be notified of hearings and filings, and the Trial Chamber criticised the Registry for that omission.⁶⁵ Despite this, there was no explanation as to why the Trial Chamber had not itself sought the views of the victims on a matter which it eventually recognised was relevant to the victims' personal interests.⁶⁶ It is difficult to avoid the conclusion that the Chamber merely did not turn its mind to the existence of the victims in the proceedings.

This example shows that, despite some progress, it remains easy for victims to be sidelined. Overall judicial practice at the ICC in this regard is in marked contrast to what occurs at the STL and the ECCC, where victims' counsel have access to confidential material and may attend hearings either as of right⁶⁷ or on the basis of a framework decision for a particular stage of the proceedings.⁶⁸

The ICC's more restrictive approach begs the question of how the Court can expect victims' counsel to effectively follow proceedings and advise their clients if they only have access to part of the case file and not all hearings. It is also worth pondering what, if anything, is gained by limiting counsel's access. Requiring them to litigate access to specific material, or excluding them, only to allow subsequent participation (as occurred in the recent *Banda* example), leads to delays and no appreciable benefits. This holds especially true since the experience of other international tribunals demonstrates that granting access to victims' counsel by default does not lead to delays, nor prejudices the integrity of the judicial process or the accused's fair trial rights.

1.4.4 *Legal aid*

Structural barriers to effective representation of victims go beyond the purely judicial. At the operational level, victims' counsel routinely face hurdles in carrying out their mandate. Perhaps the biggest practical challenge to receiving effective legal representation is the availability and extent of legal aid. While this is assuredly also a challenge in the context of defence work, it is arguably even more so for victim participation. Victims who participate in ICC proceedings tend to be among the poorest people in some of the world's most economically deprived regions. To the authors' knowledge, of the tens of thousands who have applied to the ICC to participate, no victim has ever been found by the Registry to have the means required to pay for legal representation. Despite this, and the fact that participating victims, in effect, are

v Banda, Public redacted version of 'Order following Status Conference on 30 October 2019', 13 November 2019, ICC-02/05-03/09-671-Red, 19 November 2019.

⁶⁵ *Prosecutor v Banda*, Decision on the Legal Representative of Victims' request for leave to make submissions, ICC-02/05-03/09-686, 13 May 2020, para 7.

⁶⁶ *ibid* paras 7-8.

⁶⁷ See eg ECCC Internal Rules, Rules 55(6), 55(11), 59, 69(3), 72(4)(iii), 77(4), 86, 108(6); *Case 001/18-07-2007-ECCC/SC*, F28, Appeal Judgement, 3 February 2012, paras 488-89.

⁶⁸ *Prosecutor v Ayyash et al.*, STL-11-01/PT/PTJ, F0256, Decision on the VPU's Access to Materials and the Modalities of Victims' Participation in the Proceedings before the Pre-Trial Judge, 18 May 2012; *Prosecutor v Ayyash et al.*, STL-11-01/T/TC, F1326, Directions on the Conduct of the Proceedings, 16 January 2014; *Prosecutor v Ayyash*, STL-18-01, F0168, Décision relative aux modalités de participation des victimes à la procédure et à l'accès de la Section de participation des victimes et aux documents et pièces de l'affaire, 26 June 2020.

required to have legal representation, the Court has not recognised legal aid as a right of participating victims; instead, it is granted at the Registry’s discretion.⁶⁹

In practice, the Registry has made some legal aid available to nearly all victims who are participating in an active case. However, legal aid is not provided to victims participating in proceedings at the situation level, even if there are judicial proceedings taking place. In 2019, for example, six teams of victims’ legal representatives actively participated in appeal proceedings relating to the opening of an investigation in the Afghanistan situation, a matter crucial to the interests of the victims. The teams most involved worked for approximately six months to prepare their submissions, without any of them being remunerated through legal aid. This, of course, meant that counsel and their support staff either ultimately financed victims’ representation themselves through their time and work, or had to seek alternative sources of funding—a time consuming exercise of itself.

The same problem arises in dormant cases where the presence of a suspect has not been secured.⁷⁰ Instead of tailoring legal aid to reflect the different nature of the work which is required in such instances, the Registry simply makes no funds available. This ignores the nature of counsel’s ongoing obligations in terms of effective representation, including the need to maintain communication with clients, to liaise with the prosecution, Registry and Trust Fund for Victims on matters ranging from protective measures to the application process, or to file submissions before the relevant Chamber.

Some Chambers have taken an even more extreme position, holding not only that participating victims have no right to legal aid, but in fact that it is impermissible for the Registry to offer legal aid to victims who have selected their own counsel.⁷¹ In a proposed updated legal aid policy put forward in 2019, the Registry appeared to endorse this approach.⁷² If formally adopted, this would mean that legal aid is only granted to victims where a Chamber had decided to initiate a process of ‘common legal representation’ and imposed shared counsel. In the *Ongwen* case, both the Pre-Trial and Trial Chambers refused to initiate common legal representation, while at the same time holding that without it, legal aid could not be paid to external victims’ counsel.⁷³ For one year, until the Registry decided to take a different approach,⁷⁴ counsel represented victims through the confirmation of charges and trial

⁶⁹ Rogers (n 20) para 271. See also the ICC Registry’s proposed revised Legal Aid Policy (which was ultimately not adopted): Legal aid policy of the International Criminal Court, Amendment proposal (15 September 2018) <www.icc-cpi.int/itemsDocuments/css/Draft_LAP-1.2_ENG.pdf> accessed 24 July 2020, para 14.

⁷⁰ See n 49.

⁷¹ *Prosecutor v Dominic Ongwen*, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, ICC-02/04/01/15, 27 November 2015, paras 18-20; *Prosecutor v Dominic Ongwen*, Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims, ICC-02/04-01/15, 26 May 2016.

⁷² See the ICC Registry’s proposed revised Legal Aid Policy: Legal aid policy of the International Criminal Court, Amendment proposal (n 69) paras 14-15. The revised policy was not approved by the Assembly of States Parties but an alternative proposal is yet to be produced.

⁷³ For reasons which are not apparent, the ICC made legal aid funds available to the OPCV, notwithstanding that it had not been appointed pursuant to a common legal representation process under Rule 90, or that it has its own separate budget from the Court. See *Prosecutor v Dominic Ongwen*, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, ICC-02/04/01/15, 27 November 2015, para 23.

⁷⁴ This followed a request for clarification from the Registry in response to which the Single Judge indicated that this was a matter within the Registry’s discretion. See *Prosecutor v Dominic Ongwen*, Decision on Registry’s Request for Clarification on the Issue of Legal Assistance Paid by the Court for the Legal Representatives of Victims, ICC-02/04-01/15-591, 14 November 2016, para 3.

preparation with no financial assistance from the Court.⁷⁵ Although counsel are free to fundraise from other sources, this is in itself a hugely time-consuming task and often unsuccessful, as some donors fear that funding counsel directly in this manner would encourage the ICC to continue denying legal aid to victims.

Even where legal aid is granted to victims, it tends to be extremely limited. The Registry's current legal aid policy provides for victims' legal teams composed of one counsel and one case manager during pre-trial and trial proceedings.⁷⁶ It is difficult to conceive of how such a small team could ever provide effective representation where this requires maintaining regular communication with thousands of clients in one or more countries, appearing in court in yet another country, and ensuring adequate familiarity with case material likely to include tens of thousands of pages of disclosure and hundreds if not thousands of filings. In practice, the Registry has usually exercised its discretion to fund one legal assistant and one field assistant on top of the staffing identified in its legal aid policy. Even with such additional resources, however, significant challenges remain for a team of four in meeting the enormous burden of providing effective representation to thousands of clients.

1.4.5 Other Registry services

Aside from legal aid, a number of other Registry services could be considered fundamental in ensuring effective legal representation, but are delivered to victims' counsel either partially or not at all, depending on the proceedings in question.

One key example is the electronic (ie email) notification of filings, without which lawyers would be unable to stay apprised of judicial developments. Currently, notifications are usually (but not always) provided only where the victims whom counsel represents have been formally allowed to participate in the proceedings through a Rule 89 application process. Because such processes are no longer undertaken at the situation level or in cases which are 'dormant,' counsel acting in those proceedings are not notified of filings. The example of the *Banda* case discussed above of course also demonstrates that even where victims *have* been granted formal status, their counsel are sometimes not notified.⁷⁷

Other key services are also routinely denied to victims' counsel at the situation level or in dormant cases, which inevitably and unnecessarily complicate efforts to effectively represent clients. For instance, the Registry will not always provide counsel with *notes verbales* to facilitate visas for travel to situation countries, nor letters attesting to privileges and immunities to which counsel are entitled under article 48(4) of the Rome Statute. This means that counsel have to assume the administrative burden of securing their own visas without the support of the Court, with the risk of being unsuccessful in doing so. It also means that any travel undertaken involves a level of risk that other lawyers working at the Court would typically not need to assume.

⁷⁵ Joseph A. Manoba and Francisco Cox, 'Victims' Participation in the Ongwen Case: Strengths, Weaknesses and Lessons Learned', in FIDH, *Victims at the Center of Justice: From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC* (December 2018)

www.fidh.org/IMG/pdf/droitsdesvictimes730a_final-2.pdf accessed 24 July 2020, 49.

⁷⁶ Registry's single policy document on the Court's legal aid system, ICC-ASP/12/3 (4 June 2013) paras 55-56.

⁷⁷ *Prosecutor v Banda*, Decision on the Legal Representative of Victims' request for leave to make submissions, ICC-02/05-03/09-686, 13 May 2020, para 7.

The denial of even the more seemingly mundane Registry services to victims' counsel who act outside of active cases can also undermine effective representation. Counsel are, for instance, not granted access to the Court's electronic database of court records, making basic legal research a more time-consuming task than it needs to be. Significantly as well, the Court does not issue badges to these counsel to enable them to access and move around the premises in the way staff and other counsel⁷⁸ can. This means that any professional interaction or meeting with Court officials or other counsel is subject to the Court's internal security protocols for visitors, which require having a member of Court personnel receive the visitor and escort them at all times in the building.

The Registry does not appear to maintain policies regarding the basis on which it may grant or deny such services, making the planning of work cumbersome and uncertain.

1.4.6 Information management tools

A core aspect of carrying out any form of legal representation competently and professionally is the maintenance of proper records, including accurate client records. It would be uncontroversial to expect (if not explicitly require) a lawyer to maintain accurate records of their clients' personal information, as well as notes of meetings and documents provided by clients.

This task inevitably becomes more complex as well as more time and resource intensive when the case involves hundreds or thousands of clients. Records must be maintained for large numbers of individual clients in a searchable database, and including information such as: what crimes clients experienced; the harm they suffered; how they are reachable; what their preferences for communications are; what they want from the proceedings; their links to other victims; their security concerns; and preferences regarding protective measures. Where group meetings are held, records should ideally be able to track which clients were in attendance. For each meeting, records should also be kept of clients' instructions or views on different subjects, as well as details of any briefings or information sessions provided by the victims' legal team. Not only must this information be recorded, but in order for it to be effectively used subsequently, it must be easily searchable. A victims' legal team should be able to extract data and statistics from these records regarding which victims expressed a view on a particular subject; which victims counsel could not meet for the past year; or which victims have passed away—to give a few obvious examples.

Without a tool which enables the tracking of information in this way, it is difficult to see how large numbers of victims can be effectively represented. Yet despite this, in nearly 15 years of victim representation at the ICC, no software appropriate for fulfilling these information management functions has been produced or adapted by the Court for use by victims' legal representatives. It is believed that most—or maybe all—victims' teams (including the OPCV), use Microsoft Excel to track their client information, even where they are representing thousands of victims—a tool which is far from ideal for this purpose.

1.5 Individual dilemmas at counsel's level

The analysis above has sought to demonstrate that in many respects, providing effective representation to victims at the ICC is difficult, even for the most competent, committed and

⁷⁸ That is, defence counsel and victims' counsel in active cases.

ethical counsel. However, counsel's own agency in relation to the quality of victims' representation cannot be entirely discounted. While representing victims, counsel will inevitably face choices which will impact the effectiveness of representation. While many of these will be the same types of choices which arise for defence counsel (should I file submissions on this question or remain silent? Which witnesses should I seek to call? Should I object to this line of questioning?), others are different in that they arise from or are influenced by the specific nature of victim representation itself. This section considers examples of some of the latter scenarios which have arisen in ICC practice, and the manner in which counsel have chosen to manage them.

1.5.1 Communicating with clients

Communicating with clients is clearly a necessary aspect of any form of legal representation. Unsurprisingly, the ICC's Code of Professional Conduct for Counsel requires that counsel 'provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation.'⁷⁹ Fulfilling this obligation, however, and ascertaining the limits of its meaning in practice, are among the central challenges of representing victims at the ICC. This stems from the fact that most victims' lawyers working on a trial before the Court will represent hundreds, if not thousands, of victims at a given time. The legal aid limitations discussed above make it challenging to maintain regular and meaningful communication with client groups of this size. This challenge is usually further compounded by a number of other factors: the geographical dispersal of the clients; ongoing conflicts or other potential security threats to those who engage with the court; language barriers; and poor telecommunications infrastructure. Solutions which might work in some scenarios – such as employing a (large) number of field assistants hired from the victims' communities (and ideally living in their own villages) – are not currently feasible under the Court's legal aid system.

Victims' counsel and their teams are usually therefore compelled to communicate with their clients through a combination of other means. Most resort to telephone contact with intermediaries,⁸⁰ who in turn transmit information to the clients, and vice versa. When they do manage to travel to meet clients in person, counsel try to condense as many in-person meetings with clients as possible within that trip, given the cumbersome approval process involved in having the Registry authorise travel, requests for which must be submitted one month in advance. A choice will usually need to be made between meeting with as many of the clients as possible (which is easier when meetings are held with large groups of clients at the same time) or attempting to hold private, meetings with individual clients or small groups. Where thousands of victims are represented by one legal team, regular individual meetings will almost always be impossible.

These realities present a difficult question for counsel representing victims. How often should they endeavour to meet their clients? Through what means? Individually or in a group setting?

⁷⁹ ICC Code of Professional Conduct for counsel ('ICC Code of Conduct' or 'ICC Code'), article 15(1).

⁸⁰ Intermediaries are not members of counsel's team, are not bound by rules of conduct, and in most cases, have no relevant education or training for this kind of role. A code of conduct for intermediaries has been devised, but is only binding where this is agreed to pursuant to a contract—something which rarely takes place for the intermediaries who assist victims counsel, since legal aid funds make no provision for contractual payments of intermediaries. See ICC, Guidelines Governing the Relations between the Court and Intermediaries for Organs and Units of the Court and Counsel working with intermediaries (March 2014) <www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf>, accessed 24 July 2020; ICC, Code of Conduct for Intermediaries (March 2014) <www.icc-cpi.int/iccdocs/lt/CCI-Eng.pdf> accessed 24 July 2020.

If the latter, in a group of what size? How often should counsel attend in person, and how often should she be instead represented by field assistants or others? What frequency, levels and type of interaction with the clients does counsel need to maintain in order to ensure that their representation is *effective*?

To address the inherent challenges in communicating with their clients, counsel have so far adopted a variety of methods, although these are rarely discussed in filings before the Court.⁸¹ In the *Kenyatta* case, two Kenyan field assistants were reachable at all times by telephone, and regular meetings were held with groups of around 50 to 70 victims.⁸² In the *Ongwen* case, the legal team representing one of the two groups of participating victims⁸³ usually travelled from Kampala to Northern Uganda once per month to meet clients, using a combination of large group meetings (often more than 150 people at once) to inform clients of developments and answer general questions about the case; as well as one-on-one meetings or smaller group meetings of around 7 to 10 people to deal with more detailed and sensitive matters.⁸⁴ Using these methods, counsel's team estimates that it has managed to maintain relatively regular contact with 80 per cent of its clients.⁸⁵

These types of approaches demonstrate that it is possible, given sufficient human and financial resources, to conjure some solutions to the challenge of collective representation. But in solving some problems, these solutions in turn raise new ethical and practical questions. For instance, where victims are subject to protective measures which prohibit the disclosure of their identities to others, is it permissible for a lawyer to meet those victims in a group setting? This will necessarily involve the disclosure of victims' identities to each other. At the same time, victims will often have known, since the application process itself, which of their friends, family and community members had applied to participate, raising questions about the extent to which it is useful or even possible to require this confidentiality subsequently.

Even where victims' counsel make significant effort to maintain communication with a large group of clients, practice suggests that it is almost inevitable that some participating victims will lose contact with their lawyers. This may happen when victims relocate, change telephone numbers, or become unwell. Should such persons continue to be considered as clients and participating victims indefinitely? Or is there a period of time after which their representation and participation have become so theoretical as to consider them to have ended?

Meanwhile, anecdotal accounts suggest that not all victims' counsel make as much effort to overcome the obstacles to regular communication with their clients. Some legal teams purportedly meet with their clients quite infrequently, perhaps relying instead on the application forms originally submitted by the victims as a means of gleaning minimum information about them. Such accounts are difficult—perhaps impossible—to verify, but even the possibility that they are true is interesting because it raises questions about whether such an

⁸¹ For discussion of methods used, see FIDH (n 46) 24-25; Tibori-Szabó, Barbara Bianchini, Anushka Sehmi, and Silke Studzinsky, 'Communication Between Victims' Lawyers and Their Clients, in Tibori-Szabó and Hirst (n 39) 445-47.

⁸² Anushka Sehmi, 'Now that we have no voice, what will happen to us? Experiences of Victim Participation in the *Kenyatta* Case' (2018) 16 J Int Crim Justice 571, 582.

⁸³ In the *Ongwen* case, participating victims were divided into two groups, one of which was represented by the OPCV, and one by counsel 'external' to the Court.

⁸⁴ Manoba and Cox (n 75) 51; additional information provided to the authors by the Ongwen victims' legal team.

⁸⁵ Information provided to the authors by the *Ongwen* victims' legal team.

approach *would* ever constitute effective representation. Could it ever be sufficient for victims' counsel to represent clients in the absence of regular and ongoing client communication?

When it comes to communication between counsel and the clients, the ICC's Code of Conduct provides only the very general requirement that 'counsel shall provide the client with all explanations needed to make informed decisions regarding his or her representation.'⁸⁶ This provision might be clear enough to indicate that some failures of communication are impermissible. For example, it would presumably censure the counsel who did not inform his clients that the charges against the accused had not been confirmed by the Pre-Trial Chamber and that their case would therefore not proceed, his reasoning being that victims would have found the news upsetting.⁸⁷ However, other scenarios present ethical questions that are less clear-cut.

Security concerns or lack of access to the territory of non-states parties are a frequent obstacle for effective representation at the ICC.⁸⁸ For victims' counsel such difficulties are more likely to present a fundamental obstacle to communicating with clients. In such circumstances, it is unclear whether the clients' right to effective representation, and counsel's professional obligations, can be met. If the ultimate consideration is for the clients' best interests (though this is by no means clear under the ICC Code of Conduct), the following principle might be applied for guidance: if security or access problems are such that no other counsel would be *better able* to communicate with the clients, it might be preferable for the victims to remain with existing counsel, who is able to at least act on instructions previously obtained, than to forfeit representation and thereby participation altogether.

This calculus would arguably be different where the barrier to meeting clients is not security-related but due to a lack of resources. Although no data on this exists, anecdotal accounts suggest that a significant amount of victim representation at the ICC is undertaken *pro bono*. This assumption would also be consistent with the way in which the Court administers its legal aid system for victims.⁸⁹ Victims' counsel who are not funded by the ICC may manage to fundraise elsewhere to cover some or all of their activities and expenses, but a shortage of funds is the norm. The problem is exacerbated by the fact that victim representation—even (or perhaps *especially*) at the situation level or in dormant cases—tends to last for years or even decades. Lawyers are then faced with the question of how they should fulfil their mandate when their lack of funds prevents them from regularly meeting or communicating with their clients. In one clear example—albeit not relating to legal aid but certainly showing the impact of lack of funding—a Ugandan NGO complained to the Pre-Trial Chamber about 'the lack of proper and effective legal representation that [victims] have received from the OPCV', stating that in more than ten years of representation in the *Kony et al.* case, there had been very little communication from counsel to their clients. The NGO submitted that:

It is the opinion of the victims that legal representation does not take effect only when a suspect is apprehended and when judicial proceedings commence. Despite the lack of judicial activity at the

⁸⁶ ICC Code of Professional Conduct for counsel ('ICC Code of Conduct'), art 15(1).

⁸⁷ According to what he told one of the authors of this article.

⁸⁸ Of course, this is true not only for victims' counsel of course, but also for the defence. See for example the difficulties described in: *Prosecutor v Al Hassan*, Public redacted version of Urgent Defence motion concerning insurance for non-medical evacuation caused by acts of war, ICC-01/12-01/18-570-Red, 31 January 2020.

⁸⁹ As discussed above, legal aid for victims is only available in cases that are active, and even then, can be denied as illustrated in the *Ongwen* case.

Court in relation to this case, the OPCV was still duty bound to explain to the victims of the case why the proceedings had not commenced, any obstacles in the apprehension and prosecution of the suspects in the case; as well as answer any questions that the victims had regarding their status as well as the possibility of reparations.

The victims believe that they should have benefited from more than a mere shadow of communication from the OPCV during this 10-year period, even if on an annual basis. Instead their questions have remained unanswered to date.⁹⁰

The OPCV responded:

[...] [O]ver the past 8 years, the Legal Representatives [from OPCV] have provided victims with legal assistance and representation when necessary. However, in the absence of judicial activities, their presence in Uganda was not warranted and resources requested to undertake missions to meet with victims were systematically cut from the Office's budget. Victims have been made aware of this situation several times via intermediaries and via the VPRS which benefits from a continuous field presence in the country.⁹¹

The frequency of communication was not addressed by the Pre-Trial Chamber in its decision,⁹² leaving unanswered several questions about what constitutes appropriate conduct for counsel faced with this (likely very common) scenario. Does the obligation to communicate with clients diminish 'in the absence of judicial activities' in a case or situation? What are the minimum efforts expected of counsel to secure funding from the Court or elsewhere in order to be able to carry out her duties towards her clients? Should the Chamber be informed where counsel it has appointed finds herself unable to carry out her core functions because of a lack of funding?⁹³

Unlike scenarios where security problems or a difficulty accessing a particular area hinder communications, funding difficulties may be specific to a particular counsel and her team. In such instances, if a lack of funds prevents counsel from effectively working, she may want to consider whether *other counsel* may have the means to do the work. If so, withdrawing representation may ultimately better serve the interests of the clients than continuing to act where insufficient resources force client communication to cease. It also seems reasonable that the clients themselves should have a say in the matter, and in some instances may want to opt to retain their representation, even if that means reduced communications. This in turn raises

⁹⁰ Prosecutor v Ongwen, Application by the Uganda Victims Foundation to Submit *Amicus Curie* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-02/04-01/15-211, 19 March 2015, paras 11-12.

⁹¹ Prosecutor v Ongwen, Request for leave to file a Response to "Application by the Uganda Victims Foundation to Submit *Amicus Curie* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", ICC-02/04-01/15-214-Red, 27 March 2015, para 10.

⁹² Prosecutor v Ongwen, Decision on application by the Uganda Victims Foundation to submit *amicus curiae* observations, ICC-02/04-01/15-221, 15 April 2015.

⁹³ In this respect it is interesting to note that at the beginning of the representation OPCV gave a positive assurance to the Pre-Trial Chamber about the sufficiency of the resources at its disposal, suggesting that at that time, it was considered a subject on which the Chamber should be informed: Prosecutor v Kony et al, OPCV Report on legal representation of victims, ICC-02/04-01/05-358, 28 November 2008, para 17.

the question of whether there is a minimum level of communication required in order for representation to be effective, and whether it is ever possible for a client to *consent* to communications below that level.

1.5.2 *Acting on instructions*

The collective nature of victim representation also gives rise to other ethical challenges. Although there may not be any immutable conflict of interest within the client group such as to justify separate representation,⁹⁴ it will frequently be the case that among victims within a group, there are differing views and positions on a matter being litigated before the Court. For the victims' counsel who takes seriously the responsibility to seek instructions from her clients, a difficult question therefore arises as to what should be done where those instructions diverge. Should counsel adopt the majority position? Or should she present all positions, even if this undermines the strength of all of them? Must counsel inform the Chamber of the extent of a divergence of views? One can take the conundrum even further: if counsel can disregard the instructions of some of the participating victims, can it be said at all that she is bound by her clients' instructions in the same way that defence counsel may be? In that case, to what extent are instructions binding on counsel, if at all? The ICC Code does not resolve these questions. It requires counsel to implement the 'representation agreement' with her clients, including by abiding by a client's instructions 'concerning the objectives of his or her representation' and by consulting the client on the means by which those objectives are to be pursued.⁹⁵

In the *Ruto* case, when making submissions on the question of whether hearings could take place in Kenya or Tanzania, the legal representative of victims reported in detail on the number of victims to whom he had spoken about the question (94); how many had expressed a view (50 out of 94); and what position they espoused (82% wanted trials in The Hague; 16% in Arusha; 2% in Kenya).⁹⁶ However, his written submissions also appeared to call into question the validity of some of his own clients' views:

It was the opinion of the Victims' Representative that some of views expressed may have carried an element of subjectivity in nature, and that some of the reasons for those views may not be established by or founded upon law, and cannot therefore, *stricto sensu*, be categorized as "legal".⁹⁷

He then went on to set out a range of reasons why he disagreed with those clients who preferred a trial in The Hague.⁹⁸ Referring to an 'inevitable variance'⁹⁹ between the views of the larger number of his clients and the detailed arguments which constituted most of his submissions, he argued that 'the Court's ultimate decision should involve more than a merely numerical

⁹⁴ As required by rule 90(4) of the Rules of Procedure and Evidence. See eg *Prosecutor v Katanga*, Order on the organisation of common legal representation of victims, ICC-01/04-01/07-1328, 22 July 2009; *Prosecutor v Ntaganda*, Decision Concerning the Organisation of Common Legal Representation of Victims, ICC-01/04-02/06-160, 2 December 2013. See also article 16 of the ICC Code of Conduct.

⁹⁵ ICC Code of Conduct, art 14.

⁹⁶ *Prosecutor v Ruto and Sang*, Common Legal Representative for Victims' Observations in Relation to the "Joint Defence Application for Change of Place Where the Court Shall Sit for Trial", ICC-01/09-01/11-620, 22 February 2013, paras 3-5.

⁹⁷ *ibid* para 3.

⁹⁸ *ibid* paras 14-24.

⁹⁹ *ibid* para 13.

approach’,¹⁰⁰ and asked the Trial Chamber to take into account his own views ‘alongside those of the victims’.¹⁰¹ Despite reporting that of the participating victims who had expressed a view on the subject, 82% wanted a trial in The Hague, he concluded by requesting a trial in Arusha.¹⁰² Neither the Trial Chamber nor the Presidency made any comment on the unusual approach adopted.¹⁰³ We are therefore again left without any indication of whether this approach is consistent with effective representation. It is also not clear from the submissions whether or not the victims had been informed in advance and given their agreement for counsel to include his own differing view alongside theirs.

As with the other examples given in this article, it remains unclear whether counsel acted appropriately. However, it is obvious that he was faced with a dilemma on which guidance and standards currently do not exist. Is counsel bound to follow the instructions of his victim clients? What if they *are* all in agreement? In what circumstances—if any—can counsel actively seek a different outcome than that preferred by his clients? Does it matter if counsel believes that he is acting in the victims’ best interests, if they themselves disagree?

This dilemma involves questions fundamental to the nature of victim representation itself: when article 68(3) of the Rome Statute permits the Court to hear victims’ ‘views and concerns’, does it mean the actual views and concerns of specific individual victims? Or does it permit lawyers to make submissions reflecting their own perception of the victims’ overall interests? In practice, most victim representation will fall somewhere on the spectrum between these two theoretical extremes: it will never be possible to articulate the personal views of every participating victim on a given issue; and in some instances, it will be difficult or impossible to seek instructions—particularly where timeframes are short, where the questions at hand are highly technical, or where confidentiality precludes counsel from seeking victims’ views. However, the fact that a representational relationship exists, and that it is the *victims’* views which the Court may hear, indicates that at least *some* value must be given to the victims’ instructions. In other words, victims’ participation cannot be simply the abstract presentation of victims’ *assumed* interests.

1.5.3 Case strategy and calling evidence

Victims play a role in the proceedings which is different, and arguably more fluid, than that of the prosecution and defence. While the latter have pre-determined goals (seeking a conviction and an acquittal, respectively), victims’ objectives from the trial may be more multifaceted. In most cases, victims will want a conviction to result, but the work of securing one is primarily the goal of the prosecution. In contrast, the focus of the victims might be to add to or fill gaps in the prosecution case, to add perspectives or nuance, or even to disagree with the prosecution on some points. Their efforts can be directed at securing convictions, building the case for reparations, or simply to ensuring that certain aspects of their experience are accurately reflected on the historical record. The approach will differ from case to case, depending on various factors, such as what is important to the victims, as well as the nature of the prosecution

¹⁰⁰ *ibid* para 28.

¹⁰¹ *ibid* para 13.

¹⁰² *ibid* para 15.

¹⁰³ *Prosecutor v Ruto and Arap Sang*, Recommendation to the Presidency on where the Court shall sit for trial, ICC-01/09-01/11-763, 3 June 2013; *Prosecutor v Ruto and Arap Sang*, Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-875-Anx, 26 August 2013.

and defence cases. Achieving whichever goals are important to the victims will always require a case strategy. It is difficult to conceive of effective representation taking place without one.

One of the key elements of any strategy which victims' counsel adopts for the trial phase is what evidence the victims should seek to present to the Court. It is no longer controversial at the ICC that victims' legal representatives may call witnesses at trial. For the most part, counsel have focused on the presentation of evidence from their own clients, although some have also proposed expert witnesses. In most of the trials to date at the Court, victims' counsel proposed some of their own clients to give evidence and in each case the Trial Chamber granted leave for this to occur.¹⁰⁴ While judges have shown a tendency to limit the number of such witnesses (as discussed above),¹⁰⁵ they have never, to date, denied victims' counsel the ability to call some evidence in this way.

Despite this, some victims' counsel have taken few if any steps to present evidence on behalf of their clients. In *Ongwen*, the OPCV only requested permission to present five expert witnesses, but did not seek to have the Court hear from any of their clients. More surprisingly still, in *Gbagbo and Blé Goudé*, the legal representatives did not request to call any oral evidence, seeking only to tender a single document.¹⁰⁶

These litigation choices are interesting in light of the nature of the role that victims play in international criminal trials. In contrast to the defence—which by virtue of the presumption of innocence and the prosecution's burden of proof, may simply rely on gaps in the prosecution case rather than putting forth a positive case (as occurred notably in the Kenya cases and *Gbagbo and Blé Goudé*)—the victims' role appears to be, at its most fundamental, to *add* something to the proceedings. Deciding to submit little or no evidence appears to suggest that the victims have nothing different or additional to bring to the case. In theory this is possible, but it is perhaps surprising given that even the best prosecution case will be put together under resource and time pressure, and will almost certainly emphasise issues and facts that are different from those on which the victims would choose to focus. In some instances, victims' counsel may be able to bring evidence on sensitive matters which have become known to them but not to prosecution investigators, because of the relationship of trust which has developed over time between lawyer and client.¹⁰⁷

¹⁰⁴ *Prosecutor v Lubanga*, Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032-Anx, 26 June 2009; *Prosecutor v Katanga and Ngudjolo Chui*, Decision authorising the appearance of Victims a/0381/09, a/0018/09, a/0191/08 and pan/0363/09 acting on behalf of a/0363/09, ICC-01/04-01/07-2517-tENG, 9 November 2010; *Prosecutor v Bemba*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138, 22 February 2012.

¹⁰⁵ See eg *Prosecutor v Bemba*, Second order regarding the applications by legal representatives to present evidence and the views and concerns of victims, ICC-01/05-01/08-2027, 21 December 2011; *Prosecutor v Bemba*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138, 22 February 2012.

¹⁰⁶ *Prosecutor v Gbagbo and Blé Goudé*, Order on the further conduct of the proceedings, ICC-02/11-01/15-1124, 9 February 2018, para 1; *Prosecutor v Gbagbo and Blé Goudé*, Legal Representative's Application for the introduction of documentary evidence under paragraphs 43-44 of the Amended Directions on the conduct of the proceedings, ICC-02/11-01/15-1088, 15 December 2017. This case did not proceed past the prosecution phase.

¹⁰⁷ See for example the attempt by victims' counsel to adduce evidence in the *Ongwen* case concerning sexual violence against men, which they explained had only come to light after trust had been built over 'an extended period of time': *Prosecutor v Ongwen*, Request for reconsideration of the "Decision on the Legal Representatives for Victims Request to Present Evidence and Views and Concerns and related requests", ICC-02/04-01/15-1203, 12 March 2018, para 31.

Critiquing such litigation choices by counsel is clearly fraught with difficulties. Questions about the extent and nature of evidence to call falls squarely within case strategy and will depend on many factors which are the subject of legal professional privilege and cannot be known to the external observer. It is therefore essential to emphasise that in any given case there may at least in theory be good reasons for a decision by counsel not to request to call evidence, or not to propose any of her own clients to appear before the Court.

Nonetheless, the decision is also one which must have a significant bearing on whether the representation provided is *effective*, and yet practice to date suggests that it is not clear what standards apply to legal representatives of victims in this regard. The lack of clear standards in this area also potentially leaves participating victims unclear about what they can and should expect from their legal representatives. Victims will very likely not know—unless informed by their counsel—that there is a possibility for them to be proposed as witnesses.

1.5.4 *Why such dilemmas persist*

The three dilemmas discussed above are intended as examples rather than as a comprehensive review of how victims' representation is working in practice. They reflect some of the difficult decisions that victims' counsel can face about how to carry out their role, with sometimes questionable results. But why do so many difficulties arise? Several reasons can be postulated.

To begin, the structural challenges identified above create a difficult context. These are exacerbated by the lack of established practices or expectations about how victims' representation in an international trial should work, and the absence of a cohesive community of lawyers who could share experiences with each other. But perhaps more significantly still, there is a lack of appropriate standards or guidelines relevant to the work of victims' counsel.

Of course, lawyers acting before the ICC are bound and guided by professional standards. Since the Regulations of the Court require that counsel have a right to practice in a domestic system and are registered with an appropriate professional authority,¹⁰⁸ they are necessarily also bound by the applicable national code of conduct. In addition, they are bound by the ICC's own Code of Conduct,¹⁰⁹ which has primacy over the former in the event of 'any inconsistency'.¹¹⁰ However, neither the ICC's Code of Conduct nor domestic codes offers a satisfactory solution.

For one, domestic codes of conduct are often ill-adapted to the ICC framework or the complexities of representing large groups of victims of mass crimes. They may be designed with the particularities of a national legal system in mind. For example, codes of conduct in some common law jurisdictions assume a division in the legal profession between solicitors and barristers, with neither authorised to carry out all tasks in a litigation context except where additional qualifications have been obtained. They also reflect assumptions about the nature of the clients and cases which lawyers will be undertaking. For instance, barristers in England and Wales are required to send a letter to clients they represent directly (ie without going through

¹⁰⁸ Regulations of the Court, Regulation 69(2)(b).

¹⁰⁹ Rule 22(3) of the Rules of Procedure and Evidence only provides this in relation to defence counsel, not for other counsel appearing before the Court. Article 1 of the ICC Code of Conduct, however, stipulates that it applies to all counsel, including legal representatives of victims.

¹¹⁰ ICC Code of Conduct, art 4. Note that it remains unclear what constitutes an 'inconsistency' for this purpose. For example, where conduct such as solicitation or advertising is prohibited by a national code, but the ICC Code is simply silent on the question, can it be said that the ICC Code of Conduct's lack of a prohibition trumps the national code?

a solicitor beforehand) informing them of the parameters of the relationship.¹¹¹ For many victims who participate at the ICC, this step would at best be of limited value (for example, if they are illiterate), and at worst, potentially expose them to security risks. Another typical ethical standard in domestic codes which is not readily transposable to the ICC context, is the requirement that each client consent to a risk of conflict of interest if multiple clients are being represented by the same lawyer in the same matter.¹¹² Such strict standards would be difficult to apply where thousands of victims are represented together in a complex matter involving multiple interests that are likely to create many and varied viewpoints within the group.

Moreover, the considerable variation between codes of conducts in different domestic systems can itself become a problem if counsel relies on them for guidance regarding work before the ICC. The effect is that lawyers appearing before the same international court are subject to different rules of conduct: some may be prohibited from soliciting for clients or advertising,¹¹³ or to commenting to the media about an ongoing case in which they are involved;¹¹⁴ while others are permitted to do so.¹¹⁵ Since the ICC Code of Conduct has primacy in the event of inconsistency with other codes,¹¹⁶ it may appear to be the obvious solution to the problems posed by ill-adapted and inconsistent domestic codes. However, the ICC Code of Conduct itself has considerable deficiencies.

First, the ICC Code of Conduct is oddly silent on questions of competence and the effectiveness of representation. Even the codes of professional conduct of the two *ad hoc* tribunals, which preceded the ICC Code of Conduct, had not attempted to engage in detail with the question of what constitutes effective representation.¹¹⁷ Nevertheless, those codes *did* at least incorporate some basic provisions explicitly requiring competence, diligence and the pursuit of clients' best interests.¹¹⁸ The ICC Code unfortunately appears to have stepped back from any attempt to engage with the quality of representation. Despite appearing to borrow from a number of provisions in the codes of the *ad hoc* tribunals, it did not incorporate the arguably fundamental minimum requirements for counsel to provide a competent and diligent service in the clients' best interests.

At the same time as lacking detail and key provisions on competent representation, the ICC Code of Conduct also fails to provide much guidance that is of specific relevance to the novel area of victim representation. This is perhaps understandable. The Code was adopted in

¹¹¹ See Bar Standards Board of England and Wales, Bar Standards Board Handbook, Code of Conduct, version 4.4, 3 February 2020, rC125, <<https://www.barstandardsboard.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/ef77a777-9fe0-4805-bd1847265552477c/second-edition-test31072019104713.pdf>>, accessed 25 July 2020.

¹¹² See eg American Bar Association Model Rules, Rule 1.7(b), and Comment to Rule 1.7, para 23; New Zealand Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 6.1.

¹¹³ See eg India, Standards of Professional Conduct and Etiquette to be Observed by Advocates, section 36; Uganda, The Advocates (Professional Conduct) Regulations, regulation 22; Bangladesh, Canons of Professional Conduct and Etiquette, Chapter I, sections 2-3.

¹¹⁴ See eg Victoria and New South Wales (Australia), Legal Profession Uniform Conduct (Barristers) Rules 2015, rule 77; Uganda, The Advocates (Professional Conduct) Regulations, regulation 23.

¹¹⁵ See eg Québec (Canada), Code of Professional Conduct of Lawyers, chapter B-1, r.3.1, art 17-19; Belgium, Code déontologie des avocats (2013) Titre 7, Chapitre 2, and Règlement de l'O.B.F.G. du 19 mai 2008 relatif à l'utilisation des technologies de l'information et de la communication.

¹¹⁶ ICC Code of Conduct, art 4.

¹¹⁷ For example, there was no express requirement for counsel to be present in the courtroom, or to maintain records in relation to the case.

¹¹⁸ ICTY Code of Professional Conduct for Counsel Appearing Before the International Tribunal, art 10-11; ICTR Code of Professional Conduct for Defence Counsel, art 5-6.

December 2005, at a time when no victims had yet been heard in ICC proceedings.¹¹⁹ Victim participation in international criminal trials was still an untested experiment. Some of those providing input into the drafting of the ICC Code of Conduct at the time had contemplated excluding victims' legal representatives from its ambit.¹²⁰ And while others consciously attempted to address the particular challenges likely to arise in the representation of victims,¹²¹ adequately anticipating all of these challenges must have been inherently difficult in the absence of any practice. Ultimately, the Code of Conduct includes just one provision which applies specifically to victims' counsel.¹²²

These weaknesses in the regulatory framework are difficult to correct, given the Code's extremely cumbersome amendment procedure, which requires a vote by the Assembly of States Parties.¹²³ As a consequence, in the 15 years since its adoption, the ICC Code has never been amended.

The result is that the Code of Conduct has so far been a static document, unable to adapt to either the ICC's rapidly expanding experience of victim participation or lessons learned from other institutions. As regards the latter, the work of the STL is particularly pertinent. Its Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon (STL Code) addresses the question of effective representation, defining 'ineffective' representation as 'where one or several acts or omissions of counsel or of a member of the Legal Team, materially compromise, or might irreparably compromise, the fundamental interest or rights of the Client.'¹²⁴ It also sets out criteria concerning what constitutes (in)effective representation for both defence and victims.¹²⁵ While these expectations about counsel's conduct are not sufficiently detailed to cover all of the challenges which are likely arise, including in the ICC context, they do provide basic standards in relation to many. For example, the STL Code states that counsel should:

- (i) In relation to communications with clients:
 - Meet regularly with the clients;¹²⁶
 - Advise the clients with complete candour concerning all aspects of the case, inform them objectively of the possible outcomes and keep them regularly

¹¹⁹ The ICC Trial Chamber issued the first decision that granted victims the status of participants in proceedings the following month, on 17 January 2006. See *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006.

¹²⁰ See eg IBA, *Commentary on the Code of Professional Conduct for Counsel Before the International Criminal Court Submitted by the International Bar Association*

<https://www.ibanet.org/ICC_ICL_Programme/About_the_ICC/IBA_ICC_Involvement.aspx> accessed 20 July 2020, 4-5.

¹²¹ See eg FIDH and Redress, *Comments on the Draft Code of Professional Conduct for Counsel Before the International Criminal Court* (14 April 2005)

<http://iccnow.org/documents/FIDHRedress_codeofconducts2.pdf> accessed 25 July 2020.

¹²² ICC Code of Conduct, art 16(2) concerns conflicts of interest among groups of participating victims. Article 9(2) relates to the special needs of clients who are children, elderly, disabled or victims of torture or other violence, and therefore may be of primary relevance to victims' counsel. However, suspects, accused persons and witnesses may also have these characteristics.

¹²³ *ibid* art 3(5).

¹²⁴ STL Code, art 9(A).

¹²⁵ *ibid* art 33.

¹²⁶ *ibid* art 33(B)(xi)(b).

informed of the material developments in the case (to the extent permitted by obligations of confidentiality);¹²⁷

- Seek the clients' views on factual matters which may affect the interests of the clients in respect of the case (to the extent permitted by obligations of confidentiality).¹²⁸

(ii) In relation to the clients' instructions:

- Consult the clients regularly regarding the overall objectives of representation and whether they have views or concerns regarding specific issues or motions which are before, or likely to come before, a judge or chamber;¹²⁹

- Execute the instructions of the clients in conformity with the strategy adopted and the interests of the clients.¹³⁰

(iii) In relation to case theory and the presentation of evidence:

- Following consultation with the clients, establish as soon as possible a theory of the case and decide upon and implement a strategy seeking to present this theory during trial in a coherent and effective manner;¹³¹

- When authorised to do so by the trial chamber, select, interview and present the most appropriate witnesses in support of the case theory and strategy adopted.¹³²

(iv) In relation to information management:

- Create and keep a complete, accurate, well-organised and indexed electronic or, where necessary, hard-copy case file, which includes relevant material;¹³³

- Maintain a full and contemporaneous record of the substance of any oral communication with the clients and maintain a full record of all written communication.¹³⁴

Some possible solutions

The problems identified above may never be perfectly or completely remedied. No legal system offers a body of legal professionals that is universally competent and effective. However, improvements could be made. Many of the changes which would make a significant difference to the work of victims' counsel are primarily within the power of the Court itself to bring about. Ideally, an improved body of settled jurisprudence would provide clarity to counsel on what they may or may not do on behalf of their clients, and afford them meaningful opportunities to be heard on their behalf. Again, this would ideally be coupled with an improved system of service provision and legal aid administration by the Registry to ensure that victims' counsel have the operational support they require to do their work. These are matters on which the counsel community continues to push, both individually in the context of their litigation work, and collectively through the ICC Bar Association (ICCBA).

There are additional measures which could be initiated by counsel independently from the Court, in order to improve the quality of their work. We propose three solutions of this type,

¹²⁷ *ibid* art 33(B)(xi)(a).

¹²⁸ *ibid* art 33(B)(iv)(b).

¹²⁹ *ibid* art 33(B)(xi)(d).

¹³⁰ *ibid* art 33(B)(xi)(f).

¹³¹ *ibid* art 33(B)(v).

¹³² *ibid* art 33(B)(viii)(b).

¹³³ *ibid* art 33(B)(x).

¹³⁴ *ibid* art 33(B)(xi)(e).

each of which could be implemented at relatively little cost, and without necessitating the lengthy and politically fraught approval process required to amend the Court's legal texts. These relate to: (1) developing professional guidelines for victims' counsel; (2) establishing mechanisms for monitoring and oversight; and (3) improving technological tools and services.

1.6 Professional guidelines

First and foremost, the ICC's legal community, possibly through the ICCBA, could take the initiative to develop detailed professional guidelines which would provide practical advice on concrete challenges that victims' counsel are likely to face in their work, including the question of what constitutes effective representation. These would draw on lessons learned and examples from ICC experience. The idea of developing such guidelines is not new, and has already been proposed in the past by civil society as an important step towards increasing transparency and conveying to both counsel and clients what is expected from their relationship.¹³⁵ Since amending the ICC Code of Conduct is extremely unlikely, and in any event would not resolve the need for a text which is sufficiently adaptable for the future, the development of professional guidelines represents a more realistic solution.

To a large extent the core principles of representation are already in the ICC Code, or can be inferred or derived from international standards. A detailed commentary or guidance which builds upon them could rely on the common experience of professionals actually practicing before the ICC, and allow for ongoing development and updating over time. The ICCBA has already shown an interest in elaborating on counsel's existing ethical obligations, albeit on a much smaller scale.¹³⁶ A similar approach on a more ambitious scale could be undertaken regarding minimum indicators of effective representation in relation to victims.

A suitable set of professional guidelines would have the potential to improve the quality of victims' legal representation in a number of ways:

- 1) Where legal representatives have doubts about what is required of them in a particular situation, they would have advice at least on commonly arising situations.
- 2) Victims (and any intermediaries assisting them) would have an independent source of information about what they are entitled to expect from their legal representatives.
- 3) Justifying requests for legal aid resources (and indeed deciding on them, on the part of the Registry) may be simpler if it was clearer what tasks are reasonably expected as part of a legal representative's work.
- 4) Conduct falling short of effective representation could be more easily identified, so that disciplinary or other appropriate action could be taken.

In order to achieve these goals, guidelines should:

- 1) Address the most common problematic or ambiguous situations which the existing standards do not adequately tackle.

¹³⁵ Redress (n 1) 22-24.

¹³⁶ See ICCBA Declaration on Obligations under the Code of Conduct for Counsel and Proposed Amendments thereto (2 March 2018) <https://7d089332-4642-4e78-a351-2010d4b07475.filesusr.com/ugd/ff5a5e_d2d6b8bba4ab4f1ab1a28f536401ecb2.pdf> accessed 25 July 2020.

- 2) Strike an appropriate balance between generality and detail: guidance must be general enough to cover multiple scenarios which might occur, but detailed enough to be useful. Domestic guidelines for lawyers are helpful models in this regard.¹³⁷
- 3) Be capable of being adapted and updated as new practices develop and the law evolves.

1.7 Mechanisms for monitoring and oversight

Currently the ICC has no mechanism for identifying and addressing most cases of unprofessional or ineffective representation. The disciplinary regime established under the ICC Code of Conduct is only triggered where counsel is alleged to have committed ‘misconduct’. This only occurs when counsel violates, or attempts to violate, a provision of the ICC Code of Conduct or one of the other core legal texts of the Court which imposes ‘a substantial ethical or professional duty’ on counsel.¹³⁸ Few cases have resulted in disciplinary proceedings to date.¹³⁹ None of those made public directly concerns a case of ineffective representation.¹⁴⁰ Indeed, the disciplinary procedure may not be ideally suited for dealing with questions of effectiveness of representation, except perhaps in the most extreme of cases. Given the inherent difficulty in clearly establishing that representation is ineffective, and the high threshold established by international tribunals for holding that an accused has been denied effective representation (as pointed out above), it seems likely that a disciplinary offence would be established in only the most extreme cases. This would leave the great majority of cases unaddressed, even where questionable representation is taking place.

Indeed, there appears to be a prevailing attitude at the Court that it is better not to interfere in instances where representation appears to be of doubtful quality. One possible explanation for this is that the only available remedy (namely, initiating a disciplinary proceeding for misconduct) appears drastic and punitive both to the counsel and the client(s). Perhaps if less extreme (and more constructive) responses were available, this could generate more willingness to acknowledge and address instances of poor representation when they occur.

This is the model attempted under the STL Code. Where information comes to the attention of the responsible office which ‘gives rise to a serious concern’ about the effectiveness of representation, that office initiates constructive discussions with counsel which could, if necessary lead to monitoring for up to 60 days.¹⁴¹ The monitoring period gives counsel an opportunity to improve the quality of representation without disciplinary action being taken.¹⁴²

¹³⁷ See Handbook (n 111); Barreau du Québec, Guides pratiques et aide-mémoires, <https://www.barreau.qc.ca/fr/ressources-avocats/services-avocats-outils-pratique/guides-pratiques-aide-memoires>, accessed 10 July 2020.

¹³⁸ ICC Code of Conduct, art 31.

¹³⁹ The ICC, on its website, posts decisions in respect of five complaints which it has made public. See <https://www.icc-cpi.int/get-involved/Pages/Disciplinary-board.aspx>

¹⁴⁰ Although something akin to this might be suggested in the claim one victims’ counsel accused of misconduct made to the effect that he had been unaware of his obligation to maintain confidentiality. See ICC, *In the case of Trial Chamber I v. Joseph Keta*, Decision of the Disciplinary Board, DO/2012/003/MMT/JK (18 June 2012) 25 July 2020, paras 55, 81-87.

¹⁴¹ STL Code, art 32-33.

¹⁴² Under the STL Code’s article 33(C), a decision is taken which either concludes that representation was effective; that it was ineffective but remedied during the monitoring period; or that it was ineffective and warrants the imposition of disciplinary measures.

It is perhaps unsurprising that many counsel have been unenthusiastic about the prospect of increased monitoring, often citing a concern that this could encroach on their independence.¹⁴³ And yet, mechanisms to enforce professional standards exist in national systems, suggesting that it is possible to do so without infringing on counsel's independence. In this regard, a significant distinction between domestic mechanisms and those currently in place at the ICC is that the community of counsel practicing before the ICC is not yet self-regulating. The ICCBA was not established until July 2016, and only in 2019 did the ASP formally recognise it as an 'independent representative body of counsel' within the meaning of Rule 20(3) of RPE.¹⁴⁴ It has yet to play a formal role in recognising or regulating ICC counsel.

Proposals for the establishment of monitoring mechanisms for counsel, which originated before the ICCBA's existence, have been vague and largely focused on a potential monitoring role for the Registry. In June 2012, the Registry proposed two new provisions for the Court's texts.¹⁴⁵ The first was a proposed Regulation 112*bis* of the Regulations of the Registry which read:

Monitoring of legal representatives of victims

1. The Registry shall take measures in order to monitor that *inter alia*:
 - (a) Victims assigned to a legal representative are continually informed about the proceedings affecting their interests and consulted, to the extent possible;
 - (b) Victims have not been unduly exposed to safety risks as a result of their interaction with the legal representatives;
 - (c) Victims' physical and psychological well-being, dignity, or privacy have been respected by their legal representative;
 - (d) The number of victims assigned to a legal representative or the complexity of the case are considered when allocating resources.
2. When fulfilling their functions, including those listed in paragraph 1, legal representatives of victims shall comply with the Code of Professional Conduct for Counsel.

The second was proposed Regulation 119*bis* of the Regulations of the Court which read:

Monitoring of performance by counsel

1. The Registrar shall establish, after consultation in accordance with regulations 120 and 121, a mechanism to monitor the quality of performance by counsel. Such mechanism shall be respectful of the independence of counsel.
2. The Registrar, as appropriate, may make recommendations if it appears that the counsel does not show due regards to ethic in his dealings with the persons referred to in regulation 124.

¹⁴³ Redress (n 1) 24.

¹⁴⁴ Resolution ICC-ASP/18/Res.6, 6 December 2019, para 80.

¹⁴⁵ Texts of the proposed amendments can be found in: Joseph William Davids, 'Changes to the Regulations of the Registry of the ICC', *The {New} International Law* (16 May 2012) <<https://thenewinternationallaw.wordpress.com/2012/05/16/changes-to-the-regulations-of-the-registry-of-the-icc/>> accessed 25 July 2020; Redress (n 1) 25-26, note 152; IBA, *Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC* (November 2012) <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=156FBA79-7A9D-4BD2-93D6-A81A91A4FFBA>> accessed 25 July 2020.

These proposals understandably led to concerns among counsel. They set out neither the procedure to be followed, nor any meaningful criteria for assessing the ‘quality of performance’ of counsel. Moreover, considerable concerns existed (and continue to exist) regarding the appropriateness of conferring a monitoring role upon the Registry.¹⁴⁶ Even experienced and senior Registry officials may never have practiced as litigators, with the consequence that many counsel are reluctant to be subject to their judgement as concerns appropriate decision-making in a litigation context. Tensions between counsel and the Registry which often arise out of differences over legal aid or service provision increase the lack of trust that would be necessary for counsel to feel comfortable with Registry regulation of their work.

The solution therefore lies most naturally in a role for the ICCBA in this process. This is nevertheless not without its own challenges, as full oversight would require the ICCBA to have significantly more resources than it currently has, or than it is able to generate through membership fees.¹⁴⁷ Undertaking regulatory work in its own right would accordingly likely require sustainable external funding, whether from the Registry, the ASP, or elsewhere. But even without such funding, the ICCBA might still be able to play an important role in making a Registry-led monitoring process workable. For example, if a model akin to the STL system were devised, the actual task of monitoring could be assigned to an external monitor selected from a list of counsel by agreement between the ICCBA and Registry. This would ensure that those conducting monitoring have relevant professional expertise, and have some level of trust from practitioners.

1.8 *Improved tools and services*

As discussed above, many of the challenges victims’ counsel face in their work could be significantly reduced by the use of appropriate technology. Most relevantly, the development of appropriate software for inputting (including from the field), managing and analysing client-related data would make victims’ counsel’s work considerably easier, faster and better. Given how essential such a tool is for the work for victims’ counsel, it is arguably just as incumbent on the Court’s Registry to provide software of this kind, as it is to source the case management software used by the prosecution and defence. Despite this, in the absence of appropriate services provided by the Court, nothing prevents victims’ counsel from attempting to source their own tools directly. Ideally the ICCBA, on behalf of the ICC’s legal community as a whole, could approach technology firms to explore the possibility of requesting the development of victim-specific software which all victims’ legal teams at the ICC could use, as part of a *pro bono* venture or a donation in kind. The benefit of such a tool would be hard to underestimate, particularly as it could also potentially be made available to victims’ counsel at other international courts.

Beyond these small potential steps, considerable work remains to be done to address the significant institutional obstacles which victims’ counsel face. These will require ongoing perseverance by individual victims’ counsel within their litigation activities, as well as lobbying by the ICCBA, to gradually correct over time.

¹⁴⁶ See eg IBA, *Counsel Matters* (n 145) 29; Redress (n 1) 26.

¹⁴⁷ The ICCBA charges an annual fee of €150, €90 or €50 for full members, associate members and affiliate members, respectively, and has no other significant source of revenue. It currently has 201 full members, 58 associate members and 102 affiliate members, and employs one staff member (Information provided to the authors by the ICCBA).

The Participation of Victims Before the ICC: A Revolution Not Without Challenges

Paolina Massidda*

One of the main innovations of the Statute of the International Criminal Court (the ‘ICC’ or ‘Court’) has been to change the role of victims from witnesses – constituting the majority of the incriminatory or exculpatory evidence presented in the proceedings – to one of autonomous participants.

In this new framework, victims no longer just support the thesis developed by one of the parties in the proceedings, namely the Prosecution or the Defence, as traditionally understood, but they present ‘*their views and concerns*’ in an independent manner, benefiting from rights and bearing obligations derived from their status as *participants* in the proceedings.

The article addresses, in Part I, the reasons for victims to participate in the Court’s proceedings. Part II analyses the implementation of the modalities of the participation of victims in the proceedings. Finally, Part III explains the challenges linked to such participation.

I. Reasons for Victims to Participate in the Court’s Proceedings

The practice of the Court has developed several aspects of the new status of ‘victims’ as independent participants in the proceedings. Indeed, in the vast majority of the cases before the ICC, victims participate through their counsels who file written submissions and present oral arguments on their behalf. In this regard, frequent communication between counsel and victims are essential. From these exchanges, counsel gains an in-depth knowledge of the case file and interests of all of his or her clients, allowing him or her to be able to present their stories, their views and concerns to the judges, other participants and the public.

Having nearly 15 years of experience in representing victims before the Court, it is my sincere belief that victims expect a careful, independent, fair, transparent, effective, watchful and just process, mindful of the rights of all participants in the proceedings. Victims deserve justice that is protective and restorative, and able to establish the truth about the crimes that they have experienced.

Victims mention a multitude of reasons for claiming the right to the truth, which is one of the components of the right to justice.¹ In this regard, the main interest of victims in the establishment of the facts and the identification of the perpetrators is in itself the essence of the right to the truth generally recognised for the benefit of victims of serious violations of human

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¹ See Donat-Cattin (D.), ‘Article 68’, in Triffterer (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, Nomos, 1999, pp. 876-877; Naqvi (Y.), ‘The Right to the Truth in International Law Fact or Fiction 9’, in (2006) ICRC International Review, No. 88, pp. 267-268; Mendez (J.), ‘The Right to Truth’, in Joyner (Ch.) (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights’ Proceedings of the Siracusa Conference, 17-21 September 1998*, Eres, Toulouse, 1998, pp. 257; and Ambos (K.), ‘El Marco Jurídico de la Justicia de Transición’, *Tenus*, Bogotá, 2008, notes 107-112, 42-44.

rights and international criminal law. In the process of implementing this right through criminal proceedings, victims have a key interest in the outcome of the proceedings which ought to bring clarity in relation to what really happened, and fill the gaps which might persist between the procedural findings and the truth itself.

Victims wish to contribute to the search and the establishment of the truth. This process entails speaking out, sharing of events that happened to them, and recognition of the harm suffered from, as well as of the crimes which generated said harm.

The right to reparations is also one of the essential components of justice before the ICC. Indeed, the process of participation has a cathartic and healthy virtue at an individual level, as well as a restorative virtue at a family, societal and community level. If the choice of victims to ask to participate in the proceedings is first and foremost an individual step, which allows them, mostly through their counsel, to convey part of their experience and knowledge of the events, said choice also sometimes becomes a collective step bringing together communities, neighbours, and families.

Finally, it is also a question for victims to advance the facts so that the criminal proceedings can contribute to reconciliation through the punishment of the persons responsible for the crimes committed.

Victims hope that justice is done and that their courage will set an example to prevent the commission of crimes ‘*of concern to the international community*’.²

II. The Implementation of the Modalities of Participation of Victims in the Proceedings Before the Court

The Rome Statute provides for the participation of victims at any stage of the proceedings. Each victim has to submit a request to the Registry in writing, preferably before the beginning of the phase of the proceedings in which he or she wishes to participate. The practice of Chambers has seen the proliferation of standard application forms for the purpose of requesting participation and/or reparations. This approach – adopted with the aim of facilitating the participation of victims in the proceedings – requires the Registry to adapt its way of processing the applications to each specific form. Moreover, this proliferation has created some uncertainty as to the desirable level of standardisation of the participation process.

Several provisions of the Court’s legal texts provide expressly for the victims to play a role in specific proceedings. Other provisions of the Rome Statute infer (though not expressly) the participation of victims in specific proceedings. When read in conjunction with article 68(3) of the Statute, however, these provisions appear to allow victims to present their views and concerns when their personal interests are affected.³

² See 4th preambular paragraph of the Rome Statute (*italics added*).

³ See articles 15(3), 19(3) of the Rome Statute; rule 59(3) of the Rules of Procedure and Evidence. In accordance with article 19 of the Rome Statute, victims may submit observations to the Court. Rule 59 of the Rules of Procedure and Evidence provides that victims having communicated with the Court in relation to the case may make representations to the relevant Chamber in writing. See also the proceedings deriving from the application of article 53 of the Rome Statute and rule 92(2) of the Rules of Procedure and Evidence (decision of the Prosecutor not to initiate an investigation or not to prosecute), as well as articles 56(3) and 57(3)(c) of the Rome Statute (measures to preserve evidence; measures for the protection and privacy of victims) in accordance with rules 87 and 88 of the Rules of Procedure and Evidence, or more broadly rule 93 of the Rules of Procedure and Evidence.

Victims participate in the proceedings by expressing their ‘*views and concerns*’. In accordance with the jurisprudence developed by the Court, this expression corresponds to the manner of participation and specifically to the modalities of participation which the Chambers determine.⁴ Indeed, the legal instruments of the Court do not provide details about the modalities of participation of victims in the proceedings, and left this to the discretion of the individual Chambers.

A more systematic scrutiny of the Rome Statute and the Rules of Procedure and Evidence enables one to draw more precisely the framework in which victims can exercise their right to participate in the proceedings before the Court. Indeed, victims, through their counsel, may:

- a) Attend and participate in the hearings before the Court ‘[u]nless, in the circumstances of the case, the Chamber concerned is of the view that the representative’s intervention should be confined to written observations or submissions’ pursuant to rule 91(2) of the Rules of Procedure and Evidence;
- b) Make opening and closing statements pursuant to rule 89(1) of the Rules of Procedure and Evidence;
- c) Present their views and concerns pursuant to article 68(3) of the Rome Statute and rule 89 of the Rule of Procedure and Evidence;
- d) Make representations in writing to a Pre-Trial Chamber in relation to a request for authorisation of an investigation pursuant to article 15(3) of the Rome Statute and rule 50(3) of the Rules of Procedure and Evidence;
- e) Submit observations in the proceedings dealing with a challenge to the jurisdiction of the Court or the admissibility of a case pursuant to article 19(3) of the Rome Statute;
- f) Request a Chamber to order measures to protect their safety, psychological well-being, dignity and privacy pursuant to article 68 of the Rome Statute and rule 87(1) of the Rules of Procedure and Evidence; and
- g) Request a Chamber to order special measures pursuant to article 68 of the Rome Statute and rule 88(1) of the Rules of Procedure and Evidence.

One, however, cannot consider the modalities provided for in the legal texts of the Court as being exhaustive. It is for Chambers to define, through the jurisprudence, the modalities of participation of victims in each stage of the process. Despite the fact that the modalities have varied to date depending on the composition of the relevant Chamber and specific context of each situation or case, some practices have emerged.

It is important to note that Chambers have repeatedly held that the modalities of participation shall ensure a *meaningful* – as opposed to a *symbolic* – participation of victims.⁵

⁴ See rule 89(1) of the Rules of Procedure and Evidence (providing that ‘[...] the Chamber shall then specify the proceedings and manner in which participation is considered appropriate [...]’).

⁵ See, e.g., *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-474, Pre-Trial Chamber I, Single Judge, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, para 157 (holding that ‘the object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules is to provide victims with a meaningful role in criminal proceedings before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings’). Since 2008, Chambers have consistently indicated that the victims’ participation has to be meaningful at all stages of the proceedings. See also *The Prosecutor v. Bosco Ntaganda*, No. ICC-01/04-02/06-

The participation of victims in the proceedings before the Court in an effective and efficient manner is a necessary mechanism to implement their right to justice and is an essential element of the full realisation of the other elements of that right, namely to know the truth and to obtain reparations. One can only deem such participation as being meaningful, rather than purely symbolic, if victims are entitled to positively contribute to the search for the truth – not only to retribution or punishment of given individuals. In this respect, any form of positive contribution from victims appears to be crucial for the accomplishment of the Court’s function.

Under the Rome Statute, victims have the right not only to tell their story but also to have their story heard within the judicial framework. Indeed, ‘[i]n the light of the core content of the right to be heard set out in article 68(3) of the Statute, [...] [said provision] imposes an obligation on the Court vis-à-vis victims. The use of the present tense in the French version of the text (“la Cour permet”) makes it quite clear that the victims’ guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them.’⁶

Victims may respond to the submissions from other participants in the proceedings once a Chamber has authorised them to participate. They can express their views and concerns to the Chamber orally or in writing, have access to the documents contained in the record of the case, get notice of public and confidential documents filed, present evidence and challenge the admissibility and relevance of evidence submitted by the other parties and participants, question witnesses, including experts, testify as witnesses or appear in person before a Chamber.

In order to be able to participate effectively and taking into account the complexity of the proceedings before the Court, counsel may assist victims, and victims have the right to choose a counsel (pursuant to rule 90(1) of the Rules of Procedure and Evidence). In practice, victims are represented by a counsel from the list of counsel maintained by the Court,⁷ as well as by a counsel of the Office of Public Counsel for Victims (the ‘Office’ or the ‘OPCV’), an independent section within the Court which provides support and assistance directly to victims or their counsel.⁸

Given the large number of victims who wish to participate, the Registry of the Court helps victims in organising their legal representation collectively, in accordance with any order issued by the relevant Chamber. This corresponds to the notion of ‘common legal representation.’⁹ In

449, Trial Chamber VI, Decision on victims' participation in trial proceedings, 6 February 2015, paras. 29-33; *The Prosecutor v. Dominic Ongwen*, No. ICC-02/04-01/15-1021, Trial Chamber IX, Single Judge, Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017, paras. 2-6.

⁶ See e.g., Situation in the Democratic Republic of the Congo, No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, para 71.

⁷ See rule 22 of the Rules of Procedure and Evidence and regulations 67 et seq. of the Regulations of the Court.

⁸ See regulations 80 and 81 of the Regulations of the Court.

⁹ See e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-1556-Corr, Trial Chamber I, Decision on the applications by victims to participate in the proceedings, 15 December 2008, 40. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-322, Pre-Trial Chamber III, Single Judge, Fifth Decision on Victims’ Issues Concerning Common Legal Representation of Victims, 16 December 2008; *The Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-800, Trial Chamber I, Decision on victim participation, 6 March 2015.

such a case, one (or more) counsel is appointed by the relevant Chamber taking into account the interests of the victims forming the group and avoiding any conflict of interests.

The presence of a counsel enables victims both to benefit from legal expertise and to be heard before the Court, without being unnecessarily exposed to risks to security and well-being.

The Code of Professional Conduct for Counsel applies to counsel for victims in the same manner as any counsel appearing before the Court. Counsels participate in hearings in accordance with the modalities of participation established by the relevant Chamber for each stage of the proceedings.

The interpretation proposed by counsel for victims of the relevant provisions may impact on the effective participation of victims. This provides for a certain richness in the ICC's developing victim participation system, but it also brings a factor of uncertainty. Indeed, proceedings before the Court are of a very complex nature and the effective participation of victims mainly depends on a Chamber's interpretation of the relevant legal provisions. Furthermore, the answers to the questions about the overall aim of the participation of victims in proceedings before the ICC, and about the modalities which would render such participation *effective* are still not, to a certain extent, fully settled.

Regarding the manner in which Chambers interpret the relevant provisions, the practice to date has shown different approaches depending on whether participation is granted at the preliminary stage – where modalities of participation are rather restrictive – or whether participation is granted at trial – where counsel for victims have a more robust and active role allowing them to even present evidence, call victims to appear before the Chamber as witnesses, and call victims to present their views and concerns in person without taking the solemn undertaking.

Furthermore, Chambers may issue decisions on victims' participation in proceedings and on common legal representation at a very late stage of the proceedings, namely on the eve of trial. In such instances, counsel have very limited time to familiarise themselves with the entirety of the disclosed evidence and the record of the case, just before the commencement of the procedural phase in which a Chamber has authorised victims to participate. This limited time also applies to counsel's familiarisation with the system of the Court (particularly for external counsels), with the case files of their clients and, more importantly, with their clients themselves.

Moreover, Chambers may set very short deadlines for submitting observations on issues which significantly affect the personal interests of victims – such as, requests for interim release of a suspect/accused or issues regarding the jurisdiction of the Court and the admissibility of cases. This often makes it nearly impossible for counsel to conduct timely consultations with clients residing in remote areas and not easily reachable, in order to present their views and concerns before the Court.

Finally, certain approaches to victim participation by some Chambers were apparently difficult to implement. One example is the former practice by the Appeals Chamber according to which victims who wanted to participate in an interlocutory appeal did not have an automatic right to

that effect, even though they participated in the proceedings which gave rise to that appeal.¹⁰ Consequently, victims wishing to participate in an interlocutory appeal had to request expressly to participate again in that specific appellate phase of the proceedings. In this regard, Judge Song subsequently pointed out that said approach ‘*leads to delays in the appellate process that are difficult to reconcile with the principle of expeditious proceedings.*’¹¹ Eventually, the Appeals Chamber reversed said practice, recognizing the automatic right for victims to participate in interlocutory appeals.¹²

The participation of victims should take into consideration factors which victims consider essential. It should also employ a methodology which aims to benefit as many victims as possible.

According to numerous studies in this area,¹³ in addition to the right to reparations, the right to receive information regarding the case constitutes one of the most fundamental interests of victims when they participate in criminal proceedings. Victims also attach great value to being duly informed. When duly informed, victims better understand their role in the criminal proceedings and are less likely to have false hopes in, or be disappointed by, the process. The protection of their security, well-being, privacy, story and individuality constitute other fundamental interests for victims. Finally, victims are generally satisfied when they feel they have been heard.

The entirety of said factors falls under the primary responsibility of the Court itself, but counsel for victims also must face these challenges. The involvement of victims in proceedings before the ICC implies the need to take into consideration the realities of each situation or country, as well as the cultural and social specificities of the affected communities, and even the ones of the families concerned. The Court must consider factors such as complex and long proceedings in which probably hundreds or thousands of victims will participate while the proceedings are held at a venue far away from the locations of the crimes. The Court must remain cognisant of the need to frequently inform victims, in a language they understand, despite the logistical difficulties to reach them. All of this is so that they can express their views and concerns and consequently have counsel represent their interests in the proceedings.

¹⁰ See e.g., *Situation in Darfur, Sudan*, No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, 18 June 2008. See also *The Prosecutor v. Laurent Gbagbo*, No. ICC-02/11-01/11-491 OA4, Appeals Chamber, Decision on the application by victims for participation in the appeal, 27 August 2013, paras. 3-8.

¹¹ See *Situation in Darfur, Sudan*, No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, Partly dissenting opinion of Judge Sang-Hyun Song and reasons for dissent from the decision and orders of the Appeals Chamber of 29 February 2008, 18 June 2008, para 5.

¹² See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, No. ICC-02/11-01/15-158 OA, Appeals Chamber, Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)’, 22 July 2015.

¹³ See, *inter alia*, Y. Naqvi, ‘The Right to Truth in International Law Fact or Fiction?’, *Int’l Review of the Red Cross*, vol. 88, June 2006, 267; E. Kiza, C. Rathgeber, and H. Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims Attitudes towards Addressing Atrocities*, Hamburger Institut für Sozialforschung, Hamburg, 2006, available at: <http://www.his-online.de/fileadmin/verlag/pdf/978-3-936096-73-6.pdf>.

To face these challenges, it appears that a combination of expertise from both external counsels and counsels from the Office of Public Counsel for Victims constitutes the best way to ensure meaningful, efficient and effective representation of victims in the proceedings before the Court. Indeed, counsels from the OPCV closely follow all the various proceedings before the Court and are therefore fully acquainted with the procedure and recent developments in the jurisprudence. Since the OPCV is located at the headquarters of the Court, its counsels are able to react in an expeditious manner to any submissions filed in the proceedings. The expertise and extensive knowledge of the members of the Office¹⁴ of the different challenges linked to the participation of victims, as well as of the system of the Court promotes the rights of victims and the zealous representation of their interests.

External counsels might have – in certain circumstances – a better understanding of the situation in the field, the cultural context, and better access to victims (especially if they are working or have working experience in the affected country). This can facilitate the collecting of information and evidence needed to represent the interests of victims in proceedings. Furthermore, external counsels may maintain regular contact with victims to keep them updated, inform them about the developments of proceedings, and to address their questions and expectations.

This model of OPCV and external counsel collaboration also meets the requirements of international criminal proceedings which are long and held far from the crime scenes.

The practice already established in several proceedings has shown that the added value deriving from the synergies of the combined collaboration between counsels of the OPCV and external counsels is substantial, particularly for the purpose of straightening the effectiveness of the participation of victims, and that such a system addresses in an efficient manner the needs of victims.¹⁵

¹⁴ Since its creation in September 2005, the OPCV has represented about 60,000 victims in different proceedings before the Court. In particular, Counsel from the Office are currently appointed Common Legal Representatives in the *Gbagbo and Blé Goudé* case, in the *Ongwen* case, in the *Bosco Ntaganda* case; in the *Yekatom and Ngaïssona* case. Counsel from the Office also represent victims in the *Lubanga* and *Katanga* reparations proceedings. Moreover, they have represented victims in all proceedings related to admissibility challenges and decisions in relation to the opening of an investigation.

¹⁵ In the *Lubanga* and *Bemba* cases, an OPCV team represented the interests of victims admitted to participate in proceedings as well as did other, separate teams composed of external legal representatives. In both of these cases, the cooperation between the OPCV and external teams allowed for the representation of the interests of victims in an effective and efficient manner, including through the filing of joint written submissions. In the Kenyan cases, at the trial phase, the model adopted provided for the designation of a common legal representative who resided in Kenya and was able to maintain regular contact with victims; while a legal officer of the OPCV attended hearings. This system was somehow ineffective because the lead counsel was based in the field while the presence of the lead counsel is certainly needed at the seat of the Court for the proceedings. In the *Gbagbo and Blé Goudé*, *Bosco Ntaganda* and *Ongwen* cases, a counsel from the OPCV is appointed as the common legal representative of victims admitted to participate in the proceedings, while an external counsel joined the team as counsel in the field, in Ivory Coast, DRC and Uganda, respectively, to maintain regular contact with the victims. Finally, in the *Yekatom and Ngaïssona* case, the Chamber appointed as common legal representatives a team composed of a counsel from the OPCV and four external counsels, maintaining the choice of the victims.

III. Challenges Concerning the Participation of Victims in Proceedings Before the Court

The participation of victims in proceedings before the ICC is the subject of controversy and heated debate since its introduction in the founding legal texts of the Court agreed upon by the negotiators of the Rome Statute.

The first challenge was to establish that the principle of victim participation as such was not disputable anymore and to focus attention on the implementation of this established principle, despite its detractors and critics, including, in particular, all Defence teams appointed to date in the cases before the Court.

The large number of victims seeking to participate and the resulting delay in the proceedings by the Chamber's review of their requests for participation and the participation of victims itself in the proceedings are amongst the concerns most often expressed. To address these concerns, the Court developed policies for the management of the forms filled out by the victims (the review of which the Victims Participation and Reparations Section within the Registry carried out). Moreover, the Chambers put measures in place in order to assist the Office of the Prosecutor and the Defence in relation to observations that they are entitled to make on the applications by victims (for example, deadlines established by the judges, granting funds for additional resources for staff to review victims' applications, etc.).

Victims and their counsels often have to face criticisms concerning their role in the proceedings. Defence teams regularly argue that the Chambers ought to limit the participation of victims in order to prevent them from being assimilated to a 'second' prosecutor, which the Defence teams contend is contrary to the rights of the accused including the right to a fair and impartial trial. In this regard, the role played by victims represented by their counsel is clearly distinct from that played by the Office of the Prosecutor. Indeed, while their interests converge frequently (in particular concerning the truth-seeking process and the prosecution of the suspects/accused), their views and strategies often differ on many procedural issues.¹⁶

Moreover, the ICC is located far from the countries where the atrocities took place. This distance contributes to the isolation of victims from the proceedings, particularly in states in transition – as is the case for almost all the situations before the Court – where the security environment is extremely fragile and volatile. More often than not, post-conflict societies must deal with dysfunctional public institutions, limited resources and traumatised populations in an environment marked by huge gaps or failures in the judicial sector and a lack of public confidence in the government's ability to deliver on human rights, peace and security. Justice becomes quite a relative concept in such a context. Often there is a strong need for national and international action to ensure that the public perceives that justice is effective and actually delivered. This means that, in societies suffering from mass atrocities on a scale incomprehensible to those who have not lived through them, it is crucial that the response is

¹⁶ See e.g., *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6, 17 January 2006, para 51. See also *The Prosecutor v. Joseph Kony et al.*, No. ICC-02/04-01/05-155, Pre-Trial Chamber II, Single Judge, Decision on 'Prosecutor's Application to attend 12 February hearing' 9 February 2007, 4; *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-824 OA7, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', 3 February 2007, para 55.

timely and takes a broad view of justice, incorporating both retributive and restorative elements. In this regard, there is increased recognition that in the delivery of justice outcomes, victims - like perpetrators - must be subjects as well as objects of the proceedings.

Other challenges, in addition to structural ones, concern the participation of the victims themselves. Indeed, once a victim is aware that he or she may request to participate in proceedings before the Court, he or she often has to become familiar with multiple interlocutors, including those who are linked to the Court (*e.g.* intermediaries¹⁵) and the Court's staff members, who work in different organs/sections with divergent mandates.

In this sense, the author, in exercising her mandate as a counsel of the OPCV representing victims, has repeatedly noted that victims have great difficulty distinguishing, amongst the persons providing them with information, who really works for the Court, and what are the differences between their respective mandates, if any. The comment most frequently expressed by victims is that each person met in connection with their requests filed with the Court represents the institution of the ICC.

The victims, therefore, tend to perceive the Court as *a whole* or single entity. However, the first possible interlocutors with victims may be those persons employed by the Court to work in outreach in a given country, staff members of the Victims Participation and Reparations Section disseminating the participation and reparations forms in the field, investigators of the Prosecution or Defence, or counsel for victims. This multiplicity of actors and interlocutors often creates confusion in the minds of victims. Those working for the Court, therefore, should better coordinate in this regard. This coordination is progressively developing together with the experience of the Court.

A large number of victims see their participation as a way to continue to fight, morally, for their daily survival following the extremely destructive events they experienced, to share their experiences, to 'speak out', to tell their stories, and to contribute to the establishment of the truth.

Victims often do not initially understand the difference between participation and reparations proceedings. In this sense, it is crucial that counsel (in conjunction with the staff members of the various sections of the Court in contact with the victims) explain in detail to victims the scope of the various stages of proceedings, keeping them regularly informed of the developments, to ensure their expectations are well-founded, consistent and proportionate *vis-à-vis* the mandate and capacity of the Court. Again, however, the challenge is great and since the Court proceedings are long, it is important to maintain this regular and privileged contact with victims.

From the point of view of the author, on the one hand, this is the only possible way to be able to represent the interests of victims effectively and efficiently, with full knowledge of their views and concerns. Counsel must ensure that the concept of 'participation' is really meaningful, both in the proceedings and also, mainly, for the victims themselves.

In this regard, other difficulties often arise in connection with the content of the decisions issued by the different Chambers of the Court. Some decisions are harder to explain. For example, when a Pre-Trial Chamber does not confirm all the charges alleged by the Prosecutor in a case, some of the victims may have suffered harm as a direct result of non-confirmed charges, which may leave these victims perplexed. While it is important to underline that in not confirming

certain charges, the Court does not negate the realities of some victims, nor does it deny their status as victims, to the extent that such a decision results in the exclusion of some of them from exercising their rights to participate in the proceedings. It is clear to date that victims occasionally experience misunderstandings and frustrations with the Court's decisions.

Finally, ensuring that Chambers efficiently and effectively implement the principles established by the negotiators of the Rome Statute and that the role finally recognised for victims be meaningful not only in the texts but in practice is *per se* a challenge. Implementing an international criminal justice system and balancing the interests of three parties in the proceedings are challenges for the institution itself on many levels (structural, budgetary, to name a few). It is difficult for counsel representing victims who face legal, human and logistical challenges. It is finally a challenge for the victims themselves who are at the heart of the proceedings, but also in the heart of the events that gave rise to such proceedings.

Dual Status Victim-Witnesses at the ICC: Procedures and Challenges

Nicole Samson*

Introduction

The term ‘dual status’ at the ICC refers to a special category of persons who have a dual role in the proceedings: they give evidence under oath (when called as a witness by a party, the Chamber or the legal representative of victims) and they have also been formally granted the status of participating victim in the same case.¹ As participating victims, these witnesses have separate legal representation, providing them additional support. As witnesses at trial,² they recount their experiences directly to the judges and their evidence forms part of the trial record upon which the Trial Chamber bases its final judgment. Their account faces a high level of testing, including through cross-examination; a level of scrutiny appropriate for trial witnesses but higher than that of participating victims who do not give testimonial evidence during trial proceedings.

Where a Trial Chamber does not rely on some or all of a dual status witness’s account, at the criminal standard of beyond a reasonable doubt, this can also mean the withdrawal of their victim status.³ Meanwhile, a Chamber conducting an eventual subsequent reparations phase assesses victims’ accounts at a lower standard of proof – on a balance of probabilities.⁴ Is it fair to withdraw victim status during trial? Will it dissuade participating victims from becoming

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¹ As to dual status victim-witnesses, a Trial Chamber found as follows in the *Banda* case:

22. The Chamber concurs with the current jurisprudence of the Court that, whilst the views and concerns of a victim may be presented either in person or through a representative, the manner in which a victim may contribute to the determination of the truth at trial is by giving evidence under oath, thereby becoming a ‘dual status’ individual. This may occur in one of two ways: (i) the victim is called as a witness by a party; or (ii) by the Chamber, upon request of the CLR or on its own initiative, pursuant to article 69(3) of the Statute as further developed below.

23. The Chamber will establish whether the participation of dual status individuals in the relevant stage of proceedings would be appropriate and in particular whether their participation may be effected in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and expeditious trial.

Prosecutor v. Banda, ICC-02/05-03/09-545, Decision on the Participation of Victims in Trial Proceedings, Trial Chamber IV, 20 March 2014, paras. 22-23.

² This can also include the pre-trial phase if the witness is relied upon for the confirmation hearing proceedings. In this article, I refer to the trial phase only, but it can equally apply to the pre-trial phase.

³ See, for example, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment, Trial Chamber I, 14 March 2012, para 484 (withdrawing, by a majority, the victim status of six dual status witnesses). Cf. *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, paras. 22-35.

⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3129, Judgment on the Appeals against ‘Decision Establishing the Principles and Procedures to be Applied to Reparations’ of 7 August 2012 with Amended Order for Reparations (Annex A) and public annexes 1 and 2, Appeals Chamber, 3 March 2015, para 83; ICC-01/04-01/06-3129-AnxA, para 65. See also *Prosecutor v. Katanga et al*, ICC-01/04-01/07-3728-tENG, Order for Reparations pursuant to Article 75 of the Statute, Trial Chamber II, 24 March 2017, para 50; *Prosecutor v. Al Mahdi*, Reparations Order, ICC-01/12-01/15-236, Trial Chamber VIII, 17 August 2017, para 44.

trial witnesses and attaining ‘dual status’? What other challenges do dual status victim-witnesses face in ICC proceedings?

This article addresses these questions. Part I of this article sets out the Court’s framework on when victims can participate in proceedings and how to identify dual status victim witnesses. Part II looks at trial procedures impacting dual status victim witnesses, the unique challenges they face during trial, and the potential consequences for them if the Chamber does not rely on their account. Finally, Part III contains conclusions and recommendations.

I. Victim participation framework at the ICC

The timing of victim participation

Where a Pre-Trial Chamber authorises the start of an investigation, the Registry notifies affected communities of the decision.⁵ This phase is known as the ‘situation phase’. The Victims Participation and Reparations Section (VPRS) is the section in the Registry in charge of informing these individuals of their rights and assisting them in applying to participate in the proceedings. It is important to note that participation as a victim can take place ‘only in the context of judicial proceedings’;⁶ an investigation is not a judicial proceeding, with limited exceptions.⁷ Indeed, article 68(3) of the Statute allows victims to participate in judicial proceedings before the Court *at any stage* provided that their personal interests are affected. The same provision gives judges the discretion to decide exactly when victims can participate in the proceedings. VPRS transmits complete applications for victim participation to the relevant Chamber that relate to the subject-matter of the specific proceedings for review under rule 85 of the Rules of Procedure and Evidence (‘Rules’) and article 68(3) of the Statute.⁸

Once a Chamber grants a victim participatory status during pre-trial and trial phases then it appoints legal representatives to represent the victim.⁹ In recent cases, Chambers have decided that the VPRS must submit (directly to the Chamber only, with a report) those applications that

⁵ Rule 50(5). See *Situation in the Republic of Burundi*, ICC-01/17-9-Red, Public Redacted Version of ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi,’ Pre-Trial Chamber III, 9 November 2017, para 195(f) (ordering ‘the Victims Participation and Reparations Section in the Registry to notify the present decision, once it has been made public, to the victims, or to associations representing victims, who have communicated with the Registry or the Office of the Prosecutor in relation to the situation in Burundi.’).

⁶ *Situation in the Democratic Republic of the Congo*, ICC-01/04-556, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, Appeals Chamber, 19 December 2008, para 45.

⁷ *ibid* paras. 45-56. The Appeals Chamber reversed a Pre-Trial Chamber decision enabling victims to participate generally in the investigation of a situation, but clarified that victims are ‘not precluded from seeking participation in any judicial proceedings, including proceedings affecting investigations, provided their personal interests are affected by the issues arising for resolution’. *ibid* para 56.

⁸ *Situation in the Democratic Republic of the Congo*, ICC-01/04-593, Decision on Victims’ Participation in Proceedings Relating to the Situation in the Democratic Republic of the Congo, Pre-Trial Chamber I, 11 April 2011, paras. 11-13.

⁹ Although legal representatives of victims are not formally appointed before permission to participate in the proceedings is granted to individual victims, Chambers have recognised that victims may have selected legal representatives *before* formal appointment. See *Prosecutor v. Yekatom and Ngaïsona*, ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019, paras. 41(iii), 51(i).

qualify for participation and those that do not, on a rolling basis.¹⁰ Where the Registry cannot make a clear recommendation, VPRS provides those applications, with any necessary redactions, to the parties for their observations.¹¹ The Chamber then assesses each application individually and determines which applicants it will grant participatory status. The wording of rule 89(1) of the Rules, however, mandates that the Registry ‘shall provide’ all applications to the Prosecutor and the defence ‘who shall be entitled to reply within a time limit to be set by the Chamber’. The approach whereby the Chamber sets the criteria for assessing victim applications, which the Registry then applies and the Chamber ultimately approves, ‘strike[s] a balance between the expeditiousness and fairness of the proceedings, while taking into consideration the particular circumstances of the case’.¹²

How are dual status witnesses identified?

One may identify dual status victim-witnesses in several ways. In the past, a party may have chosen them as potential witnesses based on information contained in the victim application forms of participating victims in the case. The Registry often provides these forms to the parties in redacted form and a party (usually the prosecution) can identify a number of individuals to

¹⁰ *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019, para 41, p.22; *Prosecutor v. Al Hassan*, ICC-01/-12-01/18-37-tENG, Pre-Trial Chamber I, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 24 May 2018, para 59, p.29. See also *Situation in the Democratic Republic of the Congo*, ICC-01/04-593, Decision on Victims’ Participation in Proceedings Relating to the Situation in the Democratic Republic of the Congo, Pre-Trial Chamber I, 11 April 2011, paras. 11-13; See also *Prosecutor v. Ntaganda*, ICC-01/04-02/06-449, Decision on Victims’ Participation in Trial Proceedings, Trial Chamber VI, 6 February 2015, paras. 29-33.

32. The Chamber considers that designating the Registry to assess victim applications based on clear guidelines outlined by the Chamber, who retains ultimate authority over the process, is the most efficient and appropriate way to ‘consider the applications’ in the case. The Chamber notes that the Registry makes these kinds of assessments regularly, as past victim participation decisions have required the Registry to: (i) filter out incomplete applications from the ones transmitted to the Chamber and (ii) make detained reports on the merits of the applications in order to inform the Chamber’s assessments.

33. The Chamber does not consider that such a procedure detracts from the meaningful participation of victims in ICC proceedings. In fact, this kind of procedure will expedite the processing of victims’ applications and allow them to participate through their LRVs at the earliest possible juncture. These judicial economy benefits also will expedite the trial proceedings generally, which is clearly in the interests of the victims and the parties.

ibid paras. 32-33.

¹¹ *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019, para 41(iv), (v), (vii)-(ix), p.22; *Prosecutor v. Al Hassan*, ICC-01/-12-01/18-37-tENG, Pre-Trial Chamber I, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 24 May 2018, para 59(iv), (vii)-(ix). See also *Prosecutor v. Ntaganda*, ICC-01/04-02/06-449, Decision on Victims’ Participation in Trial Proceedings, Trial Chamber VI, 6 February 2015, para 24; *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-498, Decision on Victims’ Representation and Participation, Trial Chamber V, 3 October 2012; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-460, Decision on Victims’ Representation and Participation, Trial Chamber V, 3 October 2012.

¹² *Prosecutor v. Al Hassan*, ICC-01/-12-01/18-37-tENG, Pre-Trial Chamber I, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 24 May 2018, para 60. See also *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision Establishing the Principles Applicable to Victims’ Applications for Participation, 5 March 2019, para 42. The particular circumstances include the anticipated need for redactions and the expected large number of applications. See *Prosecutor v. Ntaganda*, ICC-01/04-02/06-449, Decision on victims’ participation in trial proceedings, Trial Chamber VI, 6 February 2015, paras. 25-26.

interview based on the limited information in the applications. While this still may be the case in limited circumstances, the procedures adopted in recent cases limit the victim applications to which the parties get access, to only those in ‘Group C’ where the Registry provides victim applications to the parties only in cases where it cannot make a clear determination that they fulfil all criteria, or do not. The parties then make submissions to the Chamber on whether those Group C applications should be admitted. Where a party requests the assistance of the appointed legal representative of victims to facilitate contact with particular victims, the legal representative seeks the consent of the selected individuals to be interviewed. If the witness agrees, the legal representative of victims provides the individuals’ contact details along with non-redacted or lesser redacted copies of the victim application forms. If the party ultimately decides to call or rely on the witness for its case, then the person benefits from dual status.

Alternatively, when interviewing individuals during its investigation, a party may ask witnesses if they have applied to participate as victims. If so, and if the party decides to rely on the witness for its case, then this witness becomes a witness with dual status.

Another way to identify whether a witness has dual status arises once disclosure of trial witnesses takes place. A party at a given time must disclose the names of its trial witnesses to the opposing party, the judges, and the legal representative(s) of victims. It will ask the legal representative(s) to identify any known participating victims on its list, since in most cases the participating victims remain anonymous and their identity is unknown to the prosecution and defence. Once identified, that witness has attained dual status. The same procedure would apply if the Chamber calls a victim to be a witness and give evidence.

Why identify dual status victim-witnesses?

It is important that the parties identify the dual status witnesses as early as possible. For the calling party - in particular if it is the prosecution with its disclosure obligations - it will obtain, review and disclose the victim application forms to the defence. It may seek to maintain limited redactions. The applications contain information such as a description of the harm suffered, a description of the incident and supporting documentation.¹³ The prosecution may disclose this information either under article 67(2) of the Statute, rule 76(2) or rule 77 of the Rules.¹⁴

The calling party, and the opposing party, must review the victim application form to identify and evaluate the consistencies - or any discrepancies - with the witness statement(s), including those taken by the calling party, and the trial testimony.

As to whether the victim application forms constitute a prior statement by the witness under rule 76 of the Rules, ICC Chambers’ rulings have varied. In *Lubanga*, further to a defence application for disclosure of victim applications, the prosecution stated that victim applications constitute prior statements under rule 76.¹⁵ While the Trial Chamber did not pronounce itself

¹³ See Regulation 86(2) of the Regulations of the Court.

¹⁴ The Appeals Chamber has held that victim application forms of dual status witnesses may contain information that is material to the defence’s preparation, and therefore disclosable, under rule 77. See *Prosecutor v. Gbagbo et al*, ICC-02/11-01/15-915-Red OA9, Judgment, Appeals Chamber, 31 July 2017, para 56; see also *Prosecutor v. Ntaganda*, ICC-01/04-02/06-449, Decision on Victims’ Participation in Trial Proceedings, Trial Chamber VI, 6 February 2015, para 40.

¹⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1517, Prosecution’s Response to the « Requête de la Défense aux fins de divulgation des demandes de participation ou de réparation présentées en qualité de victimes, par les

on whether the victim application forms of dual status witnesses who testify on behalf of the prosecution are subject to disclosure under rule 76, it did hold that the forms may contain disclosable information.¹⁶ The prosecution must apply the same approach to the review and disclosure of dual status material as it does to any other potentially disclosable and exculpatory material in its possession, except that for dual status witnesses it must also obtain the views of their legal representative on disclosure.¹⁷

In *Bemba*, the Trial Chamber flatly rejected the argument that victim application forms constituted prior witness statements and declined to admit them into evidence.¹⁸ The debate in that case arose when, after cross-examination on the victim application forms, the defence tendered the victim application forms of four dual status witnesses called by the prosecution. The prosecution objected to admission, arguing that the applications are prior statements which a Chamber can admit only on an exceptional basis under Articles 69(2) and (4) of the Statute and rule 68 of the Rules. A majority of the Trial Chamber held that victim application forms may be relevant to questioning of dual status individuals, and that admission of the application form(s) may be appropriate in some cases (though not in that particular instance) if the Chamber needs it to properly understand the questioning of a witness. Importantly - and this is a point that arises later in this article under an assessment of the possible challenges to the credibility of dual status witnesses – the Chamber was clear that the victim application form serves a primarily administrative purpose limited to providing a Chamber with a basis to determine if it should permit an applicant to participate in the proceedings; the Registry did not obtain the application as evidence for the purpose of supporting or challenging the substantive criminal charges. The Chamber highlighted that the applications may contain errors because of the way in which they are completed.¹⁹

In the *Ntaganda* case, Trial Chamber VI allowed the admission of victim application forms as defence exhibits after cross-examination. The Trial Chamber held it would consider such requests ‘on a case-by-case basis’, noting however ‘that the parties ought to be conducting their examinations in a manner designed, to the extent possible, to create a clear and self-contained transcript record, without unnecessary recourse to seeking admission of supplementary documents for the purposes of impeachment on points of inconsistency with prior

témoins du Procureur et de toutes autres déclarations faites par lesdits témoins et non divulguées à ce jour », 28 November 2008, paras. 5-9. In the *Lubanga* proceedings, victim application forms were submitted in a non-redacted version to the prosecution, and in a redacted version to the defence. Trial Chambers in subsequent cases, such as *Ntaganda*, have required that the Registry provide redacted versions to both parties.

¹⁶ ICC-01/04-01/06-1637, paras. 12-13.

¹⁷ *ibid* para 13. See also *Prosecutor v. Ongwen*, ICC-02/04-01/15-907, Decision on Prosecution’s Request to Disclose Lesser Redacted Versions of 43 Victims’ Applications, Trial Chamber IX, 6 July 2017, paras. 16–27 (clarifying that the prosecution must review victim application forms to determine whether they fall under rule 77 of the Rules).

¹⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-2012-Red, Public redacted version of the First Decision on the Prosecution and Defence Requests for the Admission of Evidence, Trial Chamber III, 9 February 2012, paras. 99-103. While Judge Ozaki dissented on the admissibility of the application forms, she agreed with the majority that victim application forms do not constitute ‘prior statements’ because they are not ‘testimony’ under rule 68, in part because they do not bear minimum qualities that enable them to become a substitute for oral evidence in court. *Prosecutor v. Bemba*, ICC-01/05-01/08-2015-Red, Partly Dissenting Opinion of Judge Ozaki, 14 February 2012, paras. 8-23.

¹⁹ *Prosecutor v. Bemba*, ICC-01/05-01/08-2012-Red, Public redacted version of the First Decision on the Prosecution and Defence Requests for the Admission of Evidence, Trial Chamber III, 9 February 2012, paras. 99-103.

statements'.²⁰ The Trial Chamber then considered the probative value and weight to be accorded to the admitted victim application forms at the end of the case, for its Judgment under Article 74 of the Statute (as discussed further below).²¹

Apart from the disclosure of victim application forms, another important reason to identify dual status witnesses relates to the applicable provisions in various protocols that govern aspects of trial procedures. One such protocol relates to dual status witnesses.²² The protocol in the *Ntaganda* case required the notification of dual status witnesses to the Chamber, the defence, the prosecution, the legal representative(s) and the Victims and Witnesses Section ('VWS') as soon as the calling party was aware of the dual status.²³ This requirement ensured that their legal representative(s) were included in important communications about the witnesses. The protocol also ensured that the legal representatives of victims received notice when either the prosecution or defence sought to interview his/her client, and ensured timely receipt of a copy of the statement after the interview. The legal representatives of victims were entitled to disclosure related to their clients and to be notified of any filings or decisions related to their dual status clients. In cases where meetings between the prosecution or defence with their witnesses are authorised in advance of testimony (known as 'witness preparation'), the legal representative of victims do not attend but are given a copy of the witness preparation note disclosed shortly after the meeting takes place.²⁴

Similarly, the protocol in the *Ntaganda* case for handling of confidential information and dealing with inadvertent contacts with the witness of an opposing party obliged a party who has inadvertently contacted a dual status witness to immediately notify both the calling party and the victim's legal representative(s) as soon as it became aware of the inadvertent contact.²⁵ The protocol in the *Ntaganda* case also required interaction with the legal representatives of dual status victim witnesses in the context of requests for redactions prior to disclosure to the defence and of referrals for protective measures to the VWS.²⁶ The legal representative of victims, the prosecution or the defence may file requests for in-court protective measures for testifying witnesses under rule 87 of the Rules and in-court special measures under rule 88.²⁷

²⁰ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1070-Conf, Decision on Defence Request Seeking the Admission of Certain Documents Following the Testimony of Witness P-0010, Trial Chamber VI, 23 December 2015, para 14.

²¹ See (n 48-57) and accompanying text.

²² See *Prosecutor v. Ntaganda*, ICC-01/04-02/06-464, Decision Adopting the Protocol on Dual Status Witnesses and the Protocol on vulnerable witnesses, Trial Chamber VI; Annex 1 (Protocol), *ibid*, ICC-01/04-02/06-430-Anx1.

²³ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-430-Anx1, Annex A to Victims and Witnesses Unit's Submission of Proposed Mechanisms for Exchange of Information on Individuals Enjoying Dual Status Pursuant to Order n° ICC-01/04-02/06-416, 1-2 (Registry submission). See also *Prosecutor v. Gbagbo et al.*, ICC-02/11-01/15-199, Decision Adopting Mechanisms for Exchange of Information on Individuals Enjoying Dual Status, Trial Chamber I, 1 September 2015, paras. 15, 19-21. See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, Decision on Victims' Participation, Trial Chamber I, 18 January 2008, paras. 132-37. The Lubanga Trial Chamber set limits on the obligation on the defence to notify the VWU of dual status witnesses. *ibid* para 135.

²⁴ ICC-01/04-02/06-652-Anx and ICC-01/04-02/06-430-Anx1.

²⁵ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-412, Decision on Adoption of a 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant, Trial Chamber VI, 12 December 2014; Annex A (Protocol), *ibid*, ICC-01/04-02/06-412-AnxA.

²⁶ See *Prosecutor v. Ongwen*, ICC-02/04-01/15-907, Decision on Prosecution's Request to Disclose Lesser Redacted Versions of 43 Victims' Applications, Trial Chamber IX, 6 July 2017, paras. 16–27.

²⁷ A Chamber may also implement protective or special measures on its own motion and seek advice from the VWS. See rule 87(1) and rule 88(1).

Rule 87 protective measures include face and voice distortion, the use of a pseudonym and private session testimony to protect the identity of the witness from the public. During trial, the accused person has full disclosure of the identity of all witnesses.

The prosecution, defence or the legal representative of victims may request special measures under rule 88 to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence as set out in articles 68(1) and (2) of the Statute. If the prosecution or defence file such motions, the legal representative must have an opportunity to respond.²⁸

II. Trial procedures

The Statute and Rules specify that each Chamber will decide the manner in which it authorises victim participation.²⁹ Neither the Statute nor the Rules set any limits on the procedural rights to be granted to a participating victim who is also a witness in the same case; the Chamber must ensure, however, that any procedural rights are not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.³⁰

Legal representatives of victims are entitled to attend hearings before the Court. They can make opening and closing statements at confirmation hearing³¹ and trial,³² further to rule 89(1) of the Rules. Rule 91(3) provides that the relevant Chamber must authorise requests for legal representatives of victims to question a witness, expert or the accused, taking into account submissions by the prosecution and the defence. Such restrictions do not apply during the reparations phase, in accordance with rule 91(4).

Legal representatives seeking to question witnesses must specify the areas that they wish to explore and how these relate to the personal interests of victims they represent,³³ including evidence related to reparations,³⁴ along with the documents or other materials to be shown to the witness.³⁵ Chambers have barred the legal representatives of victims from asking leading

²⁸ See Rule 87(2)(c), (d).

²⁹ See Rules 89, 91.

³⁰ *Prosecutor v Katanga et al*, ICC-01/04-01/07-632, Decision on the Application for Participation of Witness 166, Pre-Trial Chamber I, 23 June 2008, paras. 18-19, 23-25.

³¹ See, for example, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-384-Corr, Corrigendum to the Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, Pre-Trial Chamber I, Single Judge, 6 February 2013, para 51; *Prosecutor v. Ruto et al*, ICC-01/09-01/11-249, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, Pre-Trial Chamber II, Single Judge, 5 August 2011, para 89; *Prosecutor v Lubanga*, ICC-01/04-01/06-462-tEN, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, Pre-Trial Chamber I, 22 September 2006, 6-7.

³² *Prosecutor v. Katanga et al*, ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial, Trial Chamber II, 22 January 2010, para 68, p.44; *Prosecutor v. Katanga et al*, No. ICC-01/04-01/07-3274, Ordonnance relative aux modalités de présentation des conclusions orales, Trial Chamber II, 20 April 2012, paras. 4-12. See also *Prosecutor v Ntaganda*, ICC-01/04-02/06-619, Decision on the Conduct of Proceedings, Trial Chamber VI, 2 June 2015, para 11; *Prosecutor v Bemba*, ICC-01/05-01/08-807-Corr, Corrigendum to the Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, Trial Chamber III, 30 June 2010, para 27.

³³ *Prosecutor v Ntaganda*, ICC-01/04-02/06-619, Decision on the Conduct of Proceedings, Trial Chamber VI, 2 June 2015, para 64.

³⁴ *ibid* para 67.

³⁵ *ibid* para 68 (including disclosure to the parties and the Chamber if the documents or other materials were not already disclosed).

questions.³⁶ Lines of examination must not be duplicative of prosecution questioning and must relate to the personal harm of the dual status victim witness or of other victims of the same events.³⁷ The prosecution and defence may object to specific questions in advance of the examination or during the questioning.³⁸ Common objections to the scope of questioning by the legal representatives of victims include: that lines of questioning fall outside the permissible scope because they were either already covered by Prosecution or go beyond the Chamber's authorised subjects;³⁹ they are not limited to the concrete personal harm of the victim or other victims of the same event;⁴⁰ or they pertain to matters that will be addressed by other trial witnesses.⁴¹

Challenges to dual status victim witnesses

In practice, it is most often the prosecution or the legal representatives of victims who call dual status victim-witnesses during trial proceedings. In those cases, the defence is the party challenging the credibility of dual status witnesses in the same ways as with all witnesses, including testing their purportedly poor memory, implausible accounts, inability to witness what they claim they witnessed, or bias. Yet, some credibility challenges are particular to the special status of these witnesses.

Although not a challenge aimed solely at dual status witnesses, defence teams have often argued that the participation of victims in ICC proceedings is tantamount to defending against a second prosecutor.⁴² While victims' interests are to some extent common with those of the

³⁶ *ibid* para 65; *Prosecutor v. Bemba*, ICC-01/05-01/08-807-Corr, Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, Trial Chamber III, 30 June 2010, paras. 38-40; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2127, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, Trial Chamber I, 16 September 2009, paras. 21-30.

³⁷ *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-26, p.24, l.18 – p.25, l.10, 16 September 2015.

So now we will, we are in open session and we will continue by rendering of our oral ruling on the LRV request for questioning of the witness. Over the break we deliberated with my colleagues, and having heard the submissions of Mr Suprun and of the Defence, we have made a decision on the permissible scope of the Legal Representative's questions to be put to this witness. In so doing, the Chamber notes that the jurisprudence of this--at this Court on the permissible scope of questioning of witnesses by legal representatives is varied. This Chamber would like to emphasise that while questions by the legal representative must be carefully tailored to elicit responses on the concrete harm suffered by the witness, such questions may also extend to the harm suffered by other victims of the same attack as that of the witness. Therefore, Mr Suprun, we will allow you to question the witness on the topics you have identified in your request to the extent that they comply with this guidance. In addition, please try not to be repetitive of any of the Prosecution's questions on the issues you have identified in your request.

ibid; see also *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-51, p.66, ll. 19-22, 3 May 2016; *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-26: p.24, l. 21 - p.25, l. 8, 16 September 2015.

³⁸ *Prosecutor v Ntaganda*, ICC-01/04-02/06-619, Decision on the Conduct of Proceedings, Trial Chamber VI, 2 June 2015, para 24.

³⁹ *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-51, p 67, ll. 10-15, 17 November 2015.

⁴⁰ See, for example, *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-51, p.67, ll. 16-19, ICC-01/04-02/06-T-94, p.12, ll.15-22, 3 May 2016.

⁴¹ *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-85, p.23, l.20 – p.24, l.7, 19 April 2016. This objection was not successful. See *ibid* 25, ll, 13-25, 19 April 2016.

⁴² See, for example, *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-258, p.23, l.22 – p.25, l.2, 10 March 2010 and *Prosecutor v Ntaganda*, ICC-01/04-02/06-T-263, p.20, l.18 – p.21, l.24, 16 March 2010.

Prosecutor, victims have an independent role in the Court's proceedings.⁴³ In contrast to the role of the Prosecutor,⁴⁴ victims' interests in the proceedings are to exercise their right to truth and justice, as well as eventual reparations.⁴⁵

Another common credibility challenge to dual status witnesses is the suggestion that the prospect of eventual reparations or financial assistance motivated them to lie.⁴⁶ In limited cases, dual status witnesses may have inflated their losses in their victim application forms because they wrongly thought they would be compensated a larger amount or on the spot,⁴⁷ but one must consider these forms in context, as set out below. It is suggested that clear explanations of the procedures and timing of trial, any appeal and reparations processes at the time of completing application forms should assist in setting expectations.

A party may use material inconsistencies between a victim application form and the witness's statement or testimony as a basis to challenge the veracity and reliability of the dual status witness's account during cross-examination. As with challenges to motivation for applying for victim status, the primary purpose for which the victims complete application forms, along with the limitations in interpretation and read-back during the application process, are considered by the judges in their assessment of the challenge. The *Bemba* Trial Chamber judges noted that the probative value of the victim application forms is 'limited' because they are 'administrative in nature', created 'through a relationship of confidence between a potential victim and the Registry of the Court' and that no formal requirements govern their creation, such as those applicable to the collection of 'formal statements' under rules 111 and 112 of the Rules.⁴⁸ Moreover, the judges observed that third parties often fill out the victim application forms on behalf of victims, or victims complete them with other assistance, which increases the risk of errors.⁴⁹

The *Ntaganda* Trial Chamber reached similar conclusions, adding that it may not be possible for those assisting victims in completing application forms to read the contents of the

⁴³ See *Prosecutor v. Lubanga*, ICC-01/04-01/06-824, Judgment, Appeals Chamber, 13 February 2007, para 55. See also *Situation in the Democratic Republic of the Congo*, ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, 17 January 2006, para 501; *Prosecutor v. Ongwen*, ICC-02/04-01/05-155, Decision on 'Prosecutor's Application to Attend 12 February Hearing', Pre-Trial Chamber II, 9 February 2007, 4.

⁴⁴ See *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432, Judgment, Appeals Chamber, 11 July 2008, para 93.

⁴⁵ See *Prosecutor v. Katanga et al*, ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber I, Single Judge, 13 May 2008, paras. 31-44. See also *Prosecutor v. Katanga et al*, ICC-01/04-01/07-1665-Corr, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, Trial Chamber II, 1 December 2009, paras. 82-91 (holding '[a]s a matter of general principle, [the participation of victims through their legal representative] must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution. Nevertheless, their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background.'). See also *Situation in Uganda*, ICC-02/04-101, Decision on Victims' Applications for Participation a/0010/06, a/0064/06, a/0070/06, a/0081/06, a/0104/06 and a/0111/06 to a/0127/06, Pre-Trial Chamber II, Single Judge, 10 August 2007, paras. 9-10.

⁴⁶ See for example, *Prosecutor v Ntaganda*, ICC-01/04-02/06-2298-Anx1-Corr, Defence Closing Brief, paras. 429, 976.

⁴⁷ See ICC-01/04-02/06-T-27, 27-32, 17 September 2015.

⁴⁸ ICC-01/05-01/08-2012-Red, para 100.

⁴⁹ *ibid*

applications back to the victim to ensure accuracy.⁵⁰ The Trial Chamber generally attributed less weight to inconsistencies between a witness's testimony and a victim application, than to inconsistencies with a formal witness statement; it assessed major identified inconsistencies, however, on a case-by-case basis.⁵¹

One example of the *Ntaganda* Trial Chamber's individual assessment of inconsistencies between a witness's victim application form and her testimony - and negative findings as a result - is that of witness P-0758, a witness who testified that she had been conscripted into the UPC/FPLC when she was under the age of 15.⁵² This witness had three separate victim application forms completed on her behalf: two applications related to the *Lubanga* proceedings and one application related to reparations in the *Ntaganda* case. She was a trial witness but not a participating victim in the *Ntaganda* trial, but given the inconsistent information in her *Lubanga* victim applications about her age, the prosecution disclosed her victim application forms, though from a different case, in the *Ntaganda* case. P-0758's first victim application in the *Lubanga* proceedings indicated that she was born in 1988; her second application in the same proceedings corrected this and stated that she was born in 1989. On the basis of her second application, the witness was authorised to participate as a victim in the *Lubanga* proceedings.

During her testimony in the *Ntaganda* trial, P-0758 consistently testified that she was born in 1989.⁵³ This date of birth corresponded to the date of birth on her electoral card, a birth certificate from 2006 and a birth certificate from 2008.⁵⁴ The Trial Chamber considered that these documents were of limited value in establishing P-0758's date of birth because they were

⁵⁰ See *Prosecutor v Ntaganda*, ICC-01/04-02/06-2359, Judgment, Trial Chamber VI, 8 July 2019, (Ntaganda Article 74 Judgment), para 85.

The Chamber further notes that the credibility of certain witnesses who are also participating victims (dual status) has been challenged on the basis of inconsistencies between their testimony and the information provided in their victim application forms. In this regard, the Chamber notes that, with the exception of two witnesses, the dual status witnesses in this case were, as most applicants, assisted by intermediaries in completing their application forms. While certain intermediaries have received general guidance and information by the VPRS prior to assisting applicants, stressing that statements should be read back to the applicants for their acknowledgement before signing, the VPRS also emphasised the limits of the training it provided, and was not in a position to indicate whether the intermediaries did in fact read back the statements to the relevant applicants. In this regard, the Chamber also notes that a number of dual status witnesses testified that the forms had not been read back to them, and/or that the intermediaries had inaccurately recorded aspects of their statements. As such, the conditions of production of victim applications differ from those of formal witness statements, which are taken by a party, assisted by staff qualified to do so, and recorded after having been read back to the witness. Accordingly, the Chamber has generally attributed less weight to inconsistencies between a witness's testimony and a victim application, than to inconsistencies with a formal witness statement. Major identified inconsistencies have been assessed on a case-by-case basis, considering, *inter alia*, the nature and scope of the inconsistencies, the explanations provided by the witness in this regard, and the conditions of production of the application, including, in particular, whether the form was completed with the assistance of an intermediary or individuals formally connected to the Court.

ibid

⁵¹ ibid

⁵² ibid paras. 148-60.

⁵³ ibid para 151.

⁵⁴ ibid para 152.

based exclusively on information provided by the witness to authorities, rather than on other documents.⁵⁵

Her victim application forms were also inconsistent on the timing of P-0758's abduction by the armed group, the UPC/FPLC,⁵⁶ and these inconsistencies were not sufficiently explained by either P-0758 or witness P-0761 during testimony.⁵⁷ Ultimately, while recognising that P-0758 may have faced particular difficulties in remembering specific dates and timeframes, the Trial Chamber determined that it could not be established beyond reasonable doubt that the witness was under 15 years old when she joined the UPC/FPLC because it could not be established that she joined in 2002, instead of in 2003 when she had already reached 15 years of age.⁵⁸ The Trial Chamber did find that she had been a member of the UPC/FPLC.⁵⁹

These findings show that accuracy in the completion of victim application forms is critical and that the methodology and practices used to fill in these forms must be of a high standard. It must always be borne in mind that participating victims are also potential witnesses of fact. A party may challenge their account based on inconsistencies in prior descriptions of their experiences and harm suffered, notwithstanding the lapse of time between the events in question and the date of testimony.

A potential consequence of non-reliance: loss of victim status

Parties and Chambers scrutinize the evidence of dual status witnesses at trial at a different, and higher, standard of proof than assessments of the accounts of non-testifying participating victims at the reparations phase. Hence, in *Lubanga*, once the Trial Chamber held that the testimony of six dual status witnesses was unreliable in certain aspects, a majority of the judges withdrew their victim status.⁶⁰ The majority reasoned that a Chamber grants permission to participate in proceedings based on a *prima facie* review of information in victim application forms; if it later concludes that 'its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary'.⁶¹

Judge Odio-Benito dissented.⁶² While she agreed that these witnesses could not be relied upon for the purposes of determining the accused's guilt beyond reasonable doubt, she disagreed that this required withdrawal of their victim status.⁶³ She considered that 'these individuals could have well been recruited, albeit not in the exact circumstances described in their numerous accounts' and noted that for at least one of these six dual status witnesses there was video evidence of him or her as being a soldier.⁶⁴ For this particular witness, Judge Odio-Benito agreed with the conclusions of the Trial Chamber 'that there is no doubt that at some stage this individual served as a soldier within the UPC' but agreed that the Chamber did not have

⁵⁵ *ibid* para 153.

⁵⁶ *ibid* paras. 154-55.

⁵⁷ *ibid* paras. 156-57.

⁵⁸ *ibid* para 158.

⁵⁹ *ibid* paras. 159-60.

⁶⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, para 484 (*Lubanga* Article 74 Judgment).

⁶¹ *ibid*

⁶² *Lubanga* Article 74 Judgment, Separate and Dissenting Opinion of Judge Odio Benito, paras. 22-35.

⁶³ *ibid* para 25.

⁶⁴ *ibid* paras. 25-29.

evidence beyond a reasonable doubt that this happened when the witness was less than 15 years old.⁶⁵

Judge Odio Benito found it to be ‘unfair and discriminatory’ to impose a higher evidentiary threshold on dual status witnesses as regards their victim status, when other participating victims would not be subject to examination by the parties at the reparations phase. She considered that the Trial Chamber should maintain their status as victims for evaluation at the reparations phase.⁶⁶

The *Ntaganda* Trial Chamber followed the approach of Judge Odio Benito’s dissent. For P-0010, the one dual status witness on whose testimony the *Ntaganda* Trial Chamber did not rely in respect of her age at the time of her recruitment into the UPC/FPLC (although it relied upon her testimony in other respects), it declined to grant the Defence prayer to revoke or withdraw her victim status. Instead, the Trial Chamber held that such issues will be addressed in the context of reparations, if any.⁶⁷

In another interesting previous decision in the *Katanga & Ngudjolo* case, one legal representative of victims intended to call victims to testify at trial. In the course of his preparation, he obtained information from the prosecution that a photograph used by a participating victim to support her account appeared to depict a different attack, one that had not been charged in the case – as opposed to the relevant attack on Bogoro – based on a video of the same scene.⁶⁸ If true, it would mean that the victim would not have qualified to participate in those proceedings. The legal representative undertook further investigations, and noted that two victims had not provided satisfactory responses to his query.⁶⁹ He subsequently filed a request to end his mandate to represent these two victims, on the basis that the relationship of mutual trust between himself and these two clients had been undermined; he declined to disclose further information concerning the victim status of these two persons citing professional privilege.⁷⁰ The Trial Chamber reviewed the matter of these two dual status witnesses further to a request by one accused to withdraw victim status.⁷¹ It noted that the legal representative had expressed doubts as to the veracity of the statements provided by both participating victims and, despite not having complete information before it, the Trial Chamber could nonetheless conclude that it appeared neither victim had provided a satisfactory explanation to assuage the legal representative’s doubts as to the veracity of their accounts.⁷² The Trial Chamber accordingly revoked the victim status of both victims, under rule 91(1) of the Rules.⁷³

⁶⁵ *ibid* para 26.

⁶⁶ *ibid* para 35.

⁶⁷ *Ntaganda* Article 74 Judgment, para 105, n261.

⁶⁸ *Prosecutor v Katanga et al*, ICC-01/04-01/07-2695, *Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal*, 10 February 2011, paras 21-27.

⁶⁹ *ibid* para 27.

⁷⁰ *Prosecutor v Katanga et al*, ICC-01/04-01/07-2782, *Rapport du représentant légal conformément à la décision ICC-01/04-01/07-2699-Conf et la demande de pouvoir mettre fin à son mandat concernant deux victimes (article 18 du Code de conduit professionnel)*, 18 March 2011.

⁷¹ *Prosecutor v Katanga et al*, ICC-01/04-01/07-2866-Red, *Requête de la Défense de Mathieu Ngudjolo en vue d’obtenir de la Chambre le retrait de la qualité de victime à la victime a/0363/09*, 5 May 2011.

⁷² *Prosecutor v Katanga et al*, ICC-01/04-01/07-3064-tENG, *Decision on the Maintenance of Participating Victim Status of Victims a/0381/09 and a/0363/09 and on Mr Nsita Luvengika’s Request for Leave to Terminate his Mandate as Said Victims’ Legal Representative*, Trial Chamber II, 7 July 2011, para 48.

⁷³ *ibid* para 49.

III. Conclusion

Dual status witnesses play an important role in trial proceedings as witnesses of the crimes they suffered. The protocols now employed by ICC Trial Chambers standardise procedures in each case and ensure that the special status of these witnesses is identified early, that issues related to their testimony and their security are addressed jointly with their legal representatives, that materials related to them are disclosed to the legal representatives and that any inadvertent contacts by a party other than the calling party are also raised with their legal representatives, among other protections.

There is a difference between the: (a) *prima facie* review of information in victim participation application forms that a Chamber undertakes when deciding on victim status; (b) the more robust review and scrutiny that comes from testifying as a dual status witness at trial, and; (c) the review of participation at the reparations stage. When is there enough information to revoke victim participation? What is the standard of proof? At what stage may a Chamber revoke victim participation? Certainly, where a legal representative of victims or a Chamber has determined that the participating victim was not a victim of a charged crime, at any evidentiary standard, then a Chamber should withdraw this individual's participation status.⁷⁴

The discussion of dual status witnesses in *Lubanga* was controversial because the Trial Chamber noted that certain dual status witnesses (alleged former child soldiers) may have been part of the armed group, or may have been under 15 at the relevant time,⁷⁵ but this could not be proven beyond a reasonable doubt. In those circumstances, it might be preferable to let the Chamber that will determine reparations decide whether these individuals are also victims on a balance of probabilities, instead of ordering the immediate withdrawal of victim status. In the *Katanga & Ngudjolo* decision, the Trial Chamber considered that it had sufficient doubts about the veracity of the victims' accounts to revoke victim status at the trial phase, which the legal representative of victims effectively confirmed. Improving the quality of victim participation applications will not eliminate greater scrutiny at a later phase, but it may reduce the number of victims who are granted participating status only to have their status subsequently revoked. Ultimately, those who first obtain a victim's account (for whatever purpose) have an important responsibility to ensure that this first account is as accurate as possible, and free of contamination, including through answers given in front of other victims or persons, or in response to leading questions. The VPRS has introduced significant improvements in the manner it collects victim participation applications. Continued training on best practices of

⁷⁴ Regulation 101(1) and (2) of the Regulations of the Registry reads: 'If a victim decides to withdraw an application for participation or reparations before the Registry [... and] the application has already been presented to the Chamber, the Registry shall present the withdrawal to that Chamber, including any reasons given for the withdrawal.' Indeed, Chambers have terminated victim status at the request of the Registry and the legal representative. See *Prosecutor v Ntaganda*, ICC-01/04-02/06-1970, Decision on Withdrawal of Victim's Application for Participation, Trial Chamber VI, 20 June 2017 (withdrawing victim participation status by the Chamber on application by the Registry and the victim). See also *Prosecutor v Ntaganda*, ICC-01/04-02/06-1011, Fifth Decision on Victims' Participation in Trial Proceedings, Trial Chamber VI, 16 November 2015 (terminating the status of 12 applications after the Registry informed the Chamber during trial that it had identified 13 applications that it had mistakenly transmitted as meeting all criteria for participation, and finding that it was more appropriate to transmit the 13th application to the parties for review and litigation).

⁷⁵ See *Lubanga* Article 74 Judgment, paras. 254-257, 440 and *Lubanga* Article 74 Judgment, Separate and Dissenting Opinion of Judge Odio Benito, paras. 25-29.

collection methods, qualified interpretation, accuracy in record-taking and read-back are critical to ensure quality and to minimise mistakes.⁷⁶

The victim participation application stage is, as the *Bemba* Trial Chamber held,⁷⁷ an essentially administrative process with a limited purpose and without the formal requirements of statement-taking set out in rules 111 and 112 of the Rules. This is important when Chambers have to evaluate the accuracy of information contained in the applications when set against the circumstances of collection. Yet even though only a small number of victims attain dual status during pre-trial and trial proceedings, those assisting and advising victims must remind them at the application phase of the need for accuracy because the parties and various Chambers will carefully review their account - at the application stage, the trial stage (if they become trial witnesses), or at the reparations phase.

Victims must also understand that the reparations process will start only after a conviction, if any. In addition, they need to be informed about the types of reparations Chambers have ordered to date, in order to manage expectations. While legal representatives of victims will explain all of this to their clients once they are retained or appointed, they formally become involved in the process after the victim participation applications have been completed and submitted to the Chamber or the parties for adjudication. It may be worth considering appointing legal representation for potential victims on a limited retainer at an earlier stage to provide necessary advice and direction to them from the outset. This appointment of skilled legal representatives at an earlier stage could assist in boosting victim participation and improve the presentation of evidence relevant to victims, including important dual status victim witnesses.

⁷⁶ See *Prosecutor v. Yekatom and Ngaïsona*, ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision Establishing the Principles Applicable to Victims' Applications for Participation, 5 March 2019, paras. 26-28.

⁷⁷ See *Prosecutor v. Bemba*, ICC-01/05-01/08-2012-Red, Public redacted version of the First Decision on the Prosecution and Defence Requests for the Admission of Evidence, Trial Chamber III, 9 February 2012, paras. 99-103.

Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness

Carla Ferstman*

A. Introduction

When states adopted the International Criminal Court (ICC) Statute, there was hope in some quarters that the reparations provisions would make a difference to victims' lives. The provisions reflected a new dual orientation of international criminal justice – not only retributive and perpetrator-focussed, but also reparative, aimed at helping to address victim harms and restore dignity.¹ However, this dual orientation was controversial then and remains so today. Stakeholders inside and outside the Court do not simply accept or understand the reparations mandate in the same way.² The job of implementing reparations (as well as what one might understand as effective implementation) has therefore been complicated by competing visions about the main goals the Court should be concentrating on and how reparations fit within those goals.

This article focuses on the effectiveness of reparations at the ICC. It analyses the work of the ICC and the Trust Fund for Victims in awarding and implementing reparations to victims. It considers the process as well as the outcomes on reparations in those cases where reparations orders have been made as well as the assistance mandate of the Trust Fund. It does not review all aspects of the reparations process, but instead focuses on key trends from which patterns can be ascertained and goes on to consider what steps might be taken to improve effectiveness.

The article concludes that the competing approaches to the purpose of reparations have led to vastly different perspectives on what would constitute effective reparations. These different perspectives have made it difficult for the Court to adopt a unified vision to improve reparations outcomes. The lack of unity has hampered the kind of strategic thinking and decision-making necessary to make reparations work effectively, taking into account the built-in constraints of the Statute. The more the failings become evident, the more pressure is on the system to find quick fixes or to narrow the objectives which ultimately reduce the prospects for effectiveness further. This is a cyclical problem which does not end well for the victims who continue to await – with growing impatience - reparations.

Adopting a human rights based approach to effectiveness would help the Court to develop victim-centred thinking, which is essential for effective reparations. It would also assist to inculcate a culture of institutional accountability and transparency towards the victim stakeholders of reparations. Despite the *sui generis* character of ICC proceedings, recognising

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¹ Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations', (2002) 15(3) *Leiden J Intl L* 667.

² Chris Muttukumar, 'Reparations to Victims', in Roy S. Lee (ed), *The International Criminal Court The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Brill 1999) 262–64.

that victims should have a right to expect effective reparations procedures and clear outcomes, and that the ICC is accountable to deliver them, may help reorient the process.

B. *A Quick Stock-Taking on the Court and Reparations Proceedings*

There is a ‘crisis of confidence’ currently affecting the ICC, which arguably permeates the entire fabric of the institution, and has led four former presidents of the Court’s Assembly of States Parties to lament recently the ‘growing gap between the unique vision captured in the Rome Statute, the Court’s founding document, and some of the daily work of the Court.’ They expressed that they are ‘disappointed by the quality of some of its judicial proceedings, frustrated by some of the results, and exasperated by the management deficiencies that prevent the Court from living up to its full potential.’³ This crisis has come to the fore with the 12 April 2019 Pre-Trial Chamber decision rejecting the request of the Prosecutor to investigate alleged crimes committed in Afghanistan,⁴ partly on the basis of a contorted ruling on ‘the interests of justice’.⁵ It is also accentuated by recent acquittals (for which both the Office of the Prosecutor and the relevant Chambers have been blamed in equal measure),⁶ and the failure of many states to cooperate with the ICC and surrender accused persons against whom there are outstanding arrest warrants. This is coupled with an approach taken by the Court to immunities which according to a number of states, conflicts with their other obligations and ignores international law.⁷

This ‘crisis of confidence’ is relevant to reparations, to the extent that it will result in a strategic re-focussing on the ‘core mandate’⁸ of the ICC to get the Court ‘back on track’. There is a tendency to associate the ‘core mandate’ of the ICC with a narrow focus on prosecutions. Clearly, a focus on prosecutions necessarily involves victims, however it is the recognition of victims’ agency and rights which has been perceived by some – including former Court officials⁹ and even some judges¹⁰ – as a distraction and hindrance to the Court, and an impediment to achieving the ‘core mandate’ as it has been narrowly perceived by them. Already, in response to the ‘crisis of confidence’, the Prosecutor, in her newest draft strategic plan, ‘embraces an approach of bringing cases that are more modest – either narrower in scope

³ Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser and Tiina Intelmann, ‘The International Criminal Court Needs Fixing’, *The Atlantic Council*, 24 April 2019.

⁴ Situation in the Islamic Republic of Afghanistan, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, ICC-02/17-33, 12 April 2019.

⁵ Dov Jacobs, ‘ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision’ *Spreading the Jam*, 12 April 2019.

⁶ Ben Batros, ‘The ICC Acquittal of Gbagbo: What Next for Crimes Against Humanity?’ *Just Security*, 18 January 2019; Alex Whiting, ‘Appeals Judges Turn the ICC on its Head with Bemba Decision’, *Just Security*, 14 June 2018.

⁷ Dapo Akande, ‘ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals’, *EJIL Talk*, 6 May 2019.

⁸ See for instance, the United Kingdom statement to the ICC Assembly of States Parties 17th session, 5 December 2018: ‘the Court ... must focus on its core and essential task, set out under the Statute. If it acts otherwise, it risks eroding the confidence States have in the Court and the integrity of the system. It adds to the Court’s ever-growing backlog of cases. And it increases the length of time taken for Investigations and Preliminary Examinations – some of which are as old as the Court itself. This situation is not sustainable.’ (available on the website of the Assembly of States Parties).

⁹ Christine Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’ (2008) 6(3) *Northwestern J Intl HR* 459.

¹⁰ Christine Van den Wyngaert, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’, (2011) 44 *Case Western Reserve J Intl L* 475.

or against lower-level accused.’¹¹ This may result in easier to achieve convictions, but it also means that fewer victims, and not necessarily those who suffered the most egregious forms of harm, will have access to reparations.

Even without taking into account this wider ‘crisis of confidence’, a snapshot on reparations reveals a bleak picture. In some cases, reparations have plodded forward at a snail’s pace – it has taken a long time to get to a final decision on reparations, but even then, the delays in implementation have been significant, and unacceptable. There are many busy and committed people rushing around doing a lot of work on reparation, but not much actual reparation has been achieved, for anyone.

The problem of reparations has not simply been a ‘problem’ of acquittals or limited or narrow prosecutions¹² – it is a much more fundamental problem about the lack of a common vision about what successful reparations look like, and at best lukewarm commitment to doing what would be necessary to achieve anything beyond tokenism.

C. Key Structural Challenges Associated with the Reparations System before the ICC

Some of the challenges the reparations system faces today are structural and stem from the framework set out in the ICC Statute and Rules of Procedure and Evidence. This section provides an overview of this structure and identifies some of the challenges associated with it.

A first challenge is reparations tied to individual criminal responsibility - against ‘a convicted person’.¹³ The reparations process is connected to a criminal court and reparation flows not just from the decisions about who to prosecute and for what crimes, but on the success of such prosecutions. As with the *Lubanga* case, if the Prosecutor narrowly frames the indictment, decides not to proceed with charges, or not to bring new charges to reflect evidence of additional criminality arising at trial, this will limit who is eligible for reparations.¹⁴ The *Lubanga* Appeals Chamber determined that reparations orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability is determined in a sentence.¹⁵ While some authors of submissions had encouraged the Court to take a broader approach to reparations,¹⁶ the Appeals Chamber held that reparations had no autonomous meaning outside of the conviction. In this light it held, for instance, that because they were not included in the sentence on guilt, sexual and gender-based violence could not be defined as a *harm* for the purposes of reparations resulting from the crimes for which Mr Lubanga was convicted.¹⁷ Similarly, as with the *Bemba* case, if there is an acquittal, there will

¹¹ Alex Whiting, ‘ICC Prosecutor Signals Important Shift in New Policy Document’, *Just Security*, 17 May 2019.

¹² Carla Ferstman, ‘Limited charges and limited judgments by the International Criminal Court – who bears the greatest responsibility?’ (2012) 16(5) *Intl J HR* 796.

¹³ Article 75(2) ICC Statute. See also Carsten Stahn, ‘Reparative Justice after the *Lubanga* Appeal Judgment: New Prospects for Expressivism and Participatory Justice or “Juridified Victimhood” by Other Means?’ (2015) 13 *J Intl Crim J* 801 (discussing ‘perpetrator-focussed’ reparations).

¹⁴ Ferstman (n 12).

¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2’, ICC-01/04-01/06-3129, (“Lubanga Reparations Appeal”) 3 March 2015, para 65. See also para 99.

¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ‘Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp–Trust Fund for Victims’ First Report on Reparations’, ICC-01/04-01/06, T.Ch. I, 1 September 2011, (“Lubanga case: Trust Fund First Report on Reparations”) paras. 30-45.

¹⁷ *Lubanga Reparations Appeal* (n 15) para 196.

be no Court-ordered reparations for victims associated with those proceedings; '[t]he Chamber must respect the limitations of this Court and recalls that it can only address compensation for harm suffered as a result of crimes when the person standing trial ... has been found guilty.'¹⁸ In the same way, the Kenyan post-election violence cases which ultimately collapsed or were withdrawn prior to trial did not and could not result in Court-ordered reparations.

Tied to this limitation on the 'convicted person', is the fact that individuals who perpetrate international crimes rarely act alone.¹⁹ Their crimes are fostered by the structures (e.g., governments, rebel movements, criminal enterprises, companies) that provide a cushion of support. Even though evidence of these connections may come out during the trial, and these groups may have benefited financially from the commission of crimes carried out by defendants, the ICC may only make an award against 'a convicted person', and reparations orders can only be enforced against convicted persons – even if those persons were associated with a governmental or corporate apparatus when they committed the crimes. This complicates asset recovery.²⁰

The narrow focus on the convicted person is at the root of much of the dissatisfaction of victims on the ground, who cannot comprehend why 'their' crimes did not result in reparations when other victims' crimes did, and why the levers of power that fostered the crimes remain untouchable.²¹ Consequently, some organisations have argued that the more flexible mandate of the ICC's Trust Fund for Victims should be privileged above Court-ordered reparations.²² One could take those arguments even further and question the utility of any reparations process inside the ICC. Is the rights-based approach of reparations a framework that works better with state defendants? Can reparations work at all in the context of international criminal law proceedings where the lens is focused tightly on individual criminal responsibility?²³ Might it have been more effective if the international community would have simply supported local reparations efforts in countries affected by ICC proceedings and not have gotten caught up in the intricacies of attempting to do reparations within the confines of criminal procedure?

On the one hand, a separate reparations process might have helped foster more adequate and effective reparations that correspond to the range of victimisation in the country without being limited by a narrow set of crimes. Also, it might have been a way to engage the responsibility of states and other actors, and might have a more lasting domestic impact. On the other hand, the vision of an ICC as a Court with the mandate to not only prosecute perpetrators but also support and afford reparations to victims is inherently important. The reparative naturally and inextricably connects to the retributive and this should be evidenced by the proceedings.

¹⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, 'Final decision on the reparations proceedings', ICC-01/05-01/08-3653, 3 August 2018, para 3.

¹⁹ Nadia Tapia Navarro, 'Collective Reparations and the Limitations of International Criminal Justice to Respond to Mass Atrocity', (2018) 18 *Intl Crim L Rev* 67, 79- 81.

²⁰ Carla Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (The Hague: Nijhoff/Brill, 2016) 227.

²¹ See Mariana Goetz, 'Victims' Experiences of the International Criminal Court's Reparations Mandate in the Democratic Republic of the Congo', in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (2nd edition, Brill/Nijhoff, 2019).

²² Marieke Weirda and Pablo de Greiff, 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims', International Center for Transitional Justice, 2004.

²³ Frédéric Mégret, 'Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice', (2010) 16 *Buffalo Hum Rts L Rev* 1, 11.

Furthermore, tying reparations to the proceedings ensures (at least in principle if not yet in practice) that a modicum of reparations takes place. Past attempts to establish international trust funds to support reparations for victims of conflict have not succeeded. Take for example, the recommendation of the International Commission of Inquiry on Darfur to set up a compensation commission, or the recommendation of the ICTY and ICTR presidents to establish mechanisms to support victims on the back of the establishment of those tribunals.²⁴ These recommendations were not heeded. Similarly, the same reasons why domestic courts are deemed unable or unwilling to proceed with an investigation or prosecution would likely apply to domestic reparations processes – there is no evidence that states who lack the will or capacity to investigate or prosecute are imbued with the will and capacity to establish and run effective and transparent reparations processes. Victims’ needs tend to be an afterthought; the incorporation of the reparations mandate in the ICC Statute is vital for these reasons – it *should* prevent victims’ needs and rights from being ignored.

D. Issues of interpretation and implementation that are more within the control of the Court and/or Trust Fund

An overriding challenge is the vagueness of ICC reparations provisions. In part because of the divergent views amongst states at Rome, only a bare-bones framework on reparations was included in the Statute,²⁵ which was only marginally expanded upon and clarified in the Rules of Procedure and Evidence.²⁶ The Court never adopted institution-wide principles on reparations to guide its work though arguably it was mandated to do so under Article 75(2).²⁷ It opted instead to leave the process of clarification to individual chambers in the context of concrete cases.²⁸ This approach affords the different chambers flexibility to put in place procedures that correspond to the particular circumstances of victimisation in individual cases. However, another view is that the judges were simply unable to agree a common approach, and the lack of clarity can and has contributed to administrative delays, as predicted.²⁹ While each chamber decides how it will collect and review applications and/or how it will decide upon them, the administrative arm of the Court waits for instructions to organise the work. A bespoke case by case approach means that the Registry is limited in its ability to prepare. Also, the lack of uniformity can lead to arbitrary inconsistencies in approaches taken, impacting on victims’ rights and adding to the confusion for victims and their counsel. As victims are limited in their ability to appeal rulings that impact their rights (aside from a few exceptions), there is little they can do.

²⁴ Ferstman (n 1).

²⁵ Muttukumaru (n 2).

²⁶ ICC Rules of Procedure and Evidence, Rules 94-99.

²⁷ Article 75(2) provides: ‘The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.’

²⁸ ICC, Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries, ICC-ASP/12/38, 15 October 2013, para 9.

²⁹ Carla Ferstman and Mariana Goetz, ‘Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings’, in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, (The Hague: Brill 2009) 313, 316.

Despite these overriding challenges, in practice, principles on reparations have been progressively adopted by the different chambers,³⁰ and there is a slowly developing practice that is starting to go in a consistent direction.

1. The application, verification and assessment process

The Court may, *either upon request or on its own motion in exceptional circumstances*, determine the scope and extent of any damage, loss and injury to, or in respect of victims and will state the principles on which it is acting.³¹ To date, both approaches have been used by the Court.

Reparations are typically assessed in response to applications submitted by victims. Such applications would need to comply with the stipulations in Rule 94(1) of the Rules of Procedure and Evidence,³² but there remains a lot which is unclear in the process. The rules do not specify when applications should be submitted, nor what role the Registry should play in identifying potential applicants and collecting information. This is one area where chambers' practice has varied significantly. In the earliest cases, reparations applications were received at any time, often well in advance of a conviction. Over time, however, early applications have been discouraged, perhaps with good reason, in order not to raise hopes about a reparations process until it is somewhat clearer that one will happen, and once it becomes clearer who may be eligible for reparations.³³

On occasion, the Court has determined victims' eligibility on its own motion or has supplemented victim applications with an own motion 'top up' approach. It has invited the Registry, the Trust Fund or others such as the Office of the Public Council for Victims (OPCV) to identify potential beneficiaries of reparations. While this has ultimately helped to provide a more holistic picture, the *ad hoc* approaches to beneficiary identification employed by different chambers have arguably heightened unpredictability.³⁴

For instance, different approaches have been taken by chambers in respect to whether reparations awards should be restricted to, or should privilege, individuals that submitted applications for reparations. The distinctions impact fundamentally victims' access to justice and underscore how judges and others understand the purpose of reparations within the ICC system. As the approach of the chambers is not known in advance, some victims may be caught by surprise and closed out of processes. As Delagrangé noted in 2018, '[p]resently it is still

³⁰ See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, 'Decision Establishing the Principles and Procedures to Be Applied to Reparations', ICC-01/04-01/06-2904, ("Lubanga First Reparations Decision on Principles and Procedures") 7 August 2012; Lubanga Reparations Appeal (n 15).

³¹ Article 75 ICC Statute.

³² Rule 94(1) provides: 'A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars: (a) The identity and address of the claimant; (b) A description of the injury, loss or harm; (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm; (d) Where restitution of assets, property or other tangible items is sought, a description of them; (e) Claims for compensation; (f) Claims for rehabilitation and other forms of remedy; (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.'

³³ Naturally this could not address the raised expectations of the many victims who had applied for reparations in the *Bemba* case.

³⁴ REDRESS, 'No Time to Wait: Realising Reparations for Victims before the International Criminal Court', 2019, 40-42.

unclear whether individual victims are *de facto required* to request reparations during the proceedings in order to be considered as potential beneficiaries.³⁵ This remains unclear.

A separate concern is the Registry's hands-off approach when assisting victims to apply and helping to address evidentiary gaps in applications. The Victim Participation and Reparations Section (VPRS) of the Registry is responsible for supplying and collecting victims' application forms and assisting victims to supply any additional or missing information,³⁶ though their role has been hands-off. Experience from domestic and international mass claims processes makes clear that an active Registry that supports victims' efforts to substantiate their claims and connects the minimal evidence they might have to other sources that might be easier for the Registry to collect and manage, is essential to the reparations process.³⁷ However, the worry that to be active would somehow impede defence rights has led to an overly cautious approach by the different chambers. Arguably, it should have been possible for the Court to separate out the prosecution and reparation phases of proceedings more clearly - only the former impacting on the presumption of innocence - so that Registry support to the latter phase would not lead to bias or the appearance of bias impacting the presumption of innocence. At the least, in circumstances where it is clear that the funds for reparations would be coming from the Trust Fund as opposed to the convicted perpetrator, there is no reason why the Registry could not be more actively engaged.

2. The types of reparations awards

Article 75 of the ICC Statute enables the ICC to order reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. The listing of three different forms of possible reparations and the ability for the Court to provide individual or collective reparations or both, were intended to enable the Court to respond effectively to the different kind of situations coming before it. Nevertheless, the focus on restitution, compensation and rehabilitation is narrower than the framework for reparations that has progressively come to be accepted under human rights law, which in addition to the three forms listed in Article 75, also include satisfaction and guarantees of non-repetition.³⁸ Presumably, this distinction stems from the ability of the ICC only to make awards against convicted individuals (as opposed to states or other entities). Arguably, it would be difficult for an individual perpetrator to be ordered to take measures of satisfaction or guarantees of non-repetition - measures typically associated with state responsibility and usually - though not exclusively - implemented by a state.

Nonetheless, in some of the reparations judgments to date, the Court has sought to incorporate measures of satisfaction and guarantees of non-repetition into its rulings.³⁹ As the Court held

³⁵ Mikel Delagrangé, 'The Path towards Greater Efficiency and Effectiveness in the Victim Application Processes of the International Criminal Court', (2018) 18(3) *Intl Crim L Rev* 540, 548.

³⁶ ICC Regulations of the Court, 88(2).

³⁷ See Heike Neibergall, 'Overcoming Evidentiary Weaknesses in Reparation Claims Programmes', in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (2nd edition, Brill/Nijhoff, 2019).

³⁸ 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147, 16 December 2005.

³⁹ Lubanga First Reparations Decision on Principles and Procedures (n 30) para 222; *The Prosecutor v Ahmad Al Faqi Al Mahdi*, 'Reparations Order', ICC-01/12-01/15-236, 17 August 2017, ("Al Mahdi reparations order"), para 28; *The Prosecutor v. Germain Katanga*, 'Order for Reparations pursuant to Article 75 of the Statute', ICC-01/04-01/07-3728-tENG, 24 March 2017, ("Katanga reparations order"), para 318.

in *Lubanga*, ‘Other types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate.’⁴⁰

Individual and/or collective forms of reparation

The Court can award both individual and collective forms of reparations. In essence, individual awards are directed at particular persons - individual victims. They might address actual quantifiable losses or more often in cases involving large numbers of persons, they may provide for some form of standardised payment or other benefit to individuals. Collective awards are likely to be made up of symbolic or commemorative awards, *cy pres* remedies or assistance programmes benefiting large numbers of individuals or entire communities of victims.⁴¹

The ICC Statute and Rules of Procedure and Evidence are vague in their identification of the factors which should determine whether an award is individual or collective or both.⁴² Arguably, too little emphasis has been placed on what victims themselves want, whether for reasons of perceived efficiency or possible paternalism – that the Court or Trust Fund is somehow better placed to understand their needs. In the *Lubanga* case, this way of working led to an award which arguably bore too little correlation with the harm suffered or victims’ submissions about their needs and circumstances. Though many victims submitted applications for individual reparations, the Trial Chamber favoured ‘community-based’ reparations recommended by the Trust Fund for Victims, which, it held ‘would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource intensive verification procedures.’⁴³ The Appeals Chamber largely affirmed the Trial Chamber’s approach.⁴⁴

In the *Katanga*⁴⁵ and *Al Mahdi*⁴⁶ cases, reparations awards included both individual and collective elements; indeed in the *Al Mahdi* case, individual reparations awards for both economic loss and moral damage were prioritised, to the extent that they would not hinder reconciliation or result in the stigmatisation of individuals in the community.⁴⁷ With *Katanga*, perhaps because there were a finite number of victims, but also because of the submissions made by victims which clarified that they did not see themselves as part of a collective,⁴⁸ and in which they overwhelmingly expressed their preference for obtaining financial compensation to help them address the harm they suffered, the judges awarded symbolic compensation amount of USD 250 per victim as well as collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support. While reparations were ultimately not adopted in the *Bemba* case, a group of experts recommended to the Trial Chamber a mixture of individual and collective forms of reparations.

⁴⁰ Lubanga First Reparations Decision on Principles and Procedures (n 30) para 222.

⁴¹ Rules of Procedure and Evidence, Rules 97–98

⁴² *ibid* Rules 97(1), 98(3) and (4).

⁴³ Lubanga First Reparations Decision on Principles and Procedures (n 30) para 274.

⁴⁴ Lubanga Reparations Appeal (n 15) para 214.

⁴⁵ Katanga reparations order (n 39).

⁴⁶ Al Mahdi reparations order (n 39).

⁴⁷ The *Al Mahdi* reparations order is analysed in Francesca Capone, ‘An Appraisal of the *Al Mahdi* Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage’ (2018) 16(3) *J Intl Criminal J* 645.

⁴⁸ Katanga reparations order (n 39). The Trial Chamber indicated: ‘it is paramount, in the Chamber’s view, to heed the expectations and needs voiced by the victims in the various consultation exercises’. *ibid* para 266.

It was recommended that whether symbolic forms of reparations should be ordered and what they might entail should be revisited after material reparations were designed and delivered.⁴⁹

3. The Trust Fund for Victims

Article 79 of the ICC Statute indicates that ‘[a] Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.’

Article 75 of the ICC Statute refers to the possibility for the Court to ‘order that the award for reparations be made through the Trust Fund’,⁵⁰ and Rule 98 of the Rules of Procedure and Evidence explains the modalities for using the Trust Fund to allocate or distribute the reparations awards made by the Court to victims. Rule 98 also explains the two principle roles of the Trust Fund: implementing reparations orders emanating from the Court and providing broader forms of assistance to victims and their families. These roles are furthered clarified in the Regulations of the Trust Fund.⁵¹

a. Implementing orders from the Court

The Trust Fund is mandated to implement orders for reparation coming from the Court, when the Court requests it to do so. Rule 98(2) provides that the Court may order that awards for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim, whereas paragraphs 3 and 4 provide that awards for reparations be made through the Trust Fund, ‘where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate,’ or when made ‘to an intergovernmental, international or national organisation approved by the Trust Fund.’

In practice, the implementation of Court-ordered reparations has not been smooth. The Trust Fund has been slow to come to grips with this work, which requires a different skill set to its assistance work, more interaction with chambers and less autonomy. Connected to this is some tension about authority and independence, and the control of the Trust Fund’s voluntary resources. It is clear that the Trust Fund operates within the context of the Court and in service of the overall reparative mandate of the ICC. Yet, the Trust Fund has discretion to determine how it uses the voluntary funds it collects.⁵² This discretion however, does not mean that it is simply a possible ‘implementing partner of the Court’⁵³; it is formally mandated to implement the Court’s reparations orders.⁵⁴ The Trust Fund is not empowered to reject the task of implementing the Court’s orders though it does control the use of its voluntary resources.

⁴⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Expert Report on Reparation, ‘Public Redacted Version of “Annex, 28 November 2017, ICC-01/05- 01/08-3575-Conf-Exp-Anx-Corr2”,’ ICC-01/05-01/08-3575-Anx-Corr2-Red 30-11-2017, 28 November 2017, (“Bemba expert report”).

⁵⁰ Article 75(2).

⁵¹ Resolution ICC-ASP/4/Res.3, 3 December 2005.

⁵² Trust Fund regulations, regulation 56.

⁵³ The Trust Fund for Victims made this argument in the *Lubanga* case. See *The Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers’, ICC-01/04-01/06-3208, 31 May 2016, (“Lubanga, First submission of victim dossiers”) para 170.

⁵⁴ In an early decision, the position of the chamber was that the Trust Fund was obligated to set aside voluntary resources for the implementation of Court-ordered reparations. See *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund’, ICC-01/04-492, 11 April 2008, 7.

Should it choose, the Trust Fund for Victims can apply a portion of its voluntary resources towards the implementation of a reparations award against an indigent convicted perpetrator; however, the Court does not have the power to oblige the Trust Fund for Victims to apply its voluntary resources in this way.⁵⁵ This nuance of roles and responsibilities could have been better managed.

Also, various chambers have taken issue with the draft implementation plans prepared by the Trust Fund in response to reparations orders. Particularly in the *Lubanga* and *Al Mahdi* cases, there has been a robust back and forth between the relevant chambers and the Trust Fund. The various chambers admonished the Trust Fund for the lack of specificity of draft implementation plans, extensive delays or the failure to comply fully with Court orders,⁵⁶ noting with overt frustration that ‘it is crucial for the TFV to act with due diligence in making judicial findings’, and that ‘these repeated failures to comply with the most basic requirements of a Chamber’s order suggest that the TFV has not yet gained command of its own mandate when operating within the judicial process.’⁵⁷ In contrast, the Trust Fund has argued that the orders are impossible or overly burdensome to comply with, particularly on issues such as verification of individual beneficiaries.⁵⁸ For instance, the Trust Fund has expressed deep concern about the *Lubanga* chamber’s approach to implementing collective reparations which ‘would be operationally and financially impossible for either the Trust Fund (or the Court) to manage and in addition would be very time consuming, further delaying the implementation of reparations.’⁵⁹

These battles of wills have contributed to the delay in the implementation of reparations orders, causing frustration and a sense of abandonment among victims.⁶⁰ In the *Lubanga* case, one DRC organisation assisting victims wrote to the Court in 2016, ‘It is obvious that the victims are tired of multiple interviews with NGOs and members of various services of the Court, without all this having brought results to date satisfying their expectations of reparation. They do not know what meaning to give to all these procedures which seem to them "endless"’.⁶¹

Over time, however, there appears to have developed a greater mutual understanding of roles and responsibilities. Also, the Trust Fund has progressively sought to collaborate on victim identification with the other bodies in the Court with relevant knowledge and experience in engaging victims – namely, the Victim Participation and Reparations Section of the Registry,

⁵⁵ *Lubanga* Reparations Appeal (n 15) paras. 111-114.

⁵⁶ See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Order instructing the Trust Fund for Victims to supplement the draft implementation plan’, ICC-01/04-01/06-3198-tENG, 9 February 2016, para 20; *Lubanga*, First submission of victim dossiers (n 53) paras. 8-9; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ‘Public Redacted Version of “Decision on Trust Fund for Victims’ Draft Implementation Plan for Reparations” 12 July 2018’, ICC-01/12-01/15-273-Red, 12 July 2018, paras. 9-22.

⁵⁷ *Al Mahdi* case, *ibid* paras. 9, 14.

⁵⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Request for Leave to Appeal against the “Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre” (9 February 2016)’ ICC-01/04-01/06-3200, 15 February 2016.

⁵⁹ *Lubanga*, First submission of victim dossiers (n 53) para 169.

⁶⁰ *The Prosecutor v Germain Katanga*, ‘Communication du Représentant légal relative aux vues et préoccupations des victimes bénéficiaires de réparation’, ICC-01/04-01/07-3819-Red, 17 December 2018, para 22.

⁶¹ *The Prosecutor v Thomas Lubanga Dyilo*, ‘Observations de la Ligue pour la Paix, les Droits de l’Homme et la Justice (LIPADHOJ) présentées conformément à l’ordonnance de la Chambre de céans du 15 juillet 2016 rendue en application de la règle 103 du règlement de procédure et de preuve’, ICC-01/04-01/06-3232, 29 September 2016, para 25 (unofficial translation).

the Outreach section, and the Legal Representatives of Victims.⁶² There is thus a developing good will.⁶³

Nevertheless, none of the cases that have reached the reparations implementation stage have been fully implemented. This is a problem.

b. Implementing the Trust Fund's assistance mandate

In addition to its role to implement reparations orders when requested to do so by the Court, the Trust Fund can provide general assistance to victims and affected communities, using voluntary resources it collects.⁶⁴ This possibility was intended to help avoid the situation of victims who required urgent assistance having to wait, sometimes for more than a decade, until the conclusion of a case, and also, to take into account the fact that Court-ordered reparations may not reach all victims in a particular situation.⁶⁵

In practice, the Trust Fund's assistance has been an important way to get a modicum of support to victims. The assistance projects have, on the whole, been well-received where they have occurred. The challenges lie elsewhere.

First, the Trust Fund's activities have been relatively small-scale given the limited funds it has collected to date. There is an obvious question about economies of scale; whether other development actors with access to much more significant resources would be better placed to service the needs of victims in the communities where the Trust Fund operates.⁶⁶ The Trust Fund has argued that its' victim-centred approach is unique and in addition to identifying gaps that need filling, it plays a catalytic role both in signposting the needs of victims in particular communities, bringing greater attention to those needs and helping those needs to be met – by its own funds, by the partnerships it fosters, and by others coming in to sustain the work.⁶⁷ This is a particularly important role and, when done successfully, represents a good way to make the Trust Fund's interventions sustainable.

Second, the Trust Fund has not been active in all situation countries. Its mandate allows it to provide support to natural persons and their families who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court, or organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.⁶⁸ This would include acting in the following countries, all of which involve situations under investigation by the Prosecutor:

⁶² *The Prosecutor v Thomas Lubanga Dyilo*, 'Observations in relation to the victim identification and screening process pursuant to the Trial Chamber's order of 25 January 2018', ICC-01/04-01/06-3398, 21 March 2018.

⁶³ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, 'Decision on the Updated Implementation Plan from the Trust Fund for Victims', ICC-01/12-01/15-324-Red, 4 March 2019, para 22.

⁶⁴ Rule 98(5), Rules of Procedure and Evidence. See generally, Anne Dutton and Fionnuala Ní Aoláin, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate', (2019) 19(2) *Chicago J Intl L* 490.

⁶⁵ Peter Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Columbia and the DRC', (2016) 10 *Intl J Transitional J* 88, 104.

⁶⁶ REDRESS (2019) (n 34) 31.

⁶⁷ See e.g., Trust Fund for Victims, 'Learning from the TFV's Second Mandate: From Implementing Rehabilitation Assistance to Reparations', 2010.

⁶⁸ Rules 85 and 98(5), Rules of Procedure and Evidence, read together with Regulations 48 and 50(a) of the Regulations of the Trust Fund for Victims.

Burundi, Georgia, Central African Republic, Mali, Cote d'Ivoire, Libya, Kenya, Darfur (Sudan), Uganda and DRC.⁶⁹ The Trust Fund has been active in providing assistance in DRC and Uganda, and has indicated its intention to provide support in Cote d'Ivoire and Central African Republic. The Trust Fund announced its intention to speed up the launch of its assistance programmes in the Central African Republic following the acquittal of Jean-Pierre Bemba Gombo,⁷⁰ though at the time of writing more than one year later, assistance programmes did not appear to be close to starting. The security situation and limited funding are important barriers, however, transparency is also a problem. It is not always clear why assistance programmes have been started in some countries and not others. The discretion of the Trust Fund in its assistance mandate appears limitless and impossible for victims to challenge. This has angered many victims who have been unable to access support.⁷¹

Third, an important part of the purpose of the assistance mandate as originally conceived was to ensure benefits for some of the most vulnerable victims with urgent needs that could not wait for the conclusion of a lengthy trial. The Trust Fund regulations require the Board of the Trust Fund to notify the Court before embarking on any activity or project to provide physical or psychological rehabilitation or material support for the benefit of victims and their families, in order to provide the Court with an opportunity to inform the Board if a particular project or activity would pre-determine any issue to be determined by the Court or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁷² In order to avoid any perception of prejudice, however, the Trust Fund has given an extra wide berth to the Court and has avoided undertaking activity that addresses the needs of victims affected by ongoing Court proceedings. It has argued in one of its filings that:

assistance activities under the regulatory framework are prohibited from being related to a case, interfering with a case against an accused or with a legal issue in a case. Under the Court's legal framework, assistance activities carried out under regulation 50 (a) of the Regulations of the Trust Fund cannot be associated with a case at the pre-trial stage or while the trial proceedings are on-going. In the Trust Fund's view, while the issue has not yet been litigated before the Court, its assistance activities should also not, as a matter of policy, relate to any specific case at the post-conviction stage.⁷³

This, which goes beyond the Rules of Procedure and Evidence and the Trust Fund's own regulations, produces the odd situation that if the Prosecutor decides to focus in on offences in village X, or particular crimes perpetrated by perpetrator Y, because of the gravity of those incidents and other related reasons, the Trust Fund would purposefully avoid providing assistance to the victims of those alleged crimes, opting to support victims in other places, or

⁶⁹ For an updated list of 'situation countries', see the ICC website, <https://www.icc-cpi.int/Pages/Situations.aspx>, (accessed July 2019).

⁷⁰ See the Statement from the Trust Fund for Victims' Board of Directors, 'Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic', Press Release, 13 June 2018. See also the Communication from the Chair of the Board of Directors of the Trust Fund for Victims to the President of the Assembly of States Parties, 13 June 2018.

⁷¹ See, e.g., 'ICC Trust Fund for Victims to Visit Kenya: Prospect of aid is welcomed, but those who suffered wonder why it has taken so long to begin assessing their needs' IWPR, 26 June 2014; *The Prosecutor v. Uhuru Muigai Kenyatta*, 'Victims' response to the 'Prosecution's notice of withdrawal of the charges against Uhuru Muigai Kenyatta', ICC-01/09-02/11-984, 9 December 2014.

⁷² Regulation 50(a), Regulations of the Trust Fund for Victims.

⁷³ *The Prosecutor v. Thomas Lubanga Dyilo*, 'Additional Programme Information Filing', ICC-01/04-01/06-3209, 7 June 2016, para 75.

of other crimes one step removed from the Prosecutor’s investigations. This policy choice arguably avoids all risk of potential prejudice,⁷⁴ however it defeats one of the main purposes of the assistance mandate – to ensure victims get the support they need while waiting for the trials to conclude. As REDRESS has noted, ‘[w]hile the Trust Fund’s decision to commence its assistance mandate in CAR is generally applauded, concern has been expressed that it could have acted more proactively to mitigate the suffering of CAR victims pending a final determination on reparations.’⁷⁵ Sehmi has argued similarly that:

[i]t is not a morally supportable outcome that participating victims [like Ben] die waiting for justice because of concerns that providing urgent medical assistance would violate the presumption of innocence. There is a clear distinction between urgent assistance and court ordered reparations.⁷⁶

While it is possible to imagine that there will be circumstances in which a grant of assistance might lead to real or perceived prejudice, those circumstances would be atypical. It is not appropriate for the Trust Fund to discriminate against an entire, obviously relevant, category of persons requiring urgent assistance in order to avoid potential conflicts with chambers.

E. The Need to Improve Effectiveness: Some Reflections

1. The Meaning of Effectiveness

Effectiveness has a plain-meaning and also a meaning in human rights law. The European Court of Human Rights has used the term to better understand the different positive obligations under the European Convention, intended to guarantee rights that are not theoretical or illusory, but practical and effective.⁷⁷ Many treaties recognise the right to an “effective remedy” for persons whose rights have been violated, which encompasses a variety of concepts including the right to a fair trial and the right to have access to court.⁷⁸ Reparation is an important component of an effective remedy.⁷⁹ An excessive length of proceedings has on occasion been determined to justify a finding of an absence of an effective remedy.⁸⁰

The plain meaning of ‘effectiveness’ denotes the degree to which particular objectives are achieved, behaviours are changed and the extent to which targeted problems are managed and solved; the capacity to do or deliver what is supposed to be done or delivered.⁸¹ In organisational sciences, it has been argued that ‘relationships between structure and environment, design and innovation, or adaptation and uncertainty, for example, are important

⁷⁴ See Dixon (n 65).

⁷⁵ REDRESS (2019) (n 34).

⁷⁶ Anushka Sehmi, “‘Now that we have no voice, what will happen to us?’: Experiences of Victim Participation in the Kenyatta Case”, (2018) 16 *J Intl Crim J* 571, 586.

⁷⁷ *Airey v. Ireland*, Appl no. 6289/73, 9 October 1979, para 24; *Artico v. Italy*, Appl no. 6694/74, 13 May 1980, para 33.

⁷⁸ See, e.g., Art 2(3) of the International Covenant on Civil and Political Rights; Art 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art 2 of the Convention on the Elimination of All Forms of Discrimination against Women. For an explanation of the content of an effective remedy, see UN Human Rights Committee, ‘General Comment 31’, Nature of the General Legal Obligation Imposed on States Parties to the ICCPR, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15-20.

⁷⁹ General Comment 31, *ibid* para 16.

⁸⁰ *Pizzati v. Italy*, Appl. no. 62361/00. 10 November 2004 (referred to GC on other issues).

⁸¹ Marc Levy, Oran Young and Michael Zürn, ‘The Study of International Regimes’, (1995) 1(3) *Eur J Intl Rel* 267, 290-91.

because their results lead ultimately to organizational effectiveness'.⁸² Thus, effectiveness should be judged not only on the innovations of structure, but on the capacity of an institution to adapt to meet challenges.

Having in mind the need to improve effectiveness, the ICC Assembly of States Parties invited the Court to 'intensify its efforts to enhance the efficiency and effectiveness of proceedings including by adopting further changes of practice' and 'request[ed] the Court to intensify its efforts to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs...'.⁸³ The Court has begun to develop indicators to track its work,⁸⁴ though to date, there has been only limited consideration of what would constitute effective reparations. Consequently, the concept remains malleable and changeable depending on the perspectives of those carrying out the assessment, as is explained in the next section.

2. Three frames of reference which underscore the complexity of perspectives on effectiveness

The ICC reparations regime is effective if it achieves its purpose within an appropriate time span. In a very basic sense the purpose of reparations before the ICC is to redress the harm suffered by victims of crimes within the jurisdiction of the Court. However, judgments of effectiveness are 'based on the values and preferences individuals hold for a certain organisation. The trouble with these values and preferences, however, is that they vary, and they are often contradictory among different constituencies.'⁸⁵

The effectiveness of ICC reparations can be understood through several frames of reference, in some combination:

- i) *procedural or process matters*: how lengthy, cumbersome is the process and how do the various persons involved in or affected by proceedings (including victims) experience the process including those with special needs or requirements;
- ii) *substantive matters*: whether reparations awards are targeted at appropriate and relevant persons and/or groups; whether the awards address the harms suffered by victims, were appropriate to the context and served their intended purposes; and
- iii) *wider goals*: whether reparations address the wider objectives under the ICC Statute including its preamble, contribute to victims' transformation, reconcile communities and promote non-repetition.

Clearly these are simplified versions of more complex positions. Nevertheless, the three perspectives can help explain why and how different reparative visions impact on effectiveness and why it remains challenging to chart a common path forward.

⁸² See Kim Cameron, 'Effectiveness as Paradox: Consensus and Conflict in Conceptions of Organizational Effectiveness', (1986) 32(5) *Organization Design* 539, 540.

⁸³ 'Strengthening the International Criminal Court and the Assembly of States Parties', ICC-ASP/13/Res.5, 17 December 2014, Annex I, para 7.

⁸⁴ ICC, 'Report of the Court on the development of performance indicators for the ICC', 12 November 2015. See also ICC, 'Third Court's report on the development of performance indicators for the International Criminal Court', 15 November 2017.

⁸⁵ Cameron (n 82) 541.

For some, questions of effectiveness should be assessed from the first perspective, sometimes with added criteria relating to costs. Some within this camp are likely to see reparations as important though secondary to the prosecutorial mandate of the Court; reparations are fine as an objective so long as they can be contained and do not detract from the primary mandate.⁸⁶ Given the huge needs of victims, reparations could focus on more symbolic measures, which may acknowledge victims' rights and needs but serve mainly as a catalyst for other actors to step in. Or, collective reparations could be privileged because they are perceived as simpler to implement, thus more efficient and also notionally capable of reaching a wider class of victims. Victims' preferences are to be acknowledged but to some, they will be secondary to efficiency considerations.⁸⁷ The beneficiary class could be limited to persons who submitted prior applications because it would cause too much delay to open the process to unidentified victims.⁸⁸ To others, victims' experiences of the reparations process - particularly the need for victims' voices to be heard, their priorities reflected and for the process to be expeditious - are crucial to this first frame of reference.⁸⁹

For others, effectiveness should be assessed by both first and second frames of reference and the second frame will be narrowly focussed on the victims of crimes for which the perpetrator was convicted. There may be differences of perspective regarding how closely connected victims' harms must be to the crimes, but essentially, there is an acceptance of the view that reparations is intended for victims of the crimes for which a perpetrator was convicted.⁹⁰ Reparations should focus on what is appropriate to address the actual harm suffered by victims, and not be guided primarily by expediency.⁹¹ The victims' legal representatives in the *Katanga* case underscore this point, arguing for practical measures closely connected to what the victims want and need.⁹²

For others, the second frame of reference should be broadened to consider a wider constellation of victims connected to the crimes, not solely those that have sought to interact with the Court. For some, this will be a question of allowing for a wider causal link between the crimes for which the individual was convicted and the harm suffered by victims.⁹³ For instance, the

⁸⁶ Van den Wyngaert (n 10).

⁸⁷ *The Prosecutor v. Germain Katanga*, 'Notification pursuant to regulation 56 of the TFV Regulations regarding the Trust Fund Board of Director's decision relevant to complementing the payment of the individual and collective reparations awards as requested by Trial Chamber II in its 24 March 2017 order for reparations', ICC-01/04-01/07-3740, 17 May 2017. The Trust Fund had agreed to use its voluntary resources to support the implementation of the collective aspect of the Katanga award. Ultimately, it also supported the implementation of the individualised reparations awards because it received an earmarked grant from The Netherlands to do so. See Juan Pablo Pérez-León-Acevedo, 'The Katanga Reparation Order at the International Criminal Court: Developing the Emerging Reparation Practice of the Court', (2018) 36(1) *Nordic J Hum Rts* 91, 100.

⁸⁸ Bemba expert report (n 49) paras. 41 – 51.

⁸⁹ *The Prosecutor v. Germain Katanga*, 'Observations of the victims on the principles and procedures to be applied to reparations', ICC-01/04-01/07-3555-tENG, 15 May 2015, para 12.

⁹⁰ Lubanga Reparations Appeal (n 15).

⁹¹ ICTJ makes this point in its submission on the Lubanga reparations award: it is 'important not to reflexively respond to unrealistic expectations about individual reparations by either proposing the concept of "collective reparations" as a default approach or by proposing the payment of a lump sum of money that makes no distinctions among victims' experiences and needs.' See *The Prosecutor v. Thomas Lubanga Dyilo*, 'Submission on reparations issues', ICC-01/04-01/06-2879, 10 May 2012, para 18.

⁹² *The Prosecutor v. Germain Katanga*, 'Observations of the victims on the principles and procedures to be applied to reparations', ICC-01/04-01/07-3555-tENG, 15 May 2015, paras. 26-30.

⁹³ The first Trial Chamber reparations order in the *Lubanga* case understood that gender harm should be covered, Lubanga First Reparations Decision on Principles and Procedures (n 30).

Women's Initiatives for Gender Justice submitted that: 'reparations should not be limited to a narrow assessment of the harms attached to the charges, but should be inclusive of the breadth of harm suffered as a result of these crimes.'⁹⁴

The third frame for some will be important but not directly relevant to any assessment of effectiveness (an added bonus of reparations but not the purpose of the ICC's reparative mandate), whereas for others, the third frame is by far the most relevant reference. For instance, the Trust Fund, in some of its submissions, has focused on the importance of the reparative goals of reconciliation, satisfaction and guarantees of non-repetition.⁹⁵

The Court's approach to effectiveness – where next?

Unsurprisingly, the Court has vacillated in its approach. Certain chambers have focused on the first frame of reference, and with time have mainly adopted a narrow vision of the second frame. Some chambers have incorporated into their discourse aspects of the third frame, though mainly to articulate broad principles, less so in the adoption of reparations orders and the approval of draft implementation plans. An exception to the above is the *Al Mahdi* case, in which the chamber included the objective of non-repetition into its reparation order.⁹⁶

The fact that there are so many perspectives on the goals of the reparations process and consequently, the benchmarks for effectiveness, underscores why a meeting of the minds has been difficult to achieve.

3. Article 21(3) of the Statute as a gauge for effectiveness

Article 21(3) of the ICC Statute provides:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

This provision requires the Court to interpret law consistently with internationally recognised human rights. In this section, it is argued that human rights should not only serve as the lens through which the ICC Statute and other applicable laws are applied and interpreted, it should also guide the ICC in its relationships with stakeholders (including victims) and help determine its goals and policies, particularly in relation to reparations.

While important, it is unclear whether Article 21 requires the ICC *qua* institution, including its various organs, to respect the human rights of those persons impacted by its actions. The ICC is not a party to human rights treaties and thus it has not agreed to be bound by human rights provisions in the classic sense. Nevertheless, this does not prevent it from recognising that its mandate has a direct impact on individuals' human rights, and how it treats individuals in its charge is central to questions about the effectiveness of its work.

⁹⁴ The Prosecutor v. Thomas Lubanga Dyilo, 'Observations of the Women's Initiatives for Gender Justice on Reparations', ICC-01/04-01/06-2876, 10 May 2012, para 37.

⁹⁵ See, e.g., Lubanga case: Trust Fund First Report on Reparations (n 16).

⁹⁶ *Al Mahdi* reparations order (n 39) paras. 60-67.

Human rights is an increasingly important lens through which the work of international organisations can be assessed.⁹⁷ In particular, institutions have been called upon to introduce or improve “due process” procedures to address perceived human rights deficiencies. For example, in a study commissioned by the UN Office of Legal Affairs relating to the individual sanctions regime of the UN Security Council, Professor Bardo Fassbender noted that ‘there is a legitimate expectation that the UN, through its organs, observes standards of due process, or “fair and clear procedures” on which the person concerned can rely.’⁹⁸ He notes further that ‘[d]ependent on the circumstances of a particular situation, appropriate standards must be determined, suited to that situation, paying due regard to the nature of the affected rights and freedoms and the extent to which action taken by the UN is likely adversely to affect those rights and freedoms.’⁹⁹ Similarly, in response to the perceived deficiencies of the UN response to allegations of sexual exploitation and abuse by international peacekeeping forces in Central African Republic, the group of experts appointed to carry out an independent review recommended that the UN adopt a human rights centred policy framework to address conflict related sexual violence by peacekeepers: ‘This shift in approach has important implications for the manner in which the UN responds to the needs of victims and conceives of its obligation to report, investigate and follow up on allegations.’¹⁰⁰

International criminal courts and tribunals including the ICC, have long recognised the need for their procedures to respect the rights of the accused. The UN Secretary-General has stated that it ‘is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings.’¹⁰¹ Recognised defence rights include the presumption of innocence, the right to know the charges, have the assistance of counsel, challenge the Prosecution evidence, present defence evidence, understand the proceedings and evidence, and remain silent, among other rights.¹⁰²

There is less clarity about the obligations of the ICC to uphold victims’ rights, including victims’ right to an effective remedy. Article 64(2) of the ICC Statute distinguishes the treatment of defence and victims’ rights: ‘The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with *full respect for the rights of the accused and due regard for the protection of victims and witnesses* (emphasis added).’ It is recognised that victims and witnesses must be protected, but they are not recognised as rights holders in the same sense as accused persons; victims have certain procedural rights to participate and claim reparations,

⁹⁷ See generally, Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press, 2017).

⁹⁸ Reproduced in Bardo Fassbender, ‘Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations’ (2006) 3 *Intl Org LR* 437, para 6.6.

⁹⁹ *ibid* para 10.

¹⁰⁰ Marie Deschamps, Hassan Jallow and Yasmin Sooka, ‘Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic’, 17 December 2015, 79.

¹⁰¹ UN Secretary-General’s Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia, UN Doc S/25704, 3 May 1993, para 106.

¹⁰² ICC Statute, articles 64, 66 and 67. See Guido Acquaviva ‘Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations’ (2007) 20(3) *Leiden J Intl L* 613; Lorenzo Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’, in *International Criminal Procedure: Principles and Rules*, G. Sluiter et al (eds), (Oxford University Press, 2013) 74-80.

but the wider human rights that they might benefit from under domestic law or pursuant to human rights treaties, are not recognised specifically.

Thus far, respect for human rights has not been included as part of the performance indicators developed by the Court.¹⁰³ Nevertheless, it is argued that human rights is a crucial indicator of effectiveness. Not only is recognising the inherent dignity and rights of all those who are affected by its work important in itself, it is also a clearer, less variable and arguably more neutral lens through which to observe the Court's work and its reparations framework.

Most relevant to victims' rights before the ICC, under human rights law, there is an obligation on states to investigate and prosecute the most serious human rights abuses which constitute crimes under international law¹⁰⁴ and victims are recognised to have a variety of procedural rights during the investigation and subsequently, such as the right to file a complaint, the right to receive information about the follow-up of the complaint, the right to some kind of administrative or judicial review upon a decision not to pursue an investigation or prosecution.¹⁰⁵ Victims and their families also have the right to know the truth about the abuses they suffered, including the identity of perpetrators and the causes that gave rise to the violations.¹⁰⁶

4. Key human rights principles relevant to the effectiveness of reparations before the ICC

a. Timeliness of reparations

To promote efficiency and effectiveness, the ICC should put in place measures to ensure a speedy trial – not only to guarantee defence rights, but also in recognition of victims' right to an effective remedy without delay, including reparations.¹⁰⁷ In *Ivanov v. Ukraine*, which concerned the failure to enforce in a timely way a lump-sum retirement payment and compensation award, the ECtHR determined that the right to court would be illusory if Ukraine allowed a final, binding judicial decision to remain inoperative to the detriment of one party. 'The effective access to court includes the right to have a court decision enforced without undue delay.' How long a delay is too long depends on 'the applicant's own behaviour and that of the competent authorities, and the amount and nature of the court award.'¹⁰⁸

Under a human rights performance framework, reparations would be ineffective if implementation was unduly delayed. This would change the narrative in an important way. It is not just 'unfortunate' that the process is taking so long; it would be a breach of the Court's

¹⁰³ ICC, 'Report of the Court on the development of performance indicators for the ICC', 12 November 2015. See also ICC, 'Third Court's report on the development of performance indicators for the ICC', 15 November 2017.

¹⁰⁴ This obligation is reflected in a range of treaties and conventions, including the Genocide Convention, the Geneva Conventions 1949 (grave breaches provisions), the UN Convention Against Torture, the Convention Against Enforced Disappearances, and has been reflected in numerous judicial decisions.

¹⁰⁵ See generally, REDRESS and Institute for Security Studies, 'Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions' September 2015.

¹⁰⁶ See, e.g., UN Human Rights Commission, Human Rights Resolution 9/11, 'Right to the truth', UN Doc. A/HRC/RES/9/11, 24 September 2008; *Velásquez Rodríguez v Honduras*, Ser. C No. 4, 29 July 1988; *Al Nashiri v Poland*, App. No. 28761/2011, 24 July 2014, paras. 494-95.

¹⁰⁷ The UN Committee Against Torture refers to the need for 'timely and effective redress mechanisms'. UN Committee Against Torture, 'General comment No. 3: Implementation of article 14 by States parties', UN Doc CAT/C/GC/3, 13 December 2012, para 39

¹⁰⁸ *Yuriy Nikolayevich Ivanov v. Ukraine*, Appl. no. 40450/04, 15 October 2009, para 51.

commitment to ensure victims' rights and the Court would be required to take adequate steps to rectify the breach – there is an obligation to make the process work for victims.

b. Victims' ability to express views and concerns about reparations, and for these to be taken into account

Surely, under Article 68(3) of the ICC Statute, victims can participate in proceedings that affect them, including reparations proceedings. However, engagement in reparations proceedings involves not only the ability to input into legal proceedings but to engage effectively with those developing and implementing reparations and assistance programmes.¹⁰⁹ This requires two-way discussions and a need for those in the Court and the Trust Fund to be accountable to victims for the decisions they take. The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparations underscores the need for consultation and engagement with victims throughout the reparations process; this is about recognising victims' agency and supporting their empowerment: 'Processes must empower women and girls, or those acting in the best interests of girls, to determine for themselves what forms of reparation are best suited to their situation. ... Full participation of women and girls victims should be guaranteed in every stage of the reparation process, i.e. design, implementation, evaluation, and decision-making.'¹¹⁰

c. The process should be conducted in such a way so as to guarantee the dignity, security and privacy of victims.

Victims must be treated with humanity and dignity¹¹¹ and their privacy and safety, both physical and psychological, must be safeguarded.¹¹² The connection between excessive length of reparations proceedings and the need to treat victims with humanity and dignity must be underscored.

d. Reparations awards should as far as possible, address the particular harms suffered by victims. They should be adequate and effective.

Human rights treaties recognise that reparations should be fair, adequate and effective, used either singly or grouped together as appropriate, proportionate to the harm and equitable.¹¹³ More simplified approaches tend to be taken when there is a large number of injured individuals who would be entitled to significant reparation that would be overwhelming for a court to adjudicate claim by claim, and/or when the nature of the violations is such that victims would not have the requisite proof to satisfy a court of their injuries using typical standards of proof.¹¹⁴ Nevertheless, simplified procedures should to the greatest possible extent, seek to address the particular harms suffered by victims.

¹⁰⁹ 'Updated Set of Principles for the protection and promotion of human rights through action to combat impunity', UN Doc E/CN.4/2005/102 (2005), Principle 32.

¹¹⁰ Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, 19-21 March 2007, Principles 1(d); 2(b).

¹¹¹ General Comment 31 (n 78) para 15; Basic Principles and Guidelines (n 38) 12(c).

¹¹² Basic Principles and Guidelines (n 38) 10, 12(b).

¹¹³ *Loayza Tamayo v Peru* (Reparations and Costs) Ser C No 42, 27 November 1998, para 86; Basic Principles and Guidelines (n 38) 15, 18.

¹¹⁴ See generally, Howard M Holtzmann and Edda Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (OUP 2007); Michael Bazylar and Roger Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (NYU Press 2006).

ICC chambers have incorporated many of these concepts into reparations principles they have adopted in concrete cases, however the degree to which the awards meet these objectives – a key indicator of effectiveness – is not tracked by performance indicators, nor necessarily in the draft implementation plans prepared by the Trust Fund. Instead, the Court and Trust Fund appear in some instances to have relied on the need for simplified procedures to exempt themselves from addressing the requirement for reparations to be proportionate to the harm.

F. Conclusion

Despite the structural challenges inherent to the ICC Statute, there is much more the Court can do to make reparations effective. But effectiveness should not be conflated with or sacrificed in the name of efficiency. This includes marginalising victim's voices, arbitrarily cutting off who can benefit or arbitrarily privileging collective or symbolic reparations for perceived reasons of efficiency in those instances when these measures do not align with victims' own priorities for addressing their harms.

Greater harmonisation of approaches between chambers will help to promote efficient, predictable and fairer processes. This requires more cohesion on the Court's vision for reparations and a commitment by all the principle organs, as well as the Trust Fund, to implementing a common vision. There is a need to maximise victims' access to the procedure and ultimately to reparations which address as much as possible the specificity of the harms they experienced, while at the same time simplifying and thereby reducing the time and cost of the process. In particular, there is a need to continue to streamline those procedures that do not directly impact on the rights of the defence (including the determination of those reparations awards that will ultimately be implemented through the voluntary resources of the Trust Fund).¹¹⁵

I have argued that the Court should be seeking to award and deliver 'effective reparations' which should be interpreted in line with human rights principles relating to effective remedy. While the ICC is not a human rights Court *per se*, it should be seeking to uphold the fundamental rights of all persons who come within its sphere of activity. This should apply not only to accused persons, but also to victims who are key stakeholders. Greater accountability of the ICC would be a clear way to garner greater respect for the rights of the individuals and groups who are relying upon it for a modicum of justice for all they suffered.

Victims should be consulted and involved in all stages of the reparations process – not only as participants in proceedings which affect their interests, but in the development and implementation of assistance projects and reparations awards. Lines of communication should be open to facilitate such consultation, and to promote accountability and transparency.

¹¹⁵ See Delagrangé (n 35).

The Participation of Victims in the Process of Collective Reparations at the ICC

Luc Walleyⁿ*

With the adoption of the Rome Statute of the International Criminal Court (ICC), for the first time in the history of international criminal courts, victims of international crimes were able to claim and obtain reparations. The Rome Statute also introduced two other new developments: the creation of a Trust Fund for Victims and the possibility of collective reparations. The ICC elaborated principles for collective reparations and the conditions for individual victims to participate in those reparations. But almost six years after the first final conviction of an accused, the legal framework for reparations is still confusing, and the implementation of reparation orders is a long and painful process for victims.

This article addresses the concept of collective reparations as developed and interpreted at the ICC, and the issue of repairing individual harm by collective reparations.

1. From punitive to restorative justice

From Nuremberg to the ad hoc and hybrid international courts created in the 1990's, international criminal trials have prosecuted a few accused persons, with a small number of victims participating only in the role of prosecution witnesses. On 17 July 1998, the diplomatic conference in Rome adopted the Statute of the International Criminal Court. As a result of the remarkable lobbying work of NGO's and some like-minded states, victims obtained the right to participate in the ICC's criminal proceedings and to request reparations before the Court. The drafters of the Rome Statute also provided for the establishment of a Trust Fund for Victims. This development first started in the framework of human rights law. Whereas under international humanitarian law, victims are traditionally seen as a vulnerable group in need of protection, human rights law makes the individual an actor in the justice system. The UN Resolution 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,'¹ drawn up by the Commission for Human Rights over the course of 15 years,² confirmed this development, stressed that victims possess the right to reparations as well as the right to access to justice. Those basic principles influenced the preparatory work leading to the Rome Statute and eventually the ICC's Rules of Procedure and Evidence. Indeed, the chambers of the ICC consider these principles as applicable law in reparation procedures:

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¹ UN General Assembly Resolution 60/147 of 16 December 2005.

² See Special Rapporteur Theo van Boven, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' (E/CN.4/Sub.2/1990/10, 26 July 1990).

The Chamber accepts that the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties, and in other international instruments, including the UN Basic Principles; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; the Nairobi Declaration; the Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa; and the Paris Principles. These international instruments, as well as certain significant human rights reports have provided guidance to the Chamber in establishing the present principles.³

Before the entry into force of the Rome Statute, states carried out only a number of reparation programmes for victims of mass crimes. The German ‘*Wiedergutmachung*’ programme after World War II⁴ and the UN Compensation Commission after the first Gulf war⁵ afforded individual reparations through administrative procedures without any link to criminal trials. Human rights courts in Europe, the Americas, and Africa ordered states to provide for reparations⁶ and some other states decided to do so following regime change or as part of a peace settlement.⁷ Some large reparation programmes resulted from an agreement between victim groups and states and/or private actors (e.g. the Swiss banks’ Holocaust settlement).⁸

When implementing the reparation principles in the legal framework of the Court, the drafters of the Rome Statute decided that international justice should not only punish perpetrators, but also repair the harm caused by the international crimes. Nowadays, the Trust Fund,⁹ the Court, and even the state parties stress the double (punitive and restorative) function of the Court.¹⁰

2. A skeletal legal framework for reparation of mass crimes

Only two of the 128 articles of the Rome Statute concern reparations, articles 75 and 79. Article 75 introduces the obligation of the Court to establish principles relating to reparations to victims, even on its own motion, and to make reparation orders against the convicted person. Article 79 creates the legal basis for the creation of the Trust Fund for Victims.

Although article 75 is only a first step, it establishes four important principles:

- The court can issue reparation orders on request or on its own motion;

³ *Prosecutor v. Lubanga*, Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06-2904, para 185.

⁴ Following the Luxembourg Reparations agreement of 10 September 1952 between the German Federal Republic and the State of Israel. See <https://treaties.un.org/doc/Publication/UNTS/Volume%20162/volume-162-I-2137-English.pdf>

⁵ See UN Security Council Resolution 687 (1991). See also website: <http://www.uncc.ch>.

⁶ See Lutz Odette, ‘Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies of Mass Violations’, *Reparations for victims of genocide, war crimes and crimes against humanity*, Manus Nijhoff 2009, 218.

⁷ Diana Odier-Contreras Garduno, ‘Collective reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations’, *Intersentia* 2019, 249.

⁸ Judah Gribtez and Shari Reig, ‘The Swiss Bank Holocaust settlement’, *Brill* 2009, 115.

⁹ Statement by Trust Fund for Victims Board of Directors of 14 September 2018: ‘Under the Rome Statute, reparative justice provides undeniable value to victims’, <https://www.icc-cpi.int/Pages/item.aspx?name=180914-stat-tfv>.

¹⁰ ICC Trial Chamber III, *Prosecutor v. Bemba*, 3 August 2018, ICC-01/05-01/08-3653. See also Assembly of States Parties, ‘Report of the Court on the implementation in 2013 of the revised strategy in relation to victims’, 11 October 2013, ICC-ASP/12/41, para 28.

- Reparation orders are made directly against the convicted persons;
- Reparations can be made *through* the Trust Fund;¹¹ and
- States have a role to play in the implementation of reparation orders.

The Rules of Procedure and Evidence (RPE) delve more deeply into reparations and elaborate several tracks for reparations in subsection 4, namely Rules 94 to 99.

2.1. Individual reparations on request

Rule 94 establishes a ‘classical’ approach to reparations based on individual applications for reparations. This rule seems inspired by the procedure for civil claims or, in the countries of ‘continental’ or civil law tradition, the procedure for claims as a ‘civil party’ in the framework of a criminal case. At the centre of this procedure is the individual victim who may lodge a written application containing:

- A description of his/her injury, loss or harm;
- The location and date of the incident, and identity of the persons involved (to the extent possible);
- Supporting documentation including names and addresses of witnesses; and
- The amount claimed as compensation, means of rehabilitation or other forms of individual remedy proposed.

The purpose of such an approach is to provide the victim with complete reparation of the harm in the sense of *restitutio in integrum*.¹² Rule 94 states that, ‘at the commencement of the trial’, the Registry will provide copies of those applications to the Defence and other interested persons or states who can make observations. Reparations based on individual victim claims against the convicted person thus necessarily entail a contested and judicial debate between defence and victims and a decision of a chamber about each individual claim.

The drafters of the Rules considered providing individual reparations as constituting the general rule to be applied if possible. In the context of cases of war crimes, crimes against humanity, and genocide, with thousands, potentially millions, of victims, such an individualistic approach, however, is rarely possible to implement, and can raise many challenges. For the persons convicted of mass crimes, it is generally impossible to repair completely the harm caused to each individual victim. So the convictions risk being largely symbolic. For the victims, there is a significant procedural and evidential burden, not proportionate to what they might expect to receive at the end. For the affected communities, individual reparations do not encourage reconciliation, because they are difficult to match with the principles of equity, proportionality and gender equality. Also, they can be sources of new conflicts within affected communities.

The language of Rule 98 does not provide for the TFV to intervene in individual reparations when a chamber identifies the beneficiaries, but only ‘where at the time of making the order it

¹¹ The French term ‘*par l’intermédiaire*’, suggests that ‘through’ means that the TFV is only the ‘go between’ for purposes of reparations.

¹² *Prosecutor v. Lubanga*, Order for Reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, n38 (Appeals Chamber) (holding ‘In the context of State responsibility, the IACtHR established that “the concept of ‘integral reparation’ (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused”).

is impossible or impracticable to make individual awards directly to each victim.¹³ It seems that the drafters of the Rules did not intend to involve the TFV in individual reparations. During the lengthy discussion a number of principles emerged which were incorporated in Rule 98. Firstly, the Trust Fund need not to be involved in straightforward awards to an individual. Section I of the Regulations of the TFV, however, made it possible to intervene in cases where the Court identifies each beneficiary.¹⁴ Thus, victims should not depend solely on the cooperation of states for the implementation of individual reparation orders.

When, even as the result of individual claims, the Court makes an assessment of reparations, Rule 97(1) establishes the principle that it may decide to award collective reparations when, ‘taking into account the scope and extent of any damage, loss or injury..., it deems it appropriate.’ A combination of individual and collective reparations is also possible. The Rules, however, do not expressly foresee that groups or communities can themselves lodge applications for reparations.

2.2. Collective reparations

UN Principle 13 on Reparations states that, ‘In addition to individual access to justice, states should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.’¹⁵ The concept of collective reparations, however, is not defined under international law or in the legal texts of the ICC.¹⁶ Some understand them as being mainly symbolic reparations to communities or groups, others as collectively organised reparations to individual applicants.

In 1997, the UN report of Louis Joinet on the impunity of perpetrators of human rights violations¹⁷ considered that individual measures are those of restitution, compensation and rehabilitation, while collective measures are symbolic measures of satisfaction and guarantees of non-repetition. To some, this definition seemed too restrictive. Pablo de Greiff, UN special rapporteur on the promotion of truth, justice, reparation and guarantees for non-recurrence, considered that the notion of collective reparations is used to qualify both the reparations and the persons who receive them, namely collectivities:

The notion of collective reparation has recently garnered interest and support. The term ‘collective reparation’ is ambiguous, as ‘collective’ refers to both the nature of the reparation (i.e. the types of goods distributed or the mode of distributing them) and the kind of recipient of such reparation (i.e. collectivities)....

Collective reparations are not only symbolic: some are material as well, as when a school or a hospital is built in the name of reparation and for the sake of a particular group. Collective reparations of the material kind are constantly at risk

¹³ Håkan Friman and Peter Lewis, ‘Reparations to victims’, in Roy S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Transnational 2001, 467.

¹⁴ See <https://www.trustfundforvictims.org/en/about/legal-basis>.

¹⁵ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

¹⁶ Odier-Contreras Garduno (n 7) 201.

¹⁷ Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, 2 October 1997, UN Doc. E/CN.4/Sub.2/1997/20/Rev. 1, para 42.

See <https://undocs.org/pdf?symbol=en/E/CN.4/Sub.2/1997/20/Rev.1>

of not being seen as a form of reparation at all, and as having minimal reparative capacity. Part of the problem is that such measures do not target victims specifically.¹⁸

In the context of the ICC, where only individuals and a limited number of legal entities¹⁹ can claim reparations, collective reparations should necessarily benefit individual victims and not directly their community.

Convicted individuals are not able to implement a collective reparations programme, as it needs an organisational structure and specific expertise. State parties cannot be ordered to organise reparations. Therefore, it was logical to charge the Trust Fund for Victims (TFV) with all collective reparations ordered by chambers,²⁰ although Rule 98(8) provides that NGO's or even governmental organisations can be involved when approved by the TFV.

When preparing the first collective reparations programme in *Lubanga*, the TFV consulted several experts and concluded that there are 'very different ways to interpret the concept of "collective reparations."' The TFV did not adopt any of those ways and decided 'to develop an approach that is most appropriate in the present case,'²¹ relying on the objectives set out in the Amended Reparations Order of the Appeals Chamber.²² Adapting reparations programmes to the reality of each situation is certainly necessary, but in the framework of the ICC, the Court set the objectives of the reparations orders and gave guidelines. For the TFV, used to having autonomy in organising its assistance programmes, organising reparations under strict judicial control was significantly different.

3. Contradictory case law

As of this writing, the ICC has issued reparation orders in three cases: *Lubanga*, *Katanga* and *Al Faqi Al Mahdi*.²³ Although, in the end, the Appeals Chamber handed down an acquittal in the *Bemba* case, the Trial Chamber previously issued also some decisions on reparations in that case.²⁴ Nevertheless, the ICC case law on reparations is quite contradictory and confusing for the victims.

3.1. *The first reparation order in Lubanga: a choice for collective reparations*

In the *Lubanga* case, all victims were former child soldiers and their relatives. The Trial Chamber elaborated the principles and procedures to be applied on reparations. It afforded only collective reparations, rejected the applications for individual reparations that had already been introduced, and charged the Trust Fund for Victims with a reparation programme. The Trial

¹⁸ UN, Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees for non-recurrence, UN Doc. A/69/518, 8 October 2014, 11.

¹⁹ See RPE, Rule 85(b) about hospitals, schools, religious buildings and other non-profit organisations.

²⁰ Rule 98(3) reads 'the Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.'

²¹ *Prosecutor v. Lubanga*, 'Filing on reparations and draft implementation plan', 3 November 2015, 01/04-01/06-3177, para 146.

²² *ibid.* The Appeals Chamber did not expand on the concept of collective reparations in the Reparations Order but indicated indeed some objectives for the reparations in the specific case. See paras. 71-72. Cf *infra*.

²³ Cf. *infra*.

²⁴ *Prosecutor v. Bemba*, Decision appointing experts on reparations, 2 June 2017, ICC-01/05-01/08-3532-Red); *Prosecutor v. Bemba*, Order requesting submissions relevant to reparations, 22 July 2016, ICC-01/05-01/08-3410.

Chamber did not order Mr. Lubanga to play any role in those reparations.²⁵ The Appeals Chamber broadly affirmed this decision with the notable change that it declared the accused person to be responsible for any reparation award without regard to his actual ability to pay. It instructed the Trust Fund to present a programme for collective reparations to be monitored by another, differently composed Trial Chamber. The Appeals Chamber affirmed the general principles of reparations, including procedures, and issued an amended reparation order.²⁶ Those principles are in fact a set of guidelines for future reparation decisions.

The Appeals Chamber defined the purpose of collective reparations was to ‘afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers. Reparations can assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities....’²⁷

The TFV’s draft implementation plan opted for a large range of reparation measures, considering that the lack of a definition of the concept of collective reparations in the legal text was a deliberate choice of the drafters to allow for flexible implementation.²⁸

In relation to the procedure for the Court to identify and assess potential beneficiaries of reparations, the Appeals Chamber’s judgment held that:

the Court’s legal texts provide for two distinct procedures for awards for reparations. The first, which relates to individual reparation awards, is primarily application (‘request’) based and is mainly regulated by rules 94 and 95 of the Rules of Procedure and Evidence. The second relates to collective reparation awards and is regulated in relevant part by rules 97 (1) and 98 (3) of the Rules of Procedure and Evidence.²⁹

With respect to the assessment of all individual beneficiaries of collective reparations, the Defence requested that the Court allow challenges even after the final determination of the amount the convicted person should pay. The Appeals Chamber denied this request, and held that the Court need rule on such assessment ‘when only collective reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations. Rather, the determination that it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards.’³⁰

When determining which assessment procedure is more appropriate for collective reparations, the *Lubanga* appeals judgment does not recommend a specific procedure for individual

²⁵ *Prosecutor v. Lubanga*, Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06-2904.

²⁶ *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129.

²⁷ *Prosecutor v. Lubanga*, Appeals Chamber, Order for Reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, paras. 71-72.

²⁸ *Prosecutor v. Lubanga*, TFV, Filing on reparations and draft reparations plan, 3 November 2015, ICC-01/04-01/06-3177, para 167.

²⁹ *ibid* para 149.

³⁰ *ibid* para 152.

reparations, as the Appeals Chamber ‘limits itself to the circumstances of the Impugned Decision and clarifies that this holding is without prejudice to the question of whether a Trial Chamber would be required to rule on each individual reparation request received if it decides to award reparations on an individual basis.’ The Appeals Chamber noted article 75 imposes a duty to establish principles for reparations, but does not require an assessment of each individual reparation request, as it held: ‘The Trial Chamber is not required in all circumstances (the Court “may”) to decide upon the scope and extent of any damage, loss or injury in relation to individual requests filed under rule 94 or those commenced on its own motion pursuant to rule 95 of the Rules of Procedure and Evidence.’³¹ Finally, the Appeals Chamber analysed the threshold of Rules 95 and 98 and noted that a chamber can award individual reparations on its own motion in ‘exceptional circumstances,’ but collective reparations when it is deemed to be ‘more appropriate.’

3.2. Katanga: a procedure based on individual applications

In *Katanga*, Trial Chamber took more than two years to list all direct and indirect victims, to assess their harm and to make an evaluation of the harm of each individual applicant, but decided in the end to grant mainly collective reparations, and limited the individual reparations to a symbolic amount of \$250 USD for each direct or indirect victim, irrespective of the nature or the scope of the harm they suffered. The Trial Chamber charged the Trust Fund with implementing a collective reparation programme for housing, education and psychological support for the victims as well as for the development of income generating activities. The reparation order evaluated the total harm at \$3,752,620 USD, but only ordered Katanga to pay \$1,000,000 USD (less than one-third).

In its judgement of 9 March 2018, the Appeals Chamber in *Katanga* severely criticised the approach of the Trial Chamber in a decision that reads like instructions for future cases:

1. The Appeals Chamber is not persuaded that the approach chosen by the Trial Chamber for the reparations proceedings in this case, which was based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays in the award of reparations. However, the Appeals Chamber considers that the Trial Chamber’s approach did not amount to an error of law or an abuse of discretion that would justify the reversal of the Impugned Decision.
2. Rather than attempting to determine the ‘sum-total’ of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair.
3. There may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable. This is not to say that trial chambers should not consider those applications – indeed the information therein may be crucial to

³¹ *ibid* para 148(b).

assess the types of harm alleged and it can assist a chamber in making findings as to that harm. However, setting out an analysis for each individual, in particular in circumstances where a subsequent individual award bears no relation to that detailed analysis, appears to be contrary to the need for fair and expeditious proceedings.³²

3.3. Al Faqi Al Mahdi: *balancing individual and collective reparations*

The approach recommended by the Appeals Chamber in *Katanga* was the one applied by the Trial Chamber in the *Al Faqi Al Mahdi* case.³³ That Trial Chamber established principles, identified groups of victims who suffered specific harms, ordered collective and (more than symbolic) individual reparations to victims belonging to some specific categories, and did not assess individual applications.³⁴ The Trial Chamber tasked the Trust Fund with the responsibility to assess all available applications, to identify other beneficiaries, and to decide upon collective and individual reparation in a purely administrative procedure.³⁵ The Defence could present its views and concerns to the TFV but not challenge its individual decisions.³⁶ The Trial Chamber found Mr. Al Faqi Al Mahdi liable to pay a lump sum of 2,700,000 euros to the reparations.³⁷

The Appeals Chamber in the *Al Faqi Al Mahdi* case considered that it is within the discretion of a Trial Chamber to request the assistance of the Trust Fund for Victims to undertake the administrative screening of beneficiaries of individual reparations. Further, the Appeals Chamber amended the reparations order on two points: applicants for individual reparations should be able to contest, before the Trial Chamber, the decision taken by the Trust Fund for Victims on their eligibility, and the Trial Chamber may even review such decision *proprio motu*, while applicants declining to disclose their identities to the defence may nevertheless receive individual reparations.³⁸

3.4. *The Trial Chamber in Lubanga: which screening for potential beneficiaries of collective reparations?*

In *Lubanga*, the subsequent Trial Chamber appointed for monitoring the process of reparation did not follow the approach suggested by previous Trial Chamber or the Appeals Chamber. It refused to confirm the reparation programme that the Trust Fund presented, and ordered the Trust Fund to identify, first all potential beneficiaries, and to assess their eligibility and harm.³⁹ The Trust Fund disagreed fundamentally with this approach of the Trial Chamber and requested

³² *Prosecutor v. Katanga*, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute”, 9 March 2018, ICC-01/04-01/07-3778-Red, paras 1-3.

³³ *Prosecutor v. Al Faqi Al Mahdi*, Trial Chamber VIII, Reparations Order, 17 August 2017, ICC-01/12-01/15-236, at para 44.

³⁴ *ibid* paras. 23-50.

³⁵ *ibid* paras. 142-146.

³⁶ *ibid* para 146(iv)-(v).

³⁷ *ibid* paras. 134-135, page 60 (disposition).

³⁸ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted Judgment on the appeal of the victims against the “Reparations Order”, ICC-01/12-01/15 A, 8 March 2018, ICC-01/12-01/15-259-Red2, paras 1-2.

³⁹ *Prosecutor v. Lubanga*, Trial Chamber II, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, 9 February 2016, CC-01/04-01/06-3198-tENG.

the authorisation to appeal its decision.⁴⁰ The participating victims agreed with TFV’s position, but the Office of Public Counsel for Victims (OPCV)—appointed with the purpose to represent the interest of non-identified potential victims—opposed it, considering that it would be in the interests of the victims that the Trial Chamber maintain control over the verification process. When the Trial Chamber decided that the TFV lacked standing to appeal a reparations decision, the TFV started an assessment of the participating victims through a TFV in-house verification procedure (including questioning by a TFV legal officer and examination by several experts). However, it stopped that process after two weeks, considering that the procedure was harmful to the victims and too costly. The TFV then asked for the Trial Chamber to reconsider its decision.⁴¹ The Trial Chamber reduced the obligation imposed on the TFV to take a ‘representative sample of victim dossiers’ for the purpose of determining the scale of Mr. Lubanga’s responsibility,⁴² and it authorised the OPCV to identify other potential victims and to transmit the OPCV’s dossiers to the ICC Registry.⁴³

Surprisingly, Trial Chamber II considered that all dossiers assessed by the TFV or submitted by the OPCV amounted to individual reparation requests and analysed them on their merits.

In its decision of 9 February 2016, the Trial Chamber reminded the TFV of the holding of the Appeals Chamber, namely that the standard of proof in reparations procedures is ‘a balance of probabilities’.⁴⁴ When balancing the probability of each claim, the TFV based its assessment on a personal interview with each potential victim, a screening by an expert psychologist, and the available documents, taking into account the possible presence of post-traumatic stress disorder (PTSD), as well as the age, social profile and ethnic origin of the claimant. Nevertheless, the Chamber rejected TFV’s assessment of almost half the participating victims, mainly because of inconsistencies between their TFV reparations form and previous victim participation applications, or a lack of sufficient evidentiary support or details in the TFV’s assessment.⁴⁵ Those participating victims appealed, contending that the Trial Chamber did not apply properly the ‘balance of probabilities’ standard, as it ignored the opinion of the expert, the context of the claims, and the fact that many of the former child soldiers could not read or write when intermediaries or relatives had prepared their first application forms.⁴⁶

⁴⁰ *Prosecutor v. Lubanga*, Trial Chamber II, Request for Leave to Appeal against the “Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre” (9 February 2016), 15 February 2016, ICC-01/04-01/06-3200.

⁴¹ *Prosecutor v. Lubanga*, Trial Chamber II, Additional Programme Information Filing, 7 June 2016, ICC-01/04-01/06-3209.

⁴² *Prosecutor v. Lubanga*, Trial Chamber II, Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations, 15 July 2016, ICC-01/04-01/06-3218-tENG.

⁴³ *Prosecutor v. Lubanga*, Trial Chamber II, Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016, 21 October 2016, ICC-01/04-01/06-3252-tENG. At the same date, the Chamber ordered also the TFV to submit a programme for symbolic reparations. See *Prosecutor v. Lubanga*, Trial Chamber II, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, 21 October 2016, ICC-01/04-01/06-3251.

⁴⁴ *Prosecutor v. Lubanga*, Trial Chamber II, 9 February 2016, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, ICC-01/04-01/06-3198, para 16, n24 (citing *Prosecutor v. Lubanga*, Appeals Chamber, Order for Reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA, para 65).

⁴⁵ *Prosecutor v. Lubanga*, Trial Chamber II, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG, para 155.

⁴⁶ *Prosecutor v. Lubanga*, Notice of Appeal against Trial Chamber II’s “Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu” of 15 December 2017, 19 January 2018, ICC-01/04-01/06-3387-tENG, 10-12.

In its judgment of 18 July 2019, the Appeals Chamber in *Lubanga*, found the appeal of one of the victim groups to be admissible, ruling that:

169. As a result of the above, the Trial Chamber's overall procedure for the eligibility assessment failed to ensure equal conditions for all victims and amounts to an error. This error materially affects the Impugned Decision, as some of the victims concerned may have been found eligible had they known more fully what was expected of them in submitting their dossiers, and the Trial Chamber could have given them an additional opportunity to supplement their dossiers or clarify their accounts.

170. The Appeals Chamber notes that Victims V01 are the only group of victims who expressly raise this error and that they appear to raise it with respect to victims who were previously authorised to participate in the proceedings. In their responses to Victims V01's appeal, Victims V02 only request the Appeals Chamber 'to adjudicate [Victims V01's] arguments' and the OPCV opposes these particular arguments of Victims V01. However, the Appeals Chamber finds it appropriate to extend its ruling to all victims who are potentially affected, including those who have not participated in the pre-trial and trial proceedings. Even though the OPCV did not support Victims V01's arguments in this ground of appeal, the Appeals Chamber finds that it would be inappropriate, and to the detriment of the victims in that group, to exclude them from this finding.⁴⁷

It is difficult not to interpret this as a critique of the position taken by the OPCV, which, despite the support of other teams of participating victims, opposed the appeal.

4. An emerging ICC concept of collective reparations

The 18 July 2019 judgment of the Appeals Chamber in *Lubanga* case recalled several important principles:

- Reparation programmes should be guided by the principle of *restitution in integrum*;
- Individual and collective reparations are not mutually exclusive and may be awarded concurrently;
- Collective reparations should address the harm the victims suffered on an individual and collective basis.⁴⁸

Indicating that future chambers should keep these principles in mind, the Appeals Chamber in *Lubanga* developed further its view on the concept of collective reparations and held:

Also, although it would not attempt to set out, in an exhaustive manner, how the concept of 'collective' reparations should be understood – bearing in mind the many permutations possible, which will also be dependent on the facts of particular cases – the Appeals Chamber would, nevertheless, also stress now that, in awarding collective reparations to victims, this can include reparations

⁴⁷ *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, ICC-01/04-01/06-A7 A8.

⁴⁸ *ibid* para 40.

which are individualised; in this respect, collective reparations can include the payment of sums of money to individuals to repair harm suffered and the possibility for individuals to participate in particular programmes that address the specific harm that those individuals have suffered.⁴⁹

By including the payment of sums of money to individuals, even in the context of collective reparations, the ICC Appeals Chamber appears to merge individual and collective reparations into a *sui generis* reparation scheme, still guided by the purpose to restore the victims, as far as possible, in the circumstances before the crimes occurred. Such a merged system, based on the offer of a reparation programme proposed by the Trust Fund for Victims, however, raises other questions. Can individual victims make applications to the Trust Fund for specific reparations adapted to their situation? Does the Court have the authority to order such reparations? If a victim's only choice is to accept or refuse to enter into a proposed reparations programme, who should decide upon the victims' status? Should the Defence have a voice in making those decisions? These issues remain unsettled.

5. The Trust Fund for Victims (TVF) in the Judicial Process

5.1. *The status and funding of the TFV*

In the ICC framework, the Assembly of State Parties created the TFV as foreseen by article 79 of the Rome Statute, and adopted the TFV Regulations.⁵⁰ The TFV has an independent status and its own board of directors, but is accountable before the Assembly of State Parties. The Regulations of the TFV provide for three different funding sources for the TFV:

- a) Voluntary contributions from governments, international organisations, individuals, corporations and other entities;
- b) Money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court;
- c) Resources collected through awards for reparations if ordered by the Court pursuant to rule 98 of the RPE;
- d) Such resources, other than assessed contributions, as the Assembly of States may decide to allocate to the Trust Fund.⁵¹

5.2. *Complementing reparation awards*

The Board of Directors of the TFV decides how the TFV uses all funds not collected through reparation awards, sometimes in accordance with the instructions of donors, particularly for earmarked donations. For resources collected through awards for reparations, the Board decides in accordance with the reparation order from the Court.⁵² The TFV submits a draft implementation plan for the Court's approval, and the Court maintains an on-going, monitoring role during the implementation of the awards. As the TFV Regulations indicate:

⁴⁹ *ibid*

⁵⁰ ICC-ASP/1/Res.6 (9 September 2002) on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court and of the families of such victims and ICC-ASP/4/Res.3 (3 December 2005) adopting the Regulations.

⁵¹ TFV Regulations, Reg. 21.

⁵² *ibid* Reg. 43.

57. The Trust Fund shall submit to the relevant Chamber, via the Registrar, the draft implementation plan for approval and shall consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award.

58. The Trust Fund shall provide updates to the relevant Chamber on progress in the implementation of the award, in accordance with the Chamber's order. At the end of the implementation period, the Trust Fund shall submit a final narrative and financial report to the relevant Chamber.⁵³

The chambers, however, do not have to limit their monitoring to the approval of an implementation plan, final narrative, and financial report. Some chambers indeed have given precise instructions on the procedure the TFV should use to select beneficiaries of the reparation programme, the cooperation with the OPCV and legal representatives of victims, and the contracts with implementing partners. In *Al Faqi Al Mahdi* case, the Appeals Chamber decided that individual victims could appeal decisions of the TFV before the Trial Chamber, and the Trial Chamber in *Lubanga* ordered the TFV to inform the Trial Chamber of all of TFV's individual decisions for the Trial Chamber's review and approval, before integrating the concerned individuals in any programme. One could question if the Trial Chamber's decision was consistent with the Regulations of the Trust Fund.

The Board of the TFV can also decide to 'complement the resources collected through awards for reparations' with 'other resources of the Trust Fund.'⁵⁴ As most of the convicted persons are indigent, the TFV is amenable to such alternative resources. Although it is unclear if the TFV can also advance reparation awards or even pay in place of the convicted person without any prospect of reimbursement, advancing at least part of the funds of the award that the responsible person should pay as reparation, and if this could become a general practice. This practice raises also legal problems, in particular when chambers decide to verify the beneficiaries of collective reparations implemented with 'other funds of the TFV,' or seek to impose appellate, judicial review of decisions of the Board of Directors of the TFV, where the Statute is silent and such review is not foreseen by the Regulations.⁵⁵

It is understandable that the Trust Fund wants to keep its autonomy on the use of its funds, but the chambers may see it differently and appear to be moving towards reducing the autonomy of the TFV to decide the amount to be spent on 'complementing reparation orders.' The Trial Chamber deciding reparations in the *Lubanga* case also decided that the TFV is not a 'party' in the reparation procedures.⁵⁶ The Defence, victims, and owners of property adversely affected

⁵³ *ibid* Reg. 57-58.

⁵⁴ Rule 56.

⁵⁵ Section III of the TFV Regulations of "Verification" reads:

62. The Secretariat shall verify that any persons who identify themselves to the Trust Fund are in fact members of the beneficiary group, in accordance with any principles set out in the order of the Court.

63. Subject to any stipulations set out in the order of the Court, the Board of Directors shall determine the standard of proof for the verification exercise, having regard to the prevailing circumstances of the beneficiary group and the available evidence.

64. A final list of beneficiaries shall be approved by the Board of Directors.

⁵⁶ *Prosecutor v. Lubanga*, Trial Chamber II. 4 March 2016, Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016, ICC-01/04-01/06. See https://www.icc-cpi.int/CourtRecords/CR2016_02926.PDF.

by a reparation order can appeal reparations decisions,⁵⁷ but (in the view of the *Lubanga* reparations Trial Chamber) the TFV does not constitute an owner of such property, even when its own resources are affected by an order of the Court. This finding does not appear to be consistent with at least the spirit of the Rome Statute. It would be helpful if either the Appeals Chamber or the ASP would resolve this conflict between the Court and the Trust Fund, and harmonise the Rules of the Court, the Chambers Practice Manual, and the Regulations of the TFV in this respect.

6. A difficult implementation process

As a result of conflicting legal interpretations and decisions, the present picture of reparations before the ICC is quite chaotic. Victims and their counsel do not know what to expect. The Defence and the victims appealed *all* reparation decisions. The judicial character created by the chambers for the implementation of collective reparation orders is time consuming and a huge burden on the victims. It is also using the time and energy of the judges, Court officials and counsel, and entails a huge cost without real purpose or utility for the victims or even for the convicted person. The communication of individual dossiers to the defence, even when only collective reparations are envisaged, raises security concerns and often discourages victims from participating in reparation programmes. In the *Bemba* case, which ended up acquitting the accused on appeal, the Trial Chamber had prepared the reparation phase by appointing experts on the global framework for the future reparation programme.⁵⁸ After the acquittal, the Trial Chamber could no longer order reparations, but nevertheless encouraged the TFV to organise an assistance programme in the CAR, and authorised the Counsel Support Section of the Registry to continue the mandate of and paying the legal representatives of the victims for the limited purpose of collecting updated contact and location information of the victims, to be shared with the TFV.⁵⁹

7. The grey zone between the assistance and reparation mandate of the Trust Fund and the lack of provisional relief

The mandate of the TFV established by the Assembly of State Parties⁶⁰ is two-fold: (i) to implement Court-ordered reparations; and (ii) to provide physical, psychological, and material support to victims and their families. The second part of the mandate, also referred to as the ‘assistance mandate,’ can be defined as ‘using other resources (voluntary contributions and

⁵⁷ Rome Statute, art. 83(4) reads ‘A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations.’

⁵⁸ The experts had to submit a report that included the following issues:

- a. Victims and groups of victims eligible to benefit from reparations, including issues relevant to the ‘identification of victims’;
- b. Types of relevant harm suffered by direct and indirect victims as a result of the crimes for which Mr. Bemba was convicted, regardless of whether or not they have participated at trial;
- c. Scope of Mr. Bemba’s liability for reparations, including the financial or monetary assessment of the harm suffered by the victims under (b);
- d. Types and modalities of reparations that would be appropriate to address the harm under (b);
- e. Criteria for victims’ prioritisation, including sexual violence, child victims, or other appropriate criteria.

Prosecutor v. Bemba, Trial Chamber III, Order inviting submissions on experts, 21 February 2017, para 5, ICC-01/05-01/08-3500-Red.

⁵⁹ *Prosecutor v. Bemba*, Final decision on the reparation proceedings, para 15, 3 August 2018, ICC-01/05-01/08-3653.

⁶⁰ See ICC-ASP/1/Res.6 (9 September 2002).

private donations) to provide victims under Court jurisdiction with physical rehabilitation, psychological rehabilitation, and/or material support'.⁶¹

As Odier-Contreras Garduno recalls, 'for victims, the distinction between reparations and assistance may be irrelevant in terms of the benefits obtained.'⁶² That is certainly the case if, in the framework of the assistance mandate, the TFV 'complements' reparation awards against indigent convicted persons with resources from voluntary contributions and private donations, as the TFV Regulations authorises using it to do. It is, however, unclear if, in case of such 'complementary' function that often is the only source of funding available for the implementation of reparation programmes, it still falls under the final authority of the Court or under the Board of Directors of the Trust Fund. The ASP should clarify this point.

8. Areas for improvement

8.1 Interim relief as a form of early reparation?

The most significant frustration of the victims is the lapse of time between the events that provoked the harm and the implementation of a reparation award. International procedures are slow: investigations in a conflict area are difficult. Suspects are often arrested only after a long time, and the trials last for years, as does the setting up of a reparations programme. On the other hand, the needs of the victims are the highest immediately after the events, including medical and psychological assistance, rebuilding of houses and infrastructure, and the reintegration of demobilised child soldiers in their communities and in the school system are very urgent matters and cannot wait. When victims must wait ten years or more before obtaining any form of reparations, it creates new harm and secondary victimisation, and the reparations will never amount to enough to be satisfactory. That is even more the case for collective reparations, aiming at rebuilding destroyed communities.

In fact, the harm caused by the crimes committed sometimes is in part repaired, not by the person responsible for it, but by communities organising themselves to rebuild their villages and support injured family members. NGO's deliver urgent medical assistance. International organisations restore buildings, as did UNESCO for the religious structures destroyed by IS in Mali and, for which crime Mr. Al Mahdi was convicted by the ICC. Also the Trust Fund for Victims contributes to relief for victims with resources gathered through voluntary contributions in ICC situation countries. The TFV, however, makes a strict separation between such assistance and the reparation programmes ordered by the Court. It is reluctant to start reparations for victims participating in a pending case or clearly linked to such case before final resolution of the criminal case. The TFV started assistance programmes in Uganda when no suspect was yet arrested, but did not do so in the Central African Republic (CAR) during the *Bemba* trial, notwithstanding the fact that thousands of victims were already identified. This is inconsistent. The TFV only envisaged an assistance programme in CAR after the final acquittal of Mr. Bemba by the Appeals Chamber. This is not timely.

The drafters of the ICC Rules of Procedure and Evidence rejected the granting of interim relief before any conviction.⁶³ The TFV, however, can fulfil its assistance mandate before any

⁶¹ Rule 48, TFV Regulations, and presentation on TFV section of the website of the ICC.

See <https://www.icc-cpi.int/tfv>.

⁶² Odier-Contreras Garduno (n 7) 318.

⁶³ Friman and Lewis (n 13) 488.

conviction. Even article 75 of the Rome Statute does not state that the ICC must link reparations to charges against the perpetrators.⁶⁴ In his separate opinion on the decision that discharged the accused persons in the *Ruto* case in the Kenya situation, present ICC president, Judge Eboe-Osuji, stressed the right of victims to reparations, citing the Convention on Compensation of Victims of Violent Crimes that provides in article 2(2), and opined that:

[c]ompensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished. The norm of compensation for victims regardless of prosecution or punishment of the offender is particularly significant in view of the provision of article 75(6) of the Rome Statute, which says that '[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law.' It is also undesirable to require conviction as a prerequisite to reparation at the ICC.⁶⁵

Awaiting a final conviction simply takes too long. In his separate opinion to the *Lubanga* Appeals Judgment of 18 July 2019, Judge Eboe-Osuji further developed his view, opining that:

As a practical matter, not much will turn on the nomenclature of 'reparation' in contrast to 'assistance'. It is more important that efforts are made to repair the demonstrable harm that victims suffered, notwithstanding the successful apprehension and eventual conviction of the right culprit. Where all value for such repair is placed on a stylised idea of 'reparation', as following conviction, one questions whether many victims will really value such an idea of 'reparation' that follows the conviction of an indigent convict, as opposed to substantive 'assistance' such as the TFV is able to give in the circumstances regardless of the question of conviction.

The opinion of the ICC President is not likely shared by all his colleagues, but TFV could indeed envisage to use its own resources for interim reparations and start collective reparation programmes upon the *opening* of a situation, without waiting for a conviction.⁶⁶ At the time a chamber makes a reparations award against a convicted person, it could then reimburse the TFV for the (expected) cost of the reparation program. Such a practice would make it easier for the chambers to determine the amount of the reparation award to be decided upon, and a group of initial beneficiaries would be identified at an early stage.

One could argue that starting reparations before the conviction is premature and infringes the rights of the defence. This argument, however, is unfounded. In national systems, victims receive compensation from insurance companies and national reparations programmes set up when, for example, train or plane accidents or terrorist bombings result in large numbers of victims. When in such a situation, a tribunal establishes later the responsibility of an individual or company, it will order the latter to reimburse the amount previously spent on reparations by third parties, and victims subsequently have the opportunity to claim additional compensation. Why shouldn't that be possible within the ICC framework?

⁶⁴ See L. Moffett, "Reparations for victims at the International Criminal Court: A New Way Forward?", *International Journal of Human Rights*, 2017, 1206.

⁶⁵ *Prosecutor v. Ruto and Arap Sang*, Decision on Defence Application for Judgments of Acquittal, ICC-01/09-01/11-2027 Red- Corr., Reasons of judge Eboe-Osuji, para 201.

⁶⁶ Reg. 46 of the TFV Regulations imposes only that 'Resources collected through awards for reparations may only benefit victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person.'

8.2. *The identification of potential beneficiaries*

Another challenge is the identification of potential beneficiaries of collective reparations and the assessment of the harm they suffered. Should that be done in the course of the implementation process or before? To what extent should the Defence be involved?

When a victim seeks reparations on an individual basis, paid from the assets of the convicted person, it's logical that the latter can contest the victim's claim. But when the ICC decides that (mainly) collective reparations will be organised through the Trust Fund for Victims and decides upon a global reparations award, the amount paid by the convicted person, if any, will be influenced by the expected cost of the reparations programme, but not necessary by the number of beneficiaries of that programme. In such a situation, submitting victims to an assessment procedure, even before they know what kind of services the programme will offer, is not only useless but it can also create frustration. Participating victims who already went through an assessment procedure to be authorised to participate in the criminal proceedings can feel that a second or third assessment amounts to a form of harassment. It is also a waste of energy and resources. This is especially so if at the implementation phase, a final assessment will be conducted to determine what kind of service is the most appropriate to address the needs of each individual victim.

In *Lubanga* and *Katanga*, the Appeals Chamber recalled that a trial chamber is not required to select individual beneficiaries and assess their harm when it orders collective reparations, and that an individual approach to reparations usually only suits crimes with a small number of victims.⁶⁷ Nevertheless, Trial Chamber II continues to monitor all decisions of the TFV on individual beneficiaries of collective reparations. Monitoring trial chambers could change that practice in the future, in line with the decision of the Appeals Chamber.

8.3. *The role of counsel from defence and victims*

Even when the Court makes a final decision on the amount of the reparations award, the Defence still has a basis on which to seek continuing involvement in the implementation of a collective reparations programme. Collective reparations can encourage reconciliation between communities. They can also create tensions and new conflict. From that perspective, the role of the convicted person can be very important. If he/she accepts the decision of the Court, expresses remorse, cooperates with the reparation process, and calls publicly to his/her followers to do the same, the chances of success of the reparations process will be much greater. The Defence can also present the views and concerns of the convicted person in relation to the nature and modalities of the reparation programmes and the TFV's implementation.

Legal representatives of the participating victims play an important role in the implementation of collective reparations. They can communicate with the Trust Fund on the preparation of the reparations programme, assist in the identification process of potential beneficiaries and outreach to the victims, transmit to the TFV suggestions from the victims groups they represent, and report abuse or other problems.

⁶⁷ *Prosecutor v. Katanga*, Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 8 March 2018, ICC-01/04-01/07-3778-RED, para 1.

If the TFV considers that a victim does not qualify to participate in the reparations programme, it should have standing to appeal. In *Al Faqi Al Mahdi*, the Appeals Chamber decided that victims denied reparations by the TFV could still object before the Trial Chamber.⁶⁸ Under TFV Regulation 61, the TFV Secretariat has the authority to verify that any persons who identify themselves to the Trust Fund are in fact members of the beneficiary group. Under Regulation 63, the Board of Directors shall approve the final list of beneficiaries. The Board could create a procedure for objections by delegating this function to a panel of experts. In any case, those persons denied reparations should have the assistance of counsel when presenting their arguments, be it in a judicial or administrative appeal procedure.

Finally, legal representatives of large groups of victims can play a role in some assistance programmes of the Trust Fund, assisting in outreach, and in the identification of beneficiaries, and presenting the views of victims on the proposed programmes and their implementation. It is likely that such legal representatives have a long-standing relationship with the victims and affected communities, and that the Court would benefit from their views and concerns.

Conclusion

Collective reparations represent a new development in the international criminal justice system, and few examples from national courts are available, which has made the organisation of meaningful collective reparations for victims a novel and challenging task for the ICC. Determining the principles of such reparations and monitoring the implementation of reparations are new challenges, even for experienced judges, and require actors in the judicial process to adopt a new mind-set and understand a complex set of facts. The assistance of the TFV and the legal representatives of the victims are paramount for the chambers, which should avoid unnecessary interference in the work of the TFV and micromanagement. The effectiveness of reparations is largely influenced by the pace of the criminal proceedings and by the time elapsed between the events causing harm and the reparations. In this context, the ICC and the TFV should take this time factor into account and minimise the burden for victims, while optimising the use of the funds available for reparations under an assistance mandate. Interim reparations would be very helpful in achieving that purpose, and chambers should consider ordering them in the future.

For victims and their communities, the establishment of reparations programmes can represent an important satisfaction, create the feeling that justice has been done, and advance reconciliation. At the same time, however, reparations programmes can create frustrations and to some degree a new victimisation too. From that perspective, collective reparations are less direct than individual reparations, and individual victims should not feel that their sufferings are being ignored.

The success or failure of reparations for victims has a large influence on the future of the Court, its reputation, and the public's perceptions of its effectiveness, but most of all on the trust of the victimised civilian populations in the Court.

⁶⁸ *Prosecutor v. Al Faqi Al Mahdi*, Appeals Chamber, Public redacted Judgment on the appeal of the victims against the "Reparations Order", 8 March 2018, ICC-01/12-01/15-259-Red2, para 98.

Reparations for Victims of Sexual Violence at the ICC: Preliminary Considerations in the *Ntaganda* Case

Lorraine Smith van Lin*

Introduction

The conviction and sentencing of Bosco Ntaganda (Ntaganda), also known as ‘The Terminator,’ before the International Criminal Court (ICC or the Court) in 2019, for a range of war crimes and crimes against humanity including, for the first time, rape and sexual slavery in Ituri, Democratic Republic of Congo (DRC), has placed the issue of reparations for sexual and gender-based violence (SGBV) crimes squarely back on the table at the ICC. Coming more than a year after the acquittal of Jean-Pierre Bemba, a former Congolese senator whose convictions the ICC Appeals Chamber overturned, including for sexual crimes, the *Ntaganda* judgment has revived the debate concerning the ICC’s ability to effectively deliver gender-just reparations to victims of SGBV.¹ Both Ntaganda and the Prosecution have filed appeals against his conviction and sentence.² If the Appeals Chamber upholds his conviction, the ICC will have a unique and unprecedented opportunity to address the issue of reparations for the crimes of rape and sexual slavery including sexual violence perpetrated against one’s own troops, child soldiers, and men and boys.

Reparations to victims who have suffered harm as a result of gross human rights violations are an intrinsic part of the ICC’s legal framework. The Rome Statute (Statute) establishing the Court envisages reparations for victims who meet the statutory criteria.³ The ICC also has a progressive gender framework, which places importance on investigating, prosecuting and redressing the wrongs suffered by victims of SGBV crimes. The ICC’s jurisprudence on reparations has only, within the last few years, begun to gain momentum with important decisions awarding reparations to victims in the cases against Thomas Lubanga (Lubanga) and

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¹ *The Prosecutor v Jean-Pierre Bemba Gombo* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08-3636-Red, 8 June 2018 (Bemba Appeal), available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-3636-Red>.

² *The Prosecutor v Bosco Ntaganda*, Prosecution Appeal Brief, ICC-01/04-02/06, 7 October 2019; *The Prosecutor v Bosco Ntaganda*, Defence Appeal Brief – Part I, ICC-01/04-02/06 A, 11 November 2019; *The Prosecutor v Bosco Ntaganda*, Observations on Sentencing on behalf of the Former Child Soldiers, ICC-01/04-02/06, 24 January 2020; See also *The Prosecutor v Bosco Ntaganda*, Public Redacted Version of the “Response of the Common Legal Representative of the Victims of the Attacks to the “Submissions on sentence on behalf of Mr. Ntaganda” (ICC-01/04-02/06-2424-Conf)”, ICC-01/04-02/06, 24 January 2020.

³ The Rome Statute A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. See Articles 75 and 79.

Germain Katanga (Katanga) from the Democratic Republic of Congo (DRC), and Ahmad al-Faqi al Mahdi (Al Mahdi) from Mali.⁴

Despite its progressive gender framework, gender-sensitive jurisprudential pronouncements, prolific statements from Court officials,⁵ and a detailed policy paper on gender at the Office of the Prosecutor (OTP),⁶ it is still an open question as to whether the ICC is ready and able to provide reparations to SGBV victims. The absence of SGBV charges in the *Lubanga* case,⁷ the acquittal of Germain Katanga for SGBV offences and the overturning of the Bemba conviction, clearly indicate that the ICC is yet to develop experience in awarding and implementing gender-just reparations. The ICC's convictions-based reparations framework means that it cannot directly award reparations to SGBV victims if there are no charges or affirmed convictions against the accused for such crimes.

Trial Chamber VI has commenced advanced preparations for implementing reparations if Ntaganda's conviction is affirmed. The Trial Chamber has forged ahead with significant procedural decisions including the identification of potential new beneficiaries and appointment of experts despite the pending appeal, throwing into sharp relief the prevailing tension between the need for an efficient reparations process and the risk of re-traumatisation of victims in the event of an adverse outcome on appeal. A key part of these preparatory steps will be how the Court will approach, for the first time, reparations for SGBV crimes.

This article discusses the ongoing developments in the early stage of the reparations' proceedings in the *Ntaganda* case and their important implications for ensuring gender-just reparations for SGBV victims at the ICC. Part I considers the legal framework for reparations and the investigation and prosecution of SGBV at the ICC. Part II provides a general overview of and background to the *Ntaganda* case, including some of the legal findings in relation to the sexual crimes. Finally, Part III examines the advanced preparatory steps being taken by the Trial Chamber to prepare for reparations and the potential implications for SGBV victims and gender-just reparations in the case.

I. The legal framework for ICC reparations

Reparations for victims of sexual and gender-based violence (SGBV) crimes are critical to redressing the physical, psychological and social harms suffered by these victims, their families and communities.⁸ The Court's reparative framework reflects a growing recognition in

⁴ *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', ICC-01/04-01/06-3466-Red, 18 July 2019, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3466-red> (*Lubanga* reparations appeal judgement); *The Prosecutor v Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG, 24 March 2017 (*Katanga* Reparations Order); *The Prosecutor v Ahmad al-Faqi al Mahdi*, Reparations Order, ICC-01/12-01/15-236, 17 August 2017, (*Al Mahdi* Reparations Order).

⁵ Statement of the Prosecutor-elect of the International Criminal Court, Mrs. Fatou Bensouda, Gender Justice and the ICC: Progress and Reflections, 14 February 2012.

⁶ See e.g. ICC OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014 (OTP Policy Paper on Gender).

⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, paras. 629-30 (*Lubanga* Judgment), available at: <https://www.icc-cpi.int/pages/record.aspx?uri=1379838>.

⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Trust Fund for Victims, Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, ICC-01/04-01/06-2803-Red, 1 September 2011, at para 6. See also UN General Assembly, Basic Principles and Guidelines on the Right to a

international criminal law of the need for an inclusive and participatory approach to criminal justice and effective remedies for victims.⁹ Indeed, the Appeals Chamber has noted that ‘the success of the Court is, to some extent, linked to the success of its system of reparations.’¹⁰

Article 75 of the Rome Statute sets out the legal foundation of the Court’s reparations regime.¹¹ Article 79(1) of the Statute and Rule 98 of the ICC Rules of Procedure and Evidence (RPE)¹² provide for the Trust Fund for Victims (Trust Fund), an administrative body tasked with implementing reparations orders and providing assistance to victims and their families through the use of voluntary contributions from donors.¹³ Rules 94 to 98 of the RPE provide procedural guidance to the Court and the Trust Fund concerning *inter alia*, the assessment of harm, the modalities for reparations (individual or collective awards) and the appointment of experts.

The Court’s legal texts promote a very progressive gender focus and place particular emphasis on investigating, prosecuting and redressing the wrongs suffered by SGBV victims. For example, article 54(1)(b) of the Statute requires that, in ensuring the ‘effective investigation and prosecution of crimes within the jurisdiction of the Court,’ the Prosecutor ‘take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.’¹⁴ The Statute criminalises a broad range of SGBV crimes including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and ‘any other form of sexual violence of a comparable gravity’ as crimes against humanity (under article 7(1)(g)), and as war crimes in international and non-international armed conflicts (under articles 8(2)(b)(xxii); 8(2)(e)(vi)), representing a response to decades of inadequate investigation and prosecution of rape and other forms of sexual violence at the international

Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, Resolution adopted by the General Assembly on 16 December 2005. See also article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 39 of the Convention on the Rights of the Child, article 24 of the International Convention for the Protection of All Persons from Enforced Disappearances. Regional instruments also include relevant provisions, such as article 7 of the African Charter on Human and Peoples’ Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The obligation to make reparation in case of violations of international humanitarian law is reflected in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), and article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, which are only applicable in international armed. Other relevant gender-specific declarations include the Nairobi Declaration on Women’s and Girls’ Rights to a Remedy and Reparation.

⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparations, ICC-01/04-01/06-3129-AnxA 03-03-2015, para 1 (*Lubanga* Order for Reparations), available at:

https://www.icc-cpi.int/RelatedRecords/CR2015_02633.PDF.

¹⁰ *ibid* para 3.

¹¹ The Rome Statute A/CONF.183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. See Articles 75 and 79.

¹² International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

¹³ The Trust Fund was established by Resolution 6 of the Assembly of States Parties (ASP) adopted on 9 September 2002, “for the benefit of victims of crimes within the jurisdiction of the court, and of the families of such victims.” See ASP, Resolution ICC-ASP/1/Res.6, 9 September 2002.

¹⁴ Susana SáCouto and Katherine Cleary. ‘Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court.’ *American University Journal of Gender, Social Policy & the Law*, 17, no. 2 (2009): 337-59.

level.¹⁵ The Elements of Crimes further elaborates on SGBV crimes that fall under the ICC's subject-matter jurisdiction and includes physical and non-physical acts with a sexual element.¹⁶

The ICC's legal texts and jurisprudence suggest that reparations should be designed and implemented in a manner that is gender-sensitive and gender-inclusive. For example, Rule 86 of the RPE requires the Chamber, in making any directions or orders, to take into account the needs of all victims in accordance with article 68, in particular, children, elderly persons, persons with disabilities and *victims of sexual or gender violence* (emphasis added). The Lubanga Principles, enumerated in the context of the *Lubanga case*,¹⁷ provides that 'a gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation. Other general tenets of the Lubanga Principles, including the right to participate throughout the reparations process and to receive adequate support to make their participation substantive and effective, apply to all eligible victims, including victims of SGBV crimes. Accordingly, gender parity in all aspects of reparations is an important goal of the Court.'¹⁸

The main organs of the Court have also adopted gender-sensitive approaches to their work. For the Registry, this includes taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings including at the reparations phase. Though not a party per se in reparations proceedings, the OTP supports a gender-inclusive approach to reparations, which considers the gender-specific impact on, harm caused to, and suffering of the victims affected by the crimes for which an individual has been convicted.¹⁹ As elaborated in its Gender Policy Paper, the OTP supports consultation with victims and where possible, a gender analysis to determine the most effective and appropriate forms of reparation within a particular community.²⁰

The programmatic guiding principles of the Trust Fund, which play a vital role in the reparations process, include supporting the advancement of women's human rights; increasing the participation of women; and incorporating gender perspectives in their work. In its observations for the first reparations order in the *Lubanga case*, the Trust Fund highlighted the importance of 'integrating a gender dimension to reparations orders which ensures that women are involved in the design, implementation and monitoring of the reparations process, and for reparations to be responsive to the particularities of women's vulnerability and their roles vis-

¹⁵ *ibid.* See also FIDH, Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond (FIDH SGBV report), November 2018/No. 721a, available at:

https://www.fidh.org/IMG/pdf/sgbv_721a_eng_au_20_nov_2018_13h_web.pdf

¹⁶ ICC Elements of Crime, available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>. See also the ICC OTP Policy Paper on Gender which elaborates on the relevant provisions in the Elements of Crime. Crimes of sexual violence should be distinguished from gender-based crimes. While sexual violence crimes are crimes of a sexual nature, gender-based crimes, on the other hand, are crimes committed against persons, whether male or female, because of their sex and/or socially constructed or perceived gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may also include non-sexual attacks on women and girls, and men and boys, because of their gender.

¹⁷ The Appeals Chamber described the Lubanga Principles as 'general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future TCs.' *Lubanga Order for Reparations*, para 5 (Lubanga Principles), available at:

https://www.icc-cpi.int/RelatedRecords/CR2015_02633.PDF.

¹⁸ *ibid* para 18.

¹⁹ See e.g. OTP Policy Paper on Gender, 7.

²⁰ *ibid* para 102.

à-vis their communities.’²¹ The Trust Fund also suggested that the Court implement ‘affirmative measures’ for vulnerable victims including women and girls, SGBV victims, children and the elderly in facilitating effective access to the reparations regime as well as adequate consideration to their needs in designing ‘both the process and the substance of reparations and to avoid stigmatisation and discrimination.’²²

Despite its elaborate reparations and gender framework, the award of reparations at the ICC is not an unfettered right for all victims who suffer harm and fall within the jurisdiction of the Court. Reparations depend on the charges brought by the Prosecutor and is determined based on an accused’s conviction for those charges. Thus, in the *Lubanga* case, the Prosecution’s failure to include SGBV crimes in the charges or to subsequently request amendments to include SGBV charges during the trial, precluded the judges from convicting Lubanga for those crimes.²³ Nevertheless, in handing down its first decision on reparations, Trial Chamber I considered that “[t]he Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence”.²⁴ This was, however, overturned by the Appeals Chamber on the basis that Mr. Lubanga was only liable for reparations in respect of victims of the crimes for which he was convicted.²⁵

Beyond the prosecution’s charging strategy, the approach taken by judges to the interpretation of the evidence and the charges can also determine whether or not there is a conviction which includes SGBV charges. Thus, as Patricia Sellers, Special Adviser to the ICC Prosecutor on Gender, and Professor Susana SáCouto, commented concerning the Appeals Chamber’s acquittal of Jean-Pierre Bemba, ‘the court has adopted a rigid interpretation of direct and indirect co-perpetration under Article 25(3)(a) and applied common purpose liability under Article 25(3)(d) in an arguably discriminatory manner, thereby resulting in the acquittal of sexual violence charges against the accused.’²⁶ They opined that the majority’s analysis of command responsibility in *Bemba*, if followed, significantly narrows the prospects for successful prosecution of sexual and gender-based crimes at the ICC.²⁷

II. Background and Overview of the *Ntaganda* case

Bosco Ntaganda was convicted on 8 July 2019, of 18 counts of war crimes and crimes against humanity, including for murder, rape, sexual slavery and the enlistment and conscription of

²¹ *The Prosecutor v Thomas Lubanga Dyilo*, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, ICC-01/04-01/06-2872, para 31, available at: https://www.icc-cpi.int/CourtRecords/CR2012_05251.PDF.

²² *ibid* para 28.

²³ Women’s Initiatives for Gender Justice, Gender Report Card on the ICC, 2012, 150 (Gender Report Card); *Lubanga* Judgment, para 630, available at: <http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>.

²⁴ *Lubanga* Judgment para 631.

²⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129, 3 March 2015, para 198.

²⁶ Susana SáCouto and Patricia Viseur Sellers, *The Bemba Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes?*, 27 Wm. & Mary Bill Rts. J. 599 (2019), 600-01, available at: <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1881&context=wmborj>.

²⁷ *ibid* 601.

child soldiers.²⁸ Ntaganda was the Deputy Chief of the General Staff of the Patriotic Forces for the Liberation of Congo (FPLC), the armed wing of the Union of Congolese Patriots (UPC),²⁹ and is notorious for his role as second-in-command to Thomas Lubanga Dyilo (Lubanga), former leader of the UPC and the first Congolese accused to be convicted before the ICC.³⁰ Also known as ‘the Terminator’ or ‘Warrior’ among his troops for his tendency to lead from the front and directly participate in military operations, Ntaganda served in a number of rebel groups throughout eastern Congo for more than a decade.³¹

The Trial Chamber found that Ntaganda, his co-perpetrators, and other UPC commanders planned, coordinated, and implemented multiple assaults to take over areas where the non-Hema civilian population lived and to gain control of Ituri.³² The Chamber further found that under Ntaganda’s control, FPLC soldiers committed multiple human rights abuses, including ethnic killings, torture of the civilian population, recruitment and use of children under the age of 15 to actively participate in hostilities, rapes and sexual slavery.³³

Sexual Slavery

Ntaganda’s conviction for sexual slavery represents the first time in the Court’s history that an ICC Chamber has convicted an accused for sexual slavery as a war crime and crime against humanity.³⁴ Though it had always existed globally, the international community had not

²⁸ *The Prosecutor v Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019 (*Ntaganda* Judgment). The complete list of crimes for which Ntaganda was found guilty are: crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer and deportation) and war crimes (murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against protected objects, and destroying the adversary’s property.

²⁹ Open Society Justice Initiative, Fact Sheet: Trial of Bosco Ntaganda, available at: https://www.justiceinitiative.org/uploads/d9f10a5b-2dbd-439e-be66-e56616bd7603/factsheet-ntaganda-testimony-20170609_0.pdf.

³⁰ Lubanga was convicted in 2012 for recruiting and using child soldiers in Ituri and sentenced to 14 years in prison. See *Lubanga* Judgment; See also *The Prosecutor v Thomas Lubanga Dyilo*, Case Information Sheet, ICC-PIDS-CIS-DRC-01-016/17_Eng, 15 December 2017; and Human Rights Watch, Q&A: Bosco Ntaganda, DR Congo, and the ICC.

³¹ *ibid*

³² *Ntaganda* Judgment, paras. 765, 830-55.

³³ *ibid* paras. 1187-1189. Ntaganda was convicted for rape committed in Mongbwalu and Kilo, in the context of the First Operation, and in Kobu, Sangi, and Buli in the context of the Second Operation, as well as for rape against children under the age of 15 incorporated into the UPC/FPLC between August 2002 and 31 December 2003 in Ituri. He was convicted for sexual slavery committed in Kobu and Buli, in the context of the Second Operation, and against children under the age of 15 years incorporated into the UPC/FPLC between August 2002 and 31 December 2003 in Ituri. See *The Prosecutor v. Bosco Ntaganda*, Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare, ICC-01/04-02/06-2623-Anx2-Red2, 3 November 2020, para 61 (*Ntaganda* SGBV Expert Report).

³⁴ While he was the first to be convicted for sexual slavery, Ntaganda was not the first to be charged for these crimes before the ICC. Congolese rebel leader Germain Katanga, convicted in March 2014 by the ICC for war crimes and crimes against humanity concerning an attack against Bogoro Village in Ituri, Eastern DRC, had been charged with rape and sexual slavery but was acquitted of those charges. See *The Prosecutor v Germain Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, paras. 359-384, available at: https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF. As discussed elsewhere in this article, the decision to acquit Katanga of sexual violence charges was strongly criticised as it seemed to suggest that the judges were applying a more rigorous and demanding standard of evidence for sexual violence charges than for

recognised sexual slavery under international law as a crime against humanity, nor as a war crime, until 1998, when States explicitly included it in the Rome Statute.³⁵ Sexual slavery as a crime against humanity is laid down in Article 7(1)(g) of the Statute and as a war crime in Article 8(2)(e)(vi).³⁶

In its findings, the *Ntaganda* Trial Chamber took into account various factors, such as the control exercised over the victims' movements, the nature of the physical environment, psychological control, measures taken to prevent or deter escape, duration and the victim's vulnerability among others.³⁷ The Trial Chamber found that the exercise of the right of ownership over someone need not entail a commercial transaction and that 'similar deprivation of liberty' may take various forms and include situations in which the perpetrators have not physically confined the victims but rendered them otherwise unable to leave as they would have nowhere else to go and fear for their lives.³⁸ The Trial Chamber's reasoning is consistent with that of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kunarac* case in relation to the crime against humanity of enslavement where the judges made clear that the 'acquisition' or 'disposal' of someone for monetary or other compensation, is not a requirement for enslavement, and that consent is not an issue in cases of sexual slavery.³⁹

Rape and Sexual Slavery Intra-Party

Concerning the conviction for rape and sexual slavery committed by FPLC soldiers intra-party, that is, against members of their own troops, the Judges heard evidence regarding a pattern of daily sexual violence perpetrated by Claude Uzauakiliho, Ntaganda's chief escort and Mr Ntaganda's other escorts, and found that Ntaganda himself was among the commanders who inflicted rape on his female bodyguards.⁴⁰ Ntaganda's defence vehemently opposed these

other charges which arose from the same incident and context. See WIGJ, Partial Conviction of Katanga by ICC Acquittals for Sexual Violence and Use of Child Soldiers, available at:

<http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf>.

³⁵ Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605 (2004), 607.

³⁶ ICC Elements of Crime. The material elements of both crimes as set out in the Elements of Crime requires evidence that the perpetrator exercised 'any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty, and that the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.' For sexual slavery as a crime against humanity, the Chamber must also be satisfied that the conduct was committed as part of a widespread or systematic attack directed against a civilian population; that the perpetrator had knowledge that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population; and that his conduct was deliberate and meant to cause the consequence; or was aware that it would occur in the ordinary course of events.

³⁷ *Ntaganda* Judgment, para 933, available at: https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF. See also *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, paras. 973-984, available at: https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF. In its reasoning, the Chamber also applied the jurisprudence of the Special Court for Sierra Leone in the Sesay and Charles Taylor cases. See also Valerie Oosterveld, *Gender and the Charles Taylor Case at the Special Court for Sierra Leone*, 19 Wm. & Mary J. Women & L. 7 (2012), <http://scholarship.law.wm.edu/wmjowl/vol19/iss1/3>, at 8 (providing a comprehensive overview of the application of the law concerning sexual slavery at the SCSL).

³⁸ *ibid*

³⁹ *Prosecutor v. Kunarac et al*, Judgment, Case Nos. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para 542.

⁴⁰ Although the OTP did not charge Ntaganda as a direct perpetrator for the rape and sexual slavery of his personal escorts, the Trial Chamber ruled that the evidence was nevertheless admissible and that it was appropriate for them to rely on acts of rape committed by Mr Ntaganda against his personal bodyguards in its assessment of the

charges, at all stages of the proceedings, on grounds that the alleged conduct did not constitute a war crime because the victims and perpetrators belonged to the same military group.⁴¹ The defence argued that war crimes must involve a violation of international humanitarian law (IHL), and IHL does not generally regulate the conduct of combatants toward other combatants in the *same* armed group.

The Trial Chamber found that rape and sexual slavery against any person is prohibited once there is a nexus to the armed conflict; therefore, members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery under article 8(2)(e)(vi) of the Statute.⁴² This differed to some extent from the prior reasoning of the Pre-Trial Chamber at the confirmation stage, which found that it had jurisdiction to confirm the charges because IHL protects children under the age of 15 once they were not directly/actively participating in hostilities. As such, one could not consider those subject to rape and/or sexual slavery to have been actively participating in hostilities during the specific time when they were victimised, as defined in the relevant Elements of Crimes.⁴³ On appeal, the Appeals Chamber found that the rape and sexual enslavement of child soldiers by their commanders constituted a war crime within the meaning of the Rome Statute.⁴⁴ The Appeals Chamber found that for war crimes charged under articles 8(2)(b) and (e) it was irrelevant whether the victims of the war crimes were protected persons or persons taking no active part in hostilities (pursuant to the 1949 Geneva Conventions) at the time when the rape and sexual violence occurred.⁴⁵

These decisions raise issues concerning the interpretation of IHL that are beyond the scope of this article, but have generated diverse scholarly reactions and will likely feature in Ntaganda's appeal.⁴⁶ One commentator, Rosemarie Grey, describes the Pre-Trial Chamber's decision as

mental elements required for his principal liability as an indirect co-perpetrator of the war crimes of rape and sexual slavery. See *Ntaganda* Judgment, paras 1196-97 and accompanying footnotes.

⁴¹ *Ntaganda*, Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges, ICC-01/04-02/06-292-Red2, 14 April 2014 (Pre-Trial Chamber II); Consolidated submissions challenging jurisdiction of the Court in respect of Counts 6 and 9 of the Updated Document containing the charges, ICC-01/04-02/06-1256, 7 April 2016 (Trial Chamber), available at: https://www.icc-cpi.int/CourtRecords/CR2016_02676.PDF; Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges, ICC-01/04-02/06-804, 1 September 2015 (Appeals Chamber), available at: https://www.icc-cpi.int/CourtRecords/CR2015_15463.PDF

⁴² Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-892, 9 October 2015 (First Trial Decision). The defence had challenged the jurisdiction of the Court to proceed on the charges in question but the application was denied by the Trial Chamber. The defence subsequently appealed and the Appeals Chamber ruled that the matter should be determined by the Trial Chamber, following which the Trial Chamber issued the second decision; Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06, 4 January 2017, para 18 (Second Trial Decision); See also *Ntaganda* Trial Judgment, para 965.

⁴³ *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014 (Confirmation Decision), paras. 76-80.

⁴⁴ *Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014 (Confirmation Decision), paras. 76-80, Appeals Chamber, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9," ICC-01/04-02/06, 15 June 2017, available at: https://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF.

⁴⁵ WIGJ, Gender Report Card on the International Criminal Court, December 2018, 140, available at: https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf.

⁴⁶ See also Yvonne McDermott, ICC extends War Crimes of Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator, 5 January 2017, <https://ilg2.org/2017/01/05/icc-extends-war-crimes-of-rape-and-sexual-slavery-to-victims-from-same-armed-forces-as-perpetrator/>; Kevin Jon Heller, ICC Appeals Chamber

an ‘important jurisprudential development’, noting that while the use of child soldiers in hostilities is clearly regulated by instruments of IHL and international criminal law, the use of girl soldiers for sexual purposes is not explicitly addressed in these instruments, and this gap in the legal framework reflects concerns [...] that women and girls have been ‘obscured by and within the international legal order’.⁴⁷ She challenges, however, Pre-Trial Chamber II’s reasoning as overly simplistic because it fails in her view to engage with complex legal questions regarding the continuous nature of sexual slavery which subsists as long as the perpetrators’ powers of ownership are exercised and is not limited to a single sexual act.

Sellers agrees with the Appeals Chamber decision but considered that the reasoning should have referred to other ‘relevant legal precepts when determining the content of the ‘established framework of international law’ which might have described in a more fulsome manner the legal incompatibility of sexual violence and the special protection owed to children under IHL.⁴⁸ Sellers opined that in its decision, the Appeals Chamber overlooked key provisions of Additional Protocols (I and II) to the Geneva Conventions which address the special respect owed to children, including protection from sexual violence committed by any party to an armed conflict.⁴⁹

It remains to be seen, however, whether in the appeal against conviction, a differently constituted Appeals Chamber will adopt the more expansive approach suggested by Sellers. As it now stands, the interlocutory decision of the previous Appeals Chamber is a significant ruling by the highest judicial body at the ICC concerning the absolute prohibition of intra-party sexual violence against children under IHL.

Says A War Crime Does Not Have to Violate IHL <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>; Tilman Rodenhäuser, Squaring the Circle?: Prosecuting Sexual Violence against Child Soldiers by their ‘Own Forces’, *Journal of International Criminal Justice*, Volume 14, Issue 1, 1 March 2016, p 171–93, <https://doi.org/10.1093/jicj/mqw006>; Luca Poltronieri Rosetti, Intra-party sexual crimes against child soldiers as war crimes in Ntaganda. ‘Tadić moment’ or unwarranted exercise of judicial activism?, *QIL* 60 (2019) 49-68, http://www.qil-qdi.org/wp-content/uploads/2019/09/04_Child-Soldiers_POLTRONIERI_FIN-2.pdf.

⁴⁷ Rosemary Grey, Sexual Violence against Child Soldiers: The Limits and Potential of International Criminal Law, *International Feminist Journal of Politics*, 2014 (16) No. 4, 601–21 at 602, available at: <https://www.corteidh.or.cr/tablas/r37046.pdf>

⁴⁸ Patricia Viseur Sellers, ‘Ntaganda: Re-Alignment of a Paradigm,’ (2018) *International Institute of Humanitarian Law*, <http://www.iihl.org/wp-content/uploads/2018/03/Ntaganda-V.pdf>, 12.

⁴⁹ Grey (n 47) 620. Sellers submits that the Appeals Chamber should have more closely considered Article 77 of AP I, Article 4(3) of AP II and Article 25(4)(c) of the Third Geneva Convention as well as the updated ICRC Commentary. In her view a complementary reading of these instruments could have convincingly pointed to a customary norm to prohibit intra-party sexual violence especially for children, including child soldiers. Read together, she opines, the instruments are coherent and quite logical in their posture that children and child soldiers must be as protected from sexual violence in NIAC as they are in IAC, even without having to lay down their arms. See also International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Article 25-32. available at: <http://www.refworld.org/docid/3ae6b36c8.html>; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 77, available at:

<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/4e473c7bc8854f2ec12563f60039c738/8f7d6b2dee119fbac12563cd0051e0a2>; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 4(3), available at: <https://ihl-databases.icrc.org/ihl/WebART/475-760008?OpenDocument>.

Rape of men and boys

Another important feature of the *Ntaganda* case was his conviction for rape of men and boys. Witness P-0019's testimony vividly describes how UPC/FPLC soldiers anally penetrated men with their penises or by using 'bits of wood'. The witness testified that following the rapes, the men 'suffered a great deal' and then they died.⁵⁰ The conviction of Ntaganda for rapes against men and boys, though not the first for conflict-related sexual violence against males, is an important acknowledgment that sexual violence in conflict is not exclusively limited to women.⁵¹ Rubio-Marín notes that to continue to treat sexual violence as a 'women's only issue' despite evidence that men constitute a small but sizeable percentage of victims perpetuates norms that characterise women as victims, and as a certain type of victim only.⁵² She correctly asserts that sexual violence should not be treated as a 'women's only issue,' nor should women's issues be reduced to 'sexual violence only.'⁵³

Ntaganda's conviction for rape against men and boys does not mean that only direct male victims of rape will be entitled to reparations. Indeed, up to November 2020, there were no participating male victims of sexual violence in the case.⁵⁴ Indirect victims including those who may have been forced to witness rape or sexual slavery of their female relatives are also likely to have suffered harm as a result and would thus be eligible for reparations. Men and boys suffer harm differently from female victims of rape and sexual violence as a 'result of hyper-masculinity resulting in the destabilisation of gender and sexual identity, as well as harms such as sexual dysfunction, castration and social ostracisation.'⁵⁵ The long-term effects of such violence which includes physical and mental health problems as well as stigmatisation and social ostracism, 'are often invisible even to actors concerned with the phenomenon of sexual violence, including physicians and aid workers who are not typically trained to recognise the physical traces of rape in men, nor to provide psychological counseling to male victims.'⁵⁶

⁵⁰ *Ntaganda* Judgment (n 28) para 623.

⁵¹ The case against Jean-Pierre Bemba had also included charges for unprecedented sexual violence committed against men and boys in the Central African Republic. The Prosecution's Amended Document containing the Charges alleged that 'men, women and children were raped by multiple MLC perpetrators in their homes, raped in front of family members, forced to watch rapes of family members, and raped in public locations including streets, fields and farms. Men were also raped as a deliberate tactic to humiliate civilian men and demonstrate their powerlessness to protect their families.' Despite some progress in charging sexual violence against men however, the ICC still struggles to recognise and truly understand the harm inflicted upon male victims, as evidenced by the refusal by the Trial Chamber in the case of Dominic Ongwen to grant the request of legal representative of victims to allow three male victims to testify in person concerning crimes of sexual violence which they saw and experienced. The Chamber ruled that the confirmed charges were limited to sexual violence against women and girls and the victims' testimonies would therefore be outside the scope of those charges. See discussion on this issue by I. Garofalo, Prosecuting Male Sexual Violence at the ICC: Idealism or Realism, Centre for African Justice, Peace and Human Rights; FIDH SGBV Report (n 15) 24.

⁵² Ruth Rubio-Marín, Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue, 19 *Wm. & Mary J. Women & L.* 69 (2012) 87 (Rubio-Marín), available at: <https://scholarship.law.wm.edu/wmjowl/vol19/iss1/5/>.

⁵³ *ibid*

⁵⁴ *Ntaganda* SGBV Expert Report, para 22. The expert noted however that 'interviews with NGOs and court officers with experience of interviewing and liaising with victims suggest that male child soldiers were also subjected to rape and sexual slavery, and coded inferences were often made in communications.'

⁵⁵ *The Prosecutor v Jean-Pierre Bemba Gombo*, Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute, ICC-01/05-01/08-3444, 17 October 2016, para 60 (QUB Amicus submissions), available at: https://www.icc-cpi.int/CourtRecords/CR2016_17743.PDF.

⁵⁶ Rubio-Marín (n 52) 87-88.

Gender-sensitive reparations will need to address these issues without detracting from the separate and specific needs of women and girl victims of sexual violence.

III. Key considerations for Gender-Just reparations in *Ntaganda*

The *Ntaganda* case is unique and unprecedented in several respects including in its connection to the *Lubanga* case in which reparations have already commenced. A total of 2,132 victims were previously authorised to participate in the case, but only 38 of the participating victims submitted an application form meeting the requirement laid down in Rule 94 of the RPE for requesting reparations.⁵⁷ Only a small fraction, 88 of the 2,132 (4.1%), are victims of sexual violence (rape and sexual slavery): 18 of the 88 victims are former child soldiers (8 are victims of rape, 10 are victims of sexual slavery) and 70 are victims of the attacks (48 are rape victims, 22 are victims of sexual slavery).⁵⁸ Despite the relatively small number of sexual violence victims who have applied for reparations, there is a possibility that additional SGBV victims that had not previously applied, may subsequently request reparations.

It is critical that the design, process and implementation of reparations are gender-just and gender-sensitive.⁵⁹ Gender-just reparations refers to the substantive right enjoyed by victims of gender crimes to obtain redress for the harm suffered and the procedural right to the process of securing reparations and redress. Thus, in order to be gender-just, both the legal and administrative process of awarding and implementing reparations must take into account the gendered dimensions of the crimes, the specific context of the victims and their dignity, privacy and safety.⁶⁰ Gender-sensitive reparations requires that the practices and procedures for obtaining reparation are sensitive to and fully cognisant of gender, age, cultural diversity and human rights, and must take into account women's and girls' specific circumstances, as well as their dignity, privacy and safety.⁶¹ The Court-appointed expert on reparations also stresses the importance of gender-inclusive reparations which 'requires an understanding that women, men and other gender identities must not be excluded or discouraged from coming forward to claim reparations.'⁶²

Identification of beneficiaries and determining eligibility

As a preliminary matter, the Chamber has to determine the victims that are eligible for reparations and the methodology and criteria for identifying new potential beneficiaries (who have not previously applied for reparations).⁶³ This must be carried out in a context where the

⁵⁷ *The Prosecutor v Bosco Ntaganda*, Order for preliminary information on reparations, ICC-01/04-02/06-2366, 25 July 2019, para 3.

⁵⁸ This does not include possible indirect victims of these crimes. *The Prosecutor v Bosco Ntaganda*, Registry's Observations on Reparations in the Ntaganda Case, ICC-01/04-02/06-2475-AnxI, 28 February 2020, p20. The Registry estimates that the number of currently eligible participating victims may be reduced, because the Trial Chamber had excluded some villages and crimes from Ntaganda's conviction.

⁵⁹ *Ntaganda* SGBV Expert Report, para 19.

⁶⁰ Feinstein International Centre, Making Gender-Just Remedy and Reparation Possible: Upholding the Rights of Women and Girls in the Greater North of Uganda, 4.

⁶¹ Nairobi Declaration on Women and Girls Right to a Remedy and Reparations, para 2 E.

⁶² *Ntaganda* SGBV Expert Report, para 20.

⁶³ Pursuant to an order by a Single Judge of Trial Chamber IV in the *Ntaganda* case, the Victims Participation and Reparations Section (VPRS), the Section tasked with regulating victims' issues within the ICC Registry, filed its 'observations', and the Legal Representatives of Victims (LRV), the Defence for Mr. Ntaganda, the Trust Fund and the Prosecution filed responses. See *Ntaganda*, Trial Chamber IV, Order for preliminary information on

crimes were committed more than 16 years prior to Ntaganda's conviction and many victims have relocated or were displaced due to ongoing violence and unstable security conditions in the DRC.⁶⁴ Additionally, the persistent security instability in certain parts of the DRC coupled with the impact of major health crises, Ebola and the Covid-19 pandemic, are likely to significantly impact the Court's ability to plan, prepare and implement reparations, if awarded.

Two options were presented for the Chamber's consideration: (1) the individualised 'streamlined' victim identification system proposed by the Registry, that would commence at the start of the reparations proceedings and end before the Chamber issued its reparations order; and (2) the 'simplified screening process' based on 'eligibility criteria set by the Chamber in accordance with the parameters of the conviction,' suggested by the legal representatives.⁶⁵ The Registry system would, in essence, mirror the one 'adopted for participation at trial' and entail 'the use of an individualised reparations form allowing the Registry to collect pertinent information on an individualised basis.'⁶⁶ It, however, departed from the approach taken in previous reparations cases in which the identification of potentially eligible beneficiaries and the screening for eligibility were carried out by the Trust Fund.

The legal representatives considered that, 'prior to the reparation order, nothing more than a preliminary mapping exercise of the number of potential beneficiaries should be carried out for the purposes of assessing the cost of repair and thus fixing a reparation award.'⁶⁷ They were concerned that the individual applications system was time-consuming and may ultimately prove to be wasted effort if there is an adverse Appeals Chamber ruling, or if the Chamber decides to award collective reparations. The Trust Fund also considered it more efficient for the Chamber to await the outcome of the appeal and then issue its order setting out the nature of the harm linked to Mr Ntaganda's crimes. This, in their view, would avoid unnecessary trauma to victims by excluding clearly ineligible persons and prevent them from unnecessarily filling out application forms.⁶⁸ The Defence proposed a two-phased reparations system, including: 'a pre-reparations order phase, during which only dossiers of participating victims would be assessed with the participation of the VPRS, the legal representations, and the Defence; and a post-reparations order implementation phase, where, inter alia, application forms from potential new beneficiaries would be collected by the VPRS, in consultation with the TFV, and where the parties would make submissions concerning the eligibility of these new applicants.'⁶⁹

reparations, ICC-01/04-02/06-2366, 25 July 2019; Annex I, Registry Preliminary Observations on Reparations, ICC-01/04-02/06-2391-Anx1, 6 September 2019 (Registry Observations); Trust Fund for Victims' response to the Registry's Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, ICC-01/04-02/06-2428, 3 October 2019 (Trust Fund Observations); Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations, ICC-01/04-02/06-2431, 03 October 2019 (Defence observations).

⁶⁴ *The Prosecutor v Bosco Ntaganda*, Joint Response of the Legal Representatives of Victims to the Registry's Observations on Reparations, ICC-01/04-02/06-2430, (Legal Representatives Response), p 12, 14 and 20, available at: https://www.icc-cpi.int/CourtRecords/CR2019_05881.PDF.

⁶⁵ *The Prosecutor v Bosco Ntaganda*, Public Redacted Version of the "Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations", ICC-01/04-02/06-2477-Red, 28 February 2020, para 24 (LRV Reparations Submissions).

⁶⁶ Registry Observations (n 58) para 10.

⁶⁷ LRV Reparations Submissions (n 60) para 28.

⁶⁸ Trust Fund Observations (n 61) para 26, available at:

https://www.icc-cpi.int/CourtRecords/CR2019_05879.PDF.

⁶⁹ *The Prosecutor v. Bosco Ntaganda*, First Decision on the Reparations Process, ICC-01/04-02/06-2547, 26 June 2020, para 10; *The Prosecutor v Bosco Ntaganda*, Public Redacted Version of "Defence submissions on reparations", 28 February 2020, ICC-01/04-02/06-2479, paras. 8-9.

The concern about the potentially traumatising effect of an adverse Appeals Chamber decision on victims is not without merit. Engaging with victims concerning reparations before the final outcome of the appeal carries substantial risk, particularly for the most vulnerable.⁷⁰ Following the acquittal of Jean-Pierre Bemba, victims reportedly experienced a “sense of having been “betrayed”, “stabbed in the back”, and abandoned by the international justice system that promised them so much and in which they had placed so much hope.”⁷¹ This was despite extensive efforts by the legal representative to provide advanced information concerning the duration and unpredictability of the Court process.⁷²

While recognising the inherent risks of commencing reparations proceedings simultaneously with the pending appeal, in the interest of an ‘efficient and effective’ process, the Chamber opted to proceed with a modified version of the system proposed by the Registry. In a remarkable shift away from previous practice, the Chamber ruled in favour of the identification of new potential beneficiaries before issuing the reparations order and assigned the Registry (VPRS) rather than the Trust Fund, the lead role in the process.⁷³ The Chamber’s approach has been fully endorsed by the ICC Independent Expert Review Committee, tasked by the ICC’s governing body, the Assembly of States Parties (ASP) with comprehensively reviewing the Court.⁷⁴

The applications-based process for new potentially eligible beneficiaries at the pre-reparations order phase is aimed at efficiency and expedition. However, there is no guarantee that this will be the likely result. The individual applications process is one of the ways to formally trigger victims’ request for reparations pursuant to article 75(1) of the Statute. The other is the Court’s decision to act on its own motion, in exceptional circumstances. However, triggering the reparations procedure through an application does not mean that the Chamber is mandated to consider each individual application in making a reparations award.

⁷⁰ LRV Submissions (n 60) para 23 (submitting ‘Their anticipated frustration and disappointment, should Mr Ntaganda’s conviction be wholly or partly reversed on appeal, consequently excluding them from envisaged reparations, will be incalculable’). To address these concerns, the Chamber encouraged the Registry to implement several measures to avoid victims’ re-traumatisation and security risks; to reach out to vulnerable victims including victims of SGBV and those who have been displaced; and to ‘adequately inform victims of the expected duration and the possible outcomes of the appeal proceedings in the case and their potential impact on the reparations proceedings.

⁷¹ FIDH, *Victims at the Center of Justice, From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC*, 78; available at:

https://www.fidh.org/IMG/pdf/droitsdesvictimes730a_final-2.pdf

⁷² *ibid*

⁷³ The Registry was assigned based on based on its familiarity with the case, its field presence in the DRC, as well as its role in assisting victims in participating in the different phases of the proceedings, including at the reparations stage. The Chamber acknowledged that it may not be feasible for all potential victims to get involved at this early stage and some may choose to come forward only once the types and modalities of reparations have been established.

⁷⁴ ICC-ASP, *Final Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System*, 287, R336. Decrying the length of time and extensive delays in reparations at the ICC, the Committee recommended that the VPRS should have principal responsibility for identifying, facilitating, collecting, registering and processing (including the legal assessment), of all applications by victims for participation at the trial, who intend to request reparations; and of all new potential beneficiaries eligible for reparations who intend to join the judicial process at the reparations phase, prior to the issuance by the Chamber of the Reparations order. IER Report, para 904, available at:

https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

The *Lubanga* Appeals Chamber ruled that ‘where the Chamber decides to make a reparations award that is not based on an individual assessment of harm, for example, because of the large number of victims, the individual applications may be less relevant as they will not be individually considered.’⁷⁵

It is difficult to envisage the benefits of pursuing an individualised application procedure at the pre-reparations order phase as part of the process of identifying new potential beneficiaries for reparations, when due to the numbers of potentially eligible beneficiaries, the Chamber may ultimately not make an individual assessment of the applications. Conducting a mapping exercise to gather information to assess the cost of repair, and to produce samples of the type and scope of harm, without requiring victims to complete individual application forms, seems to be a much more efficient way to inform the Chamber about the nature and extent of the harm for an eventual reparations order.

The modified decision of the Chamber seems to be a workable compromise. The Registry has been ordered to assess the potential eligibility of victims already participating in the case based on the scope of the judgment; assess how many victims eligible for reparations in the *Lubanga* case are also potentially eligible for reparations in the *Ntaganda* case; and expedite its preliminary mapping of potentially new beneficiaries including by seeking to obtain relevant first-hand information from displaced, vulnerable and marginalised victims who may have challenges in making themselves known.⁷⁶ The Registry will use a special draft form developed for this purpose and tailored for reparations to register the beneficiaries. The goal is to ensure that all relevant information is collected from the victims, so as to avoid and/or minimise the need for multiple contacts with them, notably at the implementation stage. Importantly, the Chamber has indicated that ‘*any victim who wishes to be considered as a potential beneficiary of future reparations may do so without being required to fill in the application form, as long as the relevant information is provided, considering the difficulties that using an application form may involve for some victims.*’⁷⁷

Assessment of harm

The second critical factor for the chamber deciding reparations in *Ntaganda* concerns the assessment of harm. The notion of ‘harm’ denotes ‘hurt, injury and damage’ and does not necessarily need to have been direct, but it must have been personal to the victim.⁷⁸ Harm may be material, psychological or physical in nature. SGBV victims in the case suffered a range of harms as a result of the sexual violence perpetrated against them, including social and community stigma; undesired pregnancies, miscarriages and children born of rape, and HIV/AIDS, gynaecological and medical complications such as fistulas, genital trauma and severe genital tears, and mental and psychological trauma.⁷⁹ According to the report of the Court-appointed expert, ‘out of 48 victim applications by former child soldiers, 9 direct victims explicitly mention becoming pregnant, two indirect victims refer to their daughters returning pregnant, and a further three applications speak in colloquial terms of the girl returning ‘fat’.’⁸⁰

⁷⁵ *Lubanga* reparations appeal judgement, para 87.

⁷⁶ *The Prosecutor v. Bosco Ntaganda*, First Decision on the Reparations Process, ICC-01/04-02/06-2547, 26 June 2020, para 35.

⁷⁷ *ibid* (italics added).

⁷⁸ *Lubanga* Order for Reparations, at para 10.

⁷⁹ *Ntaganda* SGBV Expert Report, para 35.

⁸⁰ *ibid* para 33.

While there are both male and female SGBV victims in the case, it is also important to understand the differentiated impact of the crimes on male and female victims.⁸¹ Although both “boys and girls may suffer stigmatisation, sexually transmitted diseases, and physical and psychosocial trauma, girls may also be faced with unwanted pregnancies, unsafe or forced abortions, resulting in long-term medical complications and sometimes death”.⁸²

Rubio-Marín notes that in order to help victims cope with the effects of violence and move forward, reparations must give primordial attention to the notion of harm and do so in ways which are adequate for the situations in which they operate.⁸³ She argues that in contexts of widespread and gross human rights violations, such as those that characterise armed conflicts, the ‘focus on harm should not translate into an attempt to measure harm for the sake of compensating proportionately, which is an attempt likely doomed to fail.’⁸⁴ Rather, in post-conflict settings, focussing on the harms that victims experience can assist ‘in the decision of which types of violations of rights ought to be prioritized, who should be included in the circle of beneficiaries, and what types of benefits would be best suited to both recognize and assist victims.’⁸⁵

It is difficult to determine and quantify the harm suffered by victims and to apportion a monetary value to that harm.⁸⁶ The general principle is that victims should receive appropriate, adequate and prompt reparations and the awards must be proportionate to the harm, injury, loss and damage as established by the Court.⁸⁷ To qualify for reparations, the applicant must provide ‘sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case.’⁸⁸ Previous Chambers have applied the ‘balance of probabilities’ (rather than the ‘beyond reasonable doubt’) standard, given the challenges many victims face, in cases of reparations for large-scale crimes, in obtaining evidence in support of their claim due to the destruction or unavailability of evidence, particularly in countries and contexts with poorly developed or under-resourced administrative and social infrastructures.⁸⁹

Given the length of time between the crimes and the conviction in *Ntaganda*, and the displacement of many victims due to prevailing insecurity, it may be appropriate for the Chamber to consider relying upon presumptions for certain types of harm rather than requiring direct proof. The experts in the reparations stage of the *Bemba* case considered presumptions to be the most practical approach for the Chamber because “an individual assessment of each

⁸¹ *The Prosecutor v Thomas Lubanga Dyilo*, Observations of the Women’s Initiatives for Gender Justice on Reparations, ICC-01/04-01/06-2876, 10 May 2012, para 31, available at:

<http://iccwomen.org/documents/Observations-on-reparations.pdf>

⁸² *ibid* para 32.

⁸³ Rubio-Marín (n 52) 74.

⁸⁴ *ibid*

⁸⁵ *ibid*

⁸⁶ REDRESS, No time to Wait: Realising Reparations for Victims before the International Criminal Court, (2019), 48, available at: <https://redress.org/wp-content/uploads/2019/02/20190221-Reparations-Report-English.pdf>.

⁸⁷ *ibid*. See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations General Assembly, UNGA Res 60/147, 21 March 2006.

⁸⁸ *The Prosecutor v Thomas Lubanga*, Order for Reparations (amended), ICC-01/04-01/06-3129-AnxA, 3 March 2015, para 11, available at: https://www.icc-cpi.int/RelatedRecords/CR2015_02633.PDF.

⁸⁹ *The Prosecutor v Thomas Lubanga*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012, para 253, available at:

https://www.icc-cpi.int/CourtRecords/CR2012_07872.PDF

victim's harm and the extent of the harm is neither feasible nor desirable due to the lack of documentary evidence, and the length of time it would take to assess each individual claim."⁹⁰ In the *Lubanga* case, Trial Chamber II presumed the existence of harm in the case of potentially eligible direct victims who had proven their child-soldier status and of potentially eligible indirect victims who proved the direct victim's child-soldier status and their close personal relationship with that direct victim.⁹¹

The Chamber should decide that children born of rape are presumed to have suffered harm as a result of the commission of rape and sexual slavery as a war crime and crime against humanity.⁹² The issue of whether children of SGBV victims may also have suffered transgenerational harm as indirect victims of the sexual violations perpetrated against their mothers and the circumstances of their birth, was previously explored and rejected in the *Katanga* case.⁹³ As the SGBV reparations expert pointed out, however, 'children born of rape can often be overlooked in policies and reparations designed to address sexual violence', yet they often suffer significant feelings of guilt, stigma and social exclusion because of the circumstances of their birth.⁹⁴ Revisiting the issue and providing tangible reparations for such victims in *Ntaganda* would be an important and positive step forward.

Types and modalities of reparations

The Chamber will also need to determine the types and modalities of reparations to be awarded to victims. Rule 97(1) of the RPE allows the Court to award reparations on an individualised or collective basis, or both, given the scope and extent of any damage, loss or injury. Reparations are considered individual when 'the resulting benefit is directly attributed to the individual in order to repair the harm he has suffered. Reparations are considered collective when they benefit a group or class of persons who have suffered common harm.'⁹⁵ The Court's jurisprudence has so far recognised two categories of collective reparations, namely community collective reparations and individual-centered collective reparations. Community collective reparations are aimed at 'benefiting the community as a whole' and take different forms, such as the construction of schools or hospitals.⁹⁶ Individual-centered collective

⁹⁰ *The Prosecutor v Jean-Pierre Bemba*, Expert report on reparation, ICC-01/05-01/08-3575-Anx-Corr2-Red, 30 November 2017, para 13.

⁹¹ *Lubanga* reparations appeal judgement, para 31.

⁹² *The Prosecutor v. Bosco Ntaganda*, First Decision on the Reparations Process, ICC-01/04-02/06-2547, 26 June 2020, para 46.

⁹³ See *The Prosecutor v Germain Katanga*, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, ICC-01/04-01/07-3804-Red-tENG, 1 October 2018. Transgenerational harm is trauma transmitted by the first generation of victims to their descendants (whether the second generation or beyond) via a complex traumatic stress disorder. In the *Katanga* case, the Trial Chamber rejected the application of five indirect victims who allegedly had suffered transgenerational harm. On appeal by the legal representatives of victims, the Appeals Chamber invited the Trial Chamber to revisit its decision and state reasons for excluding them as potential beneficiaries of reparations. The LRVs had relied on the expert testimony of a neuropsychiatrist to assess the extent of the harm suffered by indirect victims. The expert's conclusions showed that about 60 individuals, including children, in Bogoro who suffered from transgenerational trauma which drastically reduced their chances of leading a normal social and professional life. *ibid*

⁹⁴ *Ntaganda* SGBV Expert Report, para 54.

⁹⁵ *The Prosecutor v Thomas Lubanga Dyilo*, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017, paras. 193-94. See also *Katanga* Reparations Order, paras. 274-77, available at: https://www.icc-cpi.int/CourtRecords/CR2018_03560.PDF.

⁹⁶ *ibid*

reparations can, while intended for the benefit of a group, be beneficial on an individual level (such as specialised health services for a targeted group of victims).⁹⁷

In *Katanga*, the Trial Chamber awarded both individual (to 297 victims) and collective reparations to the victims.⁹⁸ In *Al Mahdi*, the Trial Chamber determined that collective reparations in the form of rehabilitation was the most appropriate way to remedy the destruction of the buildings of the community of Timbuktu.⁹⁹ The reparations measures included ‘measures to ensure the non-repetition of attacks’ and the apology made by Mr. Al Mahdi.¹⁰⁰

Given the context of the *Ntaganda* case, the Trial Chamber should consider a mixed reparations award that combines both individual and collective awards. The seriousness of the harms inflicted on victims of conflict-related sexual violence requires an appropriate combination and interplay of different forms of reparations.¹⁰¹ The Court should award compensation, where appropriate, and approach it on a ‘gender-inclusive basis and awards should avoid reinforcing previous structural inequalities and perpetuating prior discriminatory practices.’¹⁰² According to the Court-appointed SGBV expert:

[I]ndividual compensation is the most appropriate form of reparations for victims of rape and sexual slavery in the *Ntaganda* case as it acknowledges their personal suffering as well as the resultant social, economic and medical consequences caused by such crimes... [C]ompensation is also a preferred form of reparation by victims, and takes a gender and contextually sensitive approach to such crimes in the face of ongoing violence and insecurity.¹⁰³

Compensation should be awarded in a manner which respects victims’ agency and allows them the choice to invest the funds as they see fit, including in socio-economic and income generating activities of their choice or in education or other opportunities.¹⁰⁴ Compensation for direct and indirect male victims of sexual violence should, however, not inadvertently perpetuate existing patriarchal and gender stereotypes. Rubio-Marín cautions that where reparations schemes contemplate compensation, ‘compensating men financially for the sexual harm done to ‘their’ women risks entrenching patriarchal norms that interpret the harm of sexual violence as harm done primarily to men’s assets or reputation.’¹⁰⁵

The expert proposes several modalities of collective reparations for SGBV victims including medical rehabilitation (medical care for HIV and non-HIV cases for up to 5 years); mental and psychosocial rehabilitation programmes for up to 5 years; social rehabilitation consisting of a ‘sensitisation campaign that can contribute to social reintegration of victims of sexual

⁹⁷ *ibid*

⁹⁸ *Katanga* Reparations Order, 287-89.

⁹⁹ *Al Mahdi* Reparations Order, para 67.

¹⁰⁰ *ibid* paras. 70-71.

¹⁰¹ UN Women, Guidance Note of the Secretary General, 6.

¹⁰² *The Prosecutor v. Thomas Lubanga*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012, para 227.

¹⁰³ *The Prosecutor v. Bosco Ntaganda*, Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare, ICC-01/04-02/06-2623-Anx2-Red2, para 175(a).

¹⁰⁴ *ibid*

¹⁰⁵ Rubio-Marín (n 53) 90.

violence’; and symbolic measures in the form of an apology from the accused and dignification measures.¹⁰⁶

Transformative reparations

Finally, a key consideration in relation to reparations for SGBV crimes is the transformative nature of the reparations awarded. The UN Secretary-General has indicated that reparations may be transformative and “assist in overcoming structures of inequality and discrimination that predated the conflict and may have contributed to these crimes.”¹⁰⁷ These inequalities could potentially inhibit the full rehabilitation and restoration of the survivors and the full enjoyment of their rights. How reparations are designed can contribute to their transformative potential, for example through access to credit and other resources that facilitate and enhance women’s economic empowerment.¹⁰⁸

There are, however, limits to the transformative potential of ICC reparations and it remains an open question, whether reparations ordered by the ICC can realistically be expected to ‘transform’ the underlying social inequalities and gender imbalances in the DRC or should be focused on redressing the harm suffered by the victims in the case.¹⁰⁹ As Dr. Luke Moffett noted:

[T]he transformative potential of reparations rests in their ability to prioritise and publicise victimisation and underlying structural inequalities that precipitated or compounded violence. Where reparations are used solely to prevent future victimisation, such as community education or human rights training for armed forces, they may not redress individual victims’ harm. This risks overburdening the expectations of reparations in affected communities and forces those victimised to forego their remedy in the wide hope of reconciliation and peace.¹¹⁰

¹⁰⁶ *The Prosecutor v. Bosco Ntaganda*, Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare, ICC-01/04-02/06-2623-Anx2-Red2, 136.

¹⁰⁷ UN Women, Guidance Note of the Secretary General, 6, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/docs/2014/uns-g-guidance-note-reparations-for-conflictrelated-sexual-violence-2014-en.pdf?la=en&vs=1356>.

¹⁰⁸ *ibid* 9.

¹⁰⁹ Nairobi Declaration, Principle 3(H), 5. But see Andrea Durbach and Louise Chappell, Leaving Behind the Age of Impunity, Victims of Gender Violence and the Promise of Reparations, *International Feminist Journal of Politics* (2014), at 12-13, available at: <https://www.tandfonline.com/doi/abs/10.1080/14616742.2014.941251>. The authors argue that even with the best intentions, the ICC will have difficulty creating a transformative court-ordered regime for women victims of sexual violence. In their view ‘attempts to pursue a transformative reparations agenda without the appropriate mandate or resources to achieve its objectives could lead to an exacerbation of harm in fragile post-conflict states. By raising (albeit unwittingly) the expectations of victims of sexual violence about the reach and contribution of the Court’s reparations framework, the ICC could potentially leave victims more vulnerable where expectations are not met and disillusioned with justice processes that fail to deliver despite their promise.’ See also Luke Moffett, Reparations for victims at the International Criminal Court: a new way forward?, *International Journal of Human Rights* (2017) 21:9, 1204 (discussing whether transformative reparations are beyond the scope of the ICC’s reparations mandate).

¹¹⁰ *The Prosecutor v Bosco Ntaganda*, Prosecution Appeal Brief, ICC-01/04-02/06, 7 October 2019; *The Prosecutor v Bosco Ntaganda*, Defence Appeal Brief – Part I, ICC-01/04-02/06 A, 11 November 2019; *The Prosecutor v Bosco Ntaganda*, Observations on Sentencing on behalf of the Former Child Soldiers, ICC-01/04-02/06, 24 January 2020; *The Prosecutor v Bosco Ntaganda*, Public Redacted Version of the “Response of the Common Legal Representative of the Victims of the Attacks to the “Submissions on sentence on behalf of Mr. Ntaganda” (ICC-01/04-02/06-2424-Conf)”, ICC-01/04-02/06, 24 January 2020.

The focus, therefore, should be on redressing the harm suffered by the victims while recognising the contextual limitations that exist for them to fully enjoy their rights. Implementing reparations with this contextual understanding will assist the Court and the Trust Fund to design and implement reparations that are not only meaningful but may also be transformative.

Conclusion

The Defence and Prosecution appeal against conviction and sentence in the *Ntaganda* case have effectively put all but very preliminary aspects of reparations in the case on hold pending a final judgment.¹¹¹ A final decision on reparations (if one is issued) could take several years, in a context where victims have waited for more than 16 years since the offences were committed. Trial Chamber IV has made it clear that in the interest of expedition and efficiency, it will press ahead with advanced preparation for reparations despite the pending appeal and the potential for re-traumatisation in the event of an adverse outcome on appeal. By initiating the identification of potential new beneficiaries and commissioning experts to provide advice concerning an eventual reparations award, the Chamber has taken bold steps to advance the reparations process for victims that have been denied justice for many years.

Currently, only a small fraction of the victims who were approved to participate in the trial are SGBV victims, and it is not yet known whether all of them will be eligible for reparations. In the interim, pending the finalisation of the appeal, the Trust Fund should utilise its resources under its assistance mandate to assist the most vulnerable victims, including SGBV victims with chronic medical conditions.¹¹² In *Bemba*, the Trust Fund fast-tracked its assistance mandate to assist victims of the case *after* Bemba's acquittal on appeal.¹¹³ The ICC's legal framework does not preclude the Trust Fund from acting under this mandate to assist victims even while an appeal is pending, and given the issues at stake, it should do so without delay.

The Court-appointed SGBV expert has made important recommendations for ensuring gender-just, gender-sensitive and gender-inclusive reparations in the *Ntaganda* case that will likely establish critically important jurisprudential standards. The emphasis on individual compensation for victims is welcome, given that this is the overwhelmingly preferred option for victims and allows them the ability to exercise agency and autonomy. The recommendation for critically needed medical and psycho-social rehabilitation is both timely and practical since many SGBV victims are still suffering with the debilitating impact of their injuries despite the many years that have passed. As the reparations process evolves, it is critical that neither the preparatory process nor the implementation of reparations is overly burdensome, cause further harm or place victims or their families at increased risk of harm.¹¹⁴ Appropriate and timely

¹¹¹ Defence: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/06-2443>; OTP: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/06-2432>; LRV submissions (two teams): https://www.icc-cpi.int/CourtRecords/CR2020_00176.PDF; https://www.icc-cpi.int/CourtRecords/CR2020_00183.PDF.

¹¹² Trust Fund for Victims, <https://www.trustfundforvictims.org/en/about/two-mandates-tfv/assistance>

¹¹³ Trust Fund for Victims, Press Release, Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic, 13 June 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180613-TFVPR>, last accessed 8 January 2019.

¹¹⁴ See QUB, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, ICC-01/05-01/08-3448, 17 October 2016; see generally Nairobi Declaration, Principles 1-3.

consultations with SGBV victims, and women and girls in particular, will be a central part of the process to ensure that SGBV victims are fully and meaningfully included in the design and implementation of appropriate reparations.

The Psychologist-Client Relationship at the ICC: A Road Map for the Development of the Counsel-Victim Relationship

An Michels*

I. Introduction

Psychosocial support to witnesses and victims has become significantly more important in the work of international tribunals in recent years. In parallel, the participation of victims has also become an integral part of the international justice process, especially at the International Criminal Court (ICC). What both trends have in common is that the relationship between the professionals involved and the witnesses and victims they support is critical to ensure that victims gain a sense of control over their engagement in the process and that they experience the interaction with the Court as meaningful and dignified.

This article analyses the characteristics of the relationship between psychologists and witnesses and victims at the ICC, from a practitioner's perspective. It makes observations about critical aspects of psychosocial interventions, with a particular focus on finding the balance in offering the correct level of support in this particular international judicial context, which is characterised, *inter alia*, by complex and lengthy proceedings, involving witnesses and victims coming from war-torn communities who often travel far to the seat of the Court. This article, by comparing the counsel-victim relationship and the psychologist-client relationship, also reflects on how to further develop the psychological and ethical aspects of the counsel-victim relationship.

Part II of this article provides background by briefly describing the evolution of psychosocial support within the international justice context. Part III describes the support mandate of the Victims and Witnesses Section (VWS) of the ICC and gives an overview of the type and extent of psychosocial and other support provided to witnesses. Part IV focuses on the boundaries of the psychosocial support, set by the ICC regulatory framework and the ethical standards for psychologists. Part V addresses the similarities and differences between the psychologist-client relationship and the counsel-client relationship. By focusing on the characteristics of the psychologist-client relationship in the context of the ICC the article provides a road map for the development of ethical and psychological aspects of the counsel-victim relationship. Finally, in part VI, I make four recommendations to enhance the quality of the counsel-victim relationship from a psychological perspective. My recommendations relate to: (1) addressing the importance of providing legal representatives with training about the psychological aspects of victimisation and trauma in particular; promoting their access to self-care tools, peer-support and where needed, psychosocial support; (2) suggesting that the Court should pay explicit attention to ethical questions, (3) addressing potential issues in relation to the scope and boundaries of the client-counsel relationship, and; (4) considering the need of some victims to develop a personal relationship or contact with a legal representative or another professional representing the Court.

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II. Background

The adoption of the Rome Statute in 1998 constituted a major breakthrough in the development of psychosocial support for witnesses and victims in international justice mechanisms. Notwithstanding earlier evolving recognition of the importance of witness support at the ad hoc international criminal tribunals for Rwanda and the former Yugoslavia¹, it was only the establishment of the Special Court for Sierra Leone (SCSL) in 2002 that made a psychological focus an integral part of witness support and protection from the start.² In fact, the ICTY Rules of Procedure and Evidence (RPE) mentioned the requirement to hire qualified staff to provide counselling and support to for victims and witnesses, particularly in cases of rape and sexual assault.³ But the integration of psychosocial services in the work of the Victims and Witnesses Section was a slow process.⁴ Also, the scope of measures to facilitate testimony of vulnerable witnesses and to protect them against retraumatisation in Court was limited and the Court primarily implemented them through decisions on the use of procedural protective measures in the courtroom, such as the use of a pseudonym or shielding the witnesses' identity from the public.⁵ The SCSL's RPE on the other hand, partly based on the Rome Statute, included the specific provision to ensure the presence of trauma experts (psychologists) as part of the Victim and Witness Section (VWS) under the Registry.⁶ Also, the Court adopted early on special measures to facilitate the testimony of vulnerable witnesses, in particular victims of sexual assault and gender crimes and children.⁷ At the ICC, the Registry created in 2009 a position of psychologist/trauma expert and expanded in 2014 its existing psychosocial support team, based on Article 43(6) of the ICC Statute, which states that the Victims and Witnesses Unit should 'include staff with expertise in trauma, including trauma related to crimes of sexual violence.'⁸ The same article further states that the Unit 'shall provide counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.'⁹ ICC Rule 88 further foresees the possibility to implement a broad range of special measures to facilitate the testimony of vulnerable witnesses and prevent retraumatisation.¹⁰ The ICC Registry operationalised this rule through the design of the so-called Vulnerability Protocol which lays out the established

¹ See e.g. *Echoes of Testimonies, A Pilot Study into the Long-Term Impact of Bearing Witness before the ICTY* (2016) 11-20, available at: http://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report_EN.pdf.

² First Annual Report of the President of the Special Court for Sierra Leone, at 15, available at: <http://www.rscsl.org/Documents/AnRpt1.pdf>; See also Michels, A. "As if it was happening again": Supporting especially vulnerable witnesses, in particular women and children, at the Special Court for Sierra Leone', in: Arts, K. and Popovski, V. (eds) *International Accountability and the Rights of Children* (Hague Academic Press, From Peace to Justice Series, 2006).

³ Rule 34(A)(ii) ICTY Rules of Procedure and Evidence (RPE). Rule 34 does specify that due consideration shall be given, in the appointment of staff, to the employment of qualified women.

⁴ See *Echoes of Testimonies* (n 1) 15.

⁵ Rules 69, 75, ICTY RPE. see Innovative Procedures: Hearing, protecting and counselling survivors of sexual violence. Available at: <https://www.icty.org/en/features/crimes-sexual-violence/innovative-procedures>. see e.g. *Prosecutor v. Delalic et al.*, [ICTY-IT-96-21], Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M", 28 April 1997.

⁶ Rule 34(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, which reads, in part: "The [Witness and Victims] Section personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children".

⁷ *Prosecutor v. Norman et al.*, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004, SCSL-04-14-T-126; *Prosecutor v. Sesay et al.* Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004, SCSL-2004-15-T (6758-6774).

⁸ Art. 43(6), ICC Statute.

⁹ *ibid*

¹⁰ Rule 88 of the Rules of Procedure and Evidence of the ICC.

process of recommending and implementing a broad range of Rule 88 special measures on the basis of a VWS psychologist report to the Chamber¹¹ (see part III *infra*), rather than being solely premised on the type of ‘victimisation’ e.g. sexual violence victim, as was the case at the SCSL. The development of the Vulnerability Protocol was a milestone in the integration of psychosocial expertise in the judicial process in an international context because of the central role and importance given to psychologists in the process and, as a consequence, the focus placed on the individual needs of victims and witnesses.

The Rome Statute constituted a breakthrough in the way it recognises victims’ rights to participation and reparation. This development followed a growing movement to recognise the role of international justice mechanisms as providers of restorative justice, which refers to ‘a process for resolving crime by focusing on redressing the harm done to victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of a conflict.’¹² Where the ad hoc tribunals largely overlooked victims’ interests and restricted their roles to that of witnesses, the Rome Statute recognised the independent status of victims.¹³ Procedures at the ICC allow for victims to participate at different stages of the procedure, have a legal representative present their views and concerns, apply for reparations and thus, in principle, have stronger engagement with the judicial process as individuals and communities. This development created expectations and also numerous challenges,¹⁴ further discussed below. Above all, victim participation confronted victims’ counsel with a need to set rules in this uncharted territory. Defining further this additional and evolving counsel-client relationship is part of that process.

III. Psychosocial support and other assistance at the ICC

In line with its mandate, the ICC Victims and Witnesses Section (VWS) has put in place measures seeking to protect the psychological well-being, dignity and privacy of witnesses and victims, in particular those who are vulnerable.¹⁵ Vulnerability infers the presence of special needs to be addressed in order to mitigate the risk to be harmed physically or mentally. In the context of the ICC, vulnerable witnesses and victims are those persons at an increased risk of psychological harm by appearing before the Court and/or who experience psychosocial or physical difficulties which affect their ability to appear before the Court. Pursuant to the ICC regulatory framework, the ICC may assess a witness or victim’s vulnerability by examining different factors, *inter alia*, related to the person, such as age (for example, children or elderly persons), personality, disability (including cognitive impairments), mental illness or psychosocial problems (such as trauma-related problems and/or lack of social support); to the nature of the crime, in particular sexual or gender-based violence, violence against children, torture or other crimes involving grave violence; or related to particular circumstances such as significantly increased stress or anxiety due to relocation or resettlement, fear of retaliation or adaptation difficulties related to cultural differences or other factors.¹⁶

¹¹ See ICC, Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses (25 Oct. 2010), ICC-01/05-01/08-974-Anx2 [hereinafter Vulnerability Protocol].

¹² See UNODC (2006). Handbook on Restorative Justice Programmes, 6.

¹³ FIDH. ‘The Evolution of Victims’ Access to Justice’ in: *Victims’ Rights before the ICC*, 3. Available at: www.fidh.org.

¹⁴ Walley, L., ‘Victims’ Participation in ICC Proceedings: Challenges Ahead’. *International Criminal Law Review* 16 (2016) 995-1017.

¹⁵ See Vulnerability Protocol (n 11).

¹⁶ Regulation 94*bis*, ICC Regulations of the Registry.

In recent years, the VWS has invested in the expansion and strengthening of its psychosocial expertise, both at the seat of the Court in The Hague and in its field offices. It has increased the number of psychosocial positions and focused its recruitment strategy on attracting more clinical or forensic psychologists.¹⁷ Firstly, the Chamber put the responsibility for the preparation for testimony, also known as the familiarisation process,¹⁸ under the responsibility of the VWS from the beginning. The process focuses strongly on psychosocial aspects of witness testimony. VWS Staff informs witnesses and victims appearing in person early in the process about what to expect and the VWS psychosocial staff invests in the establishment of a relationship of trust with them. The witnesses and victims appearing in person undergo a preliminary vulnerability assessment by one of the VWS's psychologists who propose tailor-made special measures during testimony if vulnerability has been established during their psychosocial assessment.¹⁹ Special measures may include, *inter alia*, measures to adapt the set-up of the courtroom to the needs of the witness; measures to adapt the questioning to the needs and capacities of the witness; or in-court assistance. If needed, one of the VWS psychologists monitors the witnesses' testimony closely in the courtroom and/or communicates with the Chamber about the condition of the witness, if requested to do so by the Chamber. A VWS psychologist meets with witnesses after testimony at the seat of the Court and after return to their area of residence. Where required, witnesses can benefit from referral to specialised mental health services and receive psychosocial follow up. Furthermore, the VWS has integrated the provision of psychosocial and other support in its operational decision-making process, which allows it to implement tailor-made measures for witnesses and victims at every step of the process of being a witness or victim, before, during and after testimony. For example, it is part of standard practice to take into consideration recommendations regarding the expected psychosocial impact of operational decisions on witnesses. Aside from the preparation for testimony, the VWS can provide support at any time needed during the process of participation in the judicial process, in case there is a need for protection or a specific support need. The intervention is limited to measures put in place to facilitate interaction with the Court and prevent further harm as a result of this interaction. In other words, the intervention will only be implemented if without the support or protection the witness or victim would be at risk of harm or be unable to participate in the judicial process. Such support can include the provision of psychological assistance to victims and witnesses as well as assistance in obtaining medical, social and family support and other appropriate assistance. In addition, the VWS's psychosocial support team also provides expert advice and trainings to different entities in the Court, including the Chambers and parties, in relation to trauma, mental health, psychosocial support and vulnerable groups, in particular children and victims of sexual and gender-based violence (SGBV).

Since the start of the first trial at the ICC in 2009 the VWS has also put in place quality control mechanisms aimed at evaluating witness related services as part of a Registry-wide effort to strengthen continuous development of services. For example, a revised witness feedback project being conducted by the VWS since 2015 provides valuable insight into the impact of the measures provided to testifying witnesses and tries to record the opinions and experiences

¹⁷ In the context of the 2014 Registry's Revision psychosocial resources in the VWS were regrouped and roles and responsibilities of psychosocial staff were streamlined to ensure a more efficient use of staff. The changed recruitment strategy led to an increase of the number of psychologists in the Section.

¹⁸ See e.g. Unified Protocol on the Practices Used to Prepare and Familiarise witnesses for Giving Testimony at Trial, *Prosecutor v. Laurent Gbagbo, Charles Blé Goudé*, ICC-02/11-01/15-355-Anx 03-12-2015 1/24 EK T. In most cases before the ICC witness prepping by the calling party is not allowed.

¹⁹ See Vulnerability Protocol (n 11); Reg. 94bis, ICC Regulations of the Registry.

of witnesses and victims who appear in person before the Court. Preliminary results of the project²⁰ show on the one hand that witnesses report high levels of stress. They often report feelings of loss of control over their life and other trauma symptoms such as frequent nightmares, avoidance and negative emotions such as fear, sadness, shame and guilt. Many of them also describe the process of travel and testifying as an additional stress factor, possibly amplifying the elevated stress levels already present and at least partly caused by trauma-related experiences. On the other hand, these preliminary results also suggest that witnesses generally assess their experience as a witness positively when the VWS provides a sufficient level of support before, during and after testifying. These early results seem to confirm the findings of earlier studies which indicate that in a context where court staff or external psychosocial experts have provided psychosocial support most witnesses described the consequences of their testimony as primarily positive²¹ and look back at the experience with satisfaction.²²

IV. Psychosocial interventions anchored by ethical and professional boundaries

It is critical to understand the development of psychosocial support for witnesses and victims within the limitations of a clear legal, operational and ethical framework, which determines the boundaries of the support and assistance provided. The ICC regulatory framework, in particular its delineation of the mandate of the VWS, guides the scope of support and assistance as limited to measures put in place to facilitate interaction with the Court and prevent further harm as a result of this interaction.²³ In addition, managerial and operational requirements call for VWS managers to evaluate support interventions for their necessity and proportionality to the need, before the VWS implements any interventions.²⁴ Finally, as staff members of the ICC, the psychologists represent the organisation. In line with ethical principles,²⁵ they shall therefore ensure appropriate informed consent processes, by explaining the limitations of confidentiality to victims and witnesses as well as referring clients to external services for clinical treatment or therapy if needed.

²⁰ Unpublished results from Witness Feedback Project in the Bosco Ntaganda and Dominic Ongwen cases. The project aims at collecting a broad set of data from all witnesses and victims testifying in person, shortly before and after testimony, in order to measure, *inter alia*, the impact of testimony on psychological well-being. In addition, the VWS asks witnesses and victims to evaluate the quality of services and are gives them a chance to express their views about the process in which they participated.

²¹ Stepakoff, S., Reynolds, S., Charters, S. 'Self-Reported Psychosocial Consequences of Testifying in a War Crimes Tribunal in Sierra Leone' (2015) *International Perspectives in Psychology: Research, Practice, Consultation*, Vol. 4, No. 3, 161-181.

²² Bearing Witness at the International Criminal Court, an Interview Survey of 109 Witnesses. Human Rights Center, UC Berkeley School of Law, 2014, available at:

<https://humanrights.berkeley.edu/sites/default/files/publications/bearing-witness-at-the-international-criminal-court-june-2014.pdf>.

²³ See Regulation 79, Regulations of the Registry.

²⁴ PLAN criteria. See Operations: Tactical Planning Principles. *Authorised Professional Practice*. UK College of Policing, available at: <http://www.App.college.police.uk>.

²⁵ See APA (n 27). The ethical principle of 'multiple relationships' (Rule 3.05 (a)) stipulates that "A multiple relationship occurs when a psychologist is in a professional role with a person and at the same time is in another role with the same person". While "(...) multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical", they require psychologists to ensure that the best interests of the client are protected at all times and to take appropriate steps if needed. Also in accordance with (Rule 3.05 (c)) "When psychologists are required by law, institutional policy, or extraordinary circumstances to serve in more than one role in judicial or administrative proceedings, at the outset they clarify role expectations and the extent of confidentiality and thereafter as changes occur".

Most importantly, the professional ethics guide the ICC psychologists to set up interventions within a clearly defined professional framework.²⁶ It is a generally established principle that professional boundaries are an essential tool and yardstick for the work of psychologists and other psychosocial or medical experts.²⁷ For psychologists, boundaries are layered and multiple, consisting of legal, moral or ethical, emotional and relational aspects.²⁸ Critical elements of boundaries include: (a) managing well the relationship with clients by ensuring the psychologists' clear and unambiguous role, by maintaining the autonomy of the clients and the independence of the psychologist's professional opinion; (b) ensuring that interventions remain within the limitations of the expertise of the psychologist and avoiding under- or over-involvement of the professional (c) communicating boundaries and limitations inherent to the psychologist's role to clients by way of an informed consent process, which clearly explains the nature, purpose and limitations of the intervention that is offered and any limitations to confidentiality; (d) employing (peer) supervision; and (e) carefully observing confidentiality rules as well as other professional rules.²⁹ This obligation of setting professional boundaries even becomes more important in case of vulnerable clients: '[t]he larger the inequality in the professional relationship and the greater the dependency of clients, the heavier is the responsibility of the professional psychologist.'³⁰

The reason for the importance of establishing professional boundaries is two-fold. On the one hand, establishing professional boundaries protects psychologists in their work.³¹ It allows them to provide support starting from a position of empathy, but contained in a clearly defined framework, without being overwhelmed or 'drained' by the needs of their clients. Maintaining a professional attitude creates a professional distance that allows for containment, reflection, transference or guidance, without coinciding fully with the client's experience.³² It also assists psychologists in managing expectations of clients, whose rights may have been repeatedly violated in various ways and who often present a multitude of needs.³³ This is the case particularly in the context of witnesses and victims participating in the judicial process at the ICC, who mostly come from war-torn communities and who frequently suffer from numerous rights violations. These considerations result in the witnesses and victims having a large number of competing safety, health, economic, educational, justice and other needs. Knowing and communicating clearly which needs the VWS can address, directly or by referral, as part of the victims' participation in an international justice mechanism, and which rights the ICC

²⁶ See e.g. Victims and Witnesses Unit Report on confidentiality of medical records and consent to disclose medical records. ICC-01/04-01/06 2166 02-09-2009 IO T.

²⁷ See *Ethical Principles of Psychologists and Code of Conduct*, American Psychological Association, Art. 3.10, 4.01, 4.02; *Meta-code of Ethics*. European Federation of Psychologists' Associations, available at: <http://ethics.efpa.eu/metaand-model-code/meta-code/>; Gutheil, G., M.D. and Gabbard, G., M.D. 'The concept of Boundaries in Clinical Practice: Theoretical and Risk-Management Dimensions' (1993) *American Journal of Psychiatry*, 150-196.

²⁸ Finlay, L. *Relational Integrative Psychotherapy: Processes and Theory in Practice*. (Chichester, E. Sussex: Wiley. 2016).

²⁹ Second Report on the 'Right of everyone to the enjoyment of the highest attainable standard of physical and mental health', UN General Assembly A/64/272. Smith, D. '10 Ways Practitioners can avoid frequent ethical pitfalls' (2003) *APA Monitor on Psychology*, Vol. 34, No 1, available at www.APA.org.

³⁰ Meta-code of Ethics (n 27) para 3.

³¹ *ibid*

³² Finlay (n 28).

³³ See WHO, *Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies*, 2007, available at: https://www.who.int/gender/documents/OMS_Ethics&Safety10Aug07.pdf.

can and cannot protect, helps in the assessment and prioritisation of possible interventions by VWS.

On the other hand, the establishment and management of boundaries protect clients, witnesses and victims, especially those suffering from trauma. Often, victims and witnesses were exposed to a series of traumatic incidents, the consequence of which had shattered their lives, belief systems, trust, families, communities and physical integrity – sometimes overnight and sometimes over the course of years. While victims' psychological responses to traumatic events vary significantly and in part depend on social, cultural and political aspects of their situation,³⁴ one of the key features of trauma is the sense of loss of control.³⁵ Victims and witnesses often express how the traumatic events made them feel powerless, unable to act against their aggressor, incapable to protect themselves and their loved ones against the threat to be killed, raped or otherwise harmed. Afterwards, the trauma symptoms again cause a sense of loss of control, as the unwanted, intrusive thoughts, flashbacks or nightmares seem to appear arbitrarily, prompted by seemingly random triggers, which may result in avoidance of anything that could possibly remind the person of traumatic events. Reliving the events over and over again provokes feelings of intense fear as well as physical symptoms of arousal and hyper-alertness.³⁶ Exposure to multiple traumatic events may also lead to the development of a cognitive fear network, further amplifying the number of triggers that provoke generalised fear and other traumatic reactions.³⁷ In addition to this vicious cycle of trying to forget and being forced to remember, trauma may lead to alterations in survivors' personality, and in their capacity to relate to others and to the world. As a result, the entirety of the impact often becomes a severe hurdle in their recovery and for their efforts to rebuild their lives.³⁸

The critical importance of the sense of loss of control as part of trauma makes it also a central aspect of the interaction with witnesses and victims. Facilitating participation in judicial proceedings at the ICC may contribute to restoring their dignity and agency. Representing victims, assisting them to write their stories down in application forms, pleading on their behalf and giving them an active role in the proceedings are actions that can potentially give survivors back a sense of control and ultimately bring recognition of their suffering and a form of restoration.

This therefore begs the question: how can the Court help to ensure that interactions with witnesses and victims fulfil their potential to be restorative?

³⁴ Bracken, J. 'Hidden Agendas: Deconstructing Post Traumatic Stress Disorder' In: Bracken, J. and Petty, C. (eds) *Rethinking the Trauma of War*. (Free Association Books/London/New York, 1998, at 38-59.); de Jong, J., Komproe, I, Van Ommeren, M. (2003). *Common Mental Disorders in Post-Conflict Settings* (2003) *The Lancet*; 361:2128-2130; see Schauer E. and Elbert T. 'The Psychological Impact of Child Soldiering' In: Martz, E. (ed.), *Trauma Rehabilitation After War and Conflict* (Springer-Verlag New York, 2010, at 324).

³⁵ Van der Kolk, B. *The Body Keeps the Score: Mind, Brain and Body in the Transformation of Trauma* (Penguin Books, 2015); An Michels, Expert Report - The Psychosocial Impact of War-related Crimes on Victims of the Sierra Leonean Conflict, filed in Prosecutor v. Brima et al, case no. SCSL-04-16-T, Prosecution Submission Pursuant to Rule 100(A) of the Rules of Procedure and Evidence, 28 June 2007, available at <http://www.scsldocs.org/documents/view/4863-12754>, at Annex G (file SCSL-04-16-T-614 pgs 22304-22487), at 22457-22472.

³⁶ Herman, J. *Trauma and Recovery* (New York: Basic Books, 1992).

³⁷ See Schauer E. and Elbert T. (n 34).

³⁸ Van der Kolk (n 35).

V. Counsel or counselling: Same boundaries?

In the judicial context, there is often confusion about the words ‘counsel’ and ‘counselling’, as both can refer to providing legal advice and psychological counselling. While the two professions are very different in nature, there are important similarities in their roles in the counsel-client or psychologist-client relationship. Both relationships rely in part on the sharing of a very personal, often traumatic, story of the victim with the professional. In both relationships the establishment and management of professional boundaries and expectations is key. Difficulties may arise around the creation of dependency. Last but not least, these relationships may be emotionally draining for the professional, whether he or she is a psychologist or a legal representative.

Conscious of these parallels, it may be useful to look closer at how psychologists manage the relationship with clients, particularly witnesses and victims, to deepen our understanding of the challenges stemming from the relationship between the legal representatives and the victims. It may also help to shed light on the question how to ensure that the victim participation process is not only dignified and professional, but also fulfils its promise to be restorative. I make four points in this respect.

Firstly, as mentioned above, psychosocial interventions by the ICC have a clearly defined goal and face limitations in what the VWS can offer and achieve. Part of giving back control is being very clear about one’s role, goal and boundaries. Clear ethical standards offer a framework to determine the boundaries, as does the legal framework of the Court. The clearly defined and limited goal of a psychosocial intervention creates a focus which can be an anchor for other restorative interventions. The restricted space for intervention set by the mandate to facilitate testimony and prevent further harm creates an opportunity rather than a limitation. Indeed, the goal of the VWS’s psychosocial work at the ICC is not a therapeutic one but rather one of preventing further harm due to the involvement in the court process. Indirectly, by helping to achieve positive and meaningful participation, psychologists do contribute to bringing closure and ‘catharsis’ for witnesses and victims.³⁹ The restorative impact, however, primarily lies within the judicial process itself – enclosed in the different steps from statement taking, to testifying to judgment - even if this process is mainly retributive in nature. While the determination of the elements of a judicial process contributing to the victims’ sense of justice is a complex one, securing a conviction of the accused is certainly a key factor for victims.⁴⁰ This notwithstanding, also facilitating access to justice in a dignified way and ensuring meaningful interaction with the Court can have, for many people, a therapeutic impact, as established in previous studies.⁴¹

Secondly, there is the important aspect of managing expectations of victims. Communicating clearly what a professional can and cannot offer and explaining what a witness or victim can reasonably expect from his or her participation in a judicial process is a key ethical principle.⁴² For example, witnesses and victims appearing before the ICC in person rate very positively the

³⁹ Stepakoff, S., Reynolds, S., Charters, S. (n 22); *Echoes of Testimony*. 2016 (n 1).

⁴⁰ Human Rights Center, UC Berkeley School of Law (2015), *The Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court*, at 3 [hereinafter *Berkeley Study*]; available at: <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf>.

⁴¹ Stover, E., *The Witnesses: War Crimes and the Promise of Justice in The Hague*. Philadelphia: University of Pennsylvania Press, (2005); Stepakoff, S., Reynolds, S., Charters, S. (n 22); *Echoes of Testimony* (n 1).

⁴² See *Ethical Principles of Psychologists and Code of Conduct* (n 27); *Meta-code of Ethics*, European Federation of Psychologists’ Associations (n 27).

provision of clear and detailed information about the different steps in the process of testifying, given during the familiarisation process, because it helps them to better understand their role and gives them a feeling of control.⁴³ Making promises that a party or the VWS staff cannot keep or creating unrealistic expectations about the process of appearing before the Court may breach the trust that the victim or witness puts in the process and in those who support him or her to participate in that process.

Thirdly, avoiding dependency is another reason to clearly establish and manage well the relationship with victims. The risk of dependency is almost unavoidable, particularly in situations where victims and witnesses undergo very intrusive protection measures to keep them safe. Intrusive protection measures, such as the participation in a protection programme, take control of large parts of a person's life. In such a situation, it is also the VWS psychologist's task to monitor and advise protection teams to minimise dependency, for instance by advising on how victims and witnesses can themselves rebuild their lives and gain independence, even within the limitations and confined space of a protection programme. By encouraging protection teams to consider carefully the psychological impact of proposed protection measures, they can avoid a situation that would make a witness or victim's situation worse.

Finally, psychologists are very focused on properly managing their relationship with each victim or witness to protect themselves. Dealing with victims of trauma can be emotionally draining. The stories of victims are absorbing. They make psychologists and other support staff members - often already passionately committed to their work - walk the extra mile. But while this is mostly admirable, it also makes psychologists vulnerable. If they fail to manage their relationships with clients and do not take care of themselves, they lose focus and may damage their health, which may lead to bad decision-making and poor care.

There are, however, also important differences in the relationship between psychologists and victims and legal representatives and victims. I make four points here about these differences.

Firstly, there is a critical balance between the individual versus the collective. Although the VWS psychosocial support team also provides general advice about mental health and related issues to the VWS, the judges, parties and participants and the Court as a whole, the entire focus of the work of the psychologists is an individual one. Psychosocial interventions are always based on the outcome of individual psychosocial assessments. Every witness and victim's situation is different, and thus any proposed intervention should be tailored to meet their specific needs. This individual focus is also reflected in the Court's definition of vulnerability⁴⁴ that aims at avoiding a categorisation of vulnerable victims and witnesses and moreover looks at each person's individual needs. The broad definition, and the way the ICC implements it,⁴⁵ recognises that, for instance, not every victim of sexual and gender-based violence has the same needs, or that witnesses, who have perpetrated crimes, can be vulnerable if they suffer from trauma or anxiety linked to their circumstances as an at-risk witness.

⁴³ Witness feedback project (n 21).

⁴⁴ See Regulation 94*bis*, ICC Regulations of the Registry.

⁴⁵ See above (II): for instance, as opposed to decisions before the Special Court for Sierra Leone being premised on 'victimisation' the ICC's decision-making is based on ICC Rule 88 of the Rules of Procedure and Evidence for 'Special Measures' and individual vulnerability assessments by the Court's psychologists (pursuant to Regulation 94*bis* of the Regulations of the Registry).

Secondly, in the legal representation of victims, the uniqueness of every story is in principle a key element, as reflected by the fact that the ICC initially evaluated individually each and every victim application. However, due to the large number of victims applying to participate, and the associated security risks, legal representatives often are unable to interact meaningfully with victims in a manner that focuses on the *individual*. Legal representation of victims may in effect become representation of a *group*, which thereby diminishes the role of individuals.

Thirdly, past procedural decisions at the ICC have also increasingly tended to steer victim participation procedures towards a collective or a hybrid approach.⁴⁶ Legal representatives of victims represent groups, and therefore, mainly need to focus on the collective suffering or at least on a common understanding of what constitutes the damages for their group and, depending on the case, the collective need for reparations. In addition, the legal representatives of victims need to handle the different needs of victims and the variety of views on how they see their process of participation. While this process may be logical from a legal perspective, it creates challenges from a psychological perspective. In my opinion, not every victim group has a clear and shared identity, and some affiliations to the group of victims are much looser or more ambiguous than others. Some victims only share a common traumatic history but re-established their post-trauma life in very different ways. Others are members of the same affected communities, but differ fundamentally in what they suffered from during the conflict. And as studies show, victims also often express very different opinions on how they want to participate, have their voices heard, and be represented.⁴⁷ The risk of a conflict of interest arising between victims' groups or even within a single group creates a challenge that legal representatives face and which also impacts their relationships with victims. Psychologists, on the contrary, only exceptionally have to manage this different layer in the relationship as they primarily focus on each individual's needs and stories.

Finally, the legal representatives, more than the psychologists, need to deal directly with the lack of clarity of the legal process surrounding victim participation at the ICC. In this context, the absence of a settled body of legal precedents - due to the novelty of international judicial proceedings and disparate holdings in different cases and even at different procedural stages - brings as a consequence an unpredictability of judicial decisions, which has a direct impact on victims. This makes it difficult to manage expectations of victims and keep them duly informed as it is challenging to outline possible scenarios or predict outcomes. As the first line of communication between victims and the Court, legal representatives often find themselves in situations where they need to deal directly with the emotional impact of judicial decisions, which can be very positive in the case of a conviction, but also devastatingly negative for victims in the case of an acquittal.

⁴⁶ See generally Walley (n 14); Suprun D. (2016). 'Legal Representation of Victims before the ICC: Developments, Challenges and Perspectives' (2016), *International Criminal Law Review*, Vol. 16, Issue 6, 972-994; Berkeley Study (n 10). The collective representation model refers to the decision ordering that a common legal representative shall represent all victims who have been admitted to participate in the case. See, e.g., *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07-1328, Order on the Organisation of Common Legal Representation of Victims, para 13 (July 22, 2009). The hybrid representation model refers to 'the system that combined collective recruitment and registration, but preserved the ability of individual victims to join cases as trial participants. Only victims who wished to appear in court [...] needed to submit an individual application to chambers.' See Berkeley Human Rights Center (n 40) 27. See e.g. *Prosecutor v. Kenyatta et al, Decision on victims' participation and representation*, Case No. ICC-01/09-02/11-498 (3 October 2012).

⁴⁷ Berkeley Study (n 40) 37, 46, 59, 67. Conclusions about different victim groups highlight differences.

VI. Recommendations

Where do these observations leave us in the reflection about the psychological aspects of the counsel–victim relationship? While it is not the intention of this article to draw far-reaching conclusions about the development of the counsel–victim relationship, this article makes four suggestions to enhance the quality of this relationship from a psychological perspective. An improved counsel-client relationship will ameliorate the victims’ experience and perception of the judicial process, and may contribute to the restorative value of victim participation.

Firstly, legal representatives of victims would certainly benefit from having easy access to training about the psychological aspects of victimisation and trauma in particular. Such training will foster the understanding of the psychological meaning of the relationships they develop with victims, in their role of connecting victims to the Court and representing the variety of victims’ interests. Knowledge about the impact of trauma symptoms will also assist them in understanding the complexity and variety of needs and expectations victims present. Last but not least, it would also help them to understand and communicate the boundaries of their role, recognise the point where their job ends and where the job of psychosocial professionals begins and know the limitations of psychosocial support available in the context of the ICC judicial process. Being able to draw these lines may help them to cope better with victims’ stories and carry the weight of their expectations.

Secondly, legal representatives of victims themselves deserve access to self-care tools, peer-support and, where needed, psychosocial support. Interacting with large numbers of victims, often in difficult circumstances, having to manage directly their sometimes exaggerated or utopic expectations towards the justice process, and relentlessly representing them in a complex and unpredictable legal process, can take its toll and eventually harm the professional. Because legal representatives often operate in small teams, without institutional framework, and with limited sounding boards, these circumstances make them more susceptible to stress, secondary trauma and burn-out.

Thirdly, in the further development of legal and procedural guidance for the legal representatives of victims, the Court should pay explicit attention to ethical questions, addressing in detail potential issues around the scope and boundaries of the client-counsel relationship, especially when interacting with vulnerable victims.⁴⁸

Finally, any process of further fine-tuning the process of victim participation should take into consideration the difficult balance between the collective and the individual. In doing so, the Court should address the need of some victims to develop a personal relationship or contact with a legal representative or another professional representing the Court. Processes which are primarily collective (and lacking a sufficient personal relationship or contact) might not sufficiently address the fundamental psychological need of victims to be recognised as individuals with unique needs, wishes and strengths. At the least, the Court should create space for those victims who wish to develop a more personal link with the institution in which they put their faith.

⁴⁸ See Art 9.2, ICC Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1 (2 Dec. 2005) (referring in particular to victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled).

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

Ellie Smith*

Introduction

Whether a perpetrator commits interpersonal violence domestically or internationally in the context of armed conflict and mass victimisation, it can induce severe and long-lasting psychological trauma in victims, their families and, depending upon the context of perpetration, communities and society more widely.¹

Whilst trauma symptoms are undoubtedly problematic for the victims themselves, they can also pose challenges for prosecuting authorities in the effective administration of justice. In particular, the nature, quality and content of any evidence victims are able to provide is likely to be affected by the trauma they have suffered. Testimony may be deeply distressing and problematic for these victims. They may comport themselves poorly in or out of court. Their memory of elements of their experiences might simply be unavailable or inaccessible to them, or their recollections may be jumbled, confused and incoherent.²

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

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

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¹ Yael Danieli, 'Massive trauma and the healing role of reparative justice' (2009) 22(5) *J of Traumatic Stress* 351.

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

This article employs the term ‘trauma’ in a broad sense, to refer to an adverse psychological response to an overwhelming violent or catastrophic event or events.³ Notably, much of the Court’s attention to date in its engagement with issues of trauma has focused on the potential impacts of PTSD. The absence of a PTSD diagnosis does not necessarily mean, however, that a victim is symptom free or that they will not experience difficulties in engaging, including with the various organs of the Court and its officers.⁴

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

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

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

The Court, in most cases, operates within the challenging context of mass victimisation, seeking to pursue an ostensibly retributive mandate whilst simultaneously responding to the wide and sometimes disparate needs of societies in transition, where the reparative needs of substantial numbers of individual victims may compete with the need for collective repair and healing.⁵

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

Mass victimisation can engender a complex and interrelated interplay of individual and collective psychological responses in both individual victims and the affected community. At an individual level, trauma arising as a result of international crimes can produce ‘a

³ See Cathy Caruth, *Unclaimed Experience: Trauma, Narrative and History* (John Hopkins University Press, Baltimore 1996) (using a similar definition). I adjust the definition here to the specific context.

⁴ An ICC Trial Chamber in 2016 heard evidence on this point, namely the expert testimony of Dr. Daryn Reicherter during the *Bemba* sentencing hearing. *Prosecutor v. Bemba*, Transcript, 16 May 2016, ICC-01/05-01/08-T-368-ENG ET WT 16-05-2016 1/116 SZ T, at 88, line 15 – 89, line 9.

⁵ Fattah defines mass victimisation as ‘victimisation directed at, or affecting, not only individuals but also whole groups. In some cases the groups are very diffuse, the members have nothing or not much in common, and the group is not targeted as a specific entity. More often, however, the acts of victimisation are directed against a specific population’. Ezzat Fattah *Understanding Criminal Victimization* (Scarborough 1991) 412.

metamorphosis of the psyche ... mental decomposition and collapse,⁶ leading to the deterioration and/or collapse of mental functioning.⁷ Gross violations can profoundly affect the survivor's sense of self,⁸ engendering identity disorientation and depersonalisation.⁹ Man-made trauma such as conflict and gross human rights violations may shatter survivors' core beliefs, including their belief that the world is a just place (described as 'the existential dilemma'),¹⁰ their personal inviolability or their belief in others as trustworthy individuals.¹¹ Survivors may also experience shame, self-blame and guilt, and a sense of helplessness. Survivors can suffer grief both for others and the self, together with anxiety, depression, emotional numbness and avoidance. They may also experience intrusive phenomena including as flashbacks and nightmares.¹² Where victims have been subjected to forms of sexual violence, survivors may also experience fear of intimacy, sexual dysfunction and self-loathing, which may in turn lead to self-injurious behaviour.¹³

In addition to the psychological harms experienced at an individual level, affected societies may suffer from trauma.¹⁴ Trauma at a societal level can manifest itself in varying forms of community dysfunction. Torture or ethnic violence typically create 'an order based on imminent pervasive threat, fear, terror, and inhibition,... a state of generalized insecurity, terror, lack of confidence, and rupture of the social fabric.'¹⁵ Where communities witness the perpetration of abuses such as rape and other forms of violence against their members, they may experience severe collective trauma,¹⁶ including shock, which can be exacerbated by grief

⁶ Marcelo N. Vinar, 'The specificity of torture as trauma: The human wilderness when words fail' (2005) 86 Intl J of Psychoanalysis 313.

⁷ Henry Krystal, *Integration and Self-Healing: Affect, Trauma, Alexithymia* (The Analytic Press 1988).

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

⁹ Udo Rauchfleisch, *Allgegenwart der Gewalt* (Vandenhoeck and Ruprecht 1996).

¹⁰ See e.g., Herlihy and Turner (n 3) 84; Ramsay Gorst-Unsworth and Stuart Turner 'Psychiatric Morbidity in Survivors of Organised State Violence Including Torture' (1993) 162 British J of Psychiatry 55.

¹¹ International Rehabilitation Council for Torture Victims, *Psychological Evaluation of Torture Allegations: A practical guide to the Istanbul Protocol – for Psychologists* (2nd ed 2007) 6 – 7 [hereinafter *Practical Guide*]; see also Inger Agger, in *The Blue Room: Trauma and Testimony among Refugee Women – A Psycho-Social Exploration* (Zed Books 1992) 13.

¹² See e.g, Chris Brewin 'Autobiographical Memory for Trauma: Update on four Controversies' (2007) 15(3) Memory, 227-28; Lisa Duke and others, 'The sensitivity and specificity of flashbacks and nightmares to trauma' (2008) 22 J of Anxiety Disorders, 310-20.

¹³ See e.g, Kenneth Plummer, *Telling Sexual Stories: Power, Change and Social Worlds*, (Routledge, 1995) 70, 74; Cassandra Clifford, 'Rape as a Weapon of War and its Long-term Effects on Victims and Society', Conference paper, 7th Global Conference, *Violence and the Contexts of Hostility*, Budapest, 5-7 May 2008; Sophie Yohani and Kristen Hagen, 'Refugee women survivors of war related sexualised violence: a multicultural framework for service provision in resettlement countries' (2010) Vol. 8, No.3 Intervention, 208-09; Kristen Hagen, 'The Nature and Psychosocial Consequences of War Rape for Individuals and Communities' (2010) Vol.2, No. 2 Intl J of Psychological Studies, 19; Pamela Bell, 'Consequences of Rape for Women's Health and Well-being, Family and Society', in Marie Vlachova and Lea Biason (eds), *Women in an insecure world: Violence against women, facts, figures and analysis*, (DCAF 2005) 115-21, 117-19.

¹⁴ See Jeffrey Alexander, *Trauma: A Social Theory* (Polity Press 2012) (exploring the development of social and cultural trauma). See also Stevan Weine and others, 'Testimony psychotherapy in Bosnian refugees: A pilot study' (1998) 155 Am J of Psychiatry, 1721; Kira (n 9) 55.

¹⁵ See Kira (n 9) 54. Although torture is an act perpetrated against individual victims, its effects are intended to be experienced on a broader scale, with the effect that, whether implicitly or explicitly, torture represents a threat to the victim's wider community and its value systems. See *Practical Guide* (n 12) 7.

¹⁶ Hagen K, 'The Nature and Psychosocial Consequences of War Rape for Individuals and Communities' (2010) Vol.2, No. 2 Intl J of Psychological Studies, 19; Joshua Goldstein, *War and Gender* (Cambridge University Press 2001) 362-63; Christoph Schiessl 'An element of genocide: Rape, total war and international law in the twentieth

for the victim – where the victim has died, or, in the case of rape, is rejected by her family and community.¹⁷

Rather than being experienced discretely, individual and collective/societal aspects of trauma are interlinked and interdependent. Victims experience trauma in multiple and concurrent capacities: individually, as a direct victim; indirectly, as a family member of a direct victim; and as a member of a victimised community or group, indicating a potentially complex array of traumatic experiences and symptoms in those participating in proceedings before the ICC. Clinical literature identifies a ‘layering’ of trauma in such situations, where an individual may experience the first ‘layer’ of trauma with the initiation or increase in repression and persecution of, and violence against, the particular group with which they identify. The second ‘layering’ of trauma arises when the individual personally becomes a victim of serious human rights violations or international crimes.¹⁸

These layers operate interdependently. For example, community affiliation is an aspect of an individual’s personal identity.¹⁹ Where perpetrators direct persecutory or abusive actions, such as genocide or ethnic cleansing, at entire ethnic or cultural populations, the sense of allegiance to a group is heightened,²⁰ producing mutual support within the group and collective solidarity.²¹ An attack on the group, or any of its members, disrupts social functioning and identity at both individual and collective levels.²² In these circumstances, the consequences of an act of ethnic cleansing, such as the destruction of a village or community, amounts essentially to the destruction of the personal point of existential reference.²³

Conversely, psychological trauma can affect the individual’s sense of collective attachment and connectedness, and this, coupled with a loss of trust in others, may impact upon familial and social roles – such as parent, spouse, employee, employer, citizen²⁴ - engendering a

century’ (2002) Vol. 4(2) J of Genocide Research, 198; Bell P, ‘Consequences of Rape for Women’s Health and Well-being, Family and Society’, in Marie Vlachova and Lea Bionson (eds), *Women in an insecure world: Violence against women, facts, figures and analysis*, (DCAF 2005); Annette Lyth, ‘The development of the legal protection against sexual violence in armed conflicts – advantages and disadvantages’ (2001).

¹⁷ Yohani S and Hagen K, ‘Refugee women survivors of war related sexualised violence: a multicultural framework for service provision in resettlement countries’ (2010) Vol. 8, No.3 *Intervention*; Hagen K, ‘The Nature and Psychosocial Consequences of War Rape for Individuals and Communities’ (2010) Vol.2, No. 2 *Intl J of Psychological Studies*, 19.

¹⁸ Dislocation and exile, for those forced to flee violence and seek safety across borders marks the third phase of the traumatising process. See Guus van der Veer, *Counselling and Therapy with Refugees and Victims of Trauma: Psychological Problems of Victims of War, Torture and Repression* (2nd ed, Wiley and Sons 1998) 5.

¹⁹ See e.g. Yael Danieli, *International Handbook of Multigenerational Legacies of Trauma*, (New York 1998), at Introduction.

²⁰ See e.g. Aroche J and Coello M J, (2004) ‘Ethnocultural Considerations in Treatment of Refugees’, in Wilson J and Drozdek B (eds), *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims* (Brunner-Routledge 2004) 56 [hereinafter *Broken Spirits*].

²¹ Modvig J and Jaranson J M, ‘A Global Perspective of Torture, Political Violence, and Health’ in *Broken Spirits* (n 21) 37.

²² Joop De Jong, ‘Public Mental Health and Culture: Disasters as a Challenge to Western Mental Health Care Models, the Self, and PTSD’, in in *Broken Spirits* (n 21) 165, 168.

²³ David Becker, ‘Mental Health and Human Rights: Thinking About the Relatedness of Individual and Social Processes’, paper presented at International conference, *Towards a Better Future: Building Healthy Communities* (October 2003) Belfast.

²⁴ Ron Baker, ‘Psychosocial Consequences for Tortured Refugees Seeking Asylum and Refugee Status in Europe’, in Metin Basoglu (ed), *Torture and its Consequences: Current Treatment Approaches* (Cambridge University Press 1992) 86.

deterioration in social, educational and occupational functioning.²⁵ This in turn can lead to social withdrawal and isolation, affecting societal and cultural aspects of personal identity.²⁶

Individual and collective trauma responses are seemingly influenced by the specific targeting of abuse and the duration and intensity of the traumatic event(s).²⁷ These factors can, in turn, affect the individual's perceived threat to life, influencing the consequent trauma response. An individual is more likely to perceive a violation as representing a threat of imminent death when it is individually and directly targeted, compared to longer-term repressive stressors directed at a particular community.²⁸ Significantly, while mass conflict is recognised as having a potentially widespread, psychological impact upon society, the psychological effects are unlikely to be uniform, and instead will depend upon the extent to which specific groups and/or individuals were affected.²⁹

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

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

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

While some victims appearing before the Court either as participants or witnesses are likely to be experiencing trauma symptoms, it is important to acknowledge here that this will not be the case for all victims. A Court-funded psychologist, in the case of witnesses appearing for the Prosecution, at least, assesses individuals prior to their interviews in order to determine whether they are sufficiently mentally robust to withstand the investigative and judicial process.³⁰ Once any witness is physically before the Court, the Victims and Witnesses Section is mandated to provide support to ensure the psychological safety of witnesses.³¹

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

²⁵ *Practical guide* (note 12) 7.

²⁶ Kira (n 9) 54.

²⁷ Jens Modvig and James Jaranson, 'A Global Perspective of Torture, Political Violence, and Health', in *Broken Spirits* (n 21) 37.

²⁸ *ibid*

²⁹ Aroche and Coello (n 21) 57.

³⁰ Article 68(1) of the Rome Statute requires the Office of the Prosecutor to take measures to safeguard the victims' psychological well-being during its investigation; see also ICC Office of the Prosecutor, 'Policy Paper on Sexual and Gender-based Crimes' (2014), at para 70, <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

³¹ Rome Statute, Art. 43(6).

Prosecutor. As a result, the Defence and the Legal Representatives of Victims are not required to replicate such screening in their investigative and preparatory processes.

The precise incidence of active trauma symptoms in victims and witnesses who engage with the Court is unknown. We know, however, that traumatic symptoms in victims endure for many years after the traumatic event(s) experienced,³² and as a result, and in light of the above, one should anticipate some level of ongoing trauma in victim-witnesses.

In addition, while a significant number of victims and witnesses may have suffered trauma symptoms in the immediate aftermath of the event(s), the intervention of natural recovery responses in them may mean that they are symptom free by the time that they appear before the Court.³³ Notably, however, where those individuals suffered a trauma response at the time of the event, it may be that they still encounter difficulties in recalling the episode in its entirety or with coherence. As a result, the Court should consider the impacts of trauma on memory and testimony as a live issue in those instances.

3. The impact of trauma on memory and victim testimony

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

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

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

³² A cross-sectional survey of a population-based sample of more than 1,300 survivors of atrocities committed in the former Yugoslavia ten years after the conflict, for example, found that a third of those who were sampled had suffered from PTSD in the immediate aftermath of conflict. At the time of assessment, 22% of the study sample was still experiencing symptoms of PTSD. See Basoglu M and others, 'Psychiatric and Cognitive Effects of War in Former Yugoslavia: Association of Lack of Redress for Trauma and Posttraumatic Stress Reactions' (3 August 2005) Vol. 294, No. 5, J of the Am Medical Assn 580: A randomised study into the mental health status of 400 Rwandan genocide survivors obtained similar results. In the Rwandan study, researchers found that more than half of the study sample continued to experience PTSD symptoms ten years after the event, while 60% suffered from major depression. See Brouneus K, 'The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health' (2010) 54(3) J of Conflict Resolution, 408.

³³ See Derek Summerfield, 'The Social Experience of War and Some Issues for the Humanitarian Field' in Patrick J. Bracken & Celia Petty (eds), *Rethinking the Trauma of War*, (Save the Children/Free Association Books 1998) 9, 29 (observing that the preoccupation with therapeutic impact overlooks issues of clinical resilience).

A number of traumatic symptoms have the potential to negatively affect a victim's recall of events. Where a victim is suffering from involuntary avoidance, for example, they may experience forms of psychogenic amnesia. This in turn will likely entail a disruption of either memory or perception, especially in relation to the traumatic event itself,³⁴ with the result that some or all of the traumatic episode may simply be inaccessible for the victim for as long as he or she continues to experience psychological symptoms of trauma.

Similar challenges arise for victims who dissociated at the time of the event. Dissociation comprises 'a disruption of and/or discontinuation in the normal integration of consciousness, memory, identity, emotion, perception, body representation, motor control, and behaviour'.³⁵ While dissociation arises as a coping strategy at the time of the event, its effect is to generate a level of amnesia in the victim for some or all of the traumatic event in question.³⁶

Autobiographical memory (alternatively known as declarative or explicit memory) refers to our ability to recall the events in our own lives.³⁷ We are able to store, recall and articulate autobiographical memories chronologically, coherently and voluntarily.³⁸

For victims suffering from autobiographical memory impairment, the normal processes and pathways for the storage of memory essentially fail at the time of the event concerned. As a result, a victim's memory may be fragmentary or non-existent.³⁹ In these cases, experts believe that while typical pathways for the storage of memories fail, the body's implicit memory ('implicit memory' relates to our emotional responses, habits or reflexive actions)⁴⁰ continues to operate, and so the body retains some form of memory of the traumatic event, albeit one that it difficult for the victim to access. Retrieval of such memories in such circumstances can be complex, and may require expert support. Most notably, these 'hidden memories' can arise unpredictably, in response to triggers or reminders of the event. While triggers or stimuli might include smells, sensation or emotional states that are resonant of the event, memories can also arise when someone puts questions to a victim about it. Because of this, different aspects of a victim's experiences may arise depending on the questions posed. Significantly, rather than experiencing the event as something that happened in the past, the unprocessed memory will arise for the victim as if occurring in the present, and so recall is likely to be highly distressing for the victim.

There is a growing consensus in clinical literature that traumatic memories are of a different character.⁴¹ During deeply traumatic events, it is believed that greatly heightened emotional arousal interferes with the processing and storage of information in explicit memory, and the

³⁴ See Herlihy and Turner (n 3) 85-87.

³⁵ American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 5th ed, (American Psychiatric Publishing 2013) 291.

³⁶ See Weiss, D.S., et al., 'Predicting symptomatic distress in emergency services personnel', *J of Consulting and Clinical Psychology* 63, 361-68.

³⁷ Herlihy and Turner (n 3) 86.

³⁸ *ibid*

³⁹ *ibid* (observing that 'when someone is interviewed and asked about an experience that was traumatic, and has only, or largely, memories of this fragmented type, they are unlikely to be able to produce a coherent verbal narrative, quite simply because no complete verbal narrative exists').

⁴⁰ *ibid*

⁴¹ Brewin, C, *Post-traumatic Stress Disorder: Malady or Myth?* Yale University Press (2003), London.

process essentially fails. As a result, autobiographical memory of the event is fragmentary or non-existent.⁴²

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

Where a victim has experienced rape and/or other forms of sexual violence, traumatic sequelae and hence memory retrieval can be additionally problematic for them. Avoidance and dissociation symptoms, for example, are significantly more pronounced in victims of sexual violence than in victims of non-sexual trauma.⁴³ Victims of sexual violence also experience a higher PTSD symptom count when compared to victims of non-sexual trauma.⁴⁴

While a number of traumatic symptoms can negatively affect a victims’ memory, other symptoms, whilst deeply problematic for the victims, may operate to *enhance* their recollection. Victims who suffer from regular flashbacks of an event, for example, or who have repeated nightmares such that they regularly relive their experiences, are likely to have a better-than-normal memory of the events concerned. Intrusive phenomena, such as flashbacks, however, may arise during testimony, and this in turn will affect victims’ ability to concentrate and to provide a coherent account.⁴⁵

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

4. Variations in the quality and nature of memory

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

⁴² Herlihy and Turner, for example, observe that ‘when someone is interviewed and asked about an experience that was traumatic, and has only, or largely, memories of this fragmented type, they are unlikely to be able to produce a coherent verbal narrative, quite simply because no complete verbal narrative exists.’ Herlihy and Turner (n 3) 86.

⁴³ See Van Velsen, C., Gorst-Unsworth, C., and Turner, S., *Survivors of torture and organized violence: demography and diagnosis*, *J of Traumatic Stress* (1996) 9, 181–93, 188.

⁴⁴ Ramsay, R., Gorst-Unsworth, C., and Turner, S., ‘Psychiatric morbidity in survivors of organised state violent including torture. A retrospective series’, *The British J of Psychiatry* (1993) 5-58; see also Lecic-Tosevski, D., and Bakalic, J., ‘Against Torture – The Road to a Healthy Individual and Society’, in Spiric, Z., Knezevic, G. And Jovic, V., et al (eds), *Torture in War: Consequences And Rehabilitation of Victims – Yugoslav Experience* (Intl Aid Network 2004) 97.

⁴⁵ Bogner, D, et al. (2007) ‘Impact of sexual violence on disclosure during Home Office interviews’, *British Journal of Psychiatry* (2007) 191:75–81.

In addition to the nature, degree and duration of a traumatic episode, the victim's personality and the extent to which he or she has been able to process the experience will influence the traumatic response. Where, for example, an individual is hypersensitive, he or she would likely be traumatised more readily and would experience an event as more traumatising when compared to someone who does not easily respond to stimulation.⁴⁶ The degree of resilience a person possesses (i.e. the extent to which a person is able to recover unaided from a distressing event) also influences the persistence of his or her symptoms. One also would anticipate differences in memory and focus between victims with a 'fight' response at the time of the event when compared with those experiencing a 'flight' response. The mental focus – and hence memory content – in the former would likely relate to the source of the trauma itself, including the attacker, or any weapons used. In the case of the latter, any memory would likely focus on possible escape routes, including, for example, the layout of a room or the position of windows or the presence of others.⁴⁷

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

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

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

5. Traumatic memory in evidence before the ICC

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

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

⁴⁶ See *Prosecutor v. Ntaganda*, Transcript, 18 April 2016, ICC-01/04-02/06-T-84-ENG, at 15, lines 5-24; 17, lines 5-25 (transcribing the testimony of prosecution expert Dr. John Charles Yuille as to hypersensitivity and 'predisposing and precipitating' factors); see also Wairagala Wakabi, 'Expert Explains Variance in Memory Among Trauma Victims', Intl Justice Monitor, 18 April 2016, <https://www.ijmonitor.org/2016/04/expert-explains-variance-in-memory-among-trauma-victims/> accessed 15 September 2019; Wairagala Wakabi, 'Expert Concludes Testimony on Trauma', Intl Justice Monitor, 22 April 2016, <<https://www.ijmonitor.org/2016/04/expert-concludes-testimony-on-trauma/>> accessed 15 September 2019.

⁴⁷ *ibid* 18, line 14 – 19, line 2.

coherent, complete and logical account.⁴⁸ ICC Trial Chambers have made similar observations in *Katanga*⁴⁹ and *Bemba* judgements.⁵⁰

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

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

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

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

The context for further expert psychological engagement is a promising one. The Court is already broadly alert to the psychological impacts of trauma on victims. It already has sought to accommodate victims' needs within its processes and demonstrated a willingness to engage with psychological expertise at various junctures in exercising its judicial functions. As already noted, Article 68(1) of the Rome Statute requires that the Court take 'appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses,' requiring in particular that the Prosecutor 'shall take such measures particularly

⁴⁸ *Prosecutor v. Lubanga*, Judgment, 14 March 2012, ICC-01/04-01/06-2842, at para 103.

⁴⁹ *Prosecutor v. Katanga*, Judgment, 7 March 2014, ICC-01/04-01/07-3436, at para 83 (noting that the Trial Chamber had 'made allowance for instances of imprecision, implausibility or inconsistency, bearing in mind the overall context of the case and the specific circumstances of individual witnesses ... some of whom were still children at the time, or were traumatised').

⁵⁰ *Prosecutor v. Bemba*, Judgment, 21 March 2016, ICC-01/05-01/08-3343, at para 230 (noting its relation to its evaluation of witness testimony that it 'considered the entirety of their testimony, having regard, in particular, to the capacity and quality of their recollection. In this respect, the Chamber took into account... the fact that the charges relate to events that occurred in 2002 and 2003, and that witnesses who suffered trauma may have had particular difficulty in providing a coherent, complete, and logical account.')

during the investigation and prosecution of such crimes.’ The Court is sensitive to the emotional difficulties that witnesses might experience in speaking about their experiences, and has engaged with psychological experts to inform its actions aimed at enabling vulnerable witnesses to provide testimony. In the *Lubanga* case, for example, the Court heard expert evidence on how best it could support and enable the evidence of former child soldiers suffering from trauma.⁵¹ It heard and received expert psychological evidence of victimhood in individual cases,⁵² as well as in relation to the form, degree and impact of trauma - for the purpose of determining an appropriate sentence,⁵³ and in assessing reparations.⁵⁴

Engagement by the Court with psychological expertise as a means of enabling its assessment of oral evidence, including in terms of accuracy and veracity, is not without its challenges. An accused person has a right to be tried without undue delay.⁵⁵ As a result, recourse to psychological expertise would need to be used relatively sparingly, and the Court should employ psychological expertise early on in order to avoid undue delays. In addition, the ICC Judges are and must remain the sole arbiters of fact in any case before them, including in assessing the weight of evidence and the credibility of those testifying before it. The Court must exercise particular care to ensure that recourse to psychological expertise as a tool for assessing victims’ evidence does not usurp its evidence-assessing function.

Conclusion

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

While effective assessment of evidence will necessarily involve recourse to psychological expertise, it is essential that the Court remains the arbiter of fact in any given instance. The

⁵¹ See *Prosecutor v. Lubanga*, Instructions to the Court’s expert on child soldiers and trauma, ICC-01/04-01/06-1671, 9 February 2009.

⁵² See e.g. *Prosecutor v. Ntaganda*, Prosecution’s list of expert witnesses and request pursuant to regulation 35 to vary the time limit for disclosure of the report of one expert witness, ICC-01/04-02/06-560, at 6, 16 April 2015 (instructing, inter alia, Maeve Lewis, a psychotherapist with expertise in working with survivors of sexual violence, with respect to psychological effects of trauma on four prosecution witnesses).

⁵³ In the *Bemba* case, for example, the Trial Chamber decided it would hear the evidence of Dr Daryn Reicherter on the ‘longitudinal and intergenerational impact of crimes, including aspects which had not previously featured in the evidentiary record, for example, the effects of trauma on parenting, intergenerational transmission of trauma, and healing prospects.’ *Prosecutor v. Bemba*, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, ICC-01/05-01/08-3384, at para 12, 4 May 2016.

⁵⁴ See *Prosecutor v. Lubanga*, Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012, ICC-01/04-01/06-2904, 3rd March 2015, paras 189 and 191; *Prosecutor v. Lubanga*, Amended Order for Reparations, 3rd March 2015, ICC-01/04-01/06-3129-AnxA, para 58; *Prosecutor v. Lubanga*, Filing on Reparations and Draft Implementation Plan, ICC-01/04-01/06-3177-Red, 3rd November 2015, paras. 32, 268-70, 273-78.

⁵⁵ Rome Statute, Art. 67(1)(c).

Court, therefore, must strike a careful balance to ensure that expert clinical evidence operates to support, inform, and enhance the Court's ability to carry out this function, rather than usurp it.

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

Juridified Victimhood at the ICC

Sara Kendall*

With a mandate that included victims of grave crimes, the International Criminal Court (ICC) became part of a global humanitarian network of actors and institutions that aid individuals and communities who have suffered harms. Broadly understood, humanitarianism is animated by sentiments of care rather than concerns with accountability. Yet humanitarian work is not only confined to organisations that provide humanitarian assistance, such as the International Committee of the Red Cross and Médecins Sans Frontières. The ICC's Rome Statute brought criminal accountability together with responding to victims' harms, which added a restorative dimension to the traditionally retributive objectives of international criminal law. The Statute's preamble mentions 'victims of unimaginable atrocities' even before the perpetrators who are alleged to have brought about their suffering.¹ Scholars and advocates describe a historically punitive field in relation to values and practices that include healing, restoration and transition.

Yet international criminal law understands harms more specifically as resulting from mass atrocity crimes, placing conditions upon the extent of humanitarian care that the Court can provide. Rather than responding to a need, as with other humanitarian forms, restorative justice at the ICC responds to a wrong. This article focuses on the process of translating suffering into legal categories that address wrongs rather than needs, and on the uneven outcomes this can produce among conflict-affected populations.

Building on my previous research on the ICC as well as collaborative work with Sarah Nouwen, this article reflects on how the Court's involvement with survivors of mass crimes appears in practice.² It considers how the ICC's engagement in forms of restorative justice could be addressed within the community of practitioners and commentators who shape and develop it. The international criminal legal profession is collectively participating in a process of 'juridifying' victimhood. This legal category of victimhood is distinct from how survivors of mass crimes may understand victimhood themselves, and it is also distinct from how other forms of humanitarian assistance may address them as recipients of care. Because this translation into legal categories bears consequences for victims of mass atrocity crimes, it is critical to reflect on how institutional forms and processes produce the 'juridified victim'³ as a legal person.

This article does not claim to offer solutions to such a complex issue, where much of its audience may have direct experience of this translation between humanitarian aims and legal frameworks. Instead it aims to help diagnose and encourage further reflection on this particular

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¹ Rome Statute of the International Criminal Court 1998, preamble.

² See Sara Kendall and Sarah Nouwen, 'International Criminal Justice and Humanitarianism' in Heller, Megret, Nouwen, Ohlin and Robinson (eds), *The Oxford Handbook to International Criminal Law* (OUP 2020); Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' [2014] 76(3-4) *Law and Contemporary Problems* 235 - 262; Sara Kendall, 'Beyond the restorative turn: The limits of legal humanitarianism' in De Vos, Kendall and Stahn (eds), *Contested Justice: the Politics and Practice of International Criminal Court Interventions* (CUP 2015).

³ See Kendall and Nouwen, 'Representational Practices at the International Criminal Court' (n 2).

legal person – the juridified victim – produced by the ICC’s blend of retributive and restorative justice. More reflection upon and attention to the consequences of these humanitarian processes may help mitigate some of their more damaging outcomes. At this relatively early stage in the experiment of using international criminal law towards humanitarian ends, we should consider how this might be done within the constricting framework of retributive justice.

1. Legal Humanitarianism

Victim participation and aid provision at the ICC operate as forms of ‘legal humanitarianism’, where law is used toward humanitarian objectives.⁴ This phrase refers to the tension between the two elements of international criminal law’s restorative turn: retributive and restorative justice. Proponents argue that victims of international crimes appeared primarily as witnesses in earlier international criminal tribunals, where turning to restorative justice remedies a lack or failure. For example, an early commentary from officials at the ad hoc tribunal for the former Yugoslavia presents the inclusion of a victims’ mandate at the ICC as correcting a past oversight: as the authors put it, it ‘marks a new step forward’ to ‘fill gaps’ by ‘accord[ing] the double status denied to them by the provisions setting up the ad hoc tribunals’⁵. This ‘double status’ suggests that individuals who have been victims of international crimes should be able to participate in a criminal process – to present their views and concerns where their personal interests are affected – in addition to seeking reparations for the harms they have suffered in the event of a conviction. Yet these retributive and restorative dimensions come into tension in practice. The restorative aspects of legal humanitarianism are limited by the retributive forms through which they are interpreted, from subject matter jurisdiction to concerns for fair trial rights.

The Rome Statute sought to establish a supra-national role for victims across civil and common law traditions within the institutional space of the ICC, a development hailed by victims’ rights advocates and treated as a central feature of the Court’s work. The ICC’s restorative mandate takes two main forms considered elsewhere in this collection: a regime of victim participation, as well as assistance and reparations through its independent Trust Fund for Victims (TFV or Fund) that is responsible for assisting conflict-affected individuals and populations who fall within the Court’s jurisdiction.

With nearly two decades of ICC practice, however, organisations and advocates that promoted a more expansive role for victims have critically reflected on some of the challenges that the Court faced in implementing this mandate.⁶ For example, side events at the 2019 meeting of the Assembly of States Parties (ASP) were given titles such as ‘Toward a victim-centred assessment on ICC performance’ and ‘The value of a harm-based, victim centred approach to reparative justice’. At one of these events, a former international criminal prosecutor claimed that the future ‘depends on a victim-centred approach’.⁷ Civil society advocates contended that the Court should review the role of the victims, particularly at the pre-trial stage; it should

⁴ Kendall, ‘Beyond the Restorative Turn’ (n 2) 353.

⁵ Claude Jorda and Jérôme de Hemptinne, ‘The Status and Role of the Victim’ in Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: a commentary* (Oxford University Press 2002), 1388.

⁶ Two notable examples in this area are FIDH, *Victims at the Center of Justice From 1998 – 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC* (2018) and REDRESS *No Time to Wait: Realising Reparations for Victims before the International Criminal Court* (2019).

⁷ This point by former ICTR and SCSL Prosecutor Stephen Rapp and the following observations by civil society advocates from Côte d’Ivoire, Libya and Georgia are drawn from the author’s notes taken at ‘Toward a victim-centred assessment on ICC performance’, ICC ASP 18, 2 December 2019.

conduct further outreach; and in light of the long delays in ICC proceedings, it needed to restore trust between victims and civil society actors working on the Court's behalf as intermediaries.

Such concerns about how the ICC implements its victims mandate reveal the restrictive legal logics that shape the Court's work. The paradox of 'victim centrism' is clear: as an institution, the ICC operates according to judicial calendars, the timing of filing deadlines and the parties' procedural obligations to respond, and the responsibilities of and relationships between different actors in and divisions of the court. The concerns expressed above would touch upon – at minimum – the work of legal representatives of victims, the Office of Public Council for Victims (OPCV), the Victims Participation and Reparations Section (VPRS), the TFV, and the Public Information and Documentation Section (PIDS) that handles Court outreach. Beyond these ICC actors and agents who have more direct experience with conflict-affected communities, whether advocating on their behalf or disseminating information to them, there is the critical Court architecture that deals with more specifically legal matters, such as the Office of the Prosecutor making determinations about preliminary examinations, investigations, case selection and charging (including dropping charges), as well as decisions from the Pre-Trial, Trial, and Appeals Chambers that can have the disorienting effect of granting rights and later withdrawing them. Jean-Pierre Bemba Gombo's acquittal on appeal in 2018 is a striking example of this dynamic, which affected more than 5,000 participating victims who were no longer entitled to reparations.

The determinations of these actors also bear heavily upon the individuals and communities who were most directly affected by the crimes they adjudicate. For example, in Pre-Trial Chamber II's decision not to grant the Prosecutor's request to open an investigation in Afghanistan in 2019, the judges made a determination that included, *inter alia*, the interests of justice on behalf of the victims who could be disappointed by a process beset by state cooperation issues. This decision concerned the important matter of access to justice, and human rights experts have argued on appeal that victims' rights to an investigation were foreclosed without accounting for the Court's international obligations under human rights law.⁸ An Appeals Chamber judge also made this point in her written dissent to an oral decision not to allow the victims to appeal the Pre-Trial Chamber's decision, where she found that her colleagues' interpretation of whether victims have standing to appeal would be 'inconsistent with the internationally recognised human rights to access to justice and to have prompt and effective remedies'.⁹ The decision directly impacted the court-recognised victims whose right to a remedy would be foreclosed, as their legal representatives argued, who are in a closer relation to the individuals most affected by the decision.¹⁰ Such consequential decisions often turn on technical matters, as with the interpretation of the phrase 'either party' in this instance, and whether it could be read to include victims. Explaining the reasoning behind such legal evaluations to those affected by them is difficult for all who are involved in it, and this task does not reside with the judges who make these decisions within a complex institutional structure. The degree of the

⁸ *Situation in the Islamic Republic of Afghanistan* (Amicus Curiae Observations by Kate Mackintosh and Goran Sluiter) ICC-02/17-117 (15 November 2019), available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-117>.

⁹ *Situation in the Islamic Republic of Afghanistan* (Dissenting opinion to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal) ICC-02/17-133 (5 December 2019), para 29, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-133>.

¹⁰ *Situation in the Islamic Republic of Afghanistan* (Victims' Notice of Appeal of the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan') ICC-02/17-38, 10 June 2019, para 22, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-38>.

decision makers' proximity to victims appears to be in an inverse relationship to the degree of influence they have over victims' access to justice: remote chambers in The Hague make decisions that can decisively foreclose the possibility of Court-based redress for victims, and other actors with closer relationships, such as their legal representatives, need to adapt to these decisions and determine how best to serve their clients after their rights have been withdrawn.

Despite these formal and structural constraints, the Court and its proponents continue to claim that it is able to 'deliver' justice to victims. One way of understanding the tension between these claims on the one hand and outcomes like the Afghanistan decision on the other is through the lens of legal humanitarianism.

Humanitarianism entails the transformation of moral sentiment into material practices that seek to reduce suffering. Were the court's sole focus to be retributive, as one former ICC judge suggests,¹¹ it would not have included a system of victim participation. This practice is a humanitarian supplement to the traditional objectives of international criminal justice that provides, in the words of one legal representative, 'recognition, information and voice' to victims.¹² As with other forms of humanitarianism, victim participation at the ICC is animated by compassionate sentiments: one Court advocate has suggested that victim participation itself could be regarded as a form of reparation or redress,¹³ and the Victims' Rights Working Group has claimed that participating in the process of international criminal justice is 'the first step toward giving victims back the dignity they had lost through these crimes.'¹⁴ The reparations awarded by the Court, including for physical and psychological rehabilitation, together with the TFV's practices of providing medical and livelihood support through its assistance mandate, are more recognisable as humanitarian forms in that they respond to evident needs among conflict-affected populations.¹⁵

Legal humanitarianism routes humanitarian objectives through legal forms, transforming needs into harms that are connected to crimes. The ICC defines victims as persons who suffered harms due to the commission of crimes under the Court's Statute, making this link between harm and crime explicit as well as consequential. Both victim participation and the work of the TFV entail practices that reveal this tension between law and humanitarianism, when legal categories restrict who can be regarded as a victim, when, and under what circumstances in line with judicial determinations. Victim legal representative Luc Walleyne points out that '[i]n the field of humanitarian assistance, victims are often seen as vulnerable, helpless, and

¹¹ 'Interview with Judge Christine Van Den Wyngaert,' ICCBA Newsletter (Issue 3, September 2018), claiming that the court should attend to its 'basic function' to 'decide about the guilt or innocence of persons who have been accused of atrocity crimes' (13).

¹² Megan Hirst, 'Valuing victim participation: why we need better systems to evaluate victim participation at the ICC' in FIDH, *Victims at the Center of Justice* (n 6), 81. Although civil law jurisdictions also have victim participation in criminal processes, I contend this is a *humanitarian* supplement and the ICC's inclusion of victim participation draws inspiration from civil law forms, the fact that it had not been previously included in an international criminal tribunal before the establishment of the ICC makes it appear as a compassionate corrective measure.

¹³ Paolina Massidda, Head of the OPCV, presentation at conference 'Reparations before the International Criminal Court', The Hague, 12 May 2011, author's notes.

¹⁴ Victims' Rights Working Group, Statement Presented at the 11th Assembly of States Parties, 15 November 2012 The Hague, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-VRWG-ENG.pdf.

¹⁵ Together with Sarah Nouwen, I take this up in greater detail, exploring the role of the court in providing humanitarian assistance to conflict-affected communities and how international criminal justice might learn from reflexive accounts from the humanitarian field, in Kendall and Nouwen, 'International criminal Justice and Humanitarianism' (n 2).

voiceless people in need of assistance and protection from powerful actors’, suggesting a contrast with victims as agents within criminal proceedings.¹⁶ Yet despite extensive advocacy on their behalf, uncompensated labour by intermediaries and community based organisations, limited legal aid for victims representatives (who at times work pro bono), and efforts to engage in dialogue with conflict-affected individuals and communities to ensure that they are active subjects rather than passive beneficiaries, the law itself seriously inhibits what actions are possible. Even so, proponents claim that engaging with legal processes will empower victims and will contribute to ‘the process of healing’,¹⁷ or even that participation in international criminal justice will ‘give back’ the dignity ‘lost through these crimes.’¹⁸ While perhaps aspirational, these claims appear to presume or suggest that lack of access to this particular form of justice will contribute to ongoing suffering and lost dignity, yet the prospect that individuals who are undoubtedly victims under the broad frame of the ICC will access *specific* remedies through participating and receiving reparations are quite restricted and tightly governed by juridical forms.

Scholars have argued that humanitarianism is distinct from previous acts of compassion because it is organised and part of governance.¹⁹ These material practices govern through producing effects among vulnerable populations, where some will be assisted and others will not. This is the case with legal humanitarianism as well, which poses constraints involving jurisdiction that other humanitarian practices do not encounter to the same degree. These constraints are definitional, in classifying and categorising harm, but also temporal and spatial. From the standpoint of those who have suffered, these terms may not be particularly relevant and may be experienced as an institutional indifference to their suffering. From the standpoint of those working in the field of international criminal law, however, jurisdictional categories are so familiar and necessary that it is difficult to imagine approaching this work without them. Unsettling the familiarity of these legal framings and appreciating how strange they may appear to the populations that they affect could offer a first step toward thinking about what meaningful ‘victim centred’ approaches might look like, and what discretionary spaces there may be within the Rome Statute system to accommodate them.

2. Juridified victimhood

Jurisdictional concerns affect how the map of legal humanitarianism is drawn. The field of potential beneficiaries of the ICC’s restorative work is limited from the moment the Court intervenes in a situation. The prosecutor’s decisions regarding what crimes to investigate and what arrest warrants or summonses to issue restricts who may qualify as a participating victim. In this way the exercise of prosecutorial discretion contributes to what Sarah Nouwen and I have called ‘juridified victimhood’ - the use of legal criteria and ICC procedures to determine an individual’s status as a victim.²⁰ Victimhood becomes an identity that is regulated through jurisdictional standards, such as time and place and the subject matter of crimes.

¹⁶ Luc Walley, ‘Victims Participation in ICC Proceedings: Challenges Ahead’ [2016] 16 *International Criminal Law Review*, 995-1017, 1001.

¹⁷ Documents of the Assembly of States Parties, 11th session. *Report on ICC Revised Strategy in Relation to Victims* ICC-ASP-11-38-ENG.pdf; cited in *ibid* 998.

¹⁸ Victims’ Rights Working Group (n 14).

¹⁹ See Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Cornell University Press 2011), 21; see also Didier Fassin, *Humanitarian Reason: A Moral History of the Present* (University of California Press 2012), and Ilana Feldman and Miriam Ticktin (eds) *In the Name of Humanity: the Government of Threat and Care* (Duke University Press 2010).

²⁰ Kendall and Nouwen, ‘Representational Practices at the International Criminal Court’ (n 2).

Juridified victimhood is tenuous, and subject to legal time, which operates according to its own logics: court calendars, judicial recesses, and the contestations of different parties. By filling in victim participation forms, conflict-affected individuals are brought into a state of waiting for institutional recognition. In some situations, applicants have waited years before hearing anything about their status, as in the Ugandan situation before Dominic Ongwen was apprehended. Meanwhile, the prosecutor's decision to focus on particular geographical areas within a situation, such as focusing on crimes in Ituri and in the Kivu regions in the Democratic Republic of Congo, means that conflict-affected individuals in other areas of the country are not legally recognised as victims for the purposes of participating. Furthermore, based on charging decisions, some groups may be greater beneficiaries of victim participation and reparations than others in tense post-conflict settings. When charges or cases are dropped, as happened with the ICC situation in Kenya, this has broader implications for court-recognised victims, whose official status may change from being a victim with a nexus to a case to a victim of a broader situation, with fewer participatory rights as a result.²¹ From the standpoint of conflict-affected communities, the use of legal categories to determine qualification as a victim may seem arbitrary at best, in the sense that they are completely disconnected from their lived realities.

In addition to this seeming arbitrariness, there is the problem of uneven treatment across Pre-Trial and Trial Chambers. The Rome Statute left considerable interpretive discretion to the judges to determine 'where the personal interest of the victims are affected' and what constituted the 'appropriate stage of the proceedings' for them to participate.²² Although most chambers employed the practice of collecting and adjudicating application forms for potential participants, judges in the situation in Kenya took a different approach, developing a system of registering victims through the Registry rather than carrying out judicial determinations of individual victim status. As one victim representative observed, the 'Kenya model' would save time and resources by avoiding circumstances like the large volume of forms submitted before the confirmation of charges hearing in *Mbarushimana* that occurred too late for VPRS to process them all.²³ Yet OPCV has contested this view, arguing that victims benefit from having their forms sent to parties and read by a judge.²⁴

Despite which form is used, whether the chambers employ a 'Kenya model' of registration or render judicial determinations for each individual application, these decisions are ultimately taken by chambers without regard for how this bears out across different situations. Individual survivors may be treated differently depending on Court-centric concerns, such as the backlog of pending applications or the short amount of time before confirmation of charges hearings are scheduled to take place. For example, after the preliminary examination in Afghanistan had been open for a decade, the Pre-Trial Chamber informed the Registry that victims would have

²¹ For an account of the possibilities of victim participation in the wake of the withdrawal, see Anushka Sehmi, "'Now that we have no voice, what will happen to us?': Experiences of Victim Participation in the *Kenyatta* Case' [2018] 16(3) *Journal of International Criminal Justice*.

²² Rome Statute 68(3).

²³ Megan Hirst, 'Valuing victim participation: why we need better systems to evaluate victim participation at the ICC' in FIDH (n 6), 84.

²⁴ *Prosecutor v Laurent Gbagbo* (Submissions in accordance with the 'Order scheduling a status conference and setting a provisional agenda' issued on 8 October 2014) ICC-02/11-01/11-706 (27 October 2014), para 33, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-01/11-706>. This submission stresses the importance of the process having an 'individualised character', and that following the Kenyan model would just be a symbolic process. Credit for the reference due to Megan Hirst. *ibid* 84.

just more than two months to present their views and concerns to the judges considering the Prosecutor's request to open an investigation. In the situation in Georgia, there was a tight one-month deadline for submitting victim participation forms, and the Registry encouraged collective representations as opposed to the individualised approach previously favoured by the OPCV.²⁵

This unevenness continues in approaches to reparations and assistance, which could be characterised as an experimental attitude conditioned by available funds. The Court's TFV has a dual mandate of dispensing court-ordered reparations following a final conviction, as well as an assistance mandate that enables physical, psychological and livelihood assistance. In its latest available report to the ASP, the Fund claims that over the course of a decade, nearly half a million individuals in the DRC and Uganda have benefitted directly or indirectly through its work, which is carried out through implementing partners and funded through voluntary contributions.²⁶ Yet as advocacy organisations like REDRESS have pointed out, the TFV has been criticised for not beginning assistance activities early enough, and for the limited number of situation countries in which it carries out its work.²⁷

Kenya is an important case study in this regard as a story of deferral. The Fund had been claiming at least since 2012 that it would be carrying out an assessment,²⁸ and in 2013 a VPRS representative noted that the VPRS had been fielding questions about why the Fund was not active in Kenya and what could be done to request the TFV's assistance.²⁹ A TFV programme progress report of 2014 stated that 'an assessment mission to Kenya is planned for 2015 depending on security protocols and travel guidelines.'³⁰ A Fund representative explained in 2014 that the delay was first due to jurisdictional issues and then continued due to security concerns, as Kenya had become a dangerous environment for human rights defenders.³¹ As of the time of this publication in 2020, the TFV website continues to list Kenya under the situations 'where we work', with a status of 'under assessment'.³² Yet the 2017 Annual Report does not mention Kenya, and former legal representatives for victims maintained that '[a]s of October 2018, the TFV had provided no assistance to any victim in Kenya.'³³ In an April 2019 workshop in Nairobi reflecting on the Court's presence in and withdrawal from Kenya, many participants who had previously worked as intermediaries noted that there are clear medical, psychosocial and livelihood/economic needs resulting from the post-election violence still to be addressed, but the ICC's TFV apparently did not carry out an assessment despite years of

²⁵ On the Afghanistan and Georgian cases, see the relevant contributions in FIDH (n 6), 22-28, 63-68.

²⁶ 'Over the past 10 years, more than 104,000 individuals have benefitted directly from TFV-supported assistance in the DRC and Uganda, and more than 350,000 family and community members have indirectly benefitted.' See ICC-ASP/17/14 'Report to the Assembly of States Parties on the projects and the activities of Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018', 23 July 2018, 3.

²⁷ REDRESS (n 6) 31.

²⁸ Author's interview with TFV representative in Kampala on 25 October 2011, where the representative claimed that they would be doing an assessment in Kenya early in 2012 and would prepare a report for the Trust Fund board in March 2012. Author's notes.

²⁹ Author's interview with VPRS representative, Nairobi, 2 July 2013.

³⁰ Trust Fund for Victims, Programme Progress Report, Summer 2014, 35.

³¹ Interview with TFV representative, Kampala, 6 February 2014. Author's notes.

³² See <<https://www.trustfundforvictims.org/node/75>>. One trace of this appears in the 2019 ASP financial statement, which notes that 'Other potential assistance projects were prepared on Georgia and Kenya', with no additional details. See ICC-ASP/18/13, 'Financial Statements for the Trust Fund for Victims for the year that ended 31 December 2018', 27 July 2019, para 17.

³³ Fergal Gaynor and Anushka Sehmi, 'The Perfect Storm: Obstruction, Intimidation and Inaction in the Kenya Situation', in FIDH (n 6) 62.

claiming that it would. Participants accepted that there may have been security and resource constraints, but ICC actors and intermediaries continued to provide information about the prospects of victim support without the Fund following through. Some participants noted that this had the unfortunate consequence of suggesting that support would eventually be provided, which was more important for many victims struggling with daily survival than a remote accountability process.³⁴

An important distinction between the assistance and reparations mandates is that reparations are linked to accountability, springing from the individual criminal responsibility of a convicted person, whereas the assistance mandate is not. The TFV notes the flexibility this affords them:

Because assistance programmes are not linked to any particular case before the Court, the Trust Fund projects may provide an *immediate response*, at the individual, family, and community level, to the injury needs of victims who have suffered harm from crimes within the jurisdiction of the Court. Assistance projects also permit the TFV to assist *a wider victim population* than that which may be possible in relation to harms suffered within specific cases before the Court.³⁵

By decoupling harms from crimes charged in a particular case, the scope of the Fund's assistance mandate is much larger than its reparations mandate. Yet as the Kenyan example above shows, the idea of an 'immediate response' stretches what is capable within this juridical and institutional framework. Activities are undertaken following assessment missions, with their associated security considerations; reports are prepared for the TFV Board; permission is sought from chambers for particular activities, and the life cycle of the process can take years due to filing requirements and court timelines. Some of these constraints become apparent with the situation in the DRC: in an earlier cycle of assistance programming, there was no physical rehabilitation mandate because it was not originally requested from the chamber, and to attempt to add one would have taken considerable time.³⁶

In addition to the constraints posed with the assistance mandate, the ability of the Fund to assist victims through reparations is even further constrained by its required link to a final conviction. In the closed case against Ruto and Sang in the situation in Kenya, for example, the Trial Chamber, by a majority, issued a decision denying a filing by victims' representatives that claimed the ICC should offer assistance to Kenya with reparations by holding that the Court had no obligation to award reparations before a final conviction. Judge Eboe-Osuji's dissenting opinion contended that the Trial Chamber should not adopt a formalistic approach regarding reparations. In observing that there was no dispute that the victims had suffered harm, he maintained that there was a basis in international law for rejecting the claim of no compensation without conviction.³⁷ While this argument may prove too progressive among dominant

³⁴ Adapted from Sara Kendall and Njoki Wamai, with Terry Odhiambo, 'After the International Criminal Court Intervention in Kenya: Reflections and Alternatives', report of 15 April 2019 workshop, on file with author and available on request.

³⁵ ICC-ASP/17/14 'Report to the Assembly of States Parties on the projects and the activities of Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018', 23 July 2018, 10 (emphasis added).

³⁶ I was told in 2012 that to add a physical rehabilitation mandate would require filing a request with the Court, which would then have 45 days to decide on the proposal, and observations would need to be made by all parties. Interview with Trust Fund representative, Kampala, 12 July 2012.

³⁷ *Prosecutor v. William Ruto and Joshua Arap Sang* (Dissenting Opinion of Judge Eboe-Osuji) ICC-01/09-01/11-2038-Anx (1 July 2016) paras 12–13.

interpretations of the Rome Statute framework, it could be useful in advocating for decoupling reparations from convictions and expanding the Court's reparations mandate.

For cases where there have been convictions that were not overturned on appeal – as the *Bemba* case was – there are substantial disparities in treatment across situations. REDRESS has argued that '[i]nconsistent decisions on judicial decisions on key procedural issues have created uncertainty for victims and legal actors and delayed the proceedings', noting that the judges have a duty 'to ensure a degree of certainty and consistency between themselves.'³⁸ There has been a lack of clarity regarding which entity of the Court is responsible for identifying beneficiaries, whether the trial chambers (legal) or the TFV (administrative). In the *Lubanga* case, Trial Chamber II decided to make victim eligibility a legal procedure rather than an administrative procedure, in which the Chamber had to approve individual victim dossiers. However, the TFV claimed this would result in a lower number of victims receiving reparations, and submitted that: 'the Trust Fund is convinced that the much more formalized and adversarial identification and eligibility process devised by the Trial Chamber further exacerbates the under- and over-representation of certain groups versus others.'³⁹ In the *Al Mahdi* case, by contrast, Trial Chamber VIII established an administrative process, noting that the *Lubanga* appeals decision on reparations did not take a position on whether a trial chamber would need to rule on individual applications, or on whether they should be awarded on an individual or collective basis.⁴⁰ The TFV's general position is to prioritise collective awards, but the Trial Chamber in *Al Mahdi* suggested prioritising individual reparations.

Perhaps more consequentially for conflict-affected populations, the nature of reparations has varied significantly across cases. The principles established in the first completed case against Thomas Lubanga afforded chambers 'a real measure of flexibility' to address the consequences of a perpetrator's individual criminal responsibility,⁴¹ and the Court has not established general principles governing reparations, 'opting instead', according to REDRESS, 'to develop the principles through its jurisprudence despite strong urging from civil society and States to the contrary.'⁴² The resulting jurisprudence has been inconsistent across cases: in *Lubanga*, reparations were symbolic and collective; in *Katanga*, reparations were individual as well as collective; and in *Al Mahdi*, reparations were individual, collective and symbolic. Beneficiaries of the *Katanga* reparations order were individually awarded symbolic compensation of \$250 each, along with collective reparations such as housing, support for income generating activities, educational aid, and psychological support. This contrasted with the form of collective reparations offered to victims in the *Lubanga* case, which involved community centres and a program to reduce discrimination against child soldiers. Meanwhile, the *Al Mahdi* reparations award granted economic compensation to those whose livelihood depended on the damaged sites, as well as collective reparations aimed at rehabilitation. Further collective reparations were directed at the mental harm suffered by the community, where family members of those buried in the damaged sites would be entitled to compensation for mental harm, and assistance programmes would be made available to the broader community.

³⁸ REDRESS (n 6) 11.

³⁹ *Prosecutor v. Thomas Lubanga Dyilo* (Additional Programme Information Filing) ICC-01/04-01/06-3209 (7 June 2016) para 62, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3209>.

⁴⁰ *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236 (17 August 2017), paras 142-44, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-236>.

⁴¹ *Prosecutor v. Thomas Lubanga Dyilo* (Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04/01/06-2904 (7 August 2012) para 180, available at: <https://www.icc-cpi.int/pages/record.aspx?uri=1447971>.

⁴² REDRESS (n 6) 23.

According to REDRESS, intersections between these cases in terms of timing, requirements for victim identification and verification, and reporting to the chambers ‘significantly stretched [the TFV’s] legal capacity to lay the foundation for and guide the implementation of reparations awards’.⁴³

The conception of ‘juridified victimhood’ helps to diagnose what is problematic within these processes – processes that are all too familiar to those working within the legal field. The Court’s experimental case-by-case approach, tied to other factors such as the TFV’s funding reserves, led to date to an inconsistent application of reparative justice from the standpoint of those most directly affected by these judicial determinations. Individuals who have suffered harms are unquestionably victims, and in principle, victims of sexual violence in the eastern DRC should be entitled to a remedy for the harms that they have suffered as victims of grave international crimes by a court entrusted with adjudicating such crimes and empowered to grant reparations. However, the Appeals Chamber determined in *Lubanga* that victims of sexual violence did not fall within the category of individuals who would be beneficiaries of reparations because the causal link between Lubanga’s actions and victims of sexual violence had not been established beyond a reasonable doubt, and they could receive assistance through the TFV rather than reparations.⁴⁴

Linking reparations directly to individual criminal responsibility for specific charged crimes means that outcomes are determined by prosecutorial charging practices, which then restricts the beneficiary population. The prosecutor’s decisions to charge particular crimes is tied to interpretation of the evidence, which itself is determined by the quality of the investigations – including their duration, repetition, and effectiveness of investigative missions – as well as issues of state cooperation (or lack thereof). Victims’ legal representative Luc Walley points out the importance of victim participation in the pre-trial phase: ‘The decisions most important for victims are made at this stage: the decision to open a formal investigation, the choice of the suspects to be prosecuted, the incidents to be investigated, the confirmation or not of charges, the admissibility or not of a case, and even the place where the hearings will take place.’⁴⁵ These decisions bear out across conflict-affected populations throughout the duration of a trial and into the reparations phase.

Law’s general tendency to classify and categorise – long critiqued as a practice of humanitarianism, particularly with relief work and among refugee communities⁴⁶ – is made even more concrete when it entails calculations of harm to determine reparations. As REDRESS has observed:

The Court’s approach to determining the amount to be awarded as reparation has not always been clear. Chambers have taken divergent approaches to determining the amounts to be awarded, the methodology was unclear, and in some cases, the

⁴³ *ibid* 33.

⁴⁴ *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with Amended order for Reparations (Annex A) and public annexes 1 and 2) ICC-01-04/01/06-3129 (3 March 2015) paras 197-99, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3129>.

⁴⁵ Walley (n 16) at 999.

⁴⁶ See in particular Fassin (n 19) and Miriam Ticktin, *Casualties of Care: Immigration and the Politics of Humanitarianism in France* (University of California Press, 2011).

final amount did not correspond to any of the submissions of the parties or experts.⁴⁷

In the norm-setting decision establishing principles for reparations in *Lubanga*, the Appeals Chamber recognised a ‘principle of liability to remedy harm’ that derives from ‘the individual criminal responsibility’ of the perpetrator.⁴⁸ While this clearly expresses the accountability of the convicted person through an order against them, and is viewed favourably by the Principal Counsel of the OPCV,⁴⁹ at the same time it seems to work against the position proposed by legal representatives of victims in the *Bemba* case to dissociate criminal responsibility of the accused from reparations for victims.⁵⁰ Yet individual responsibility was further cemented in the *Katanga* reparations decision, which was the first (and only to date) to award financial reparations to applicants.

It appears that the main shared principle across decisions is this focus on culpability for harms, and chambers engage in exercises of distilling the convicted person’s liability as distinct from the general harm suffered by applicants. At times this can appear to be not only highly specific but also opaque, as with the reparations order in the *Katanga* case. In *Katanga*, the judges assessed the physical, material, and psychological harm suffered by the victims at the specific total monetary value of \$3,752,620, including an evaluation of the psychological harm of the Bogoro attack at \$2,000 per applicant.⁵¹ Yet because *Katanga*’s liability had to be established in line with his participation in the crimes, not in relation to the harm suffered, the judges of Trial Chamber II then set his liability at the round sum of \$1,000,000, claiming that it was proportionate to the harm he had caused and his participation in the crimes, but without further reasoning as to why this sum was proportionate. Finding that the 297 eligible victims made individual awards possible, the Chamber then awarded them a symbolic compensation of \$250; further collective reparations included support for housing, support for income-generating activities, education aid, and psychological support. While observing that the amount would not address the extent of the harm suffered, the Chamber held that it ‘could help the victims become financially independent, by enabling them, for instance, to purchase tools or livestock, or to set up a small business.’⁵² Why economic reparations would be considered helpful for victims of *Katanga*’s crimes but were not granted for victims of *Lubanga*’s crimes is unclear, as the Chambers appear to reason in relation to the specific case before them rather than thinking across cases and chambers in line with principles of equal or comparable treatment to conflict-affected populations.

Many claims are made about ‘what victims want’ from the ICC. The relatively limited empirical material that has been gathered to date on victim expectations suggests that reparations or some form of material support remain important. This is recognised to some

⁴⁷ REDRESS (n 6) 49.

⁴⁸ *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with Amended Order for reparations) ICC-01/04-01/06-3129 (3 March 2015) paras 99-101, available at: [available at: https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3129](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3129).

⁴⁹ Paolina Massida, ‘Retributive and restorative justice for victims: considerations on the *Lubanga* proceedings before the ICC’ in FIDH (n 6).

⁵⁰ Marie-Edith Douzima, Evelynne Ombeni and Lydia El Halw, ‘Victims’ participation in reparations proceedings in the *Bemba* case’ in FIDH (n 6) 79.

⁵¹ *The Prosecutor v. Germain Katanga* (Order for Reparations pursuant to Article 75 of the Statute) ICC-01-04-01/07-3728-tENG (24 March 2017) para 239, available at:

<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/07-3728-tENG>.

⁵² *ibid* para 300.

extent by Trial Chamber II in the *Katanga* reparations decision, in that the Chamber adapted the modes of collective reparation to reflect interests in economic and material support. An empirical study carried out through the Berkeley Human Rights Centre documented a widespread expectation among victims that they would receive individual reparations: nearly three quarters of the Ugandan respondents claimed that the main reason why they applied to become victim participants was to receive reparations, and a vast majority of respondents from Kenya and the DRC stated that they desired individual reparations. The court's own materials suggest that individual reparations may be forthcoming, with forms containing language about what reparations victims would want. According to victims' advocates, 'this not only encouraged victims to request reparation, it also created expectations that those requests would be considered in one way or another.'⁵³ The factors influencing whether requests are considered and eventually granted are bound to so many juridical elements – jurisdiction, charging, quality of evidence, the timing of applications and the stage of trial at which they are made – that by the end of the process, the outcome may bear little resemblance to what victims originally inscribed on the forms that brought them into a state of waiting for possible future assistance.

3. Conclusion: (re)opening spaces for redress?

The figure of the juridified victim – a legal person produced through encounters with legal processes – is governed through a relationship to time that is tied to considerations of little relevance to everyday life in ICC situation countries. Judicial calendars, scheduling orders, the collection of submissions by parties, and resource constraints structure how time plays out in international criminal law for those most directly affected by its outcomes. Empirical surveys have illustrated this impact by documenting how court-identified victims are concerned with the slow pace of proceedings. In Uganda, for example, one respondent explained, '[w]e are in the process of waiting. That is why there is a quickly degenerating sense of trust between the people and the court.'⁵⁴

Proponents of reforming ICC practices in relation to victims often focus on matters of timing – implementing outreach earlier, as with the 'early outreach and information activities' in the Palestine situation, early contact with victims, and encouraging their involvement in preliminary examinations. For example, victim representatives claimed that early engagement with those most directly affected by the conflict in Myanmar helped their attempts to expand the scope of the relevant crimes, where they argued that the crime against humanity of persecution had occurred in addition to that of deportation.⁵⁵ Engaging with conflict-affected communities at the early stages of ICC processes can help strengthen the factual and legal analysis of the conflict and can help to shape judicial outcomes. Despite regular invocations of their centrality to the Court's work, however, victims' interests have remained persistently marginal in light of the extensive advocacy carried out on their behalf.

One space of potential discretion for improving the Court's impact upon victims would be to shift the balance in favour of adding more time for activities that pertain to identifying victims

⁵³ Douzima, Ombeni and El Halw (n 50) 11.

⁵⁴ Berkeley Human Rights Center, 'The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court' (2015) 35.

⁵⁵ *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute) ICC-RoC46(3)-01/18-37 (6 September 2018), available at: [https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46\(3\)-01/18-37](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46(3)-01/18-37). See also Wayne Jordash and Uzay Yasar Aysev, 'Victim Participation in the pre-situation phase: insights from the Pre-Trial Chamber's Rohingya decision', FIDH (n 6) 13-21.

and gathering their views. For example, longer periods of time were needed to submit views in advance of confirmation of charges hearings, where advocates and intermediaries were granted only two months in the situation in Afghanistan and shortly more than one month in the situation in Georgia. Furthermore, the victim representatives in the *Bemba* case were only permitted a short period in which to consult their clients about the consequences of his acquittal on appeal despite their high numbers and geographic dispersal across the territory of the Central African Republic.⁵⁶ This lack of sufficient time is particularly troubling in light of the finality of the judgment and its foreclosure of the possibility of reparations. The prospect of making scheduling decisions that are more ‘field’-centric rather than Hague-centric raises the question of whether the Court is capable of being more responsive toward the individuals and communities in whose interests it claims to act. This would require judges affording greater weight to claims about the timing considerations of victims’ advocates than they have thus far.

Some victims’ advocates and judges have also sought innovative approaches for strengthening the roles of and outcomes for conflict affected communities in ICC processes. This has ranged from the work of victims’ advocates attempting to develop alternative frameworks to the TFV accelerating its assistance mandate in an overturned judgment, to a judge (and many committed human rights lawyers) who have proposed thinking beyond the Rome Statute to further sources of international legal obligations toward victims, such as customary international law and human rights law. For example, victims’ legal representatives in the *Bemba* case argued for an ‘innovative’ interpretation of the ICC’s governing texts that would decouple reparations from criminal responsibility of the accused, since ‘no other Trial Chamber has ever been faced with a similar situation and such a reading was hence not triggered. There is no precedent to which the Chamber could refer since the system put in place at the Court in relation to victims is in itself unprecedented.’⁵⁷ In his dissenting opinion on reparations in the *Ruto and Sang* case, Judge Eboe-Osuji found that in certain circumstances, the ending of legal proceedings should not prevent victims’ rights to obtain reparations as soon as possible.⁵⁸ Meanwhile, in dissenting from an oral decision in the situation in Afghanistan that denied the victims’ leave to appeal, Judge Luz del Carmen Ibáñez Carranza found that:

As has been the case with previous dissenting opinions regarding the role of victims at this Court at other stages in the proceedings, this opinion might help future compositions of the Appeals Chamber to sustain an interpretation that is consistent with the internationally recognised human rights of victims. To that end, victims should keep bringing their appeals to the Appeals Chamber under their human rights to do so.⁵⁹

⁵⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo* (Legal Representatives of Victims joint submissions on the consequences of the Appeals Chambers Judgment of 8 June 2018 on the reparations proceedings) ICC-01/05-01/08-3649 (12 July 2018), available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-3649>, para 29 (submitting ‘It is the victims’ opinion that the Judgment reduced the heinous crimes which victimised thousands of women, men and children in the Central African Republic to a mere chapter of daily local news; these crimes which, yet, have revealed their horror over the course of these 10 years of procedure and have caused the outrage of the entire international community’).

⁵⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo* (Joint Submissions of the Legal Representatives of Victims on the Consequences of the Appeals Chambers Judgment of 8 June 2018 on the Reparations Proceedings) ICC-01/05-01/08-3647 (6 July 2018), para 45, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-3647>. See also Douzima, Ombeni and El Halw (n 50) 79.

⁵⁸ *Ruto* (n 37).

⁵⁹ *Situation in the Islamic Republic of Afghanistan* (Dissenting opinion to the majority’s oral ruling of 5 December 2019 denying victims’ standing to appeal) ICC-02/17-133 (5 December 2019), paras 3-4, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-133>.

Although victims' rights at the ICC have been narrowed considerably through jurisprudence and practices developed over the Court's lifespan, there may be possibilities for practitioners to draw tactically upon the discretionary spaces within the Rome Statute system and beyond to work on securing more equitable and ethical outcomes. This may require pointing out the problems with juridified victimhood, as when victims representatives in the situation in Afghanistan built upon the presiding judge's claim that the ICC is 'a victim-centred court' in their submissions to contest that Chamber's use of the term 'potential victim', claiming that using such a term to refer to 'persons who have already suffered harm as a result of the gravest international crimes, simply because the court has not yet undertaken formal procedures for victim recognition in a specific case undermines the experience and status of victims before the court.'⁶⁰ More of these interventions may help to point out the improbability of 'victim centrism' at the ICC, where the figure of the 'potential victim' would only be possible if victimhood is thought in purely juridical terms. The starting point of advocacy and judicial reasoning could take the phenomenon of victimhood more seriously rather than already seeing it within legal terms and frameworks. Those committed to using the Court as a mechanism for redress for victims could find ways of adapting the terms and frameworks to victims rather than further entrenching the primacy of juridical logics. Such a task is surely daunting in light of the fundamentally retributive orientation of the ICC's work, but unsettling victimhood as a purely juridical category may serve as a step in a more progressive direction for the field of international criminal law.

⁶⁰ *Situation in the Islamic Republic of Afghanistan* (Corrigendum of Victims' Joint Appeal Brief against the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of the Investigation into the Situation in the Islamic Republic of Afghanistan' of 30 September 2019) ICC-02/17-75 (1 October 2019), para 14, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-75-Corr>

Concluding Remarks

Gregory Townsend*

One might fairly conclude from reading the articles in this collection that victim participation and reparations at the International Criminal Court (ICC) largely remain *works in progress*. The authors—knowledgeable academics and seasoned practitioners—who have contributed these nine insightful articles, seek to advance essential work in the uncharted waters of victim participation in international justice, while acknowledging that the task to date and ahead is and remains arduous and the challenges manifold. In these remarks, I briefly recall some of the key points that emerge from the constructive contributions of the nine authors, before attempting to place them in the context of the recent Independent Expert Review’s recommendations related to victim participation and reparations.

In the first article, Hirst and Sahyouni examine in depth how stakeholders and counsel might concretely improve the effectiveness of the legal representation of victims before the ICC. Drawing on analogies to defence representation, they note the procedural ambiguity and lack of settled jurisprudence in victim participation, as well as shortfalls in legal aid and servicing for legal representatives of victims. Moreover, they seek to raise the bar, advocating for the development of professional guidelines for victim’s legal representatives and the establishment of mechanisms for monitoring and oversight of the work of victims’ counsel. They rightly suggest that victims’ counsel would benefit from the development of victim-specific software that victims’ legal teams could use, including in the field, to enhance their efficiency.

Massidda, based on extensive insight gained from her fifteen years of experience with the ICC’s Office of Public Counsel for Victims (OPCV), explains the rationale for establishing victim participation within the Rome Statute system. She also analyses the way in which the Court has implemented the modalities of participation and candidly highlights some of the challenges linked to victims’ involvement, including keeping numerous, far-flung clients duly informed, and helping victims to understand the Court’s many facets.

Samson’s article astutely examines recent jurisprudence and practice on dual-status victim-witnesses. She clearly sets out the Court’s framework and looks at trial procedures impacting this particular group of victims, as well as the unique challenges they face during trial, and the potential consequences for them if the Chamber does not rely on their evidence. Samson notes the important role played by the protocols for witnesses handed down by a Trial Chamber, including those for special status witnesses. She suggests the Court appoint legal representation for potential victims at an earlier stage, to provide them with necessary advice and direction from the outset. The earlier appointment of skilled legal representatives could, Samson points out, help to boost victim participation and improve the presentation of evidence relevant to victims and dual-status victim-witnesses.

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Ferstman shrewdly notes that the implementation of the ICC's reparations regime has been complicated by competing visions about the Court's main goals and how reparations fit within those goals. The Court is yet to adopt a unified vision on reparations. As to the reparations mandate, she notes that the Court has faced pressure and at times sought quick fixes. Her article suggests that a human rights based approach would help the Court to develop victim-centred thinking, which is essential for providing effective reparations.

Walley, who also writes with perspective gained from years of experience, particularly on the *Lubanga* case, traces the development of the concept of international victim participation, examines the ICC's skeletal legal framework, analyses the contradictory case law handed down from case to case, and suggests improvements in collective reparations. His advice includes a proposal for the granting of 'interim relief' as a form of timely reparations for victims. He explains victims' frustrations with procedural 'harassment' and concludes that the Court's reputation is closely linked to its success or failure in deciding reparations for victims.

Smith van Lin closely examines the Trial Chamber's conviction of Ntaganda in 2019, which placed the issue of reparations for sexual and gender-based violence (SGBV) 'squarely back on the table at the ICC' after the acquittal of Bemba on appeal. She describes the appeal in *Ntaganda* as representing an unprecedented opportunity to address the issue of reparations for the crimes of rape, sexual slavery, and sexual violence perpetrated against one's own troops, child soldiers, and men and boys. Smith van Lin lauds individual compensation as well as the recommendations made by the Court-appointed SGBV expert for ensuring gender-just, gender-sensitive and gender-inclusive reparations, and anticipates the *Ntaganda* case will set important precedents in this vein.

Michels, from her perspective as a practitioner in the ICC's Victims and Witnesses Section (VWS), analyses the relationship between psychologists and witnesses and victims at the ICC. She explains aspects of psychosocial interventions, compares the counsel-victim relationship with the psychologist-client relationship, and reflects on further developing the psychological and ethical aspects of the counsel-victim relationship. She makes constructive recommendations regarding: training for legal representatives on the psychological aspects of victimisation and trauma; paying attention to confidentiality and ethical questions; setting the boundaries of the client-counsel relationship; and the needs of some victims to feel supported in their relationships with legal representatives and Court staff.

Smith argues convincingly that the Court should engage with expert practitioners in psychology to better understand victims' trauma. She explains that trauma affects 'the ability of victims to construct a complete, accurate, chronological and coherent account of their experiences, and this, in turn, presents specific challenges for the Court in its elicitation of victim testimony and assessment of witness credibility.' To weigh such evidence, the Court should rely on psychological expertise to understand the impact of trauma on the quality and nature of the victim's memory, but in doing so, the judges must remain nonetheless the final arbiters of fact.

Kendall's article focuses on the process of translating the suffering of victimhood into 'legal categories that address wrongs rather than needs, and on the uneven outcomes this can produce among conflict-affected populations.' She contends that because the ICC represents the blending of retributive and restorative justice (and the use of international criminal law for humanitarian ends), academics and practitioners should reflect further on what it means to be a juridified victim.

Independent Expert Review

The ICC Chambers have held in several instances that the purpose of the Court's victim participation scheme is to give victims a 'meaningful' role in all stages of its proceedings.¹ Yet, the report of the recent Independent Expert Review on the ICC does not paint a rosy picture of the present state of play. According to the three experts, victim participation at the ICC to date suffers from complexity and uncertainty, unsettled and unclear practices, inconsistent approaches, as well as obstacles and challenges that prevent more victims from benefitting.² Profound delays mean some victims are 'waiting a lifetime' for reparations.³ Only a fraction of potential victims actually engage in participation with the Court.⁴ The experts concluded that for 'victims, so far, the Court is not functioning and delivering as envisioned'.⁵

Within the scope of their broad review of the work of the ICC, the experts assessed victim participation and reparations,⁶ and made numerous specific recommendations with respect to the Court's work in these areas.⁷ As to victim participation, the experts recommended, inter alia: giving the ICC Registry's Victims Participation and Reparations Section (VPRS) the principal or 'lead' role in identifying victims for reparations at an earlier stage (upon the issuance of an arrest warrant or summons); considering appointing legal representatives for victims earlier (to foster participation at an earlier stage such as during preliminary examinations and requests for authorisation to open an investigation); and providing for 'automatic' admission of victims to participate in any other case within the same situation.⁸ As to reparations, the experts recommended, inter alia: that the Court develop consistent and coherent principles relating to reparations; that reparations not be stayed pending appeal of a trial judgement; and that the Court should grant VPRS principal responsibility, and extend time limits to allow more participation in the reparations phase.⁹

The adoption of consistent and coherent principles for victim participation and reparations, and of measures to allow more victims to participate, as well as appointing legal representation for victims at the earliest stages of ICC proceedings, are all recommendations previously advanced by several authors in this collection.

The rather chaotic evolution of victim participation and reparations is ongoing as the ICC also grapples with an ever-expanding caseload within its jurisdiction. The Court is presently moving forward in several situations at the same time. The Trust Fund for Victims (TFV) recently reported that three ICC cases are at the reparations implementation stage, namely *Lubanga*, *Katanga* and *Al Mahdi*, and that the Court already started reparations proceedings in the

¹ See *Prosecutor v. Katanga and Ngudjolo*, No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, para 157; *Prosecutor v. Ntaganda*, No. ICC-01/04-02/06-449, Decision on victims' participation in trial proceedings, 6 February 2015, paras. 29-33; *Prosecutor v. Ongwen*, No. ICC-02/04-01/15-1021, Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017, paras. 2-6; see also Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, para 842, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (IER).

² IER (n 1) paras. 858, 863.

³ *ibid* para 879.

⁴ *ibid* para 862.

⁵ *ibid* para 885.

⁶ *ibid* 270-287; 287-311.

⁷ *ibid* 287, 303-04, 311.

⁸ *ibid* 287.

⁹ *ibid* 303-04.

Ntaganda case in 2019.¹⁰ The TFV is continuing its assistance mandate programme in northern Uganda, has selected partner organisations in the Central African Republic, Côte d'Ivoire, and the Democratic Republic of the Congo, and is conducting harm-based needs assessments in Georgia, Kenya, and Mali.¹¹

The Independent Expert Review also recommended that the ICC establish a standing coordination body to follow up on its recommendations, including conducting a further, full appraisal of the victim participation scheme.¹² In November 2019, the ICC's Independent Oversight Mechanism (IOM), pursuant to a request from the Assembly of States Parties (ASP), submitted to the TFV its evaluation report of the Secretariat of the TFV.¹³ The ASP had tasked the IOM with conducting an 'independent assessment of the activities of the Secretariat, focusing on the implementation of reparations, the extent to which these activities are effective and coordinated with internal stakeholders, lessons learnt and areas that need improvement'.¹⁴

Thus, it seems clear that further review, and more recommendations for changes (potentially ranging from fine tuning to a major overhaul) to the ICC's yet-to-be-settled victim participation and reparations schemes are likely to materialise in the years to come. It remains to be seen who — the ASP, certain states, organs of the Court, other stakeholders, a new standing coordination body or some combination of actors — will take the lead in shaping *reimagined* victim participation and reparations schemes at the ICC.

¹⁰ Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2019 to 30 June 2020, 16 September 2020, ICC-ASP/19/14*, 2, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-19-14-ENG-BDTFV-Report-16sep20-1730.pdf.

¹¹ *ibid*

¹² IER (n 1) para 864, 287 (R339), 311 (R359).

¹³ Annual report of the Head of the Independent Oversight Mechanism, ICC-ASP/18/22, 11 November 2019, 24, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-22-ENG.pdf, para 4 (Executive Summary).

¹⁴ *ibid* 24.