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Representation, Agency, and Voice

Victim Legal Representation before the ICC and ECCC

Rachel Killean* and Luke Moffett**

Abstract

Victims have often been the justification of international criminal trials, but only recently allowed to participate in proceedings. With the provision of victim participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia there is a growing literature in international criminal justice exploring the role of victims in such proceedings. This article provides an empirical contribution to this literature, drawing from fieldwork conducted in Uganda and Cambodia to examine the role of legal representatives in furthering victims' rights and interests within international criminal courts. The article analyses the concepts of victim agency and voice and the practice of representation within the courts, assessing the extent to which victims are able to exercise agency and voice through representation. It argues that victims are having their agency limited by restrictions placed on their ability to choose representatives, and that the introduction of common representation has collectivised victims' voices, leading to disputes surrounding who may legitimately represent victims.

1. Introduction

Victim participation in international criminal tribunals and courts has often been lauded as innovative in ensuring justice for victims. Despite the burgeoning literature on the issue, there is little research examining victim legal representatives and their role in advocating victims' interests.¹ This is surprising given that the mass scale of international crimes means the vast majority of victims will not appear before these courts, but will be represented by a lawyer. This article provides an empirical contribution which draws on the experiences of victims, lawyers and other actors engaged in the work of the International Criminal Court (ICC), in the Ugandan situation in particular, and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Adopting a socio-legal perspective, which engages with the emerging literature on

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¹ E. Haslam and R. Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' 12 *International Criminal Law Review* (2012) 871; M. Hebert-Dolbec, 'Towards Bureaucratization: An Analysis of Common Legal Representation Practices before the International Criminal Court', 23 *Revue québécoise de droit international* (2015) 34.

victimhood in transitional contexts, this article considers the implications of representation on victims' ability to exercise agency and voice within the ICC and ECCC.

The authors draw on fieldwork in Uganda and Cambodia. In Uganda, fieldwork was carried out during June–July 2011 and March–April 2015, and involved 45 semi-structured interviews with ICC staff, victims' legal representatives (VLRs), government officials, and civil society, as well as seven focus groups with 76 victims in northern Uganda including at a number of sites and with communities that fell within the *Ongwen* and *Kony et al.* cases.² In Cambodia, fieldwork was conducted between October 2013 and January 2014 and in November 2014. Semi-structured interviews were conducted with 27 victims participating at the ECCC, 18 lawyers, judges and administrative staff employed by the ECCC, and seven lawyers and civil society actors engaged in either representing or providing other forms of support to victims.³ In both countries purposive selection was used to interview individuals who were engaged with the ICC and ECCC or experience with these courts in civil society and government, as well as other victims outside these structures.

It must be acknowledged that the authors, in drawing from interviews for their analysis, are inevitably engaging in a process of representation themselves, and are not free from the challenges associated with power, agency and voice explored within this research.⁴ Acknowledging what Alcoff has termed 'problem of speaking for others',⁵ the authors took precautions to minimise the risk of misrepresentation. Semi-structured interviews allowed for in-depth explorations of the interpretations and understandings of the individuals engaged in the Courts' work.⁶ Participants were encouraged to express their attitudes and perceptions without feeling constrained,⁷ were given space to explain the meanings placed on their experiences,⁸ and were able to raise issues not initially considered by the interviewers. To reassure participants that they could speak

² *Ongwen* (ICC-02/04-01/15); *Kony and Otti* (ICC-02/04-01/05).

³ In order to protect the interviewees' anonymity, they will be referred to by job title in the case of professionals, and by a number system in the case of civil parties and focus groups.

⁴ See also, A. Frederick, 'The Influence of Power Shifts in Data Collection and Analysis Stages: A Focus on Qualitative Research Interview', *The Qualitative Report* (2013) 1-9.

⁵ L. Alcoff, 'The problem of speaking for others', 20 *Cultural Critique* (1991-1992) 5.

⁶ A. Bryson and S. McConville, *The Routledge Guide to Interviewing: Oral History, Social Enquiry and Investigation* (Routledge, 2013), 12.

⁷ T. May, *Social Research: Issues, Methods and Process* (Open University Press, 2011), 132-136.

⁸ N. Denzin and Y. Lincoln (eds) *The SAGE Handbook of Qualitative Research* (SAGE, 2000), 3.

freely, the authors chose safe spaces for interviews,⁹ clearly identified their approach with regards to anonymity and data storage, reasserted their own independent status as researchers, and used interpreters (when necessary) who would be seen as politically neutral and as disconnected from the courts as possible.¹⁰ Both authors undertook two periods of fieldwork in order to allow for a reflective approach, sought feedback on initial theories, and triangulated findings with those of other academics and civil society actors who have conducted quantitative and qualitative research in this area, while remaining aware that such sources will have been subjected to the researchers' own interpretations.¹¹ This approach was also balanced by textual analysis of court documents and transcripts, in order to explore the practice of representation within the courtrooms, as well as the perceptions held about that practice.¹² Nevertheless, challenges remain, and as the study is primarily a qualitative study, no claims are made as to the study being statistically representative. Rather, it is an exploration of how particular people, at a particular time, have expressed their own actions and experiences.¹³

Although the ICC and the ECCC have different legal frameworks for victim legal representation, there are lessons to be learned from a combined analysis of both courts — the current developments at the ICC around common legal representation and limited legal aid represent difficulties already experienced at the ECCC. Both also face challenges associated with balancing scarce resources, large numbers of victims and the rights of the accused to a fair and expeditious trial. Furthermore, both have adopted methods of collective representation, and therefore can be critiqued on the extent to which victims are genuinely able to exercise agency and voice. These issues will be explored throughout the article. By bringing together the authors' experience and fieldwork in this area, this article hopes to provide a substantive comparative analysis of legal representation of victims at the ICC and the ECCC, as other literature often focuses on the separate experience of these courts.

⁹ S.A. Elwood and D. G. Martin, "Placing" Interviews: Location and Scales of Power in Qualitative Research', 52 *The Professional Geographer* (2000) 649.

¹⁰ E. Pittaway, L. Bartolomei and R. Hugman, "Stop Stealing Our Stories": The Ethics of Research with Vulnerable Groups', 2 *Journal of Human Rights Practice* (2010) 229.

¹¹ P. Larkin, B. De Casterlé and P. Schotsmans, 'Multilingual Translation Issues in Qualitative Research: Reflections on a Metaphorical Process', 17 *Qualitative Health Research* (2007) 468.

¹² N. Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (Routledge, 2003).

¹³ N. Palmer, *Courts in Conflict* (Oxford University Press, 2015), at 15.

The article begins by exploring some of the critiques of victim participation and representation in international criminal law, before outlining the representation regimes within the ICC and ECCC. It then explores the practice of representation within the courts, assessing the extent to which victims can exercise agency and voice through legal representation. Three arguments are made. First, significant limitations are being imposed on victims' ability to exercise agency within the two Courts due to restrictions on their ability to make choices about their own representation. Second, the introduction of common representation has resulted in a collectivisation of victims' voices. Third, these factors have contributed to disputes about who may legitimately represent victims.

2. Representation, Agency and Voice in International Criminal Law

Since victim participation was first introduced in the 1998 Rome Statute of the ICC, participation mechanisms have been adopted by the ECCC, the Special Tribunal for Lebanon and in Kosovo,¹⁴ indicating what some have described as a shift towards more 'victim-oriented justice'.¹⁵ Academics and practitioners have spoken of the importance of incorporating the victims' voice into the proceedings,¹⁶ arguing that participation will enhance victims' satisfaction with the process and provide a sense of justice and empowerment.¹⁷ Increasingly, international criminal law scholars have drawn on procedural justice theory,¹⁸ which posits that ensuring procedures are fair to victims can do much to improve their overall perceptions of the criminal justice system.¹⁹

¹⁴ Art. 17 STLSt.; Art. 22 Law on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015.

¹⁵ S. Vasiliev, 'Article 68(3) and the Personal Interests of Victims in the Emerging Practice of the ICC', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009) 635-690.

¹⁶ L. Moffett, *Justice for Victims before the International Criminal Court* (Routledge, 2014); C. Hoyle and L. Ullrich, 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court', 12 *Journal of International Criminal Justice (JICJ)* (2014) 681.

¹⁷ Hoyle and Ullrich, *ibid.*

¹⁸ R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia', 16 *International Criminal Law Review* (2016) 1; Moffett, *supra* note 16; B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011); S. Kutnjak Ivković and J. Hagan, *Reclaiming Justice* (Oxford University Press, 2011).

¹⁹ J. Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996); L. Musante, M.A. Gilbert and J. Thibaut, 'The Effects of Control on Perceived Fairness of Procedure and Outcome', 19 *Journal of Experimental Social Psychology* (1983) 223.

Although originally a psychological rather than a victimological theory,²⁰ such an approach is relevant to the victims' rights debate because of its emphasis on the positive impact of procedural rights.²¹

The use of representatives has potential benefits. For example, victims may lack the capacity to represent themselves.²² Legal representatives can be an appreciated source of information, serving as valuable translators of legalese and conveyers of victims' interests. However, the introduction of representation also raises challenges, as representatives and other 'transitional justice entrepreneurs'²³ engage in the process of re-producing the voices of victims and making decisions on their behalf. Such actions create power dynamics that restrict the potential for agency, and produce contests over who may legitimately 'speak for' the victims.²⁴ The 'problem of speaking for others' emerges along with critiques that victims are unable to truly exercise voice and agency within courtrooms.²⁵ The use of legalese can exclude victims from understanding the 'rules of the game', thus denying them the ability to become active agents in proceedings.²⁶ As a result, victims' representatives may have significant control over how their clients' voices are expressed and used within the courtroom.²⁷ As McEvoy and McConnachie suggest, victims' voices end up 'picked out, appropriated and then re-presented to suit' lawyers' agendas.²⁸

A further critique is that demands for justice are driven by 'urban elites and high-profile victims, who have a strong moral voice and an ability to clearly articulate

²⁰ A. Bottoms and J. Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice', 102 *Journal of Criminal Law and Criminology* (2012) 119.

²¹ E.A. Lind, 'The Psychology of Courtroom Procedure', in N.L. Kerr and R.M. Bray (eds), *The Psychology of the Courtroom* (Academic Press, 1982) 13.

²² K. McEvoy and K. McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', 22 *Social and Legal Studies* (2013) 489; C. Sperfeldt, 'The Role of Cambodian Civil Society in the Victim Participation Scheme of the Extraordinary Chambers in the Courts of Cambodia', in T. Bonacker and C. Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (Springer, 2013), 352.

²³ T. Madlingozi, 'On Transitional Justice Entrepreneurs and the Production of Victims', 2 *Journal of Human Rights Practice* (2010) 208.

²⁴ L. Mazzei and A. Jackson, 'Complicating Voice in a Refusal to "Let Participants Speak for Themselves"', 18 *Qualitative Inquiry* (2012) 745.

²⁵ L. Alcoff, 'The problem of speaking for others', 20 *Cultural Critique* (1991-1992) 5.

²⁶ P. Dixon and C. Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', 7 *International Journal of Transitional Justice (IJTJ)* (2013) 393, 412.

²⁷ S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' 76 *Law and Contemporary Problems* (2013) 235, 250.

²⁸ McEvoy and McConnachie, *supra* note 22, 495.

demands’.²⁹ These victims are often not representative of all who have suffered harm, and the prioritisation of such voices may reinforce or cause secondary victimisation to other victims, who may already have suffered marginalisation as a result of international crimes.³⁰ This echoes wider challenges of social inclusion in enabling victims to exercise agency through participation in international criminal trials. The nature of international criminal trials exacerbates this risk, as numerous victims with a multiplicity of views are often required to speak with one voice. Such challenges have led to critical views emerging within the literature. Fletcher critiques the use of the ‘imagined victim’ as ‘supporting the logics of international criminal justice which limit and render suspect, if not invisible, the particular meanings and desires of real victims for justice’.³¹ Kendall and Nouwen view victims as increasingly abstracted, depoliticised and re-represented, while the imagery of victims is used to legitimise international criminal justice.³²

Although calls for greater victims’ rights have nominally been heeded, there is a growing awareness within the literature of the challenges associated with representing victims within international criminal courts. This article seeks to make an empirical contribution to the discussion surrounding these challenges in the context of the ICC and ECCC. The rest of this section provides some context by briefly outlining the legal regimes of victim participation in both courts.

A. *Victim Representation at the ICC*

At the ICC, victim participation is mostly provided through Article 68(3),³³ which enables victims to provide their views and concerns where their personal interests are affected. It further stipulates that victims’ ‘views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate’. The Court’s Rules of Procedure and Evidence (RPE) distinguish this further by only

²⁹ H. van der Merwe, ‘Reparations through different lenses: The culture, rights and politics of healing and empowerment after mass atrocities’, in J. Wemmers (ed.), *Reparation for Victims of Crimes against Humanity* (Routledge, 2014), 200, 201.

³⁰ *Ibid.*

³¹ L.E. Fletcher, ‘Refracted Justice: The Imagined Victim and the International Criminal Court’, in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: the Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2016) 302-325.

³² Kendall and Nouwen, *supra* note 27.

³³ There are other provisions for victim participation in *proprio motu* investigations (Art. 15(3)), admissibility decisions (Art. 19(3)), and reparations proceedings (Art. 75(3)).

entitling VLRs to attend and participate in proceedings, thereby giving the representatives ‘enhanced’ procedural rights, rather than the victims themselves.³⁴ This is a largely pragmatic development; given the large numbers of victims that would be eligible to participate in a case, allowing each individual to personally appear before the Court would be unworkable.³⁵ Indeed, the Registry and the Court have struggled to process the applications of the large number of victims seeking to participate within the deadlines for proceedings, meaning that some victims are excluded from participating due to the lack of sufficient administrative capabilities at the Court.³⁶

Decisions on participation are determined on a case-by-case basis, leading to diversity in the practice of appointing legal representatives.³⁷ The case of Thomas Lubanga saw seven VLRs representing 129 victims, whereas in later cases there were fewer counsel, with only two VLRS (assisted by field assistants) representing 5,229 victims.³⁸ The provision on VLRs only paints part of the picture of victim legal representation because the Court has an independent Office of the Public Counsel for Victims (OPCV). The OPCV as an independent body within the Registry is responsible for providing legal research and advice to participating victims, as well as appearing before the Chambers on specific issues, or to act as legal counsel for unrepresented victims.³⁹

Although the RPE provides victims ‘shall be free to choose a legal representative’,⁴⁰ the Chamber can request that victims or groups of victims choose a common legal representative(s).⁴¹ If victims are unable amongst themselves to choose a common legal representative(s) within the time limit set by the Chamber, then the judges can decide or ask the Registry to choose one or more legal representatives, which have increasingly been the OPCV.⁴² Read together the language of ‘shall’ would suggest that victims have a right to legal representation and the Chamber is obliged to

³⁴ Rule 91(2). E. Baumgartner, ‘Aspects of victim participation in the proceedings of the International Criminal Court’, 90 *International Review of the Red Cross* (2008) 409, 430.

³⁵ Decision on victims’ participation, *Lubanga* (ICC-01/04-01/06-1119), Pre-Trial Chamber I, 18 January 2009, §§ 115-116.

³⁶ See E. Haslam and R. Edmunds, ‘Victim Participation, Politics and the Construction of Victims at the International Criminal Court: Reflections on Proceedings in Banda and Jerbo’, 14 *Melbourne Journal of International Law* (2014) 727, 874-875.

³⁷ *Supra* note 30, § 125.

³⁸ From January 2014 victims in the *Bemba* case were represented by one VLR following the death of the other appointed VLR.

³⁹ Regulations 80 and 81, ICC Regulations.

⁴⁰ Rule 90(1).

⁴¹ Rule 90(2).

⁴² Rule 90(3).

facilitate their wishes. Yet, in the face of the reality of mass victimisation, this entitlement is diluted to victims being assigned a common legal representative. Given the case-by-case basis of appointing common legal representatives it leaves victims with a lack of certainty of how victim participation will operate and how their views and concerns will be heard by the Court. As such, victims' legal agency is restrained to more collective and indirect participation through a common legal representative.

In an attempt to better manage the Court's growing caseload and corresponding victim numbers, the Assembly of State Parties, which funds and decides the annual budget of the ICC, has encouraged judges to develop a more consistent practice and obtain value for money from the legal aid budget for VLRs.⁴³ In response, the Registrar issued a ReVision proposal, suggesting the creation of a Victim Office that would combine the work of OPCV, Victims Participation and Reparations Section and Counsel Support Service.⁴⁴ The Victim Office would aim to streamline engagement with victims, reducing the number of contact points for victims and intermediaries, and addressing the concern that 'differing working methods and systems of these different actors sometimes cause confusion and frustration for victims'.⁴⁵ However, there are concerns that the office will remove the appointment of VLRs from judges and the Registry,⁴⁶ and perceive the appointment of the OPCV as internal counsel over external counsel (despite them being independent office in the Registry), threatening the independence and effectiveness of victim representation.⁴⁷ Although discussions are still ongoing, the ReVision proposal has fed into judicial decision on external and internal legal representation in the case of Dominic Ongwen, discussed below.⁴⁸

B. *Victim Representation at the ECCC*

The ECCC's victim participation regime is contained within the Court's Internal Rules. Drafted by the Court's judicial officers,⁴⁹ these Rules detail a system of civil party

⁴³ ICC-ASP/12/Res.1, section H, para.3.

⁴⁴ Draft Registry ReVision project, Basic Outline of Proposals to establish Defence and Victims, 2014.

⁴⁵ ICC Registry, *Basic Outline of Proposals to Establish Defence and Victims Offices* (2014).

⁴⁶ REDRESS, *Comments to the Registrar in relation to the ReVision project as it relates to victims' rights before the ICC* (2015).

⁴⁷ FIDH, *Comments on the ICC Registrar's ReVision proposals in relation to victims* (2014).

⁴⁸ Section 3(B).

⁴⁹ S. Studzinsky, 'Victim Participation before the ECCC', 6 *Zeitschrift für Internationale Strafrechtsdogmatik*. (2011) 887.

participation, nominally based on Cambodia's own criminal procedures.⁵⁰ The Rules place the safeguarding of the interests of victims at the heart of the Court's mandate, holding that their rights be respected throughout the proceedings.⁵¹ Those victims who are accepted as civil parties constitute a party to the proceedings, enjoying rights similar to those of the prosecution and defence. They are tasked with 'supporting the prosecution' and may seek collective and moral reparations⁵² defined as being those reparations which 'acknowledge the harm' suffered by civil parties and 'provide benefits' which address this harm.⁵³

In practice, the Court has made clear that while civil parties may testify and provide statements of suffering, they may not represent themselves, nor directly address the Court other than through their representatives.⁵⁴ Rather, they must choose a representative, and the Victim Support Services (VSS) maintains a list of foreign and national lawyers who wish to represent victims. Thus, similarly to the ICC, civil party representatives are granted greater procedural rights than their clients.

The ECCC's system of civil party representation has been revised multiple times as the Court has struggled with the large numbers of victims who have sought to participate. As a result, civil party representation has significantly differed in the Court's first two cases. During Case 001, against Kaing Guek Eav, alias Duch, civil parties were able to choose their own legal representation.⁵⁵ However, Case 002, now against Khieu Samphan and Nuon Chea, following the death of the other two defendants, was preceded by the introduction of the Lead Co-Lawyers (LCLs).⁵⁶ The LCLs consist of one national and one international lawyer who are selected by the Court to be jointly responsible for the overall advocacy, strategy and in-court presentation of the civil parties at the trial and appeal stage. The civil parties therefore retain their individual representatives, but are represented as one consolidated group at trial. In the first sub-trial of Case 002 (which had been severed due to concerns regarding trial

⁵⁰ D. Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation', 4 *JICJ* (2006) 307.

⁵¹ Internal Rule 21(c).

⁵² Internal Rule 23.

⁵³ Internal Rule 23 *quinquies*.

⁵⁴ Decision of 1 July on the Civil Party's Request to Address the Court in Person, *Case 002* (002/19-09-2007-ECCC/OCIJ) Pre-Trial Chamber, 3 July 2008.

⁵⁵ ECCC Internal Rules, (Revision 1), 1 February 2008, Rule 23(7).

⁵⁶ ECCC Internal Rules, (Revision 5), 5 February 2010, Rules 12*ter*, 23(5).

management and expediency) nearly 4,000 individual civil parties were represented in this way. The ECCC justified this decision as being due to the ‘need to streamline and consolidate Civil Party participation ... safeguard the ability of the ECCC to reach a verdict in its core case ... [and] enhance the quality of victim participation from the perspective of the victims.’⁵⁷ It was claimed that the changes would greatly enhance meaningful civil party participation in Case 002.⁵⁸ However, these changes have resulted in limitations being placed on the civil parties’ ability to hire and fire their legal representatives, impacting on their ability to exercise agency. This will be explored below.⁵⁹

3. Agency and the Selection of Representatives

Victim agency is often framed using the concept of victims’ rights,⁶⁰ with rights to representation and participation emerging in domestic and international contexts.⁶¹ There has been little theoretical engagement with what is meant by victim ‘agency’. Agency connotes autonomy; the idea that an individual has freedom to determine and contribute to issues that affect them.⁶² Abrams categorises agency as involving self-definition and self-direction:⁶³ self-definition as determining one’s own identity and values, and self-direction as the individual’s determination of their goals and life plan. This liberal position of autonomy as agency has been critiqued as failing to consider that a homogenous experience of freedom and autonomy may not be familiar to marginalised groups.⁶⁴ Critical and feminist scholars have suggested that autonomy and agency is shaped by social and cultural influences, and in certain respects constrained by law and politics, such as inequality and discrimination.⁶⁵

⁵⁷ ECCC Press Release, 7th Plenary Session of the ECCC Commences Monday 2 February 2010, available at www.eccc.gov.kh/sites/default/files/media/ECCC-PR28Jan2010-Eng_.pdf (visited 29 June 2016).

⁵⁸ *Ibid.*

⁵⁹ See Section 3.

⁶⁰ K. McEvoy and K. McConnachie, ‘Victimology in transitional justice: Victimhood, innocence and hierarchy’, 9 *European Journal of Criminology* (2012) 527.

⁶¹ E.g. S. Walklate, *Handbook of Victims and Victimology* (Willan, 2007).

⁶² M. Garvin and D.E. Beloof, ‘Crime Victim Agency: Independent Lawyers for Sexual Assault Victims’, 13 *Ohio State Journal of Criminal Law* (2015-2016) 67-88.

⁶³ K. Abrams, ‘From Autonomy to Agency: Feminist Perspectives on Self-Direction’, 40 *William and Mary Law Review* (1998-1999) 805-846.

⁶⁴ T.E. Hill Jr., ‘Autonomy and Agency’, 40 *William and Mary Law Review* (1998-1999) 847-856.

⁶⁵ *Ibid.*

The lack of agency for victims in international criminal justice has been a growing critique of the legitimacy of such trials.⁶⁶ Baines posits the dichotomy between the ‘ideal’ victim in transitional justice as a person ‘without agency’ and the ‘unbounded agency’ of the perpetrator.⁶⁷ We argue that the agency of victims of international crimes can be conceptualised in three ways: moral, political, and legal. Moral agency constitutes a value based judgement of the worthiness of an individual as deserving of ‘victim’ status. Moral agency can be independent of objective judgments as to the individual’s victim status, but decision makers and other actors can also shape who is seen as deserving of victim status.⁶⁸ Political agency means the role of victims in influencing the political landscape, and using their identity or to shape responses to meet their needs or interests. As Baines suggests, political agency can provide a means through which victims can contest their status and advance social action.⁶⁹ Finally, legal agency involves victims having access to judicial or administrative bodies in order to exercise and vindicate their rights where they have been violated. These typologies are not discrete. Being granted participatory rights, for example, can further both moral agency (through the granting of victim status) and legal agency (through the ability to participate). The typologies may also be contested and distinct, such in the case of *Lubanga*, where child soldiers saw their moral agency contested by other victims affected by their crimes, but were still able to participate in legal proceedings at the ICC.⁷⁰ Moral, political and legal agency can be shaped by social, cultural and economic influences that may inhibit certain groups or individuals from exercising their agency.

Commentators have suggested that victims in international criminal justice are only rhetorically represented as moral agents to legitimise the prosecution and punishment of perpetrators, with victims’ legal agency detached and represented by others.⁷¹ In other words, victims have their moral agency by being seen as deserving

⁶⁶ It was identified as a potential problem by C. Jorda and J. de Hemptinne, ‘The Status and Role of the Victim’, in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 1387–1419.

⁶⁷ E.K. Baines, ‘“Today, I Want to Speak Out the Truth”: Victim Agency, Responsibility, and Transitional Justice’, 9 *International Political Sociology* (2015) 316–332, at 317.

⁶⁸ See L. Moffett, ‘Reparations for ‘Guilty Victims’: Navigating Complex Identities of Victim–Perpetrators in Reparation Mechanisms’, 10 *IJTJ* (2016) 146–167.

⁶⁹ Baines, *supra* note 67.

⁷⁰ V. Spiga, ‘Indirect Victims’ Participation in the Lubanga Trial’, 8 *JICJ* (2010) 183–198.

⁷¹ Kendall and Nouwen, *supra* note 27; A Branch, ‘Dominic Ongwen on Trial: The ICC’s African Dilemmas’, 11 *IJTJ* (2017) 30–49.

individuals who have suffered, but their legal entitlements are non-existent because their case is stated by others. As Kendall and Nouwen observe, ‘justice is carried out in the name of "The Victims" by the "international community." "The Victims" thus appears as the passive object of an active subject.’⁷² This perhaps oversimplifies the legal agency victims can exercise through proceedings: while agency may be filtered through a legal representative, such representation can effectively voice victims’ interests.

Given the limits on the rights of victims to participate directly in proceedings, the selection of representatives is important, particularly for legal agency. If legal agency is understood as the power to make choices and to pursue chosen goals within legal systems, then the selection of representatives constitutes an important element of victims’ legal agency. Furthermore, choosing a legal representative may enhance a sense of moral agency, by recognizing victims’ legal entitlement and dignity in contrast to their victimhood.⁷³ However, a combination of factors restricts victims’ ability to exercise their legal agency at the ECCC and ICC. The lack of sufficient legal aid constructs practical barriers to their ability to access competent professional representation. Both courts also increasingly demonstrate an inclination to assign victims their representatives. Victims of international crimes are often left destitute and unable to afford specialist counsel who can advocate on their behalf. Unlike defendants, there is often little provision for assisting them in obtaining the services of legal representatives. Yet access to professional, competent representatives is crucial to ensuring that representation is more than purely symbolic. As argued by Human Rights Watch in their commentary on the ICC’s RPE:

an essential component of providing access to justice is removing barriers, including economic barriers, that make the exercise of rights illusory. Affording access by victims to the ICC should involve providing such assistance as may prove necessary to ensure that victims can participate and be represented. Absent provision for legal support, including of a financial nature, the Rules will create a hierarchical system that effectively excludes many victims or jeopardizes their ability to effectively protect their essential interests.⁷⁴

⁷² Kendall and Nouwen, *supra* note 27 at 256.

⁷³ M. Pena and G. Carayon, ‘Is the ICC Making the Most of Victim Participation?’ 7 *IJTJ* (2013) 519, 534.

⁷⁴ Human Rights Watch, *Commentary to the Second Preparatory Commission on Rules of Procedure and Elements of Crimes* (1999), 40-41.

These fears have been realized, at least in part, at both the ICC and the ECCC.

A. *The ECCC*

At the ECCC, the way representation has been funded and selected has significantly changed over the course of the first two cases. Initially, no provisions were made for the funding of victim assistance or representation, but each civil party was entitled to choose their own legal representation. In practice, civil parties usually chose on the basis of their relationship with the particular civil society groups who informed them of their right to participate and assisted with their application.⁷⁵ This resulted in the 96 civil parties being represented through four distinct legal teams, comprised of national and international lawyers, who were either being funded by foreign governmental or non-governmental organisations or were working entirely pro bono.⁷⁶ While civil parties were therefore able to exercise some legal agency through the selection of their representatives, and indeed were able to obtain representation which would not have been available to them otherwise, this method of funding had implications for the amount of time the lawyers were able to dedicate to their clients. As explained by one international civil party lawyer: ‘The Cambodia work involves going to Cambodia about four times a year, for about a month each time, whenever I can get leave from work. Because it was unpaid I had to be quite strategic with it, I had to take it on my annual leave.’⁷⁷

Similarly, a former civil party lawyer reflected on the struggles facing international lawyers:

All the other international lawyers had their own law firms back at home. And this is already a full time job to have a law firm, how are they able to follow a case? And this is of course because there is no legal aid, you can’t blame the international lawyers because they were not paid for their work, and some of them tried over time to find some resources to have an assistant in [Phnom Penh], but all this is different from having a proper legal aid

⁷⁵ McGonigle Leyh, *supra* note 18, at 218.

⁷⁶ *Ibid.*, at 219.

⁷⁷ Lawyer 2 (CP Team), 26 September 2015.

system where you are assured that you have the money and you can really deal and have a budget.⁷⁸

Indeed, civil party interviewees spoke of having only limited contact with their lawyers, and complained of receiving insufficient information about their cases' progress:

Since I attended as a civil party at the Tribunal ... I have not received any information.⁷⁹

I went several times [to the Court] and nothing is going to change, they don't keep me updated.⁸⁰

I haven't gained anything from the court because I didn't get any update from the court.⁸¹

Perhaps due to these difficulties, civil party representatives were often subjected to criticisms from other Court actors with regards to their professionalism.⁸² A particularly troubling accusation was that the civil party lawyers not only failed to represent their clients' interests, but undermined them, by drawing out exculpatory evidence: 'We've had disastrous questioning of key witnesses, we've had civil party lawyers elicit exculpatory evidence ... against the prosecution and against their own interests.'⁸³

While one must be wary of assuming that civil parties' interests completely align with that of the prosecution, studies have repeatedly shown that the successful prosecution and punishment of the accused before the ECCC is important to civil parties.⁸⁴ Thus, such criticisms highlight the need to ensure that victims are able to access professional, capable lawyers who will effectively represent their interests. This requires adequate allocation of resources: if effective representation is to be delivered, victims must have full access to legal aid.⁸⁵

Since 2010, some financial assistance has been budgeted for the employment of Court-funded civil party representatives.⁸⁶ Civil parties who cannot afford a lawyer

⁷⁸ Lawyer (Former CP Team member), 11 September 2015.

⁷⁹ Civil Party 14, 20 December 2013.

⁸⁰ Civil Party 1, 18 December 2013

⁸¹ Civil Party 5, 18 December 2013.

⁸² Lawyer 1 (Co-Prosecutors Office), 8 November 2013.

⁸³ Lawyer 2 (Co-Prosecutors' Team), 8 November 2013.

⁸⁴ E.g. E. Hoven, M. Feiler and S. Scheibel, 'Victims in Trials of Mass Crimes', 3 *Cologne Occasional Papers on International Peace and Security Law* (2013); P. Pham et al., *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley Human Rights Centre, 2011); N. Stammel et al., *The Survivors' Voices: Attitudes on the ECCC, the Former Khmer Rouge and Civil Party Participation* (Berlin Center for the Treatment of Torture Victims, 2010).

⁸⁵ Studzinsky, *supra* note 49.

⁸⁶ Sperfeldt, *supra* note 22.

may now seek help from the Office of Administration,⁸⁷ who have since funded one Cambodian legal team to help deal with the 799 civil parties who remained unrepresented in Case 002. This has led to a disparity in representation because externally funded teams generally include Cambodian and international lawyers.⁸⁸ This disparity can be attributed to the fact that Cambodian lawyers are significantly cheaper to hire.⁸⁹ However, it overrides the wishes of some civil parties, who have expressed a desire to receive the same standard of representation as the defence, and rely on international lawyers to guarantee that the system is not corrupt.⁹⁰ This limitation of legal agency is compounded by the fact that since 2010, judges may require civil parties to form groups and choose a common lawyer, assign them to existing groups, and designate lawyers for such groups.⁹¹ While there is some evidence to suggest that victims have sought to exercise agency by challenging the allocation of representatives, this has encountered resistance within the Court's staff. As recalled by one NGO worker:

They seem not quite happy with their lawyer, and for the Case 003 and 004 they suggest new lawyers and some of the previous civil parties from Case 002 also want to find a new lawyer. When I met some of VSS last month, I talk about that problem, but some of the VSS Khmer staff are not happy, they say, why you make trouble for us?⁹²

The introduction of the LCLs has arguably also had implications for the effectiveness of civil party representation; not least in relation to how nearly 4,000 individuals can have their interests effectively represented within a consolidated group.⁹³ While the LCLs have adopted regulations to facilitate coordination,⁹⁴ there remains little recourse for civil party lawyers who feel the views of their clients are being overlooked or misrepresented.⁹⁵ The attorney-client relationship between civil parties and their

⁸⁷ Internal Rule 12.

⁸⁸ Legal Assistant (CP Team), 10 December 2013.

⁸⁹ Lawyer (Former CP Team member), 11 September 2015.

⁹⁰ *Ibid.*

⁹¹ Internal Rule 23*ter*.

⁹² Legal Assistant (CP Team), 10 December 2013.

⁹³ I. Stegmiller, 'Legal Developments in Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia', 27 *Leiden Journal of International Law* (2014) 465.

⁹⁴ LCLs and Civil Party Lawyers, Internal Regulations, August 2011.

⁹⁵ Lawyer (Former CP Team member), 11 September 2015.

representatives in the courtroom has been severed,⁹⁶ inhibiting civil parties' ability to hire or fire their representatives, and restricting their opportunities to influence the courtroom strategy of those representatives.⁹⁷ A former civil party lawyer spoke of the frustration her clients felt at being unable to seek replacements for the LCLs: 'My clients asked me whether they can get rid of the LCLs because they had learned that they can choose their lawyers — and fire them when they are not satisfied. Then they had to learn that these LCLs were imposed and they cannot fire them.'⁹⁸

If civil parties are unhappy with their representation at trial, they have little recourse beyond withdrawing from the proceedings, a situation which significantly inhibits their ability to pursue their legitimate interests within the Court⁹⁹ and exercise legal agency through a meaningful client-attorney relationship.

B. The ICC

Similar challenges have been encountered within the ICC. While victims were able to choose their legal representative in the first cases, the Court has increasingly appointed common legal representatives on their behalf. The judges have stated on several occasions that victims' right to choose counsel is not absolute, in particular where there are a number of victims or where there are deadlines for proceedings to commence.¹⁰⁰ As stated in the *Katanga and Chui* case:

the right [to choose a legal representative] is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court. Common legal representation is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible.¹⁰¹

⁹⁶ Internal Rule 12 *ter*.

⁹⁷ J.D. Ciorciari and A. Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal', 35 *Michigan Journal of International Law* (2014) 369, at 222.

⁹⁸ Lawyer (Former CP Team member), 11 September 2015.

⁹⁹ A.F. Diamond Esq., 'Victims Once Again? Civil Party Participation before the Extraordinary Chambers in the Courts of Cambodia', 38 *Rutgers Law Record* (2010-2011) 34.

¹⁰⁰ Decision on common legal representation, *Benda and Jerbo* (ICC-02/05-03/09-337), Trial Chamber IV, 25 May 2012, §§ 12-13; Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, *Gbagbo* (ICC-02/11-01/11-138 04-06-2012), Pre-Trial Chamber I, 4 June 2012, § 35.

¹⁰¹ Order on the organisation of common legal representation of victims, *Katanga and Chui* (ICC-01/04-01/07-1328), Trial Chamber II, 22 July 2009, § 11.

Certainly, in early proceedings such as the confirmation of charges, it can be difficult in practice to consult with victims and find consensus on an appropriate common legal representative.¹⁰² Although the appointment of common legal representatives may therefore seem practical, it can also appear paternalistic, giving an impression that the courts know who can best represent victims' interests. Indeed, the selection has at times been against victims' wishes or without their full consultation for the reasons of expedience and fairness of the trial. While this is permissible, the OPCV is increasingly being used to instead of victims' preferred counsel, this raises concerns in relation to victims' agency. In the *Gbagbo* case the Court appointed the OPCV as the principal common legal representative, as well as a team member based in the field and a case manager.¹⁰³ The Court held that this approach was the 'most appropriate and cost effective system at this stage as it would enable to combine understanding of the local context with experience and expertise of proceedings before the Court, without causing undue delay in the case at hand'.¹⁰⁴ A similar approach has been adopted in the *Ntaganda* case where two counsel from the OPCV have been appointed to represent two victim groups, supported by two or more legal assistants.¹⁰⁵ This is despite 213 victims signing power of attorney to six lawyers.¹⁰⁶ Such developments signal an apparent preference for trial practicality over respecting victims' legal agency. REDRESS has opined that the Court has often undermined victims' 'agency in choosing for themselves'.¹⁰⁷ Similarly to the ECCC, victims have exercised their legal agency by challenging such appointments where they were not consulted or able to provide their views, but such claims have been rejected¹⁰⁸ and victims have no legal recourse or standing to appeal decisions on common legal representation.

With representation increasingly being carried out by court-appointed common

¹⁰² Registry's Proposal for the common legal representation of victims, *Ruto, Kosgey and Sang* (ICC-01/09-01/11-243), 1 August 2011.

¹⁰³ *Gbagbo*, *supra* note 73.

¹⁰⁴ *Ibid.*

¹⁰⁵ Decision Concerning the Organisation of Common Legal Representation of Victims, *Ntaganda* (ICC-01/04-02/06-160), Pre-Trial Chamber II, 2 December 2013, §§ 10, 23.

¹⁰⁶ *Ibid.*, § 11.

¹⁰⁷ REDRESS, *Representing Victims before the ICC: Recommendations on the Legal Representation System* (April 2015), at 4.

¹⁰⁸ 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, *Ruto, Kosgey and Sang* (ICC-01/09-01/11-314), 31 August 2011.

representatives, questions can be raised as to the meaningfulness of representation to the victims themselves. As stated by the Independent Expert Panel on victim participation at the ICC: ‘barring any breakdown in trust or relations between the victims and their legal representative, the continuity of legal representation should be seen as essential to maintain the relationship and trust that victims may have with their counsel.’¹⁰⁹

Similarly, a civil society member has opined:

Those who have already chosen to participate, because you make your own decision, the satisfaction which they will get at the end of the trial by knowing that truly they have been fully represented my lawyer did everything raised all the concern which was brought forward and finally judges has brought out this. It will encourage the future participation. It will be shared in other scenarios. But if they feel after the end of the *trial that they were poorly represented, it will discourage them and* maybe participation will not be looked as ... taken seriously by the international criminal justice system.¹¹⁰

There is also perception from international lawyers that victims can have high expectations of lawyers in meeting their needs. As one victim lawyer commented on the Uganda situation where the case did not proceed for a decade, that there was

a misinterpretation of the role of legal representatives of victims. A lot of people expect lawyers to be there at all times, however, if there is no judicial activity their presence is not warranted. This concept seems to be misunderstood also because there is a tendency to consider the Court as an humanitarian institution and therefore lawyers – who are in direct contact with the victims — often receive requests for assistance which have nothing to do with their mandate to represent victims in the proceedings.¹¹¹

For victims, the delay in proceedings has left them feeling neglected and disadvantaged in proceedings: ‘Dominic has been given ample time also to prepare with his lawyer all the defence, but for us as we talk now, we have not even been asked which lawyer we would choose.’¹¹²

¹⁰⁹ Independent Panel of Experts, *Report on victim participation at the International Criminal Court*, July 2013, 97.

¹¹⁰ Civil society member, Lira, April 2015.

¹¹¹ Victims’ lawyer, August 2015.

¹¹² A victim affected by Ongwen crimes in northern Uganda, April 2015.

Similar concerns about the legitimacy of voice and representation in lawyers engaging with victims in northern Uganda was highlighted in other research.¹¹³ We discuss this issue later in relation to the Ugandan situation.¹¹⁴ It raises the question of how lawyers representing victims at international courts can effectively ensure trust and informed expectations when judicial proceedings are delayed or suspended.

With regards to the funding of representatives, victims do not have a right to legal aid, but ‘may’ receive appropriate assistance from the Registry for a common legal representative. In contrast to the regulations on legal aid for defence counsel,¹¹⁵ such assistance is discretionary and excludes support for those seeking individual legal representatives.¹¹⁶

In the *Ongwen* case, legal aid has become a key area of contest around the effective representation of victims. In a decision on contested victims’ applications, Judge Tarfusser distinguished counsel chosen by victims from common legal representatives, finding that victims who chose their own counsel did not qualify for financial assistance.¹¹⁷ The case was further complicated by the fact that the two lawyers chosen by the victims, Joseph Akwenyu Manoba and Francisco Cox, had informed the victims that they would represent them free of charge with their costs covered by the Court, with the majority of victims signing over their powers of attorney on the basis of the VLRs representing them on a pro bono basis.¹¹⁸ This self-selection by the VLRs was very much disproved of by Judge Tarfusser, who held that selecting the two VLRs as the common legal representatives would be inappropriate as they ‘not been selected pursuant to a transparent and competitive procedure organised by the Registry’ and ‘appointment of external counsel would bring a disproportionate and unjustified burden to the Court’s legal aid budget.’¹¹⁹ Instead the Chamber held that the OPCV would be better positioned to act as common legal representative. When the two VLRs later requested legal aid, they were strongly rejected on the grounds that they

¹¹³ See Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court, Berkeley Human Rights Centre, 2015, at 33.

¹¹⁴ Section 4.

¹¹⁵ Regulation 83(2), Regulations of the Court.

¹¹⁶ Rule 90(5), RPE.

¹¹⁷ Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, *Ongwen* (ICC-02/04-01/15-350), Pre-Trial Chamber II, § 18.

¹¹⁸ *Ibid.*, § 18.

¹¹⁹ *Ibid.*, § 20.

were not common legal representatives. Further, they were informed that they would violate the Code of Professional Conduct if they refused to represent their victims on the basis of inability to obtain legal aid, after offering their services to victims for free.¹²⁰

Judge Tarfusser based his decision on the nebulous grounds of the ‘interests of justice’, with a counsel from the OPCV representing victims at the ICC and one or more legal field assistants liaising with victims in northern Uganda.¹²¹ This was contrary to the wishes of the victims, who had indicated that they wished to be represented by someone from the Acholi region, or at least someone who spoke Acholi and was able to communicate with them.¹²² The OPCV appointed Ugandan lawyer Jane Adong as field counsel, but the division in representation remains split between the legal representatives who are acting on behalf over half the victims (2,601 individuals) with the remainder represented by the OPCV (1,502).¹²³ This focus on funding, and ignoring of victims’ wishes, has led civil society actors to criticize the court, stating that: ‘the Court’s major concern is just to talk about the lack of funds, which means they are not ready to spend on that they don’t value. Maybe the judges are thinking whether victims’ participation or not make no difference.’¹²⁴

The decision to not award legal aid to the VLRs in the *Ongwen* case also saw leading international civil society actors issue a letter to the ICC Registrar to release funds to ensure the 2,601 victims have adequately funded representation. As stated in the letter ‘listening to victims’ choices of legal representation and supporting such choice is a pre-condition for their genuine participation in the ICC proceedings.’¹²⁵ Subsequently the Registrar, under his own discretion and the broad guidelines of Judge Tarfusser, released the funds for the two VLRs to enable them to represent their clients

¹²⁰ Decision on requests to postpone the hearing on the confirmation of charges, *Ongwen* (ICC-02/04-01/15-396), Pre-Trial Chamber II, 12 January 2016, § 17.

¹²¹ *Supra* note 117, §§ 23-24.

¹²² *Ibid.*, § 23. Position affirmed in Decision on Registry’s Request for Clarification on the Issue of Legal Assistance Paid by the Court for the Legal Representatives of Victims, *Ongwen* (ICC-02/04-01/15-591), Trial Chamber VII, 14 November 2016.

¹²³ A total of 4,107 victims are participating with the counsel for the remaining 4 victims to be decided at a later date. See Updated consolidated list of victims admitted to participate in the proceedings, *Ongwen* (ICC-02/04-01/15-652), Registry, 13 January 2017.

¹²⁴ Civil society member, Lira, April 2015.

¹²⁵ Letter to the Registrar of the ICC Re: Legal Aid for Victims in the *Ongwen* case, from FIDH, REDRESS, International Bar Association, No Peace Without Justice and Parliamentarians for Global Action, 17th November 2016.

at the trial stage. The debacle illustrates the challenge of ensuring victims' legal agency and transparent legal representation while controlling the proliferation of representation and preventing duplication of tasks.

Thibaut and Walker in their work on procedural justice found that perceptions of the quality of justice were improved where more assistance was given to participants to present their case, rather than by the impact of such participation on decision-making.¹²⁶ In other words, participants appreciate the quality of representation, and the ability to fairly state their case in their own terms, even if their views are not determinative of outcomes. Further research is required to fully explore victims' perceptions of the quality of legal representation and agency at the two Courts. It is arguable that in cases where financial restraints are placed on victim legal representation, then more should be done to place reasonable controls on the number and quality of legal representatives. However, the risk is that the pursuit of cost-effectiveness inhibits victims' perceptions of the effectiveness and meaningfulness of legal representation, with implications for the perceived success of the victim participation project in international criminal justice. In addition, perceptions of fairness of funding may impact upon local and international civil society actors' engagement and support of the Courts, with implications for the future work of two Courts who particularly rely on civil society assistance and support.

4. Voices as Property

Restrictions on victims' ability to exercise their legal agency through choice of legal representation has implications for *who* may legitimately speak for victims and *how* their voices are used. In this context, voice can be distinguished from agency: agency is the ability to self-identify and act, while 'voice' relates to the expression of specific interests and needs. The issue of voice and who may legitimately speak for victims has been a growing concern in transitional justice, drawing upon similar debates in criminology and victimology.¹²⁷ In 1977, Christie decried the loss of the victim's 'conflict' with the offender, through his/her lack of participation or ownership in

¹²⁶ J. Thibaut and L. Walker, 'A Theory of Procedure', 66 *California Law Review* (1978) 541-566, at 554.

¹²⁷ McEvoy and McConnachie, *supra* note 60.

prosecuting such cases.¹²⁸ Victims have frequently been neglected in both domestic and international criminal proceedings, becoming so ‘thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing.’¹²⁹ In earlier international criminal tribunals such as Nuremberg, and the tribunals for Rwanda and the former Yugoslavia, victims’ voices were often appropriated and packaged in legal terms to support arguments made by the prosecution.¹³⁰

Since Christie first explored the concept of ‘conflicts as property’, there have been significant developments, domestically and internationally, which have sought to re-introduce the victim’s voice into the legal arena. From victim impact statements in common law jurisdictions, to victim and civil party participation at the ICC and ECCC, it appears that there is a growing trend towards ‘hearing’ the victim’s voice within criminal prosecutions.¹³¹ In this regard, the introduction of representation is a positive development because it may enable victims’ voices to be communicated to decision makers.¹³² However, while such measures may be lauded as increasing the victim-centrism of criminal prosecutions,¹³³ new challenges arise with regards to the how victims’ voices are transmitted, interpreted and used. In fact, victim participation has arguably changed the nature of Christie’s typology of ‘conflicts as property’ to that of ‘voices as property’, with victims’ voices being appropriated by professional elites. Such concerns are amplified within the international criminal arena due to the multitude of voices and the power dynamics that may exist between victimised communities and the legal elites who represent them.¹³⁴ This section considers these issues in the context of the ICC and ECCC, exploring how victims have sought to exercise voice, and how their voices have arguably been appropriated by other actors.

¹²⁸ N. Christie, ‘Conflicts as Property’, 17 *British Journal of Criminology* (1977) 1, at 7.

¹²⁹ *Ibid.*, at 3.

¹³⁰ McEvoy and McConnachie, *supra* note 22, at 495.

¹³¹ McEvoy and McConnachie, *supra* note 60.

¹³² T. Kirchengast, ‘Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial’, 16 *New Criminal Law Review* (2013) 568, 571.

¹³³ S. Robins, ‘Towards victim-centred transitional justice: Understanding the needs of families of the disappeared in postconflict Nepal’, 5 *IJTJ* (2011) 75.

¹³⁴ Alcoff, *supra* note 25.

A. *Who Speaks for the Victims?*

The limiting of opportunities to speak directly, and the collectivisation of representation, risk the complexities of victim identity and the multitude of victim perspectives and wishes being entirely lost within the courtroom. As Haslam and Edmunds argue, the organization of common legal representation appears to be based on assumptions that victims have ‘homogenous’ views, concerns and interests.¹³⁵ Such an approach narrowly frames victims’ voice and legal agency, and risks rendering irrelevant those victims whose views appear contradictory or outside the evidence or charges presented at trial. While courts cannot accommodate all victims’ interests in their decision making, the simplification of victims’ voices as ‘wanting justice’, overlooks the complexities of victims’ experiences and wishes. Furthermore, victims can articulate principles that have legal meaning, such as modes of liability around command responsibility,¹³⁶ characterization of crimes as sexual slavery,¹³⁷ and inapplicability of defenses.¹³⁸ While it is natural to question the extent to which large numbers of individuals can have their interests represented within the confines of a courtroom, such problems of collectivising voice at least require a reconsideration of the extent to which international criminal institutions such as the ECCC and ICC can be considered victim-centric.

At the ECCC, collectivisation of victims’ voices has been formalised through the introduction of the LCLs, a development which has provoked different reactions among the Court’s practitioners and stakeholders. The fact that victims speak with one consolidated voice at trial has been seen by many Court practitioners as a fair exchange for enhanced efficiency, and the LCLs have been praised for having ‘done largely a very good job of herding a bunch of cats.’¹³⁹ However, it has not been welcomed by the civil party lawyers themselves. As noted by one member of the working group responsible for the creation of LCLs: ‘we were fought tooth and nail by civil party lawyers who wanted to have independent rights of audience, individually.’¹⁴⁰

¹³⁵ Haslam and Edmunds, *supra* note 1, at 888.

¹³⁶ Focus group 3, Northern Uganda, 14 July.

¹³⁷ Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, *Lubanga* (ICC-01/04-01/06-1891-t(ENG)), 16 July 2009.

¹³⁸ Focus group 4, Northern Uganda, 14 July 2011.

¹³⁹ Lawyer 2 (Co-Prosecutors’ Team), 8 November 2013.

¹⁴⁰ *Ibid.*

While this appeared to be interpreted by the interviewee (and others) as demonstrating a selfish desire for court time,¹⁴¹ it is worth considering whether the civil party lawyers were not at least in part anxious about their ability to effectively represent their clients' interests within the courtroom. With nearly 4,000 individuals represented as a collective, the potential for conflicts of interests to arise is undeniable. This risk is exacerbated by the fact that the LCLs are hired by the Court, rather than by the civil parties themselves, and indeed have been criticized as placing the interests of the Court before that of their clients. One example flagged in the interviews related to the severance of Case 002 into sub-trials. As it was known that there was a strong likelihood of Case 002/02 never being completed due to the advanced age of the defendants, the Supreme Court Chamber had clarified that the first sub-trial should aim to be representative.¹⁴² Yet both the Prosecution, and the LCLs requested the inclusion of only a limited number of the indictment's crimes: those committed at the S-21 security centre and forced transfers. As observed by one defence lawyer: 'So here the civil parties are standing up and asking that 75% of their clients be dismissed. There's so many things you can say about that. One is there is an undeniable conflict of interest.'

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Ultimately the severance did occur along the lines suggested by the Prosecution and LCLs. This resulted in the harms of many civil parties being absent from the judgment, with associated limitations being placed on their ability to participate directly through the provision of testimony or statements of suffering. The risks associated with such conflicts of interests are exacerbated by the inability of civil party lawyers to challenge the LCLs approach through an independent process. The LCLs have noted their duty to consult with civil party lawyers and seek consensus when coordinating representation,¹⁴⁴ but there is little recourse for civil party representatives who disagree with the consolidated approach. One interviewee spoke of attempting to circumvent the LCLs' procedures in order to make a submission on behalf of her clients: 'I drafted a submission and sent it to the Lead Co-Lawyers, but there was no reaction, no comment

¹⁴¹ Lawyer 2 (Co-Prosecutors' Team), 8 November 2013; Lawyer 4 (Defence), 13 December 2013.

¹⁴² Decision on Severance of Case 002/01 following Supreme Court Chamber Decision of 8 February 2013, *Case 002* (002/19-09-2007/ECCC/TC), Trial Chamber, 26 April 2013.

¹⁴³ Lawyer 3 (Defence), 29 October 2014.

¹⁴⁴ *Supra* note 94.

no nothing. So I submitted this then and signed it together with my Cambodian counterparts, and then it was rejected by the Chamber as deficient because it was not signed by the LCLs’¹⁴⁵

These changes in representation raise questions as to who constitutes a party to the trial: the civil parties as individuals, or a ‘consolidated group’?¹⁴⁶ As the minimum rights granted to ‘parties’ are no longer open to the civil parties and their individual lawyers, it appears that the idea of the ‘group as a party’ carries more weight.¹⁴⁷ Such an approach is arguably problematic, as victims do not speak with one voice, and often have a strong sense of their own individual harm and a desire to express it.¹⁴⁸

Amongst the civil parties interviewed, those who were aware of the change in representation were generally accepting of the change:

If the Tribunal allows everyone [representation] then there would be no time, I understand.¹⁴⁹

...

Only two, international and national, are enough, because I believe they will give justice to me.¹⁵⁰

However, it is worth noting that this was not a uniformly held belief, as other studies amongst civil parties have demonstrated that while not all civil parties are aware of the specific change in procedures, there is a sense that they are less involved in Case 002, and that this is a negative change.¹⁵¹ Such differences can in part be attributed to the fact that civil parties are not a homogenous group and different perspectives are natural, but may also be linked to the lack of up-to-date information received by the interviewees, as explored above.¹⁵²

¹⁴⁵ Lawyer (Former CP Team member), 11 September 2015.

¹⁴⁶ Internal Rule 12ter(5).

¹⁴⁷ Diamond, *supra* note 72.

¹⁴⁸ Reparations for Victims of the Khmer Rouge Regime, Conference Report (edited by Ch. Sperfeldt/W. Winodan), CHRAE/ECCC Victims Unit, Phnom Penh, May 2009.

¹⁴⁹ Civil Party 9, 19 December 2013.

¹⁵⁰ Civil Party 15, 20 December 2013.

¹⁵¹ Hoven, Feiler and Scheibel, *supra* note 84.

¹⁵² See also Killean, *supra* note 18 for a more in-depth discussion on civil party access to information.

It must also be acknowledged that the civil party lawyers, as the direct representatives of the civil parties, are neither free from power dynamics,¹⁵³ nor immune to the ‘problem of speaking for others’.¹⁵⁴ Indeed, one must be wary of underestimating the differences in opinion that can occur between civil parties and their representatives.¹⁵⁵ Even those genuinely attempting to represent victims’ interests can unintentionally misappropriate the voice of the victim,¹⁵⁶ or overlook those victims who may be disenfranchised as a result of their gender, race or community power dynamics.¹⁵⁷ Thus, it must be remembered that victim representatives can contribute to the continued ‘theft of the conflict’,¹⁵⁸ that claims to speak on behalf of victim populations must be scrutinised, and the extent to which victims are genuinely able to exercise voice and agency through such organisations should be questioned.¹⁵⁹

Just as the representations of the LCLs are given preference over those of the civil party lawyers at the ECCC, there is the risk that it will be the voice of the professionals that is given priority.¹⁶⁰ Haslam has noted the tendency of international criminal institutions to investigate and determine the interests of victim communities through ‘experts’. The discussion is farmed from the start in a way that reflects dominant international criminal discourse, thereby silencing other, potentially more critical perspectives.¹⁶¹ One particularly public example of disagreement between civil parties and their representatives occurred at the end of Case 002/01 at the ECCC. The LCLs, after consulting the civil party lawyers, VSS and a number of civil society organisations, put forward a reparations proposal, focusing on collective and moral reparations.¹⁶² However, the start of Case 002/02 saw a group of 200 civil parties assemble at the ECCC, protesting what they termed ‘worthless’ reparations, and

¹⁵³ H. Veltmeyer, *The Critical Development Studies Handbook: Tools For Change* (Fernwood Publishing, 2011); R. Munck and D. O’Hearn (eds) *Critical Development Theory: Contributions To A New Paradigm* (Zed Books, 2009).

¹⁵⁴ Alcoff, *supra* note 25.

¹⁵⁵ Sperfeldt, *supra* note 22, at 9.

¹⁵⁶ McEvoy and McConnachie, *supra* note 2.

¹⁵⁷ G. Mohan, ‘Not so Distant, Not so Strange: the Personal and the Political in Participatory Research’, *2 Ethics, Place and the Environment* (1999) 41, 46.

¹⁵⁸ Christie, *supra* note 128.

¹⁵⁹ E. Haslam, ‘Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience’, in D. McGoldrick et al., *The Permanent International Criminal Court: Legal And Policy Issues* (Hart Publishing, 2004) 315.

¹⁶⁰ McEvoy and McConnachie, *supra* note 17, at 498.

¹⁶¹ Haslam, *supra* note 143.

¹⁶² Trial Judgement, *Case 002/01* (002/19-09-2007/ECCC/TC), 7 August 2014.

demanding individual compensation for their harm.¹⁶³ This group claimed to represent 1,780 civil parties, suggesting a troubling disconnect between civil parties and their lawyers. Indeed, civil parties interviewed by the author often expressed a desire for monetary reparation:

Not only me, but other people that suffer from the Khmer Rouge regime, they expect that they will get compensation, to help their family improvement ... they should give money in compensation to help them.¹⁶⁴

The Court should give money directly to the civil parties through their lawyer.¹⁶⁵

It may be that the civil party lawyers were more than aware of their clients' attitudes towards collective reparations,¹⁶⁶ but felt it their duty to at least propose measures with a likelihood of being accepted by the Court. Yet their complicity in accepting the limitations of the Court's reparations mandate reaffirms the mandate's legitimacy and plays down the sense of dissatisfaction that led to civil parties personally bringing their objections to the Court.

At the ICC, similar issues associated with collectivised representation have been observed, despite steps being taken by the Court to promote effective and meaningful common representation. For example, common legal representatives are meant to capture the collective voices of the victims they represent and present their views and concerns to the Court. They are appointed on criteria that lend themselves to being more associated or empathetic to victims by sharing with them '(i) the language spoken by victims [and the legal representative], (ii) links between them provided by time, place and circumstances, (iii) the specific crimes of which they allege to be victims, (iv) the views of victims, and (v) respect of local traditions.'¹⁶⁷ The Registry's criteria for legal representatives were set out in the *Ntaganda* case as being able to 'also demonstrate abilities to communicate easily and to establish a relationship of trust with victims.'¹⁶⁸

¹⁶³ K. Naren and H. Robertson, 'Victims Call for Money from ECCC', *The Cambodia Daily*, 17 October 2014.

¹⁶⁴ Civil Party 17, 29 October 2014.

¹⁶⁵ Civil Party 14, 20 December 2013.

¹⁶⁶ Lawyer 1 (CP Team), 11 November 2013.

¹⁶⁷ Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, *Bemba* (ICC-01/05-01/08-322), Pre-Trial Chamber III, 16 December 2008, § 9.

¹⁶⁸ *Ntaganda* (ICC-01/04-02/06-141-Conf-Exp), § 19.

Furthermore, the RPE recognises that collectivising victims' voices can be detrimental to certain groups, by stipulating that consideration for victims' distinct interests are to be represented and any conflicts of interest to be avoided is for victims of sexual or gender violence or violence against children.¹⁶⁹ In the *Katanga* case, for example, victims were organised into two groups with two teams of VLRs, one representing child soldiers and the other victims of the Bogoro massacre.¹⁷⁰ In the *Bemba* case involving 5,229 victims, they were grouped geographically to enable victims of the same family and community to be represented by the same common legal representative to facilitate efficient communication.¹⁷¹ This was criticised by the Women's Initiative on Gender Justice, which argued that such geographical organisation of common legal representation may not serve the distinct interests of victims of sexual violence.¹⁷²

As with the ECCC, there are emerging conflicts over who legitimately speaks for victims. This is apparent in the Ugandan situation, where there has been competition over who legitimately represents the voices of victims among the OPCV, VLRs and civil society. These groups are not so distinct; one of the VLRs, Joseph Manoba Akaweyu, comes from the Ugandan Victims Foundation, a leading Ugandan victim civil society organization. Ugandan civil society organisations have been active in petitioning the ICC to participate to speak on behalf of victims in the *Ongwen* case, claiming 'the Ugandan victims want to be given agency in a process that affects them and play a role in the choice of their legal representative, instead of having one appointed for them with no consultation.'¹⁷³ This was based on frustration with the ICC and the OPCV, which had been appointed to act on behalf of victims who had applied to participate in the Ugandan situation and who were entitled to participate in the *Kony and other* case. Yet in the periods between the issuance of arrest warrants in 2005 and Ongwen being apprehended in 2015, there was little judicial activity in the case, resulting in the field activities of the ICC being scaled back. As one civil society

¹⁶⁹ Rule 90(4), as provided in Art. 68(1).

¹⁷⁰ Order on the Organisation of Common Legal Representation of Victims, *Katanga and Chui* (ICC-01/04-01/07-1328), Trial Chamber II, 22 July 2009, §12.

¹⁷¹ Decision on common legal representation of victims for the purpose of trial, *Bemba* (ICC-01/05-01/08-1005), Trial Chamber III, 10 November 2010, §§ 18–20.

¹⁷² B. Inder, Statement by the Women's Initiatives at the opening of the Trial of Jean-Pierre Bemba Gombo, 22 November 2010, at 4.

¹⁷³ Application by the Uganda Victims Foundation to Submit Amicus Curie Observations pursuant to Rule 103 of the Rules of Procedure and Evidence, *Ongwen* (ICC-02/04-01/15-211), Pre-Trial Chamber II, 20 March 2015, §13.

member said, between 2008 and 2015 there was a ‘vacuum in terms of information flow’ between the ICC and victims. The OPCV has taken the brunt of this criticism, as civil society and victims expected them to maintain contact with them.¹⁷⁴

This competition has taken the form of one civil society organisation, the Ugandan Victims Foundation, making an *amicus curiae* submission to the ICC citing the

lack of proper and effective legal representation that they have received from the OPCV thus far. In a ten-year period the victims have received very little communication from the OPCV regarding the progress or lack thereof of the proceedings against Kony et al. 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.¹⁷⁵

In response, the OPCV argued that such claims were premature because the Court had not at that stage decided legal representation.¹⁷⁶ Moreover, the OPCV asserted that the Uganda Victims Foundation (UVF) did not have the ‘legitimacy to speak on behalf of the victims represented by the Legal Representatives’.¹⁷⁷ Since March 2015 when these submissions were made, Judge Tarfusser has transferred most of the representation over to the VLRs. The future of such representation by external counsel is questionable without legal aid. At the trial stage of proceedings Judge Schmitt found that the current arrangement of victim representation was not ineffectively operating and that

the interests of the two groups of victims represented by the LRVs and OPCV are not distinct, nor are there any irreconcilable conflicts apparent within each group. Further, according to the Registry, the victims themselves do not object to the possibility of a single counsel or team representing all participating victims in the case. In these circumstances, the Single Judge considers that the LRVs and OPCV must consult, cooperate and, whenever possible, act jointly. This promotes the fair and expeditious conduct of the proceedings and the rights of the accused.¹⁷⁸

¹⁷⁴ Civil society member 01, Lira, April 2015.

¹⁷⁵ *Supra* note 155, § 11.

¹⁷⁶ Request for leave to file a Response to the ‘Application by the Uganda Victims Foundation to Submit Amicus Curie Observations pursuant to Rule 103 of the Rules of Procedure and Evidence’, *Ongwen* (ICC-02/04-01/15-214-Red), Trial Chamber II, 27 March 2015, §7.

¹⁷⁷ *Ibid.*, §9.

¹⁷⁸ Decision on Requests Concerning Organisation of Victim Representation, *Ongwen* (ICC-02/04-01/15-476), Trial Chamber IX, 17 June 2016, §§ 11-12.

The contest between the OPCV and victim selected counsel also reflects wider dissatisfaction with the ICC in northern Uganda amongst civil society and victims. Civil society feel that they have been side-lined after spending months and years travelling out into the bush on motorbike and foot to help victims complete and submit applications to participate at the Court.¹⁷⁹ This loss of control and even acknowledgement for the key facilitation role they have played is felt more acutely due to the fact that many members of civil society organisations are victims themselves, but fall outside the narrow charges against Dominic Ongwen. The selection of the OPCV rather than more local domestic counsel may just be the most visible point of frustration. As one civil society member remarked, ‘We are willing to cooperate with the court, but it’s just a shame that the court seems committed to getting any lawyer for victims whether they want or not.’¹⁸⁰

Moreover one leading member of civil society commented that it was ‘very unprofessional’ for the OPCV to directly approach victims for participation.¹⁸¹ In focus groups involving victims participating before the ICC, the victims identified that they wanted a lawyer to be appointed to represent their interests and that they should be involved in the selection of participations in the trial ‘to avoid imposters representing us.’¹⁸² Having spoken to the Lukodi community in March 2015, where most of the crimes against Ongwen were original based, many victims were keen to choose their legal representation at the ICC, but no one had yet approached them to provide legal advice or assistance. Victims in the Lukodi community expressed their fatigue of being mobilised and engaged by civil society and international actors, without seeing any substantive change to their situation in over a decade.¹⁸³ As one victim stated: ‘We see so many different people coming to Acholi for some issue, like to find out the views of all the victims of the case ... the court will come a number of times, [but] some of the

¹⁷⁹ Interviews with civil society actors in Lira and Gulu, April 2015.

¹⁸⁰ Civil society member, Lira, April 2015.

¹⁸¹ *Ibid.*

¹⁸² Male respondent, focus group discussion, Lukodi, cited in Oryem Nyeko and Harriet Aloyocan, Community Perceptions on Dominic Ongwen Situational Brief, Justice and Reconciliation Project, May 2015.

¹⁸³ Focus groups conducted in June-July 2011, and April 2015.

victims could have died already so the place of the victims in terms of benefit is not very clear.’¹⁸⁴

More critical views points contended that

As far as victims' interests are concerned, it has been dominated by civil society organisations, who claim to speak on behalf of victims, there are some in northern Uganda who work closely with the victims, and some in Kampala who have never set foot in northern Uganda ... it undermines a lot.¹⁸⁵

This difficulty arises not only from the OPCV representing victims, but from national civil society organisations becoming VLRs despite being based hundreds of miles from victims. In competing over who represents victims, there is very little space for victims to exert ownership or participation at the Court, as they have no recourse to appeal to the Court directly beyond the OPCV or legal representatives. The Victim Participation and Reparations Section, an organ in the Registry, could be an avenue, but has no standing in proceedings to raise such issues before the Court on behalf of victims.

5. Conclusion

The discord over victim participation and representation demonstrates contested visions of what such procedures should look like. It is likely that this discord is in part attributable to the incoherent participation and representation schemes at the ICC and ECCC, both of which feature case-by-case variance. It is clear the civil party participation is an evolving experiment, as ruefully acknowledged by one ECCC judge: ‘The form of representation and participation, we haven’t got it right, it still needs to be tweaked, but as an experiment, that’s a terrible thing to say, not as an experiment but as a best try, I think a lot has been learned from it.’¹⁸⁶

In this ambiguous space of victim participation, victims’ voices are extrapolated and contested amongst lawyers, sometimes thousands of miles away. More worryingly, the increasing internalization of victim representation by in-house lawyers represents

¹⁸⁴ Focus group 1, northern Uganda, April 2015.

¹⁸⁵ Civil society member, Gulu, April 2015.

¹⁸⁶ Judge 1, 7 November 2013.

courts ‘insulating’ themselves from victims, who in themselves represent disorder to the tightly controlled and regulated court proceedings.

Rajagopal, in his critique of human rights discourse, has spoken of the need to ‘listen and respond to the voices of the subalterns’;¹⁸⁷ we would submit that this need cannot be fulfilled by listening only to legal representatives. Such concerns have been reflected academically through, for example, the call for a turn towards international criminal law ‘from below’,¹⁸⁸ an approach that advocates for greater engagement with grassroots and community organisations.¹⁸⁹ Orentlicher has also articulated this necessity, emphasising the need to give ‘victims’ agency in defining their own interests and preferences and in participating in national processes aimed at designing policies of transitional justice’.¹⁹⁰

Opportunities remain to follow Orentlicher’s advice. For example, at the ECCC victims may form Victim Associations.¹⁹¹ A number of civil parties have done so, for example Ksaem Ksan, founded by two survivors of S-21.¹⁹² While there is a need to be aware of power dynamics and hierarchies of voice within such organisations, greater direct communication with Victim Associations may provide a way for the Court to engage with affected communities, as may a greater focus on outreach and engagement from within the Court’s organs. Such measures could make the difference between the ECCC delivering what Gready has termed ‘distant justice,’ and justice which is ‘embedded’ in those communities most affected by the crimes charged.¹⁹³ However, such activities require financial support, and this has not been forthcoming from the ECCC’s financial managers and donors. Thus, the reliance on professionalised civil society remains linked to budgetary limitations. That said, it may be useful for other international courts in the future to explore the role of civil society organisations, who

¹⁸⁷ B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003).

¹⁸⁸ K. McEvoy and L. McGregor, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart, 2008).

¹⁸⁹ See also L. Kent, ‘Local Memory Practices in East Timor: Disrupting Transitional Justice Narratives’, 5 *IJTJ* (2011) 434.

¹⁹⁰ D. Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency”, 1 *IJTJ* (2007) 10,19.

¹⁹¹ Internal Rule 23 *quater*.

¹⁹² H. Jarvis, “‘Justice for the deceased’: Victims’ Participation in the Extraordinary Chambers in the Courts of Cambodia”, 8 *Genocide Studies and Prevention: An International Journal* (2013) 19, 24.

¹⁹³ P. Gready, ‘Reconceptualising Transitional Justice: Embedded and Distanced Justice’, 5 *Conflict Security and Development* (2005) 2.

have been advancing victims' political agency, to be further conduits for victims' legal agency, while understanding their limits and their honesty as brokers.

At the ICC future reform through the Registrar's ReVision project could value victims' voice and agency through ensuring sufficient independence and funding for victim representation. Decisions over victim representation should allow victims to have a say in the decision making process through, for example, surveying their opinion on legal representation. Moreover, there needs to be greater engagement and information provision to affected communities and civil societies on the limits of the Court in responding to the needs of those victims affected by the case before it. Such engagement with civil society in Uganda has led to the inclusion, for the first time of victim legal representatives in a domestic trial (in the trial of former LRA commander Thomas Kwoyelo).¹⁹⁴

Hébert-Dolbec argues that the recent developments of common legal representation at the ICC have resulted in the bureaucratization of victim participation, increasing victims' marginalization and invisibility and leaving them devoid of any political or legal agency.¹⁹⁵ We disagree in part. While the courts have increasingly moved towards systems of collective representation, legal assistants in the field, such as local lawyers and civil party lawyers, continue to engage with victims and challenge the Court to the extent to possible. They act outside the Court in terms of political agency and within it by acting as external counsel and representing victims' voices as legal agency. Victims, at least some of them, are able to exercise some form of legal agency through their legal representatives, challenging evidence, calling witnesses, and making statements. However, there is a long way yet to go to make their participation meaningful. There remains a real risk that within the courtroom victim participation is a token effort, rather than a genuine representation of voice and legal agency. Victims of international crimes are often left destitute after mass atrocities. With their account of suffering the only intangible property they may have left, greater care should be taken in how their voice is collected, represented and used in respecting their legal agency.

¹⁹⁴ L. Moffett, 'Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo', 16 *International Criminal Law Review* (2016) 503.

¹⁹⁵ *Supra* note 1.