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REALISING JUSTICE FOR VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

The International Criminal Court (ICC) has been celebrated for its innovative victim provisions, which enable victims to participate in proceedings, avail of protection measures and assistance, and to claim reparations. The impetus for incorporating victim provisions within the ICC, came from victims' dissatisfaction with the ad hoc tribunals in providing them with more meaningful and tangible justice.¹ The International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R) only included victim protection measures, with no provisions for victims to participate in proceedings nor to claim reparations at them. Developments in domestic and international law, in particular human rights such as the 1985 UN Declaration on Justice for Victims and the UN Guidelines on Remedy and Reparations, and transitional justice mechanisms, such as truth commissions and reparations bodies, have helped to expand the notion of justice for international crimes to be more attuned to victims as key stakeholders in dealing with such crimes.

With the first convictions secured at the ICC and the victim participation and reparation regime taking form, it is worth evaluating the extent to which these innovative provisions have translated into justice for victims. The first part of this paper outlines what justice for victims of international crimes entails, drawing from victimology and human rights. The second section surveys the extent to which the ICC has incorporated justice for victims, in procedural and substantive terms, before concluding in looking beyond the Court to how state parties can complement the ICC in achieving justice for victims. This paper argues that while much progress has been made to institutionalise justice for victims within the Court, there is much more progress needed to evolve and develop justice for victims within the ICC to avoid dissatisfaction of past tribunals.

I. JUSTICE FOR VICTIMS OF INTERNATIONAL CRIMES

Over the past few decades many domestic jurisdictions have been concerned with improving victim satisfaction with the criminal justice system. Enhancing victims' experience is supposed to foster their engagement as witnesses to help prosecutions as well as to improve the legitimacy of criminal trials. While there are similar concerns in international criminal justice, there are stark differences in terms of political dimensions between state sovereignty and distinction from domestic crimes. International crimes generally involve mass victimisation and large-scale organised participation,

¹ The ICTY and ICTR were established only a few years earlier from the Rome Statute to address violence in the former Yugoslavia and the genocide in Rwanda.

such as the Rwanda genocide; they can be ideologically driven by dehumanising victims to legitimise violence against them; involve the action or inaction of the state; and have a long-term impact on victims, particularly in cases of impunity.² In developing how justice can be delivered for victims of international crimes it is worth first looking at their needs, before turning to procedural and substantive aspects of justice.

A. Victims' needs

Victimological studies of domestic victimisation have found that victims generally have emotional, informational and practical needs.³ For international crimes, these needs can be more acute owing to the scale and gravity of the crimes committed.⁴ Emotional needs of victims may require medical rehabilitation to cope with their trauma, public acknowledgement of their suffering to counter impunity, as well as supportive treatment and protection measures in judicial proceedings to ensure they are not revictimised. Victims' informational needs may include wanting to know why they were targeted, who is responsible, the wider context of violations, and how they can access redress. In terms of practical needs, victims may want to see those responsible to be identified, prosecuted and punished; they may need financial support, protection from further violence, as well as basic provision of necessities, given the scale of destruction cause by international crimes. Victims are not homogenous, nor do they speak with one voice.⁵ Their needs can change over time and can conflict with others, such as some preferring peace over accountability, or compensation instead of goods in kind. Crimes and violations impact individuals and groups differently, given their diverse social and cultural background and personal characteristics.⁶ Instead of being prescriptive to respond to these general needs, which would be challenging given their broad and at times conflicting nature, justice should be responsive, as far as possible, to victims, enabling them to access redress and present their interests in proceedings which determine outcomes that affect them.

² See M. S. Groenhuijsen and A. Pemberton, 'Genocide, Crimes Against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice', in: R. Letschert, R. Haveman, A-M. de Brouwer and A. Pemberton (eds.), *Victimological Approaches to International Crimes: Africa*, Antwerp: Intersentia 2011, pp. 9-34; L. Moffett, *Justice for Victims before the International Criminal Court*, Abingdon, Oxon: Routledge 2014, pp.10-12; ICC, *Prosecutor v Muthaura et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, [ICC-01/09-02/11-382-Red](#), 26 January 2012, para. 277.

³ S. Walklate, *Victimology: The Victim and the Criminal Justice Process*, Boston: Unwin Hyman 1989, pp. 133–136; M. Maguire, 'The Needs and Rights of Victims of Crime', *Crime and Justice*, Vol. 14 (1991), pp. 363–433; '[Criminal Neglect: No Justice beyond Criminal Justice](#)', London: Victim Support 2002.

⁴ See E. Kiza, C. Rathgeber and H. Rohne, [Victims of War: War-Victimization and Victims' Attitudes towards Addressing Atrocities](#), Hamburg: Hamburger Edition 2006.

⁵ See L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, London: Hart Publishing 2008, pp. 360–366.

⁶ H. Rombouts, 'Importance and Difficulties of Victim-based Research in Post-conflict Societies', *European Journal of Crime, Criminal Law, and Criminal Justice*, Vol. 10(2–3) (2003), pp. 216–232, p. 220.

Justice for victims is contrary to impunity, which denies victims' suffering and prevents their access to redress.⁷ Instead justice for victims affirms victims' dignity, by acknowledging their suffering and remedying their harm. Justice for victims also engages with a rights discourse, as it protects victims' agency through legal entitlement and encourages the use of a common language to balance differing interests, rather than to trump others.⁸ This concept is comparable to an effective remedy in human rights law, though it also draws from victimological research, and recognises that responsibility for violence can be attributed to non-state actors.⁹ This rights and victimological based approach helps to conceptualise justice for victims in procedural and substantive terms.

B. Procedural justice

Procedural justice for victims comprises of access to redress and fair treatment within proceedings.¹⁰ As victims' interaction with the criminal justice system can be a source of secondary victimisation, such as denying their victimisation or ignoring their needs, procedural justice tries to ensure that they are treated with dignity and respect.¹¹ In order to protect victims' interests, procedural justice includes a number of provisions including protection measures, participation in proceedings which affect their interests, access to legal representation, assistance and support, and to claim reparations.¹² Together these provisions can improve victims' satisfaction of justice processes, improving their legitimacy in the eyes of those most affected by crimes, as well as encouraging their engagement to assist such processes, whether through acting as witnesses or participating in proceedings to ensure that judicial outcomes can more effectively respond to their needs. Importantly for victims recognising their role in proceedings enables them to have the agency to shape outcomes that can respond to their needs and interests.

⁷ Y. Danieli, 'Massive Trauma and the Healing Role of Reparative Justice', pp. 41-78, in: C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making*, Leiden: Martinus Nijhoff 2009, p. 45; J. O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?', *Harvard International Law Journal*, 2005, Vol. 46, pp. 295-345, p. 310.

⁸ R.I. Mawby, 'Victims' Needs or Victims' Rights: Alternative Approaches to Policy Making', in: M. Maguire and J. Pointing (eds.), *Victims of Crime: A New Deal*, Oxford: Oxford University Press 1988, pp. 127-137, p. 133; M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton, N.J.: Princeton University Press 2003, pp. 20-21.

⁹ D. Shelton, *Remedies in International Human Rights Law*, Oxford: Oxford University Press 2005, 2nd edn., p. 7; Moffett, *supra* note 2, pp. 30 and 149-150.

¹⁰ See J-A. Wemmers, *Victims in the Criminal Justice System*, New York: Kugler 1996.

¹¹ United Nations, *Handbook on Justice for Victims*, New York: UNODCCP 1999, pp. 9-10.

¹² Principles 4-17, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, [A/RES/40/34](#), 29 November 1985; Principles 12-14, UN 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 (UNBPG); International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), A/61/488, 2 October 2008. See A-M. de Brouwer and M. Groenhuijsen, 'The Role of Victims in International Criminal Proceedings', pp. 149-204, in: G. Sluiter and S. Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law*, London: Cameron May 2009, pp. 153-154.

C. Substantive justice

Substantive justice encompasses the outcomes of judicial processes. For victims, substantive justice involves redressing the harm they have suffered and the causes of victimisation.¹³ This corresponds with an effective remedy in human rights law, which has developed three rights for victims of gross violations: truth; justice; and reparations.¹⁴ The right to truth involves determining what international crimes occurred, the context and consequences, as well as the fate and whereabouts of those who died.¹⁵ The right to truth, while not entitling victims to information on every detail or guaranteeing the unearthing the identity of every perpetrator, does allow them to affirm their suffering with a public historical account of the past. The right to justice comprises of victims' procedural access to redress as well as to seek prosecution of those responsible.¹⁶ It does not entitle victims' to a particular outcome, such as a conviction, due to limitations in evidence or other public interest concerns, rather it is concentrated on allowing access to redress against a responsible actor.¹⁷ The right to reparations enables victims to avail of appropriate remedial measures to alleviate their harm.¹⁸ In comparison to the other two rights, reparations can provide more tangible measures to victims that can improve their quality of life.

Justice for victims comprises of both the procedural and substantive aspects, which complement each other as a means and an end to redress their harm. The purpose of justice for victims is to ensure that victims have some form of defined agency or role through presenting their interests in proceedings which affect them, in order to help shape outcomes that can remedy their suffering, rather than being objects of moral concern. That said justice mechanisms, such as the ICC do not solely exist to respond to victims' interests, but have to balance other interests before it, such as the rights of the defendant and the prosecution. Accordingly, such courts are not victim-centred, but rather victim-orientated in the sense that they are responsive as far as possible to victims in light of balancing competing interests.

¹³ J-A. Wemmers, 'Victims' Need for Justice: Individual versus Collective Justice', pp. 145-152, in: Letschert *et al.*, *supra* note 2, p. 148.

¹⁴ See M. Cherif Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review*, 2006, Vol. 6(2), pp. 203–279.

¹⁵ 'Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights', [E/CN.4/2006/91](#), UN Commission on Human Rights, 8 February 2006.

¹⁶ Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised final report prepared by Mr Joinet Pursuant to Sub-Commission Decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997; Principle 19, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, [E/ CN.4/2005/102/Add.1](#), 8 February 2005.

¹⁷ ECtHR, *Öneriyildiz v Turkey*, Judgment Grand Chamber, [App. No. 48939/99](#), 30 November 2004, para. 96; Human Rights Committee, *Arhuaco v Colombia*, Views on Communication No. 612/1995, CCPR/ C/60/D/612/1995, 29 July 1997.

¹⁸ See 2005 UN 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, A/RES/60/147, (UNBPG). There are five main types of reparations including restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition, as appropriate in effectively remedying gross violations of human rights.

II. JUSTICE FOR VICTIMS WITHIN THE INTERNATIONAL CRIMINAL COURT

Justice for victims has been expressed as the *raison d'être* of the International Criminal Court.¹⁹ Commentators have expressed that the ICC offers a 'high-water mark'²⁰ for victims in terms of its provisions and that it places victims at the 'heart of international criminal justice'.²¹ Others have suggested that the Court incorporates restorative justice, in that it seeks to resort victims with less of a retributive focus than demarcated previous international criminal tribunals.²² Human rights law has also influenced the victim provisions within the Rome Statute, which traditionally takes a victim-centred approach.²³ Yet the core purpose of the ICC is to investigate, prosecute and punish those most responsible for international crimes, with justice for victims secondary to this goal. The Court has to balance other interests before it. Instead of being restorative or victim-centred, the ICC represented more victim-orientated justice in that it remains a criminal court, but is responsive to victims' interests as far as possible, without undermining the rights of the defendant.²⁴ This section analyses the extent to which the ICC has been responsive to victims' interests, both in procedural terms of enabling their participation and protection in proceedings as well as in terms of determining outcomes which affect them. The purpose of the first sub-section is to give an overview of these provisions before examining their effectiveness in the subsequent sub-section.

A. Victim provisions within the Rome Statute

The Rome Statute of the International Criminal Court includes a number of innovative victim provisions on recognition, participation, protection and assistance, and reparations. In terms of which individuals can avail of the victim provisions before the Court, Rule 85 in the Rules of Procedure and Evidence (RPE) define 'victims' as 'any natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court' as well as certain legal persons.²⁵ This

¹⁹ Opening Speech by French Justice Minister Elisabeth Guigou at the International Meeting on 'Access of Victims to the International Criminal Court', Paris, 27 April 1999, quoted in: E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience', pp. 315-334, in: D. McGoldrick (ed.), *The Permanent International Criminal Court*, London: Hart Publishing 2004, p. 325.

²⁰ C. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?,' *Northwestern Journal of International Human Rights*, Spring 2008, Vol. 6(3), pp. 459-545, p. 516.

²¹ P. Massidda and S. Pellet, 'Role and Practice of the Office of Public Counsel for Victims', pp. 691-706, in: C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Brill 2009, p. 692.

²² T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court*, Oxford: Oxford University Press 2010, p. 4; A.H. Guhr, 'Victim Participation during the Pre-Trial Stage at the International Criminal Court', *International Criminal Law Review*, 2008, Vol. 8(1-2), pp. 109-142, p.110.

²³ F. Klug, 'Human Rights and Victims', pp. 111-124, in: E. Cape (ed.), *Reconcilable Rights? Analysing the Tensions between Victims and Defendants*, London: Legal Action Group 2004.

²⁴ See S. Vasiliev, 'Article 68(3) and personal interests of victims in the emerging practice of the ICC', pp. 635-690, in: Stahn and Sluiter (eds.), *supra* note 21, p. 677.

²⁵ Rule 85 RPE. With harm broadly interpreted by the Court. See ICC, *Situation in the DRC*, 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](#), 17 January 2006, para. 115; ICC, *Prosecutor v Lubanga*, Judgment on the Appeals of the Prosecutor and

is narrowed down by the selection of perpetrators and crimes by the Prosecutor to be tried before the ICC, though they have to take into account the 'interests of victims' and 'justice'.²⁶ Accordingly while on the face of it Rule 85 provides a wide definition of victim, the limited cases before the ICC has the effect of confining the number of victims who can seek justice before the Court.

The provisions on victim participation are one of the most commented and litigated aspects of the ICC, given that such participation has the potential to conflict with the rights of the defendant.²⁷ The main victim participation provisions under Article 68(3) enables victims to present their 'views and concerns' in appropriate proceedings where their personal interests are affected.²⁸ The Court has interpreted victim participation to include eight modalities in how they can partake in proceedings: attend hearings; make oral motions, responses, and submissions; file written submissions; access evidence; ask questions; submit evidence; call witnesses; and to be notified of issues or proceedings which affect them.²⁹ As the potential numbers of victims could be in their thousands, as in the *Bemba* case where they number 5,229, their views and concerns are advocated by legal representatives (VLRs). This can benefit victims, as VLRs are familiar with the rules and proceedings of the Court and can better articulate victims' interests before the ICC.³⁰ That said victims do not have a right per se as a legal entitlement to participate in every proceeding or with all modalities, as it has to be permitted by the judges on balance with the rights of the defendant and a fair and expeditious trial.

In terms of victim protection the Rome Statute and RPE provides a well-developed regime, drawing from the experience of the ad hoc tribunals and human rights jurisprudence.³¹ Protection is extended to not only those victims and witnesses testifying before the Court, but also those applying to participate. Protection measures include closed hearings (in camera), pseudonyms, voice and facial distortion, public non-disclosure, and redaction of identity or identifying information from the record.³² Special measures are also afforded to vulnerable witnesses and victims, such as children and those subjected to sexual violence, and comprise a support person, shielding devices, video conferencing technology, and sensitive questioning.³³ The protection regime is facilitated by the Victims 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, para. 33.

²⁶ Articles 53(1)(c) and (2)(c) Rome Statute.

²⁷ See Funk, *supra* note 22; B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Cambridge: Intersentia 2011; Moffett *supra* note 2, pp. 94-128.

²⁸ There are also specific victim participation rules under Articles 15(3), 19(3), and 75(3) Rome Statute.

²⁹ Rules 91–92 and 144 RPE; see ICC, *Prosecutor v Lubanga*, Decision on Victims' Participation, [ICC-01/04-01/06-1119](#), 18 January 2008; ICC, *Prosecutor v Katanga and Chui*, Decision on the Modalities of Victim Participation at Trial, [ICC-01/04-01/07-1788](#), 22 January 2010; ICC, *Prosecutor v Bemba*, Fourth Decision on Victim's participation, [ICC-01/05-01/08-320](#), 12 December 2008.

³⁰ For instance see ICC, *Prosecutor v Bemba*, [ICC-01/05-01/08-T-227-Red-ENG](#), 25 June 2012, p. 29.

³¹ Article 68(1) and (2) Rome Statute, Rules 16-19 and 87-88 RPE. See Moffett, *supra* note 2, pp. 128-141.

³² Article 68(2) Rome Statute, Rule 87(3) RPE, and Regulation 94 Registry Regulations.

³³ Rule 88(1) RPE.

Witnesses Unit (VWU) within the Registry, which provides counselling and other assistance to witnesses and victims before the Court. This is supplemented with assistance to victims through the Trust Fund for Victims (TFV), which under its second mandate is to provide 'physical or psychological rehabilitation or material support for the benefit of victims and their families' who have suffered from crimes within the jurisdiction of the Court under Rule 85.³⁴ Victims can also claim reparations once a perpetrator is convicted under Article 75. Together these are the main provisions for victims with the ICC, it is worth now turning to evaluate how effective they are in practice.

B. Justice for victims?

It is apparent from the proceedings of the ICC that victims are represented and their views and concerns voiced through their legal representatives. However, the effectiveness and meaningfulness of such participation has been increasingly limited over fears that such participation undermines the right of the defendant to a fair and expedient trial. Moreover, victim participation while first allowed during the investigate stage, has been reversed by the Appeals Chamber to protect the independence of the Prosecutor, despite human rights jurisprudence finding the importance of victim participation at such a stage to ensure public transparency and scrutiny.³⁵ In trial proceedings victims can present evidence, but the Court has tried to limit this to the role of the prosecution and defence, to ensure there is equality of arms.³⁶ That said Trial Chamber III in the *Bemba* case has allowed victims to present evidence on the criminal culpability of the accused.³⁷ It is easy to discern that there is piecemeal approach to victim participation within the Court, with some Chambers enabling victims greater participatory rights than in others.³⁸ These inconsistencies have meant there is inequality in participation for victims before the ICC.³⁹ This distinction can boil down to judges' personal views on victim participation, with Judges Kaul and Steiner more receptive to a

³⁴ Article 79(1), and TFV Regulations 42 and 50(a)(i). Under its first mandate the TFV facilitates reparations ordered by the Court.

³⁵ ICC, *Situation in the DRC*, 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, [ICC-01/04-556](#), 19 December 2008, para. 45; ICC, *Situation in the Republic of Kenya*, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, [ICC-01/09-24](#), 3 November 2010, para. 9. For human rights cases see ECtHR, *Kaya v Turkey*, Judgment, [App. No. 22535/93](#), 28 March 2000, paras.121-126; IACtHR, *Mapiripán Massacre v Colombia*, Merits, Reparations and Costs, Judgment, Series C No. 134, 15 September 2005, paras.116 and 119.

³⁶ J. D. Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice?', *Journal of Law and Society*, 2003, Vol. 30(2), pp. 309–326; and ECtHR, *Berger v France*, Judgment, [App. No. 48221/99](#), 21 May 2003, para. 38.

³⁷ ICC, *Prosecutor v Bemba*, Decision (i) Ruling on Legal Representatives' Applications 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](#), 9 September 2011; cf. ICC, *Prosecutor v Katanga and Chui*, Applications for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, ICC-01/04-01/07-1665, 20 November 2009, paras. 90–91.

³⁸ For instance see the difference in participatory rights in these two cases: ICC, *Prosecutor v Bosco Ntaganda*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, [ICC-01/04-02/06-211](#), 15 January 2014, paras.85-96, and ICC, *Prosecutor v Abdallah Banda*, Decision on the participation of victims in the trial proceedings, [ICC-02/05-03/09-545](#), 20 March 2014, paras. 24-41.

³⁹ S. Zappalà, 'The Rights of Victims v. the Rights of the Accused', *Journal of International Criminal Justice*, 2010, Vol. 8(1), pp.137–164, p. 142.

broad notion of victim participation, whereas other such as Pikis and Wyngaert concerned that victims risk undermining the rights of the defendant. There is need for greater harmonisation of the victim participation regime to ensure equality for victims and other participants, as well as to protect defendants from any legal uncertainty which could undermine their presumption of innocence.⁴⁰

With regards to victim representation, concerns over legal aid costs for victim participation and increasing number of applicants has meant that there is growing reliance on collectivising application and participation.⁴¹ While victim legal representatives in the *Lubanga* case numbered seven for 129 victims, in the *Bemba* case there are two VLRs acting on behalf of 5,229 victims. It is questionable how effective thousands of victims' views and concerns can be effectively represented before the Court. Support teams are established in country to facilitate exchanges between victims and the legal representatives.⁴² The Registry also notifies victims and conducts outreach with affected communities to inform them of the work and progress of cases.⁴³ The collectivisation of victim applications in the *Kenyatta* case has the potential to further dilute victims' participation in proceedings, given that the 'represented victims have not been subject to an individual assessment by the Court.'⁴⁴ In making participation more economically efficient, we should be careful not to undermine the standing of victims or their individual voices.

More worryingly is the impact, or rather lack of, victim participation is having on decision making within the Court. While victims have presented their views and concerns, they have not been an important consideration in the judges' decision making in determining outcomes such as truth, justice and reparations. In terms of truth, the Court has enabled a number of victims to present in person their views and concerns in proceedings to help the judges 'determine the truth' under Article 69(1). However, victims' role in such proceedings are functional in determining the truth about the facts of the case for the Chamber's benefit, rather than wider notions of truth that are important to victims, such as documentation of the role of neighbouring states in Mr Lubanga's crimes.⁴⁵

⁴⁰ See S. Vasiliev, 'Victim Participation Revisited: What the ICC is learning about itself', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford: Oxford University Press 2014 (forthcoming); and Zappalá, *supra* note 39, pp. 137-164.

⁴¹ Legal aid for victim legal representatives amounted to €4.9 million for all cases in 2012. ASP, 'Report of the Committee on Budget and Finance on the work of its twentieth session', [ICC-ASP/12/5/Rev.1](#), 7 June 2013, para. 83.

⁴² ICC, *Prosecutor v Bemba*, Decision on Common Legal Representation of Victims for the Purpose of Trial, [ICC-01/05-01/08-1005](#), 10 November 2010.

⁴³ ASP, 'Report of the Court on the public information strategy 2011-2013', [ICC-ASP/9/29](#), 22 November 2010, para. 4.

⁴⁴ ICC, *Prosecutor v Muthaura and Kenyatta*, Decision on Victims' Representation and Participation, [ICC-01/09-02/11-498](#), 3 October 2012.

⁴⁵ ICC, *Prosecutor v Lubanga*, Decision on the Request by the Legal Representative of Victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07, and a/0162/07 for Admission of the Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo as Evidence, [ICC-01/04-01/06-2135](#), 22 September 2009.

In terms of justice, victims have suggested that in the sentencing of *Lubanga* and *Katanga* the Court should have ordered longer sentences than the respective 14 and 12 years handed down.⁴⁶ Similarly in decisions on admissibility of situations before the Court in assessing the effectiveness of domestic capacity, ICC judges have failed to take into account victims' interests in the lack of effective local redress, beyond witness protection.⁴⁷ The withdrawal of the prosecution's appeal of the *Katanga* judgement after the defendant retracted his appeal and accepted the conviction expressing remorse to the victims, failed to appreciate victims' interests that the judgment did not find him responsible for sexual violence and other crimes.⁴⁸ By preventing victims from appealing the decision the Court evinces its preference of the prosecution and defence, with the victims as participants rather than parties to proceedings. The limited impact of victims' concerns on judges' decision making is perhaps most evident in the Court's first reparation decision in the *Lubanga* case, where the risk to rights of the defendant and role of the prosecutor are minimised, given the trial has been completed and the accused convicted. In the *Lubanga* decision, despite representations by the victims for individual and collective reparations to help remedy their suffering, the judges instead ordered that reparations be made through the Trust Fund to benefit the community.⁴⁹

With protection and assistance, the Court has been proactive in ensuring that victims are satisfied with their engagement within criminal proceedings.⁵⁰ Judges and the VWU have been sensitive to the individual needs of victims and supportive of them in proceedings. The ICC judges have acknowledged that criminal proceedings can be 'foreign and uncomfortable' and even intimidating to victims and witnesses, these protective and special measures help to facilitate their testimony and participation in proceedings.⁵¹ The Court has not yet endorsed anonymous victims or witnesses to testify before the Court. A more systemic problem rests in protecting victims domestically, particularly where the ICC is dependent on local police forces, such as in the Kenyan situation where

⁴⁶ ICC, *Prosecutor v Lubanga*, Observations sur la peine pour le groupe de victimes V01, [ICC-01/04-01/06-2880](#), 14 May 2012 ; ICC, *Prosecutor v Lubanga*, Observations du groupe de victimes VO2 Sur des éléments de preuve établissant des circonstances aggravantes ou des circonstances atténuantes des faits portés à la charge de l'accusé reconnu coupable, [ICC-01/04-01/06-2882](#), 14 May 2012; ICC, *Prosecutor v Katanga*, Observations du représentant légal relatives à la fixation de la peine, [ICC-01/04-01/07-3457-Red](#), 7 April 2014.

⁴⁷ ICC, *Prosecutor v Saif Al-Islam Gaddafi*, Observations on Behalf of Victims on the Government of Libya's Application Pursuant to Article 19 of the Rome Statute, ICC-01/11-01/11-166- Red-Corr, 5 June 2012, paras. 52–54.

⁴⁸ ICC, *Prosecutor v Katanga*, Decision on the victims' requests to participate in the appeal proceedings, [ICC-01/04-01/07-3505](#), 24 July 2014.

⁴⁹ ICC, *Prosecutor v Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparations, [ICC-01/04-01/06-2904](#), 7 August 2012. See L. Moffett, 'Reparative complementarity: Ensuring an effective remedy for victims in the reparation regime of the International Criminal Court', *International Journal of Human Rights*, 2013, Vol. 17(3), pp. 368-390.

⁵⁰ See '[Bearing witness at the International Criminal Court: An Interview Survey of 109 Witnesses](#)', Berkley Human Rights Centre, June 2014.

⁵¹ ICC, *Prosecutor v Lubanga*, Decision Regarding the Practices used to Prepare and Familiarise Witnesses for giving Testimony at Trial, [ICC-01/04-01/06-1049](#), 30 November 2007, para. 32.

there have been reports of intimidation of those victims participating before the Court.⁵² In terms of assistance the Trust Fund for Victims has been somewhat of a success provide support to over 100,000 victims.⁵³ That said a large percentage of these numbers is made up of victim sensitisation or peace-building programmes to affected communities, which offer little direct benefit to victims, in comparison to more remedial reconstructive surgery.

Accordingly while the ICC affords victims a participatory role in proceedings, incorporating principles of procedural justice, their role has minimal impact on the judges' determinations of outcomes of truth, justice and reparations. This reflects an internal challenge of the ICC in balancing the competing interests before it with limited resources. Moreover, in substantive terms, the ICC cannot uncover the complete truth of a conflict, prosecute every perpetrator or offer reparations to every victim. The ICC is more selective and intended to deal with the most serious international crimes and perpetrators. However, the Court can be more responsible to victims in the proceedings before it, in particular the Court needs to better manage expectations as to what it can and cannot do. Nevertheless, it does not mean there should be impunity for crimes which fall outside the Court's capacity, but rather state parties should be adopting victim-orientated provisions to complement the work of the ICC.⁵⁴

III. Conclusion

The inclusion of a number of victim provisions within the International Criminal Court represents a welcomed step in international criminal justice to incorporate justice for victims within its proceedings and outcomes. That said there remains work to be done to improve victim participation in the investigation and trial stage of proceedings, as well as to take into account their interests in determining outcomes. Moreover given concerns with the rising costs of participation and the number of victims applying to participate at the Court, greater effort needs to be made to ensure that collectivising victims' views and concerns does not filter out the voices of more vulnerable groups, such as those subjected to sexual violence or children.⁵⁵

⁵² See ICC, *Prosecutor v Ruto and Sang*, Common Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013, [ICC-01/09-01/11-896-Corr-Red](#), 5 September 2013.

⁵³ ['External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo'](#), The Trust Fund for Victims, November 2013.

⁵⁴ See Moffett, *supra* note 2, pp. 234-239.

⁵⁵ ['Statement by the Women's Initiatives at the opening of the Trial of Jean-Pierre Bemba Gombo'](#), Women's Initiatives for Gender Justice, 22 November 2010, p. 4.

While we look to the ICC to deliver justice for victims, it is only one international institution. It cannot deliver justice to the millions of victims of international crimes. Instead the Court represents an international effort to end impunity for international crimes and to deliver justice for victims. To more effectively achieve justice for victims of international crimes, it requires states to domestically deliver it and for the ICC to be a court of last resort. As such a more victim-orientated approach to complementarity is required, where states are encouraged and monitored to provide redress to victims locally. This is compliant with numerous human rights treaties and international customary law, in that providing remedy to victims of international crimes is an effective way to tackle impunity. Justice for victims is a step closer to being realised with the creation and work of the ICC. Yet there remains much to do in making victims' engagement with the ICC meaningful and effective at the local and international level.