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## **Alternative Sanctions Before The Special Jurisdiction For Peace: Reflections on International Law and Transitional Justice**

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Reparations, Responsibility

 Victimhood in Transitional Societies

# **Alternative Sanctions Before The Special Jurisdiction For Peace:**

Reflections on International  
Law and Transitional Justice

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## Executive Summary

Criminal courts play an important function in post-conflict societies in reaffirming moral values and establishing the rule of law. In the face of mass atrocities over decades, no amount of punishment is going to undo the harm caused, but a tailored and comprehensive transitional justice system, including criminal trials that provide proportionate punishments can force those perpetrators to confront their responsibility and for the rest of society to be edified by the performance of justice. For victims, trials and reparations can serve as processes to end impunity of the crimes they have suffered, by receiving public acknowledgement of their harm and forcing those individuals who committed such harm to correct the imbalance in the relationship between them. While no one country's experience can be replicated exactly in another (or should be), this report seeks to provide some lessons learned and guidance to better inform the Special Jurisdiction for Peace's (JEP) approach to alternative sanctions, victim participation and reparations. This report follows on from engagements with the JEP in September 2018 and February 2019 that hope to start a dialogue on these issues. As such, it reflects the start of the conversation to broadly set out the contours of the issues, but we expect more specific comments and questions to deepen our discussion.

This report approaches these issues under four headings: restorative justice; victim participation; international standards on sentencing; and alternative sanctions, reparations and accountability. With the first of these, restorative justice has been practiced in some transitional societies. However, often the use of restorative justice has been for low-level perpetrators and associated with truth recovery processes and criminal trials. That said restorative justice could more finely attune criminal trials to be more responsive to victims' views and concerns in proceedings, and to better shape justice outcomes through dialogue with perpetrators. It must be noted that restorative justice takes time, there can be a number of drawbacks including power imbalances, pressure on participants to satisfy external goals, insincerity of perpetrators, and lack of attention to gender perspectives and harms.

With regards to victim participation, the report outlines the practice of international criminal justice bodies, in particular the International Criminal Court. It highlights the human rights jurisprudence and the literature on procedure justice, which emphasises the importance of victims' voices being heard in judicial proceedings, respected and reflected in decision making. Given that international crimes involve thousands of victims, there is increasing practice to collectivise the representation of victims, but this brings its own issues of how well victims are communicated with, their voices represented, and how conflicting voices are managed. The section also reflects on the practice of victim participation in other bodies, as well as opportunities for victims to appear in person to give their views and concerns. Final part of this section highlights some of the provisions and challenges of victim protection and psychological support in coming forward to international criminal bodies.

In terms of international guidance on sentencing for international crimes, there is no stipulated penalty schedule in international criminal law. However there are a number of principles to guide sentencing that correspond to traditional domestic penology, in particular proportionality. The jurisprudence of international criminal law and regional human rights courts supports that states do have some discretion to mitigate sentences where perpetrators make contribution to reparations to victims,

reconciliation and the peace process. These lessons can be applicable to the alternative sanction regime, drawing upon the lessons of the international criminal justice bodies and their use of pleas, mitigation and reparation for international crimes. The use of alternative sanctions is a means to strike a proportionate balance of punishment and restoration by engaging in communication with the perpetrator on the wrongfulness of their actions. By allowing perpetrators to mitigate the harm they have caused through incentivising confessions and certain forms of reparations, it can help to break the silence of impunity, but also communicate norms and reaffirm the rule of law. Ex-combatants can make an important contribution to dealing with the past and should be provided with a framework to resolve some of the victims' moral harm and unanswered questions. Consideration should also be made of complex victims, or victimised perpetrators, in how they can fit into the JEP process in terms of restorative justice and reparations.

The report finishes on a number of recommendations:

- ▶ The JEP should establish principles on victim participation, reparations and alternative sanctions to ensure coherence and consistency across its cases and demonstrate some certainty to participants and the wider public;
- ▶ The JEP should ensure that victims are informed of their choices to participate and engage, this may involve collective and individual in person participation;
- ▶ Effective outreach activities should be conducted to encourage dialogue with victims and affected communities – this is a two way communication;
- ▶ Victim participation should be supported by psychological services and support-persons;
- ▶ Efforts should be made to avoid instrumentalising victims, instead their agency and choice should be respected, allowing them to accept or reject meetings, apologies or acknowledgements by responsible actors – forgiveness is a personal choice;
- ▶ The use of restorative justice should be made clear as to what this entails and does not rediscover or manipulate traditional practices, with the use of traditional justice only used where it is relevant and done in cases with the consent and design of indigenous or Afro-Colombian communities;
- ▶ Using restorative justice to address large scale atrocities should make the most of its principles of active participation, encouraging the parties to together find solutions, making the use of private spaces to encourage dialogue, staging of engagement and conditionality of any agreement in case it is broken;

- ▶ The JEP should make use of process and outcome indicators to measure the impact on victims and affected communities on its work;
- ▶ Alternative sanctions should be viewed as a way to find a proportional punishment to repair the relationship of the perpetrator with society and more reparative measures to repair the relationship or at least civic trust of victims;
- ▶ Reparations ordered by the JEP should not include compensation, but make the most of the JEP's position in facilitating measures of satisfaction and community service from perpetrators in consultation with victims. Victims should be signposted to other reparations available through the Victims Unit;
- ▶ The JEP cannot undo all the harm of the Colombia conflict, but it can make a modest contribution to re-establishing morals and human rights values.

# Introduction\*

1. Transitional justice offers a toolkit for each country to craft their own solutions to mass atrocities within their own particular circumstances and in light of domestic and international legal obligations. International law obliges states to effectively investigate, prosecute and remedy international crimes and gross violations of human rights to ensure that there is not impunity for such atrocities.<sup>1</sup> This reflects that impunity is silence – the failure to speak out and for society to confront the atrocities of the past, enables perpetrators to deny they occurred and for victims to be left with the burden of harm.<sup>2</sup> As such, efforts to investigate, prosecute and remedy are intended to prevent impunity of such crimes as the ‘opposite of justice’, as impunity serves to repudiate victims’ suffering and access to redress.<sup>3</sup> By blocking victims from seeking recognition and an appropriate remedy, impunity can implicitly signal that such individuals, groups, and communities deserved to be harmed. Accordingly, taking a victim-centred approach is a way to seek restoration, recognition of their suffering and assigning responsibility to those who caused it.
2. International law does not prescribe the way in which states should punish or the processes in which investigations and remedy must take place, just that gross violations are effectively, promptly and transparently investigated with appropriate redress to victims and proportional punishment for perpetrators. The Rome Statute of the International Criminal Court can only exercise its jurisdiction over a state party where it is admissible on the grounds that the state is unable or unwilling to investigate and prosecute international crimes. Unwillingness is determined on whether or not domestic proceedings are being used to shield a person from criminal responsibility, unjustified delay or proceedings not being conducted in an independent or impartial manner to bring the concerned person to justice.<sup>4</sup> Alternative sanctions do not fall within this definition, as it is a not preventing the establishment of criminal responsibility, there is no unjustifiable delay and it is being conducted in an independent and impartial manner.
3. At their core, criminal courts aim to provide retribution, not as vengeance (i.e. *lex talionis*), but as proportional punishment that recognises the rights of all the parties involved (victims, perpetrators and society), with punishment through sentencing as a means to ‘right the wrong’.<sup>5</sup> No amount of punishment can undo or equate with international crimes, given its ‘radical evil’ that ‘explode[s] the limits

\* Written by Luke Moffett, Cheryl Lawther, Kieran McEvoy, Clara Sandoval, and Peter Dixon. Thanks to Siofra Corr for her background research and Adriana Rudling for her comments.

- 1 See Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (hereafter Impunity Principles), E/CN.4/2005/102/Add.1, 8 February 2005, p. 6.
- 2 See Martha Minow, *Between Vengeance and Forgiveness*, Beacon Press (1998), p16.
- 3 Jamie O’Connell, Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims? *Harvard International Law Journal* 46 (2005) 295–345, p310.
- 4 Article 17(2).
- 5 Jean Hampton, Correcting Harms versus Righting Wrongs: The Goals of Retribution, *University California Los Angeles Law Review* 39 (1991–1992) 1659–1702, p. 1663; and see also George P. Fletcher, The Place of Victims in the Theory of Retribution, *Buffalo Criminal Law Review* 3 (1999–2000) 51–64.

of the law’.<sup>6</sup> Instead the contribution of perpetrators to victims and society through reparations, peace building, reconciliation efforts and community service can be seen as a way to mitigate the severity of the punishment. Criminal courts can also serve utilitarian goals, not to ‘torment’ the offender or to undo the crime, but to achieve its aims of deterrence, incapacitation, and rehabilitation so as to enhance social utility, thereby fulfilling society’s interests by preventing future crimes.<sup>7</sup>

4. Criminal courts can also play an important expressive function, in that they convey moral or normative messages by condemning those who have breached society’s values.<sup>8</sup> Duff suggests that punishment as a communicative process can result in repentance, reform and reconciliation of perpetrators, by imprisoning them to show the errors of their ways and to repair the damage they have caused so as to prevent their repetition in their future behaviour.<sup>9</sup> This shares some aspects of reintegrative shaming discussed further below on restorative justice, that courts can offer a forum to reprimand behaviour and encourage perpetrators to confront their wrongdoing and remedy it. However for unresponsive perpetrators who reject the moral messages being communicated by a court, punishment can serve to educate the public by imposing ‘shame, sanction, and stigma’ on offenders.<sup>10</sup> The role of the JEP as a retributive, expressive and restorative court, places it in a unique position to respond to extraordinary violence by re-establishing values in Colombian society. The use of alternative sanctions is a means to strike a proportionate balance of punishment and restoration by engaging in communication with the perpetrator on the wrongfulness of their actions. By allowing perpetrators to mitigate the harm they have caused through incentivising confessions and certain forms of reparations, it can help to break the silence of impunity, but also communicate norms and reaffirm the rule of law. This reflects that after protracted conflict and gross violations of human rights, no amount of punishment can undo the harm done, but criminal courts can be wielded in a way to re-establish moral values in a society, which for too long has permitted and incentivised violence.

## Report Layout

5. This report sets out the experience of other transitional societies in responding to mass atrocities. This is not to suggest that their processes and successes can be replicated or should be, but rather it is indicative of how other countries have developed context specific responses to atrocities. It begins in the first section by outlining the use of restorative justice as an approach to dealing with the past, by involving victims, perpetrators and the community to come together in a safe and supportive space, facilitated by an impartial mediator, to negotiate amongst

6 L. Kohler and H. Saner (eds), *Hannah Arendt and Karl Jaspers: Correspondence: 1926–1969*, (Harcourt Brace International 1992), p54; and Carlos S. Nino, *Radical Evil on Trial*, (Yale University Press 1998), p135–137.

7 Cesare Bonesana di Beccaria, *An Essay on Crimes and Punishments*, (W.C. Little & Co. 1872), Ch. 12 ‘Of the Intent of Punishments’; and Richard S. Murphy, The Significance of Victim Harm: Booth v Maryland and the Philosophy of Punishment in the Supreme Court, *University of Chicago Law Review* 55(4) (1988) 1303–1333, p1310.

8 See Joel Feinberg, The Expressive Function of Punishment, *The Monist*, 49(3) (1965), 397–423; and Tim Meijers and Marlies Glasius, Trials as Messages of Justice: What Should Be Expected of International Criminal Courts? *Ethics & International Affairs*, 30(4)(2016) 429–447.

9 Antony Duff, *Punishment, Communication, and Community*. Oxford University Press (2000), p91–92.

10 Mark Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press (2007), p175.

themselves ways to deal with the consequences of the crime. While using informal or traditional forms of justice to repair the social fabric and relationships in communities can be more inclusive, there are dangers and challenges in such an approach, such as unequal power relations, lack of procedural protections and scaling restorative justice up to address mass violence.

6. In section two provisions on victim participation are detailed, in particular noting the challenges of using a formal legal process in international criminal proceedings. This includes notions of procedural justice, victim application process, representation and voice, the different modalities victims can participate and the importance of protection and psychological support measures. The third section outlines the international legal standards on sentence reduction, amnesties and pardons used in exchange for incentivising truth recovery, non-recurrence of violence and reconciliation. The final section discusses the contribution ex-combatants can make to transitional justice processes, in particular how providing a legal space through a restorative informed retributive criminal justice can incentivise individuals and organisations to be more responsive in providing reparative measures to victims. The report concludes with some reflections on how the experiences in other jurisdictions could help relevant stakeholders in Colombia reflect on these issues along with some recommendations for the JEP.

## Restorative Justice

7. Restorative justice is 'a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.'<sup>11</sup> In particular, restorative justice processes emphasise the restoration of relationships between offenders, victims and communities rather than the punishment of perpetrators. Criminal justice has long been criticised for instrumentalising victims by prioritising the prosecution of perpetrators or 'upholding the rule of law' rather than focusing on the needs of victims, which may be more complex than measuring the degree of retribution or 'jail-time' received by offenders. For some restorative justice advocates, the state is sometimes involved in 'stealing the conflict' between victims and perpetrators through a depersonalised process, using victims' suffering to further a retributive agenda, wherein criminal justice professionals and politicians can portray themselves as being 'tough on crime'.<sup>12</sup> Retributive processes may not only ignore the needs of victims, but also leave perpetrators with a sense that they have been victimised by a punitive justice system (thus allowing the offenders to take avoid taking *real* responsibility for past actions) and remove the broader community of any of its responsibilities for healing damaged relations, because it has become the job of the state.

11 Tony F. Marshall, *Restorative Justice: An Overview* (Home Office 1999), p5.

12 Nils Christie, *Conflicts as Property*, *British Journal of Criminology* 17(1) (1977) 1-15.

8. Restorative justice therefore attempts to find imaginative ways of shifting the 'ownership' of past harms away from being the sole preserve of the state and to involving perpetrators, victim and communities affected by those harms in an effort to improve social cohesion.<sup>13</sup> Criminal justice punishment can be 'disintegrative' inflicting more damage on society<sup>14</sup> and 'ruptures familial and social bonds ... generates further animosity and antagonism, and often engulfs the parties in bitter, never-ending hostilities.'<sup>15</sup> In contrast restorative justice is intended to restore relationships between the parties and promote personal 'active responsibility'<sup>16</sup> of the offender to make amends to the victim for the harm they have caused by righting their wrongs.<sup>17</sup> The offender can contribute to alleviating the victim's suffering through acknowledging responsibility for their actions, facing the consequences of the harm he/she has caused, empathising with the victim, offering a sincere apology, and (where possible) making restitution or paying compensation.<sup>18</sup> In this way, the offender can be better reintegrated back into community having attempted to address their past harms, which in turn makes their likelihood of re-offending significantly less likely. While they can be compelled or incentivised into such a process, it should not aim to humiliate offenders, instead offering them a way to be resocialised and reincorporated into society as a citizen.<sup>19</sup> This process has been described by the Australian criminologist Braithwaite as 'reintegrative shaming' – a shift away from the stigmatisation of the offender. Braithwaite described the difference as,

'Reintegrative shaming communicates disapproval within a continuum of respect for the offender; the offender is treated as a good person who has done a bad deed. Stigmatization is disrespectful shaming; the offender is treated as a bad person. Stigmatization is unforgiving - the offender is left with the stigma permanently, whereas reintegrative shaming is forgiving ... Put another way, societies that are forgiving and respectful while taking crime seriously have low crime rates; societies that degrade and humiliate criminals have higher crime rates.'<sup>20</sup>

A restorative justice process can provide a more informal space for affected parties to recover the truth, by enabling victims to discuss with the perpetrator the nature and motivations for the harm. This can allow participants "to tell the 'whole truth' as they see it", without evidential rules and procedures that limit them to

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- 13 Ezzat A. Fattah, *Gearing Justice Action to Victim Satisfaction: Contrasting Two Justice Philosophies: Retribution and Redress*, in H. Kaptein and M. Malsch (eds.), *Crime, Victims and Justice: Essays on Principles and Practice*, Ashgate (2004) 16-30, p28.
  - 14 Lucia Zedner, *Reparation and Retribution: Are They Reconcilable?* *Modern Law Review* 57(2) (1994), 228-250, p250.
  - 15 Ezzat Fattah, *A Critical Assessment of Two Justice Paradigms: Contrasting the Restorative and Retributive Justice Models*, in E. Fattah and T. Peters (ed.), *Support for Crime Victims in a Comparative Perspective*, 99-110, p101.
  - 16 John Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press (2002), p129.
  - 17 Christa Obold-Eshleman, *Victims' Rights and the Danger of Domestication of the Restorative Justice Paradigm*, *Notre Dame Journal of Law, Ethics and Public Policy* 18 (2004) 571-603, p572.
  - 18 See Heather Strang, *Repair or Revenge: Victims and Restorative Justice*, (OUP 2002); and John Braithwaite, *Crime, Shame, and Reintegration*, (CUP 1999).
  - 19 Kieran McEvoy and Louise Mallinder, *Amnesties, Punishment and the Calibration of Mercy in Transition*, *Journal of Law and Society* 39(3) (2012) 410-440, p430.
  - 20 See Braithwaite n.18.

narrating the facts relevant to a criminal court.<sup>21</sup> The involvement of the victim and community in restorative conferencing can encourage the active responsibility of these actors in 'putting things right' and the prevention of recurrence of violations.<sup>22</sup> By focusing on the social and personal context of the harm, the participants and the consequences, restorative justice hopes to provide contextual justice rather than consistent justice in sentencing.<sup>23</sup>

9. There are of course shortcomings and challenges in using restorative justice processes, such as the lack of proper procedural safeguards and emotional support that can cause further suffering to participants,<sup>24</sup> the dominance of certain groups' interests over others, pressure on participants to facilitate more collective goals of healing and restoration or diversion priorities of the state to avoid court proceedings and to ease pressure on prisons,<sup>25</sup> or not responding sufficiently to victims' needs.<sup>26</sup> The restorative potential of such informal justice meetings can be compounded by non-engagement by victims or offenders, or insufficient funding by the state, leaving voluntary organisations to find or supply the capacity and resources to support such processes. The 2000 UN Principles on the Use of Restorative Justice Programmes in Criminal Matters suggest that to overcome these issues well-trained facilitators can help to ensure a safe and appropriate environment for treating the participants with dignity and impartiality, as well as being sensitive to vulnerable participants.<sup>27</sup>

## Restorative Justice and Transitional Justice

10. In relation to transitional justice, restorative justice is increasingly relied upon as a theoretical and practical framework within which to situate less retributive facing approaches to past crimes. For example, Archbishop Desmond Tutu, former chair of the South African Truth and Reconciliation Commission (TRC), described the work of the TRC in the following terms,

'Retributive justice – in which an impersonal state hands down punishment with little consideration for victims and hardly any for perpetrators – is not the only form of justice. I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into

21 Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, Hart (2008), p264; and Martha Wright, *Justice for Victims and Offenders: A Restorative Response to Crime*, (Waterside 1996), p138.

22 Braithwaite n.16, p129.

23 Lode Walgrave, *Restorative justice and the law*, Willan (2002), p158.

24 Rob Mawby and Sandra Walklate, *Critical Victimology: International Perspectives*, Sage (1994), p68.

25 Margarita Zernova, Aspirations of restorative justice proponents and experiences of participants in family group conference, *British Journal of Criminology* 47(3) (2007) 491-509. p506.

26 Janice Evans, Integrating Victims into Restorative Justice, *Practice* 18(4) (2006) 279-289, p285; and Brian Williams, *Victims of Crime and Community Justice*, (Jessica Kingsley 2005) p79.

27 Principles 17-20, Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).

the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture in relationships. Thus we should claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation.<sup>28</sup>

In other contexts, there has been some practice of informal processes to adjudicate international crimes and political violence that can be termed as restorative. Indeed the inclusion of provisions on victim participation (discussed in the next section) and reparations within the Rome Statute of the International Criminal Court (ICC) have even been seen as a 'restorative turn' in nuancing retributive justice in addressing international crimes, but this may be more rhetorical given what can realistically be delivered within a criminal justice framework.<sup>29</sup> At the ICC, while victim provisions promised restorative justice, it very much connected to the trial and punishment of perpetrators, as seen with the limited participation opportunities of victims to directly engage and question accused persons, as well as reparations being limited to convicted persons.<sup>30</sup> Victims can present their views on punishment, including the length of sentence and mitigating and aggravating factors. More generally, alongside the use of conditional amnesties and immunities, transitional justice mechanisms have been able to create a space where individuals can come forward to speak without fear of self-implication.<sup>31</sup>

11. There are of course some challenges. Restorative justice cannot restore relationships or victims to their position before the violation or conflict and victims' expectations of any justice process (retributive or restorative) need to be managed accordingly. Moreover, in some contexts where the state has been a protagonist in the conflict, there may be suspicions of the state's motivations in seeking to frame past violence as *only* involving the perpetrators and victims, thereby obscuring its own past culpability.<sup>32</sup> For example, this has certainly been the case in Northern Ireland wherein discussions of the conflict that focus only on past violence between Catholics and Protestants, while ignoring the role of the British state, are treated with great suspicion.<sup>33</sup> In contexts where there is residual suspicion towards the state, a facilitator who is perceived as impartial from the state, by commanding respect and following clear restorative justice values, can help to build trust amongst participants in proceedings. Indeed, the use of a neutral facilitator who is distinct and independent from the state may help to demonstrate a shift from punitive approach to responding to violence (both criminal and structural) of the past. There are a number of context specific practices of using restorative justice processes to address international crimes alongside other transitional justice mechanisms. These experiences reflect the social, political and cultural circumstances of the country in transition. That said, they provide some lessons

28 Desmond Tutu, *No Future Without Forgiveness*, Rider (1999), p51. The South African experience is discussed further below.

29 Sara Kendall, Beyond the restorative turn: The limits of legal humanitarianism, in C. De Vos, and S. Kendall, and C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*. Cambridge University Press (2015), 352-376.

30 Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge 2014, p89-90.

31 See discussion below on Amnesty and Pardon.

32 McEvoy and Mallinder n.19, p428.

33 See Cheryl Lawther, *Truth, Denial and Transition: Northern Ireland and the Contested Past*, Routledge (2014).

on the successes, tensions and challenges in moving beyond retributive justice to engage in more restorative and informal processes to redress victims' harm and improve social cohesion.

### Rwanda's Gacaca Courts

12. In response to the genocide in Rwanda there three mechanisms were established – the International Criminal Tribunal for Rwanda,<sup>34</sup> national courts,<sup>35</sup> and the community level gacaca ('on the small grass') courts.<sup>36</sup> The 12,000 gacaca courts in Rwanda were created to enable rapid prosecution and trials, aimed not only in providing punishment, but to assisting in 'reconstituting Rwandan society' by providing penalties that allow convicted persons to 'amend themselves and to favour their reintegration'.<sup>37</sup> Based on the traditional gacaca model of informal dispute resolution in the community, modern gacaca courts intended to look beyond punishment alone and the reintegration of offenders through community work in a process that involved victims, perpetrators and community members.
13. In terms of process, while victims were given a participatory role, like others in the community hearings, they often remained silent providing only their witness statement.<sup>38</sup> Over time participation dropped as most community members were peasants, who could not afford to spend one day a week at the hearings, became 'trial fatigued' with little incentive beyond curiosity to participate in another hearing, or cases were too individualised, failing to tackle broader or more complex narratives of the period, such as war crimes by government forces (RPF) against Hutus.<sup>39</sup> Others were discouraged from participating or appearing as a witness due to intimidation, ostracism from the community, or being falsely accused.<sup>40</sup> Yet in practice there remains an unequal relationship that impacts upon individuals participating in the gacaca courts. The traditional role of the judge (*inyangamugayo*) shifted from being a mediator to being an arbiter on guilt and punishment. Perpetrators appeared at the gacaca courts in pink jumpsuits under armed guard, without legal representation. Accusations were encouraged to uncover those responsible and the truth,<sup>41</sup> and guilt was established on a *prima facie* burden of proof.<sup>42</sup> The system itself while building on traditional community

34 Which dealt with 93 leaders, military commanders and senior perpetrators.

35 Addressing 10,000 high level or most responsible perpetrators.

36 To deal with 1.2 million low level participants in the genocide.

37 Preamble Organic Law n° 40/2000 of January 26, 2001 amended by Organic Law N° 16/2004 of 19/6/2004.

38 Penal Reform International (PRI), *The contribution of the Gacaca jurisdictions to resolving cases arising from the genocide Contributions, limitations and expectations of the post-Gacaca phase*, (2010), p17.

39 Lars Waldorf, Rwanda's failing experiment in restorative justice, in D. Sullivan and L. Tiff (eds.) *Handbook of Restorative Justice: A Global Perspective*, Routledge (2006), 422-435, p429; and PRI 2010, p18.

40 See *Justice Compromised The Legacy of Rwanda's Community-Based Gacaca Courts*, Human Rights Watch, p86-98; and PRI 2010, p17-18.

41 Rosemary Nagy, Traditional Justice and Legal Pluralism in Transitional Context: The Case of Rwanda's Gacaca Courts, in J. Quinn (ed.), *Reconciliation(s): Transitional Justice in Postconflict Societies*, McGill-Queen's University Press (2009), 86-115, p93-94.

42 Nicholas A. Jones, *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha*, Routledge (2009), p70.

justice, is a retributive mechanism intended to deal with mid-level and rank and file perpetrators of the genocide.

14. The Rwandan government intended that the punishment of those involved in the genocide would help to facilitate their reintegration into their old communities.<sup>43</sup> The gacaca court system was intended to incentivise perpetrators by offering a reduced sentence (halved) if they made a plea guilty, showed remorse through truth telling and apologised to the victims, and engaged in community service or victim compensation, allowing them to rebuild trust with members of their old community and victims.<sup>44</sup> However, such community service was often conducted far from victims and their community, providing them with little direct benefit. Confessions were partially made, for minor offences, placing greater blame on those who had been killed or where in exile or to settle a score, with allegations that perpetrators colluded in their confessions to hide evidence and limit their responsibility.<sup>45</sup> Perpetrators were often indigent, unable to pay compensation or return property they had stolen after years in prison, causing some victims to abandon the gacaca process. Others negotiated directly with perpetrators to obtain money and buy their silence.<sup>46</sup> Apologies were seen by some victims as lacking sincerity and as instrumental in allowing perpetrators to get a lighter sentence.<sup>47</sup> In addition, the gacaca courts failed to integrate a gender perspective, although the government was proactive in including women as judges (*inyanamugayo*); rape was only added in 2008 despite being a feature of the genocide; and there was an uneasy balance with victims coming forward in front of their own community with *in camera* (confidential in private) hearings for sexual violence crimes that seemed contradictory to the goals of gacaca in encouraging public debate and community participation.<sup>48</sup>
15. The prison and community service experience has had mixed results. Community service work was determined based on the needs of the region, but included activities such as repairing roads, rebuilding homes of victims, building bridges or planting trees. While most of the community service is conducted through the Rwandan government's *Travail d'Intérêt Général* (TIG – works of public interest), it halves their sentence where they confessed and recognised their crime. This meant that someone convicted of 20 years could have their sentenced reduced to 10 years, serving 50% i.e. five years in full time community service. Those who do community service 'tigistes' are required to work three days per week, and where they are staying in a camp their days are combined. The institution the tigistes work for provides them with medicine, food and accommodation, with clothes and education supplied by the Rwandan Correctional Service.<sup>49</sup> According to Brehm et al, 29% (91,556) of cases dealt with by the gacaca courts involve community

43 Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda Justice without Lawyers*, CUP 2010, p249.

44 Clark *ibid.*, p251.

45 Penal Reform International, *Eight Years On ... A Record of Gacaca Monitoring in Rwanda* (2010), p36; and Clark, p209.

46 PRI *ibid.*, p46; Clark, p179; HRW p80.

47 Clark n.43, p250.

48 Pietro Sullo, *Beyond Genocide: Transitional Justice and Gacaca Courts in Rwanda: The Search for Truth, Justice and Reconciliation*, Springer (2018), p212-213.

49 Presidential Order No.66/01 of 02/11/2012 Determining the Modalities of Implementation of Community Service as an Alternative Penalty to Imprisonment.

service obligations.<sup>50</sup> In their assessment of sentencing, Brehm et al found that the high level perpetrators (Category 1) who were ineligible for community sentence were convicted of 19 years on average, excluding life sentences, whereas mid level perpetrators who committed murder, rape and torture (Category 2) were convicted of 15 years on average.<sup>51</sup> Category 3 perpetrators who committed property crimes served no prison time or community service, but were instead had fines imposed (90%) on them averaging at \$11 USD or agreement with victims, with some (9%) initiated by the perpetrator who wished to be forgiven and returned the victims' property.<sup>52</sup>

16. There is some research to suggest that for ex-prisoners who engaged in the gacaca courts and worked in the community service through TIG have remained embarrassed or silent about their role during the genocide once being released, particularly with their family, entrenching denial.<sup>53</sup> The impact of perpetrators removal from their family has also caused marital problems, as they are unable to contribute to their wealth and wellbeing, partners remarried, and there were a number of tigistes committing suicide within the TIG camps or they left the country upon release, rather than returning home to their community.<sup>54</sup> Other tigistes have found the community service useful in giving them new skills and work experience, or at least more liveable conditions than prison with less surveillance and contact with the outside world.<sup>55</sup>
17. For victims they were divided on the TIG, some worried that tigistes would settle old scores at night, but these concerns did not materialise as tigistes often worked far away from their home communities and had no reason to leave the camp at night as relatives and friends were too far away.<sup>56</sup> This is not to negate that victims feared the proximity of former genocidiaries in the community and the community service did not mitigate this for all.<sup>57</sup> For some victims seeing tigistes rebuilding their house or working alongside them in the fields helped to alleviate some of their fears. More generally society in Rwanda initially perceived early release and community service as a 'trick', but with those who did not confess remaining in prison overtime society's perceptions began to change along with sensitisation programmes by the state, and welcomed the opportunity for economic benefits from the TIG in communities.<sup>58</sup>
18. The gacaca court process provided a forum to confront the widespread involvement of individuals in the genocide, position the community to shame perpetrators through their confessions, express moral values to contribute to preventing its repetition, while allowing some recovery of truth, expression of

50 Hollie Nyseth Brehm, Christopher Uggen, and Jean-Damascène Gasanabo, Genocide, Justice, and Rwanda's Gacaca Courts, *Journal of Contemporary Criminal Justice* 30(3) (2014) 333-352.

51 Brehm et al *ibid.*, p344.

52 *Ibid.* p340-341.

53 Théoneste Rutayisire and Annemiek Richters, Everyday suffering outside prison walls: A legacy of community justice in post-genocide Rwanda, *Social Science and Medicine* 120 (2014) 413-420, p417.

54 *Ibid.*

55 PRI *Monitoring and Research Report on the Gacaca Community Service (TIG): Areas of reflection*, March 2007, p22-23.

56 See *ibid.*

57 PRI 2007, p35.

58 PRI 2007, p28-31.

remorse and reintegration.<sup>59</sup> Although confession, apology and remorse were integral to the gacaca system, enabling such reintegrative shaming requires a 'sufficiently coherent and engaged community to have the capacity to reintegrate a wrongdoer.'<sup>60</sup> As a result, the 'gacaca has always been an uneasy mix of restorative and retributive justice' which over time became 'less participatory and more coercive'.<sup>61</sup>

## Northern Ireland

19. In Northern Ireland, there are a number of informal restorative processes have been led or contributed to by former combatants: community restorative justice; search for the disappeared; and a number of truth recovery initiatives. The first of these have been efforts over the past twenty-five years to transform violence within communities by paramilitaries, who often carried out punishment attacks against alleged anti-social offenders as part of their 'policing' activities in working class areas.<sup>62</sup> When the paramilitary cease-fires were called in 1994, such 'policing activities' continued. Thereafter, engagement between human rights and civil society actors and the Republican and Loyalist armed groups ultimately led to the creation of community based restorative justice programmes as alternatives to violence. These non-violent and lawful projects, many of them staffed by former combatants, were shaped by the principles and practices of restorative justice.<sup>63</sup> These projects benefitted from former combatants, along with local community members, acting as volunteers to provide moral authority and legitimacy to a non-violent approach in mediating disputes, which followed restorative justice values with a flexible process.<sup>64</sup> While the number of attacks has markedly dropped within communities, such attacks do continue by dissident republican and loyalist groups.<sup>65</sup> However, mainstream IRA punishment violence has completely stopped. In 1996 there were 302 punishment shootings by loyalist and republican groups, which by 2006 had dropped down to 49.<sup>66</sup> Such ex-combatant restorative processes did have the effect of transforming community dispute resolution, reducing distance between victim, offenders and the community,<sup>67</sup> and at the same time facilitated

59 Clark n.43, p205.

60 Martha Minow, *Breaking the Cycles of Hatred: Memory, Law, and Repair*, Princeton University Press 2002, p75.

61 Waldorf n.39, p422-423.

62 Such as drug dealing and burglaries. Such attacks involved a range of punishments from warnings, beatings, shootings and exile. See Anna Eriksson, *Restorative Justice in the Northern Ireland Transition*, Wilan (2009), 341-361, p344.

63 Kieran McEvoy and Peter Shirlow, Reimagining DDR: Ex-combatants, leadership and Moral Agency in Conflict Transformation, *Theoretical Criminology* 13(1) (2009) 31-59, p37; and Kieran McEvoy and Harry Mika, Restorative Justice and the Critique of Informalism in Northern Ireland, *British Journal of Criminology*, 43(3) (2002) 534-563.

64 Eriksson n.62, p345.

65 Henry McDonald, Northern Ireland 'punishment' attacks rise 60% in four years, *The Guardian*, 12 March 2018.

66 For a discussion see Tim Chapman and Hugh Campbell, Working across frontiers in Northern Ireland: The contribution of community-based restorative justice to security and justice in local communities, in K. Clamp (ed.), *Restorative Justice in Transitional Societies*, (2016) 115-132, p119. See recent statistics since 2003 here: <https://www.psnipolice.uk/inside-psni/Statistics/security-situation-statistics/security-situation-statistics-archive/>

67 *Ibid.*

a common usage of human rights language to allow participants and the state engage in decision making from the 'bottom-up'.<sup>68</sup> Fears that such restorative processes would extend paramilitaries 'control' over their community during peace or to exclude state system have proved unfounded.<sup>69</sup> Instead community restorative justice has provided 'scaffolding', which enables a safe, neutral space and a process of dialogue between people affected by conflict to engage with the other constructively.<sup>70</sup>

20. Engagement by paramilitaries in finding solutions to the harm they caused is also apparent in two other respects. During the Northern Ireland conflict, 16 people were disappeared by non-state armed groups (principally the IRA). To help facilitate the recovery of victims' remains, the Independent Commission for the Location of Victims' Remains (ICLVR) was established by the British and Irish governments in 1999.<sup>71</sup> In the attempt to incentivise information retrieval, the ICLVR offers a *de facto* amnesty for those individuals who come forward with information relating to the recovery of the disappeared. The offer of immunity from prosecution is entirely pragmatic and reflects the reality that without the input of those directly involved in the act of disappearance, the recovery of victims' remains would be highly unlikely, if not impossible. Of course, given the guarantee of non-prosecution, there was little scope for the Republican movement to fail to co-operate with the recovery of the remains of the disappeared. At the end of 2018, the remains of 13 of the 16 disappeared have been recovered and returned to their families for burial. However, the ICLVR has concentrated on the single goal of determining the location of remains of those victims who were disappeared – broader goals of truth and acknowledgement were not built into the commission. Indeed, such objectives may have run contrary to the 'quiet' nature of its operation.<sup>72</sup> Building on the model of the ICLVR, more recently, and as part of the 2014 Stormont House Agreement, a truth recovery body - the Independent Commission for Information Retrieval has been proposed on a similar legal basis, which would allow victims to privately seek and receive information about the death of their next of kin from ex-combatants.<sup>73</sup>
21. Outside of this legal framework some victims have directly engaged with paramilitary groups to uncover further information of the death of their loved ones through more informal back channels. Notable examples include the work of several victims' organisations who have acted as interlocutors between victims' families and former members of paramilitary organisations in the quest to answer questions of significance to family members and the rehabilitation of the reputation of informers killed by the IRA, wherein investigations were internally conducted and apologies made to the families and later published in a republican

68 See Kieran McEvoy and Anna Erikson, Restorative Justice in Transition: ownership, leadership, and 'bottom-up' human rights, *Handbook of Restorative Justice* (2006) 321-337.

69 Kieran McEvoy and Harry Mika Punishment, policing and praxis: Restorative justice and non-violent alternatives to paramilitary punishments in Northern Ireland, *Policing and Society: An International Journal*, 11(3-4) (2001), 359-382, p376-377.

70 Chapman and Campbell n.66, p117.

71 The Northern Ireland (Location of Victims' Remains) Act 1999 was passed by the British government, and the Criminal Justice (Location of Victims' Remains) Act 1999 was passed by the Irish government.

72 See Lauren Dempster, 'Quiet' Transitional Justice: 'Publicness', Trust and Legitimacy in the Search for the 'Disappeared', *Social & Legal Studies* (2019) 1-27.

73 Stormont House Agreement. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390672/Stormont\\_House\\_Agreement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf)

magazine.<sup>74</sup> However such informal engagements have become more difficult for ex-combatants over fear of self-incrimination and prosecution, after testimony provided by now deceased members of paramilitary organisations were published as part of a Boston College project, resulting in the tapes being subpoenaed by the Northern Ireland police and the arrest of living comrades implicated in the stories.<sup>75</sup> Thus informal information sharing can pose a danger for all parties involved.

## South Africa

22. Established in 1996 to deal with the horrors of apartheid and with the ambitious goal of 'reconciling a nation', the South African Truth and Reconciliation Commission (TRC) adopted a language of healing, forgiveness, reconciliation and restorative justice.<sup>76</sup> Restorative justice is premised upon the belief that crime or anti-social behaviour is 'a violation of people and relationships' rather than simply lawbreaking.<sup>77</sup> As a result, restorative approaches seek to identify the 'harms' caused by the offenders' actions to individual victims, the wider community and the harm caused by the punishment and stigmatization to offenders themselves.<sup>78</sup>
23. Eschewing retribution, the TRC sought to restore relationships between victims and perpetrators and repair the damage suffered by both parties.<sup>79</sup> As noted above, for the Chair of the TRC Archbishop Desmond Tutu, this emphasis on restorative justice chimed with traditional African approaches to conflict transformation – 'western justice is largely retributive'.<sup>80</sup> The TRC's restorative focus also resonated with the traditional concept of Ubuntu as 'humaneness' and respect for human dignity in the move from violence to reconciliation.<sup>81</sup> These sentiments were shared by the South African Constitutional Court in its examination of the National Reconciliation Act 1995 that established the TRC,

'by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for

74 See Ron Dudai, Closing the gap: symbolic reparations and armed groups, *International Review of the Red Cross* 93(883) September 2011, 783-808.

75 Boston College tapes: Truth-recovery pie in the sky as long as shadow of arrest looms, *Belfast Telegraph*, 30 January 2015.

76 Charles Villa-Vicencio, Restorative Justice: Dealing with the Past Differently, in C. Villa-Vicencio and W. Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, University of Cape Town Press (2000).

77 Howard Zehr, Doing Justice, Healing Trauma: The Role of Restorative Justice in Peacebuilding, *South Asian Journal of Peacebuilding* 1 (2000) 2-16.

78 Braithwaite n.16.

79 Kerry Clamp and Jonathan Doak. More than Words: Restorative Justice Concepts in Transitional Justice Settings, *International Criminal Law Review*, 12 (2012) 339-360.

80 Cited in Minow n.2, p.81

81 *umuntu ngumuntu ngabantu* – 'people are people through other people'. TRC Volume 1, Chapter 5, p127.

such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the “reconciliation and reconstruction” which informs the very difficult and sometimes painful objectives of the amnesty.<sup>182</sup>

24. The restorative approach articulated by the TRC can be divided into four aspects:
- ‘seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings, as injury or wrong done to another person;
  - is based on reparation: it aims at the healing and the restoration of all concerned – of victims in the first place, but also of offenders, their families and the larger community;
  - encourages victims, offenders and the community to be directly involved in resolving conflict, with the state and legal professionals acting as facilitators;
  - supports a criminal justice system that aims at offender accountability, full participation of both the victims and offenders and making good or putting right what is wrong.<sup>183</sup>
25. The importance of the full participation of former combatants and their contribution to truth recovery was also framed within a restorative lens:

‘that the accountability of perpetrators be extended to making a contribution to the restoration of the well-being of their victims. ...The fact that people are given their freedom without taking responsibility for some form of restitution remains a major problem with the amnesty process. Only if the emerging truth unleashes a social dynamic that includes redressing the suffering of victims will it meet the ideal of restorative justice.<sup>184</sup>

For these reasons, the TRC, through the Amnesty Committee hearings offered a conditional amnesty to former combatants who engaged in the truth recovery process. Some scope was provided for the presence and participation of victims

82 Mahomed DP, *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*, (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).

83 TRC Volume 1, Chapter 5, p126.

84 TRC Volume 1, Chapter 5, p131.

in the Amnesty Committee hearings.<sup>85</sup> Victims’ rights included the right to be notified of the hearings and to be present, to provide evidence (oral or written statements) that were taken into consideration, to give formal testimony (under oath and subject to cross-examination), to question amnesty applicants (in person or through their counsel), as well as apply for a judicial review of amnesty decisions.<sup>86</sup> In addition, and in exceptional cases following a victim request, the hearings were accompanied by ‘behind the scenes interpersonal dialogues’ between victims and perpetrators, facilitated by TRC staff. As well as helping to contribute to the restoration of victims, engagement in truth telling helped to promote the reintegration of ex-combatants into society, contributed to the development of richer, more inclusive narratives on which a shared history could be formed and assisted to promote social understanding of the causes of violence.<sup>87</sup>

26. That said, a number of critiques have been made of the restorative capacity of the TRC. First, the legal nature of amnesty committee hearings often left victims as spectators of legal debates between their own and other lawyers in the hearings.<sup>88</sup> Informal meetings facilitated by TRC staff and lawyers, offered a more direct way to obtain truth and assess the sincerity of the perpetrator’s remorse. However, these were not organised by the TRC and the timeframe of the hearings may have been too soon for victims to engage in such processes.<sup>89</sup>
27. Second, the amnesty hearings did not require perpetrators to express remorse or an apology, just the truth, though perpetrators did at times express regret and sympathy, others entered a rote apology and some even justified their actions.<sup>90</sup>
28. Third, the separation of the committees on amnesty, violations and rehabilitation and reparation, limited the relational aspect of sharing information between perpetrators and victims. Although the committees allowed information to be transferred between them and provided opportunities for victims to engage with perpetrators, the system was not set up to facilitate detailed discussions on truth, such as the location of those disappeared.<sup>91</sup> Numerous investigators were involved in the amnesty committee to verify facts and identities as well as to trace victims, but this was a substantive amount of work and time to collect and collate such information.
29. Fourth, perceptions of the TRC being more ‘perpetrator friendly’, in particular the amnesty commission, were not helped by the TRC being able to resolve a

85 Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process*, Intersentia (2004).

86 See Antje du Bois-Pedain, *Transitional Amnesty in South Africa*, Cambridge University Press (2007).

87 See McEvoy and Mallinder n.19.

88 Timothy Sizwe Phakathi and Hugo van der Merwe, The Impact of the TRC’s Amnesty Process on Survivors of Human Rights Violations, in A. Chapman and H. van der Merwe (eds.), *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, University of Pennsylvania Press (2007) 116-142, p136.

89 Sizwe Phakathi and van der Merwe *ibid.*, p138-139.

90 Madeleine Fullard and Nicky Rousseau, Uncertain borders: The TRC and the (un)making of public myths, *Kronos* 34(1) (2008), 215-239, p223.

91 477 disappearances were recognised by the TRC in part based on information provided by perpetrators and has been used as a starting point for their recovery and reburial by the Missing Persons Task Team. See Jay D. Aronson, The Strengths and Limitations of South Africa’s Search for Apartheid-Era Missing Persons, *International Journal of Transitional Justice* 5 (2011), 262-281.

perpetrator's legal situation by confirming or denying them an amnesty, whereas despite making recommendations for reparations, victims had to await years for implementation by the state.<sup>92</sup> Despite the promise of restoration, reparations were limited in scope to those victims who testified before the TRC, falling within its definition of gross violations of human rights, and by the subsequent partial implementation by the South African government.

30. Expectations can widely vary amongst victims from confronting those responsible, finding the truth or location of the remains of a loved one, obtaining acknowledgement and reparation or an apology, or to contribute to healing and reconciliation of the country.<sup>93</sup> In terms of justice and reparations, victim engagement was a way to highlight their interests in economic rehabilitation, such as education or skills development, as a means to assert their dignity after living under the repression of apartheid.<sup>94</sup> Counselling was not provided by the TRC, but through other groups, such as Khulumani Support Group; however, such groups did not have the capacity to provide services to thousands of victims and other participants.<sup>95</sup> The South African experience offered innovation in exploring truth and offender-victim engagement, but without supportive services, it failed to inform victims of what they could expect from an early stage, provided a narrow focus on specific gross violations and the partial and delayed reparations offered missed an opportunity to ensure a more joined up response to dealing with the past. Moreover, having an acknowledgement ceremony or truthful revealing account by a perpetrator may not by itself contribute to healing. This may reflect a broader trend of expectation outstripping the capacity of any one commission, requiring modesty on what such mechanisms can do in the face of mass atrocities.

### Other contexts

31. The use of restorative justice or traditional rituals in addressing conflict-related crimes is apparent in a number of other contexts.<sup>96</sup> In Northern Uganda, traditional Acholi practices were incorporated into the Juba peace agreement between the Lord's Resistance Army and the Ugandan government, alongside the creation of a war crimes division to provide an 'overarching justice framework' through formal and 'complementary alternative justice mechanisms'.<sup>97</sup> Despite the final peace agreement not being formally signed by the LRA, a range of traditional ceremonies are engaged with to facilitate community cohesion and mediate conflicts. Other measures which have been enacted, such as the 2000 Amnesty Act that provides a blanket amnesty to anyone in rebellion, has no conditions for an individual to contribute to truth, accountability or reparations.<sup>98</sup> In the absence of a joined up comprehensive process to deal with the past, traditional ceremonies, although

92 SATRC, Vol. 6, p84.

93 Sizwe Phakathi and van der Merwe n.88, p122.

94 Ibid., p126.

95 Ibid., p127.

96 Such as Kenya, Somalia, Mozambique, Solomon Islands, Papua New Guinea, Sierra Leone, and Angola. See Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Hart 2008, p187.

97 Clause 5.3 of the Agreement and clause 19 of the Annexure.

98 The blanket nature of the amnesty has been reinterpreted by the Ugandan Supreme Court in 2015.

having mixed contemporary use by individuals, have been sought out the former combatants and victims to assist in reintegrating and normalizing their place in the community. These traditional ceremonies are framed on restoring harmony in the community through the clan taking responsibility for the actions of its members, whether through internal reconciliation ceremonies or external with other clans.<sup>99</sup> *Nyouo tong gweno* (stepping on an egg on top of an opobo twig) is a cleansing ritual used to purify those who have been away from home for a long time, and is applied in welcoming back former child soldiers.<sup>100</sup> There are also reburial rites like *inko cogo* (reburial of the bones) and area cleansing has facilitated appropriate burials, family reunions and for some members of the community to return from displaced persons camps, by removing bad spirits caused by the spilling of blood on the land during the war.

32. One of the most discussed traditional ceremonies in Acholi is *mato oput* (drinking the bitter root), where warring parties are reconciled after the responsible party or clan acknowledges their wrongdoing in front of the community, provides a truthful account, makes compensation to the victim's clan (*culo kwor*) to atone for the harm, and then both clans share a meal together. Where clans are warring amongst each other, *mato oput* ceremony can be linked to negotiations on appropriate reparations for the damage caused, and followed by the *gomo tong* (bending of spears) to prevent recurrence of violence. Cultural and religious institutions have also played a key role in promoting healing and reconciliation amongst the affected communities.<sup>101</sup> Nonetheless, these mechanisms do not provide official acknowledgement of responsibility or harm and there are little corresponding reparations from the state for victims. While one off reintegration packages are provided to amnesty reporters (USD \$70 and tools), there is no corresponding support for victims. As one northern Uganda interviewed by the team stated, "I am a victim, but I do not have the benefits of a perpetrator, who is also a victim."<sup>102</sup>
33. Similarly in Timor Leste, there were three mechanisms to deal with the occupation and liberation war, from the truth commission (CAVR), Serious Crime Unit (CRU) to deal with senior perpetrators, down to the grassroots Community Reconciliation Process (CRP). Offenders would voluntarily make a written application to the CAVR, which would be sent to the Office of the General Prosecutor for review if it needed to go before the CRU, otherwise it would go before the CRP. The CRP invoked traditional community mediation to reintegrate over 1,000 perpetrators, due to the devastation caused by the occupation and conflict to the criminal justice system.<sup>103</sup> The CRP or *nahe biti bo'ot* ('stretching the big mat' where perpetrators, victims and elders sit) involved mediation between the aggrieved party and the perpetrator in the form of a panel from the community. This process culminated in a one-day ceremony, but usually required three months pre-negotiation to reach

99 Joanna R. Quinn, What of Reconciliation? Traditional Mechanisms of Acknowledgment in Uganda, in J. Quinn (ed.), *Reconciliation(s): Transitional Justice in Postconflict Societies*, McGill-Queen's University Press (2009), 174-206, p190-191.

100 Quinn *ibid.*, p188.

101 See Erin K Baines, The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda, *International Journal of Transitional Justice*, 1(1)(2007), 91-114.

102 Interview, Gulu, Northern Uganda, July 2011.

103 1,371 perpetrators completed a CRP. See *Chega!* Part 9: Community Reconciliation, para.6.

an agreement, which would help restore the balance between the spiritual and the physical world, disturbed by the wrongdoing.<sup>104</sup>

34. The ceremony itself drew from traditional rituals of *lisan* and was opened by a prayer from a Catholic priest in the local language.<sup>105</sup> The offender would make a statement on their responsible acts, with questions from the CRP panel, victims and community members. This often did not result in interrogation of their accomplices, instead victims' questions concentrated on 'idiosyncratic issues' important to them.<sup>106</sup> Where an agreement was reached, it would be read out and signed by all the participants, whereby the perpetrator would apologise to the community, pay a fine to the victim or give symbolic reparations (such as jewellery or *tais* (textiles)), or community service (property reconstruction, cleaning or infrastructure repair) and renounce all forms of violence for political ends. Thereafter they would be welcomed back and immunity granted from civil and criminal liability.<sup>107</sup> These 'acts of reconciliation' were not intended to 'burden' perpetrators with obligations beyond their means.<sup>108</sup> For those who broke their commitments to the victim or community, they faced up to a year in prison or a US \$3,000 fine.<sup>109</sup> Where an agreement was not reached it would be referred to the police. Most of the perpetrators before the CRP were low-level individuals, who had mostly committed theft.
35. For victims, the CRP enabled them to confront their perpetrator and ascertain some form of truth, or at least it distilled some information from the rumour, exaggeration and lies during the chaos of the war.<sup>110</sup> Victims' capacity and ability to engage in the process was limited, as they were not supported by the CAVR or briefed on what to expect. Victims also had less time to prepare than the perpetrator who made the request, further compounding their frustrations. Many victims were unable to participate in hearings due to sickness, lack of transportation or being unable to afford taking a day off work in the fields; this had a gender dimension for women who were often excluded by male family members or had to look after children.<sup>111</sup> Perpetrators only provided token reparations, and the state has yet to pass the 2012 reparation bill. In addition, victims reported feeling pressurised by the community to reconcile with the offender.<sup>112</sup> Victims participation in the CRP did not automatically mean that they wanted to reconcile with a perpetrator, some felt it was a personal choice,<sup>113</sup> others felt that there was an imbalance in favour of the interests of the perpetrator to ensure fast reconciliation.<sup>114</sup> That said, the CAVR

104 John Braithwaite, Hilary Charlesworth and Adérito Soares, *Networked Governance of Freedom and Tyranny: Peace in Timor-Leste*, Australian National University E-Press (2012), p206.

105 Braithwaite *ibid.*, p205-206.

106 Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, Stanford University Press (2006), p221.

107 Elizabeth Stanley, *Torture, Truth and Justice: The Case of Timor-Leste*, Routledge 2008, p113-114; and CAVR Part 9, paras. 80-83.

108 CAVR Part 9, para.80.

109 Stanley n.107, p114.

110 CAVR Part 9, para.122.

111 Stanley n.107, p116-117.

112 CAVR Part 9, para.132.

113 Piers Pigou, *Crying Without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations*, ICTJ (2003), p43.

114 Stanley n.107, p120-121.

truth commission noted that the grassroots CRP had the effect of deepening and broadening the reach of efforts to tackle impunity, by reaching across the country, at the local level, incentivising perpetrators to acknowledge their crimes, take responsibility for their wrongdoing and make efforts to remedy the harm caused to victims and their community.<sup>115</sup> Yet for those perpetrators most responsible for serious crimes, including sexual violence, they were able to slip across the border to West Timor, escaping justice before the CRU and CRP.<sup>116</sup>

## Victim Participation

36. The participation of victims in proceedings involving international crimes has been growing since its inclusion in the Rome Statute of the International Criminal Court.<sup>117</sup> This inclusion within the Rome Statute reflects the frustrations of civil society and victims with previous tribunals' neglect of victims' interests.<sup>118</sup> It also coincided with domestic developments, which increasingly included victims in civil law countries, such as *partie civile* or *Nebenklage*. The *partie civile* procedure in French-speaking countries enables victims to initiate prosecutions, participate as a party in proceedings, and bring ancillary claims for damages on the prosecution's case.<sup>119</sup> In the German-speaking countries the *Nebenklage* procedure permits victims to appoint their own counsel to act as a private accessory prosecutor, who can inspect files, present their case in a trial, question witnesses, object to judges' orders and questions, apply for evidence to be taken, and make statements.<sup>120</sup> In addition, victims in Islamic law countries have the right to prosecute privately an offender and to claim compensation.<sup>121</sup> In some common law countries, victims can also bring private prosecutions and make impact statements during sentencing.<sup>122</sup>
37. Involving victims in decision-making processes can help them to express their voice on issues that affect them, providing them with some ownership based on

115 CAVR Part 9, paras.143-144.

116 Braithwaite n.104, p212.

117 Such as the ECCC, EAC, STL and Kosovo. Art. 17 STL Statute; Art. 22 Law on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015.

118 See Claude Jorda and Jérôme de Hemptinne, The Status and Role of the Victim, in A. Cassese, P. Gaeta, and R.W. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 1387-1419; and Sergey Vasiliev, Article 68(3) and 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; and Moffett n.30, 86-142.

119 See Articles 52 and 706-742 of the French Criminal Code; Articles 85-91, 371-375, and 418-426 of the French Code of Criminal Procedure.

120 Sections 397 and 403-406 of the Strafprozessordnung of the German Criminal Code.

121 Hossein Esmaeili and Jeremy Gans, Islamic Law across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials, *Denver Journal of International Law and Policy* 28 (1999-2000) 145-174, p149-150.

122 In the United Kingdom, Section 6 of the Prosecution of Offences Act 1985 governs private prosecutions. See Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart 2008), p124-130.

feelings of respect, in that their voices are valued.<sup>123</sup> Social psychologists have long conducted research on participants on the fairness in decision-making and judicial process. Their research indicates that participants who were able to exercise their voice in procedures which affected them and influenced decision-making had greater satisfaction than those who were unable to express their views.<sup>124</sup> Tyler clarifies these in respect to consistency, representation and accuracy; consistency is based on comparison to prior decision, representation on the extent to which participants can make their case, and accuracy in how decisions are reached taking into account participants' input.<sup>125</sup> The benefits for victims in participating in proceedings can vary depending on whether they are directly presenting their views and concerns before a court, appearing as a witness, or more indirectly by being named in proceedings on their harm or represented through their lawyers. For those directly participating in proceedings, it can validate their experience of victimisation and make them feel empowered through the law. However, it can also be stressful and psychologically strain victims where proceedings are long.<sup>126</sup> For those who participate through their lawyers or see their perpetrator convicted, it can acknowledge their suffering, provide some physical protection by imprisoning responsible perpetrators and reveal some truth as to the atrocities committed against them.<sup>127</sup> For some victims participating directly can be a mixed experience, as one victim interviewed by the authors in Guatemala, who participated in the trial of former Guatemalan president Rios Montt, stated,

"[When I went to] give my testimony and now I was very happy because Rios Montt was going to jail. Finally – justice. I was happy. I told him in front of him 'you are the one who killed my kids. I am happy I already met you and I can see your face because I don't know you, I didn't have any problems with you, whenever you came to our village, you burned everything, you killed everyone. I don't owe you anything', I told him. I told him that 'I'm happy that I'm here, that I met you and you're going to pay for this and tell me, what did you do with my kids?' and he answered 'You're lying' and I said 'No, I don't lie, I'm saying the truth, they died and you killed them, because I'm a survivor, I saw what you did, I saw what the whole military did, I remember what happened because after that, life was very sad...'"<sup>128</sup>

38. Although only the perspective of one individual, it reflects the mixed emotions of participating in person in criminal proceedings. Moreover, it illustrates the confrontational nature of criminal proceedings, where victim and accused are disputing their own versions and justifications of the past. In the end Rios Montt died before his second trial of genocide could be completed. Such visible participation can also result in victims facing intimidation and social ostracism.<sup>129</sup> Indeed the victim quoted above was subjected to domestic violence from her

123 See Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler 1996).

124 John Thibaut and Laurens Walker, A Theory of Procedure, *California Law Review* 66 (1977) 541-566.

125 Tom R. Tyler, What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures, *Law and Society Review* 22(1) (1988) 103-135, p107.

126 O'Connell, n.3, p301.

127 Ibid., p300.

128 Interview with project team, G20, Ixil region, Guatemala, May 2018.

129 O'Connell, n.3 p301.

husband and stigmatised by her community to remain silent in case they were attacked again by the military.

39. For victims expressing their views and concerns, while recognising their value, agency and dignity, is not a one-way process. The value in voicing concerns is only shared by participants where a decision maker, such as a judge, considers their views in decision-making, in particular how they directly communicate and explain their decisions.<sup>130</sup> Clarity and certainty of the role of victims and how they are being heard and its impact on decision-making, can help to mitigate frustration at negative outcomes, as a victim making a statement for sentencing can help to affirm their dignity and self-worth.<sup>131</sup> There can still be value expressive benefits where a victim's input has no effect on the outcome, but participants appreciate being given the opportunity to voice their concerns. It is very important in restorative and procedural justice approaches to criminal justice to inform victims of what they can expect from the process, wherein modesty of what is deliverable with the framework of the institution is key. This can be greatly assisted by engaging victims through a process that is clear and certain in how, why and when they will be engaged with. For instance the victim lawyers in the *Kenyatta* case at the ICC, while often hundreds of miles away and victims faced security issues, kept victims informed of proceedings through phone calls every 6-8 weeks as well as to communicate their views and concerns. Civil society actors can play a key role in support these process, from not only carrying out community sensitisation, but also filling out forms, provide legal advice or covering costs for victims to attend hearings or workshops.
40. An example of this process has been developing in Northern Ireland with victim impact statements.<sup>132</sup> These statements are often letters written by victims on how the harm of the crime has affected them or expert reports from psychiatrists. Similar practice is now well established in the United States, New Zealand and Australia, and more recently the UK.<sup>133</sup> For some victims writing these reports can offer some catharsis, by putting down their harm on paper, but by itself it is not enough to amount to closure. The effectiveness of a victim statement depends on the skill of the statement taker and how articulate a victim is in explaining the impact of the harm on them. However these statements have become quite legalised with intermediaries, mainly family liaison officers in the police and the prosecution, ensuring that victims do not implicate the defendant in other crimes not subject to the case. At the moment in Northern Ireland, the statement is just written but in the rest of Ireland and the UK victims can orally read out their statement to the court if they choose, this does not undermine the rights of the defendant as it is usually after the judge has decided the sentence, but before it is pronounced. In some cases of a single person being killed, a number of family members may want

130 Tom R. Tyler, Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models, *Journal of Personality and Social Psychology*, 52(2) (1987) 333-344, p342.

131 Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, *Crime and Justice* 30 (2003) 283- 357, p350.

132 See Luke Moffett, Victim personal statements in managing victims' voices in sentencing in Northern Ireland: taking a more procedural justice approach, *Northern Ireland Legal Quarterly* 68(4) (2017) 555-576.

133 See K. Kennard, The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions, *California Law Review* 77(2) (1989) 417-453; and J. Roberts J., and M. Manikis, *Victim Personal Statements A Review of Empirical Research*, Report for the Commissioner for Victims and Witnesses in England and Wales (2011).

to submit an impact statement. A collective form for families has been introduced,<sup>134</sup> but this has not been used much and uptake of the victim personal statement (VPS) in general is quite low. That said while there may be multiple statements for each victim, it does not detract from the pluralistic harm experience by families in the aftermath of loss that a judge can express in their sentencing remarks. Yet if victims' voices are collectivised by taking away the uniqueness of a victim's story, emphasizing different aspects, or representing victims' harm in generic terms, it may understate impact of the crime or undermine the communicative function of the victim's statement.

41. In practice in Northern Ireland and the UK, the VPS is framed under headings to give it some shape and ensure it is more helpful to judges, and also to minimise it being a rant at the defendant. This very much reflects the use of the VPS as a statement to judge on the consequences of the harm of a victim, rather than a direct engagement with a defendant. There are disclosure issues – some victims do not want the defendant to know the extent of their suffering, in particular where they live in the same community or family, for fear it could be used against them in emotional abuse or future attacks, which has the effect of silencing or disincentivising victims from coming forward or detailing all their suffering. Cross-examination on such statements can have a similar effect. At the same time there needs to be some control or verification of the extent of harm, as some victims made statements that were not true, can exaggerate their harm (or self-diagnose), may be quite volatile in the severity of the punishment of the defendant or may risk prejudicing the judge. For example one victim, whose son had been murdered, said he had been beaten to a pulp in her VPS, but this was not true.
42. The VPS can also send moral messages about the defendant's responsibility in a crime as a way of 'shaming' them by laying bare the harmful consequences the crime has had on the victim and their next of kin. This is not to suggest that VPS can always provide a sort of restorative justice forum in criminal sentencing, but it can help to return some of the victim's agency and identity undermined by the defendant during the crime by confronting them and the court with the harmful effects.<sup>135</sup> The VPS can have therapeutic benefits through the victim's harm being publicly acknowledged. This reflects both the practice of emoting (i.e. publicly sharing their emotions) and the role of procedural justice in how victims' voices are accurately respected and considered by the criminal justice system. Lens et al suggest that there are no direct therapeutic effects from making a VPS, but feelings of anxiety can decrease where the victims feel satisfied by how they were respected and treated.<sup>136</sup> The VPS can offer a way of acknowledging the victim's suffering through their inclusion in the sentencing process. Judges reading out the VPS alongside their sentencing remarks can publicly acknowledge the victim's experience, making their suffering official and giving a valued place for their voice.<sup>137</sup> Acknowledgment can help to give the victim a human face, rather than

being just anonymous or a statistic. In Northern Ireland, judges failed to capitalise on the victim statements by not acknowledging them in their sentencing remarks or judgements, which disincentivised victims from making them and frustrated third parties, such as the police and civil society groups, from helping victims or promoting them.

43. Courts can also benefit from the insights of victims. Victim participation can help to humanise and make their suffering more visible. Victims as witnesses of violence can contribute to truth recovery through a more comprehensive account of what happened by involving those primarily affected.<sup>138</sup> Victim participation can also encourage greater levels of transparency and accountability making the international criminal justice more legitimate in the eyes most affected.<sup>139</sup> That said, victims while key stakeholders in justice processes, are one of a number of interested parties in criminal proceedings whose rights and views have to be balanced.<sup>140</sup> Victims do not speak with one voice, they can contradict and compete with each other. Their needs and interests can change over time. Those who are seriously injured or disabled, mentally impaired, elderly or very young may not be able to speak on their own behalf or be able to engage as much as they would like in processes. In such cases, provisions should be put in place to ensure they are kept informed and that their views and concerns are effectively presented to decision makers, such as allowing them to designate a representative or legal guardian.
44. It is worth outlining how the process of victim participation works for international crimes. While a formal legal process, distinct from restorative proceedings above, it does offer lessons on a lawyer dominated process. The rest of this section begins by outlining the application process at the International Criminal Court, before turning to discuss the legal representation of victims and challenges of ensuring the accuracy of their voice in legal proceedings. The following sub-section examines the modalities of victim participation at the ICC in how their views and concerns are represented and practice before the Court. Given that there are tens of thousands of victims before the ICC, there is increasing collectivisation of their participation through legal representatives, which is explored in the subsequent section and contrasted with the few occasions victims have participated in person. The final sub-section highlights the rules and practice of victim protection and psychological support before international criminal justice bodies.

### Application Process

45. At the International Criminal Court (ICC) the Victims Participation and Reparation Section (VPRS) in the Court's Registry facilitates access for victims by receiving, collecting and processing their application into a secure database. Application forms are reviewed on whether or not they provide sufficient information on the incident and personal details of the individual applicant, which the VPRS will try to

134 Justice Act (Northern Ireland) 2015, s.33(2).

135 See Jonathan Doak, and Louise Taylor, Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing, *Northern Ireland Legal Quarterly* (2013) 64(1), 25–46.

136 K. Lens, A. Pemberton, K. Brans, J. Wageningen, S. Bogaerts and E. Lahlah, Delivering a Victim Impact Statement: Emotionally Effective or Counterproductive?, *European Journal of Criminology* (2015) 12(1), 17–34, p30–31.

137 Jonathan Doak, Ralph Henham and Barry Mitchell, Victims and the Sentencing Process: Developing Participatory Rights? *Legal Studies* 29(4) (2009) 651–677, p668.

138 *Lubanga*, ICC-01/04-01/06-2127, paras 28–29.

139 Jonathan Doak, Victims' Rights in Criminal Trials: Prospects for Participation, *Journal of Law and Society* 32(2) (2005) 294–316, p312; and Tatjana Hornle, Distribution of Punishment: The role of a victim's perspective, *Buffalo Criminal Law Review* 3 (1999–2000) 175–209, p318.

140 Ian Edwards, The evidential quality of victim personal statements and family impact statements, *International Journal of Evidence & Proof*, 13(4) (2009), 293–320, p299.

verify this information and a *prima facie* analysis of the applications veracity.<sup>141</sup> The Victims Support Section (VSS) in the ECCC performs a similar function of both the ICC's Office of the Public Counsel for Victims (OPCV) and VPRS, in collecting and screening applications, as well as providing legal aid and advice to victims.<sup>142</sup> There were proposals to merge the OPCV and VPRS into a Victims' Unit at the ICC as part of the ReVision programme to make the administration more efficient, but this was strongly resisted by staff of the Court and has since been dropped.

46. Victims apply to participate at the ICC through an application form. Initially this was a 17 pages document, then reduced to 7, and is now only one double-sided page. However, it is only in English, French and soon Sango (CAR II), so it has to be translated into the local languages of victims by intermediaries, i.e. local civil society organisations. The move to a one- page application is intended to expedite the application process, with one side collecting information on the victim's personal details and connection to incidents/crimes, with the back page dedicated to collecting basic views on appropriate reparations if proceedings do arise. In contrast, the Extraordinary Chambers in the Courts of Cambodia (ECCC) has a standard five page application form available on the ECCC website in English, French and Khmer.<sup>143</sup> The Special Tribunal for Lebanon has a 9 page application form, available on the Tribunal's website in French, Arabic and English.<sup>144</sup>

47. In 2012 the ICC collectivised its application process in the Gbagbo case, victims could collectively apply through a group application form with participation to be facilitated by an individual victim representative. In turn they would be represented by a single Victim Legal Representative (VLR).<sup>145</sup> The ICC Registry has noted that a flexible approach is need as,

'it is not always be feasible or advisable to bring together groups of victims physically for the purposes of an application process. In some cases the security context may not be conducive for such meetings, in others not all victims feel comfortable speaking in front of groups, whether due to the nature of the harm suffered (such as victims of sexual violence) or generally due to tensions within a community, fear of stigmatisation, or other reason.'<sup>146</sup>

48. In the subsequent *Muthaura and Kenyatta* case, Trial Chamber V took a tiered approach to victim applications, in order to ensure victims' views and concerns could be heard before the commencement of the trial.<sup>147</sup> The Chamber distinguished between individual and collective applicants, individuals could still appear before the Court and have their applications individually assessed. The majority of victims under the collective participation application would be represented by a

141 MéliSSa Fardel and Nuria Vehils Olarra, The Application Process: Procedure and Players, in K. Tibori-Szabó and M. Hirst (eds.), *Victim Participation in International Criminal Justice*, Asser (2017), 11-43, p13-14.

142 Rule 12, ECCC Internal Rules.

143 <https://www.eccc.gov.kh/en/forms>

144 <https://www.stl-tsl.org/en/about-the-stl/5885-application-for-victims-to-participate-in-the-proceedings>

145 *Prosecutor v Gbagbo*, Organization of the Participation of Victims, ICC-02/11-01/11-29- Red, 6 February 2012.

146 Registry Observations in Compliance with the Decision, ICC-01/04-02/06-54-Conf, 6 May 2013, para.8.

147 *Prosecutor v Muthaura and Kenyatta*, Decision on Victims' Representation and Participation, ICC-01/09-02/11-498, 3 October 2012.

common legal representative and would not have to go through the application procedures under Rule 89 of the Rules of Procedure and Evidence. Instead these collective victims would be registered and the VPRS in conjunction with the legal representative would prepare and submit reports on the victim population.<sup>148</sup> This collective approach aims to mitigate the cost and time spent on the application procedure, while protecting the rights of the defendant from undue delay and allowing victims to present their interests. Furthermore, the Chamber stated that,

'registration does not imply any judicial determination of the status of the individual victims. Moreover, when assessing any submissions or requests made by the common legal representative, the Chamber will be mindful of the fact that the represented victims have not been subject to an individual assessment by the Court.'<sup>149</sup>

49. As a result of the number of victims applying before international criminal justice bodies, at the outset information require from them is reduced in order to facilitate administration; for victims who want to participate in proceedings further information and verification is required. For reparation proceedings the application is only useful for mapping out general sentiments to assist the Registry to have a certain idea of victims' views, who will have to go through another application or at least verification with the Chamber and Trust Fund for Victims if proceedings do arise on conviction of the accused.

50. Intermediaries have played an important part in extending the reach and capacity of the ICC in engaging with victims, especially in areas of ongoing conflict. These civil society actors, community leaders or international NGOs, usually have a pre-existing relationship of trust with victimised communities, speak their language and understand the local context, enabling them to explain developments and procedures of a court into words that victims can understand.<sup>150</sup> However, such engagement can be time and resource intensive for local civil society actors, especially when the ICC is usually unwilling to pay them for their time over concerns of impartiality. Intermediaries can become frustrated at the Court neglecting their input into proceedings as they do not have legal standing, or they can become frustrated at delays or lack of acknowledgment of their contribution in organising victims and collecting applications.<sup>151</sup> None of the international criminal justice bodies that allow victim participation provide legal aid to allow victims to complete their applications. Some lawyers work pro-bono, but vast majority of victims are reliant on intermediaries to assist them in providing relevant information and evidence for their applications.<sup>152</sup> Victims can also become fatigued in being mobilised and engaged by civil society and international actors, without seeing any substantive change to their situation, causing them to disengage. Intermediaries can also face intimidation and security threats, and may not be in the best position to explain messages from the Court or counsel to victims, particularly where it

148 Ibid., paras 24 and 38.

149 Ibid., para 37.

150 Mariana Pena, The Role of Intermediaries and Third Parties in Victim Participation, in K. Tibori-Szabó and M. Hirst (eds.), *Victim Participation in International Criminal Justice*, Asser (2017), 81-109, p95.

151 See Rachel Killean and Luke Moffett, Victim Legal Representation before the ICC and ECCC, *Journal of International Criminal Justice* 15(4) (2017), 713-740, p737.

152 Megan Hirst, Legal Representation of Participating Victims, in K. Tibori-Szabó and M. Hirst (eds.) *Victim Participation in International Criminal Justice*, Asser (2017), 111-169, p119.

involves rejection or collapse in a case.<sup>153</sup> Only the Special Tribunal for Lebanon (STL) provides for the possibility of a temporary victims' legal representative to represent victim's views in specific proceedings, such as appealing decisions on the rejection of a victim's application.<sup>154</sup>

### Representation and Voice

51. Legal representation can allow victims' interests to be more effectively conveyed by a lawyer who understands legal procedure and norms.<sup>155</sup> Legal representatives can act as information conduits between victims and legal processes, translating their interests into legal submissions, procedures and appeals, removing the burden and stress of victims participating themselves.<sup>156</sup> There is a danger that in relying on lawyers to present victims' interests their views become simplified, filtered, reinterpreted or compromised to reflect the diverging views among the victim group, inhibiting victims' voice and agency.<sup>157</sup> The use of legalese<sup>158</sup> can inhibit victims from becoming active participants in proceedings. In addition, victims who are able to participate may not be representative of all victims or their inclusion may have led to the exclusion or marginalisation of other voices. Justice demands can be driven by 'urban elites and high-profile victims, who have a strong moral voice and an ability to clearly articulate demands.'<sup>159</sup> The ICC in the Cote d'Ivoire cases had to request the Registry to reengage affected communities, as participation was dominated by males and certain and ethnic groups, with very few participants who had been the victims of sexual violence, including victims of rape.<sup>160</sup>
52. At the ICC, victim participation is mostly provided through Article 68(3), which enables victims to provide their views and concerns where their personal interests are affected. Such 'views and concerns' are usually presented by the legal representatives of the victims (VLRs) 'where the Court considers it appropriate'. The Court's Rules of Procedure and Evidence (RPE) distinguish this further by only entitling VLRs to attend and participate in proceedings, thereby giving the representatives 'enhanced' procedural rights, rather than the victims themselves.<sup>161</sup> 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.

153 Pena n.150, p96.

154 STL Directive on Victims' Legal Representation, Article 18(A).

155 See Killean and Moffett n.151, p716.

156 Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', *Social and Legal Studies* 22 (2013) 489-513.

157 Killean and Moffett n.151, p717; McEvoy and McConnachie *ibid.*, p495.

158 The technical and formal use of legal language.

159 Hugo 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, p201.

160 Situation in Republic of Côte d'Ivoire, ICC-02/11-14, 15 November 2011, para.211.

161 Rule 91(2) RPE. Elisabeth Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court', *International Review of the Red Cross* (2008) 90(870) 409, p430.

53. Decisions on participation are determined on a case-by-case basis, leading to diversity in the practice of appointing legal representatives. The case of *Thomas Lubanga* saw seven VLRs representing 129 victims, whereas in later cases there were fewer counsel - only two VLRS (assisted by field assistants) representing 5229 victims, though from January 2014 victims in the *Bemba* case were represented by one VLR following the death of the other appointed representative. The Registry of the Court also has an independent Office of the Public Counsel for Victims (OPCV), which 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.<sup>162</sup> The Court's Rules assert that victims 'shall be free to choose a legal representative',<sup>163</sup> but the Chamber can request that victims or groups of victims choose a common legal representative(s).<sup>164</sup> 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. Given that cases before the ICC involve a few thousand victims, victims' legal agency is limited to collective and indirect participation through a common legal representative.
54. 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.<sup>165</sup> 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'.<sup>166</sup> 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.<sup>167</sup> This is despite 213 victims signing power of attorney to six lawyers.<sup>168</sup> This organisation of legal representation through two lawyers of the OPCV was to ensure victims could be effectively legally represented at an early stage.<sup>169</sup> Such developments can signal an apparent preference for trial practicality over respecting victims' legal agency, to ensure that the experience of lengthy interlocutory appeals and administration of victim participation do not delay trial proceedings.
55. The ICC has recognised the need for lawyers appointed for victims to understand the local context or be from the same country so as to promote effective and meaningful common representation. 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

162 Regulations 80 and 81, ICC Regulations.

163 Rule 90(1) RPE.

164 Rule 90(2) RPE.

165 *Gbagbo*, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, (ICC-02/11-01/11-13804-06-2012), Pre-Trial Chamber I, 4 June 2012, para.35.

166 *Ibid.*

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

168 *Ibid.* para.11.

169 *Ntaganda*, Pre-Trial Chamber I, Decision Concerning the Organisation of Common Legal Representation of Victims, ICC-01/04-02/06-160, 2 December 2013, paras.20-21.

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.<sup>170</sup> 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'.<sup>171</sup>

56. In representing victims, the judges in a Chamber have oversight in ensuring VLRs consider the 'views of the victims, and the need to respect local traditions and to assist specific groups of victims'.<sup>172</sup> The Court has been careful to guarantee effective communication between VLRs and victims by requiring counsel to come from the victims' area and to speak the same language.<sup>173</sup> In addition, the Court has established support teams in The Hague and the field to 'facilitate regular exchanges' between victims and their VLRs.<sup>174</sup> The ICC Registry also notifies victims, and conducts outreach to affected communities to inform them of the work and progress of the Court as well as their ability to participate in proceedings.<sup>175</sup> The Court has acknowledged that without notification, victims' rights would 'remain little more than a theoretical exercise'.<sup>176</sup>

### Modalities of Victim Participation

57. For the Court, victims' interests are affected in criminal proceedings against the accused owing to their rights to truth and justice.<sup>177</sup> In order to present victims' 'views and concerns' the Court has established that VLRs can participate in proceedings through eight different modalities: to attend hearings; make oral motions, responses, and submissions; file written submissions; access evidence; ask questions; submit evidence; call witnesses; and to be notified.<sup>178</sup> These modalities are discretionary owing to the protection of other interests before the Court, such as the rights of the defendant, meaning that victims do not automatically have the right to participate.
58. Trial Chamber III has allowed victims to present evidence on the responsibility of the accused. The general approach by Court has been to enable victims to present

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

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

172 Regulation 79(2), ICC Regulations.

173 *Katanga and Chui*, ICC-01/04-01/07-1328, para. 15; *Prosecutor v Bemba*, Decision on Common Legal Representation of Victims for the Purpose of Trial, ICC-01/05-01/08-1005, 10 November 2010, para.10.

174 *Ibid.*, ICC-01/04-01/07-1328, para.17; *ibid.*, ICC-01/05-01/08-1005, paras.24–27.

175 See ICC Outreach Reports 2007–2010, Public Information and Documentation Section, Outreach Unit.

176 *Situation in Uganda*, ICC-02/04-101, para.164.

177 *Prosecutor v Katanga and Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, paras.31–44; *Prosecutor v Bemba*, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 12 December 2008; *Prosecutor v Abu Garda*, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, ICC-02/05-02/09-121, 29 September 2009, para. 3; *Prosecutor v Al Bashir*, Decision on Applications a/0011/06 to a/0013/06, a/0015/06, and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, ICC-02/05-01/09-62, 15 December 2009, paras 4–5.

178 Rules 91–92 and 144; see *Lubanga*, ICC-01/04-01/06-1119; *Katanga and Chui*, ICC-01/04-01/07-474; *Katanga and Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788, 22 January 2010; *Bemba*, ICC-01/05-01/08-320.

evidence through three participation modalities of: (1) submitting evidence; (2) asking questions; and (3) calling witnesses. These modalities do not appear in the Statute, RPE, or Regulations, but are based on Article 69(3) of the Rome Statute, which enables the Court to request all relevant 'evidence that it considers necessary for the determination of the truth'. This indicates that victims' role is to aid the Court in the clarification of facts rather than determination of the responsibility of the accused. Nevertheless, the Court has held in the Kenyan cases that the defendant has to be present for victims' questions and statements, emphasising that defendants' attendance during victims' presentation of evidence requires the cooperation of the accused to make it meaningful, suggesting a more restorative function of victim participation beyond clarifying the truth.<sup>179</sup>

59. On the first modality on submitting evidence, the Court has recognised that VLRs can submit incriminating evidence on the defendant's guilt as long as it satisfies three admissibility criteria, namely (1) relevant material, (2) probative value, and (3) probative value outweighs its prejudicial effect.<sup>180</sup> Allowing VLRs to submit evidence can present an opportunity to highlight facts that the prosecution or the defence have overlooked or neglected.<sup>181</sup> However, on the two occasions where evidence was submitted by the VLRs, the judges rejected their submissions as they repeated evidence already before the Court or lacked probative value.<sup>182</sup> Submitting evidence has so far not engendered a conflict between the rights of the victims and the defendant, but the Court retains very strict control of the ability VLRs to do so.
60. The other two modalities of questioning and calling witnesses have been more contentious and required a more delicate balancing of rights by the Court. With regards to VLRs questioning witnesses, the Court has established that in order to achieve a balance between the rights of the victims and the defendant, a number of criteria must be adhered to: questions must be neutral in nature (i.e. they must not be a cross-examination or 'combative'); relevant to victims' personal interests; and not be leading or closed questions.<sup>183</sup> The Court has emphasised that VLRs are not auxiliary prosecutors to prove the guilt or innocence of the accused as in civil law countries, but rather assistants to help the judges determine the truth, therefore having a more neutral role.<sup>184</sup>

179 See *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ICC-01/09-01/11-777, 18 June 2013.

180 Rule 91(3)(a); *Lubanga*, ICC-01/04-01/06-1119, paras 108–109; *Lubanga*, ICC-01/04-01/06-1432, para.104; *Lubanga*, ICC-01/04-01/06-2135, paras.21–22; *Katanga and Chui*, ICC-01/04-01/07-1788, paras.81–85; *Bemba*, ICC-01/05-01/08-807-Corr, paras.30–32.

181 *Katanga and Chui*, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, ICC-01/04-01/07-1665, 20 November 2009, para.82; and *Katanga and Chui*, ICC-01/04-01/07-1788, paras.102–103.

182 See *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; *Katanga and Chui*, Décision relative à trois requêtes tendant à la production d'éléments de preuve supplémentaires, ICC-01/04-01/07-3217-Conf, ICC-01/04-01/07-3217-Red, 4 January 2012.

183 *Lubanga*, ICC-01/04-01/06-2127, paras 28–30; *Katanga and Chui*, ICC-01/04-01/07-1665, paras 82 and 90–91; *Katanga and Chui*, ICC-01/04-01/07-1788, paras 72–75; *Bemba*, ICC-01/05-01/08-807-Corr, paras 30–32; *Katanga and Chui*, ICC-01/04-01/07-474, para. 135.

184 *Lubanga*, ICC-01/04-01/06-2127, paras 28–29.

61. In the *Katanga and Chui* case, victims' legal representatives focused their questions on highlighting the suffering of victims, the context of victimisation, and the continuing hardship victims continue to face.<sup>185</sup> Different Chambers of the Court have taken diverging approaches in balancing victims' and defendants' rights with regards to questions asked by VLRs. Trial Chamber II in the *Katanga and Chui* case has followed a more restrictive approach to questioning by limiting VLRs to factual points, so as to preserve the equality of arms between the prosecution and the defence.<sup>186</sup> Trial Chamber II's strict adherence to this approach can be seen where a VLR asked a witness on a meeting with Katanga whether he had any children as bodyguards with him. This was objected to by the defence as it was linked to the responsibility of the accused, and was instead modified into a more neutral question by the judges.<sup>187</sup> Accordingly, the victims' role was to voice their experiences and emotions on the harm they have suffered rather than presenting evidence on their interests in truth and justice.<sup>188</sup> This is in contrast to Trial Chambers I and III which have allowed VLRs to question witnesses on factual and legal points that at times have been linked to the responsibility of the accused.<sup>189</sup> Trial Chamber III in the *Bemba* case has taken this further, with the judges declaring that,

'the interests of victims are not limited to the physical commission of the alleged crimes under consideration. Rather, their interests extend to the question of the person or persons who should be held liable for those crimes, whether physical perpetrators or others. In this respect, victims have a general interest in the proceedings and in their outcome. As such, they have an interest in making sure that all pertinent questions are put to witnesses.'<sup>190</sup>

62. In the trial the VLR's questions to a witness concentrated on the responsibility of the defendant by asking him about Bemba's role in the chain of command and whether he was informed of the commission of crimes.<sup>191</sup> This approach is consistent with a victim-orientated justice, which recognises victims' interests in truth and justice, as well as their independent perspective from the prosecution.
63. The European Court of Human Rights has recognised that victims do not necessarily infringe the equality of arms as they 'cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different'.<sup>192</sup> The ICC has also adopted such a position by stating that victim participation is supposed to provide victims with an independent voice, which is consistent with the intention of the drafters to ensure justice for victims.<sup>193</sup>

185 For instance, *Lubanga*, ICC-01/04-01/06-T-39-ENG, 21 November 2006, pp. 95 and 141.

186 *Katanga and Chui*, ICC-01/04-01/07-1665, paras 90–91; *Katanga and Chui*, ICC-01/04-01/07-2288, para. 112.

187 *Katanga and Chui*, ICC-01/04-01/07-T-141-Red-ENG, 14 May 2010, p.28–34.

188 Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersentia 2011), p300.

189 McGonigle n.188, p298-300.

190 *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, para.15.

191 *Bemba*, ICC-01/05-01/08-T-160-Red-ENG, 13 September 2011.

192 *Berger v France*, App. no. 48221/99 (ECtHR, 21 May 2003), para.38.

193 *Situation in DRC*, ICC-01/04-101, para. 51; *Prosecutor v Bemba*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, ICC-01/05-01/08-2140, 23 February 2012, para.25.

Therefore the Court's position that victims are to remain neutral is incorrect as they have an interest in determining the culpability of the accused. Instead, it is the judges who have to be neutral and balance the interests before them.

64. On the final evidential modality, the Court can call a witness or victim on the VLRs' behalf on the condition that it will provide 'important information' and a 'genuine contribution to the ascertainment of the truth' which the other parties have not addressed.<sup>194</sup> Trial Chamber II has also set out some criteria for evaluating the VLRs' applications for victims to testify, namely: has the matter already been addressed by the prosecution so as to avoid repetitions; is it closely related to the charges; is it typical of the experiences of a larger group of victims or is the victim uniquely apt to give evidence; and will it bring to light new information to the Chamber?<sup>195</sup>

### Collective participation

65. Given the increasing number of victims participating in cases before the ICC, the Court has tried to streamline the application and representation of victims to minimize the impact such organisation and oversight has on proceedings. The Rules and jurisprudence of the ICC recognise that collectivizing victims' voices can be detrimental to certain groups. The Court requires that as far as possible victims' distinct interests should be represented and any conflicts of interest to be avoided,<sup>196</sup> in particular for victims of sexual or gender violence or violence against children.<sup>197</sup> In the *Bemba* case, Trial Chamber III grouped victims geographically. This allowed victims of the same family and community to be represented together and facilitated contact between them and their legal representative.<sup>198</sup> Women's Initiatives for Gender Justice (WIGJ) warned the Court that organisation of victims into geographical groups, especially considering their numbers, may not protect victims' distinct interests, such as those who suffered sexual violence.<sup>199</sup> Instead, WIGJ proposed that victim representation should be organised on the nature of the crimes committed against them so as to reduce conflicting interests, but there can be remaining difficulties where victims are displaced.
66. Where a conflict in interests arises between victims under one VLR, the Court can split the group and order the OPCV to represent the separate group of victims.<sup>200</sup> However, defining what constitutes a conflict of interest requiring separate representation remains difficult,<sup>201</sup> but Trial Chamber IV indicates that a 'conflict of interest may arise when the situation or the specificity of the victims is so different

194 In accordance with Articles 64(4)(d) and 69(3); *Katanga and Chui*, ICC-01/04-01/07-1665, paras.45–48.

195 *Ibid.*, para.30.

196 *Prosecutor v Banda and Jerbo*, Summary of Information relevant to the grouping of victims, ICC-02/05-03/09-203-Anx2-Red, 25 August 2011, para.5.

197 Rule 90(4) RPE, as provided in Art. 68(1) ICCSt.

198 *Bemba*, ICC-01/05-01/08-1005, paras 18–20

199 Statement by the Women's Initiatives at the opening of the Trial of Jean-Pierre Bemba Gombo, 22 November 2010, p4.

200 *Katanga and Chui*, ICC-01/04-01/07-1328, para.16.

201 Hirst n.152, p.130.

that their interests are irreconcilable.<sup>202</sup> In the *Katanga and Chui*, Trial Chamber II split the common legal representation between those victims who were former child soldiers and the larger group of those who had been attacked by the militias in Bogoro on 24 February 2003, due to the victims coming from different ethnic groups.<sup>203</sup> In the Kenya cases, in which ethnicity was such a significant factor in the Post-Election Violence, the Registry considered at length whether this was a basis for separately representing victims. Ultimately it held that in each case the various ethnic groups among the victims did not have 'clear and significant distinct interests'. Indeed, the Registry noted that intermediaries, lawyers and others working with victims had warned against separating victim groupings along ethnic lines, for fear that this would only serve to reinforce ethnic divisions.<sup>204</sup> In *Banda and Jerbo* that the fact that victims came from different countries and spoke different languages, was not enough to justify separate representation.<sup>205</sup> Yet in the *Ongwen* case victims are organised based on their choice of legal counsel between the OPCV (1,502 victims) and a team of external counsel (2,061 victims), who cover the same crimes and locales.<sup>206</sup> This reflects that lawyers can represent to an extent competing and diverse groups of victims, who will often not speak with one voice or completely agree. The role of the lawyer is to instead echo their views and concerns, and to ensure that each perspective is effectively communicated and translated into legal actions within the Court.

67. There are advantages to collectivising victim representation and participation: it expedites proceedings, maximises the prospects of coherent strategy from victims, and is more financially efficient, being cheaper than constituting multiple teams of a smaller size.<sup>207</sup> However there can also be dangers in collectivising participation, such as the dominance of certain victims' views, the loss of individuals' voices, the creation of further complexity, and if not properly regulated the causing of secondary victimisation.<sup>208</sup> Introducing new levels of representation risks an additional person misrepresenting the interests of victims, such as victims being

202 *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, Decision on common legal representation, ICC-02/05-03/09-337, 25 May 2012, para.42.

203 *Katanga and Chui*, ICC-01/04-01/07-1328, para.12.

204 *Prosecutor v Henry Kiprono Kosgey and Joshua Arap Sang*, Registry, Summary of information relevant to the grouping of victims, ICC-01/09-01/11-243-Anx2, 1 August 2011, paras 7-11; ICC, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammad Hussein Ali*, Registry, Summary of information relevant to the grouping of victims, ICC-01/09-02/11-214-Anx2, 5 August 2011, paras 8-12. ICC, *Banda and Jerbo*, Registry, Summary of Information Relevant to the Grouping of Victims, ICC-02/05-03/09-203-Anx2-Red, 25 August 2011, para 8; ICC, *Banda and Jerbo*, Trial Chamber IV, Decision on common legal representation, ICC-02/05-03/09-337, 25 May 2012, para 34.

205 *Banda and Jerbo*, Registry, Summary of Information Relevant to the Grouping of Victims, ICC-02/05-03/09-203-Anx2-Red, 25 August 2011, para.8; and Decision on common legal representation, ICC-02/05-03/09-337, 25 May 2012, para.34.

206 A total of 4,107 victims are participating with the counsel for the remaining four victims to be decided at a later date. See *Ongwen*, Updated Consolidated List of Victims Admitted to Participate in the Proceedings, (ICC-02/04-01/15-652), 13 January 2017.

207 *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammad Hussein Ali*, Proposal for the common legal representation of victims, ICC-01/09-01/11-243, 1 August 2011, para 9; Registry, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Proposal for the common legal representation of victims, ICC-02/11-01/11-120, 16 May 2012, para.9; ICC, *Katanga and Chui*, Order on the organisation of common legal representation of victims, ICC-01/04-01/07-1328, 22 July 2009, para 10; STL, *Prosecutor v. Ayyash et al.*, Pre-Trial Judge, Decision on Victims' Participation in the Proceedings, STL11-01/T/PTJ, 8 May 2012, para.120.

208 See *Prosecutor v Gbagbo*, Observations on the Practical Implications of the Registry's Proposal on a partly Collective Application Form for Victims' Participation, ICC-02/11-01/11-66, 19 March 2012.

organised in to victim association or groups, which are then represented with other groups represented by a single lawyer.

68. Collective victim participation has become the norm in other international and hybrid criminal proceedings on international crimes. Probably the most developed of these other tribunals is the Extraordinary Chambers in the Courts of Cambodia (ECCC) which is mandated to address the crimes of the Khmer Rouge. Victim participation at the ECCC is somewhat different from the ICC.<sup>209</sup> As a hybrid body, victim participation was established by judicial officers within the Court's Internal Rules, rather than being in its statute. The ECCC Rules distinguish 'victim' as those natural persons or a legal entity that has suffered harm as a result of a crime within its jurisdiction, from a civil party as a victim whose application to participate has been declared admissible.<sup>210</sup> Victim participation at the ECCC as a civil party draws from similar provisions for victims within Cambodia's own criminal procedures. The ECCC requires the Court to ensure that victims are 'kept informed and that their rights are respected throughout the proceedings'.<sup>211</sup> The role of civil parties in the criminal proceedings includes 'supporting the prosecution' and seeking 'collective and moral reparations'.<sup>212</sup> Civil parties can individually participate at the pre-trial stage, but beyond this at trial and later stages their participation can only be through a single, consolidated group 'whose interests are represented by the Civil Party Lead Co-Lawyers'.<sup>213</sup> Civil parties can testify and provide statements of suffering, but they cannot represent themselves, nor directly address the Court other than through their representatives.<sup>214</sup>

69. In the first case against Kaing Guek Eav, alias Duch, the civil parties were allowed to choose their own legal representative.<sup>215</sup> Some 94 civil parties participated and were represented by four legal teams. A survey of some of the participants and victims found that only 14.6% of civil parties and 20.8% of civil party representatives attended live proceedings, with many of those not attending citing they did not know about the possibility of going in person to proceedings (39-42%) or not being invited or official asked (31.5-34%), with 16% unable to attend due to limited resources as money, transportation time and distance to the court.<sup>216</sup> Yet in the second case, against Nuon Chea and Khieu Sampha, the Court amended the rules and organised participation through two Lead Co-Lawyers (one international and one Cambodian) who would coordinate with civil party representatives,<sup>217</sup> due to over 4,000 civil parties wanting to participate in the case. This has limited civil parties' rights to select and release their legal representatives, as well as their

209 See Killean and Moffett n.151, p720-721.

210 Glossary, ECCC Internal Rules (Rev.8), 3 August 2011.

211 Rule 21(c), ECCC Internal Rules.

212 Rule 23(1), ECCC Internal Rules.

213 Rule 23(3), ECCC Internal Rules.

214 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.

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

216 N. Kirchenbauer, M. Balthazard, L. Ky, P. Vinck, P. and N. Pham, Victims Participation before the Extraordinary Chambers in the Courts of Cambodia, (2013, Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative), p35.

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

proximity to counsel and the court, which has impacted upon their agency and inclusion in proceedings.<sup>218</sup>

70. In other tribunals legal representation has been organised differently from the ICC and ECCC. At the Special Tribunal for Lebanon (STL) victims are unable to arrange their own legal representation before the STL and must await the designation of a legal representative by the Registrar after being granted participation status. The Tribunal does not formally recognise any legal representation, which may be privately arranged by victims during the application stage.<sup>219</sup> The Extraordinary African Chambers (EAC) were organised on the basis of civil law tradition and Senegalese law, whereby victims participated as civil parties. At the Extraordinary African Chambers in the Habré case, victims could form civil parties to participate or join together as a group represented by a joint legal representative. Some 4,500 victims participated as civil parties in the *Habré* case, represented by three victim associations.<sup>220</sup> The Kosovo Specialist Chambers only allows legal representation through a victims' counsel provided through the Registry's Victims Participation Office.<sup>221</sup> At the Extraordinary African Chambers in the Habré case, victims could form civil parties to participate or join together as a group represented by a joint legal representative. The Chambers could offer the victims or a group of victims the choice of having one or more joint representatives, but if they are unable to select one or more within the allotted time, the Administrator of the EAC can appoint one or several representatives.<sup>222</sup> The Kosovo Specialist Chambers only allows legal representation through a victims' counsel provided through the Registry's Victims Participation Office.<sup>223</sup>
71. While the Special Tribunal for Lebanon is focused exclusively on the 14 February 2005 bombing that killed Prime Minister Rafik Hariri and 21 others, there are over 70 victims participating through three legal counsel, one international lead co-lawyer with international criminal law experience with two Lebanese counsel who have an existing relationship with the victims.<sup>224</sup> In the International Crimes Division in Uganda, two victim legal representatives have been appointed to represent 98 victims in the *Kwoyelo* case, with a similar arrangement for the *Mukulu* case.<sup>225</sup> Yet in its first decision on the Kampala bombing against members of Al-Shabaab, no

218 Killean and Moffett n.151, p721.

219 See STL Directive on Victims' Legal Representation.

220 The Association of Victims of Crime and Political Repression (AVCRP); The Association of Victims of Crimes of the Habré regime (AVCRHH); and The Network of Human Rights in Chad (RADHT). See Christoph Sperfeldt The trial against Hissène Habré: networked justice and reparations at the Extraordinary African Chambers, *The International Journal of Human Rights*, 21(9) (2017), 1243-1260, p1248.

221 Article 22(5).

222 Article 14, EAC Statute

223 Article 22(5).

224 Appointed on the basis of include notably the views or preferences expressed by the participating victims, the nature and complexity of the case, the skills, experience and personal attributes of the legal representative, including language skills, previous experience in international criminal proceedings, and/or familiarity with Lebanon and/or Lebanese law, and any existing relationship between the victims who are to be represented and the legal representative.' Designation of Victims' Legal Representation, STL-11-01/PT/PTJ 16 May 2012, para.9; and Article 19(c), STL Directive on Victims' Legal Representation.

225 Jane Patricia Bako, One Step Forward, One Step Back: The Fate of Victims Before the International Crimes Division of Uganda, *International Justice Monitor*, 27 June 2018.

victims were able to participate and the prosecutor did not engage with victims for an impact statement on sentencing.<sup>226</sup>

72. Common across our engagement with legal representatives for victims in domestic, hybrid and international criminal proceedings has been the lack of funding which has inhibited their ability to engage regularly with victims. At the Ugandan ICD while victims could appoint their own lawyer where they could afford it, all are impoverished and dependent on legal aid and so were not consulted on which counsel they preferred as the two appointed in the *Kwoyelo* case are funded by the state.<sup>227</sup> Even upon being appointed, these legal counsel have other cases, as money has been slow in being paid from the Registry of the ICD, meaning that one of the victim lawyers who lives a few miles away from the community only sees them every six months.<sup>228</sup> Similar problems of sufficient legal aid was a problem for victims in the South African Truth and Reconciliation Commission, which noted that a limited budget and tariffs that were lower than normal, discouraged higher skilled lawyers from representing victims.<sup>229</sup>

## Participation in person

73. Some victims have participated in person at the ICC to present their personal views and concerns to the Court. In the *Lubanga* and the *Katanga and Chui* cases the Court required victims to testify under oath so that their testimony would be used as evidence, giving them the status of witnesses. These victims were allowed to discuss at length their victimisation, other crimes that occurred, and the responsibility of the accused.<sup>230</sup> The Court has found victims personally voicing their views and concerns should ideally only be made through their legal representatives, in order to protect the defendant who can only cross-examine witnesses.<sup>231</sup> In the *Lubanga* case, Trial Chamber I decided that the purpose of victims presenting their views and concerns was not part of the evidence, but to provide the judges with a contextual understanding of the facts before the Court.<sup>232</sup> The Court has used this discretion on the grounds that it is empowered to find and determine the truth.
74. In the *Bemba* case, Trial Chamber III allowed three victims to express their views and concerns through live video link, on the basis of their harm being representative of a larger group of victims before the Court.<sup>233</sup> Despite opposition from the defence and the prosecution, the judges allowed these three victims to speak in their own

226 *Uganda v Kamoga Siraje & 13 Ors* (Criminal Session Case No. HCT - 00 - ICD - CR - SC - No. 004 OF 2015) [2017] UGHCI CD 1 (21 August 2017).

227 Section 46, ICD Rules; and Bako, n. 224.

228 Interview UG15, July 2018, Gulu, Uganda.

229 TRC Final Report, Vol. V, p117.

230 *Lubanga*, ICC-01/04-01/06-T-225-RED, p. 31.

231 Article 67(1)(e); Prosecutor v *Lubanga*, Order Issuing Public Redacted Version of the 'Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence during the Trial', ICC- 01/04-01/06-2032-Anx, 9 July 2009, paras 25–26; *Katanga and Chui*, ICC-01/04-01/07- 1788tENG, paras 86–89.

232 ICC-01/04-01/06-2032-Anx, para.25.

233 *Bemba*, ICC-01/05-01/08-2138, paras 39–51; Victims a/0542/08, a/0394/08, and a/0511/08; see *Bemba*, Transcripts 25–26 July 2012, ICC-01/05-01/08-T-227- Red-ENG and ICC-01/05-01/08-T-228-Red-ENG.

right, not as witnesses. This was justified on the grounds that victims needed to narrate in their own words the factual background to the charges which their views and concerns arose from. In addition, it would be impossible for victims, particularly those who suffer from sexual violence, to be able to present their views and concerns in an abstract general way devoid of the facts and their lived experience of what occurred.<sup>234</sup> As they were not being sworn in as witnesses, they could not be cross-examined by the prosecution or defence, and as a result the judges would not consider victims' views and concerns as part of their final determination of evidence.<sup>235</sup> As such, the direct participation of victims is only used to give a very selective contextual background. The victims' oral statements to the Court discuss their experience of violence by Mr Bemba's troops and the consequential harm they continue to face.<sup>236</sup> Although the victims expressed satisfaction and some form of relief by testifying before the Court, they only stated this when prompted by the judges. An area of concern of such testimony was the victims' unmitigated expectations of the ICC, with one looking to obtain funds from the Trust Fund for Victims (TFV) and another looking for a new artificial leg. While such opportunities may help to provide a 'human perspective' to a court,<sup>237</sup> the long-term benefit to victims is questionable, particularly in light of the collapse of the *Bemba* case in June 2018.

75. In order to protect the rights of the defendant, victims who participate anonymously are limited to making opening and closing statements, accessing public documents, and participation in public hearings.<sup>238</sup> In the *Lubanga* case, the Court held that while there is a need to protect the accused from anonymous accusation, victim participation would be undermined if they had to give up the protection of anonymity in order to participate.<sup>239</sup> Accordingly, '[t]he greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself'.<sup>240</sup> As an additional safeguard, the Chamber emphasised that it will always know the identity of the victim and will be in the best position to judge the extent of his/her participation. In contrast, the *Bemba* case the judges found that there is no distinction in the way in which anonymous and non-anonymous victims can participate.<sup>241</sup> In practice this issue may be moot, as anonymous and non-anonymous victims are commonly represented by the same legal representatives.<sup>242</sup>

234 *Bemba*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, ICC-01/05-01/08-2140, 23 February 2012, p21-22.

235 *Bemba*, ICC-01/05-01/08-T-227-Red-ENG, 25 July 2012, p19-22.

236 See Moffett n.30, p106-108.

237 Carsten Stahn, Hector Olásolo, and Kate Gibson, Participating of Victims in Pre-trial Proceedings of the ICC, *Journal of International Criminal Justice* 4(2) (2006) 219-238, p221.

238 *Lubanga*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06, and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462, 22 September 2006, pp. 6-7; *Lubanga*, ICC-01/04-01/06-1119, paras 130-131; *Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para.36; *Katanga and Chui*, ICC-01/04-01/07-474, para. 184; *Bemba*, ICC-01/05-01/08-807, paras 61-69.

239 *Lubanga*, ICC-01/04-01/06-1119, para. 130; *Lubanga*, ICC-01/04-01/06-1191, para. 36; *Katanga and Chui*, ICC-01/04-01/07-474, para. 182.

240 *Lubanga*, ICC-01/04-01/06-1119, para. 131.

241 *Bemba*, ICC-01/05-01/08-320, para. 99.

242 McGonigle n.188, p285.

## Protection and Psychological support

76. The protection and support of victims appearing before international criminal justice bodies has been an institutional challenge, especially where there is ongoing insecurity or perpetrators remain at large or in power. That said a number of practices have emerged from these courts and tribunals that aim to minimise secondary victimisation of victims who engage with them. The ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were under an obligation to protect victims and witnesses, with specific measures for survivors of sexual violence.<sup>243</sup> Both tribunals had Witness Support Sections for witnesses and victims coming forward to testify to provide them with a safe and dignified environment, so as to avoid causing them trauma in proceedings.<sup>244</sup> The tribunals provided protective measures including confidentiality measures in proceedings (private hearings and voice/face distortion), anonymity and relocation. The ICTY adopted protective measures in 38% of cases, where at the ICTR this was 95%.<sup>245</sup> Despite these provisions at least 9 witnesses were killed in one case at the ICTY,<sup>246</sup> and 99 witnesses and victims were killed in the months running up to the setting up of the Witness and Victim Support Section of the ICTR. Many others were stigmatised, ostracised from their family or community, harassed, and even violently attacked.<sup>247</sup> In proceedings of the ICTY and ICTR, victims appearing as witnesses also suffered from some defendants who verbally attacked them, such as Milošević calling one a "murderer and robber",<sup>248</sup> and Karadžić saying another was "not a victim" despite surviving a mass execution in Srebrenica.<sup>249</sup> The criminal nature of proceedings meant that the chambers and parties were more interested in establishing facts and individual criminal responsibility, than hearing victims' voices. These experiences of secondary victimisation negatively impacted upon victims' willingness to engage with the tribunals and also shaped their expectations and perceptions of justice.<sup>250</sup>
77. At the ICC the treatment of victims is similar to the ad hoc tribunals, with a Victims and Witnesses Unit (VWU) in the Registry providing protection measures, security, counselling and other appropriate measures for victims and witnesses who appear before the Court.<sup>251</sup> The Court also operates the Initial Response System (IRS) in countries under investigation, which allows victims or witnesses to seek

243 Article 22, ICTY; Article 21, ICTR; and Rule 96.

244 Antonio Cassese, Annual Report of the ICTY to the UN General Assembly, A/50/365, para.108-110.

245 Göran Sluiter, The ICTR and the Protection of Witnesses, *Journal of International Criminal Justice* 3(4) (2005) 962-976, p967.

246 The *Haradinaj* case, see Merdijana Sadović and Aleksandar Roknic, Serbian Anger at Haradinaj Acquittal, *IWPR*, 14 April 2008.

247 Eric Stover, *The Witnesses* (University of Pennsylvania Press 2005), p98; Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa*, (Institute for Security Studies 2001), p59; and More Can Be Done to Protect ICTR Witnesses, *Hirondelle News Agency*, 17 December 2004.

248 Stover *ibid.*, p99.

249 *Prosecutor v Radovan Karadžić*, IT-95-5/18-I, Transcript, 21 April 2010, p. 1330.

250 See Marie-Bénédicte Dembour and Emily Haslam, Silencing Hearings? Victim-Witnesses at War Crimes Trials, *European Journal of International Law* 15(1) (2004) 151-177.

251 Article 43(6), Rome Statute.

assistance at any time they believe they or their families are in danger.<sup>252</sup> If any calls are received, a local partner extracts the individual(s) and places them in a safe location before the need for further measures of protection are assessed. However, this system relies on local police forces, who may be corrupt or the crimes may involve the government, and could result in further harm to the individual. The VWU also has a protection programme which can relocate victims and witnesses if need be in or out of the country. The VWU also offers 24 hour 'psychological, social assistance and advice' to victims, witnesses, and their families, as well as in-court support assistants to 'attend to [their] emotional and physical needs'.<sup>253</sup>

78. The ICC includes a range of protective measures to enable victims and witnesses to participate in proceedings by minimising their risk in doing so. Such measures can include closed hearings (in camera), pseudonyms, voice and facial distortion, public non-disclosure, and redaction of identity or identifying information from the record.<sup>254</sup> The Court has varied the use of these measures depending on the stage of proceedings and in striking the correct balance between the rights of the defendant to confront their accuser and the protection and safety of victims. For instance, judges have redacted most of the information on victims in the pre-trial stage, as they do not impact the rights of the defendant until the trial stage.<sup>255</sup> While cost effective when the Court does not have a substantial presence on the ground, redactions can also limit victims' ability to participate, as in balancing with the rights of the defendant, if victims want more participatory rights, such as questioning witnesses or the defendant, they need to forgo their anonymity.<sup>256</sup> The most extreme measure the Court can use is relocation, but it is often reluctant to use it, as noted by the Appeals Chamber, relocation is a

'serious matter that can . . . have a 'dramatic impact' and 'serious effect' upon the life of an individual, particularly in terms of removing a witness from their normal surroundings and family ties and re-settling that person into a new environment. It may well have long-term consequences for the individual who is relocated – including potentially placing an individual at increased risk by highlighting his or her involvement with the Court and making it more difficult for that individual to move back to the place from which he or she was relocated, even in circumstances where it was intended that the relocation should be only provisional. Where relocation occurs, it is likely to involve careful and possibly long-term planning for the safety and well-being of the witness concerned.'<sup>257</sup>

252 Regulations 93 and 95 Registry Regulations; Report of the Court on the Kampala Field Office: Activities, Challenges and Review of Staffing Levels; On Memoranda of Understanding with Situation Countries, ICC-ASP/9/11, 2011, p2; Silvana Arbia, The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits, *Commonwealth Law Bulletin* 36(3) (2010) 519–528, p522.

253 Article 68(2), Rule 87(3), and Regulation 94, Registry Regulations.

254 Article 68(2), Rule 87(3), and Regulation 94, Registry Regulations.

255 *Kony et al.*, ICC-02/04-01/05-134, para. 21; *Situation in DRC*, ICC-01/04-374, para. 28; *Katanga and Chui*, ICC-01/04-01/07-579.

256 See *Katanga and Chui*, ICC-01/04-01/07-1788-tENG, paras. 92–93.

257 *Prosecutor v Katanga and Chui*, On the Appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I, ICC-01/04-01/07-776, 26 November 2008, para.66; endorsing ICC-01/04-01/07-585; a Special Relocation Fund amongst State Parties has been established to sponsor relocations.

79. For vulnerable victims or witnesses, they can be provided with special measures that include a support person in proceedings, shielding devices, video conferencing technology, and sensitive questioning.<sup>258</sup> Judges have also played a key role in keeping defendants and defence counsel's questioning of victims in check, and they are obliged to do so under the rules of the Court as are counsel under their code of conduct.<sup>259</sup> Judges have incorporated some good practice of procedural justice by allowing victims to testify by first 'telling their story' in narrative form, without interruptions or leading questions.<sup>260</sup> In addition, judges have been empathetic and respectful to victims, thanking them for attending and helping the Court to determine the truth, as well as wishing them the best of health.<sup>261</sup>
80. Despite these protective measures in Kenya, witnesses and victims were identified on social media by Kenyan journalists and other actors, intimidated by threats, the use of bribery, and the exertion of social pressure, with some being killed.<sup>262</sup> As a result, the proceedings against the president, vice-president and other indicted persons collapsed.<sup>263</sup> Together the experience of international criminal justice bodies in protecting victims and witnesses who come before them in post-conflict societies is problematic, which is not helped by distance of such courts or risk of individuals being identified in close-knit communities.

## International standards on sentencing for international crimes

81. There is no specific obligation on states under international human rights law or international criminal law to provide a required or particular penalty for those responsible for international crimes (crimes against humanity, genocide or war crimes). The Rome Statute for the International Criminal Court provides a maximum sentence of 30 years, and life sentences in cases of extreme gravity,<sup>264</sup>

258 Rule 88. See Moffett n.30, p130-141.

259 Rule 88(5), ICC Rules of Procedure and Evidence; and Article 24, Code of Professional Conduct for counsel, Resolution ICC-ASP/4/Res.1, 2 December 2005.

260 McGonigle n.188, p. 322, fn. 610.

261 See for example the two victims that testified in the Katanga and Chui trial, Witness DRCV19- P-0002, ICC-01/04-01/07-T-233-Red-ENG, 23 February 2011, p. 53 lines 7–19, and Witness DRC-V19-P-0004, ICC-01/04-01/07-T-235-Red-ENG, 25 February 2011, p. 45 lines 19–25.

262 See *Prosecutor v Ruto and Sang*, ICC-01/09-01/11-896-Corr-Red, 5 September 2013; and Warrant of Arrest for Walter Osapiri Barasa, ICC-01/09-01/13-1-Red2, 2 August 2013.

263 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following an application seeking an adjournment of the provisional trial date, 19 December 2013.

264 Article 77(1), Rome Statute.

but in the first few convictions before the Court the average has been 13.25 years.<sup>265</sup> In terms of complementarity, the ICC only foresees sentencing being an issue where such provisions are intended to shield a person from criminal responsibility or proceedings were not conducted independently or impartially in light of international due process norm, which are inconsistent with an intent to bring the person concerned to justice.<sup>266</sup> To date the ICC has not made a case admissible on the basis of ineffective sentencing, though there are two cases where indicted suspects wanted by the Court, have been prosecuted, convicted and imprisoned, to then receive a pardon some months later.<sup>267</sup> It would be hard for international judges to determine that reduced sentences brokered under a peace agreement and approved by a national legislature are best decided before the Court.

82. International fair trial and access to justice norms include mitigating in sentencing, amnesties and pardons. While there has been a growing body of jurisprudence recognising victims' right to justice, it is an obligation of means and not outcome upon a state. In other words, victims do not have a right to demand a particular person is convicted or a specific sentence or sanction.<sup>268</sup> The rest of this section outlines the issue of sentence mitigation for international crimes, as well as the use of amnesties and pardons to facilitate accountability, truth and reconciliation. These principles and jurisprudence can be instructive in providing a customary international law basis for decision-making on alternative sanctions.

### Sentencing and proportionality

83. Sentencing for gross human rights violations and international crimes should impose appropriate penalties proportionate to the gravity of the violation.<sup>269</sup> The ICTY has followed such a proportionate retributive approach, characterised by its determination of 'just deserts', with sentences 'having to be proportional to the gravity of the crime and the moral guilt of the convicted.'<sup>270</sup> A similar calculation

265 Lubanga was sentenced to 14 years for using child soldiers, Katanga was sentenced to 12 years for his role in the Bogoro massacre, Bemba was convicted on the grounds of command responsibility for killing, raping and looting of his troop in CAR and sentenced to 18 years (later acquitted), and Al Mahdi was sentenced to 9 years after a guilty plea.

266 Article 17(1)(c) and Article 20(3), Rome Statute. See Hector Olasolo, Complementarity Analysis of National Sentencing, in R Haveman and O Olusanya (eds), *Sentencing and Sanctioning in Supranational Criminal Law*, (Antwerp/Oxford, Intersentia, 2006) 37-66.

267 Simone Gbagbo in Cote d'Ivoire and Saif Gaddafi in Libya. These proceedings are ongoing at the ICC, but remain admissible due to earlier decisions on the characterisation of the charges against them in domestic proceedings. For individuals prosecuted in domestic proceedings the ICC can only consider them admissible where such proceedings are shielding the individual, unjustifiably delayed, or not conducted impartially or independently.

268 *Budayeva and Others v. Russia* 15339/02 11673/02 15343/02... | Judgment (Merits and Just Satisfaction) | Court (First Section) | 20/03/2008, para.144.

269 Article 4(2), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and *Manuel Cepeda Vargas v Colombia* Judgement 26 May 2010 (Preliminary objections, merits, reparations and Costs), para.150 and fn.210; *Rochela Massacre v. Colombia*, Judgment 11 May 2007 (Merits, Reparations, and Costs), para.193

270 *Prosecutor v. Erdemović*, Sentencing Judgment, IT-96-22-T (29 November 1996, para.64; *Prosecutor v. Dragan Nikolić*, IT-94-2-S, 18 December 2003, para.245.

is used by the ICC.<sup>271</sup> The Inter-American Court has stated that the rule of proportionality requires that States,

'impose penalties that truly contribute to prevent impunity, taking into account various factors such as the characteristics of the offense, and the participation and guilt of the accused.'<sup>272</sup>

84. In the *Rochela Massacre* case, the Court stated in relation to the Justice and Peace Law proceedings that

'punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrator acted, which in turn should be established as a function of the nature and gravity of the events. The punishment should be the result of a judgment issued by a judicial authority. Moreover, in identifying the appropriate punishment, the reasons for the punishment should be determined. With regard to the principle of lenity based upon the existence of an earlier more lenient law, this principle should be harmonized with the principle of proportionality of punishment, such that criminal justice does not become illusory. Every element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention.'<sup>273</sup>

85. The European Court of Human Rights has similarly found that,

'just and proportionate punishment are the subject of rational debate and civilised disagreement. Accordingly, Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes.'<sup>274</sup>

86. Proportionality in international criminal law is a key consideration in international criminal justice bodies sentencing, but such assessments are based on the gravity of the crime, and mitigating and aggravating factors.<sup>275</sup>

### Sentence mitigation and guilty pleas

87. International criminal justice has traditionally since the Second World War permitted sentence mitigation as not to 'reduce the degree of the crime ...[but]

271 Under Article 81(2)(a), Rome Statute, and Rule 145(1)(a) of the RPE. See Lubanga Sentencing Decision, 10 July 2012, para. 93; *Katanga*, ICC-01/04-01/07-3484-tENG-Corr, para.39; and Al Mahdi, Judgment and Sentence ICC-01/12-01/15-171 27 September 2016, para.67.

272 *Heliodoro Portugal v Panamá*, Judgement (Preliminary Objections, Merits, Reparations and Costs) (12 August 2008), para. 203. See also *Caso Raxcacó Reyes v Guatemala*, para.133; *Manuel Cepeda Vargas v Colombia*, para.150 and 153.

273 *Rochela Massacre* para.196.

274 *Vinter and Others v. The United Kingdom*, Application Nos. 66069/09, 130/10 and 3896/10, Judgment (Merits and Just Satisfaction), 9 July 2013, para.105.

275 Proportionality is used in a range of other international law areas including international humanitarian law, arbitration, and constitutional law. See Thomas Cottier, Roberto Echarri, Rachel Liechti-McKee, Tetyana Payosova and Charlotte Sieber, The Principle of Proportionality in International Law: Foundations and Variations, *The Journal of World Investment and Trade* 18(4) (2017), 628-672.

more a matter of grace than of defense'.<sup>276</sup> Mitigation of sentence and early release have a number of factors that will decrease the number of years a person responsible for international crimes will stay in prison.

88. The ICC in early release decisions takes into account the 'genuine dissociation' of a sentenced person from their crime, the prospects of them being resocialised or successful resettlement back into society, whether their release would give rise to 'significant social instability', any 'significant' action by the sentence person for the benefit of victims and the impact of their release on victims and their families, and their individual circumstances, such as worsening health or advanced age.<sup>277</sup>
89. The UN Principles to Combat Impunity foresee the role of confessions, disclosure and repentance as a legitimate justification for reduction of sentence, but not an exemption from criminal or other responsibility.<sup>278</sup> This reflects that most criminal justice systems allow reduced sentences with guilty pleas, but the Impunity Principles provide no guidance on the scope of such reduction or whether it can be automatic.<sup>279</sup> The Convention on Enforced Disappearances also suggests that State Parties establish mitigating circumstances for individuals involved in disappearances who effectively clarify the fate, whereabouts or identity of the victim(s).<sup>280</sup> However, imposing small suspended fines on state forces responsible for killing civilians can make punishment derisory and fail to ensure the protection of individuals' right to life. In an effective criminal justice system, there needs to be an acknowledgement of responsibility for serious human rights violations with appropriate sanctions.<sup>281</sup> In addition, leniency can be viewed as unwarranted, such as the case of domestic violence being justified on grounds of 'custom, tradition or honour'.<sup>282</sup> There has to be consistency and certainty that leniency or pardons apply to state and non-state actors equally, those provided to state actors responsible for violations alone will be seen as incompatible with human rights obligations, especially where they have faced no disciplinary sanctions.<sup>283</sup> Relevant for our analysis are mitigating factors on a convicted person's contribution to a peace or

reconciliation process, cooperation with a court, behaviour after the crime, and conduct towards victims including any efforts to compensate them.<sup>284</sup>

90. The cessation of violence and involvement of perpetrators in peace negotiations is an important mitigating factor at the ICTY and ICC.<sup>285</sup> Such efforts are required to be 'genuine and concrete'.<sup>286</sup> In the *Katanga* case the ICC considered that the convicted person's 'personal and active support to the process of disarming and demobilising child soldiers,'<sup>287</sup> assistance in the release of hostages, and protection of civilians within his own community,<sup>288</sup> could not play a determinate role due to his crimes committed against member of the other civilian community in Ituri the Hema. Such efforts need to be 'both palpable and genuine, without the need to demand results,'<sup>289</sup> with evidence based on a balance of probabilities.<sup>290</sup> Convicted persons need to show that their peace and reconciliatory efforts are sincere, genuine and implemented. The ICC held in the *Bemba* case that the accused writing a book on peace was insufficient.<sup>291</sup> Efforts to contribute to peace in other countries and not in country the individual was convicted of crimes in, has limited value in mitigation.<sup>292</sup>
91. Similar findings were considered by the ICTY and ICTR in that contrition or contribution to peace or reconciliation can be weighty mitigating factors where they recognise victims' suffering, acknowledge their responsibility, apologise, and actively promote and negotiate peace.<sup>293</sup> However such efforts by convicted person could not be judged by their acts to protect civilians within their own community.<sup>294</sup> Statements of remorse and apologies by convicted persons is considered to also contribute to reconciliation by being part of a proportionate sentence, in that it is not too lenient or harsh,<sup>295</sup> but judges have recognised that punishment in

276 *United States of America vs. Wilhelm List et al. (Hostage Case)*, 19 February 1948, XI Trial of War Criminals, p1317.

277 Rule 223, Rules of Procedure and Evidence.

278 Principle 28, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1.

279 Christopher Gosnell, Principle 28 Restrictions on the Effects of Legislation on Disclosure or Repentance, in F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary*, 305-314, p307.

280 Article 7(2)(a), 2007 International Convention for the Protection of All Persons from Enforced Disappearance.

281 *Önerildiz v. Turkey*, App. No. 48939/99, Judgment (Merits and Just Satisfaction), 30 November 2004, para.116-117.

282 *Opuz v. Turkey*, App. No. 33401/02, Judgment (Merits and Just Satisfaction), 9 June 2009, para.103.

283 *Kepa Urra Guridi v. Spain*, CAT/C/34/D/212/2002, 17 May 2005, para.6.6.

284 The ICTY included a range of mitigating factors: (1) co-operation with the Prosecution; (2) the admission of guilt or a guilty plea; (3) the expression of remorse; (4) voluntary surrender; (5) good character with no prior criminal convictions; (6) comportment in detention; (7) personal and family circumstances; (8) the character of the accused subsequent to the conflict; (9) duress and indirect participation; (10) diminished mental responsibility; (11) age; and (12) assistance to detainees or victims. Poor health is to be considered only in exceptional or rare cases. – *Prosecutor v. Blaškić*, Appeal Judgement, IT-95-14-A, 29 July 2004, para.696; and *Prosecutor v. Milan Babić*, Judgement on Sentencing Appeal, IT-03-72-A, 18 July 2005, para.43.

285 *Prosecutor v. Blagojevic and Jokic* Trial Judgement, IT-02-60, 7 January 2005, paras. 858-860), and *Prosecutor v. Biljana Plavšić*, Sentencing Judgement, IT-00-39&40/1, 27 February 2003, paras. 85-94 and 110.

286 *Bemba*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para.72.

287 *Katanga*, ICC-01/04-01/07-3484-tENG-Corr, para.144.

288 *Ibid*, para 88 and 92.

289 *Katanga*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-tENG-Corr, 23-10-2015, para.91

290 *Lubanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901 10-07-2012, para.34.

291 *Bemba*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para.73.

292 *Bemba*, ICC-01/05-01/08-3399, 21 June 2016, para.76.

293 *Plavšić*, Sentencing Judgement, 27 February 2003, IT-00-39&40/1, para.73-94; and Omar Serushago, ICTR-98-39, 5 February 1999, para.38.

294 *Babić*, para.60.

295 *Prosecutor v. Dragan Nikolić*, Sentencing Judgement, IT-94-2-S, 18 December 2003, para.245; *Al Mahdi* Judgment and Sentence ICC-01/12-01/15-171 27 September 2016, para.67 and 100.

itself can only make a limited contribution in post-conflict societies.<sup>296</sup> Statements of remorse and apologies can be mitigating factors where they are genuine and sincere.<sup>297</sup> There seems to be a need for the convicted person to reflect on their actions and have an awareness of their wrongdoing by trying to make amends for the actions during the war in securing peace and reconciliation.<sup>298</sup>

92. The Special Court for Sierra Leone considered that the convicted persons acting out of civic duty in fighting to reinstate democracy in the *Fofana and Kondewa* case,<sup>299</sup> but that,

'the crimes for which the Accused were tried and convicted remain very serious crimes, and both Fofana and Kondewa will bear the stigma of a conviction after we have pronounced their sentences. The Chamber hopes that this Judgement will send a message to future pro-democracy armed forces or militia groups that notwithstanding the justness or propriety of their cause, they must observe the laws of war in pursuing or defending legitimate causes, and that they must not recruit or use children as agents or instruments of war. It will, in addition, remind them of their obligation to protect civilians who are unarmed and not participating in hostilities, and whose aspiration is only to protection, regardless of their perceived affiliation.'<sup>300</sup>

93. However in the *AFRC* case, a good service record in the army was not considered a mitigating factor, but 'merely ... duty'.<sup>301</sup> Providing a guilty plea has been noted as a mitigating factor, in that it saves the Court time and relieves witnesses and victims the stress of testifying,<sup>302</sup> but it is given more weight were convicted persons are willing to provide testimony in other cases. However, in a number of cases in the early years of the ICTR, while a number of high level of suspects did plead guilty, the tribunal imposed long sentences due to the gravity of the charges of genocide.<sup>303</sup> Most ICTR defendants were keen to receive reduced sentences, but they were not willing to plead guilty to genocide to receive it, due to many of them viewing the violence as part of a conflict between the Rwandan Hutu government and Uganda Tutsi rebels.<sup>304</sup>
94. Contributing reparations or assisting victims can be considered a substantial mitigating factor of sentence. The ICC mitigating factors in sentencing explicitly recognise the defendant's conduct in providing compensation to victims.<sup>305</sup> There are similar provisions in the Ugandan ICD.<sup>306</sup> Giving assistance to victims featured in 38-42.5% of sentencing decisions at the ICTY and ICTR examined by Hola et

296 *Nikolić*, para.245.

297 *Blaškić*, Appeal Judgement, para. 705.

298 *Bemba*, ICC-01/05-01/08-3399, 21 June 2016, para.76.

299 Judgement on the Sentencing of Moinina Fofana and Allied Kondewa, Case No.SCSL-04-14-T 9 October 2007, para.94-95.

300 *Ibid.* para.96.

301 *AFRC Sentencing Judgement*, Brima, Kamara, and Kanu, 19 July 2007, para.134.

302 *Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para.100.

303 *Prosecutor v Jean Kambanda*, ICTR 97-23-S, 4 September 1998, para.50-56.

304 Combs n.106, p97.

305 Rule 145(2)(a)(ii), and also Rule 223(d) for sentence reduction/early release.

306 See also Section 47(3)(a)(ii), The Judicature (High Court) (International Crimes Division) Rules, 2015.

*al.*<sup>307</sup> The weight that assisting victims and civilians is judged against the gravity of the offences the individual is convicted of, such as saving a family from another community when involved in killing hundreds of civilians.<sup>308</sup> The ICC has been explicit that assistance to victims and civilians in general should be given more weight as a mitigating factor, than selective assistance.<sup>309</sup> Expressing statements of remorse, including apologies, are considered a significant factor.<sup>310</sup> However, expressing sympathy or empathy to victims is given less weight, as the convicted person is not renouncing their wrongful actions.<sup>311</sup> Despite these considerations, aggravating factors of the convicted person's seniority and gravity of offences, in particular genocide, can outweigh such efforts towards victims.<sup>312</sup>

95. In the *Katanga* case at the ICC the convicted person provided a recorded video where he apologised to the victims of the Bogoro massacre, as part of an assessment for reducing his sentence. However, the victims participating in the case rejected his apology. While the defence counsel did meet with the victims in Bogoro to discuss the apology and sentence reduction, the victims remained unhappy with some feeling further traumatised by the meeting. There was a feeling amongst the victims that Mr Katanga's apology was not sincere and would not have been forthcoming without him benefiting through a reduced sentence. The legal representative of the victims further presented testimony from a community leader in Bogoro on the traditional settlement of disputes by the Hema as,

"According to our custom, when there is a conflict between two people they can sit down to discuss it; the first thing that we do is seek to make amends. The second stage is to bring people together to try to find a solution. Where Katanga is concerned, it is as if he is reversing the process. Personally, I do not agree with this back-to-front approach. People should first sit down, make amends, and then apologise. If someone has been hurt, the wound must be treated and, once the person is cured, forgiveness can be sought."<sup>313</sup>

As a result, despite Mr Katanga offering to meet with victims to give a personal apology, it was rejected as insufficient to benefit the victims.<sup>314</sup>

96. Similarly in the *Al Mahdi* case the convicted individual plead guilty and apologised to the victims and the community in Timbuktu for the destruction of the World Heritage site.<sup>315</sup> He also called upon others to not engage in such destruction of cultural property and vowed to never commit atrocities again.<sup>316</sup> Yet the victims felt

307 Barbra Holá, Alette Smeulders and Catrien Bijleveld, International Sentencing Facts and Figures Sentencing Practice at the ICTY and ICTR, *Journal of International Criminal Justice* 9 (2011), 411-439, p433.

308 See *Prosecutor v. Paul Bisengimana*, Case No. ICTR 00-60-T Judgement, 13 April 2006, para.125.

309 *Bemba*, ICC-01/05-01/08-3399, 21 June 2016, para.72.

310 *Al Mahdi*, ICC-01/12-01/15-171, para.105.

311 *Katanga*, ICC-01/04-01/07-3484, para.117.

312 See *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, para. 2273.

313 Legal Representative's observations on the reduction of sentence of Germain Katanga, 18 September 2015, ICC-01/04-01/07-3597-tENG, para.54.

314 Decision on the review concerning reduction of sentence of Mr Germain Katanga, ICC-01/04-01/07-3615, 13 November 2015, paras.91-103.

315 Transcript of Hearing, 22 August 2016, ICC-01/12-01/15-T-4-Red-ENG, page 8, lines 13-16.

316 *Al Mahdi*, Judgment and Sentence ICC-01/12-01/15-171 27 September 2016, para.103-104.

it was insufficient. While some were willing to accept the apology, as forgiveness is a tenet of Islam, others were concerned that they could not forgive Mr Al Mahdi by only his words, but by his deeds, as they were concerned that accepting his apology may forego their claims for reparation.<sup>317</sup> As stated by their legal representative, 'Apologies alone, as sincere as they may be, cannot make amends for the harm suffered and allow the victims to return to their previous lives and regain their dignity.'<sup>318</sup> Despite these interventions, the Court held that Mr Al Mahdi's apology was a 'significant' mitigating factor.<sup>319</sup>

97. In comparison at the ECCC in Case 001, while the Duch made a number of public apologies and expressed remorse to the victims, the Chambers found it was undermined by his failure to offer a full and unequivocal admission of his responsibility, particularly as he requested an acquittal in his closing statement, which was held to diminish his remorse.<sup>320</sup> In the subsequent Case 002/01 Nuon Chea did apologise to the public and victims, but the Court found it was undermined by 'his failure to accept responsibility for his own wrongdoing', as he minimised his own responsibility for the Khmer Rouge's lack of control over 'traitors' who committed the crimes against humanity and genocide of which he was convicted.<sup>321</sup> Accordingly, a range of conducts by defendants, in particular in contributing to peace and victims' needs, is considered a sufficient and proportionate factor in reducing sentences for international crimes. However, the failure to acknowledge responsibility seems to be a clear ground to distinguish the proportion of punishment in sentencing. Similar issues are factored into the provision of certain amnesties and pardons in post-conflict societies.

### Amnesty and pardons

98. Amnesty extinguishes or prevents criminal and civil liability, whereas a pardon ends the 'execution of a penalty, though in other respects the effects of the conviction remain in being.'<sup>322</sup> Pardons are seen as more acceptable, due to them being the prerogative of the executive and after the pronouncement of a person's guilt and sentence, provided they are made on justifiable grounds.<sup>323</sup> For the ICRC, amnesty was a way to 'encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided.'<sup>324</sup> Article 6(5) of Additional Protocol II, while providing a broad amnesty to those taking part

317 *Al Mahdi*, Public redacted version of "Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation" dated 2 December 2016 (ICC-01/12-01/15-190-Conf), 3 January 2017, para.43-46.

318 *Ibid.* para.45.

319 *Al Mahdi*, ICC-01/12-01/15-171, para.105.

320 His statements of apology were combined in a document and used as a form of symbolic reparation by the Court after requests by civil parties, but the victims' statements to go alongside his apologies was rejected by the chamber. Judgment, Case File/Dossier No. 001/18-07-2007/ECCC/TC, 26 July 2010, paras. 610 and 668.

321 Case 002/01, Judgment, 7 August 2014, para.1092-1093.

322 AP II 1987 Commentary, at 4617.

323 See *Lexa v. Slovakia* (Application no. 54334/00), 23 December 2008, para.88-95; and *Zimbabwe Human Rights NGO Forum v Zimbabwe*, African Commission on Human and Peoples' Rights, Communication 245/02, 15 May 2006, para.196-198.

324 AP II 1987 Commentary, at 4618.

in hostilities, has recently been limited by regional<sup>325</sup> and national courts to exclude international crimes, as going beyond the act of rebellion or waging war.<sup>326</sup>

99. Regional human rights courts have developed a body of jurisprudence around the permissibility of amnesties in delivering national goals. The European Court of Human Rights has held that obligations to prosecute and punish individuals can, exceptionally, be set aside for a 'reconciliation process and/or a form of compensation to the victims'.<sup>327</sup> In particular it has stated that,

'even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.'<sup>328</sup>

100. Blanket amnesties are seen as problematic and in violation of international human rights law, not just in the extent they allow impunity, but in how they deny victims' right to an effective remedy.<sup>329</sup> This has also been recognised by the ECCC.<sup>330</sup> The Inter-American Court has a long jurisprudence on such issues.<sup>331</sup> Recently in relation to the Ugandan Amnesty Act 2000, the African Commission of Human and Peoples' Rights stated that states,

'should ensure that such amnesties comply with both procedural and substantive conditions. In procedural terms, conditional amnesties should be formulated with the participation of affected communities including victim groups. Substantively speaking, amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations. They should also facilitate a measure of reconciliation with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered.'<sup>332</sup>

101. As such, trade-offs with punishment must ensure that there is an effective investigation that can lead to the identification of those responsible, some form of accountability of such individuals and appropriate and adequate reparations

325 *Massacres of El Mozote and Nearby Places v. El Salvador*, Inter-Am. ct. H.R. (ser. c) No. 252/83 (2012), para.285.

326 B.M. Katureebe, *Uganda v. Kwoyelo*, (Constitutional Appeal No. 01 of 2012) [2015] UGSC 5 (8 April 2015), p62.

327 *Margus v. Croatia*, 2014, para.139. See also *Ould Dah v. France*, App no 13113/03 (ECtHR, 17 March 2009).

328 *Tarbuk v. Croatia*, App no. 31360/10, 11 December 2012, para.50. See also *Dujardin and others v. France*, App. No. 16734/90; 72 D.R. 236.

329 *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, African Commission on Human and Peoples' Rights, Communication 245/02, 15 May 2006, para.215; *Mouvement ivoirien des droits humains (MIDH) v. Cote d'Ivoire*, Communication 246/02, 29 July 2008, para.98; and *Thomas Kwoyelo v. Uganda*, Communication 431/12, 17 October 2018, paras. 291-293.

330 Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne Bis In Idem and Amnesty and Pardon), Case File/Dossier No. 002/19-09-2007/ECCC/FC, 3 November 2011, para.54

331 *Barrios Altos v. Peru*, IACtHR, (Ser. c) No 83, (2001); *La Cantuta v. Perú*, Judgment, IACtHR,(Ser. c) No. 162 (2006); *Gomes Lund v Brazil* Preliminary Objections, Merits, Reparations and costs, Judgment, Inter-Am. ct. H.R. Ser. c No. 219 (2010); *Gelman v. Uruguay* Merits and Reparations, Judgments, Inter-Am. ct. H.R. (Ser. c) No. 221 (2011); and *Massacres of El Mozote and Nearby Places v. El Salvador*, Inter-Am. ct. H.R. (ser. c) No. 252/83 (2012).

332 *Thomas Kwoyelo v. Uganda*, 431/12 Communication, 17 October 2018, para. 293.

to victims. This is to ensure that society knows the facts of what happened and prevents their occurrence or any appearance of state tolerance or collusion in such unlawful acts.<sup>333</sup>

102. The Juba peace agreement between the Lord's Resistance Army (LRA) and the Ugandan government stipulated a number of accountability mechanisms to address the conflict. Lower ranking combatants would be subject to traditional justice, and state forces would be judged through existing accountability mechanisms. For senior LRA suspects, a cooperative system was proposed before the International Crimes Division, where suspects who make a confession, disclosure or other relevant information, would in turn benefit for the purposes of sentencing.<sup>334</sup> Cooperation in providing relevant information would have included the individual's conduct during the conflict, details assisting in establishing the fate of persons missing during the conflict, the location of land mines or unexploded ordnances of other munitions, and any other relevant information.<sup>335</sup> Such individuals who cooperated would have expected to benefit from alternative penalties and sanction, which were to

'reflect the gravity of the crimes or violations; promote reconciliation between individuals and within communities; promote the rehabilitation of offenders; take into account an individual's admissions or other cooperation with proceedings; and, require perpetrators to make reparations to victims.'<sup>336</sup>

103. Similarly, in the Central African Republic the Special Criminal Court for high level perpetrators of international crimes is supported by a justice, truth, reparations and reconciliation commission with branches at the local level. Its mission is to identify and investigate crimes and abuses, with perpetrators to be divided into two categories: 'Those whose perpetrators must be brought to justice; [and those] that may be subject to reparations through the payment of compensation or the performance of community service, in order to promote a spirit of contrition and inter-community reconciliation.'<sup>337</sup> It is worth noting that in Uganda the peace agreement fell apart and so the issue of alternative sanctions did not arise, and in CAR violence remains ongoing, with suspects in both contexts being transferred to the International Criminal Court.
104. Amnesties and sentence mitigation have been used in a number of contexts to incentivise ex-combatants and perpetrators to fulfil the wider political goals of the transition.<sup>338</sup> The Gambian Truth Reconciliation and Reparations Commission can provide an amnesty to those who report before it and give a 'full disclosure' and express 'remorse for their acts or conduct'.<sup>339</sup> This amnesty excludes those who were involved in any acts that formed part of a crime against humanity.<sup>340</sup> It is

333 *Jelić v. Croatia*, Application no. 57856/11, 12 June 2014, para.94.

334 Clause 3.5-3.6, Agreement on Accountability and Reconciliation, 29 June 2007.

335 Clause 15, Annexure to the Agreement on Accountability and Reconciliation 19 February 2008.

336 Clause 6.4, Agreement on Accountability and Reconciliation, 29 June 2007.

337 Republican Pact for Peace, National Reconciliation and Reconstruction in the Central African Republic, p4.

338 Mallinder n.96, p160-163.

339 Section 19(1), Truth, Reconciliation and Reparations Commission Act 2017.

340 Section 19(3).

intended that informants who have committed crimes against humanity, while not eligible for an amnesty, will be able to benefit from reduced sentences where they cooperate.<sup>341</sup> In South Africa, the amnesty and truth exchanged for perpetrators of gross human rights violations to facilitate the work of the Truth and Reconciliation Commission, did not absolve the person's moral responsibility in such violations so as to allow them rewrite history or 'muzzle the truth'.<sup>342</sup>

105. Pardons can also play an important part in incentivising individuals to express remorse or contribute to repairing the harm caused to victims. This issue is gaining increasing attention at the ICC<sup>343</sup> as well as the Inter-American Court, in relation to the release of former Peruvian president Fujimori. On Fujimori's release from prison in Peru on humanitarian grounds, the IACtHR declared that punishments cannot be unduly affected or rendered illusory, given that they are integral to victims' right to justice.<sup>344</sup> Where sentences are reduced for serious human rights violations it must be a reduction that is the least restrictive to victims' right to justice, and applied in extreme cases and for a prevailing need (such as emergency medical care).<sup>345</sup> Again this is a question of proportionality in achieving the wider public goal, for instance release on medical grounds for better treatment, is less restrictive of victims' right to justice, than extinguishing a sentence through pardon.<sup>346</sup> That said the executive has discretion to show mercy in punishment, subject to judicial oversight, drawing from international criminal law on mitigation of sentence and early release, paying civil compensation, clarifying the truth, recognising the seriousness of the crimes they have perpetrated, their rehabilitation, and the effect of their release on society and victims.<sup>347</sup> In line with amnesties and sentence reduction, pardons and other measures are increasingly being seen as legitimate provided there are clear legal boundaries on their extent and conditionality. In other words, provided there is a legitimate public interest (reconciliation, remedy to victims) and they allow the investigation and attachment of responsibility, alternative sanctions can be crafted under international law that do not run afoul of being blanket amnesties or self-serving pardons.

341 Mission Report of the Agja-Wayamo Delegation to the Gambia: Meeting Expectations on the Road to Justice: Achieving Accountability in The Gambia, The Africa Group for Justice and Accountability (Agja) and The Wayamo Foundation, p11.

342 *Citizen v. McBride*, Case CCT 23/10, Judgment of the Constitutional Court of South Africa, [2011] ZACC 11.

343 In the cases involving Simone Gbagbo in Cote d'Ivoire and Saif Gaddafi in Libya.

344 *Caso Barrios Altos y Caso La Cantuta vs. Perú*, Supervisión de Cumplimiento de Sentencia Obligación de Investigar, Juzgar y, de Ser el Caso, Sancionar, Resolución de la Corte Interamericana De Derechos Humanos, 30 May 2018, para.47.

345 *Ibid.* para.53.

346 *Ibid.* paras.53 and 56.

347 *Ibid.* para.57.

## Alternative sanctions, reparations and accountability

106. Reparations are measures to remedy and alleviate victims' suffering, but they also serve an expressive function in validating victims' harm as wrongful and obliging those responsible to repair their wrong.<sup>348</sup> For victims, such accountability is evinced by identifying those parties responsible, holding them to account for their actions, issuing a judgment on their liability, and requiring them to provide reparations.<sup>349</sup> Attaching responsibility for reparations to perpetrators, whether individual, state, or organisational, can fulfil an important psychological function for victims in appropriately directing blame at those who committed the atrocity against them and relieving their guilt.<sup>350</sup> Reparations made by the responsible perpetrator can also help to symbolise their commitment to remedying the past and to be held to account for their actions. However, compensation paid to victim without any acknowledgement of responsibility can be seen as perpetuating impunity by 'buying them off'. Alternative sanctions are often not widely supported by the public as they 'fail to express condemnation as dramatically and unequivocally as imprisonment.'<sup>351</sup> Thus, responsibility for reparations distinguishes such measures from charity or humanitarian assistance by achieving some form of accountability.<sup>352</sup>
107. Responsibility in international law has traditionally been the domain of states. However the increasing occurrence of non-international armed conflicts and non-state armed groups controlling territory has meant that such groups can act like de facto authorities in the area they control. This gives rise to certain human rights obligations in particular circumstances, including the obligation to remedy gross violations of human rights and grave breaches of international humanitarian law.<sup>353</sup> Accountability can be broadly understood as the constraint of power, but can be narrowly defined as its 'operationalisation' with common characteristics including,
- '(1) there is an individual or institution that is capable of being held to account for their decisions, actions or omissions; (2) there is an individual or institution that is empowered to hold the decision-maker accountable; (3) that there is a process by which the decision-maker is required to disclose and explain their decision; and (4) that there is an enforcement process, in which the accountability actor can impose sanctions on decision-makers who violated their duties.'<sup>354</sup>

348 Combs n.106, p19.

349 *Prosecutor v Thomas Lubanga*, Decision Establishing the Principles and Procedures to be applied to Reparations, ICC-01/04-01/06-2904, 7 August 2012, para.179.

350 Brandon Hamber, Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition, in P. de Greiff (ed.), *The Handbook of Reparations*, (Oxford University Press 2006) 560–588, p.566.

351 Dan M. Kahan, What Do Alternative Sanctions Mean? *University of Chicago Law Review* 63(2) (1996), 591-653, p592.

352 See Moffett n.30, p147-150.

353 See Principle 15, UN Basic Principles 2005.

354 Louise Mallinder and Kieran McEvoy, Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies, *Contemporary Social Science: Journal of the Academy of Social Sciences*, 6(1) (2011), 107-128, p109-111.

108. Holding the individuals most responsible for the actions of the group in committing international crimes is a 'legal fiction', especially where such crimes are carried out on a collective basis with individual participation deeply conformist or complicit.<sup>355</sup> Members of an armed group agree with the group's principles, purpose, or aims, and by themselves in a normal society would not agree to such actions, but for the group. Moreover, as members of an armed group expressing approval of the organisation's action and benefitting from membership of the group, they should be collectively responsible for the acts of the group and contributing as far as possible to the 'cost' of reparation. The collective behaviour of members in an organisation reflects the collective pressure, organisation, and culture through discipline and orders which conditions individuals to collectively act as an armed group, thus lending itself to organisational responsibility and collectively seeking reparations from members of a group, rather than just individuals.<sup>356</sup> Imposing collective responsibility on the membership of an organisation is not collective punishment,<sup>357</sup> but recognition that members have an obligation to make good the harm they are responsible for or face individual criminal prosecution. As such reparations and ex-combatants contributions to them, are not intended to be punitive, but an attempt to rebalance the harm caused.<sup>358</sup>
109. For instance, a large car bomb exploded in Omagh in western Northern Ireland in 1998, killing 29 civilians and two unborn twins. While no individual has yet been prosecuted for this bombing, some of the victims' families brought civil litigation against the dissident republicans they identified as responsible. In 2009, Belfast High Court upheld their claim against four individuals, including Liam Campbell, a senior Real IRA leader was held to be a representative of the RIRA Army Council that sanctioned the bombing, and ordered them to make reparations.<sup>359</sup> Therefore the court not only held those individuals who carried out the bombing responsible, but also those commanding the organisation, reflecting that this sort of atrocity was not the act of individuals, but a concerted organised effort by an armed group involving different responsible actors. For the victims suing for compensation, their efforts were hoped to ensure some form of accountability and deter such groups from committing violence in the future.<sup>360</sup> In other contexts, armed groups have agreed to provide reparations as part of a peace agreement and transitional justice processes.<sup>361</sup>

355 Drumbl n.10, p24; and Erin Kelly, Reparative Justice, in T. Isaacs and R. Vernon (eds), *Accountability for Collective Wrongdoing*, (Cambridge University Press 2011) 193–209, p. 201.

356 Jann K. Kleffner, The collective accountability of organized armed groups for system crimes, in H. Wilt and A. Nollkaemper (eds.) *System criminality in international law*, (Cambridge University Press 2009) 238-269, p.244.

357 Drumbl n.10, p25.

358 Kleffner n.355, p.265.

359 *Breslin & Ors v Seamus McKenna & Ors* [2009] NIQB 50, paras.83-86

360 The families hoped that the litigation would be 'a vehicle for putting as much information as possible into the public domain about the bombing and the men they claim were involved.' Real IRA founder loses Omagh civil case appeal, *The Guardian*, 7 July 2011.

361 For instance in Uganda under Clauses 6.4, 8.1, and 9, Juba Peace Agreement on Accountability and Reconciliation, 29 June 2007.

## Reparations in international criminal justice bodies

110. Since the creation of the International Criminal Court, reparations have been awarded against those convicted before the Court. As discussed in the previous section, providing reparations to victims is considered a mitigating factor in international criminal justice sentencing. At the ICC, the Court has the discretion to award a fine against convicted persons as well as reparations.<sup>362</sup> To date, this has only been ordered against Mr Bemba for his conviction of witness tampering. Reparations at the ICC have only been awarded in three cases at the Court, with all of the convicted persons being indigent, meaning that their financial contribution is offset to the future. Ongoing insecurity and their incarceration has prevented those convicted from directly contributing symbolic measures to victims. In the Lubanga case the Court declined to order compensation given his lack of financial resources, but also because awarding monetary awards to the victims who were child soldiers may cause community resentment and social tensions.<sup>363</sup> While initially the Court in the Lubanga case awarded community based reparations to affected communities, this was later rejected on appeal on the grounds that reparations had to be aimed to victims harmed by the crimes of which the accused is convicted.<sup>364</sup> Instead the Chamber approved the Trust Fund's later implementation plan of collective reparations that included symbolic measures of construction of community centres and a mobile programme to reduce stigma and discrimination against former child soldiers, along with service-based collective measures through physical and psychological rehabilitation, vocational training and income generating activities.<sup>365</sup>
111. In the subsequent *Katanga* case victims of a massacre in Bogoro, Ituri (DRC) demanded monetary measures to alleviate their suffering and rejected collective symbolic measures such as apologies and memorials as unsuitable, pointless or had the potential to cause unrest.<sup>366</sup> Instead the Chamber awarded \$250 to the victims, as a way to provide a 'personal and symbolic acknowledgement' and to help them to regain their 'self-sufficiency and to make decisions for themselves on the basis of their needs'.<sup>367</sup> The Court also approved the Trust Fund's implementation plan for services such as housing assistance, education assistance, income-generating activities, and psychological rehabilitation, to be provided to victims.<sup>368</sup> Similar in the Al Mahdi case involving the destruction of the world heritage site at Timbuktu, the victims rejected the TFV proposed symbolic measures of memorialisation, use of Mr Al Mahdi's apology and a re-sanctification of the buildings, as inappropriate.<sup>369</sup> Taking these concerns on-board the Court

362 Article 77(2)(a), Rome Statute.

363 ICC-01/04-01/06-2904, para.231; and ICC-01/04-01/06-3129-AnxA, para.67(ii).

364 *Lubanga*, ICC-01/04-01/06-2904, para.274; and ICC-01/04-01/06-3129, 03-03-2015, para.214.

365 Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, 21 October 2016, ICC-01/04-01/06-3251; and Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims, 6 April 2017, ICC-01/04-01/06-3289.

366 ICC-01/04-01/07-3728-tENG, para.301.

367 ICC-01/04-01/07-3728-tENG 17-08-2017, para.285.

368 ICC-01/04-01/07-3728-tENG, paras.302-304.

369 ICC-01/12-01/15-291-Red2, para.157-167.

approved the Trust Fund's implementation of economic development, including compensation to directly affected victims.<sup>370</sup>

112. International criminal justice bodies have increasingly used the language of 'collective' reparations, which is often absent in the conceptualisation and operation of many domestic reparation programmes, the jurisprudence of the Inter-American Court of Human Rights and the 2005 UN Basic Principles on Reparations.<sup>371</sup> On the ground, victims may not distinguish collective reparations from assistance where they are delivered in the same form, i.e. monetary awards or collective development. Reparations carry a strong symbolic component that brings them into the 'politics of recognition' of who is seen as deserving of publicly acknowledged redress.<sup>372</sup> Contreras-Garduño suggests that collective reparations should be complemented with symbolic measures, such as apologies and memorials, to more clearly associate such reparations as a measure of justice.<sup>373</sup> As such collective reparations have to be carefully crafted to ensure that they are 'aimed at conferring official recognition upon victims, and assisting to restore dignity and preserve the collective memory'.<sup>374</sup>
113. Collective reparations are meant to provide 'benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law'.<sup>375</sup> This reflects that with international crimes harm is not limited to individuals, but causes collective harm, as it is committed in a discriminatory way or through indiscriminate attacks against groups or civilian populations, such as crimes against humanity and genocide.<sup>376</sup> Necessarily individual harm is bound up with collective harm, due to their membership of the group.<sup>377</sup> The ICC in *Katanga* defined reparations to a collective as 'a group or category of persons that may be bound by a shared identity or experience, but also by victimization by dint of the same violation or the same crime within the jurisdiction of the Court'.<sup>378</sup> Together with measures of satisfaction such collective reparations measures can vindicate the 'moral status'<sup>379</sup> of victims as human beings who have suffered unlawful harm, which they did not deserve, can collective reparations send important moral messages about the wrongfulness of their

370 Decision on the Updated Implementation Plan from the Trust Fund for Victims, ICC-01/12-01/15-324-Red, 4 March 2019.

371 See some exceptions *Ituango Massacres v. Colombia*, Merits, Reparations and Legal Costs, IACtHR, 1 July 2006, para. 354 and 397; and ICTJ, Rapport de la Conférence de Rabat, Le Concept et Les Défis Des Réparations Collectives, February 2009.

372 Peter J. Dixon, Reparations and the Politics of Recognition, in C. Stahn, C. de Vos and S. Kendall (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (CUP, 2015), 326-351.

373 Diana Contreras-Garduño, Defining Beneficiaries of Collective Reparations: The experience of the IACtHR, *Amsterdam Law Forum* 4(3) (2012) 40-57, p48.

374 Duch, ECCC Trial Chamber, Judgment, Case File 001/18-07-2007/ECCC/TC, E188, 26 July 2010, para.661.

375 Friedrich Rosenfeld, Collective reparation for victims of armed conflict, *International Review of the Red Cross* 92(879), September 2010, 731-746, p732.

376 Moffett n.30, p11-12.

377 Christoph Sperfeldt, Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia, *International Criminal Law Review* 12 (2012) 457-489, p472-475.

378 ICC-01/04-01/07-3728-tENG 17-08-2017, para.274.

379 Conor McCarthy, Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory, *International Journal of Transitional Justice* 3(2) (2009) 250-271, p. 271. Luke Moffett, Transitional Justice and Reparations, in C. Lawther, L. Moffett and D. Jacobs (eds.), *Research Handbook on Transitional Justice* Edward Elgar, (2017), 377-400.

continuing suffering. Collective and moral reparations can provide recognition to groups of victims that acknowledges their lived reality, but also benefit society in reaffirming the legal order and awakening public consciousness about such victimisation to prevent its reoccurrence.<sup>380</sup>

114. The International Criminal Court is unique compared to other international criminal bodies, as a Trust Fund for Victims was created alongside it that had been fundraising for a number of years before a reparations decision was reached. The Extraordinary African Chambers (EAC) ordered compensation against the convicted person amounting to \$139 million (USD) in the Hissène Habré case, but as none of his assets had been identified a trust fund has been established to provide compensation to victims.<sup>381</sup> The EAC rejected collective and symbolic reparations as they lacked specificity of their cost, location and programme operation. In addition, as the EAC did not have jurisdiction over Chad it could not find it responsible nor order it to implement collective measures. In domestic Chadian proceedings against 20 of Habré's associates, a court awarded \$125 million (USD) after their conviction for torture, including the seizure of their assets and half liability of the state, due to the convicted person's official position at the time of the violations. The trust fund established by the African Union in 2018, is intended to facilitate compensation through identifying assets stolen by Habré and his cadres as well as contribution from donors, but also has powers to award collective and moral reparations in collaboration with the Chadian government, as well as with other states, inter-governmental organisations and civil society groups.<sup>382</sup> One civil party group (AVCRHH) had requested the chamber for 30% of funds designated for compensation to be used to fund collective reparations to benefit communities affected by the crimes. These measures included income-generating development projects, creation of monuments in memory to the victims, commemorating 30 May as a day against impunity, educational materials in school curricula, and socio-professional training facilities for indirect, women and children victims.<sup>383</sup>
115. At the Extraordinary Chambers in the Courts of Cambodia explicitly excludes compensation or other monetary measures of reparations, by only permitting claims for 'collective and moral' measures.<sup>384</sup> As such the purpose of such reparations before the ECCC are to 'acknowledge the harm' suffered by the victims before the Court as a result of a crime the accused is convicted and 'provide benefits' which address their harm.<sup>385</sup> This narrow scope of reparations reflects the legal and political situation the ECCC operates within, in that it does not have a trust fund, has millions of potential victims and has no jurisdiction over the

380 Luke Moffett, *Transitional Justice and Reparations*, in C. Lawther, L. Moffett and D. Jacobs (eds.), *Research Handbook on Transitional Justice* Edward Elgar, (2017), 377–400.

381 *The Prosecutor v. Hissène Habré*, Appeals Chamber of the Extraordinary African Chambers, dispositif, p225-227.

382 Article 7(c)-(d), Statute of the Trust Fund for Victims of Hissène Habré's Crimes, EX.CL/1040(XXXI). See Nader Diab, *Challenges in the Implementation of the Reparation Award against Hissène Habré: Can the Spell of Unenforceable Awards across the Globe be Broken?* *Journal of International Criminal Justice*, 16(1) (2018) 141-163.

383 Judgment on Reparations, Hissène Habré, EAC, First Instance Chamber, 29 July 2016, para.59-68. See Diab *ibid.*, p144-145.

384 Internal Rule 23 quinquies.

385 Internal Rule 23 quinquies 1(a)-(b).

Cambodian government to enforce implementation.<sup>386</sup> In Case 001 against Kaing Guek Eav (aka *Duch*) involving the torture site of S-21, the Court only awarded reparations that include a declaration that all the civil parties admitted in the case had suffered harm as a result of the Duch crimes, along with a compilation of all statements of apology and acknowledgement made by him during the trial.<sup>387</sup> In Case 002/01 against the two most senior remaining leaders of the Khmer Rouge Nuon Chea and Khieu Samphan, focused on crimes against humanity related to the forced displacement of civilians and execution of soldiers. The ECCC approved in Case 002/01 eleven out of thirteen proposed measures ranging from a national remembrance day for victims, psychological therapy and self-help groups, inclusion of material on the Khmer Rouge in the national curriculum, publication of the judgement and inclusion of civil parties' names on the ECCC website.<sup>388</sup> These measures were supported by the ECCC as they had receiving funding from donors and provides 'support to the victims, keeps their memory alive, acknowledges their suffering and awakens public awareness to avoid repetition of acts such as those that occurred.'<sup>389</sup> Two measures on creating public memorials in Cambodia and Paris were not approved as they failed to receive funding. Civil parties in Case 001 had proposed a national remembrance day, but the Court rejected this as it required action by the state, which only consented in Case 002/01 as no funding was required to implement it.

116. The subsequent Case 002/02 against Nuon Chea and Khieu Samphan examined a broader category of crimes that included genocide against the Cham and ethnic Vietnamese communities in Cambodia, forced marriage and rape, executions, torture and enforced disappearances. The lead co-lawyers proposed 18 reparation projects ranging from mental health support, legal and civil education for minority groups, a song-writing competition, dance production on forced marriage, and a photo exhibition on genocide of Cham and ethnic Vietnamese.<sup>390</sup> The ECCC refused to approve five projects as they had not received funding from donors. Notably the ECCC rejected part of project 13 involving mental health support and livelihood support to elderly civil parties, given that the latter part looked like monetary reparation, rather than collective and moral measures. Project 15 involving acknowledgement of discrimination and persecution of indigenous minorities in Ratanakiri and Mondulakiri provinces was rejected as the accused were not charged or convicted of these crimes.<sup>391</sup> As such the ECCC reparation process is a means for donor funded programmes to receive official approval for specific projects that aim to address some of victims' needs, but without a national reparation programme the measures do not adequately remedy their harm. For instance the ethnic Vietnamese continue to be denied rights as citizens, causing many to living on floating villages on the Tonlé Sap river, as they are unable to own land legally or send their children to school. Due to controversy amongst other civil parties who wanted the ethnic Vietnamese excluded from the ECCC, their reparations was diluted down from assisting them attaining citizenship to

386 Renée Jeffery, *Beyond Repair? Collective and Moral Reparations at the Khmer Rouge Tribunal*, *Journal of Human Rights* 13(1) (2014) 103-119.

387 Trial Judgment, paras.682-683.

388 Trial Judgment, 7 August 2014, paras.1126-1162.

389 Trial Judgment, 7 August 2014, para.1164.

390 See Civil Party Lead Co-Lawyers' Final Claim for Reparation in Case 002/02, E457/6/2/1 30 May 2017.

391 See Trial Summary Judgment.

legal and civic education. Similarly the Cham community who had their religious leader killed and tens of thousands of their members killed during the genocide, lost some of their cultural heritage and wanted educational scholarships so that the next generation could reconnect with their cultural legacy, instead before the ECCC they received a photo exhibition and awareness raising activities.<sup>392</sup>

117. Ultimately the challenges of reparations before international criminal justice bodies is that they are dealing with asymmetrical justice, in that they holding individuals liable for crimes which affected thousands of victims, with no recourse to call upon the state or other responsible organisations to support such reparation measures within a large administrative scheme. It also reflects that international criminal justice bodies cannot provide comprehensive reparations like state administrative programmes, as they lack the resources and capacity. However, such courts can provide a form of reparations, at least at the minimalist end, of measures that acknowledge and seek to remedy the moral harm suffered by victims. That said there is emerging practice of ex-combatants, in particular former non-state armed groups, to provide reparations, not as a punishment, but through being incentivised to voluntarily contribute to the remedy of victims' harm.

## Complex Political Victims

118. The final area we wish to address in this report is that of 'complex political victims' – those victims who simultaneously or successively experienced harm and participated in systems of oppression and political violence.<sup>393</sup> One caveat is essential. Arguing for the acknowledgement of complex identities is not to imply a collectivisation of guilt or to suggest that all perpetrators are victims or vice versa. Moreover, it is not meant to deny the victim status of individuals, especially since discourses of blaming and silencing victims are often instrumental to political violence.<sup>394</sup> However, it is necessary to recognise the messy reality of conflict in which individual identities cannot be neatly accommodated into strict categories of 'innocent victims' and 'guilty perpetrators'. Former vice Chair of the South African Truth and Reconciliation Commission Alex Boraine takes up this point:

'To think of the perpetrators as victims is not to condone their actions or their deeds, nor is it to turn away from the many victims whose lives they destroyed by their activities. It is simply to try to understand something of the ambiguity, the contradictions, of war, of conflict, of prejudice.'<sup>395</sup>

119. Holocaust survivor Primo Levi offers perhaps the most generous insight into the complexity of victimhood, arguing that even in the horror of the concentration camps, the complex network of human relations could not always be reduced to 'two blocs' of victims and persecutors'.<sup>396</sup> Reflecting on his and others' 'inadequate'

efforts at resistance during their time in German concentration camps, Levi hints at a belief that through their 'failure' to 'resist', he and fellow prisoners were also complicit in the atrocities that took place. In doing so, Levi implicates all humans in the acts of others, encompassing not only deeds of depravity, but also the failure to act to prevent such deeds:

'What guilt? When all was over, the awareness emerged that we had no done anything or not enough, against the system into which we had been absorbed... on a rational plane, there should not have been much to be ashamed of, but shame persisted nonetheless, especially for the few, bright examples of those who had the strength and possibility to resist.'<sup>397</sup>

120. For Erin Baines, the term perpetrator includes bystanders, collaborators, informants, forced perpetrators, forced combatants, victims turned-perpetrators, and perpetrators-turned-victims.<sup>398</sup> The following example provides a way into this complexity: 'A student watches his parents being harassed by secret police; the student joins protest or freedom-fighting groups and then is arrested; the student emerges willing to use terrorist tactics against the secret police, and sets off bombs that kill civilians'.<sup>399</sup> In this example, the student has been a victim, combatant and bystander. Equally, as Claire Moon notes, the South African Truth and Reconciliation Commission required South Africans to be designated as either 'victims' or 'perpetrators', but in respect to perpetrators, did not distinguish between the kinds of acts committed, the reasons why they were committed, their consequences or their context, or between individuals who committed just one act and those whose entire operation and purpose was the commission of such acts.<sup>400</sup> Some of those who came before the TRC could not easily be accommodated within these categories of 'victim' and 'perpetrator'. One controversial figure (Robert McBride) who applied for and was granted amnesty for his actions during the liberation struggle (including planting a bomb at a bar, which caused the deaths of 3 people and injured a further 69) declared that he too had been a victim of the white Apartheid regime and that it was his determination to fight against that system that led to his involvement in armed struggle.<sup>401</sup>
121. The most obvious example of perpetrators who can also be thought of as victims are child soldiers and female combatants.<sup>402</sup> The use of child soldiers – those under the age of 15 who are conscripted or enlisted into armed groups and/or used to actively participate in hostilities is ubiquitous. For example, between 30,000-60,000 children were abducted to fill the ranks of the Ugandan Lord's Resistance Army, while an estimated 7,500 children were recruited by all parties to the Colombian conflict – guerrilla organisations, the military and state-aligned paramilitary groups. Writing in respect to child soldiers in the Lord's Resistance Army, Baines notes the

392 See Rachel Killean and Luke Moffett, What's in a name? The Discourse and Practice of Reparations at the Extraordinary Chambers in the Courts of Cambodia, (forthcoming 2019).

393 Erica Bouris, *Complex Political Victims*. Bloomfield, CT: Kumarian (2007).

394 Julie Bernath, 'Complex Political Victims' in the Aftermath of Mass Atrocity: Reflections on the Khmer Rouge Tribunal in Cambodia, *International Journal of Transitional Justice*, 10(1) (2016) 44-66.

395 Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*, Oxford University Press (2000).

396 Primo Levi, *The Drowned and the Saved*, Abacus, (1986) p23.

397 Ibid. p56-57.

398 Erin Baines, *Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice*, *African Affairs*, 109(436) (2010) 409-430.

399 Minow n.2, p63.

400 Claire Moon, *Healing past violence: traumatic assumptions and therapeutic interventions in war and reconciliation*, *Journal of Human Rights*, 8(1) (2009) 71-91.

401 See McEvoy and McConnachie n.156; and Du Bois-Pendain n.86, p213.

402 See for example: Kirsten Fisher, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict Contexts*. Basingstoke: Palgrave Macmillan (2013); Seema Shekhawat, *Female Combatants in Conflict and Peace: Challenging Gender in Violence and Post-Conflict Reintegration*. Basingstoke: Palgrave Macmillan (2015).

'choiceless decisions' child soldiers are forced to make in order to navigate complex, violent terrains, but which simultaneously, leaves emotional and physical scars as a result as their abduction, captivity and the harms they perpetrated.<sup>403</sup> Similarly, in South Africa, it is arguable that young Afrikaner soldiers and policemen can be viewed as victims of an authoritarian, masculinized militarized society in which they were forced to go through a cadet system at school, were conscripted into the army and were subjected to daily state propaganda.<sup>404</sup> In such contexts, the question of perpetrator agency and the role of larger structural factors must be considered when probing questions of victimization.

122. In other instances, the complex identity of victim-perpetrators refers to individuals who are members of non-state armed, paramilitary or terrorist groups, or state forces who commit human rights abuses but have also been victimized<sup>405</sup> through identifiable international crimes, such as disappearances, extrajudicial killings, sexual violence, torture, serious injury or ill-treatment caused by other actors.<sup>406</sup> The circularity in such claims-making – of people who become involved in violence because of their own or their communities' experience of violence – has been a constant refrain repeated to one of the authors in literally hundreds of interviews with combatants and ex-combatants over the years. Equally, many ex-combatants continue to suffer as a result of their militarized histories and involvement in violent conflict.<sup>407</sup> Sources of trauma among former combatants in South Africa include the brutalization of South African Defence Force (SADF) conscripts in training; the conditions under which Umkhonto we Sizwe (MK) members lived in exile; the resulting paranoia that comes from a culture of infiltration; government security-force harassment of liberation fighters' families and the consequences of witnessing and participating in violent acts.<sup>408</sup> In Northern Ireland, 45.3% of former republican and loyalist combatants are reported to have experienced moderate or severe physical injuries, while 53.1% have been psychologically harmed.<sup>409</sup> The same survey revealed that 68.8% of respondents engaged in hazardous levels of alcohol abuse, while 32.6% had received prescription medication for depression in the previous year – a prevalence rate that is 5 times higher than the Northern Ireland average for men.<sup>410</sup> Given that at least 15,000 people were incarcerated during the conflict, the effect of the unresolved past on individuals and the knock-on effect onto extended families cannot be underestimated.<sup>411</sup> As Bouris explains,

403 Erin Baines, Complex Political Perpetrators: Reflections on Dominic Ongwen, *The Journal of Modern African Studies*, 47(2) 162-191.

404 Tristan A. Borer, A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa, *Human Rights Quarterly*, 25(4) (2003) 1088-1116.

405 There are also shades of grey between 'volunteering' to join armed groups or being physically or economically forced to do so.

406 Luke Moffett, Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms, *International Journal of Transitional Justice*, 10(1) (2016) 146-167.

407 Sasha Gear, Wishing Us Away: Challenges Facing Ex-Combatants in the 'New' South Africa, Violence and Transition Series, 8, Johannesburg: Centre for the Study of Violence and Reconciliation (2002).

408 Ibid.

409 Ruth Jamieson, Peter Shirlow, and Adrian Grounds, *Ageing and Social Exclusion among Former Politically Motivated Prisoners in Northern Ireland*. Belfast: Changing Age Partnership (2010).

410 Ibid.

411 Cheryl Lawther, Haunting and Transitional Justice: On Lives, Landscapes and Unresolved Pasts in Northern Ireland. In K. Wale, P. Gobodo-Madikizela, y J. Prager., (eds). *Post-Conflict Hauntings: Transforming Collective Memories of Historical Trauma*. Palgrave. Forthcoming (2019).

'recognizing these perpetrators as victims is quite critical, because if we do not see them as victims, we are unlikely to understand the true horror of [the context]'.<sup>412</sup>

## Contribution of ex-combatants and organisations

123. There is growing practice that ex-combatants can make a useful contribution to securing the peace and assisting transitional justice mechanisms. Their role is not just instrumental in these mechanisms, but ex-combatants can in engaging in such acts rehabilitate their image as not just fighters, but citizens trying to amend for past wrongs. In turn this can to an extent help to reintegrate and resocialise them into society by their public deeds. It is worth keeping in mind that such individuals are not simply perpetrators or combatants, but can be representatives, leaders and mediators in their own communities, to some they are defenders of victimised or marginalised communities, and even victims themselves. In Nepal we interviewed a number of former child soldiers who joined up with Maoist guerrillas after their family members were disappeared by the army, and in Uganda and Guatemala civilians who have been abducted and forced to join armed and paramilitary armed groups.
124. There are experiences elsewhere of ex-combatants making important contributions to reparations. In the Philippines, the Transitional Justice and Reconciliation Commission Bangsamoro recommended that the Philippine army and national police contribute to symbolic reparations, such as formal apologies for their role in human rights and humanitarian law violation, as well as to provide 'material reparations', including 'rebuilding homes, mosques, madrasahs, and other community infrastructure in affected Bangsamoro communities.' The Commission also recommended that the archives of such organisations should be accessible and protected by them.<sup>413</sup>
125. The contribution of assets by ex-combatants to reparations can provide a symbolic token to offsetting the cost of reparations borne by the state to all victims, but it is likely that any such remaining assets within a group will have been substantially reduced during the conflict. In the Solomon Islands, while amnesty excluded international crimes, the amnesty was conditioned on individuals returning 'all weapons and ammunition and stolen property' possessed by militant groups.<sup>414</sup> In Sierra Leone subsistence support to ex-combatants to assist their reintegration where weapons were exchanged for compensation, was perceived as only assisting those who fought in the war rather than the suffering of victims, inhibiting reconciliation and reintegration. It also meant that some vulnerable groups of women and children remained dependent on former commanders, 'reinforcing loyalties and preventing their return to local communities.'<sup>415</sup>

412 Bouris n.393, p67.

413 Report of the Transitional Justice and Reconciliation Commission Bangsamoro, (2016), p87.

414 Section 3(3), Amnesty Act 2001. See also the amnesty in Section 5, Northern Ireland Arms Decommissioning Act 1997,

415 W. Andy Knight Disarmament, Demobilization, and Reintegration and Post-Conflict Peacebuilding in Africa: An Overview, *African Security*, 1(1) (2008), 24-52, p42.

126. While there is some practice of the assets of suspected international war criminals being seized, it requires a team of investigators, cooperation of other states and forensic accountants to identify, freeze and seize such resources.<sup>416</sup> How long should such obligations be imposed and balanced with an ex-combatant's reintegration and ability to support themselves and their family? This issue has been raised at the International Criminal Court, with judges in the *Katanga* case finding that long term imposition of a debt on a convicted person is based on his obligation to repair the harm caused, rather than consideration of punishment or his reintegration in society.<sup>417</sup> However in the subsequent decision in *Al Mahdi*, the Chamber recognised that the convicted person's financial circumstances affected implementation, such as instalments, but it did not want to 'impose hardships' on Mr Al Mahdi that would 'make it impossible for him to reintegrate into society upon his release.'<sup>418</sup> Ultimately the state has a subsidiarity responsibility to all victims to provide reparations for gross violations of human rights no matter who is the responsible actor, leaving non-state armed groups the space to indemnify the state.<sup>419</sup>
127. Reparations do not always have to be financial, especially where armed groups are demobilised and disarmed. Ex-combatants and their organisations can make important expressive messages to victims and society in acknowledging their role in the violence of the past and making expressions of remorse. Acknowledgements of responsibility should be sincere and genuine, those that are rushed or rote statements of responsibility can 'make survivors feel that reparations are being used to buy their silence and put a stop to their continuing quest for truth and justice.'<sup>420</sup> Apologies can be distinguished from acknowledgements of responsibility by their remorseful framing and gestures of such statements.<sup>421</sup> There are a number of factors that can make an apology successful in that it mainly satisfies victims: timeliness, explicit statements of apology and regret, an acceptance of personal responsibility, the avoidance of offensive explanations or excuses, sincerity, willingness to make amends and promises to avoid future transgressions.<sup>422</sup> As discussed above in relation to apologies made at the ICC and ECCC, such measures are often seen as insufficient or premature without other measures of reparations being made to victims first. Accordingly, apologies and acknowledgement of responsibility can carry symbolic messages of recognition of the wrongfulness of victims' suffering but needed to be properly timed and

416 Three of the convicted individuals before the ICC have been declared indigent. See also the *Kenyatta* case, Decision on the implementation of the request to freeze assets, ICC-01/09-02/11-931 8 July 2014. There are only 25 enforced sentences resulting from Colombian Law 975/2005 proceedings, with only 13 compensations ordered being paid out to date.

417 ICC-01/04-01/07-3778-Red, 9 March 2018, paras.178-186.

418 ICC-01/12-01/15-236, para.114.

419 Principle 15 and 16, UN Basic Principles on Reparation 2005.

420 Brandon Hamber and Richard Wilson, (2002) Symbolic closure through memory, reparation and revenge in post-conflict societies, *Journal of Human Rights*, 1 (1), 35-53, p46.

421 Federico Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives* Oxford University Press, (2008), p119.

422 See C. Ancarno, 'Press Representations of Successful Public Apologies in Britain and France,' 3 *University of Reading Language Studies Working Papers* (2011) 38; J. B. Hatch, *Race and Reconciliation: Redressing Wounds of Injustice* (Lexington Books, Plymouth, 2010), p189; M.R. Marrus, 'Official apologies and the quest for historical justice' 6 *Journal of Human Rights* (2007) 75; N Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation*, (Stanford University Press, Stanford, 1991), p17; and M. Cunningham, *Saying sorry: the politics of apology*, 70 *The Political Quarterly* (1999) 285.

appropriately crafted for victims. When coming from ex-combatants, apologies can also contribute to a shift within their own political community to self-reflect on their own actions and justification of the past and violence. Victim participation in developing what an apology should include in terms of language and scope can help to make it more effective and meaningful, but this will need to be carefully constructed that it does not alienate former comrades or supportive communities.

128. Ex-combatants can also play an important role in the clarification of facts, especially in the confusion of war; information can be misrepresented, misunderstood or misperceived. In Northern Ireland, republican and loyalists have carried out internal investigations into murders to determine and clarify facts. These have in some cases resulted in apologies, especially for those identified as informers.<sup>423</sup> Use immunities have also been used in a number of public inquiries, such as the Bloody Sunday massacre, whereby any oral or written statement could not be used in criminal or civil proceedings. This enabled members of state forces and the IRA to speak openly about their own involvement in the events leading up to and after the massacre.<sup>424</sup> Similarly for individuals who had their amnesty application rejected by the South African TRC, their disclosure was not be used against them in any future prosecution.<sup>425</sup> As discussed above in relation to Northern Ireland, ex-combatants have provided key information, which has facilitated the recovery of some of 'the disappeared'.
129. Legal representation can assist ex-combatants to fill in relevant forms and understand their rights. The experience of the Amnesty Commission of the South African TRC found that applications made by amnesty applicants were very scant, due to them most of them being unable to afford legal representation or for those that could their lawyers advised their client to divulge as little as information as possible.<sup>426</sup> The dependence on legal staff to act as judges, lawyers and advocates in the proceedings of the amnesty committee made it largely a 'court room model', marginalising victims to 'an audience in a legal show' between lawyers.<sup>427</sup> Legal representatives of amnesty applicants acted to protect their clients from self-incrimination causing them to be 'a buffer, gatekeeper and silence in what should have been a space for open and extensive disclosure.'<sup>428</sup>
130. There is clear role for responsible organisations to cooperate in the administration of fact clarification by furnishing corroborating information to investigators to verify statements and information provided by individual members or victims.<sup>429</sup> This can help minimise delay, but resources may be needed to help build the organisation's capacity to expedite such information gathering. Impartial verification with sources outside such organisations should also be used to corroborate information on events to avoid a one sided version of the past. The South African TRC Amnesty Committee recommended that one of lessons from its experience was to have

423 See Dudai n.74.

424 See Kieran McEvoy, Luke Moffett, Louise Mallinder and Gordon Anthony, *The Historical Use of Amnesties, Immunities, and Sentence Reductions in Northern Ireland*, Queen's University Belfast (March 2015) p11-12.

425 SATRC Vol. 6, p14.

426 Vol. 6, p34.

427 Fullard and Rousseau n.90, p202.

428 Ibid.

429 See SATRC, Vol. 6, p35.

application forms that require individuals to provide a narrative summary of both the incident and the role of the applicant.<sup>430</sup> In addition, proceedings should only occur where facts are in dispute between the parties, thereby allowing where the parties agree to submit evidence or information into the factual record without a public hearing, so as to expedite the process and minimise costs.<sup>431</sup> Applicants for amnesty had to make a 'full disclosure' to be eligible, with those who were untruthful on a 'material aspect' being refused. However, such a full disclosure only had to be on 'relevant facts' as to the incidents raised in the amnesty application.<sup>432</sup> The leadership of the ANC made an organisational submission to the TRC covering 37 leaders, and although their application did not detail individual acts as required for the amnesty, it was awarded collectively. This was subsequently heavily criticised as a 'blanket amnesty'.<sup>433</sup>

131. There should be consideration of how military or government actors can contribute to alternative sanctions, such as losing or reducing military privileges, such as them contributing some of their pensions or tax breaks to supporting victims. In the case of former Guatemalan president Rios Montt, he was not given a state funeral, but a private military funeral. While this was not part of reparations to victims or penalty for his earlier conviction of genocide (though later overturned), it reflects the inappropriate use of state funds to commemorate individuals who grossly violated the rights of citizens.
132. In processes where ex-combatants have contributed information or other material, trust, patience, informed expectations, and in particular the leadership of ex-combatants has been key to their success. These restorative processes in Northern Ireland, discussed above, aimed to maximize information exchange, dialogue and mutual consent.<sup>434</sup> Reintegration and engagement with transitional justice mechanisms by ex-combatants has to be carefully crafted. The use of the language of rehabilitation, shame or punishment for being a combatant, may sit uncomfortably with those who were struggling for a better country or fulfilling their duty as defenders of the state, and neglects their experience of victimisation or the structural causes of their belligerency.<sup>435</sup> Instead, viewing them as peacebuilding agents can harness the potential of ex-combatants to provide moral, political and organisational leadership to processes dedicated to the past, as well as 'credibility, respect and legitimacy', at least within their own political communities.<sup>436</sup> The organisational structure of an armed group means that former members have a shared experience and history, with bonds of loyalty and a command structure. These bonds can be used to mobilise them collectively to contribute information on the past including location of those disappeared.<sup>437</sup> This

430 SATRC, Vol. 6, p87.

431 SATRC, Vol. 6, p89.

432 SATRC, Vol. 6, p10.

433 Louise Mallinder, *Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa*, Working Paper No. 2 From Beyond Legalism: Amnesties, Transition and Conflict Transformation, (2009), p78.

434 McEvoy and Mika n.69, p367.

435 Kieran McEvoy and Peter Shirlow, Re-imagining DDR Ex-combatants, leadership and moral agency in conflict transformation, *Theoretical Criminology* 13(1) (2009) 31–59, p33–34.

436 McEvoy and Shirlow *ibid.*, p41.

437 Clare D. Dwyer, Expanding DDR: The Transformative Role of Former Prisoners in Community-Based Reintegration in Northern Ireland, *International Journal of Transitional Justice*, Vol. 6, 2012, 274–295, p283.

also corresponds to wider issues within DDR, that challenges to reintegration are not so apparent within communities where shaming is caused not usually because of an individual's role in conflict, but because of their affiliation to the faction or group's reputation.<sup>438</sup> Thus having former armed group involved as a collective organisation, can serve not only to maximise its ability to deliver on demobilisation, but also use its membership to crowd-source information within the organisation. It can also assist in the reincorporation of ex-combatants as not ordinary criminals, but responsible agents still struggling to improve or protect their society. Individual leadership within an organisation to catalyse such behaviour is key. Moreover, given their position within their own community, such groups can act as strategic mediators to minimise future violence and guaranteeing non-recurrence through their organic legitimacy.

## Challenges

133. There are a number of challenges for ex-combatants in respect to engaging with past focused mechanisms. Personal feelings of blame, shame, stigma may hinder their reintegration or willingness to speak opening about their past. The change of identity from combatant to civilian, may still belie continuing notions of loyalty or social bonds to the organisation or state, or having to confront their underlying justification for violence in contrast with the consequences of their action and victimisation.<sup>439</sup> This may be further complicated masculinity, complex victimhood, or continuing psychological trauma and the re-opening of old wounds by talking about the past. Ex-combatants, who may be willing to speak about their own involvement in conflict, may be reluctant to implicate others. This was apparent in the Saville Inquiry into the events on Bloody Sunday massacre of 13 civilians in 1974. When called to give evidence, and despite the provision of a use immunity, the former Sinn Fein Deputy First Minister Martin McGuinness and formerly second in command of the IRA, referred to a 'code of honour' that prevented him from fully revealing all information that would breach the trust and confidence of members of his organisation and its supportive community,

"I feel I cannot answer that question because there is a Republican code of honour. The people who would have allowed us to use their houses, such as the two occasions that you have identified to me, are people who would have placed great faith in those IRA members who were using the house. For me to identify who those people are would be a betrayal, in my view...I have a duty, in my view, stretching back 30 years, to those people and I am not prepared to break my word to them under any circumstances."<sup>440</sup>

Similarly, Miroslav Bralo at the ICTY cooperated in providing information on the location of disappeared victims that led to the recovery of some of their bodies, but

438 Macartan Humphreys and Jeremy Weinstein, Demobilization and Reintegration, *Journal of Conflict Resolution* 51(4) (2007) 531–567, p548.

439 See Cheryl Lawther, The Truth about Loyalty: Emotions, Ex-Combatants and Transitioning from the Past, *International Journal of Transitional Justice*, 2017, 11, 484–504.

440 Testimony of Martin McGuinness to the Saville Inquiry, 4th and 5th November 2003, available at; <http://webarchive.nationalarchives.gov.uk/20101103103930/http://report.bloody-sunday-inquiry.org/evidence-index/>

refused to cooperate with the prosecution in implicating other former comrades in fear of retaliation against his family.<sup>441</sup>

134. Trust is an important part of engaging in such difficult processes in confronting the past. Trust was central in the experience in Northern Ireland in ex-combatant's role in the recovery of the disappeared.<sup>442</sup> Ex-combatants grew confident in the ICVLR's commissioners and investigators in respect to the values they followed and how treated them, the 'quiet' nature of the process and the provision of immunity from prosecution. Moreover, there was a political impetus on republicans to address this dark chapter of their past, given that the victims came from within their own community and their families had been effective in public advocating for action around the peace negotiations.<sup>443</sup> Trust is linked to expected outcomes of processes and perceptions of impartiality of the laws, actors and processes involved.<sup>444</sup> Where unrealistic claims and commitments are made that cannot be met by a commission it can contribute to mistrust and disengagement by participants.<sup>445</sup> This underlines the importance of informing victims at the outset and throughout the process of the likely long period of time it would take to identify the remains and being realistic that there may not be a satisfactory outcome no matter the amount of contribution of ex-combatants.
135. The sincerity of ex-combatants is a further point of consideration when they engage in such processes. In Rwanda apologies before the gacaca courts were judged by how 'complete and sincere' they were, which in practice contained a detailed description of the crimes committed, the names of the victims, accomplices, locations, and, if relevant, the property that was damaged.<sup>446</sup> Local judges determined how fulsome an apology was by its sincerity and the extent to which it corresponded to the truth presented by all the participants involved in the incident. The ICC has held that mere expressions of 'sympathy or genuine compassion for the victims' is given less weight in mitigation than an expression of remorse.<sup>447</sup> The ICTY judged the sincerity of statements of remorse and apologies on 'not only the accused's statements but also of his behaviour (voluntary surrender, guilty plea).'<sup>448</sup> This is not an infallible process, as can be seen in the case of former Republika Srpska president Biljana Plavšić, who received a mitigated sentence of 11 years following her crimes against humanity conviction for contributing to local reconciliation through an apology, making a remorseful admission and her positive impact on the reconciliatory process.<sup>449</sup> She declared "I sacrificed myself. I have done nothing wrong. I pleaded guilty to crimes against humanity so I could

441 Combs n.106, p83-84.

442 See Lauren Dempster, *Transitional Justice and the Disappeared of Northern Ireland: Silence, Memory, and the Construction of the Past*, Routledge (2019).

443 See Lauren Dempster, 'Quiet' Transitional Justice: 'Publicness,' Trust and Legitimacy in the Search for the 'Disappeared', *Social and Legal Studies* (2019).

444 Morton Deutsch, Trust and Suspicion, *Journal of Conflict Resolution*, 2(4), (1958), 265-279.

445 QUB Human Rights Centre, Addressing the Legacy of Northern Ireland's Past: The Human Rights Dimension, October 2018, p15-16.

446 Penal Reform International, Eight Years On ... A Record of Gacaca Monitoring in Rwanda (2010), p35.

447 *Katanga*, ICC-01/04-01/07-3484-tENG-Corr, para.117.

448 *Blaškić*, Trial Judgement, IT-95-14-T, 3 March 2000, para.775.

449 *The Prosecutor v. Biljana Plavšić*, Sentencing Judgment, IT-00-39&40/1-S, (27 February 2003), para. 71-81.

bargain for the other charges [of genocide].<sup>450</sup> She went on to indicate that her side did nothing wrong during the conflict and the victims deserved what they got.<sup>451</sup> Making such reduced sentences or alternative penalties conditional on individuals renouncing violence, along with monitoring of their compliance post release, may help to mitigate such situations.

## Monitoring of Sanction and Reintegration

136. In Northern Ireland, early release for prisoners was a key issue in the peace negotiation and 1998 agreement.<sup>452</sup> Under the subsequent law, a person in a non-state armed group (prescribed organisation) who is convicted of a schedule offence can obtain a reduced sentence of two years, including murder, gross bodily harm and rape. The sentence reduction does not absolve the individual of their criminal responsibility and it does not expunge their criminal record.<sup>453</sup> Instead, their sentence would be suspended unless they breached the conditions of their release. This consideration for release is centred on applicants upon being let out of prison on the grounds of them not being a supporter or likely to become a supporter of a specified organisation which is opposed to the peace process (i.e. on ceasefire and decommissioned); likely to become involved in acts of terrorism connected with the affairs of Northern Ireland; or if a life sentence prisoner, be a danger to the public.<sup>454</sup> This process has been very successful with 488 prisoners being released and only 23 being returned to prison in a 20 year period,<sup>455</sup> reflecting the political nature and motivation of such violence, but also the role of organisations in transforming their members from conflict to peace. Local police and prosecution service provided monitoring when people came before them on charges or in court, with the panel for sentence reduction only having to meet to determine new cases as they arose. Despite this, individuals released under the scheme and other ex-prisoners continue to face barriers to employment that allow them to fully reintegrate into society as civilians.<sup>456</sup>

450 Jelena Subotic, The Cruelty of False Remorse: Biljana Plavšić at the Hague, *36 Southeastern Europe* (2012) 39-51, p48.

451 S. Dana, The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?, *Penn State Journal of Law and International Affairs*, (2014), p.98-99.

452 In the UK - Northern Ireland (Sentences) Act 1998; and in the Republic of Ireland - the Criminal Justice (Release of Prisoners) Act 1998.

453 See Kieran McEvoy, Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict, *Fordham International Law Journal* (1999) 26(1) 145-181.

454 Section 9, Northern Ireland (Sentences) Act 1998.

455 Sentence Review Commissioners Annual Report 2017/18, HMSO HC 1241 (2018) p19.

456 See OFMDFM, Recruiting People with Conflict Related Convictions: Employers' Guidance (OFMDFM, 2007).

## Conclusion - Alternative Sanctions

137. The JEP sits in a unique position to recalibrate justice that mediates the concerns and needs of victims with the responsibility of perpetrators. This report has sought to highlight some of the international and national jurisprudence and practices in responding to international crimes. There are no simple answers or perfect solutions to follow. However there are good practices and lessons to be learnt, as well as international obligations to ensure victims' and perpetrators' right to steer such a process.
138. International human rights law and international criminal law do not specify particular penalties or punishments for international crimes. Although blanket amnesties are generally considered illegal, conditional amnesties are in principle acceptable, where individuals contribute information, reparations or other efforts to reconciliation and peace. Alternative sanctions sit somewhere between punishment and amnesty, in that they ensure that individuals are held responsible for their wrongful actions under international human rights and international criminal law, but their punishment is attenuated by the broad political goal of reconciliation. In particular the attention to shift justice from being retributive, to being more sensitive to delivering victims' rights to truth and reparations. A criminal court can never fully satisfy victims' right to reparation or truth, it is why it needs to be completed by bodies specialised in delivering these broad goals. Nonetheless, it can facilitate perpetrators to confront their wrongdoing and incentivise them to make some measure of repair and acknowledgement to victims.

## Recommendations

Below are some indicative recommendations that are not exhaustive on learning from the lessons in other context that may be useful for the JEP:

### Restorative justice

139. Engaging in restorative justice at the community level can help to rebuild the social fabric in how communities resolve disputes amongst themselves, which can assist in developing communal bonds and social resilience. For victims it can allow them greater ownership of proceedings, enabling them to 'tell their story' by narrating events on their own terms,<sup>457</sup> rather than answering questions in criminal proceedings, and provides the possibility of directly engaging with those responsible. Protracted conflicts involve a complex web of responsibility and victimisation, creating a process that only seeks to mediate between victims and perpetrators, could potentially neglect the role of the state in victimising perpetrators or the structural causes of violence. Attention needs to be paid to the gender dynamics of violence and responses to it, to ensure that women and girls can effectively contribute and shape processes to their needs and interests. Similar thought needs to be given to how disabled or elderly victims and perpetrators can engage in and benefit from such processes.
140. There are some common experiences of challenges in these informal settings that the JEP should make an effort to avoid such as: apprehension of participants (victim and perpetrator) in seeing the other participant(s),<sup>458</sup> due to fear of reprisals or being falsely denounced;<sup>459</sup> a lack of sincerity; strategic non-engagement by victims to not participate due to time commitments or security risks; silence in the public forum (may encourage more private meetings);<sup>460</sup> pressure on participants to fulfil external or state goals for the process (such as reconciliation);<sup>461</sup> selective framing of the context;<sup>462</sup> and neglect of a gender perspective, gender-based crimes and sexual violence.
141. Informing expectations and providing some legal certainty on the restorative approach of the JEP is important, but boundaries need to be clear on what a process can and cannot provide. Having complementary processes in place to address other needs (such as the Victims Unit and the truth commission (CEV)) and signposting participants to support services can help improve understanding and satisfaction. Restoration for victims cannot be provided through perpetrators

457 Sullo n.48, p267.

458 Therese Abrahamsen & Hugo van der Merwe, Reconciliation through Amnesty? Amnesty Applicants' Views of the South African Truth and Reconciliation Commission, CSVN 2005, p9.

459 PRI, The contribution of the Gacaca jurisdictions to resolving cases arising from the genocide Contributions, limitations and expectations of the post-Gacaca phase, 2010, p17-18.

460 Fullard and Rosseau n.90, p223.

461 Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*, Routledge (2011), p111.

462 In the gacaca the de facto exclusion of crimes of the RPF. Sullo n.48, p268.

alone, and requires a comprehensive reparations programme to deliver a more integrated package of remedies to victims. This reflects that reparations encompass a range of services, awards and symbolic measures, but at its minimalist end is about officially acknowledging and recognising victims' moral harm. Likewise, perpetrators through their engagement with a restorative process will need some form of financial or educational support and other reintegration programmes to support their socio-economic transition back into society. As such restorative justice processes can potentially provide an interface, in a safe and supportive environment for victims, perpetrators and the community to probe the past.

142. The traditional and rituals practices in different contexts are cultural rooted in their experience and identity as a community. Rediscovery of traditions, usually tasked to deal with petty crime, can risk them being used by elites to achieve their political goals, instrumentalising victims and the local community or undermining their ability to effectively participate or benefit, due lack of capacity.<sup>463</sup> Care must be taken in returning to a 'traditional' or informal form of justice through restoration, that indigenous practices are not appropriated without consent or used in a manner that insidiously extends state power in a neo-colonial manner. In Colombia there are a range of existing traditional responses to crimes within Afro-Colombian communities and indigenous peoples. There are many places where conflict took place and impacted through gross human rights violations where 'the tradition' does not really exist or has been disrupted by displacement and violence. There may be a role for religious institutions to play in bringing parties together or providing a neutral space to meet on common principles of respect and forgiveness.
143. Taking a restorative justice approach can help to humanise perpetrators and victims, allowing them to participate and develop a sense of ownership of the transitional process.<sup>464</sup> Yet when addressing gross violations of human rights or international crimes, the inhumanity of war that created such victims cannot be forgotten. Indeed, a restorative process should be concerned with the victim, but also in reaffirming the wrongfulness of such acts that victimised them and the broader structural causes of violence that perpetuated/continue to perpetuate violence. There is value in recognising the modest contribution a restorative process in the JEP involving victims and ex-combatants can make to peace and dealing with the past. Such processes need to coordinate with other transitional justice mechanisms, and where available, processes and interactions beyond the state. Victim participation should not be framed as only forgiveness, it may need to be slowly introduced or in a staged process, as it may take time for the participants to trust the system and each other.

## Sentencing and alternative sanctions

144. In line with human rights and international criminal law, sentences should be proportional, with the imposition of 5-8 years sanction being conditional on individuals complying with their commitment to peace and reconciliation. Those

463 McEvoy and Mallinder n.19, p432.

464 Kieran McEvoy and Lorna McGregor, *Transitional Justice from Below: An Agenda for Research, Policy and Praxis*, in K. McEvoy and L. McGregor (eds.) *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, Hart (2008), p5.

individuals who will face the higher threshold of 8 years should be left for those who served in higher positions when international crimes were committed, thus reflecting the gravity of their crimes and superior responsibility. Seeing the harm collectively caused by different armed groups and armed forces – there is a collective and individual responsibility to acknowledge and remedy victims' harm by the organisation and individuals involved.

145. For individual perpetrators, it may be worth them to make individual contributions to truth and acknowledgement, such as testimony on particular dates and events, but also letters of apology or information to victims. Organisations can provide a more corporate view of the collective responsibility of the group, but also make use of their organisation to collect information and for senior leaders to provide wider apologies and acknowledgements of responsibility. Protracted conflicts involve a web of responsible and victimised actors. Consideration should also be made for ex-combatants who have also been victimised by other actors to seek some form of remedy. For instance consideration should be made as to whether victimised FARC members by the state or by their own organisation should receive an apology or reparations from those responsible actors before the JEP, even though they are excluded from reparations through the Victims Unit. This speaks to reparations reaffirming the dignity and human rights of individuals no matter their background, even when they might be responsible for victimising others. It may not mean that victimised FARC members should be awarded compensation, but should receive some form of symbolic reparation through apologies and acknowledgements of responsibility.<sup>465</sup> To be truly restorative, it requires seeing the conflict beyond binary black-and-white terms. If one group only carries out restoration to another in a unilateral way, it misses a deeper problem of the complex multidirectional nature of violence and the role of the state and society that allowed and justified violence to be committed with impunity.

## Victim Participation

146. In a system built on the foundations of restorative justice, victims' direct and indirect participation is essential to restoring relations and helping victims and perpetrators move forward. Victims need to understand and feel that they play a central role in this system. This can also demonstrate respect and reaffirm victims' dignity by treating them as right-holders and participants with a valuable role in the JEP.
147. It would be important for the JEP to make a list of the various opportunities that its proceedings allow victims to participate in the process, either directly or through their legal representatives or other intermediaries. It should be borne in mind the potential for victims to enhance justice and/or to benefit from such participation, and determine which of those constitute the best opportunities for participation. The JEP already contains various opportunities for victims to participate through presenting reports, using remedies, or attending some hearings. However, participation in such opportunities is of a different nature. Reports are written by a few and do not allow a direct contact between victims and the system. Provision could continue to be made throughout the process for other mediums of submitting information, such as audio recordings or videos, particularly for those

465 See Moffett n.405.

victims who are illiterate, disabled or elderly. Hearings are more immediate and permit victims to feel part of the system. However, the JEP should ensure that victims feel part of the justice process and that they are taken seriously and not as a validation mechanism of the system. The JEP should also adopt all necessary measures to consult victims and not to impose participation. They should be given the opportunity to say if they wish to participate, and they should be briefed on what to expect from such a process. Victims' direct participation should not be limited to appearing at the hearing of acknowledgment of responsibility (at the Chamber of recognition of responsibility) or at the hearing where the Tribunal reads its resolution with its conclusions. Participation, in person, should precede these hearings and will help the JEP tailor justice to those most affected by these crimes, improving victim satisfaction.

148. There are a number of ways to allow victims to participate at the JEP. Restorative justice speaks of affected parties coming together in a safe environment to resolve the consequence of the crime through agreement.<sup>466</sup> Such participation at the ICC has not been restorative given the number of victims, the position of the Court in the Hague and victim participation through lawyers. That said there are lessons to be learned from the ICC and restorative justice in terms of victim participation. Respect victims' agency: allow them choice in how they want to be represented as far as possible, be innovative in means for them to contribute to the JEP, their engagement may be staggered to build trust and confidence that can lead up to direct engagement with perpetrators, such as written letters, recorded video statements, video-links, revealed/hidden identity and one-to-one meetings with support persons. The formality of the courtroom may not be the best space to enable victims to voice their views and concerns. The experience in other contexts, such as the Historical Institutional Abuse Inquiry in Northern Ireland, some victims found that appearing in a courtroom was quite formal, causing them to be nervous and not effectively articulate their views and concerns, whereas the Acknowledgement Forum, a more informal space where victims could tell their story, while helpful, made some victims feel that they were being infantilised instead of having their rights satisfied. Victim testimony can be impacted by malnutrition impairing their memory and its cogency and completeness.<sup>467</sup> As a result of trauma, victims may have difficulties in recollecting a full and detailed account of events.<sup>468</sup> This is connected to the discussion above on procedural justice, in directly engaging and testifying before a court, victims need to 'telling their stories to an engaged listener and to receive formal and informal acknowledgement'.<sup>469</sup> Accordingly, victims appearing as witnesses to only testify and respond to questions may be counterintuitive in ensuring their views and concerns are effectively represented and heard. Victims should be able to present their voices in narrative form without interruption, before then questions being introduced; as far as possible these questions should be submitted to them beforehand to alleviate any stress on them or being 'ambushed' through cross-examination.

466 Principles 2 and 3, UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

467 Ellie Smith, Victims in the Witness Stand: Socio-Cultural and Psychological Challenges in Eliciting Victim Testimony, in K. Tibori-Szabó and M. Hirst (eds.), *Victim Participation in International Criminal Justice*, Asser (2017), 315-340, p319.

468 Ibid, p324.

469 Ibid, p332.

149. The JEP should avoid using or instrumentalising victims without their consent. In particular, victims should not be rolled out in front of the media in order to capture them having their first meeting with a perpetrator. The experience of the South African TRC was that these encounters worked best in private. The 'big' acknowledgment moment by a responsible organisation should be carefully choreographed with victims to ensure that it is with their consent and has a reparative benefit for them, and is not just about legitimising the judicial work.
150. Victim participation can help to pinpoint and correct whether or not such acknowledgments and other outcomes measures would be useful. Victims should have a choice, and be able to change this over time as far as possible. While the process can be framed as restorative, it is important to inform victims of their rights and availability of services, such as representation, counselling, protection and financial support to attend hearings. Representation should include a range of options, including in person, through a victim or community organisation designated by victims, or legal representatives. Legal aid should be provided to allow victims to avail of their legal rights. Having an internal institutional body, such as OPCV at the ICC, helps to provide general information of victims' rights and signpost them to relevant victim associations, funding for participation in person, or other bodies, such as for reparations. Providing financial support to allow victims attend, both in terms of transport and childcare, can ensure a better engagement by those who work and have family commitments, so as not to exclude the voices of those impoverished or a gender perspective.
151. Given that the JEP will have macro-cases, and that not all victims of the atrocities will be able to participate before it, it is important that through its Secretary, the JEP takes important measures to keep all other victims informed and to create spaces where they can also feel, even if less directly, that they are also part of the process. For example, by being able to see, from abroad the acknowledgment of responsibility of perpetrators, or by having a say in relation to the types of *sanciones propias* that could be imposed on the perpetrators.
152. Psychosocial support for victims is vital to support them participating directly at the JEP. This should include a support person to accompany them when testifying or sharing their views and concerns, a briefing and debriefing before doing so, allowing them to take breaks when needed, and changing the format of the chamber to be more private or comfortable (i.e. removal of gowns) when dealing with vulnerable victims, such as traumatised or children victims. It may be that victims feel more comfortable speaking to staff within their own victim association, so provision should be made to hold workshops and training for victim groups to build their capacity and therefore reach of psychological support. Ideally counsellors and psychological supports staff in victim groups should be funded by the state to allow for the professionalization of such service provision. Relatedly, it would be important to monitor the way victims experience participation and restorative justice at the JEP, by doing surveys and other assessments in a periodic manner so as to be able to correct, in a timely manner, areas that are seen by victims as problematic. Such monitoring should be cognizant of victims' expectations. As with reparations, the JEP should closely manage expectations in relation to participation to ensure that victims' understandings of their rights to participation are in line with the JEP's organizational practices.

### Strategic Principles of Participation and Reparation

153. To facilitate the monitoring of victims' experience of the JEP's restorative justice system, the JEP should establish strategic principles and benchmarks according to which processes can be designed and victims' experiences measured. These principles should be of a general nature and should include both process and output/outcome-oriented indicators. Process indicators may include, for example, principles on outreach, including when to communicate with victims at various stages of the JEP's proceedings; what types of information should be provided; when to consult with victims on various aspects of the JEP's work, including alternative sanctions. Process indicators should also include when and how to coordinate with civil society. Having such clear indicators and principles can help to give victim participation at the JEP more coherence and clarity to victims and the public on what is to be expected.
154. Output/outcome indicators should identify the general impact which the JEP hopes to achieve if such processes work as planned. These may include both objective indicators, such as a number or percentage of victims who participate at various stages, as well as subjective indicators, such as the "feeling of being repaired", victims' satisfaction, and the successful management of expectations. Such principles will facilitate the JEP's monitoring of its work and help keep it accountable to its various stakeholders, most importantly victims of the armed conflict. These principles should also enable internal coordination and planning within the organization and across its various units and offices and facilitate the public identify "One JEP" in communities.

### Outreach

155. To increase awareness of victims' rights to participation and reparation, the JEP should develop outreach strategies and mechanisms that will facilitate its communication with victims and communities at the territorial level. This will support the organizational processes through which victims can access the JEP and bolster its key pedagogical role within the *Sistema integral de Verdad, Justicia, Reparación y no Repetición*. Furthermore, providing clear and objective information about its activities and victims' rights at various stages, will also provide a valuable counterweight to external accounts that seek to politicize and/or weaken the JEP's standing. Outreach materials should be simple and accessible and provide a realistic understanding of the SIVJRR, the JEP's place within it, how the JEP works as an organization and how its various stages and processes are organized, and how victims can access it, while always taking care not to raise unrealistic expectations.
156. Outreach engagement with victims should be a 'two-way communication ... to conduct interactive activities, to listen to victims and respond to what they are saying, and to take into account victims' concerns'.<sup>470</sup> The Office of the High Commissioner for Human Rights as stated that 'national consultations are a form of vigorous and respectful dialogue whereby the consulted parties are given the space to express themselves freely, in a secure environment, with a view to

470 ICC Strategy in Relation to Victims 2009, ICC-ASP/8/45, para.22.

shaping or enhancing the design of transitional justice programmes.<sup>471</sup> As such consultations are not PR exercises and are distinct from outreach, which aim to sensitise affected communities. Once institutions are legislated for, set up and operational, outreach to affected communities is key. The United Nations Secretary General notes the importance of outreach in ensuring the impact and sustainability of transitional justice institutions so that they are clearly understood and coherently communicated.<sup>472</sup> Effective consultation also can contribute to the collective dimension of the right to truth for society and not just victims to be aware of the consequences of the conflict and the need to redress the suffering of those most affected.<sup>473</sup>

157. Inclusion of victims requires effective outreach and even identifying and locating them, as well as consideration of those who do not want to participate and the impact their non-engagement will have on other victims, society and ex-combatants. The mix of individual and collective efforts to engage and provide information to victims and other bodies such as the truth commission, alongside community service may help to bridge this gap.

### Coordination and Partnerships

158. The JEP should establish processes and principles of internal coordination as well as take full advantage of its place within the *Sistema integral de Verdad, Justicia, Reparación y no Repetición* (SIVJRR) through regular and systematic coordination with the institutions of the SIVJRR and, to a more limited extent, the institutions of the broader victims' policy in Colombia. Colombia's implementation of justice, truth and reparation processes simultaneously through different state institutions gives it a unique place in the history of transitional justice processes. The comprehensive nature of the system gives the opportunity to provide Colombians with a holistic experience of multiple dimensions of the transitional justice "toolkit". At the same time, it presents the risk of an uncoordinated and ad-hoc implementation at the territorial level. Victims should not be expected themselves to understand the various institutional identities and organizational realities of the different parts of the system, but rather should be presented with a holistic and coordinated response, to the extent possible. This will require coordination at multiple levels. For example, vertical coordination is necessary to streamline the JEP's work and communication between its base in Bogotá and staff in the territories. At the same time, *horizontal* coordination is necessary for alignment and cooperation between organizations. Both will require specific organizational mechanisms to facilitate cooperation, communication and information sharing, such as the proposed Committee of Inter-Institutional Coordination. In addition, the JEP should take full advantage of civil society to extend its reach to the territories and multiply its symbolic and operational presence. At the same time, experience with the ICC has shown that civil society can feel taken advantage-of if not duly sensitised as to their expected roles and place in a transitional system.

471 National consultations on transitional justice, Rule-of-Law Tools for Post-Conflict States, (2009), p3.

472 Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010, p10.

473 See *Youth Initiative for Human Rights v. Serbia*, (Application No. 48135/06), 25 June 2013; and *Magyar Helsinki Bizottság v Hungary*, (Application No. 18030/11, 8 November 2016.

## Reparations and community service

159. Consideration needs to be made in how community service can be conducted by ex-combatants in communities affected by the conflict, which is connected to wider development programmes, without undermining employment opportunities for victims or members of the community. Specialist tasks like demining provide employment opportunities for ex-combatants, victims and other Colombians, but in itself is not reparations unless it has reparative value to victims in acknowledging and remedying their harm. It may be a stretch to think of demining as a guarantee of non-repetition. As a form of community service, demining is risky work and may be one measure of alternative sanctions. In terms of reintegration, such demining work may not provide transferrable skills to another job once it is completed in a zone, but this should be the concern of the reintegration bodies that the JEP should coordinate with.
160. The Special Jurisdiction for Peace should not order reparation against perpetrators in the form of compensation. This point appears to be also settled by the decision of the Constitutional Court C-080/18. Reparations are a continuum, where at its minimalist end is about providing acknowledgement for moral harm by a responsible actor and its maximalist end is having a comprehensive reparation programme in place. The JEP is not a reparation programme and cannot replicate the work of the Unidad Víctimas, nor should it. The JEP can signpost victims to other avenues for reparations and truth recovery (CEV). The JEP should learn from the lessons of the ICC, EAC and ECCC that criminal courts cannot deliver large-scale reparations. Instead the JEP needs to be modest and capitalise on its unique position of bringing for perpetrators to confront their wrongdoing to victims and society, and make community service efforts to repair some of the harm. The JEP can engage with other forms of reparation, or contribute with actions that have a reparatory effect on victims and the wider society. For example, the JEP should consider how best to use satisfaction as a form of reparation in the form of apologies or other similar acts of recognition of responsibility to dignify victims. Such acts could also be seen as acts of restitution of dignity for victims. There may also be connections between alternative sanctions and reparations in perpetrators building monuments or memorial gardens for victims with their consent.
161. The *sanciones propias* equally offer an important opportunity for the JEP to consider its reparatory dimension where it is directed to victimised individuals or groups. While *stricto sensu* they are sanctions and their primary aim is to punish the perpetrators for their wrongdoing, they could still have a reparatory dimension in particular for victimised communities, by showing atonement from perpetrators, but also demonstrate how ex-combatants can contribute to repair of some of victims' harm, by for example building a school, a road or demining.

162. Sending individual letters of acknowledgement or apology from ex-combatants or in a compiled report by the JEP to each victim can provide symbolic recognition.<sup>474</sup> The JEP can contribute a very specific form of redress to victims, but this is part of a comprehensive system. Without implementation of reparations to victims through the Unidad Víctimas, victims may feel that the engagement with ex-combatants in the JEP process, while providing an opportunity for clarification of facts, apology or location of remains, may be superficial in redressing their harm and alleviate their daily consequences of the conflict and just a process to facilitate the sentence reduction and reintegration of ex-combatants.
163. The JEP could also modestly contribute more broadly to the reparation system in Colombia, by supporting perpetrators to transfer assets and ensuring that they go to the Reparation Fund to provide reparation to victims under the Victims and Land Restitution Law/Peace Agreement. At the same time, the JEP should take care not to set expectations too high in areas outside of its control and jurisdiction, understanding that unmet expectations can have a significantly detrimental effect on its broader reception in the territories. It should though make links and reach memorandums of understanding with other transitional justice organisations in how best to coordinate and complement each other on reparations and alternative sanctions.

474 Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para 33.

Reparations, Responsibility

 Victimhood in Transitional Societies

# Alternative Sanctions Before The Special Jurisdiction For Peace:

Reflections on International  
Law and Transitional Justice

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