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Victims of the Gravest Crimes

**The Role of Victims in Legal Proceedings Before
the International Criminal Court**

Master's Thesis

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I declare that I have written the enclosed Master's Thesis completely by myself.

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Prague, 16 April 2018

Eliška Mocková

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Introduction

“International Criminal Court is a dramatic and unprecedented experiment in international criminal justice.” (Nowak, 2015: v)

International Criminal Court (ICC) is one of the most visible results of the rapid development of international criminal law in the 20th and 21st century. Its very existence is to some extent miraculous, given that this Court was established to prosecute “highly placed individuals” (Gegout, 2013:800) – usually people with political or military power which serves them as *de facto* immunity from national prosecution. The ICC’s legal framework is also rather extraordinary and includes many progressive features worked upon by scholars and practitioners throughout the decades. One of those features is a special role of victims in the proceedings (Sadat and Carden, 2000:396).

While traditionally victims of the gravest crimes served as “means to an end in the prosecution’s case” they enjoy more dignified position in proceedings before the ICC (Carayon and Pena 2013:520). Though not parties to the proceedings, they may present their views and concerns as participants in the process with their own independent interests being considered by the Court. This development coincides with a recent spread of human rights. It also further petrifies position of an individual in the field of international law, the so-called legal subjectivity of an individual, which is still perceived as somewhat controversial (Mills, 2014:236).

This newly found interest in victims is not accidental. There are some important reasons for the ICC and the world of international criminal justice to care about them. Letting aside the moral claims of justice and ignoring the fact that victims have often functioned as valuable witnesses and assisted the investigators, their potential dissatisfaction may play a crucial role in the evaluation of the Court’s functioning by the relevant stakeholders as well as by the public. And such a historically controversial institution needs its legitimacy. Especially now, when some leaders are turning away from the Court (Dutton, 2017:120).

This is not an overstatement. In 2009, president of another transnational judicial organ, the ICTY, Patrick Lipton Robinson, expressed his fears of failure to address the needs of victims harmed during the conflict in the former Yugoslavia. He also stated that such a fiasco would undermine the ICTY’s efforts to contribute to peace and stability (Pena and Caraon, 2013:522). People connected with the ICC are also very well-aware of the importance of victims. Not

unintentionally it is so often invoked as the main reason of the Court's actions. For example, the Prosecutor allegedly opened investigations in Côte d'Ivoire for the sake of victims, saying that the "sole raison d'être of the ICC's activities in Côte d'Ivoire is the victims and the justice they deserve" (Kendall and Nouwen, 2013:6).

However, until now the whole Court and its "victims' mandate" (a term used to designate the whole "package" of rights attributed to the victims in the legal instruments regulating the ICC) have been fiercely criticized. A crowd of critics is mainly concerned with the results and impact on the functioning of the Court. They argue that the efforts invested, and the overall cost of the victim-related activities are not matching the results and that it reveals that the Court is not capable of taking a proper care of the victims. Some authors argue, that not only it is not in the Court's capacity to satisfy the victim's claims, but that it should not even be (Anon. 2015:7). These are often the proponents of retributive justice, as opposed to restorative justice, which is to some extent embedded within the provisions regulating the conduct of the ICC (Garbett, 2017: 198).

This thesis maps and evaluates current situation of victims involved in the proceedings before the ICC. The research question which this thesis attempts to answer is two-fold. First, it tries to establish what is the current design of the victims' mandate and secondly, how fit it is to fulfill the goals of the Court – to be the victims' court. The thesis is divided into three independent chapters. Chapter I is of introductory nature and traces the development of international criminal law in relation to victims until the establishment of the ICC. The purpose is to explain relevant context of the legal regulation analyzed in Chapter II. This part should help to understand what is historically exceptional and characteristic for the ICC. This chapter relies heavily on secondary sources, but also on the relevant legal instruments. The order is chronological and covers the events from the beginning of the 20th century.

In Chapter II, the first part of the research question is being analyzed. Relevant provisions related to victims of crimes tried by the ICC are presented here. They are explained with use of an imaginary case and, where appropriate, compared with the provisions in the legal frameworks of the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia. These two international criminal law bodies fall under the category of hybrid tribunals and are well-known for their extensive victims' rights (Acevedo, 2012:84;109). The purpose of this chapter is to provide a complex picture of the rights that victims have in order to achieve justice and satisfy their interests and needs.

The third and last chapter is concerned with an overall effectiveness of this regulation and answers the second part of the research question. The main failures and successes concerning the victims in those more than 15 years of the Court's existence are discussed here. This chapter researches all the Court's current situations by asking what benefits and detriments they brought to the victims. However, their analysis is not exhaustive, only demonstrative. Some of the problematic issues hinted in the Chapter II are discussed in detail in the second part of this chapter. It also briefly evaluates an impact of the victims' mandate on the ICC, especially on the length and cost of the proceedings. In the conclusion, some ways forward are suggested.

Where appropriate, the thesis works with primary sources, legal instruments and case law. Regarding the secondary sources, the thesis is based on English-written texts – books and peer-reviewed articles (with some exceptions being written in French). Where necessary, especially regarding very recent events, media, reports of non-governmental organizations and other non-academic sources are used. As regards the Czech scholarship on the topic of victims before the International Criminal Court, a *lacuna* exists. Therefore - with one exception - no Czech article is being used in the thesis.

1 The Position of Victims in International Criminal Proceedings prior to the Rome Statute

1.1 From Istanbul to The Hague

This chapter discusses the gradual development in the position of an individual in international criminal proceedings as well as factors which contributed to those changes. It is observed how the emphasis, initially placed on the rights of the defendants, subsequently shifted and rights of the defendants were (more or less) balanced with the rights of victims. Starting from the very beginning, the attempt to put Emperor Wilhelm after WWI on trial is discussed here, followed by the Nuremberg trials, Tokyo trials, International Criminal Tribunal for the former Yugoslavia (ICTY), and International Criminal Tribunal for Rwanda (ICTR), tracing thus in a chronological order the most important developments of international criminal justice prior to the Rome Statute.

Retrospectively, academics sometimes identify a role of individuals within international criminal law in historical writings of renowned scholars, such as Sun Tzu, St. Augustine, or Thomas Aquinas, referring for example to responsibility for war and war crimes, suffering of victims and their right to be spared of it (Gagro, 2012:105). Nevertheless, with a historical exception of the trial of Peter von Hagenbach in 1474¹ and the intended trial of Napoleon², the practice of modern international criminal trials starts with the beginning of the bloody 20th century. The historical and philosophical roots of criminal justice are therefore omitted, also due to scope of the thesis.

This part, but also other parts of the thesis attempt to go beyond the empiricism and employ a critical perspective. The purpose is to identify legal cultures that contributed to the current position of victims in international criminal law – and to identify legal cultures which were

¹ Trial of Peter von Hagenbach was the first truly international trial for the perpetration of atrocities committed during the occupation of Breisach, Holy Roman Empire. When the town was retaken, von Hagenbach, Dutch *condottier*, was charged with war crimes. He was tried before a tribunal which included judges from Switzerland, Austria, **Bohemia**, Luxembourg, Milan, the Netherlands, Switzerland, and many other members of the Holy Roman Empire. In his defence, von Hagenbach argued that he had followed orders of his superior - French head of state. This defence was, however, ignored by the judges. The court convicted him of the crime and Peter was executed in a particularly brutal way (the trial also followed some political motives as showed by Bassiouni). (Bassiouni, 2010: 299-300). This 'experiment of medieval international justice' (Schabas, 2007:1) was soon overtaken by the doctrine of State's sovereignty, which became for a long time an insurmountable obstacle to any other international trial.

² In this case, however, *realpolitik* prevailed over justice and Napoleon was only exiled to be deprived of martyr status, as Bassiouni argues. From his impunity benefited also his generals (Bassiouni, 2010:301).

silenced. Punishment of crimes, especially punishment of crimes under international law, remains primarily a Western product. Its character has been dominated by the Western tradition and keeps its retributive character rather than restorative justice, appreciated by some other legal cultures (Acevedo, 2014: 1). However, this is gradually changing. For example, the Rome Statute was characterized as “a fascinating mix of common law, civil law, and law sui generis” (Sadat and Carden, 2000:458). It is important to discover “how did we get there” to foresee the consequences.

1.1.1 The First War Crimes Trials: Leipzig and Istanbul - Victors’ Justice or Travesty of Justice?

1.1.1.1. Leipzig debacle

The first serious attempt of the international community³ to prosecute crimes under international law occurred after the end of WWI (Krzan, 2016: 232). The Treaty of Versailles from 1919 in its part VII called *Penalties* envisioned a special tribunal. This tribunal was supposed to lead the trail with William II of Hohenzollern, German ex-Emperor, for a “supreme offence against international morality and the sanctity of treaties⁴” (Treaty of Versailles, 1919: art. 227).

As revealed by contemporary scholarship, the modest number of articles in the Treaty caused a lot of confusion. There were uncertainties as to which substantive law should be applied, which rules of procedure and evidence should be chosen. Neither was it clear how to reconcile differences between continental and common-law. For example, there were disputes about the standard of proof, also whether a right not to incriminate oneself existed before the special tribunal, or whether it was legitimate to ignore the *nullum crimen sine lege* principle. (Baldwin, 1919: 75-77). Without a single hegemon, there was no clear dominant legal culture, hence no one to “impose justice on the losers” by establishing unified rules of the game.

What was quite clear, however, was the status of victims. The only victims acknowledged by the Treaty were the attacked countries. At this point, an individual could only be a wrongdoer (Baldwin, 1919: 75), otherwise held no role in international criminal proceedings. Nevertheless, the Netherlands granted the ex-Emperor asylum and refused to extradite him as

³ The concept of international community is somewhat tricky, because, historically, it is a concept of exclusion, rather than of inclusion – initially it has always designated the ‘civilized nations’.

⁴ International morality, though disputed by some, is generally considered to be a different label for international law (Baldwin, 1919:75).

this would allegedly impair their neutrality status and because “no such crime existed in Dutch law” (Gagro, 2012: 108). As a result, there has never been a trial with the ex-Emperor, neither international nor national.

The Allies, in accordance with the Treaty, asked Germany to extradite hundreds of other suspects, who were accused of ruthless warfare, killing thousands of civilians during the invasion of Belgium and France in 1914, cruelty to prisoners of war, U-boat warfare (unarmed civilians and non-combatants were drowned), and laying waste to territory during the German retreats in 1917 and 1918 (Kramer, 2006: 422).

However, there was no genuine will to prosecute the war criminals before an international tribunal. Hence, when Germany suggested to prosecute them within their own legal system, it was widely and quickly accepted. National trials were eventually held in Leipzig and became soon known as a legal debacle. Professor Bassiouni described them as “the sacrifice of justice on the altars of international and domestic politics of the Allies” (Gagro, 2012: 108).

In Leipzig, extremely mild punishments were given to a few individuals, who were moreover supported by national demonstrations in the streets and celebrated as national heroes. Prosecution in most of the cases did not collect evidence properly and even when they did, the Court acquitted the accused based on many excuses such as that the soldiers “lacked awareness of illegality” about killing civilians or that it was self-defense of the German soldiers against Belgian and French civilians (!). In other cases, the witnesses, often children, were marginalized and in one case even German soldiers were called “untrustworthy Alsatians, or allegedly deserters” when they witnessed against the German army (Kramer, 2006: 448).

1.1.1.2 Istanbul's shadow of unpunished Armenian genocide

Similarly, the Allies demanded Turkey to prosecute those responsible for “crimes against humanity and civilization” referring to the mass killing of the Armenians, as the concept of *genocide* was invented much later, in 1943⁵ (Kramer, 2006: 441). However, political goals of the Allies were prioritized over justice and their will to prosecute was not strong enough to overcome their colliding interests. British attempt to establish international trial failed in 1920 and 1921 due to obstructions of Turkish government (esp. tampering with evidence). Lack of desire to exert some pressure on Turkey by other Allies, mainly France, resulted in yet another

⁵ The term was famously created by Raphael Lemkin and described in Chapter IX of his book *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress*, (Washington, D.C.: Carnegie Endowment for International Peace, 1944)

series of perverted domestic trials (Kramer, 2006:446). These failings from Istanbul and Leipzig certainly contributed to a different conduct of justice after the WWII.⁶

1.1.2 Nuremberg, the birth of international criminal law

1.1.2.1 Nuremberg - the success story?

During World War II the Allied Governments issued several documents demonstrating their strong determination to punish criminals for atrocities committed in the course of war. In Moscow Declaration of 30 October 1943, United Kingdom, United States, and USSR claimed that those horrible crimes had serious impact on the victims (Moscow Declaration: Statement on Atrocities, 1943). It stated that German war criminals should be judged and punished in the countries where they committed those crimes (=within their legal systems). Justice for victims of the immense atrocities therefore seemed to be considered primarily a national matter of the countries where the victims lived (Moscow Declaration: Statement on Atrocities, 1943).

This passage contrasts with a single sentence about internationalized crimes: “The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies” (Moscow Declaration: Statement on Atrocities, 1943). The main goal of both ways of prosecution – national and international⁷, described in the declaration, is nevertheless the same -deterrence of other potential war crimes.⁸

An agreement referring to the Moscow Declaration principles was drafted at a summer conference 1945 in London. Annexed to this agreement was also the Charter of International

⁶ Interestingly enough, these events also contributed to its outbreak in the first place. Adolf Hitler’s interpretation of the events was remarked in his speech in 1939 when he justified his own genocidal plans with words: “*Who after all is today speaking about the destruction of the Armenians?*” (Cox, 2017:63)

⁷ It is fascinating that a third system of prosecuting crimes committed by Nazis was tested in the early- to mid-1940s. At that time, the exile governments of continental Europe began initiating large-scale war crimes prosecution efforts based on international cooperation. 16 allies had created the UN (=Allies) War Crimes Commission – a mechanism to provide legal advice to state and peer-review their national trials. This way 36,000 people and military units were indicted (out of that unbelievable 10,000 people were convicted in about 2,000 trials). The thousands of files (including a file on Hitler himself, a file about the death camps and deportation system of Jews) were however sealed and kept secret until 1980s and revealed only in 2014. The UN files were closed to everyone including its own members and federal German prosecutors until 2014 – at the US’s insistence. The commission’s work is considered to be advanced for its time, especially for its advanced polices on rape and forced prostitution and focus on mid- and low-level perpetrators. More to be found here: <https://theconversation.com/long-hidden-world-war-ii-files-offer-another-way-to-prosecute-war-crimes-83619>

⁸ “Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.” (Moscow Declaration - Statement on Atrocities, 1943).

Military Tribunal (hereinafter “IMTN” or “Nuremberg Tribunal”), the Tribunal was thereby established (London Agreement, 1945). The Charter is not too comprehensive, it only comprises 30 rather short articles. Brevity of the Charter underlines the importance of what is missing and what is present.

1.1.2.2 Right of the defendants in the spotlight

Apart from the goal, jurisdiction and its limits, countries involved in the trial, basic principles, the waiver of immunities, the irrelevance of orders by superiors in terms of guilt, and other *sine qua non*, the fourth part of the Charter contains a provision on fair trial for the defendants⁹. These are balanced by the powers of the Tribunal, listed in the following part. Nuremberg has thus firmly grounded the rights of defense in international criminal law system (Chenivesse and Piranio, 2011:406).

The emphasis on the rights of the defendants is also obvious from the opening statement of the Chief United States Prosecutor Robert Jackson: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well.” Thus, the defendants were given the right to a fair trial¹⁰ - a privilege, which was hardly provided to anyone by the Nazi Party judges and officials (Ferencz, 1999:458).

1.1.2.3 Conspiracy of Silence and other shortcomings

The Charter is prevalingly focused on substantive matters. The article 19 explicitly states that the Tribunal should not be bound by technical rules of evidence and that it shall adopt and apply quick and nontechnical procedure and admit any evidence which it considers to be of use for validation and clarifications of the facts. Hence, the Charter gives the judges a great freedom to modify the process according to their own preferences (London Agreement, 1945).

Nevertheless, this freedom was not utilized in favor of the victims. Nuremberg trials were a battle between prosecution and the defendants exclusively, there was no space for the victims left. Despite the Russian and French participation, the Anglo-American systems dominated the Tribunal, which hence followed the logic of an adversarial system. Therefore, victims’ position

⁹ See Article 16 of the Nuremberg Charter.

¹⁰ If we, however, ignore the Soviet efforts to manipulate the Court and falsely implicate the defendants with regard to the Katyn massacre, which was committed by the Soviets in 1940. As a result, the defence argued the *tu quoque* and lack of legitimacy (Moffet, 2012:251).

was limited to that of witnesses, their experiences were considered unnecessary for the conduct of the trial, and therefore were often suppressed (Acevedo, 2014: 1). All the attention was given to the perpetrators. The trials, considered perfect with regard to methodology and efficiency (Wolfgram, 2014:283), hence arguably contributed to what is known as a *conspiracy of silence*¹¹ phenomenon. Nuremberg thus failed the victims, even though it did not have to be the case (Danieli, 2006:1641).

Judges were so concentrated on the defendants that they not rarely overlooked the protection and fair treatment of victims-witnesses. For example, they often failed to avoid outrageous victim-blaming (Moffett, 2012: 255). Trying to speed up the proceedings, the judges themselves used to interrupt the victims in the middle of their testimonies, for example when the victims-witnesses were recalling the most degrading and cruel things ever done to them, thus suppressing their perspective, autonomy, and playing down their suffering¹² (Moffett, 2012:256).

1.1.2.4 The Jewish victims

The overall number of witnesses was extremely low, even lower was the number of victims among them. Only thirty-three prosecution witnesses appeared before the Tribunal, and from them just fourteen were victims. Yet, the most striking (though explainable by the historical-social context of the Tribunal) was the lack of presence and influence of the Jews¹³. Thirty of the witnesses testified on crimes against Jews, but only three of them were Jews themselves.

All of the Jewish witnesses must have testified in the official languages of the Allied powers, there was no option for them to testify in Yiddish (Jockusch, 2012:108). On the other hand, defendants were given the right to use their mother tongue. The Institute for Jewish Affairs

¹¹ Some authors (for example Danieli) work with a concept called *conspiracy of silence* to describe the lack of public debate on the suffering of the victims after WWII. This was broken much later and contributed to self-blame of the victims, denial and blaming of victims by public, lack of understanding of their suffering from the others. All of that hindered their healing, impacting their mental health, and reintegration (Moffet, 2012:258).

¹² This is one of the very outrages moments, when the presiding judge interrupted the victim, Dr. Alfred Balachowsky, to announce the prosecutor that the witness only talks about the same 'sort of brutalities' he has already heard about.

The President: "[To the witness] Just a minute, please. M. Dubost, you said you were going to call this witness upon experiments. He is now giving us all the details of camp life which we have already heard on several occasions."

M. Dubost [French prosecutor]: "So far nobody has spoken about the Dora Camp, Mr. President."

The President: "Yes, but every camp we have heard of has got the same sort of brutalities, hasn't it, according to the witnesses who have been called?..."

¹³ But there were other groups targeted by Nazis and completely missing before the Tribunal, such as Jehovah witnesses, those with disabilities or mental-illness, Freemasons, Roma, and homosexuals (Moffet, 2012:255).

wanted to participate in the trial as *amicus curiae* (friend of the court) but was rejected on the grounds that other victims and groups might want to participate as well, which could cause the trial to be unworkable and unfair (Moffet, 2012:252).

Nevertheless, there are some scholars who argue that there was a strong behind-the-scenes Jewish presence. As an example, they mention the American prosecution team. Allegedly, Justice Jackson was happy to have Jewish lawyers on his team - as long as they did not present the Jewish case (e.g. Jockusch, 2012:119). Nevertheless, we may legitimately ask whether this fact really opposes the argument above - or rather petrifies it.

1.1.2.5 Degraded survivors

Danieli in his article mentions a widely accepted argument as to why the victims were so belittled. It is believed that the nature of evidence decisive for the Nuremberg trials strongly influenced the position of victims before the Tribunal. Since the Prosecution, especially Robert Jackson, heavily relied on the documentary evidence to secure impartiality and fairness, using the perversely detailed inventory of Nazi crimes, the role of witnesses/victims was secondary (Danieli, 2006:1641). The major trials were conducted often without any witnesses - victims or not - testimonies (Danieli, 2006:1642). And where they were asked to testify, it was rationally calculated to increase drama and further the impact of the Tribunal rather than to address their suffering (Moffett: 2012:255).

As Benjamin B. Ferencz, the United States investigator and Chief Prosecutor recalls, the Jewish victims, the Holocaust survivors, were too busy trying to stay alive and recover at the time of the Nuremberg trials. They were searching for other survivors, grieving their losses, looking for places to stay out of the Displaced Persons camps, and for so needed food, with nothing, but the ominous tattoos and deep traumas. Nuremberg trials were taking place in a different world, somewhat far-away from the brutal world of Holocaust survivors, and were followed mainly by German audience (Danieli, 2006:1642). For all of that, it was the voices of perpetrators, what was heard in the courtroom, not the victims¹⁴.

¹⁴ Ferencz himself therefore after the Nuremberg trials (where he at the age of 27 famously convicted 22 coldblooded murderers of the monstrous SS Einsatzgruppen), helped two great initiatives in favour of the victims. First of them was the Jewish Restitution Successor Organization, which helped to redistribute the confiscated Jewish property to the Jewish survivors. Secondly, he also helped to negotiate compensation from Germany and monitored its compliance (Ferencz, 1999: 461).

Israel Gutman, a Polish-born Israeli survivor and historian of the Holocaust said in an interview that the trials were exclusively about the military, concentration camps, and war. There was nothing about Jews and Jewish suffering, no one dealt with racism. He felt like it was an unrelated matter, like the crimes committed on Jews were not even prosecuted in the Tribunal. At that time, he sensed that it was all about Superpowers dealing with the war. He also thinks that should he had tried to enter “[...] they would not even let me in.” (Ferstman et al, 2009:68).

These impressions are supported by findings of scholars. As Moffett stresses, it was not even clear from the official documents, who was the victim before the tribunal (Moffett, 2012:249). We are therefore left to deduce that it was everyone subjected to crimes against peace, war crimes, and crimes against humanity – those crimes which were prosecuted before the Tribunal. Due to the US influence¹⁵, the emphasis was primarily on crimes against peace, while war crimes and crimes against humanity were considered mere “symptoms” of crimes against peace.

Victims of crimes against peace are typically countries, rather than individuals, which led to further marginalization of individual victims (Moffet, 2012:250). Accordingly, crimes against peace were defined by the Nuremberg’s Charter as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing” (Nuremberg Charter, 1945: Article 6 (a)).

In contrast, war crimes have been defined as “violations of the laws or customs of war, such as murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity” - the list is not exhaustive (Nuremberg Charter, 1945: Article 6 (b)).

In addition, crimes against humanity were defined by the Charter as “murder, extermination, enslavement, deportation, and other inhumane acts against civilian population”, or “persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal”, regardless of domestic laws and taking into account superior responsibility (Nuremberg Charter, 1945: Article 6 (c)). Crimes against

¹⁵ This influence also led to the conduct of trial in accordance with common law proceedings rather than continental, for example French where the victim has traditionally stronger position (Moffet, 2012:249).

humanity are the acknowledgement of individual suffering and a great advance of international law. Nevertheless, by the language of the Charter, they were considered only a supplement to those other crimes that were prosecuted.

Moreover, crimes against humanity were then dependent on the duration of war and must have been committed during or before war (=immediately before). Conceived that way they ensured yet another loophole in the prosecution and another groups of victims, to whom Nuremberg did no justice – the crimes against Germans, especially German Jews, under the Nazis before the outbreak of the war. This subsidiary nature of crimes against humanity became characteristic for the whole Trial (Moffet, 2012: 251).

1.1.2.6 The unpunished crimes and lack of reparations

Another shortcoming with regard to the victims was the apparent lack of will to prosecute the crimes committed by the Allies themselves (a famous example is the Katyn massacre). This had also a serious impact on possible prosecution of crimes, which were committed by the Allies and Germans alike - sexual violence. Rape never appeared on the indictment, victims of sexual violence were not recognized by the Charter. Especially the brutal Soviet mass rape in Germany was never addressed by the Tribunal. Lack of female staff and even lack of female witnesses (only two of all) contributed to the omission (Moffet, 2012: 252).

The very last thing to consider in relation to Nuremberg Trials were reparations. While under Article 28 of the Charter victims were entitled to reparations (restitution for stolen property), the Tribunal gave no mention to this issue. The restored property was later given to the Allied Control Council, which was entrusted with the conduct of reparations, rather than to individual victims (Buxbaum, 2005:350). Nevertheless, it is often opposed that even if the reparations were mentioned/granted, it would be largely symbolic. Otherwise the Tribunal would be overwhelmed and rendered dysfunctional as it would be hardly possible to provide reparations to the millions of victims, argument fairly acceptable.

1.2 Tokyo, the Far East Nuremberg?

International Military Tribunal for the Far East (or the “Tokyo tribunal”) was established a few months later. Its institutional design was based on the Nuremberg tribunal, and it was almost identical. Even the employees were comparable, the very same applies for its modus operandi. This is, why the Tokyo tribunal is often overlooked by scholars (Kaufman, 2010:754). But

there were also some significant differences – Nuremberg was established and run by the victors, while in Tokyo participated eleven nations, which were the victims of Japanese aggression (Moffet, 2012:261). At least from this point of view this trial had the potential not to amount to victor’s justice.

1.2.1 The unbearable lightness of the selectivity of international justice – and other issues

Like Nuremberg, also Tokyo largely failed with regard to individual victims. For example, the Potsdam Declaration which heralded the conduct of justice for the crimes committed by Japan, only referred to the treatment of Allied prisoners as victims (Potsdam Declaration, 1945) - largely ignoring the whole continent of Asia. There was no reference to the victims in the Charter of the Tribunal - but the whole Section III was devoted to provisions on fair trial for the accused (London Agreement-IMTFE Charter, 1946: Section III).

102 witnesses testified for the prosecution, out of them twenty-seven victim-witnesses. Twenty-three¹⁶ of the victims were Australian, British, American, and Canadian prisoners of war. Only three were Asians and two women (an American and an Australian). The small number of witnesses was again partly caused by the overconcentration on crime against peace (on which only a small number of well-informed people could testify), which gained primacy over crimes against humanity and war crimes. Another reason was a problem in translating proceedings into Japanese and Japanese into English as well as with other languages (Moffet, 2012:266).

The conduct of trials was highly selective, which is to some extent inherent to international criminal justice. In this case individual incidents were often chosen as “representatives” of other crimes, or some crimes of similar nature were prosecuted while others were not (example would be the Bataan Death March, whose victim was -interestingly enough- among the judges, while other death marches were disregarded) - which later proved to be fatal for the whole region as demonstrated below (Moffet, 2012:263).

As a result, millions of Asian victims were overlooked at the Tokyo tribunal. Though the judgement to some extent covered Chinese victims, American, British, French, Dutch and colonial victims, such as the Filipino victims, most Asian victims were ignored. Even the countries which participated in the Tribunal omitted certain groups in their own countries (e.g. Chinese communist victims were overlooked by the Chinese nationalist prosecutor). Japanese

¹⁶ Moffet incorrectly states that twenty-four (Moffet 2012:265).

colonies of Korea and Taiwan even though subjected to some of the worst crimes were excluded as it was allegedly “too difficult to distinguish” who there was a victim and who the criminal (Moffet, 2012:263).

1.2.2 Sexual crimes and its victims

The selectivity issue also appeared in the range of crimes which were prosecuted versus those which were omitted, of those an example would be sexual crimes. Rape was not enumerated as a crime against humanity which were defined in the same way as in the Nuremberg Charter. Hence, crimes against humanity were “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal”. Again, the domestic law was irrelevant to the issue of guilt and innocence and superior responsibility was embedded within the definition (London agreement, IMTFE-Charter, 1946: Article 5 (c)).

In addition, no rape victim was called to testify. But - unlike in Nuremberg - it was explicitly included as a crime in the indictments. This was possible due to the very broad definition of war crimes which were defined as violations of the laws and customs of war (IMTFE-Charter, 1946: Article 5 (b)). Hence, rape of prisoners of war and rape of medical personnel were listed in the indictments (in its Annex) as war crimes (IMTFE-Indictment, 1946: pp 7, 46, 47, 49). Charges were brought against the defendants for the war crimes committed during the Nanking invasion, notoriously known as the Rape of Nanking (Judgement IMTFE: pp. 49,604). Hence, rape was acknowledged as a crime under international law for the first time within the system of international criminal justice, though it did not “make it” into the judgement.

Not even this was the case of massive sexual slavery, one of the worst gendered crimes ever committed. Japan created a notoriously known system of military controlled brothels (who were privately run/financed) to prevent espionage and sexually transmitted diseases to spread among soldiers. Very young girls and women, often prisoners of war, were deprived of freedom behind the barbed wire and subjected to repeated rape and violence to satisfy the Japanese soldiers. The institutionalization of military brothels was an integral part of the Japanese war plan to dominate the region and it is extremely difficult to ascertain why these crimes were not prosecuted at the Tokyo trial (Henry, 2012:369).

Henry argues that one of the reasons was the exclusive focus on defendants as opposed to victims. But she offers other explanations – such as the overconcentration on crimes committed against the victor nations. Another of the factors might be the construction of a victim hierarchy, another of the serious mistakes sometimes appearing in international justice. It is based either on national identity, race, class or gender and contributes to marginalization of certain groups of victims, typically women. Important reason for that was also the effort of the victorious nations to avoid scrutiny of their own complicity. It is for instance well established that US soldiers visited those brothels for almost a year, until General MacArthur ordered to close them down in 1946 (Henry, 213:368).

Especially in recent decades, Japan experienced waves of nationalism and denialism of those crimes, especially sexual crimes. This includes Japan's political establishment, too. Legal silence of the Tokyo Tribunal, the failure to acknowledge suffering of the "comfort women", fuels this denial¹⁷. It also causes a new wave of suffering for the survivors and prevents them from obtaining compensation. Moreover, their number is dramatically decreasing since it is already more than seven decades ago (Henry, 2013:370).

1.2.3 The Implications of Tokyo

The Tokyo Tribunal's record is thus far from satisfactory with regard to the victims. The issue of comfort women damages and will continue to damage its international relationships with countries in the region – with China and especially South Korea, but also North Korea, Thailand, Vietnam, Malaysia, Taiwan, Indonesia, East Timor and other countries. This Tokyo Tribunal's legacy shows how important is to be selective in a careful, just and objective way.

The injustice left after the Tokyo Tribunals also led to an establishment of the 2000 Women's International War Crimes Tribunal. The Women's Tribunal was organized by women's NGOs throughout Asia. The Tribunal declared the proceedings of the Tokyo Trial incomplete because it had failed to adequately consider sexual crimes (Henry, 2013: 373). Testimonies of the suffering and pain endured by the comfort women were heard by the Women's Tribunal. Criminal liability of leading military figures, political officials and the Japanese state was

¹⁷ One of the factors which further strengthens denial is the dissenting opinion of Justice Pal, Indian radical nationalist, who questioned legitimacy of the trial and infamously questioned the scale of rape by Japanese forces, trying to marginalize the issue. In relation to Nanking, where demonstrably tens of thousands of women were raped, Pal referred to it as the 'incident', and placed the word rape in quotation marks thereby questioning (later even directly) the reliability of witnesses and victims of sexual violence (Moffet, 2012: 263).

established. Unfortunately, Japan is still deaf to those voices calling for justice, refuses to accept responsibility and provide reparations.

1.3 ICTY – Winds of Change

Antonio Cassese, the first President of the International Tribunal for the former Yugoslavia (ICTY)¹⁸, on the occasion of a lecture delivered to the British Institute of Human Rights, emphasized the difference between the ICTY and the Nuremberg and Tokyo Tribunals with respect to the victims:

[I]t can be truly said of the Tribunal that it was essentially set up for the victims of crimes, i.e. the individual rape or torture victim or the relative of a murder victim, whereas the Nuremberg Tribunal was created primarily to try Axis war criminals for the crimes committed against the Allied Nations and their nationals. To protect victims is the very “raison d’être” of the ICTY, which was established to halt and redress the crimes being committed against defenceless persons. (Spiga, 2012: 1378).

The Security Council Resolution 827¹⁹ in May 1993 established an international tribunal precisely because of the continuing flagrant violations of international humanitarian law in the territory of the former Yugoslavia, including mass killings, massive, organized and systematic detention and rape of women, and ethnic cleansing. This situation was considered a threat to international peace and security and the UNSC therefore established the Court acting under Chapter VII (UNSC Res. 827, 1993). In this sense, the reason to establish the Court indeed was the suffering of individual victims in the territory of former Yugoslavia.²⁰

¹⁸ Full designation: The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council resolution 827 of 25 May 1993.

¹⁹ Reaffirming the decision to in the Resolution 764 from July 1992, that persons who committed violations of international humanitarian law and the Geneva Conventions would be held responsible.

²⁰ Nevertheless, there are interesting academic debates about the strategies of choosing international justice as an appropriate response toward situations threatening peace and security. One of them is the Realpolitik claim that international justice is often chosen as a fig leaf – a symbolic gesture to cover the unwillingness to undertake effective collective action, such as authorized military intervention which is considered too costly and politically risky (Fehl, 2014:9). Some of those debates are also relevant in this political context but are far beyond the scope of the thesis.

1.3.1 The Statute and Rules of Procedure and Evidence

Compared to the WWII tribunals, the ICTY Statute (also adopted by a resolution, namely the Resolution n. 827) includes many changes. For example, the Article 21 devoted to the rights of the accused is followed by a provision on protection of victims and witnesses. Also, protection measures are mentioned here (ICTY Statute, 1993: Article 22). The authorizing provision in Article 15²¹ specifically stresses that rules governing the protection of victims and witnesses should be adopted by the Court (ICTY Statute, 1993: Article 15). The effort to reach a balance between the parties appears in the Article 20 which states that the trial should respect the rights of the accused and regard the protection of victims and witnesses (ICTY Statute, 1993: Article 20).

In the Rules of Procedure and Evidence²² the victim is defined by the Rule 2 as a “person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed” (ICTY-RPE, 2015: Rule 2). Rule 3 then establishes English and French as the working languages of the Tribunal. As previously, an accused is granted the right to use his or her own language. But this time also others, including victims, appearing before the Tribunal without sufficient knowledge of English or French may have used their native language (ICTY-RPE, 2015: Rule 3).

1.3.2 Victims and Witnesses Section and Protective Measures

Nowadays, it seems common that to facilitate effective intervention of victims and witnesses, international and criminal courts have special sections, which are primarily responsible for assisting victims and witnesses when they testify. Also, the ICTY had its Victims and Witnesses Section (VWS), established by Rule 34. The VWS was working under the authority of the Registrar and its main goals, listed in the rules, were to recommend protective measures and to provide victims and witnesses with advising and support, especially in cases of rape and sexual assault. (ICTY-RPE, 2015: Rule 34).

The VWS had three units. The protective measures were the responsibility of the Protection Unit. The VWS had also Operational Unit which focused on logistics (arrangement of

²¹The Statute allowed the judges themselves to create and adopt the Rules of Procedures and Evidence of the Tribunal, pursuant to the Article 15 of the Statute (a power that the current International Criminal Court may envy).

²² If not stated otherwise, we are discussing the final version of the Rules of Procedure and Evidence, tracing thus the latest developments – it is not within the scope of this work to trace all the developments since the beginning of the work of the Tribunal.

formalities, collaboration with border police or reimbursement of wages) and Support Unit which provided social and psychological counselling, be it help in The Hague or anticipatory assistance, such as preparation of information brochures²³ or support on the way, since travelling often showed to be psychologically difficult for the victims and witnesses (Rohne, 2003:6).

Regarding the protection of victims and witnesses, the Prosecutor had been authorized to ask the states in case of emergency to intervene and prevent their injury or intimidation (ICTY-RPE: 2015: Rule 40). The Rule 40 bis enabled the Tribunal to detain the suspect in case the victims are endangered (ICTY-RPE: 2015: Rule 40 bis). The Rule 69 stipulates that the Trial Chamber may order “the non-disclosure of the identity of a victim or witness who may be in danger or at risk”. The measure may have been applied until the person was brought under the protection of the Tribunal. But, to secure fair trial for the accused, it was complemented by the provision that the identity of the victim or witness must be disclosed timely to allow enough of time for preparation of the defense (ICTY-RPE: 2015: Rule 69).

Rule 75 envisaged further measures that could be ordered to protect victims’ identities. A Judge or a Chamber may have ordered precautions with regard to the privacy and protection of victims and witnesses, again, consistent with the protection of rights of the accused. This could be done *proprio motu*, at the request of a party, or at the request of the victims or witnesses themselves, and potentially also of the VWS. Examples of these measures are giving of testimony through image -or voice- altering devices or closed-circuit television or assignment of a pseudonym (ICTY-RPE: 2015: Rule 75). The RPE does not have any provision on post-trial protection, nevertheless, VWS has provided some measures, including relocation (ICTY Manual on Developed Practices, 2009:8).

As regards the application of these provisions, the ICTY’s VWS was generally very active in assisting the victims and witnesses (Wald, 2014: 219)), despite the fact that it was understaffed and underfinanced. Its employees engaged in counselling, made travel arrangements for those coming to The Hague and supervised their visits. They “did their best” to ensure witnesses’ health, safety, and security (Wald, 2014:221). The judges were also not unwilling to use the provisions about protection of victims and witnesses. In the first case (Tadić) certain witnesses

²³ Specifically, the ICTY Victims and Witnesses Section and ICTR Victims and Witnesses Support Unit must have made sure that the witness had been informed before giving evidence that his or her testimony and identity may be disclosed at a later date in another case (RPE, 2015: 75 (C)). Witnesses are hence in advance informed of potential negative outcomes and the risk of surprising victims via unexpected changes or a secondary victimization can be reduced (Acevedo, 2012: 192).

who were also victims and concerned about their security, were granted a leave to remain anonymous. This invoked a strong dissent by one of the judges and furious criticism by the American Bar Association, hence it was not repeated by the Court (Wald, 2014:223).

The measures imposed included redaction of information. Throughout the proceedings and even in the final judgments, protected witnesses were known by pseudonyms (e.g. Witness A). Also, important parts of the proceedings were not public. Only colored cubes were visible on the screen in place of witnesses' faces (see the picture below), the uniform drone of distorted voices replaced the witnesses' own voice. It was criticized that the overwhelming use of these measures by the judges eventually disrupted the Statute's guarantee of a public trial and impaired also the right to fair trial (Wald, 2014: 223).



An example of the protective measures granted by the ICTY: Witness O testified with his name and identity withheld from the public. A 17-year old boy who truly miraculously survived genocide testified on 13 April 2000 in the case against Radislav Krstić.

(Source: UN-ICTY website, available at: <http://www.icty.org/specials/srebrenica20/?q=srebrenica20/>)

1.3.3 Victim as a Witness – an instrumental approach

As outlined above, the victims before the ICTY did not have a special status. Though they were formally separated in the ICTY's legal instruments (which talk about "victims and witnesses"—they only acted as witnesses in the proceedings. Interestingly, most of the witnesses were, in fact, victims-witnesses (Wald, 2014:221). With regard to the testimonies, RPE states that a "Chamber shall control the manner of questioning to prevent any harassment or intimidation [...]“ (ICTY-RPE: 2015: Rule 75), which is a welcome improvement since the WWII Tribunals where the judges themselves contributed to the secondary victimization as outlined above.

Other important instruments which enable victims to participate are submission of *amicus curiae* briefs in the trial proceeding and victims' impact statements for sentencing purposes. *Amicus curiae* submissions provide a way for victims to express their views and concerns. The Rule, common also to the ICTR, stated that "Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to

appear before it and make submissions on an issue specified by the Chamber” (ICTY-RPE, 2015: Rule 74).

Amicus curiae briefs have been, for example, utilized by women’s organizations to support sexual violence victims before the ICTR²⁴. Also before the ICTY, namely in Tadić, several individuals and organizations (including the International Women’s Human Rights Law Clinic of the City University New York Law School, the Women Refugees Project of the Harvard Immigration and Refugee Programme and the Centre for Constitutional Rights) filed an *amicus curiae* brief, asking the Trial Chamber to balance requirements for protective measures against the accused’s right to a fair trial, which was found admissible (Acevedo, 2012:425).

The ICTY - as well as the ICTR - have admitted victim impact statement filed by the Prosecutor. The impact statements by the victims were not allowed²⁵. The submission of those statements to the Chamber was not originally provided for in the Statutes or the RPE of those tribunals. Their legal basis has been added as the ICTY RPE and the ICTR RPE rule 92 bis (RPE, 2015: Rule 92 bis). The purpose was to influence the process of sentencing. These statements portray the victims’ suffering and harm endured by them, especially stressing the defenceless of the victim, vulnerability of the victims (e.g. due to age) or heinous methods (Acevedo, 2012:505). Therefore, it was identified as an aggravating factor in Krstić by the ICTY (ICTY, 2001, paras 701, 703- Krstić).

Nevertheless, the judges themselves often interrupted the victims’ when their narratives become irrelevant for the goal of determining someone’s guilt. At best, this approach may not do any harm. It also reveals the utilitarian and retributive approach toward the testimonies - as compared to a potential therapeutic or restorative approach, should the victims be allowed to communicate freely their experiences (Acevedo, 2012: 133). As the ICTY’s former President, Judge Jorda confirmed, the ICTY cannot “hear the tens of thousands of victims”, only those considered “useful” were invited to testify (del Ponte, 2000).

In addition, about 11 % of the witnesses²⁶ who were called to The Hague, did not testify at all, mainly due to procedural reasons – for example when the circumstance in question has been clarified in the meantime – or due to time constraints when the Court attempted to shorten the

²⁴ For instance, the Coalition for Women’s Human Rights in Conflict Situations, applied to file *amicus curiae* briefs in Akayesu and Ntagerura et al.- though with very different results. (More about that in: Acevedo, 2012:423).

²⁵ E.g. ICTR (1996) Akayesu ICTR-96-4-T, Sentencing Judgment, Trial Chamber, 2 October 1996.

²⁶ It is not known how many of those 11 % were also victims.

lengthy proceedings. After the decision to testify was taken, the subsequent frustration was hard to handle for the VWS, especially in case of those who were simultaneously victims and hoped that the testimony would help to bring closure to their victimization (Rohne, 2003:5).

1.3.4. The overall position of victims before the ICTY and the right to a fair trial

Despite certain developments, the logic of the Tribunal has remained predominantly adversarial (Acevedo, 2012:84)²⁷. This adversarial model is largely attributed to the influence of common law background draftsmen on the establishment of the ICTY (Acevedo, 2012:84). For instance, according to the original RPE the Trial Chamber Judges would approach each case as a *tabula rasa* - as the common law fact-finders (Acevedo, 2012:85). Another example is the ICTY rules on disclosure which were influenced by the US Federal Rules of Criminal Procedure (Acevedo, 2012: 86). In this regard, Cassese also highlighted the role of the limited precedent of the Nuremberg and Tokyo and the need for “us, as judges, to remain as impartial as possible” which also contributed to the adversarial nature of the system (Fairlie, 2004:245).

Consequently, the Prosecutor has been authorized to represent the interests of the victims; they are not an independent party. Moreover, the Tribunal in the case of Kupreskic et al. found that once a witness has taken the oath, he or she becomes a *witness of truth* not a witness for either party (ICTY, 1998, cons. 3 - Kupreskic et al.). This means that they cannot testify for themselves – from their perspective - and remain to be a tool of prosecution or defence. Nevertheless, number of measures favoring victims were added gradually as a result of the power of the judges to adjust the RPE. Purely adversarial model was hence transformed into a *sui generis* model (Acevedo, 2012:89).

In addition, the Tribunal found in its case law that restoration, social defence and rehabilitation in sentencing have not yet achieved the same importance as retribution and deterrence in the history of the Tribunal, though they are crucial for fulfilling its goals (ICTY, 2004, para 1092 - Brđanin). On the other hand, the significance of deterrence as the Tribunal’s main goal was regularly emphasized (e.g. ICTY, 1996, para 64 - Erdemović). Somewhat confusingly, the Tribunal retained the logic of retributive justice while expressing the need for restorative mechanisms in international criminal law.

²⁷ Adversarial system is a system based on opposing parties with a neutral judge, where victims have not much room for action, their status is predominantly limited to that of witnesses (Acevedo, 2014:1)

Given the strengthening of the victims and witnesses position, the process was eventually challenged also regarding the rights of the defendants, being thus criticized from both sides. Nevertheless, in 2000 the European Court of Human Rights in its decision on admissibility in case of Mladen Naletilic against Croatia found that the Statute and RPE provide the accused with all necessary due process guarantees. These included also guarantees of impartiality and independence (ECHR, 2000: para. 1 b – Naletilic v Croatia).

Nevertheless, some critical voices remained regarding the right to a fair trial. The ICTY Appeals Chamber has for example decided that the principle of cross-examination was reserved for the subject matter of the evidence-in-chief and matters affecting the credibility of the witness, and therefore was not absolute. In other words, when the conviction is not decisively based on the testimony of a witness not examined by the accused, cross-examination is not necessary. The purpose was to prevent secondary victimization by aggressive cross-examination (Acevedo, 2012:132). In addition, an option of written testimonies “where the interests of justice allow” was instituted and gained much criticism from common-law lawyers, too (Acevedo, 2012: 128). Such testimony could not be admitted for proving the individual responsibility of the accused (ICTY-RPE, Rule 92 bis (a)).

The problematic relationship between the rights of the accused and the protection of victims as witnesses was deliberated by the ICTY in several cases (e.g. ICTY, 2007 para 9 ff - Haradinaj). It was found that where the accused opposes the admission of evidence due to alleged breach of his right to a fair trial, a Trial Chamber must always individually consider how to maintain the appropriate balance between the need to ensure the rights of the accused. Its decision to admit such evidence must evaluate the situation in a complex way (ICTY, 2009 para 25- Prlić et al.). Hence, it is not purely a matter of individual decisions, but the overall conduct of the trial must be balanced/fair.

The victims’ mandate does not only complicate functioning of the judicial bodies regarding the material capacities and the rights of the accused. Occasionally, the international criminal courts find themselves in a controversial position, when the accused is a victim – or a potential victim - as well as a perpetrator. If not managed well, such situation may easily put its legitimacy at risk and increase the symbolic distance between Tribunals and public. Such as was the infamous case of Erdemović before the ICTY (Knoops, 2008:50).

Mr. Erdemović claimed duress as a defence to the accusations of war crimes and crimes against humanity (Erdemović, 1996, para. 10). This was *a priori* refused by the Tribunal as not

embedded in the international customary law (with the exception of the judge's Cassese minority dissenting opinion where he argued that duress is eligible but must be strictly tested in every case before the Tribunal). In addition, there was also a controversy about whether Erdemović's confession to the crimes committed under duress might have been treated as a guilty plea without other deliberations. As a result of the latter dispute, the RPE have been amended and certain qualifying conditions added (ICTY-RPE, 2002: 62 bis).

1.4 The ICTY's 'sister tribunal' - ICTR

In 1994, the UN Security Council passed Resolution 955, establishing so the *ad hoc* International Criminal Tribunal for Rwanda²⁸ (ICTR) in order to deliver justice to the Rwandans after one of the most horrifying genocides in recorded history took place (Appelbaum, 2008:1). This Resolution also contained the Statute of the Tribunal (as was the case with the ICTY Statute). Even the ICTY Rules of Procedure and Evidence were initially copied by the ICTR judges (Acevedo, 2012: 84). Though having a similar legal framework to the ICTY, the different situation, personnel and cultural context of the ICTR resulted in certain diversions in their developments²⁹. Those concerning the victims are mentioned here.

1.4.1 The Statute and the Rules of Procedure and Evidence

In a parallel to the authorizing article 15 in the ICTY Statute, ICTR's Statute in its Article 14 authorized the Tribunal to adopt the Rules of Procedure and Evidence (RPE) according to its needs with an emphasis on the protection of victims and witnesses (ICTR Statute, 1994: Art.14). The RPE includes a definition of victims which – as in case of the ICTY - is limited to the "direct victims" excluding so the dependents and relatives of the victims (ICTR-RPE, 2015: 2 (A)).

The changes which evolved gradually, include for example minor differences in the Rule n. 34 of the RPE, establishing the Victims and Witnesses Support Unit. Compared to the same rule in the ICTY RPE, an emphasis is given not only to the short-term protection of persons who

²⁸ Full designation: The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council resolution 955 of 8 November 1994.

²⁹ Though many of the developments were more or less mirrored by the other court. As a result, ICTR also incorporated some inquisitorial elements to its adversarial framework and became of "mixed nature" (Acevedo, 2012: 89).

testified before the Tribunal including the victims, but also to their long-term protection of life, property and their family (ICTR-RPE, 2015: 34). In addition, a specific focus is on ‘gender sensitive’ protective and support measures – a feature that became a hallmark of the Tribunal.

1.4.2 *Victim as a witness*

Before the ICTR, “victims and witnesses” mean basically “witnesses”, since this is the only substantial role that they can play in the Tribunal(s)’ proceedings (Acevedo, 2012: 125). They were the instruments of prosecution and were not allowed to ‘take a part’ but became *witnesses of justice*. They could be summoned at the request of the judges to complete the evidence – but could not access the evidence already presented during the trial by the parties (Acevedo, 2012: 125). They had no right to the presence of a lawyer when giving evidence and could only speak in the context of the examination.

Witnesses also could not demand to be kept informed of the proceedings and were not allowed to be present in the court during other witnesses’ testimonies. To testify, they were obliged to take a solemn declaration ‘I solemnly declare that I will speak the truth, the whole truth and nothing but the truth’ (ICTR-RPE, 2012: 90 (a))³⁰.

According to the ICTR RPE, potential witnesses and victims might be granted protective measures in the pre-trial and trial phases. For example, under rule 69 of the ICTY RPE, the identity of witnesses from the defence may be withheld until the person is brought under the protection of the Tribunal³¹. However, full consideration needs to be given to the rights of the accused (ICTR Statute, 1994: 19 (1)). ICTR case law has stated that proper consideration must be given to all the aspects of the individual case in view of the accused’s rights. Necessary is a holistic view to secure the right to a fair trial – the disadvantages must be balanced (ICTR, 2001, para 68 - Musema).

The ICTR’s and ICTY’s case law identified some issues concerning the accused’s right to a fair and public trial and witnesses-victims’ interests. The potential complications for the

³⁰ Children, if sufficiently mature to be able to report the facts, were allowed to testify without the declaration. The ICTY RPE as well as the ICTR RPE state that a judgment cannot be based on a child’s unsworn testimony - an exception to the general rule that corroboration is not required (Acevedo, 2012:127)

³¹ No anonymous witnesses were permitted, but the ICTR on some occasions authorized the disclosure of the witnesses’ identities only after the beginning of the trial. The witness’ identity was revealed within allegedly sufficient time prior to the witness giving evidence to permit the accused to prepare defence. For example, in Bagosora the ICTR Chamber allowed the Prosecutor not to disclose the identities of the witnesses until 35 days before the witness was called to give evidence. Nevertheless, these measures are questioned as they jeopardize the defendant’s right to a fair trial by significantly reducing the amount of time the defence has to prepare its case (Acevedo, 2012: 250)

victims' rights and security rest in the principles of publicity and orality. The rule 78 of the ICTR RPE (as well as the ICTY RPE) establishes that "all proceedings before a Trial Chamber, other than deliberations of the Chamber" are to be public. Moreover, there was a strong preference of the judges for the victims and witnesses to testify orally. They were pressured to appear in person, only age and bad health were considered as sufficient reasons not to come to the Tribunals (Acevedo, 2012:190).

Gradually, video-link testimonies were used - much more often at the ICTR than at the ICTY. They were disputed by the accused as breaching his right to confront the witnesses and deliberated by the Appeals Chamber in Zigiranyirazo case. The Appeal Chamber considered three questions - whether presence means exclusively physical presence in court. If so, whether the right to be physically present in court is inviolable. Thirdly, if the right may be limited in certain situations. It was hence concluded that the right is not absolute (ICTY, 2006: para 8 - Zigiranyirazo).³²

Regarding the testimonies, there were some interesting observations made, confirming the cultural embeddedness of international justice in Western logic. During the Muhimana trial, J. Appelbaum noticed that in many cases emotional upset stemmed from a witness's (or victim's) inability to answer seemingly basic inquiries – about what was the time of certain event and how far the person or village or an object was... (Appelbaum, 2008:3). These questions were dwelled upon by the lawyers which brought frustration to the Rwandan witnesses.

Witnesses stressed the different perception of time and distance in Rwanda. Many of them were illiterate and not aware of calendars, hence could not say a specific date. (Appelbaum, 2008:7). Most of them "could not afford watches" and "never travelled anywhere outside of the village" and were therefore unable to answer inquiries about exact time of the events or distances between the villages in the densely populated Rwanda. Still, they were often answering the questions about time quite precisely - in terms of daily routine (such as 'before breakfast') or a position of sun. Unable to quantify distances, they sometimes offered to show the place instead of using some abstract measurements, which, of course, did not satisfy the interviewers and increased mutual frustration (Appelbaum, 2008: 7).

³² Nevertheless, the principle of proportionality to restrict accused's rights must always be taken into consideration and in this specific case the Trial Chamber did not properly exercise its discretion.

1.4.3 Victims of sexual crimes

ICTR and to some extent also ICTY have become the flagships for international gender crimes. While the prosecution of sexual crimes in Yugoslavia was controversial due to the politicization of the topic³³, ICTR encountered many advances and was perceived in a very positive light in this regard. Between 250.000 to 500.000 women were raped during the genocide in Rwanda and the extent was certainly one of the factors leading to the breaking of silence often characteristic for sexual and gender-based crimes (Appelbaum, 2008:1).

Nevertheless, it should not be considered a natural, unaided development of international criminal justice. In fact, it was found that in the beginning very few international investigators asked Rwandan women about sexual violence (Koomen, 2013:258). Journalist Elizabeth Neuffer found that UN investigators “often didn’t ask about rape” since they did not perceive it as “important enough to ask about”. Rwandan women found it difficult to approach investigators, “mostly white males” who “roared into the villages in their white UN Jeeps and then treated survivors with condescension”. They were not trusted to protect the victims from possible retaliation (Koomen, 2013:258).

Especially due to work of lawyers, such as Binaifer Nowrojee - and genocide survivors such as Godelieve Mukasarasi, as well as sue to determination of testifying victims, this unacceptable situation changed. Sexual crimes were taken seriously – prosecuted and punished. One of the landmark decisions became the case of Akayesu. Akayesu was found responsible for systematic sexual violence committed by militia under his command and for that he had encouraged the rape of women in Taba (Koomen, 2013:255).

This case significantly expanded prosecution for gender-based crimes in international criminal law. The Trial Chamber recognized that sexual violence and rape constitute genocide in the same meaning in which the other ways intended to eliminate particular group do (ICTR, 1998: para. 731 - Akayesu). The Trial Chamber stated that “[s]exual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself” (ICTR, 1998: para. 732 - Akayesu).

In the Akayesu judgement, the Tribunal also recognized rape and other forms of sexual violence as independent crimes constituting crimes against humanity, for which Akayesu was

³³ There were for example prominent disputes about the number of the victims. It was claimed that famous MacKinnon who represented Bosnian Muslim and Croat women intentionally exaggerated the numbers and simplified matters for her purposes (Kestic, 1994:276, 277).

also found guilty (ICTR, 1998: Verdict, Count 13 Akayesu). In this case, the Tribunal provided a clear and progressive definition of rape (ICTR, 1998: 597 - Akayesu), which has been later extensively cited by the following ICTY and ICTR rape cases.

Regarding the legal framework, the ICTR RPE³⁴ explicitly stated that corroboration of the victim's testimony is not required (RPE, 2015: 96 (i)). Consent is not allowed as a defence if the victim has been subject to physical or psychological constraints (RPE, 2015: Rule 96 (ii)). Rule 96 (iv) of the ICTR RPE (and also ICTY RPE) states that "prior sexual conduct of the victim shall not be admitted in evidence". This rule, known as the "rape shield" provision, has been adopted in many national systems in order to prevent oppressive cross-examination of the victims of sexual crimes and their secondary victimization (Acevedo, 2012: 195).

1.5 Chapter I Conclusion

In this chapter, the gradual development of the internationally institutionalized criminal justice has been observed. In the very modest beginnings after the World Wars, the only individuals whose rights were seriously considered, were the defendants. Later, the ad hoc Tribunals, which petrified the position of an individual in the system of international criminal justice, tried to balance the rights of defendants with those of witnesses/victims.

As well as praised, the ICTR and ICTY have been harshly criticized for many reasons. Being too expensive and bureaucratic were some of them. Other controversial issues were also the delayed trials³⁵, and alleged violations of the rights of the defendants. The ICTR has been criticized for not having prosecuted crimes committed by the Rwandan Patriotic Forces (Acevedo, 2012:79). Both, the ICTY and the ICTR were mostly inaccessible for victims as the trials did not reach them. In addition, victims' experiences were not entirely positive, often due to procedural flaws (Acevedo, 2012:79).

Additionally, there was a widespread sense of absurdity concerning the economic aspects of the trials. The Rwandan victims/witnesses were for a few days shifted from very poor conditions to decent facilities in Arusha, provided by the -very expansive- Tribunal and then thrown back to the poverty after the testimonies (Koomen, 2013:264). Moreover, they were

³⁴ This is also in the ICTY RPE (the same number of the Rule).

³⁵ Only recently a new 'series' of judgements were issued, including the judgement on Mladic and sparked a new wave of questions about the actual benefits of international justice for the victims (e.g. <http://www.aljazeera.com/indepth/features/2017/11/bosnia-war-victims-speak-ratko-mladic-verdic-171120142218960.html>)

supposed to be pleased about this course of events, since this was done for them and in their name.

The Tribunals did not provide any mechanism for victims seeking reparations, even though both Tribunals stipulated that in case of conviction of the accused, competent national courts were to be bound by the findings of the *ad hoc* to award the compensations (ICTR/ICTY-RPE, 2015: Rule 106; Eser, 2011:112). The former ICTY/ICTR Prosecutor Carla del Ponte, too, put forward the issues of victim participation and compensation before the Security Council in 2000, suggesting a change to the Statutes (del Ponte, 2000). However, no amendment has been introduced.

Nevertheless, though this justice imposed on victims was far from perfect, there were many pioneering developments. For example, both Tribunals had its own unit to assist the victims and witnesses. We must also keep in mind that even things such as the right to use own language, were not previously a commonplace for the victims within the system of international criminal justice. Also, the efforts to prevent their harassment and secondary victimizations when testifying and variety of protective measures must be appreciated.

In addition, the submission of *amicus curiae* briefs in the trial proceeding and victims' impact statements for sentencing purposes were some of the crucial advances. Hence, in many ways, the *ad hoc* Tribunals were trailblazers for the inclusion of victims in the narrative as well as in the procedure of international criminal justice. Many of their contributions as well as lectures from their shortcomings were utilized during the drafting of the Rome Statute.

Currently, the tasks of the ICTY's VWS and ICTR' VWSU are carried out by the UN Mechanism for International Criminal Tribunals. The Mechanism has the power to prosecute and has the same material, territorial, temporal and personal jurisdiction as the *ad hoc* Tribunals (MICT- Statute, 2010, Article 1). Each branch of the Mechanism has its own Witness Support and Protection Unit (WISP) based in The Hague and Arusha with respective field offices in Bosnia and Herzegovina and Rwanda³⁶. The Mechanism is responsible for providing protection and appropriate support to the victims and witnesses related to their protection, safety and well-being (MICT- Statute, 2010, Article 20; MICT-RPE, 2016: Rules 75,86,155).

³⁶ For more, see the Mechanism's website, section 'Witnesses': <http://www.unmict.org/en/about/functions/witnesses>

2 Victims before the ICC

This chapter's central theme is the legal position of victims in proceedings before the ICC as established by relevant legal instruments. Their role in the proceedings is illustrated on an imaginary case before the ICC. Nevertheless, it also includes some comments on the provisions concerning victims in proceedings before the so-called hybrid or internationalized tribunals (Williams, 2009:5). This includes the Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), which are known for their unique treatment of victims. The purpose is to contrast or compare specific legal concepts relating to the position of victims in the proceedings before the ICC with judicial bodies in different cultural environments, having distinct mandates and dealing with different situations as well as expectations.

2.1 The Victims' Mandate

As declared in the beginning of this thesis, the International Criminal Court is a groundbreaking institution in many respects. This applies also to its treatment of victims. For the first time in the history of international criminal justice, victims have obtained the right to effectively participate in the proceedings – to present their own views on the decisions about investigations, admissibility of a case, and issues that affect their interests (Trumbull IV, 2008:778). As a result, victims are not merely a tool of prosecution, but independent participants (though not parties!) in the proceedings. In addition, they have a right to seek reparations and enjoy some other “additional” and already well-established rights, such as to be informed, to enjoy protection, and others. The rights that co-create the victims' legal status in the ICC's proceedings are collectively called by some authors as *victims' mandate* (Pena, Carayony, 2013:519) or victims' status.

2.1.1 Sources of the Victims' Mandate(s)

The basis of the victim's mandate is outlined in the Rome Statute³⁷, the founding document of the ICC (esp. ICC-RS, 1998: Articles 75 and 68). Already its preamble stresses suffering of the

³⁷ As of February 2018, 123 states are parties to the Rome Statute after the first country, Burundi, withdrew from the International Criminal Court. The country, where well-documented crimes, allegedly constituting crimes against humanity, took place (e.g. UNHRC, Report of the Commission of Inquiry on Burundi, 2017), is nevertheless being investigated by the Court (Anon. Burundi - ICC: No Escape, 2017). On 14 March 2018, Philippines has also announced that the country would withdraw from the Rome Statute. Previously, the preliminary investigation has been opened into the accusations that President Rodrigo Duterte

victims of “unimaginable atrocities that deeply shock the conscience of humanity” in a signal that the Court aims to be more victim-centered than any previous international judicial body (ICC-RS, 1998: pmb1). These rights are detailed in the Rules of Procedure and Evidence, which also contain the definition of a victim (ICC-RPE, 2013: Rule 85).

In addition, relevant victims-related provisions are included in other instruments, namely the Regulations of the Court, the Regulations of the Registry, the Regulations of the Office of the Prosecutor and the Code of Professional Conduct for counsel. The Elements of Crimes are also important for victims, since they provide a substantive basis for adjudicating criminal acts listed in Article 6, 7, 8, and newly 8 bis of the Rome Statute. According to the definition of a victim, only a person who has suffered harm as a result of commissioning of “any crime within the jurisdiction of the Court” is considered a victim. The Elements enable to decide who is it and who is not (ICC-RPE, 2013: Rule 85). Those are the seven core legal texts that together form the legal framework for the functioning of the Court.

The Extraordinary Chambers in the Courts of Cambodia, ECCC, have jurisdiction over “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, committed during the period from 17 April 1975 to 6 January 1979” (Agreement between the UN and Cambodia, 2003: Articles 1,2). The ECCC has five sources of applicable law, namely the Framework Agreement between the UN and Cambodia, the Law on the Establishment of the Extraordinary Chambers, the Internal Rules, the Cambodian Code of Criminal Procedure and International Standards. The ECCC is well-known for its broad participation of victims. This is to a large extent attributable to the significant colonial and postcolonial influence of France on the country (Leyh, 2010:2)³⁸.

The Special Tribunal for Lebanon, STL, also counts participation of victims within its unique features.³⁹ The STL has been established by the Agreement between the United Nations and the Lebanese Republic pursuant to the Security Council Resolution 1664 of 29 March 2006. It has the mandate to hold trials for the people accused of carrying out the attack of 14 February 2005 in Beirut. This attack killed 22 people, including the former prime minister of Lebanon,

and other Philippine officials had committed crimes against humanity in the course of the government’s notorious crackdown on drugs (Villamor, 2018).

³⁸ In contrast to the previously established international criminal bodies, which were based on common-law tradition (see Chapter I). France is famous for its strong and ever strengthening position of victims in criminal proceedings (Barbot, Dodier, 2014:414 ff).

³⁹ See the Tribunal’s website: <https://www.stl-tsl.org/en/about-the-stl/unique-features/victim-participation-1>.

Rafik Hariri and injured many others (Agreement between the UN and the Lebanese Republic, 2007, Article 1). As regards the legal framework of the Court, the Statute which is attached to the Agreement, contains the participatory rights of victims. These are then detailed in the Rules of Procedure and Evidence, which are complemented by ancillary documents, such as the Directive on Victims' Legal Representation; the Code of Professional Conduct; and Legal Aid Policy for Victims' Participation.

Legal gaps within the applicable law of all three bodies, the ICC, STL, and ECCC, are being filled with the use of their respective case law.

2.1.2 The Origins of the Victims' Mandate

More extensive model of justice was endorsed at the Rome Conference in 1998 as a result of many factors. As described in the first chapter, the Nuremberg, Tokyo, ICTY's and ICTR's perceived and real failures concerning the victims had a crucial impact on this development. Nevertheless, some additional aspects must be taken into consideration, one of them being the passionate advocacy of Kofi Annan who stated that victims' concerns are the "overriding interest" that should drive the Rome Conference. It has been reported that many delegates followed his call (Trumbull IV, 2008:788).

Among other factors has been the changing rhetoric on the international level and adoption of certain documents, such as the 1985 Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 (Basic Principles). The Basic Principles state that victims should be treated with compassion and dignity and have a right to justice in timely manner without discrimination. Secondary victimization should be prevented. Victims' views and concerns should be heard, and they should have a right to remedy (UNGA-Basic Principles, 1985).⁴⁰ Another is the 2005 UN Commission on Human Rights' resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law (Guidelines), containing a strong call on the international community to adopt a victim-oriented perspective (UNGA-Guidelines, 2005).⁴¹

The position of victims has been greatly enhanced by the case law of human rights courts, especially the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR). These courts have established in their case law that states have a duty

⁴⁰ Some parts of the Basic Principles were "copy-pasted" into the Rome Statute (Wyngaert, 2011: 9:02).

⁴¹ These documents are not legally binding texts, only soft law. Nevertheless, since the Basic Principles, as well as the Guidelines were endorsed by the international community, they have a great indicative value.

to investigate and prosecute serious crimes. Unlike the traditional conception of an obligation owed to public, it is also a private right owed to the victims (IACHR- Velásquez Rodríguez, 1988: para 174 ff).

Moreover, it was established the prosecution and investigations must fulfil certain standards to be effective to satisfy the victim's need for truth and justice (e.g. ECHR-Jaloud, 2014, para 209 ff). In addition, a proper participation of victims in the proceedings is necessary to enforce this private right. For this, the victims must be endowed by corresponding participatory rights, including a right to protection during the proceedings (e.g. ECHR-Opuz, 2009: para 141 ff).⁴² The case law of those two international human rights courts was also explicitly invoked by the ICC when dealing with the victims (e.g. ICC-01/04-101-tEN-Corr, 2006: para 117).

Though innovative in the context of international criminal law, a strong position of victims is traditional for many national systems of civil law countries, and also for Islamic and African legal cultures. On the other hand, it has been rather unfamiliar to common law⁴³ (Trumbull IV, 2008: 778), for a long time the dominant legal culture of international criminal law as demonstrated in the previous chapter. For example, in the USA, victims are generally excluded from the battle between the defendant and the prosecutor, while having a minor role during sentencing. In addition, across the world (the USA not excluding), victims' position is getting stronger with the victims' rights movements (Jungwirth, Lipovský, 2012:39). As a result, their procedural rights are being extended (Trumbull IV, 2008: 778) which has an influence on international bodies (e.g. in the form of 'general principles' as they are entrenched i.a. in the ICC-RS, 1998: Article 21 1 (c)).

2.2 A Victim 'Step by Step'

Having established the general meaning, sources, and origins of the ICC's victims' mandate, this part moves on to describe the entire process of being a victim before the ICC in more practical terms. The rights accorded to victims from the beginning to the very end of the proceedings are being listed and explained here. The process is illustrated on an imaginary case of a former child soldier from Uganda. Such approach enables to capture all the relevant

⁴² For more information see 'The Case Law of the European Court of Human Rights on Victim's Rights in Criminal Proceedings' by Jeremy McBride, available at: <https://rm.coe.int/coe-georgia-echr-case-study-victims-rights/1680780298>.

⁴³ Interestingly, the legal background also played a role during the negotiations in Rome since the negotiators from common law countries were to some extent unable to grasp the meaning of the negotiated provisions (Vega González, 2006: 20).

provisions in a complex and accessible way. This part addresses the questions about who does qualify as a victim, how does he or she become a victim for the purpose of the proceedings, what rights is he or she entitled to and what is his or her overall impact on the proceedings.

Imaginary case of Cimidon Nonweg

Cimidon Nonweg is a young man from Northern Uganda, whose parents were murdered as a part of a systematic attack against the inhabitants of the IDP Lukodi Camp in 2004. At the age of nine, Cimidon was, following the attack, forcefully conscripted into the Lord's Resistance Army (LRA). He has managed to escape before his 18th birthday.

Dominic Ongwen, one of the LRA's leaders who were indicted by the ICC, and the only one currently on trial, is allegedly responsible for this attack, as claimed by the Prosecutor. Charges brought by the Prosecutor include seventy counts of crimes against humanity, (such as murder, enslavement, gender-based crimes, inhumane acts of inflicting serious bodily injury and suffering) and war crimes (murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging.)⁴⁴ The murder of Cimidon's parents and his conscription are therefore covered by the charges.

2.2.1 Who Is the Victim?

2.2.1.1 Natural and Legal Persons

Rule 85 of the Rules of Procedure and Evidence defines victims as natural persons⁴⁵ who have “suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. Victims may also include legal persons - organizations or institutions that have sustained “direct harm to any of their property dedicated to religion, education, art or science or charitable purposes, and historic monuments, hospitals and other places and objects for humanitarian

⁴⁴ For more, see the Court's website: <https://www.icc-cpi.int/uganda/ongwen/pages/alleged-crimes.aspx>.

⁴⁵ The controversial question whether the application may be submitted in the name of deceased was answered negatively by the Pre-Trial Chamber: La juge “estime donc que les personnes décédées ne peuvent être considérées comme des personnes physiques au sens de la règle 85-a du Règlement” (ICC-01/04-423-Corr, 2008: paras. 23-25). Hence, the close relatives of the deceased may only apply on their own behalf, referring to the moral/material harm caused by the death of this person.

purposes” (ICC-RPE 2013, Rule 85).⁴⁶ The ICC’s definition of victims is broader than that of the ICTY and ICTR due to its concept of *indirect victims*, and also due to the inclusion of *collective victims* – organizations and institutions.⁴⁷

Compared to the STL, the ICC’s definition is broader since it does not exclude legal entities entirely. In the STL’s Rules of Procedure and Evidence, a victim is defined as a “natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal’s jurisdiction (STL-RPE, 2017: Rule 2). In comparison to the ECCC, however, the ICC’s definition is more limited. Although, strictly speaking, there is no definition of a victim in the ECCC’s legal instruments, only the so-called ‘Civil Party’ definition.

Civil Party is a form of victim participation for “any person or legal entity who has suffered from physical, psychological, or material harm as a direct consequence of the crimes committed in Cambodia by the Democratic Kampuchea regime between 17 April 1975 and 6 January 1979 that are under the jurisdiction of the ECCC” (ECCC-Internal Rules, 2015: Rule 23bis). This right shall be exercised without discrimination, regardless of current residence or nationality. The purpose of the Civil Party is to participate in the proceedings and to achieve collective and moral reparations (ECCC-Internal Rules, 2015: Rule 23). Despite the word ‘direct’ this definition of Civil Party includes also indirect victims (Acevedo, 2012:644) and much broader scope of legal entities than the ICC’s definition.⁴⁸

In our case, the limitation of the ICC’s definition, excluding certain legal entities, does not play a role, since Cimidon is a natural person. Moreover, he is considered a victim in relation to both of these unfortunate events - his conscription and murder of his parents. Unlike letter (b), which talks about legal persons, letter (a) of the Rule 85 does not limit the status of victims – natural persons – to direct victims but includes also indirect victims. Hence, even though the attack against Cimidon’s parents was not directed against his own bodily integrity, he is still considered a victim of this crime. Moreover, he is a direct victim of the enforced conscription.

⁴⁶ This definition was brought by a group of Arab states after a deadlock occurred during the negotiations (Acevedo, 2012: 302).

⁴⁷ In the DRC situation, a headmaster of a school was accepted to act on behalf of the school and the school was granted the victim participant status. In addition, Trial Chamber I in Lubanga determined that he could participate in the proceedings on his own behalf and on behalf of the school and was authorized to testify before the Chamber (Zammit-Borda, 2010:8).

⁴⁸ This, however, may be explained by the specific nature of the Kampuchean regime, hostile towards private property, market economy and hence eliminating business legal entities which might have invoked a greater need to address those crimes and redress those legal entities as well (author’s comment).

2.2.1.2 Harm (As a Result of...)

The other component of the definition – “harm” is not defined in the Rome Statute nor in the Rules of Procedure and Evidence. In this case it is rather clear, that Cimidon has suffered harm, since loss of parents for a child represents one of the gravest harms (especially such a violent death)⁴⁹ and the conscription into the army has extremely severe implications as well.⁵⁰ In less obvious cases the definition of harm must be interpreted on a case-by-case basis as concluded by the Pre-Trial Chamber I (PTC I) in its Decision on the Applications for Participation in the Proceedings of 17 January 2006, n. ICC-01/04-101-tEN-Corr.

Nevertheless, to provide some guidelines for such interpretation, the PTC-I attempted to define certain aspects of the notion of harm (ICC-01/04-101-tEN-Corr, 2006: para 81 ff). Hence, it was established that the concept must be interpreted in the light of article 21 of the Statute. This article which addresses the Court’s sources of law requires the interpretation and application of law to be consistent with internationally recognized human rights (ICC-RS, 1998: Article 21 (3)). This is not an unusual way for the ICC to interpret relevant provisions, concepts and even fulfil certain legal gaps in its applicable law.

Human rights law plays an important role in the existence and functioning of the Court (Jones, 2016: 703ff). From the relevant sources, the aforementioned 1985 Basic Principles were applied by the PTC-I, as well as the Guidelines of 2005 when referring to the rights of victims. In the same Decision by the PTC-I of 17 January 2006 emotional suffering and also economic loss were recognized as relevant forms of harm. To further support this interpretation, the Chamber referred to the case law of IACHR and the ECHR, both of which have repeatedly awarded reparations for harm due to emotional suffering or economic loss (ICC-01/04-101-tEN-Corr, 2006: para 115 ff). Hence, the concept of harm as applied by the ICC is broad enough to cover many possible impacts of the gravest crimes, also due to influence of human rights law.

The last condition is hidden in the wording “as a result of “. Clearly, there must be a causal relationship between the crime and the harm suffered. This has been also fulfilled in this case,

⁴⁹ Grief and long-term tensions, depressions, anxieties, poorer health, underachievement are some of the consequences of early loss of parents (Ellis, Dowrick, Lloyd-Williams, 2013, 57ff). <http://doi.org/10.1177/0141076812472623>. The consequences during armed conflict with all its consequences must be further multiplied.

⁵⁰ It is a well-established fact that being a child soldier has far-reaching destructive consequences with regard to mental health; PTSD, depression, and inability to integrate back into society being some of the impacts (Schauer, Elbert, 2010: 321).

since Cimidon suffered serious emotional/psychological (and presumably also economic) harm as a result of the loss of his parents and physical, psychological/emotional, as well economic harm by the enforced conscription.

2.2.1.3 *The Commission of Any Crime Within the Jurisdiction of the Court*

The last thing to consider is the question whether the crimes committed against Cimidon and his parents are within jurisdiction of the Court. Cimidon's parents (civilians) were murdered as a result of a systematic attack against civilians. Pursuant to Article 7 (1) (a) of the Rome Statute (and according to the Elements of Crimes) such act constitutes crime against humanity and falls within jurisdiction *ratione materiae* of the Court (ICC, RS, 1998: Article 5). Regarding Cimidon's conscription when he was under the age of fifteen, or his "use to participate actively in hostilities" pursuant to Article 8 (2) (b) (xxvi) of the Rome Statute (and according to the Elements of Crimes) falls within the framework of international law as one of the "other serious violations of the laws and customs applicable in international armed conflict".

As regards jurisdiction *ratione temporis*, the Court exercises its powers with respect to the crimes committed after the entry into force of this Statute (ICC-RS, 1998: Article 11), which the attack committed in 2004 also satisfies.⁵¹ Moreover, this situation fulfils the precondition for the Court to exercise its jurisdiction which is set in Article 12 (1), since Uganda ratified the Rome Statute already in 2002. In January 2003, Uganda referred the situation⁵² in its territory since 1 July 2002 to the ICC as envisaged by the Article 13 (a). Pursuant to Article 14 of the Rome Statute the Court thus may exercise its jurisdiction *ratione loci*.

Lastly, the negatively formulated jurisdiction *ratione personae* in Article 26 does not exclude Cimidon's case since all of the LRA's leaders are at the time being over 18 years of age. The only member of the LRA's leadership currently on trial is Dominic Ongwen who surrendered himself in January 2015. Other top members of the LRA, Joseph Kony and Vincent Otti, wanted by the ICC (ICC Case Information Sheet, 2015a), remain on the run despite a year-lasting, multimillion-dollar US-Ugandan chase, which has been recently terminated (Hattem, 2017).

⁵¹ On 11 April 2002, 11 States simultaneously ratified the Rome Statute, crossing the threshold of 60 ratifications, necessary for the Statute to enter into force (ICC-OPCV, 2010: 13).

⁵² For the sake of scope of the thesis, the issues of complementarity and admissibility, which governs the relationship between the Court and national jurisdictions, are omitted (ICC-RS, 1998: Article 17 ff).

The ICC is also specific in that it does not require the perpetrators to be nationals of the country over which the Court exercises jurisdiction and to occur on its territory simultaneously. Personal (ICC-RS, 1998: Article 12 (b)) and territorial jurisdictions (ICC-RS, 1998: Article 12 (a)) are alternative, not cumulative conditions for the Court to get involved. Hence, it is sufficient if the conduct of the crime occurred on the country's territory OR if those crimes were committed by its nationals, irrespective of the location.⁵³ Nevertheless, in this case both of these conditions were fulfilled – the crimes occurred on the territory of Uganda and were committed by Uganda's nationals. The act hence falls within the jurisdiction of this Court and caused him significant personal harm.

Cimidon is considered a victim pursuant to the Rule 85 of the ICC RPE.

2.2.2 How does the Victim Become a Participant in the Proceedings?

2.2.2.1 The Way to The Hague

Unlike the ICTY' or the ICTR' Statutes, the Rome Statute recognizes a victim as such from the moment he or she reports the crime to the Court (Acevedo, 2012: 303). Once Cimidon reports the crimes, he is a victim *largo sensu* before the Court. However, to become a victim *stricto sensu*, with all the participatory rights, the victim needs to be determined by the Court. To begin this process, it is necessary to fill an application for participation (ICC-RPE, 2013: Rule 89). For this purpose, a 7 pages long application form was developed by the Registry and is available at the Court's website.⁵⁴

The Registry is one of the four distinct organs of the Court and plays an important role in the victims' agenda (e.g., ICC-RPE, 2013: Rule 16). It is generally responsible for the non-judiciary aspects of the administration and service of the Court. Pursuant to article 34 of the Rome Statute, there are three other organs, namely Judicial Divisions (an Appeals Division, a Trial Division and a Pre-Trial Division) in which sit all the 18 Judges of the Court (ICC-RS,

⁵³ Regarding the territorial jurisdiction, there are some additional issues to consider, for example a deviating jurisdiction of the crimes of aggression or an issue raised about the word "conduct" in the definition which might cover only place of behaviour but not necessarily of its result, should it be in a different state. Nevertheless, for the sake of simplification and with regard to the scope and topic of the thesis, these considerations are omitted.

⁵⁴ The application is available at: <http://www.victimdefence.com/pdf/SAFIndividualEng.pdf> for natural persons (Accessed 28 February 2017). Legal persons have different application: <https://www.icc-cpi.int/NR/rdonlyres/D670BB98-0F00-4E01-BA39-0BECC411B83F/0/SAFOrganisationEng.pdf>. The length was reduced from originally roughly 17 pages (Wyngaert, 2011: 16:29)

1998: Article 36), Presidency, and the Office of the Prosecutor. All have different tasks related to the victim's agenda.

Pursuant to Article 86(2) of the Regulations of the Court, the standardized form provided by the Registry does not have to be used by the victims as long as the other applications include information required under this article. It is among others the identity and address of the victim, description of harm suffered, description of the incident (including its location and date), the identity of the person the victim believes to be responsible, any relevant supporting documentation, and information as to why the personal interests of the victim are affected and stage of the proceedings in which the victim wishes to participate (ICC-RC, 2002: Regulation 86(2)).

Naturally, this may not be the first thing Cimidon decides to do after such crime occurs - or after the continuing crime is terminated, as in this case. There are many reasons, such as lack of information about the ICC and its participatory regime, concerns about basic needs, mistrust towards institutions, psychological and other health obstacles, illiteracy, lack of access to internet, etc. which might have prevented Cimidon from applying to become a victim before the ICC. For this reason, the Victims Participation and Reparation Section's (VPRS) Field Officers attend the places where such crimes occurred and inform the citizens about their rights. VPRS is a specialized unit within the Registry which deals exclusively with the victims' participation and reparations.⁵⁵

The VPRS's Field Officers help the victims to fill the application forms which must be supported by evidence. Let us assume that Cimidon has attended one of the meetings organized by a Field Officer and was advised on this matter. His and others' applications were subsequently sent from the Field Offices to The Hague's VPRS. This may sound easily, however, in countries such as Uganda, the Central African Republic (CAR), or the Democratic Republic of the Congo (DRC), this may be an extremely arduous task due to the Court's limited capacities, distances, limited infrastructure, and other factors.

This is the moment when the hundreds of NGOs (or *intermediaries*) which are coordinated by the ICC's Public Information and Outreach Section and help with its victims' mandate, are indispensable (ICC, Victims' participation before the ICC: 3:41). This has not been envisaged

⁵⁵ Two remaining parts of the ICC which deal with victims are the Victims and Witnesses Section (VWS) and an independent office, the Office of Public Counsel for Victims (OPCV). To complement the Court's work on reparation, an independent Trust Fund for Victims was established.

in the Court's core texts but appears in the Regulations of the Registry from 2006 (ICC-RR, 2006: Regulation 86(1)) as it only gradually became apparent that the Court cannot make it alone.

The VPRS in The Hague (formally under the Registry section) then preliminarily considers whether the application is within the extent of the particular case (*prima facie* analysis) (Victims' participation before the International Criminal Court, 2013: 4:05). But to do so, they often must be translated first, together with the supporting evidence. Afterwards, it is transmitted to the Chamber, together with a Report created by the Registrar on a group of victims (to help the Chamber with decision-making), taking into consideration the distinct interests of the victims (Regulations of the Court, 2004: Regulation 86 (5)). All the applications are also transmitted to the Prosecution and Defence. The parties are entitled to reply within a time limit to be set by the Chamber. It is also the task of the Chamber to specify the proceedings and manner in which participation by victims is considered "appropriate" (ICC-RPE, 2013: Rule (89(1))).

Nevertheless, before the application is communicated to the defence and Prosecution, it must be often redacted due to fear of the victims about their safety in case of revelation of their identity to the defence. It is the obligation under article 57 (3) (c) and 68 (1) of the Rome Statute to protect the privacy, safety and well-being of victims and witnesses and under rule 86 of the Rules of Procedure and Evidence to consider the needs of victims and witnesses when making orders (ICC-02/05-01/09, 2009: Para 12).⁵⁶

Even before there is a decision on the application, the (nonregistered) victim may exercise certain rights. For example, pursuant to Article 15 (3) of the Rome Statute and Rule 15 of the Rules of Procedure and Evidence, when the Prosecutor requests opening of an investigation *proprio motu*, victims may make a representation on this particular issue to the Pre-Trial Chamber. The same applies in case the Prosecutor decides not to initiate investigations (ICC-RS, 1998: Article 53). In addition, observations may be submitted on jurisdiction and admissibility under Article 19, but this has been restricted to the victims which has at least formally applied to participate in the proceedings (ICC-02/04-01705 7/9 21, October 2008: 7/9).

⁵⁶ The extent of redaction must not exceed what is strictly necessary to ensure the right to fair trial for the accused (ICC-02/05-01/09, 2009: Para 12).

Pursuant to Rule 89, unsuccessful applicant may apply again later in the proceedings (ICC-RPE, 2013: Rule (89(2)). This is not an appeal, but a “a brand new” application - unlike before the ECCC and STL (Fardel, Olarra, 2017: 38). This individual application process is difficult for all, the Chamber, Prosecution, as well as Defence, it is costly and time-consuming⁵⁷. Let us nevertheless assume that this complicated process has been finished and the Chamber determined that Cimidon’s application was more or less coherent, has fallen within the relevant time and area of the relevant crimes. He was communicated this decision by the Registry (ICC-RPE, 2013: Rule 16 (1) (a)). At this point, Cimidon may exercise his right to participate.

The application process is being gradually rationalized to alleviate the Court’s overload. For example, in the situation of Kenya, the Court allowed to the victims that did not wish to represent their views and concerns individually, to merely register with the Registry without the involvement of judges. In addition, specifically in the Ongwen case (and also Ntaganda), radically simplified application forms were allowed by the Court (Tibori-Szabó and Hirst, 2017:17).

2.3 Right to Participate

Regarding the moment when the victim starts to participate in the proceedings, there was once a significant controversy which remains to be addressed, before moving on to the content of the right to participate. In 2006, a question has arisen about whether the Chamber should determine the victims according to their relation to a *case* (e.g. the case against Dominic Ongwen) or whether it should be analyzed with view of a *situation* (e.g. the situation in Uganda), even if there is no case opened yet by the Prosecution. In the latter scenario, the victims would only participate after the investigations are finished and the case initiated. In the former, they would also participate in the investigations.

For example, if Cimidon lived in a different IDP camp, which was not attacked under the command of Dominic Ongwen, he would not be considered a victim in the trial against Ongwen. Nevertheless, he could still be considered a victim for the stages preceding the Trial, based on the involvement of the ICC in the situation in Uganda and participate in the stage following the preliminary examination, in other words - investigations. His further

⁵⁷ Moreover, this determination must be done again time for different stages of proceedings, for example to participate in the interlocutory appeal (ICC-01/04-01/06-2904, 2009: 34 ff). It must be again demonstrated how the victims’ interests are affected, even though he or she has already participated in the proceedings.

participation would depend on the development of the case and on the question whether the person responsible for his suffering would be prosecuted.

There was a controversy between the Pre-Trial Chambers and the Prosecutor about this issue. The Prosecutor invoked terminology and argued that the word “proceedings” in Article 68 (3) of the Rome Statute does not include investigations. Moreover, article 68 is in Part 6 of the Statute, which is entitled *The Trial*, hence the context supports the claim that the preceding stages are excluded. In addition, the Prosecutor claimed that the participation of victims at the investigation stage is inappropriate and causes inefficiency (ICC-01/04-101-tEN-Corr, 2006: para 25 ff). On the other hand, the Pre-Trial Chamber argued that the terminology was not strict in the Rome Statute and, moreover, the French version excluded any possibility to make such a conclusion. The contextual argument was also refused. Based on teleological argument, the Chamber found that article 68 (3) was applicable to the investigations (ICC-01/04-101-tEN-Corr, 2006: para 54 ff).

On January 18, 2008, the Trial Chamber ruled that all the victims from DRC could potentially participate in the trial, although the trial itself involved only a single former DRC militia leader, Thomas Lubanga Dyilo who faced charges of child conscription, child enlistment, and use of children in hostilities. Hence, by these early decisions, the victim’s mandate was interpreted in a broad and truly unprecedented way. But the decision was not unanimous, neither uncontroversial. René Blattman, the ICC’s judge, reasoned in his dissent to the Decision that not to link the status of victim and consequent rights of participation to the charges confirmed against the accused transgressed the fundamental principle of criminal proceedings - principle of legality (Chung, 2008: 461).

Eventually, the situation was clarified. The victims may indeed participate as the “victims of situation”, however, only in *judicial* proceedings. Complex participation in investigation is, therefore, excluded, apart from the *ad hoc* representations listed in the Rome Statute (ICC-01/04-556, 2008: paras 55-60). This is a very moderate option to influence one of the most important parts of the proceedings. Compared to the ECCC, it seems even more limited, since victims before the ECCC may get involved sooner and address the Prosecutor to initiate a case via Public Action (ECCC-IRR, 2015: Rule 49 (2,3)). However, materially this is not that significant right, since the Prosecutors at the ICC and ECCC may be approached with relevant information by anyone.

In this regard, Cimidon's position is undisputable. He became involved only after the case was opened against Dominic Ongwen. Hence, let us assume that his application was affirmed, and he is now a victim *stricto sensu* for the Trial stage of the proceedings. As regards the way in which he may exercise his right to participate⁵⁸, the Rome Statute does not contain very specific language. The crucial article 68 (3) states that “[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court”. This must be conducted consistently with the rights of the accused to secure his right to a fair and impartial trial. Victims hence must be able to demonstrate such interest (ICC-OPCV, 2010: 41).

The Rules of Procedure and Evidence are not particularly specific either, since they state that “[t]he Chamber shall specify the proceedings and manner in which participation is considered appropriate” (ICC-RPE, 2013: Rule 89(1)). As a consequence, the judges have a great role in determining the scope of the victims' rights. The Chamber differentiates between a decision granting or denying victim status of an applicant and a decision defining the modalities of his or her participation. However, in the trial stage both determinations are made together. Subsequently, only one decision is issued which may determine both, status of a victim and the modalities of participation (ICC-01/04-01/07-933, 2009: para 2).

The concept of interests is crucial for the participation and hence must be described. Assuming that Cimidon's interests are not significantly different from those of the other victims of the gravest crimes, we may rely on their experiences. Hence, Cimidon wants to know the whole truth about the events that has ruined his life – the reason behind the attack, and the perpetrators. Secondly, it is in his interest to see that the perpetrators are authoritatively designated and punished, which is the retributive function of the Court (ICC-OPCV, 2010: 41). These two interrelated interests correspond with the very essence of retributive criminal proceedings.

Therefore, as decided by the Pre-Trial Chamber II on 10 August 2007, the “personal interest” requirement is generally met whenever a victim applies for participation in proceedings following the issuance of a warrant of arrest/a summons to appear in relation to the very crime of which he or she is a victim (ICC-02/04-101, 2007: paras. 8-10). This is also the Cimidon's case, he may therefore participate. But, as was already outlined, the scope of this participation

⁵⁸ The Court has provided a booklet for the victims with an overview of their rights: <https://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>

is not provided by the applicable laws, only by the decision of the judges (“decision on modalities of victim participation by a Single Judge”).

The victims may participate with help of their legal representatives, but also directly express their views and concerns before the judges – as victims, not as witnesses. They are allowed to do so, when they convince the Court that their reasons are truly powerful. However, they are perceived more as an exception to the rule that the representation by the lawyers is sufficient (Rudy, Hirst, 2017: 286). This right is truly unmatched in the legal regulation of any other international judicial body, the ECCC and STL including (Rudy, Hirst, 2017: 285).

Through their legal representatives, the victims can ask⁵⁹ the witnesses, experts, or the accused some specific questions, make opening and closing statements, and challenge and present evidence (though not to adduce it (Wyngaert, 2011: 21:05ff)). The rights reserved to the legal representatives of victims are more or less comparable at the ECCC and STL (Haynes, 2017: 243ff). The Rome Statute naturally also contains the imperative that all the rights may be exercised by the victims “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” (ICC-RS, 1998: Article 68 (3)).

Certain victim hierarchy was therefore created by the system under the Rome Statute (well described by Kendall, Nouwen, 2013:9-11) which has, in turn, a negative impact on the “other” victims. The views and concerns (of the majority) of the others are, as a rule, communicated to the Court via legal representatives, either private legal representatives or, in most cases, by the common legal representative. In practice, the victims must always be represented by a lawyer to participate in the proceedings – be it before the ICC, ECCC, or the STL (Hirst, 2017a: 115).

This issue is highly divisive among the scholars as well as practitioners, since some authors argue that victims’ experiences shall be always and exclusively communicated via their legal representatives and that there is no space for self-representation (Chung, 2008:464). However, such reading of the Rome Statute is not correct.⁶⁰ Mandatory legal representation is only

⁵⁹ The scope of the questions is limited to the questions pertaining to the victims’ interests only – the questions on the guilt or innocence could not be posed by the victim’s representatives (Haynes, 2017: 250).

⁶⁰ Article 68 (3) states that “[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner, which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence. In addition, the rule 90 (2) of the Rules of Procedure establishes that “the Chamber may for the purposes of proceedings, request victims or particular groups of victims’ to choose a common legal representative or representatives”. The language is not mandatory.

implied in the Rules of Procedure and Evidence (Hirst, 2017a:115). The decision about the modalities of participation is entirely in discretion of the judges, and they - so far always - chose to do it via the legal representation. A request for self-representation was refused in 2011 Ruto and Sang case (ICC-01/09-01/11- 330, 2011: para 15). Efficiency, professionalism and right to a fair trial of the accused, are often invoked by the proponents of this approach.

On the other hand, activists, academics and members of civil society often argue that such attitude is not desirable because it renders the participation only symbolic. Especially, since the issue of legal representation became somewhat more complicated with the decision of Single Judge from November 27, 2015 in the case of Dominic Ongwen. Rule 90 (1) of the Rules of Procedure and Evidence states that “victims are free to choose a legal representative of their choice”. Pursuant to Regulation 80 of the Regulations of the Court, a Chamber can appoint a legal representative of victims “where the interests of justice so require”. Under the Regulation 113 of the Regulations of the Registry which stipulates that “the Registry shall inform victims that they may apply for legal assistance paid by the Court”.⁶¹

In this case, hundreds of victims endowed two legal representatives with power of attorney for their representation. These legal representatives promised them to act *pro bono* and to request financial help from the Court. However, the Single Judge decided that these lawyers do not qualify for legal aid pursuant to Rule 90(5) of the Rules of Procedure which stipulates that a victim who lacks the means “to pay for a common legal representative chosen by the Court may receive assistance from the Registry” (ICC-02/04-01/15-350, 2015: para 18), the decision was later confirmed by the Trial Chamber. Moreover, the judge established a common legal representative from the Office of Public Counsel for Victims (financially supported by the Court) for the remaining victims without representation (Denis, 2016:2).

This approach taken by the Single Judge caused many practical problems, for example some members of one family were represented by the private representatives, while their children by the OPCV. It was sometimes unclear who was and who was not represented, and it was difficult to arrange meetings, because the victims themselves were confused about their representation (Ogora, 2016). But, more importantly, it made some authors worry that if most of the victims

⁶¹ For this, a new standardized form must be sent, this time it is sufficient via e-mail, the declaration of indigence must be attached to the form and signed by the victim. The form is provided to the applicant on his or her request (ICC-OPCV, 2010: 190). The Registrar shall decide within one month of the submission of an Application whether legal assistance should be paid by the Court. Registrar shall take into account, inter alia, the factors mentioned in article 68, paragraph 1, special needs of the victims, the complexity of the case, the possibility of asking the OPCV to act (!), and the availability of pro bono legal advice and assistance’.

cannot do anything else than to accept the representative chosen by the Court (which is the consequence of this decision), it makes it a “closed game on the ICC’s courtyard” - it further diminishes the role of the victims and renders the victim participation even more distanced and abstract.

Since Cimidon holds no property, he cannot afford to pay for a legal representative. Based on the recent case law, it is also improbable that a lawyer would offer him *pro bono* services. Of course, there might be an exception, if the lawyer is for example supported by a certain NGO. However, Cimidon would most probably participate through the Common Legal Representative, established by Single Judge deciding on the modalities of participation of victims in his case.

2.3.1 Termination of Victim Participation

The withdrawal of an application before the determination by the judges was only presupposed in the Regulations of the Registry of the ICC (ICC-RR, 2006: Regulation 101), not before the STL nor ECCC (Hirst, 2017b:416). To withdraw once the person is a recognized victim is also possible, though this option was not elaborated by the ICC’s and STL’s legal text, only by their case law. It was only established by the legal regulations of the ECCC (Hirst, 2017b:416). It is apparent that such option exists before all of the Courts – no one may be forced to participate as a victim. However, it is less clear what the procedure should be – how should the withdrawal look like and whether the victim is required to provide the Courts with a reason (Hirst, 2017b:417).

Hirst compares two relevant cases before the ICC. In Katanga case, a written and signed notification was filed by the legal representative of the victims. The ICC did not issue any decision, nor any other document. The Court merely noted the fact (ICC-01/04-01/07-3509, 2004). However, in Ruto and Sang case, a letter written by an intermediary⁶² which did not appear to contain reliable information, must have been followed by a direct request from the

⁶² It is one of the examples when intermediaries appeared to be a double-edged sword. On one hand, the Court needs them to carry out the victims’ mandate, on the other some of the intermediaries in the past for example charged the victims with fees for help or exploited their cooperation with the ICC to attract foreign donors. In response, the ICC has published guidelines on intermediaries and specified their relation to the court (Anon, 2015:24).

victims (ICC-01/09-01/11-1098, 2013).⁶³ The approaches of different chambers are not unified yet and there are no guiding sources to answer this question.

Before the STL, the emphasis is clearly on the voluntariness of the withdrawal – the judges must be sure that there was no external pressure on the victim. Before the ECCC, the victim is fully in control of his or her application. There is no need to state reasons of the withdrawal from the Civil Party, the mere act of informing the chamber(s) is enough (Hirst, 2017b: 419).

However, there are many ambiguities as to when and under what conditions this may and may not be done, to come to valid conclusions. If Cimidon wished to withdraw his application, it would be best for him to submit a written and signed statement (or a statement otherwise corroborated, for example by witnesses) and stating the reasons to avoid unnecessary complications.

In addition, the participation may also end with the death of the victim, which is, nevertheless, not a rule. Before the ECCC, a recognized civil party continues to enjoy the status of Civil Party. In case of the ICC, a close relative may continue to express the views and concerns on behalf of the deceased, while such option does not exist before the STL. Lastly, the termination may be involuntary, most often, when the claim against the accused is not supported by the evidence or when the victims' credibility is under serious doubt (this happened in Lubanga case) (Hirst, 2017b: 420, 424). In addition, the participation should be also ended when the charges are being narrowed and the crime committed against the victims is no longer part of the proceedings.

2.4 Right to Reparation

After the loss of his parents and escape from the LRA, Cimidon was left empty-handed. It is also possible, even probable, that the very society which he used to harm will not accept him back. It may be difficult for him to make a living. The mere justice for perpetrators is not going to be enough. For his and similar cases, the ICC is equipped with certain tools to address the most desperate victims and their needs. This right to reparation is the second most apparent aspect of the restorative ambitions of the Court. It is also an acknowledgement that (costly) international justice cannot be celebrated by those who may have hardship to survive due to the crimes that were committed to them, while it is being done to/for them. To fulfil its purpose,

⁶³ In the same decision it was stated that withdrawal from participation has no impact on the right to reparations (ICC-01/09-01/11-1098, 2013: para 18).

the reparations should be adequate and balance – as far as possible - the injury suffered by the victims (Shelton and Ingadottir, 1999:8).

The Rome Statute is even more niggardly and less specific on the reparations than on the right to participation. The basis of the right to reparation is in Article 75 of the Rome Statute which stipulates that the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.⁶⁴ Before making the order under this article, the Court may invite and shall take account of the views of the convicted persons, victims, and other interested persons or even interested states (ICC-RS, 1998: Article 75).

Rule 97 of the Rules of Procedure and Evidence then stipulates that when deliberating upon possible reparations, the Court shall consider the scope and extent of any damage, loss or injury. The reparations are awarded on an individualized basis or on a collective basis (or both). At the request of victims, their legal representatives, or at the request of the convicted person, and even on its own motion, the Court may appoint experts to determine this damage, loss or injury and to suggest various options concerning the appropriate ways and modalities of reparations. The Court shall also invite victims or their legal representatives, the convicted person, interested persons and interested states to make observations on the reports of the experts when it deems appropriate. In all cases, the Court shall respect the rights of victims and the convicted person.

The provisions on reparations are not so vague by a mere negligence. It was difficult to achieve an agreement during the negotiations in Rome on the form and extent of the right to reparations. Therefore, much was left to the judges (Wyngaert, 2011: 23:12). This freedom to shape the form of reparations was not welcome by all of the judges. As judge Wyngaert noted, the fact that criminal lawyers were required to establish tort liability caused them some uneasiness.

And there were many other issues. In 2011, it was still unclear what causal link should be required, whether harm should be individualized in case of mass murders, how the reparations should be provided in case of psychological harm, etc. Also, there were some unclarity about who should adduce evidence and in what regime. It was not clear whether the Defence may

⁶⁴ Rehabilitation is a human rights law concept, broadly defined in the Guidelines (also used by the ICC), n. 21: “Rehabilitation should include medical and psychological care as well as legal and social services”.

cross-examine, and even what should be the standard of evidence. It was feared that there would be further prolongations of the already lengthy proceedings (Wyngaert, 2011: 26: 17).

Since then, some of the questions were dealt with by the judges. For example, it was decided that the “balance of probabilities” standard is a sufficient and proportionate threshold when the Court decides on an order against the convicted person (ICC-01/04-01/06-2904, 2012: para 253). So far, the Court decided on reparations in three cases, in the case of Lubanga, Al Mahdi, and Katanga⁶⁵. Al Mahdi was found guilty of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu.

Individual and collective reparations were awarded to the victims of crimes committed by Germain Katanga on 24 February 2003 during an attack on the village of Bogoro, in the Ituri district of the DRC. Thirdly, in 2012, Thomas Lubanga Dyilo was convicted for enlisting, conscripting and using child soldiers during the Ituri conflict in the Democratic Republic of Congo (DRC). Since the legal provisions are clearly insufficient to estimate how high should be Cimidon’s expectations regarding the reparations, the Court’s case law on reparations must be analyzed, as well as the material conditions by which the Court is limited.

To start from the beginning, the proceedings concerning reparations are independent of the trial on guilt or innocence, which must proceed to it. For Cimidon, this means to file a new application – this time a claim for reparations. The relevant moment is, pursuant to regulation 86(3) of the Regulations of the Court, “before the start of the stage of the proceedings in which [victims] want to participate”. Compared to the initial application, this application would be most probably submitted by his legal representative (Yogendran, 2017: 70).⁶⁶ As an alternative to this request, the Court could also award reparations on its own initiative (ICC-RS, 1998: Article 75 (1)). If Cimidon wishes so, his identity may not be disclosed to the Defence (ICC-02/04-01/15-471, 2016: para 11).

The reparations generally take form of monetary compensation, restitution in form of a return of property, rehabilitation, or symbolic measures such as apologies or memorial.⁶⁷ For Cimidon

⁶⁵ Bemba is still pending at the time of writing of this thesis.

⁶⁶ Otherwise, another standardized form (<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Reparation/Standard+application+for+m+for+reparations+before+the+International+Criminal+Court+for+individual+vic.htm>), once completed, should be sent to the Victims Participation and Reparations Section (VPRS) P.O. Box 19519, 2500 CM The Hague, The Netherlands.

⁶⁷ See the Court’s website: <https://www.icc-cpi.int/Pages/ReparationCompensation.aspx>.

and other victims in similar situations, monetary compensation is the most preferable way of reparation. This was also confirmed in the case of Lubanga. The victims' main aim was to reintegrate into society which was considered possible through money from which they could pay for education or an access to employment opportunities, for example to found businesses (Yogendran, 2017:65). Monetary compensations are generally paid from two sources – from the sources of the perpetrator, or, where appropriate, by the Trust Fund for Victims where the Court orders so (ICC-RS, 1998: Article 75(2)).⁶⁸ The Trust Fund for Victims is funded of confiscated goods and completed by voluntary contributions.

Instead of, or next to the individual reparations, the collective reparations/symbolic reparations may be ordered. Their focus is on repairing the damage sustained to a community as a whole. This includes memorials and monuments, learning centers and public apologies. From the victims' point of view, individual reparations are generally more desirable. However, there are additional factors which must be taken into consideration (Yogendran, 2017: 73-74), for example the limited scope of victims involved in a case, real impact on the affected communities, and material capacities of the convict (and/or of the Trust Fund for Victims).

To estimate the options of the convicted person to provide reparations/pay compensations, the Court is entitled to ask the states for help under article 93 (1) and ask them to search and seize the property of the accused (ICC-RS, 1998: Article 75 (4)). In order to secure sufficient means for reparations, an impulse to cooperate is also provided by the Rome Statute directly to the perpetrator. His sentence may be reduced e.g. when he voluntarily provides assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for benefit of the victims (ICC-RS, 1998 Article 110).

On 7 August 2012, Decision establishing the principles and procedures to be applied to reparations was issued with an amended order for reparations. This judgment was very significant because it established a reparations regime on the liability of the convicted person and his accountability towards the victims. On 3 March 2015, the Appeals Chamber of the ICC issued its Judgment on the appeals against the Decision of 2012, which mostly confirmed the Decision. It was thus established that the convicted person's liability for reparations had to be proportionate to the harm caused (ICC-01/04-01/06-2904, 2012: para 243). Only those victims who had suffered harm as a result of the crimes for which Lubanga was found guilty were

⁶⁸ Unlike human rights courts where reparations are being paid by the responsible states.

eligible for reparations. The victims' eligibility to demand reparations was not dependent on their previous participation in the trial (ICC-01/04-01/06-2904, 2012: para 194).

The Court may only make an order for reparations subject to a judgment of guilt and the criminal conviction of the accused. However, this does not exclude completely the victims who are not involved in the specific cases before the ICC (the *victims of situations*). The Trust Fund for Victims may act independently of the Court "to the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims" (ICC-RS, 1998: Article 79). This may be done even in situations where no judgement was issued, such as it was in the situation in Uganda. For this purpose, the Trust Fund cooperates with the so-called implementing partners (local organizations, victim's survivor organizations, women's association, or faith-based NGOs, etc) (Pena, 2017: 88).

Many factors are considered by the Court when deciding on the reparations, such as physical harm, moral and non-material, as well as material damage, lost opportunities, cost of legal, medical and other experts (ICC-01/04-01/06-2904, 2012: para 230). Vulnerable victims may be prioritized over others (ICC-01/04-01/06-2904, 2012: para 200). In addition, gender and age-specific impact that the crimes of enlisting and conscripting children under the age of 15, is taken into consideration (ICC-01/04-01/06-2904, 2012: para 231).

Monetary compensations do not have to take a form of a "blanket cheque" (even though compensation paid directly into the bank account of the victim are allowed (ICC-01/04-01/07, 2017: para 271). They may also take a form of pensions paid in periodic instalments. The Court with the help of the Trust Fund may provide variety of other measures, avoiding thus monetary compensations. These rehabilitating measures include provision of education and vocational training, employment opportunities and other support measures, such as social and psychological assistance. As the Court stressed reparations need to support programs that are self-sustaining (ICC-01/04-01/06-2904, 2012: para 246). Hence, Cimidon may obtain monetary compensations, education or employment opportunities, medical and psychological support.

These particular decisions are not done by the Court in its decisions on reparations, since this would be far beyond its capacities. Rather, the Court relies on implementation plan proposed by the Trust Fund, which is then being executed by the Trust Fund with help of the Registry, the OPCV and the experts, but which also heavily relies on the aforementioned

intermediaries.⁶⁹ Under the rule 98(2) and (3) of the Rules of Procedure and Evidence and 54 of the Regulations of the Trust fund for Victims, the Chamber directs the Trust Fund to prepare such draft plan for the implementation of the reparations. The judges only exercise monitoring and oversight functions (ICC-01/04-01/06-2904, 2012: para 281).

The non-monetary reparations include means of addressing the shame that child victims may feel (ICC-01/04-01/06-2904, 2012: para 235), certificates that acknowledge the harm particular individuals experienced, outreach and promotional programs that inform victims as to the outcome of the trial; and educational campaigns that aim at reducing the stigmatization and marginalization of the victims (ICC-01/04-01/06-2904, 2012: para 239). They are also often symbolic, hence used as collective reparations.

If this was not highly inappropriate description given the circumstances, Cimidon could even consider himself lucky, because he is one of the most “acknowledged” victims by the Court - vulnerable former child soldier. Not only he is the victim of the particular case, but even in this already very narrow group, he may have quite high hopes that he would not be overlooked. On the other hand, Dominic Ongwen is considered indigent, hence, the only possible source of material reparations would be limited to those provided by the Trust Fund which is already active in Uganda.

As regards non-material or symbolic reparations, they may be provided to Cimidon, too (for example apology). In addition, the Court takes a holistic approach in such and similar cases. Given the uncertainty as to the number of victims, the Court attempts to “reach those victims who are currently unidentified” and redress the community as a whole (ICC-01/04-01/06-2904, 2012: para 219). They take form, for example, of commemorations and tributes (ICC-01/04-01/06-2904, 2012: para 236). Hence, it is possible that Cimidon’s birth town, or even the region will benefit from the reparations, as well as Cimidon himself.

⁶⁹ Quite specific was the function of intermediaries before the ECCC – the Court’s Victim Support Section was heavily underfinanced. Therefore, the Cambodian NGO’s basically took over some of the functions, such as outreach programmes, but also legal representation on *pro bono* basis to enable the Section to establish itself. Even though the Section consolidated in the meantime, the NGOs still continue to be of critical importance to the Section (Pena, 2017: 91).

2.5 Additional and Related Rights

There are some additional rights, connected to the overarching rights to participation and to reparations which enable Cimidon and other victims to “get through” the proceedings and achieve their aims. Some of the most important or previously contended rights are mentioned here. First of all, to effectively contribute to the proceedings, Cimidon must be informed about the developments in the proceedings. Interestingly, the right to be informed applies not only to the recognized victims, but also to the victims whose applications were not determined yet. They may also make representation in writing to the competent Chamber. However, this applies only to significant developments, for example challenge of jurisdiction or admissibility (ICC-RPE, 2013: Rule 59).

This obligation mostly falls on the Registry, especially in the very beginning when the victims are informed about the right to participate in the proceedings, or about the options regarding the legal representatives (Tibori-Szabó, Hirst, 2017:14). Afterwards, it is up to the victims’ lawyers to keep them informed. As regards the access to confidential information, the victims are only allowed to be informed about matters which are known to public. Their legal representatives have a right to obtain confidential information before the ECCC and STL, which is rather uncontroversial. However, the practice before the ICC has not been clear on this matter and is only gradually becoming unified (Tibori-Szabó, Hirst, 2017:6)

Secondly, should there be an NGO involved in the issue of child soldiers or another stakeholder interested in Cimidon’s case, the ICC’s Rule of Procedure and Evidence now clearly establishes the rules for submission of *amicus curia* and other forms of submission. This is also a welcome step ahead, compared to the uncertainty and discrepancies before the ICTY/ICTR (as outlined in Chapter I). At any stage of proceedings, a Chamber may itself invite or grant leave to a state, organization, or person to submit any observation the Court finds appropriate. The submissions may be written or oral. The Prosecutor and the Defence team are entitled to respond to them (ICC-RPE, 2013: Rule 103).

Unsurprisingly, the victims have the right to ask the Court to take all possible measures to respect their safety, well-being, dignity and privacy in the course of their participation in the proceedings. They must take into account victims’ age, gender, health, and the nature of the crime. The legal basis of protective measures rests in the Article 68 of the Rome Statute. For example, victims can request the judges to order that some of information they provide in the application form is not communicated to the Prosecution or the Defence (ICC-RS, 1998:

Article 68 (5)). To date it has been the practice of the Court that the identity of victims is not made public unless the victim wants and requests this to happen.

Victims' (and witnesses') safety is crucial for the Court. Protective measures are also in the discretion of the Victims and Witnesses Section (VWS, formerly known as Victims and Witnesses Unit) (ICC-RS, 1998: Article 68 (4)). Pursuant to Article 43 of the Rome Statute, the Victims and Witnesses Section was set up within the Registry. The VWS provides protective measures and security arrangements, counselling and other assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.

Assuming that Cimidon is afraid of a revenge of the remaining LRA members, he may ask the Court not to disclose his identity to the Defence. Even if he appeared during his participation in the proceedings before the Court and made representation there, appearing directly before the judges, his identity would not be disclosed to the Defence. Interestingly, the institute of an anonymous victim is applied by the ICC (ICC-02/04-01/15-471, 2016: para 11), but such measure has never been contemplated by the ECCC and the STL has explicitly refused it.

Not having many better options, Cimidon returned to the village from which he was kidnapped as a child. Despite the fact that his identity was not revealed to the Defence, and that he was provided an assistance by the VWS, he may still be afraid of the LRA's return to his village. Since the LRA is a non-state actor, it should be also in the interest of the government of Uganda to have them prosecuted for the crimes committed. The state cooperation envisaged in Article 93 of the Rome Statute is therefore theoretically possible in this case (though the political reality is somewhere else). Article 93 imposes an obligation on the state parties to cooperate with the Court in many regards, including the protection of victims (ICC-RS, 1998: Article 93 (j)). Hence, the Court might request the government of Uganda to implement some protective measures, too, for example to increase presence of police or military in the village/region.⁷⁰

The protective measures are not novelties of the Rome Statute, the other way around. They are already well embedded in the international criminal law, especially through the work of the *ad hoc* tribunals, as mentioned in the previous chapter, hence are not discussed in greater detail.

⁷⁰ The issue of state cooperation is quite notorious, since there are no means how to force the states to cooperate. The Court may only ask - and hope. In the past, some countries failed to extradite persons wanted by the Court.

3 Evaluation of the Victim Mandate

“[...]the failure to dispense timely, adequate and appropriate reparations continues to undermine the legitimacy of the Court” (Moffet, 2012:206).

Observing historical developments as well as the most recent design of the status of victims in the international criminal proceedings the last step is to evaluate this regulation. The purpose is to answer the second part of the research question – how the ICC fulfills its victims’ mandate. The third chapter thus analyzes the tangible contributions and results of the ICC victims’ mandate introduced in the second chapter. This part assesses how the Court treats the victims given their rights detailed in Chapter II and whether it fulfils its goal to be the victims’ court. For that the overall impact which the Court has on the victims is described. Secondly, the other consequences of the victims’ mandate for the proceedings are considered, especially as regards the functioning of the Court, such as cost and length of the victims-related issues.

3.1 What Did the Court Bring to the Victims So Far?

This part describes the tangible results of the victims’ mandate of the ICC and its aim to include not only retributive (punishment of the perpetrators), but also restorative aspects into its functioning (Anon, 2015:1). A definition elaborated by Marshall describes restorative justice as “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” (Garbett, 2017: 201). An important part of this process is a face-to-face controlled or supervised encounter between the perpetrators and the victims, as well as a detailed description by everyone involved about what happened, what are the implications and possible solutions to achieve restoration (Garbett, 2017: 201). Reparations are also an important aspect of restorative justice, since they represent a possible solution to some of the consequences of the crimes that were committed.⁷¹ All of the Courts’ situations are briefly described as regards the number of determined victims, their mode of participation, and reparations, as well as other significant facts and comments. The order is chronological, based on the date when the investigations were opened.

⁷¹ The PCIJ case *Factory at Chorzów* established that: “reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law” (PCIJ, 1928: para 125).

3.1.1 Democratic Republic of Kongo (June 2004)

The DRC earlier cases took an individual approach towards the victims. The numbers allowed it. For example, compared to the other cases, only a limited number of victims (129, some sources talked about 144) - participated in the first case of Congolese warlord Lubanga, three of the victims were heard by the judges (Case Information Sheet, 2017a). Some of them were former child soldiers who controversially sought acquittal for Lubanga because he fed them and took care of them (Anon., 2015:39).⁷² 13 items of evidence were presented by the victims (Stahn, 2015:36.2). Two other Congolese warlords, Katanga and Mathieu Ngudjolo Chui, were jointly prosecuted later, though Chui was acquitted (BBC, 2012). The chambers authorized the participation of 366 case victims. Two victims were heard, victims also introduced 5 items as evidence (Stahn, 2015:36.2).

Ntaganda has been charged with war crimes in eastern DRC, the trial has begun in September 2015. One of the novelties of the victims' participation in this case was the simplified 1-page long application form which was allowed by the Court instead of the 7-pages long official application (Tibori-Szabó, Hirst, 2017:17). Two legal representatives represented 922 recognized victims in Ntaganda case (ICC-01/04-02/06, 2014: para 2). Eventually, 2149 victims participated (Case Information Sheet, 2017b).

Ntaganda is also one of those whose name featured in the prominent debates on the relationship of peace versus justice (shortly, the debates whether justice should be pursued when there is for example a prospect of a peace deal, conditioned by an amnesty). After an arrest warrant for Ntaganda has been issued, a peace deal enabled him to become a general in the Congolese national army. He only surrendered himself after he allegedly lost his popularity and perhaps feared for his safety (Anon, 2015:41).

As noted by Bassiouni, these situations have hardly been exceptional – in fact, impunity has often been the price for ceasing of hostilities.⁷³ In these situations, “the victims' rights become the objects of political trade-offs, and justice becomes, depending upon one's perspective, the victim of the means of Realpolitik” (Bassiouni, 1996:12). The dilemma is spelled in this way – either the negotiators sacrifice justice including victims' rights or they risk increasing the

⁷² The second controversy regarding this case is the well-known omission of charges of sexual and gender-based crimes which were committed by Lubanga. These were, in turn, addressed by the Trust Fund, which was ordered by the Court (Anon, 2015:40).

⁷³ On the other hand, the collapse of the Juba Peace Talks between the LRA and Ugandan government in 2008 has been seen as an unnecessary sacrifice of peace in the name of blind justice (Ogora, 2017a). Indeed, the relationship between peace and justice has not been always harmonious.

number of victims by prolongation of the conflict. Despite the fact that impunity and amnesty do not necessarily contribute to lasting peace (or in terminology of Galtung *positive peace*), they are often necessary perceived as necessary for an immediate ceasefire (*negative peace*) (Bassiouni, 1996:13).

In other cases, the charges were not confirmed (Mbarushimana), or the suspect remains at large (Mudacumura). Victims in DRC felt in general respected by the Court, unlike in Uganda where majority felt safe cooperating with the Court, in DRC many were afraid that their cooperation with the ICC could have negative consequences, especially if the suspects were released from detention. Only few victims trusted the ICC, especially due to the excessive length of proceedings and limited communication (Anon., 2015:44). One third of the victims also invoked reparations as the main reason they participated in the proceedings, showing a lack of correct information among the victims about the functioning of the Court. Perhaps this mistake was also supported by the local perception of justice. “In Africa, to console means helping. If you are not helping, it is traumatizing the person” (Anon., 2015:45).

There are already two cases in the stage of reparation/compensation proceedings - Lubanga and Katanga. As regards the means of reparations, the Chamber in this case eventually assessed the harm suffered by the 425 persons recognized as victims of Mr Lubanga at USD 10,000,000 and found Lubanga liable for this sum (ICC-01/04-01/06, 2017: 281). In Katanga’s case, the Chamber awarded compensations in the form of a symbolic award of USD 250 to 297 beneficiaries. Furthermore, collective reparations for each victim were granted in the form of support for housing, support for an income-generating activity, support for education and psychological support (ICC-01/04-01/07, 2017: para 306).⁷⁴ The independent activities of the Trust Fund also help the victims to cope with their situations. The Trust Fund has already financed intermediaries to provide physical, psychological, as well as social support and has implemented its programs in the DRC since 2008.⁷⁵

As apparent from above, the ICC’s activities in the DRC are not entirely unsuccessful. However, the good impression slightly wanes in the conflict of such scale and brutality. The number of perpetrators indicted by the ICC is literally a drop in the ocean, moreover the

⁷⁴ The Chamber assessed the extent of the physical, material and psychological harm suffered by the victims at a total monetary value of approximately USD 3,752,620, but, observing the principle of proportionality, the amount of Mr Katanga's liability was set at USD 1,000,000. The victims’ legal representatives appealed against the order, demanding more victims to be granted reparations, Katanga appealed against the level of financial compensation (Wakabi, 2017).

⁷⁵ For more information, see the Court’s website: <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>.

government has again been “omitted” by the prosecution, leaving thus many victims desperate and left out (CICC, 2018).

3.1.2 Uganda (July 2004)

Since this is one of the earliest cases, there were many confusions (not only) about the matters related to the victims, for example the participation in investigations or the threshold required to be acknowledged as a victim (Chung, 2008:475ff). A very individual approach was taken to the victim participation, which proved to be ineffective and time-consuming. The length and arguably also the uncertainty contributed to victims’ frustration (Chung, 2008:498). Initially, 40 victims were allowed to participate in a very broad manner - as victims of the situation and in the case of Kony et al (ICC-02/04 OA, 2009: para 40) before it was cleared that to participate meaningfully means to participate in a limited number of *judicial* proceedings related to the personal matters of the victims. Indeed, not many of the victims with the “theoretical right to participate” (when the perpetrator is not specified yet or remains at large) ever actually used it to their benefit (Chung, 2008:498).

Nowadays, the only ongoing trial against the LRA, case of Ongwen, has currently 4,107 participating victims (HRW, 2017). Only three of them were allowed to share their views and concerns directly with the judges in the form of testimony. They complemented four expert witnesses called by the victim’s legal representatives (ICC-02/04-01/15, 2018: 26). Other victims were declined, including victims testifying about sexual violence against men. The judges explained that it was not “appropriate and necessary for the determination of the truth” because Ongwen has been charged with sexual crimes against women and girls. Since the facts and circumstances described and confirmed by the Pre-Trial Chamber were only limited to sexual crimes against women, sexual violence against men consequently does not fall within the scope of the charges. The victim’s legal representatives contended this decision on 12 March 2018 (Maliti, 2018).

As regards the modalities of participation, Single Judge established a broad permissive model of victims’ participation already during the pre-trial proceedings. It was decided that legal representatives would have the general right to attend all public but also non-public hearings. They could make submissions to the Chamber and respond to submissions of the parties in this phase of proceedings (ICC-02/04-01/15-350, 2015 para 29).

As the trial is still ongoing, reparations have not been an issue so far. The possibility of reparations was identified as the main reason for participation/cooperation with the Court by $\frac{3}{4}$ of the victims in Uganda. Interestingly, it was not only due to their material concerns, but the victims were often echoing Acholi conception of justice that necessarily includes reparations to the victim in the form of goods or cattle (Anon. 2016:36). They compared their situation to victims of natural disasters who were in their view often being assisted by foreign donors. Another victim highlighted that the government of Uganda should bear a part of the costs. The victims also recognized that Kony (or the other rebels) would not be able to pay them reparations and welcomed the prospect of a greater engagement of the Trust Fund (Anon. 2016:37ff).

In northern Uganda, the Trust Fund has 9 projects carried out by the implementing partners. These projects aim at physical rehabilitation (such as surgery, bullet and bomb fragment removal, prosthetic devices, orthopedic devices, solution and mitigation of gynecological/reproductive complications) and psychological rehabilitation (individual as well as group-based consultations), but also campaigns and radio programs aimed at awareness raising. The ICC's VPRS first appeared in Uganda in November 2004 to map the situation and identify communities in need as well as the intermediaries⁷⁶ (Anon 2015: 22). After preparations, the Trust Fund started to distribute its support to the victims. Officials of the Trust Fund estimated that €3.148 million had been invested into rehabilitation programs in Northern Uganda. And approximately 45,000 victims have benefitted from these activities until 2017. Many of those who did not receive any support, questioned the way the Trust Fund chooses its investments (Ogora, 2017b).

The victims were generally concerned with lack of feedback from the Court (which is, again, limited in its capacities to do so). Especially in areas without an access to the internet and other means of communication, where the officials or intermediaries would have to come in person, this is a real problem (Anon, 2015:33). It also influenced their trust to the Court. Nevertheless, victims are still supportive of the Court, claiming that despite its shortcomings it is their best hope for justice and reparations. On the other hand, when they came, it was perceived as a signal of respect and warmly welcome by the victims. As one of them stated “[t]hat way we know that [we] are not forgotten” (Anon, 2015:35).

⁷⁶ This usually includes an identification of victims' communities and potential intermediaries (Anon, 2015:23).

Frustration was expressed by the victims about the fact that only trials against the LRA's members were opened so far. It is no surprise since at certain moments, the government was responsible for more deaths and damage than the LRA in Northern Uganda (Kersten, 2015; Anon. 2015:34). The apparent partiality of the first prosecutor, Ocampo, towards the government of the (still) president Museveni caused a great damage to the Court and continues to do so. Despite the fact that the ICC soon declared its readiness to prosecute also the governmental authorities, the focus after all those years still remains solely on the LRA. Some argue that this is also the pragmatic end of the Ugandan-ICC story since the Court which has no police nor armed force needs the government to at least prosecute the LRA (Kersten, 2015).

3.1.3 Sudan (June 2005)

In 2007, some victims from Darfur were allowed to participate in investigations and be the victims of the situation (ICC-02/05-01/09-280, 2017: para 4). In 2009, some applicants (12) were recognized as victims in the pre-trial stage of the Bashir case (ICC-02/05-01/09-280, 2017: para 7). As noted by the legal representatives of the victims, this participation was extremely narrow, almost close to meaningless. The victims asked to express their views on the infamous "Bashir's travels" (ICC-02/05-01/09-280, 2017: para 24) – the situations when the state parties to the Rome Statute, most profoundly South Africa, failed to arrest Al Bashir. However, it was found that the purposes of a determination under article 87(7) of the Statute (determination of state cooperation) is not a *judicial proceeding* within the scope of Article 68(3) of the Rome Statute which is limited to criminal proceedings leading to individual responsibility (ICC-02/05-01/09-280, 2017: para 5).

Sudan was referred to the Court by the Security Council already in 2005. But, after so many years there has been no justice for the victims in Sudan (Khan, Marwat, 2016:248). Four suspects are still at large – apart from Al Bashir also Harun, Kushayb, Hussein. The proceedings hence remain in the Pre-Trial stage. Charges in case of Abu Garda were not confirmed and the case is closed. Banda appeared voluntarily, hence the case in its Trial phase, however, he is currently also at large. Banda's case also involved Saleh Mohammed Jerbo Jamus but proceedings against him were terminated due to his death.⁷⁷ Hence, when the Prosecutor noted that "[i]t is indeed an understatement to say that we have failed Darfur's victims who continue to bear the brunt of these crimes" when presenting her report to the

⁷⁷ For the current state of affairs, see the Court's website: <https://www.icc-cpi.int/darfur>.

Security Council in 2014 (UNSC Meeting Coverage, 2014). No justice - no meaningful participation, no reparations, no activities by the Trust Fund. Sudanese victims have been so far failed by the international community.

3.1.4 Central African Republic (May 2007) and Central African Republic II (September 2014)

The number of participating victims in the DRC Lubanga and Katanga cases was well below the number of victims in Bemba case. In Bemba case, 5,229 victims were authorized to participate in the proceedings (out of 5,708 applications) – at the confirmation stage, as well as in the trial proceedings (ICC-01/05-01/08-3343, 2016: Para 18). Most of them were natural persons, 14 were organizations (ICC-01/05-01/08-3343, 2016: Para 19). As regards the face-to-face encounter, only three persons were allowed to appear directly before the Court to present their views and concerns (Rudy, Hirst, 2017: 286). The others in Bemba case were represented by two legal representatives who must have divided the victims into five groups according to their status, harm suffered and location (ICC-01/05-01/08-3343, 2016: Para 23). They hence must have weighted their interests, prioritized them, and excluded conflicting claims (Garbett, 2017: 209). As a result, individual views or concerns necessarily often not have been heard.

The Legal Representatives participated at hearings and conferences, made opening and closing statements, filed written submissions, and introduced evidence. They also questioned witnesses (subject to a written application decided by a Chamber) and accessed confidential documents. Two victims gave evidence as witnesses (ICC-01/05-01/08-3343, 2016: Para 24). As regards the reparations, the frustrated victims are still waiting.⁷⁸ The International Federation for Human Rights (FIDH) delegation travelled to CAR in June 2017 to meet the victims of violence and attacks by troops loyal to Bemba (Bemba was sentenced in March 2016 to 18 years in prison).

Report by the FIDH highlights that fifteen years after the events (!) the victims continue to struggle to survive and live in extreme distress. Many of the victims have lost their families and property. Some of them already died in misery, while others suffer from illnesses (often having contracted HIV/AIDS from the rapists) and live in in the shadow of imminent death. They are also ostracized from their communities. Especially women who have been raped,

⁷⁸ See the Court's website: <https://www.icc-cpi.int/car/bemba>.

were subsequently abandoned by their husbands. They are often bringing up children who were born as a result of rape who are also stigmatized (FIDH, 2017:6).

Regarding the source of the reparations, some victims indicated that they wished to receive reparation mainly from Bemba himself. Given that most of his assets might be consumed to pay his legal fees (yet another of the uncomfortable aspects of international justice), it is unlikely that those assets will suffice to cover all of his obligations towards the victims. The Trust Fund for Victims will have to allocate a significant sum to supplement the contribution of Bemba.

Positive is, that a lot of victims indicated that the participation in the ICC's proceedings alleviated their psychological suffering (FIDH, 2017: 22). Unlike in the situation of Uganda, however, the Trust Fund has not initiated any activities in the CAR independent of the proceedings and potential reparation orders.⁷⁹ In May 2011, the Trust Fund invited so-called Expressions of Interest to find the victims of sexual and gender-based violence in the CAR who need support and rehabilitation. However, until now, no project has been launched. Moreover, the reparations order must have been delayed again, since on 27 February 2018, the Chamber received an "extremely unfortunate" request from the TFV to extend the deadline for filing its final submissions due to an unexpected increase in workload (ICC-01/05-01/08- 3608, 2018: para 13).

The second case which emanated from this situation concerns offences against the administration of justice by Bemba and his associates (Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, mostly by corrupting witnesses (Case Information Sheet, 2018a). No victims were participating (Chaitidou, 2017b:35).

3.1.5 Kenya (March 2010)

The failure of cases against those responsible for Kenya's 2007 and 2008 post-election violence is an example *par excellence* why it is so difficult to go against those who control state apparatus, especially security apparatus and media (Anon., 2015:48). In such situation, it is extremely difficult to access, protect, or control witnesses, or written and other evidence. It is also as much difficult to contact the victims without compromising them. Hence, when the Prosecutor decided to open the case here, the staff (for security reasons mostly non-Kenyan) must have been extremely cautious, when collecting victims' representations commenting this

⁷⁹ Compare the Court's website: <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>

decision. They had to rely on face-to-face contacts and avoided phones and Internet communication. Eventually, the VPRS managed to collect application from 320 individual victims and 76 organizations in the Pre-Trial stage (when deciding about authorization of the investigations; 383 applicants were in favor of the ICC investigations).

Four cases were gradually opened in the situation of Kenya. The case related to the post-election violence was opened against president Kenyatta and in the beginning included charges against Mohammed Hussein Ali, which were not confirmed, and Francis Muthaura, which have been dropped in 2013 after a key witness has been compromised and admitted that he accepted bribes, other refused to testify or died (Al-Jazeera, 2013). The participation of victims in the Kenyatta case should have been conducted solely through the Common Legal Representative⁸⁰ (ICC-01/09-02/11-498, 2012: para 40). 725 victims participated in the proceedings (ICC-Case Information Sheet, 2015b).

Innovatively, Legal Representatives were for the first time responsible for registering the victims through the simplified form helping thus enormously the Chambers which were excluded from the application review (Sehmi, 2013:6). Only those victims who wanted to appear in person before the Court must have fulfilled the individual detailed application (Anon, 2015:27). The Legal Representative was based in Kenya to ease victims the process and communication (ICC-01/09-02/11-498, 2012: para 59). Clearly, apart from resource management, the Single Judge in this case also took into account the social and security situation in Kenya (Anon, 2015:27; ICC-01/09-02/11-498, 2012: para 23). Already in 2015, the victims' opinions on the ICC were mixed – some of them saw the Court as the only hope for change and appreciated the victims' mandate. The other thought that the Court was all but independent and impartial. They even blamed the Prosecutor Bensouda for corruption (Anon.,2015:54).

The security situation of the witnesses – intimidation combined with bribery proved fatal for the cases. Despite the effort of ICC, the case against Kenyatta collapsed (ICC-Statement of the Prosecutor, 2014). Second case within this situation – case of Ruto and Sang (previously also Kosgey, but the charges against him were not confirmed) followed the same path. Ruto with Sang and Kenyatta were previously vehement political opponents, but befriended in their common fight against ICC, in their fight for impunity. In Ruto and Sang, one lawyer

⁸⁰ The expected costs and effort required from the Common Legal Representative in this arrangement led the appointed victims' lawyers to abandon their positions; new Representatives must have been appointed (Anon.,2015:50).

represented 628 victims (Case Information Sheet, 2016). These victims, too, achieved no justice. There is hence no reparation proceeding, also no activities by the Trust Fund.

The level of intimidation and bribing of the witnesses reached such intensity that the Prosecutor subsequently opened two cases against persons involved in those activities. Barasa, one of those suspected of offering bribes to the witnesses, remains at large (BBC, 2013). The very same applies to Gicheru and Bett, suspected of corruptly influencing six Prosecution witnesses (ICC- Statement of the Prosecutor, 2015). Unlike in Bemba et al case, the efforts to stop the prosecution and avoid justice were successful. Would it be hence possible for the victims to participate, given that they suffered personal harm (were deprived of justice) as a result of this action? And what could be the mode of participation in this case? The very same as for victims in the ‘original cases against Kenyatta, Ruto and Sang? What is clear, however, is that the Court had so far not enough of capacities to bring justice to Kenyan victims.

3.1.6. Libya

Libya, too, is not exactly a success story, nor for the Court, neither for the victims. After Sudan, it is the second state which was referred to the Court by the Security Council, following the excessive violence used by Muammar Gaddafi against civilians in 2011. The arrest warrant was issued for Muammar Gaddafi (case terminated after his death), but also his son, Saif Al-Islam Gaddafi already in 2011, who is in the Court’s detention. The case also included Abdullah Al-Senussi, former intelligence chief, but was declared inadmissible in 2013. Case against Muammar Gaddafi was terminated on 22 November 2011, following his death. Other cases – against Khaled and Al-Werfalli – remain at their Pre-Trial stage due to the absence of the suspects. There was no participation of victims (Chaitidou, 2018:79-80).

Victims have not achieved justice, yet - neither reparations, nor meaningful participation. It is ironic that they were invoked by the government as an argument against admissibility of the case against Saif Al-Islam Gaddafi, (whom the Libyan government failed to extradite). The Libyan government argued that Gaddafi should be prosecuted in Libya since victims should observe justice where it was violated in the first place, ensuring thus local ownership (Moffett, 2014:274). Instead of meaningful and just prosecution, however, Saif Al-Islam Gaddafi was released in summer 2017 and his whereabouts were unknown until the recent announcement of his intention to run for elections (Al-Jazeera, 2018). Sadly, he would not be the first man wanted by the Court running for elections (The Guardian, 2017). This is certainly not what the victims deserve.

3.1.7 Côte d'Ivoire (October 2011)

After Kenya, Côte d'Ivoire was the second case opened *proprio motu* by the Prosecutor. Therefore, the victims were again invited to make representations on the decision to open investigation, pursuant to Article 15 (3) of the Rome Statute (ICC-02/11-3, 2011: 6). Altogether 679 representations were made by the victims, including 655 individual and 24 collective representations (ICC-02/1-3, 2011: para 19). In December 2014, charges were confirmed against Laurent Gbagbo, a leader of the pro-Gbagbo youth movement, and his associate, Charles Blé Goudé, both are accused of crimes against humanity. Their cases were joined on 11 March 2015.

In 2016, the decision on participation of victims confirmed victims could participate in the joined proceedings, if they suffered as a result of the crimes contained within the charges against Gbagbo and/or Blé Goudé (ICC-02/11-01/15-379, 2016: para 54). This may raise a question whether such joint participation of victims does not impair the right to a fair trial, due to seemingly bigger number of persons harmed and participating in the proceedings. There was also an interesting dispute between the Prosecutor and the Pre-Trial Chamber. The Prosecutor requested an access to those representations while the Pre-Trial Chamber offered merely a consolidate report prepared by the Registry, claiming that the Prosecutor is not entitled to use them as evidence. Eventually, this decision was changed - but the VPRS could at least redact some information (Sluiter, Friman, Linton, Vasiliev, Zappalà, 2013:1315).

Since the trial is still ongoing, no order of reparations has been issued, yet. There is only one other person still wanted by the Court - Simone Gbagbo. However, she was not extradited by Côte d'Ivoire where she was sentenced to twenty years (more than she would be given in The Hague and twice more than was requested by the national Prosecutor). Technically, she should not even be wanted anymore, given that the Court functions on the basis of complementarity (Heller, 2016:638).

The Trust Fund for Victims' websites inform that the preliminary assessment of potential assistance programs in Côte d'Ivoire was conducted in 2017. The Trust Funds has already allocated money for this purpose and hopes to have projects launched in 2018.⁸¹

⁸¹ For current information, see the Trust Fund's website: <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>.

3.1.8 Mali

No proceedings occurred at the situation level. The first case was opened against Al-Mahdi who was found responsible for destruction of nine mausoleums and a mosque in the Timbuktu region and sentenced to nine years imprisonment (Chaitidou, 2018:73). Participation in the case against Al-Mahdi was limited, only 9 victims participated in the trial, 139 participated in the reparation proceedings (Chaitidou, 2018:73). Al-Mahdi pleaded guilty and was found liable for 2.7 million euros in expenses for individual and collective reparations for the community of Timbuktu (ICC-01/12-01/15-236, 2017: para 139). The order was mostly confirmed after an appeal on 8 March 2018. The Trust Fund is entrusted to provide an implementation plan. Though the reparations order mostly follows the principles established in Lubanga and Katanga, there were some peculiarities due to the specific nature of the crimes (Starrenburg, 2017).

First of all, it was not entirely clear who is the victim eligible to seek reparations. It was specified that the crime committed by Al Mahdi must be real and proximate cause of the harm for which the reparations are demanded (the standard was “balance of probabilities”). The community of Timbuktu was compensated for the suffered economic consequences. The second group within Timbuktu was awarded reparations due to suffered moral harm (for example when ancestor’s burial sites were damaged by the attack). However, in a symbolic move to demonstrate the loss to the Malian nation and humanity as a whole, the Chamber awarded EUR 1 to the Malian State and UNESCO (Chaitidou, 2018:75).

However, as the chief of a morality brigade (*Hisbah*), Al-Mahdi was most probably also responsible for crimes against humans, committed when Timbuktu was occupied by the Ansar Dine. The FIDH estimates that Al-Mahdi in his capacity as the chief of *Hisbah* endorsed the actions of the "Centre d'application du convenable et de l'interdiction du blâmable". The Centre have allegedly persecuted women and subjected them to forced marriages. According to the Federation, Al Mahdi also sanctioned rape and sexual slavery (FIDH, 2016). It is not excluded that there may have been a trade-off for information or the guilty plea with the Prosecution.

The second case within the situation in Mali is the case of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud who was, however, only surrendered to the ICC on 31 March 2018. Al Hassan is charged with several counts of crimes against humanity. He is also suspected of participating in the policy of forced marriages which victimized the female inhabitants of

Timbuktu and led to their repeated rapes and sexual enslavement - the crime which did not appear in Al-Mahdi's charges (Case Information Sheet, 2018b).

3.1.9 Georgia (January 2016)

In 2015, the Prosecutor informed victims that there is a reasonable basis to proceed with an investigation into the situation in Georgia concerning alleged crimes of August 2008. Pursuant to Article 15(3) of the Rome Statute, victims were notified to use their right to make representations to the Pre-Trial Chamber (ICC-Public Notice, 2015). Approximately 6.335 victims made such representation, out of them 99% supported ICC-led investigations, while the remaining 1 % was concerned with possible security implications (FIDH, 2018:16). The investigation was authorized by a Chamber (ICC-01/15-12, 2016:26).

Only very recently (January/February 2018) a Field Office has been established in Georgia for outreach activities, including a contact with the victims and communication with general public, state officials, academia, etc. This is done independently of the ongoing investigations, which are carried out exclusively by the Office of the Prosecutor and in a confidential manner (Georgia Today, 2018).

3.1.10 Burundi (October 2017)

The investigations *proprio motu* were opened quite recently. Alleged crimes against humanity committed in Burundi or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017 are the object of these investigations. There has not been an opportunity for victims to participate, yet. The judges of the Pre-Trial Chamber III authorized the inquiry in autumn 2017. They also gave the Prosecutor 10 working days before their decision was made public to enable the court to protect victims and witnesses (ICC-01/17-9-Red, 2017: para 19). It remains to be seen what may be done for the victims in Burundi, especially given the difficulties caused by the Burundian non-cooperative regime.

Moreover, it is reasonable to expect that the number of victims will increase in future, proportionally to the growing knowledge about the Court across the world. When the investigations in Afghanistan were opened and the Prosecutor invited representations from the victims, 794 representations were made (out of them 41 assessed as duplicates) (ICC-02/17-28, 2017: para 11), representing about 1.17 million of victims in a strong signal that justice is demanded here (TJCG-Press Statement, 2018).

3.2 Wider Implications

Several thousand of victims were already accepted as participants to the ICC's proceedings. Out of these participating victims, only few individuals were called to express their concerns and views directly to the judges during the proceedings. The highest number was three for one case (in Lubanga and Ongwen). Thus, despite the romantic image off the ICC as a healing platform for those who suffered, and which is supposed to "restore their dignity" by listening to their stories (Chung, 2008:464), the reality lags far behind. And their share is most probably going to decrease even more since the number of victims is gradually growing⁸² (Kendall and Nouwen, 2013:15). As stated in the beginning of this chapter, direct participation is perceived as a significant aspect of restorative justice and the ICC could be seen as failing in this regard.

However, the research conducted by the Human Rights Center at the University of California, Berkeley revealed that among 622 victims from Uganda, Democratic Republic of Congo, Kenya, and Côte d'Ivoire only very few actually wanted to present their views and concerns to the Court directly (Anon., 2015:3). The victims were satisfied with putting their views into the application, which they valued as sufficient - in case someone reviews it at the ICC⁸³ (while they even did not expect the judges to do it) (Anon., 2015: 3-4). Some feared reprisals which could follow their direct participation in the proceedings and therefore preferred not to do so.

Too many of the respondents who participated in the proceedings participated because they were misinformed and believed that this process would lead to individual reparations (Anon., 2015:4). This lack of information contributes to false/unrealistic expectations of the victims and should be of a significant concern to the ICC. Great expectations lead easily to even greater disappointment. The victims were misinformed about many other things, including the very nature of the Court and its purpose (which is comprehensible, given their restricted access to information) (Anon.,2015:53).

Hence, it seems that the victims have generally little appreciation of and interest in direct participation in the proceedings. On the other hand, they somewhat unexpectedly praise the written applications - for the mere knowledge that someone is interested in their stories, that they had a way how to share them. It is hence necessary to question the value of this right to participation. If the victims only need to be listened, would not it be enough if they felt that

⁸² Already in 2011, judge Wyngaert called the number of victims applying for participation "overwhelming".

⁸³ One of the respondents from Uganda particularly said: 'I was given a number, and I was also made to register my complaint on the paper. It is important because what we suffered and how we feel about it has been taken up to the court. It is known there' (Anon, 2015:33).

they are heard by the Prosecution? It would probably require more sources and training on the part of the OTP not to victimize or overlook the victims the way the *ad hoc* Tribunals did, but it might be eventually facilitated. However, this cannot be considered a serious proposal at this point. To come to solid conclusions, more research similar to the one conducted by the University of California is needed.

Concerning the second part of the restorative ambitions - reparations, they are still a chimera for most of the victims, as apparent from above. The reason is that the reparations depend on conviction. Length of proceedings is the main reason why the victims wait so long for justice and reparations. But there are other complications, for example the fact that the perpetrators are often indigent, and the means of the Trust Fund are limited, hence it must be carefully deliberated how to carry them out (Stover, Crittenden, Koenig, Peskin Gurd, 2010: 24).

Unlike participation, lack of reparations is not easily ignored by the victims, who, not rarely, struggle to survive as a consequence of the crimes committed to them (e.g. FIDH, 2017:6). For example, in Uganda and DRC, reparations were the main reason why the respondents engaged with the Court (Anon.,2015.4). In these and other African states, but also in Georgia, reparations were perceived not only in a material way, but also as an important aspect of justice (FIDH, 2018:30)

Paradoxically, the length of proceeding, which postpones justice and reparations, is much influenced by the participation of victims in the proceedings (despite the efforts to rationalize for example the application system, which are taking place already for many years). This might be yet another argument against the right to participate in the way it is now existent. Much more documents must be translated, communicated to the parties, reviewed by the Chambers, etc. - a fact often criticized by the judges, most prominently by Hon. Christine van den Wyngaert. She scarcely misses any opportunity to remind it to the world (Huiskes, 2013).

Moreover, there is a growing pressure from the ICC's state parties to decrease the costs of the Court as a whole, which are perceived as excessive. The cost of the victims' mandate includes for example costs of legal representation, VPRS, and OPCV. In the 2015 budget proposal this was estimated to be € 5,624,000,33 out of € 135,391,700.34, which was the total budget proposal (FIDH, 2014:12). This is approximately the same amount which the Trust Fund for victims had collected between 2002 and 2010(!) (Stover, Crittenden, Koenig, Peskin Gurd, 2010: 24).

In addition, there are also ‘hidden’ costs in form of time and effort devoted to the issues related to the victims by the parties, the judges, as well as Registry and other ICC’s employees (Wynngaert, 2011:45:00). She is also concerned with the impact on right to fair trial in the case of victims-witnesses and possible undermining of prosecution, when a victim who was not called by Prosecution for strategic reasons, is called to speak as a victim (Wynngaert, 2011:29:00). These might be other arguments for a radical change (or even elimination) of the right to participate as it looks today.

As regards the other failures of the victims’ mandate, they are often connected to the failures of the Court or the very concept of international criminal justice, for example the aforementioned peace versus justice dilemma. Another is the inherent selectivity of international criminal justice, which has its impact on victims, too. It starts already with the selection of the countries (though it seems to be improving under the current Prosecutor Bensouda (Maupas, 2017)). It continues with the selection of the parties (for example, the Ocampo’s “pragmatic” choice to prosecute the non-state actor - LRA and avoid the government in Uganda and DRC).

Even then, the selectivity goes on with the selection of the individual cases and culminates in the selection of charges (example is the notorious omission of sexual crimes in Lubanga case). The frustration of those who are not being noticed even though they may live next to the others who participated and were compensated, is comprehensible. Hence, the victims which get their say before the Court and also achieve reparations are limited (that is why collective reparations are being nowadays prioritized by the Court – e.g. in the case of Al-Mahdi, even though victims prefer individual reparations, as stated above). Judge Wynngaert links this selectivity to some possible obstacles during post-conflict reconciliation. Some may wonder why others have been compensated and others have not which may complicate the process (Wynngaert, 2011:40:00).

The ICC is not the only one that struggles to satisfy the victims. As regards reparations, the ECCC largely failed victims in its first trial. At the time of this case, the ECCC’s ruled, for example, that civil parties were supposed to estimate the cost of pagoda which they required as compensation. Since they failed to do so, their request must have been rejected as lacking specificity. Also, medical aid was refused to be paid since it was not symbolic yet designed to benefit a large number of individual victims, which was perceived as outside of the scope of ECCC’s rules (Redress, 2011:23). In this regard, the STL may consider itself “fortunate” since it does not have the power to give reparations directly to the victims. The victims may demand

reparations in Lebanese civil court using the judgment of the STL (STL-Agreement with the Statute: Article 25).

Conclusion

The victims' mandate is a double-edged sword. Nowadays, it seems necessary for the system of international criminal justice to care about the victims, among others, to maintain its legitimacy, but also meaningfulness. On the other hand, badly-managed victims' mandate may have destructive consequences, be it loss of legitimacy, or the very disabling of the Court's functioning. And so far, the Court does not seem to be very convincing in the way it deals with this part of its agenda. Indeed, to satisfy the victims' needs and interests through the means available to international criminal justice seems an uneasy task.

At this point, it is hardly a controversial statement to say that the ICC' victims' mandate needs a serious reform. It was already clear in 2008 (Chung, 2008:527) – and some changes occurred, such as is it was described in the Chapters II and III. The calls for reform were, however, just as urgent in 2015 as they were in 2008. For example, the need to further reform the application system was recognized in the ICC's 2015 Report (ICC-Report on Cluster, 2015:2). And the situation has not changed dramatically since then. Therefore, it is safe to say that there is now an agreement that a significant modification is needed (Anon, 2015: 1).

The judges attempt to do so by the way of changing case law. However, it may be the time to consider more substantial change, perhaps not within the existent law, but such that would also include a change of the Rules of Procedure and Evidence. For this, it would be necessary to conduct more research on the real impacts of victims' mandate. This must be the governing source of any future change. Who else should decide what is desirable for the victims than the victims themselves?

In the aforementioned research by the University of California, Berkeley, the victims kept stressing two goals – reparations, which were perceived as an inherent part of justice and quite unsurprisingly - conviction of the accused (Anon, 2015:3). Indeed, receiving medical aid from the Trust Fund is important, but living in a fear of reprisal and with knowledge those responsible for one's suffering are living their lives as nothing has ever happened, seems, said gently, insufficient and improper.

Not only from this research it appears that participation is somewhat overlooked, in comparison to the retributive justice and reparations. It also seems that in its current form, this participatory regime cannot justify itself. The costs spent on the administration are excessive compared to, for example, the funds collected by the Trust Fund. Moreover, the participation unnecessarily

prolongs the proceedings and the regime has therefore an adverse impact on delivery of justice and reparations to the victims. These concerns are not new, either. Already in 2008, Mina Rauschenbach and Damien Scalia have also questioned whether the system has any legal, economic and psychological benefit for the victims (Rauschenbach, Scalia, 2008:443).

On the other hand, reparations are perceived as *sine qua non* by many of the victims. And yet, their inclusion under the auspices of the ICC is disputed by some, namely by the judges. Judge Wyngaert went as far as to suggest that the reparatory mechanism should be completely changed – separated from the Court’s proceedings and fully reserved to the (modified) Trust Fund. In her opinion, it is not a purpose of a criminal court and not a task of criminal lawyers/judges to adjudicate reparations. The Court lacks the necessary capacities and the combination of restorative and retributive functions does not seem to be perfectly compatible as it was demonstrated in Chapter III. On the other hand, it seems a missed opportunity for the Court to give up the reparatory regime completely. Perhaps an ideal solution would be a functional independence but still under the “brand” of the ICC, since this is what may support its credibility and legitimacy among the victims. It seems to be too soon to make a definite conclusion.

However, it is already clear that this mixture of retributive and restorative ambitions may sometimes lead to unexpected and rather dramatic situations. In 2016, Dominic Ongwen became the first individual in the history of the ICC prosecuted for the same crimes of which he is also a victim. When Ongwen was kidnapped as a child from his home, Joseph Kony was the leader of the group. Even though, the hunt after Kony was recently terminated, there is still a chance that he may once appear before the Court. It seems that in such case - depending on the scope of the charges - Dominic Ongwen might participate in his proceedings as a victim and seek reparations from the very same institution and for the very same crime, by and for which he is currently being prosecuted.

Indeed, the presence of victims in international criminal proceedings is a delicate issue, with an enormous potential to undermine the legitimacy of international institutions. Dominic Ongwen is currently what the case of Erdemović was for the ICTY – a somewhat wake-up call that something is not entirely right in the way the international criminal law reflects the reality. Ongwen reminds us that the world goes beyond the simple divide between the perpetrators and the victims as it appears in the legal instruments of the ICC. It also opens a whole Pandora box

of uncomfortable issues and raises many emotions and polarized reactions (e.g. Kersten, 2016a; Jakobsson, 2017).

As in case of Erdemović, these legal disputes and controversies are mostly related to the issue of grounds excluding criminal responsibility. The Defence argued that since Ongwen was abducted as a child, he should benefit from the protection of child soldiers provided by international law until the very moment of his leaving of the LRA (which is, however, almost 30 years after he was kidnapped (ICC-02/04-01/15, 2016: para 150)). The Defence also claimed that his psychology was broken since he, from the very early age, witnessed and was forced to perform acts of unspeakable brutality and since he was disconnected his whole life from normal society he had no opportunity to question his actions. Lastly, they put forward the argument of duress. Therefore, they argued, Ongwen's responsibility should be excluded (ICC-02/04-01/15, 2016: para 151).

Duress was refused by the Chamber since there was no "threat of imminent death". To the other claims, the Chamber had a simple answer to that – the law only excuses those child soldiers who escaped before their reached adulthood. While Ongwen instead chose to rise in the armed group's hierarchy (ICC-02/04-01/15, 2016: para 153). It is true that, should the Court find such an extensive ground excluding responsibility, it could lead to a serious discussion on the value of free will and moral agency within law, perhaps shaking the very basics of law as we know it. It would also be a betray of the thousands of persons who became victims of Ongwen's brutal crimes. Hence, it seems to be the case that Ongwen's unfortunate destiny will be only a mitigating factor during the sentencing.

Indeed, many of Ongwen's fellow child soldiers chose differently and escaped from the LRA. On the other hand, many of other child soldiers received amnesty (Kersten, 2016a). Moreover, Ongwen was abducted as a nine-year old child, he was unusually young. And already then, he was intelligent, ambitious, determined to survive and to please his leaders as he was used to excel in school (Kersten, 2016b). That is, why our imaginary case from the Chapter II works with circumstances which are similar to Ongwen's life (indeed, even Cimidon Nonweg's name is an anagram, created from Ongwen's name) but allowed him to choose more wisely and escape when it was possible in order not to victimize the helpless civilians of norther Uganda anymore. Hence, Cimidon, unlike Dominic is a victim and only victim, not a perpetrator.

Nevertheless, not only to the author it still causes a great discomfort to realize that Ongwen is going to be prosecuted for violations of humanitarian law even though the very same legal

system failed to protect him when he was a child. Moreover, if the Ugandan government cared about the events in northern Uganda and seriously attempted to protect its population (e.g. Pearson and Pedersen), Ongwen could nowadays be a lawyer, teacher, or a doctor. In addition, if the international community did not largely ignore the events in northern Uganda, maybe the government would not be so lukewarm.⁸⁴

But, since this was not in the government's interest, nor in the international community's interest, Ongwen is now prosecuted before the eyes of the very same world who did not care about his suffering before. He is prosecuted by those who grew up in, compared to his, certainly privileged conditions, their lives very never tested in such a brutal way, and cannot even imagine what would be their choice in his circumstances. The trial of Dominic Ongwen is to some extent the trial of this very world.

To conclude, as shown throughout this thesis, the challenges of the role of victims before the ICC are multiple and immense. Until there is an active involvement of the Assembly of State Parties, it is primarily a task of the judges to deal with them. But it is not and will not be an easy one. More research is needed on the real impacts of law on the victims to provide guidelines for potential changes.

⁸⁴ It is hence no wonder that in 2017 some of the LRA abductees sued the government for alleged negligence that led to their abduction (Odeng, Kabahumuza, 2017).

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List of Abbreviations

CAR – Central African Republic
DRC – Democratic Republic of the Congo
ECCC – Extraordinary Chambers in the Courts of Cambodia
ECHR – European Court of Human Rights
FIDH - International Federation for Human Rights
IACHR – Inter-American Court of Human Rights
ICC – International Criminal Court
ICTY – International Tribunal for the former Yugoslavia
ICTR – International Tribunal for Rwanda
IMTFE - International Military Tribunal for the Far East
IMTN - International Military Tribunal in Nuremberg
LRA – Lord’s Resistance Army
OPCV – Office of Public Counsel for Victims
PCIJ – Permanent Court of International Justice
RC – Regulations of the Court
RPE – Rules of Procedure and Evidence
RR – Regulations of the Registry
STL – Special Tribunal for Lebanon
UNGA – United Nations General Assembly
UNHRC – United Nations Human Rights Council
UNSC – United Nations Security Council
VPRS - Victims Participation and Reparations Section