Victims and international criminal law

15.1 Introduction

A common criticism of international criminal justice has been that it neither allowed victims sufficient rights of participation nor sufficiently acknowledged their suffering. That is, the accusation goes, it has not allowed victims a genuine 'voice'. In particular, crimes against women and children, especially crimes of sexual violence, are often considered to have gone under-acknowledged and under-prosecuted by international criminal tribunals.

Against this background, many authors suggest that international criminal law has, in recent years, been undergoing a shift from being principally concerned with *retributive* justice to increasingly focussing on *restorative* justice. That is, while the retributive justice aims to punish the guilty on behalf of society, restorative justice is concerned with making some form of fair restitution to the victim of crime. The risk of retributive justice is that while it may serve broader social goals, legal proceedings focussed narrowly only the guilt or innocence of an accused person may alienate or further traumatise victims. Indeed, coupled with the right to a fair trial it may often seem as if retributive justice accords greater rights to an accused person than to their alleged victim. At the international level, the classic focus upon retributive justice over other goals is best illustrated by the role of victims simply as witnesses before the ad hoc Tribunals for Yugoslavia and Rwanda. By comparison, the International Criminal Court makes extensive provision for the rights of victims in both the Rome Statute and the Rules of Procedure and Evidence. The ICC is therefore frequently praised as being a milestone in the development of international criminal law[1] because it was 'designed to combine retributive justice (prosecuting offenders) and restorative justice (including victims in the legal process and authorising reparations) in a single institution'.[2]

[1] See generally: S Vasiliev, 'Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Nijhoff 2009), Chapter 33; S Kendall, 'Beyond the Restorative Turn: The Limits of Legal Humanitarianism' in C De Vos, S Kendall and C Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge 2015), Chapter 14.

[2] L Fletcher, 'Refracted Justice: The Imagined Victim and the International Criminal Court' in De Vos, Kendall and Stahn (eds), *Contested Justice*, 304.

This is in line with a broader shift in international law generally, and human rights law in particular, of seeing victims as having particular rights in the criminal justice process. In this context the role of the General Assembly's 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ('Declaration of Basic Principles') is noteworthy.[3] This instrument has had a significant influence on core concepts found in the Rome Statute including through:

- defining victims as 'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights' as a result of crime, including 'indirect' victims such as the family members of those who have suffered direct harm;
- the idea that victims 'are entitled to access to … justice and to prompt redress'; and
- setting out the need for judicial systems to allow 'the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.'[4]

The idea that victims should have a right of access to a remedy and a right to participate in a criminal justice process against perpetrators is obviously an important one. It is also extremely challenging to deliver at the international level where resources will always be limited and justice necessarily selective.[5] Further, it is open to question whether the extensive legal provisions of the Rome Statute concerning victims have in practice granted them a true voice in proceedings. There is a distinct risk that the ICC may unrealistically raise the expectations of victims regarding their (ultimately limited) ability to participate in proceedings or obtain reparations through Court processes.[6]

[3] Adopted in UN GA Res. 40/34, 29 November 1985. Available at: http://www.un.org/documents/ga/res/40/a40r034.htm.

[4] Ibid, Annex, paragraphs 1, 4 and 6(b).

[5] As discussed in Chapter 3, Section 6.2.

[6] Fletcher, 'Refracted Justice', 304.

Learning Aims

By the end of this chapter you should be able to discuss or explain:

- the approach taken to the rights of victims before the International Criminal Court, especially as regards rights of participation, protection, and reparation;
- the complexities of prosecuting international offences committed against certain particularly vulnerable victims, especially children; and
- the extent to which the new focus on restorative justice in international criminal law has been successful.

This chapter therefore proceeds as follows:

- **Section 15.2** discusses the position of victims before the International Criminal Court under the Rome Statute, the Rules of Procedure and Evidence, and the Court's emerging case law;
- **Section 15.3** provides a detailed case study of the difficulties that may occur in prosecuting crimes against child soldiers, particularly sexual offences; and
- **Section 15.4** engages in a more critical and theoretical appraisal of what international criminal justice has promised victims and whether there are, in fact, risks in the turn towards restorative justice.

While there are questions relevant to victims which could be explored in relation to the ICTY and ICTR, the focus of this chapter is very much on the ICC. This follows from the fact that the extensive system of victims' rights found in the Rome Statute was in part a reaction to their absence in the ICTY and ICTR Statutes.

15.2 The participation of victims before the International Criminal Court

To understand the provision made for victims under the International Criminal Court Rome Statute and Rules of Procedure and Evidence (RPE) we need to ask ourselves a series of questions: Who is a victim? How are victims represented? What rights of participation do victims have? What protection do victims enjoy? What is the content of their right to reparations? This section will address each of these questions in turn, before considering

some of the challenges posed by incorporating a greater role for victims and their interests into ICC proceedings.

15.2.1 Who is a victim?

In order to participate in ICC proceedings as a victim, an individual or organisation must first qualify as being a victim within the ICC framework. The relevant definition is found in Rule 85 of the RPE. Before the ICC a victim is either:

- a natural person who has suffered harm as a result of a crime committed within the jurisdiction of the Court, or
- an institution or organisation which has sustained harm to certain types of property presumably, though the RPE are silent on the point, as a result of a crime within the jurisdiction of the Court.[7]

The person or organisation wishing to participate in proceedings as a victim must first file an application with the ICC Registry, which is then forwarded to the Pre-Trial Chamber dealing with the relevant situation or case.[8] The application must, among other matters, provide details of the 'location and date of the incident [in which harm was suffered] and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm'.[9] The application must also include sufficient identifying information to demonstrate that the applicant is who they say they are, though in practice the Pre-Trial Chambers have taken a fairly flexible approach to acceptable forms of identification.[10]

[7] Under Rule 85(b), ICC RPE: "Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

[8] Rule 89(1), ICC RPE.

[9] Rule 94(1)(c), ICC RPE.

[10] Rule 94(1)(a), ICC RPE; M Kelly, 'The Status of Victims under the Rome Statute of the International Criminal Court' in T Bonacker and C Safferling (eds) *Victims of International Crimes: An Interdisciplinary Discourse* (Asser Press 2013) 50.

The Pre-Trial Chamber must then make a decision on the status of the applicant, assessing the evidence to determine whether there are a *prima facie* credible grounds that a person has suffered relevant harm.[11] The questions for the Chamber will include: whether the crime alleged falls within the jurisdiction of the Court; whether the applicant has suffered harm; and whether the harm has a 'causal connection to the alleged crime before the court.'[12] The case law defines harm broadly. Harm to a natural person includes '[m]aterial, physical, and psychological harm … if they are suffered personally by the victim' ('personal harm').[13] However, this may also include some forms of indirect harm. The Appeals Chamber in *Lubanga* reasoned:

> Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child.[14]

The causal link requirement also appears to be applied relatively broadly. It is said to be 'a pragmatic, strictly factual approach', which will be satisfied if 'the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least appear compatible'.[15] Enquiries into theories of causation are not required.

Nonetheless, this system has been criticised as being too complicated. The application form is not easy to fill out and may not even be physically available to many victims. This may have real consequences: victims who do not participate in the proceedings are not

[11] L Catani, 'Victims at the International Criminal Court: Some Lessons Learned from the Lubanga Case' (2012) 10 Journal of International Criminal Justice 905, 909 and 916.

[12] Kelly, 'The Status of Victims', 51.

[13] *Prosecutor v Lubanga*, Appeals Chamber, Appeal on Participation of Victims, 11 July 2008, para 32.

[14] Ibid.

[15] *Prosecutor v Kony et al*, Pre Trial Chamber II, Decision on victims' applications for participation, 10 August 2007, para 14; see also *Prosecutor v Bemba*, Pre-Trial Chamber III, Fourth Decision on Victim's Participation, 12 December 2008, para 75 (approving of this approach).

eligible to receive individual reparations. Further, given that the ICC Prosecutor will only act in cases where States are unwilling or unable genuinely to prosecute the suspect, this may leave an 'impunity gap' in which some (or many) victims lack any access to *any* remedy before either national or international courts.[16]

An opposing criticism is that this unwieldy system may allow so many people the status of victims that their rights of participation become negligible; lost, as it were, in the crowd. In *Bemba*, for example, the Trial Chamber granted victim status to over 4000 applicants.[17] The system of processing claims to victim status individually is also labour intensive and a huge burden on the Court. As early as 2011 one ICC judge noted that 'the number victims is becoming overwhelming… [The Court] may well have to consider replacing individual applications with collective applications'.[18] The possibility of 'class action' representation is considered further in section 15.2.6.

15.2.2 How are victims represented?

The question of how victims should be represented before the Court was always contentious. Certainly, there was perceived to be a risk that victims could effectively act as a second prosecution,[19] complicating the role of the Office of the Prosecutor and even perhaps undermining the position of the defendant could be faced with two different cases to answer.

While victims have a right to representation before the Court, in practice this will work in one of a number of ways and may be subject to limitations. First, a victim may appoint and

[16] C Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10 Journal of International Criminal Justice 1357-1375.

[17] Catani, 'Victims at the International Criminal Court', 917.

[18] C Van den Wyngaert, 'Victims before International Criminal Court: Some Views of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 483.

[19] H Friman, 'Victims in the International Criminal Process' in R Cryer, H Friman, D Robinson, and E Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd ed (Cambridge University Press 2014), 488. The argument was put by defence counsel and rejected in: *Prosecutor v Katanga*, Appeals Chamber, Appeal on Modalities of Victim Participation, 16 July 2010, para 113.

fund his or her own legal counsel.[20] Second, the Court may request that a group of victims be represented by a common representative, which may obviously be necessary in cases involving large numbers of victims.[21] Where victims cannot afford paid legal representation, the Registry may provide financial assistance. Since 2005 there has also been the ICC Office for Public Council for Victims (OPCV). Among other forms of assistance, members of the OPCV may been appointed as legal representatives for victims and participate directly in proceedings. In the period 2005-2010, for example, the OPCV 'represented approximately 2000 victims' and 'assisted 30 external legal representatives in all situations and cases, and provided close to 600 legal advisors to them.'[22]

Nonetheless, the extent to which victims actually participate in proceedings is ultimately in the control of the Court itself. Victims may be limited to providing only observations or written submissions,[23] but the Rules of Procedure and Evidence otherwise grant the legal representatives of victims quite active powers of participation including the power to question witnesses as discussed below.[24]

15.2.3 What rights of participation do victims have?

Article 68(3) of the Rome Statute provides:

> Where the personal interests of the victim 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.

[20] Rule 90(1), RPE.

[21] Rule 90(2), RPE.

[22] K Clarke, '"We Ask for Justice, You Give Us Law": The Rule of law, Economic Markets and the Reconfiguration of Victimhood', in C De Vos, S Kendall and C Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge 2015) 287-8.

[23] Rule 91(2), RPE.

[24] Rule 91(3)(a), RPE.

The drafting of this provision is obviously open-ended and gives limited guidance to the Court. It has given rise to a number of difficulties in practice. The first key question for the Court is to determine when the 'personal interests of the victim are affected'. This concept has been interpreted broadly on the whole. In *Katanga* the range of victims' personal interests was said to cover not only 'seeking reparations' but also:

> Seeking determination of the truth concerning the events they experienced, or wishing to see the perpetrators of the crimes they suffered being brought to justice.[25]

Such a broad interpretation would appear not to place any practical limit on the range of situations in which victims might seek to intervene in proceedings. Indeed, the case law generated by different ICC Chambers has been criticised for a lack of clarity and failure to provide concrete guidance on this point.[26]

There might also be a question as to the 'stages of proceedings' in which victims should be allowed to participate. Again, the case law and RPE do not indicate that this will likely prove much of a limitation in practice. Thus far, 'the Court has not discovered any stage of the proceedings at which victims' participatory rights pursuant to Article 68(3) are per se inappropriate.'[27] At the least:[28]

- Rule 92(2) of the RPE requires that victims be notified of the possibility of participating in proceedings to review a decision of the Prosecutor not to initiate an investigation or not to prosecute (under Article 53 of the Rome Statute), although this may not extend to a power to challenge the Prosecutor's decision to *suspend* an investigation;

[25] See e.g.: *Prosecution v Katanga and Chui*, Trial Chamber, Decision on the Modalities of Victim Participation at Trial, 22 January 2010.

[26] S Vasiliev, 'Article 68 (3)', 655.

[27] G Boas et al, *International Criminal Law Practitioner Library: International Criminal Procedure*, Vol 3 (Cambridge 2013), 313.

[28] See further: ibid, 314-16; Vasiliev, 'Article 68 (3)', 641-644; and Catani, 'Victims at the International Criminal Court', 910.

- Article 15(3) of the Rome Statute and Rule 50 expressly permit victims to participate in an application by the Prosecutor to formally open an investigation;
- Under Article 19(3) victims may participate in proceedings regarding the jurisdiction or admissibility of a case;
- Rule 92(3) permits victims to participate in the confirmation of charges hearing; and
- Rule 89(1) allows victims to make opening and closing statements;
- Rules 91(2) and (3) allow victims' representatives to attend and participate in proceedings (within limits set by the Chamber) and to question witnesses, respectively; and
- Rule 119(3) requires a Pre-Trial Chamber considering whether a defendant should be released from custody during a trial to seek the views (among other persons) of victims who 'could be at risk' if that person were to be released.

Further, victims may have access to publically or confidentially filed evidence of 'material relevance' to their personal interests so long 'as this does not breach any protective measures in place'.[29]

An area of controversy, however, is the extent to which victims should be allowed to participate in proceedings governing the conduct of an investigation once opened but prior to any summons or arrest warrants being issued. That is, should victims be able to participate in investigatory processes in respect of a *situation* before any suspect perpetrator has been formally identified and a *case* opened? The answer at present appears to be yes, but only in a very limited manner. A number of early decisions of Chambers of the Court, over the strenuous objections of the Prosecutor, held that victims could have procedural rights to participate (in some form) in investigations in respect of a situation.[30] It was suggested that participation in the investigatory phase could allow

[29] Catani, 'Victims at the International Criminal Court', 910; citing *Prosecutor v Lubanga*, Trial Chamber I, Decision on victims' participation, 18 January 2008, paras 105-107.

[30] Vasiliev, 'Article 68 (3)', 644-5. See for example: *Situation in the Democratic Republic of the Congo*, ICC Pre-Trial Chamber I, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2,VPRS 3,VPRS 4,VPRS 5 and VPRS 6, 17 January 2006; *Situation in the Democratic Republic of the Congo*, ICC Pre-Trial Chamber I, Decision on the Applications for participation in the proceedings of a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, 6 December 2007, para 14.

victims to 'clarify the facts', 'make known what was inflicted upon them' and 'that, following this information, the Prosecutor would investigate the events' although the precise modalities by which this would be achieved would be for the Pre-Trial Chamber to decide in each case.[31]

Such a wide-ranging interpretation has since been rejected by the Appeals Chamber, which has observed 'there is ample scope within the statutory scheme of the Statute for victims and anyone else with relevant information to pass it on to the Prosecutor without first being formally accorded "a general right to participate".'[32] The investigation of a situation, strictly, is thus a matter for the Prosecutor alone. (Although we should note the Prosecutor's independent duty to consider the interests of victims in deciding whether there is a sufficient basis to commence a prosecution.[33]) Nonetheless, to the extent that *judicial proceedings* arise in the course of an investigation persons may apply to participate in them as victims.[34] Thus, if the Prosecutor during an investigatory phase requested a Pre-Trial Chamber issue arrest warrant or summons to appear and give evidence for the purpose of the investigation, victims could seek to participate in those proceedings (subject to demonstrating their personal interests were affected).[35] Nonetheless, this leads to the unsatisfactory prospect that someone could be a victim in respect of a *situation* (if he or she suffered harm in a given conflict), but not in any actual *case* arising out that situation (if the persons indicted by the Prosecutor did not include those who had harmed him or her). A person recognised as a victim during the investigatory phase could thus effectively lose that status once charges are actually brought.

[31] *Situation in the Democratic Republic of the Congo*, ICC Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556, para 53.

[32] Ibid.

[33] Art 53(2)(c), ICC Statute.

[34] Ibid, para 57; compare: *Situation in the Republic of Kenya*, ICC Pre-Trial Chamber II, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2010, para 9; and Boas et al, *International Criminal Law Practitioner Library*, Vol 3, 321.

[35] See D Guilfoyle, *International Criminal Law* (Oxford University Press 2016), 134 for further examples of judicial proceedings which might arise during an investigation.

The power of victims to present 'their views and concerns' has also been interpreted widely. The case law of the ICC has confirmed that this allows victims to question witnesses and present evidence, despite objections from the Prosecutor 'to such a broad interpretation.'[36] Indeed, in *Lubanga* the Appeals Chamber even heard a motion from victims that the charges brought against the defendant were too narrow – although it did not ultimately rule on the point or order the Prosecution to expand its case.[37] On the power of victims to challenge evidence the Appeals Chamber in *Lubanga* put it this way:[38]

> the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation. For example, should a victim demonstrate that his or her personal interests would be negatively affected if a particular witness (who could attest to the harm suffered by the victim) was not called to testify … then the victim would be able to move the Chamber to exercise its powers under article 69 (3) to present the evidence ...

Further practical examples of situations in which evidence could have an effect on the personal interests of the victim given by the Appeals Chamber in *Lubanga* include (but were not limited to) presentation of evidence in court:[39]

- "which violates the rules of confidentiality, in particular, if the confidentiality affects victim protection (article 69 (5))";
- "which is obtained by a means which violates an internationally recognised human right of the victim or a family member (article 69 (7))";
- "whose presentation might be harmful to [a victim's] security and safety or dignity";

[36] Kelly, 'The Status of Victims', 55.

[37] Ibid, 56; see further on the procedural history Catani, 'Victims at the International Criminal Court', 914 (efforts to recharacterise the facts to include charges of sexual slavery in *Lubanga* were ultimately rejected by the Trial Chamber).

[38] *Prosecutor v Lubanga*, ICC Appeals Chamber, Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, para 99.

[39] Ibid, para 103.

- "which would violate rules 70 and 71 [on impermissible inferences of consent or evidence of prior sexual conduct] in the case of sexual violence"; or
- "which would violate an arrangement with the victim or a family member pursuant to article 54(3)(d) [on witness protection arrangements concluded with the Prosecutor]".

In such cases, among others, victims would have the right to challenge evidence or otherwise make their 'views and concerns' known to the Chamber. As a practical matter, for example, legal representatives for the victims in *Lubanga* addressed points made by the defence counsel about apparent inconsistency in the identification evidence of witnesses by highlighting 'the circumstances in which names are used in the [Democratic Republic of the Congo], and provid[ing] possible explanations for the apparent inconsistencies'.[40] This resulted in the Trial Chamber appointing an independent expert on 'names and other social conventions in the DRC'.[41]

Victims may also seek to testify and give evidence. This may be allowed, so long as their evidence goes to the guilt or innocence of the accused and is 'necessary for the determination of the truth'.[42] This will 'inevitably' have to 'be decided by the Trial Chamber on a case-by-case basis.'[43] A Trial Chamber may also request victims to present incriminating evidence, even where that evidence had not been disclosed to the accused prior to the trial commencing.[44]

Finally, while the harm done to victims may be an aggravating factor in sentencing before international courts, victims cannot bring an appeal challenging conviction or sentence.[45]

15.2.4 What protection do victims enjoy?

[40] Catani, 'Victims at the International Criminal Court', 913.

[41] Ibid.

[42] *Prosecutor v Katanga*, Appeals Chamber, Appeal on Modalities of Victim Participation,16 July 2010, paras 111-112.

[43] Ibid, para 112.

[44] Ibid, para 37.

[45] See: Chapter 5, section 4.5; and G Boas et al, 'Appeals, Reviews and Reconsideration' in G Sluiter et al (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013), 954.

Both victims and witnesses enjoy certain protections under Article 68 of the ICC Statute. First, the court has a duty to protect the 'safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.[46] In determining the kind of protection which should be provided the Court must take into account relevant factors including the victim's or witness's age, gender, and the nature of crime and in particular the needs of victims of crimes involving sexual violence or violence against children.[47] In particular in the case of sexual offences or offences against children it may be appropriate to use the Court's power to depart from the ordinary principles of public hearings and hold certain parts of proceedings *in camera*.[48]

While a fair trial would normally require the disclosure of all evidence to the accused, Article 68(5) provides for an exceptional procedure in cases where 'the disclosure of evidence or information … may lead to the grave endangerment of the security of a witness or his or her family'. In such cases the Prosecutor may instead submit a summary of the evidence. Importantly, however, this power may only be exercised 'for the purposes of any proceedings conducted prior to the commencement of the trial'. The presumption appears to be that at the trial (once the defendant is in custody) such evidence could be disclosed.

In the course of proceedings the Prosecutor (or the defence, or a victim or witness) may request that the Chamber 'order measures to protect a victim, a witness or another person at risk on account of testimony' given in proceedings.[49] Such an order may include *inter alia*:[50]

- that a person's name (or other potentially identifying information) be expunged from the public record;
- that all parties to the case 'be prohibited from disclosing such information to a third party';

[46] Art 68(1), ICC Statute.

[47] Ibid.

[48] Art 68(2), ICC Statute. See also: Art 64(7), ICC Statute; Rules 72 and 87, ICC RPE; and to similar effect Art 79(A), ICTY and ICTR RPE.

[49] Rule 87(1), ICC RPE.

[50] Rule 87(3), ICC RPE.

- that testimony be given by electronic means, including through use of voice altering technology or video conferencing;
- that a 'pseudonym be used for a victim, a witness or other person at risk'; and
- that part of the proceedings be conducted *in camera*.

There may, of course, be situations where victims and witnesses require ongoing protection. As noted above, the Prosecutor may enter such arrangements with the victim or a family member pursuant under Article 54(3)(d). Such 'protective and security arrangements' along with 'counselling and other appropriate assistance' for witnesses and victims are implemented by the Victims and Witnesses Unit of the ICC Registry.[51] The VWU may also 'advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and [measures of] assistance'.[52] In particular the VWU has a role in providing to the Court and parties training 'in issues of trauma, sexual violence, security and confidentiality' and taking 'gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings'.[53]
Particular problems may arise where an individual has 'dual status' as both a victim and a witness. In such a situation a person may be in an ICC protective program run by the VWU and in addition be both represented in proceedings by a legal representative *and* also be a witness the prosecution wishes to call. This raises a number of practical problems, including the difficulties posed in disclosing evidence to the defence (which may reveal a protected person's identity) or the ability of the prosecution to communicate with one of its witnesses other than through (or in the presence of) a legal representative.[54] Indeed, there could even be situations where the prosecution is unaware that one of its proposed witnesses is also a victim, or where the victim's legal representative or the VPRS is unaware that the prosecution intends to call a person in an ICC protection program as a witness.

In the *Lubanga* case a series of procedures were ordered by the Trial Chamber such that the question of an individual's dual status could be resolved, and lines of communication

[51] Art 43(6), ICC Statute.

[52] Art 68(4), ICC Statute.

[53] Rule 17(2)(a)(4) and (b)(iii), ICC RPE.

[54] See: *Prosecutor v Lubanga*, ICC Trial Chamber, Decision on certain practicalities regarding individuals who have the dual status of witness and victim, 5 June 2008.

between the parties and various branches of the registry were established with the overall aim that '[p]articipation by an individual as a victim in the proceedings shall not compromise his or her security'.[55] Nonetheless, there were unexpected results. Some witnesses who had originally been given victim status provided evidence that was so weak and contradictory that it called into question whether they genuinely were victims, causing the Trial Chamber to reassess whether they met the *prima facie* test of victim status (discussed above).[56] This lead to the Trial Chamber withdrawing the victim status of five 'child soldier' witnesses, along with the 'indirect' victim status of the father of one of the witnesses.[57]

15.2.5 What is the content of the right to reparations?

Finally, persons or organisations certified as victims by the court may have a right to reparations. These may take the form of 'restitution, compensation or rehabilitation.'[58] That is reparations may consist of attempting to restore things to their previous state (for example, rebuilding a church, temple or mosque), paying monetary damages, or funding rehabilitation programs (for example, aimed at reintegrating former combatants into post-conflict society). The Court may order a convicted person to make reparations directly to victims, though in most cases this is likely to be impractical unless the reparations sought are precise and limited or the convicted person has extensive assets.[59] Instead, the Rome Statute creates a Trust Fund for Victims (TFV) as the principal vehicle for administering reparations.[60] The TFV serves two functions: first it is the mechanism by which court ordered reparations are implemented; and second, it may provide 'general assistance to victims or communities of victims' funded through voluntary contributions made by donors.[61] Importantly this 'second mandate' allows reparation or restorative just projects to be undertaken to support communities affected by an ICC situation irrespective of whether there have been individual determinations of victim status in an individual case.

[55] Ibid, paras 52-78.

[56] Catani, 'Victims at the International Criminal Court', 916.

[57] Ibid.

[58] Art 75(1), ICC Statute; Kelly, 'The Status of Victims', 59.

[59] Art 75(2), ICC Statute.

[60] Arts 75(1) and 79, ICC Statute. See also Rules 94-99, ICC RPE.

[61] Clarke, '"We ask for justice, you give us law"', 287; and Kelly, 'The Status of Victims', 61.

How is the Trust Fund financed? In part, through the sentencing of convicted defendants. The Court may order a convicted defendant to pay a fine or make an order for 'forfeiture of proceeds, property and assets derived directly or indirectly from [their] crime, without prejudice to the rights of bona fide third parties'.[62] State Parties are obliged to give effect to fines or forfeitures ordered by the Court and to transfer money raised, for example, by the sale of seized property to the Court.[63] The Court may order funds collected through fines or forfeiture be paid into the TFV.[64] Claims for reparations by victims may be filed with the Registrar of the ICC or a decision on reparations may be made by a Trial Chamber.[65] Secondly, it may receive funds allocated to it by the Assembly of State Parties or through voluntary contributions made by states, individuals, or other organisations or entities.[66]

Nonetheless, a substantial limitation on the effectiveness of the TFV will be the availability of funds. Typically, States will often be implicated in international crimes. There is however no provision in the Rome Statute allowing a finding that a State was involved in an international crime and levying fines or ordering confiscation against it.[67] This is a potentially serious weakness in the reparation system as States will obviously have access to significantly more resources than individual defendants and, in any event, the cooperation of States will be necessary for any effective implementation of a reparations award.[68]

[62] Art 77(1), ICC Statute.

[63] Art 109(1) and (3), ICC Statute.

[64] Art 79(2), ICC Statute.

[65] Rules 94 and 95, RPE; and Art 75(1), ICC Statute.

[66] Kelly, 'The Status of Victims', 61.

[67] F Mégret, 'Article of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice' (2010) 16 Buffalo Human Rights Law Review 1, 11.

[68] Ibid.

At the time of writing many TFV projects focussed on psychological rehabilitation and 'material support' for victims and in some cases the provision of prosthetics for injured victims.[69]

15.2.6 Practical challenges

A key challenge in the system governing victim participation in the work of the ICC is the unwieldy present system for considering victim status based on individual applications.[70] It has been suggested that in international criminal proceedings generally that 'the logical means of accommodating large numbers of victims would be to provide for some form of collective or class action'.[71] Class actions are typically understood as a device allowing judicial certification that a limited number of plaintiffs (or victims) may represent a broader class of persons because: the class of persons is so numerous that they cannot, practically, all be joined to proceedings and jointly or individually represented; common questions of law or fact affect all members of the class; the claims of the representative parties are typical of the claims of other class members; and 'the representative parties are able fairly and adequately to protect the interests of the class'.[72] By taking this approach victims would be eligible for individual reparations under the ICC system if they could later establish they fell within the class, irrespective of whether they had been individually certified as victims by the ICC during the course of proceedings.

However, there is a risk of dramatic narrowing in any system of recognising victim classes. Kelly takes as a hypothetical example the crimes committed in Cambodia in the 1970s.[73] Imagine a situation in which potentially over 1 million people are victims of international crimes generally but less than 100,000 are victims of genocide specifically (due to their being targeted as a protected group falling within the definition of genocide). What occurs

[69] See: Clarke, '"We ask for justice, you give us law"', 294-6; and http://www.trustfundforvictims.org/programmes.

[70] Kelly, 'The Status of Victims', 65.

[71] D Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation' (2006) 4 Journal of International Criminal Justice 307, 310.

[72] C Kaoutzanis, 'Two Birds with One Stone: How the Use of the Class Action Device for Victim Participation in the International Criminal Court Can Improve Both the Fight against Impunity and Victim Participation' (2010) 17 U.C. Davis Journal of International Law & Policy 111, 135 quoting Rule 23 of the US Federal Rules of Civil Procedure.

if a prosecutor in a similar situation falling within ICC jurisdiction brings only a case concerning genocide goes ahead. Does the rest of the population lose its victim status? There is also the possibility that in the course of a long conflict those who are victims in one phase of hostilities may become perpetrators in another. How such cases should be treated is not immediately apparent.

15.3 Case study: child soldiers as victims of sexual violence

The question of whether international criminal law does (or can) adequately address the experience of victims becomes particularly acute in relation to sexual violence committed against child soldiers (also known as 'children associated with armed forces'). Girl soldiers in particular may be forced by commanders to serve as scouts or fighters, perform domestic services, and also be subjected to rape.[74]
Sexual violence against child soldiers has only been charged him one ICC case: *Ntaganda*, a case against a rebel leader involved in hostilities in the Democratic Republic of the Congo. The issue was also relevant in *Lubanga*, the first case in which there was a conviction at the ICC. However, Mr Lubanga was not charged with responsibility for sexual violence against child soldiers. Nonetheless, the issue of sexual violence against child soldiers formed part of the facts alleged – though not charges brought – by the prosecution.

In each case the issue gave rise to different legal questions. In *Ntaganda* the question was whether sexual offences could be committed as war crimes against participants in hostilities. That is, by definition a war crime must be committed against someone falling within a category of protected persons. Combatants participating in hostilities are not ordinarily protected persons. The legal difficulty which then arises is whether a child soldier *cannot* by definition be a victim of war crimes under the Rome Statute simply because they were also participants in the conflict (even if perhaps unwilling participants). The question in *Lubanga* was different. In *Lubanga* the Prosecutor had chosen to run a case focusing on one particular charge: the recruitment of child soldiers. It is possible to

[73] Kelly, 'The Status of Victims', 65.

[74] *Prosecutor v Lubanga*, ICC Trial Chamber, Transcript, 26 January 2009, 11 (Prosecutor's opening statement).

see this kind of narrow prosecutorial strategy as a response to the *Milošević* trial which became unmanageable due to both the large number of charges brought and the attempt to make the proceedings a complete historic record of the conflict in the former Yugoslavia.[75] Notably, the trial concluded only with the death of Mr Milošević. The resulting conventional wisdom is that it is best for an international prosecutor to focus on only a narrow selection of charges in order to maximise the chances of securing a conviction. On this approach, it is not surprising that in *Lubanga* the Prosecutor chose to focus on a single charge. Some, however, considered that the recruitment of child soldiers was far from the worst crime committed in the conflict and that this choice was questionable. Certainly, on its face it excluded a wide range of further offences committed both *against* and *by* child soldiers in the conflict. The offence of recruitment of child soldiers as found in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute covers only the conscription or enlistment of children, or 'using them to participate actively in hostilities'. The question which then arises is whether sexual violence committed against child soldiers could be considered a form of 'using' them in hostilities.

The issues arising in *Ntaganda* and *Lubanga* will be considered in turn below.

Counterpoint

It is tempting to see child soldiers as an undifferentiated category of victims.[76] In particular, it is common to think of girl soldiers as simply domestic servants and the victims of sexual enslavement. The experiences of child soldiers vary greatly. Girl soldiers may be used as forced domestic and sexual services but also be active combatants or used for directly combat related functions such as scouting.[77] It may be important to recognise this dual character of their experience for several reasons. First, it is clearly important that international criminal law acknowledges the experience of the victims as part of its truth-telling or history-recording function. Second, in some post-conflict transitional justice societies reintegration services may be available to combatants but not to those whose

[75] See, for example: James G. Stewart, 'Lubanga in Context', *Opinio Juris*, 18 March 2012, http://opiniojuris.org/2012/03/18/.

[76] M Drumbl, 'The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering' (2012) 15 Yearbook of International Humanitarian Law 87, especially at 93-96.

[77] See generally: R Grey, 'Sexual Violence against Child Soldiers' (2014) 16 International Feminist Journal of Politics 601.

'only' role in the conflict was that of a victim. More generally, the experience and blameworthiness of child soldiers may also vary, along with the nature of their recruitment and participation in hostilities.

Ntaganda

The question for the pre-trial chamber in *Ntaganda* was whether child soldiers could be victims of war crimes of sexual violence under article 8(2)(e)(7) covering 'rape, sexual slavery, enforced prostitution … and any other form of sexual violence also constituting a serious violation of [common article 3]'. Mr Ntaganda was charged (on the basis of multiple modes of participation) with crimes of rape and sexual enslavement of child soldiers under the age of 15. Ntaganda challenged the inclusion of these charges in the confirmation of charges hearing before the ICC Pre-Trial Chamber.

The key legal difficulty was that law of war crimes 'does not [generally] protect persons taking part in hostilities from crimes committed by other persons taking part in hostilities on the same side of the conflict'.[78] Thus the defence counsel for Ntaganda was able to argue that the defendant could not be charged with crimes committed by his own troops against others of his troops, even if the victims were children.

In response, in its Decision on the Charges of 2014, the Pre-Trial Chamber concluded that the recruitment of children into armed forces does *not* of itself deprive them of any protected status. The critical part of the Pre-Trial Chamber's reasoning was the idea that under the wording of Common Article 3 of the Geneva Conventions 'persons taking no active part' in hostilities are protected. Therefore children, who should generally be considered protected persons, should only lose that protection to the extent they were actively or directly participating in an armed conflict.[79] In particular, the Chamber held:

> the mere membership of children under the age of 15 years in an armed group cannot be considered as determinative proof of direct/active participation in

[78] *Prosecutor v Ntaganda*, ICC Pre-Trial Chamber II, Decision on the Charges, 9 June 2014, para 76.

[79] Ibid, para 77.

> hostilities, considering that their presence in the armed group is specifically proscribed under international law in the first place.[80]

That is, it makes little sense to create an offence of recruiting children into armed forces and then hold that once recruited they lose their protection under the law of armed conflict and international criminal law. This is particularly the case when many child soldiers may be forcibly recruited. Thus, 'in the view of the Chamber, children under the age of 15 years lose the protection afforded by international humanitarian law (IHL) only during their direct/active participation in hostilities.'[81]

The reasoning here does contain one important elision. The Chamber appears to have equated 'active' or 'direct' participation in hostilities (an IHL concept arising under Common Article 3) with 'active' participation in a hostilities (under Articles 8(2)(b)(xxvi) and 8(2)(e)(7) of the Rome Statute). While it may generally be sensible to interpret the law of war crimes in line with concepts found in IHL it is not necessary and may not always be desirable. The concept of 'direct' participation is relevant to the principle of distinction: a child who is 'directly' participating in hostilities may be targeted with lethal force. The paradox is this: expanding the concept of 'active' participation under international criminal law may seem to increase the protection of children in war, as it expands the range of conduct which can be prosecuted under international criminal law. However, if 'direct' participation under IHL has the same meaning, then expanding the range of conduct which can be prosecuted in international criminal law will also expand the range of occasions in which child soldiers can be targeted under IHL. This would appear to *decrease* their protection on the battlefield. The point is returned to in the discussion of *Lubanga*.

For the purposes of the charges in *Ntaganda* the Pre-Trial Chamber held:

> the Chamber clarifies that those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of sexual nature, including rape, as defined in the relevant

[80] Ibid, para 78.

[81] Ibid, para 79.

> Elements of Crimes. The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time.[82]

This 'timing-based' approach focusing on the idea that a person cannot be engaged in hostilities at the moment of a sexual assault seems logical enough in relation to the crime of rape.[83] However, the situation is rather more complex in relation to crimes of sexual slavery. Sexual enslavement is defined by exercising rights of ownership over another person and by its nature it extends over time. In such cases it may be simplistic to assume that 'sexual slavery and … participation in hostilities occur at separate times'.[84] Grey suggests that the focus on *de facto* ownership and restriction of liberty makes it possible to conceive of a victim who participates in hostilities while remaining subject to sexual enslavement.[85] Such an approach would be difficult to apply under the logic of the *Ntaganda* Pre-Trial Chamber. Nonetheless, the Chamber's decision at least acknowledges the complex reality of girl soldiers who may be both victims of sexual enslavement and active participants in hostilities, even if it artificially suggests that they cannot be both at the same time.

Lubanga

As outlined above, the question of sexual offences against child soldiers was not directly addressed in *Lubanga* given the manner in which the prosecution framed its case. That is, while the evidence was presented of sexual offences against child soldiers, including the sexual enslavement of girl soldiers, these offences were not included in the charges by the prosecution. As the judgement of the Court cannot exceed the charges, these offences were not dealt with by the Trial Chamber.[86] As noted, Mr Lubanga was charged only with recruiting child soldiers and 'using them to participate actively in hostilities'.

[82] Ibid, para 79.

[83] Chandni Dhingra, 'Childproofing War: Prosecuting Sexual Violence against Child Soldiers' (unpublished honours thesis, Monash University, 2015), 40.

[84] R Grey, 'Sexual Violence against Child Soldiers' (2014) 16 International Feminist Journal of Politics 601, 614.

[85] Ibid.

[86] *Prosecutor v Lubanga*, ICC Trial Chamber I, 14 March 2012, paras 16 and 36.

Nonetheless, Judge Odio Benito in her dissenting opinion held that the Trial Chamber could have convicted Lubanga in respect of such sexual offences as they constituted a form of 'use' of child soldiers. (The United Nations Special Representative of the Secretary-General on Children in Armed Conflict had also made similar submissions to the Trial Chamber.) Given this, it is worth asking whether such sexual offences could be considered as falling within the crime of 'using' children in hostilities.

First, as noted in the discussion of *Ntaganda*, there is a difficult question to resolve as to how widely or narrowly the concept of 'using' children to 'participate actively in hostilities' should be drawn. As noted above, the difficulty arises because if children lack protected status while participating in hostilities, they may legitimately be targeted. Thus if the concept of participating in hostilities is drawn widely, then the final result would appear to be to reduce the protection of children and further expose them to the hazards of war. However, this would only be the result if the applicable test for 'participation' in international criminal law and IHL work the same way or must be given the same meaning. This is not necessarily the case.

IHL uses the concepts of 'direct' or 'active participation in hostilities'.[87] The question for the ICC was whether the concept of 'active' participation in hostilities should be given the technical meaning it has under IHL, or a broader meaning which could encompass at least some indirect support functions. In the end, the Appeal Chamber in *Lubanga* held that the meaning of 'active' participation in hostilities for the purposes of the crime of using child soldiers is not necessarily the same as 'active' or 'direct' participation in hostilities under Common Article 3. The Appeals Chamber thus took a different course of reasoning than that adopted in *Ntaganda*. Having found the two concepts are separate, it was then possible to conclude that 'indirect' combat support functions – of the type which would *not* lose a child his or her protected status under the principle of distinction – could form the basis of the crime of 'using' children in armed conflict. This uncoupling of the two concepts avoids the paradox of any expansion of protection under ICL leading to a reduction of protection under IHL.

[87] See, for example: International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

What kind of activities, then, constitute 'use'? The Appeals Chamber interpreted Article 8(2)(e)(vii) in light of both the ICRC commentary to the provision on child soldiers in Article 77(2) of API and the work of the Preparatory Committee which assisted in drafting the ICC Statute ('ICC Preparatory Committee'). The former refers to 'indirect acts of participation' as including: 'gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc.'[88] The ICC Preparatory Committee offered the following explanation of the words 'using' and 'participate' in its Draft Statute in relation to child soldiers:

> The words 'using' and 'participate' … cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase of the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.[89]

The Appeals Chamber held the essential test was 'the existence of a link between the activity [carried out by the child soldier] and the hostilities.'[90] The Trial Chamber had suggested an additional requirement, namely consideration of the extent to which the support activity provided by the child to combatants 'exposed him or her to real danger as a potential target'.[91] This additional risk-based criterion was rejected by the Appeal Chamber. The Appeals Chamber and Trial Chamber agreed that whether a particular

[88] *Prosecutor v Lubanga*, ICC Appeals Chamber, 1 December 2014, para 326 quoting Y. Sandoz et al., *Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August* 1949 (International Committee of the Red Cross, 1987), 901, para 3187.

[89] *Prosecutor v Lubanga*, ICC Appeals Chamber, 1 December 2014, para 326 quoting *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 1998. See: *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (1998), vol. III, 18, footnote 19 <http://legal.un.org/icc/rome/proceedings/contents.htm>.

[90] *Prosecutor v Lubanga*, ICC Appeals Chamber, 1 December 2014, para 333.

[91] Ibid, para 329.

activity had a sufficient 'link' to hostilities would require a case-by-case determination and exhaustive guidance could not be given in advance.[92]

The question, then, is whether the sexual exploitation of child soldiers by other members of the same party to a conflict can constitute their 'use'. As noted, such an argument was made by Judge Odio Benito in her dissenting opinion in the *Lubanga* Trial Chamber. She considered that by failing to consider sexual violence part of 'use to participate actively in the hostilities' had made 'the sexual violence and other ill treatment suffered by girls and boys ... invisible'.[93] Further, Judge Benito reasoned that:

> sexual violence or enslavement are illegal acts … [and are] a harm directly caused by … the war crime of enlisting, conscripting and the use of children under the age of 15 in support of the combatants. Sexual violence and enslavement are in the main crimes committed against girls and their illegal recruitment is often intended for that purpose (nevertheless they also often participate in direct combat.) ... It is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys. The use of young girls' and boys' bodies by combatants within or outside the group is a war crime ...

This is a powerful argument: if it is a war crime to recruit boy soldiers to use their bodies as porters or bodyguards, why is it not a war crime to sexually exploit the bodies of girl soldiers? The weaker counter-argument is that such exploitation is covered by other more specific sexual offences. However, it is not necessary to charge only the most precise crime possible against a defendant: while torture is a specific war crime, it may be easier to prove the same acts constitute the more general offence of cruel treatment. The stronger counter-argument is that Judge Odio Benito's logic appears to lead, in her words, to the conclusion that: '[g]irls who are used as sex slaves or "wives" of commanders or other members of the armed group provide essential support to the armed groups.'[94] The idea that sexual exploitation is an *essential* support function in armed conflict comparable

[92] Ibid, para 335; *Lubanga*, ICC Trial Chamber I, 14 March 2012, para 628.

[93] *Prosecutor v Lubanga*, ICC Appeals Chamber, 1 December 2014, Dissenting Opinion of Judge Odio Benito, para. 16.

to 'cooking, providing health care, spying, portering, and communicating messages' is 'deeply discomfiting' as it comes close to suggesting it is justified.[95] This cannot be correct. There is certainly broad support in a range of soft-law instruments for an expansive understanding of the roles of child soldiers (including the sexual exploitation of both boy and girl soldiers).[96] However, these definitions are provided for purposes such as post-conflict reintegration, transposing them into the Rome Statute may 'distort' the criminal law.[97] The real difficulty in the *Lubanga* case is that the narrowness of the charges brought by the Prosecutor appears to impair the truth-telling function of the Court. This, however, only takes us back to the problem of the 'overabundance' of goals which international criminal justice is meant to serve (see Chapter 3.6).

15.4 The role of victims in international criminal law: Criticisms and reflections

Who is international criminal law for? It is common for ICC Prosecutors to declare that they are working on behalf of victims and that justice for victims is the sole *raison d'étre* of the Court.[98] If this is true, however, it comes with substantial risks.

If the purpose of international criminal law is to deliver justice for victims, what does it say about the project when victims are themselves dissatisfied with the outcomes?[99] Indeed, a significant challenge for the ICC has, since the very creation of its mechanisms for victim participation and reparation, been managing the expectations of victims.[100] It is easy for the ICC to be seen as promising victims a great deal while delivering *them* relatively little. This was, however, inevitably going to be the case. The ICC is a court of limited jurisdiction and resources.

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[94] Ibid, para 20.

[95] Drumbl, 'The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering', 104 n 68.

[96] E.g.: The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, 2007, para 2.1 <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>.

[97] N Jogensen, 'Child Soldiers and the Parameters of International Criminal Law' (2012) 11 Chinese Journal of International Law 657, 681.

[98] Kendall, 'Beyond the Restorative Turn', 358; S Kendall and S Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) 76 Law and Contemporary Problems 235-62.

[99] F Mégret, 'In Whose Name? The ICC and the Search for Constituency' in De Vos, Kendall and Stahn (eds), *Contested Justice*, 42.

[100] Fletcher, 'Refracted Justice', 304.

Further, as noted elsewhere in this book, international criminal law is inherently selective.[101] Out of all the atrocities and internal conflicts in the world, only some fall within the jurisdiction of international courts or tribunals. This limits from the outset the pool of individuals harmed by international crimes who may be considered 'victims' before an international court or tribunal. Further, at the ICC, it is the Prosecutor who will select which situations falling within the Court's jurisdiction are investigated. This again narrows the class of potential victims. Further, those who apply to participate (in a very limited manner) as victims at the investigatory or situation stage may not in fact be victims for the purposes of the cases actually brought. This will depend entirely upon which the defendants the Prosecutor chooses to pursue cases against. The result is a progressive narrowing of the pyramid at each stage until only a very few victims (out of an enormous possible pool) are recognised as such by the ICC.[102] Further, selectivity may have *geographic* effects: in a large conflict zone where all have suffered, the Prosecutor may nonetheless for practical reasons have to focus on only a few towns or villages, meaning only certain 'localities' are 'officially sanctioned by the ICC as having suffered.'[103] Both in respect of reparations and the truth-telling or history-recording functions of the ICC there may thus be competition 'for victim status' or 'over legitimate victimhood' amongst those harmed.[104]

Further, the limited resources of the Court and Trust Fund for Victims mean that the emphasis in reparations will necessarily be on collective rather than individual reparation programs.[105] While this is not inherently problematic, there will still necessarily be choices to be made. The discretionary allocation of resources is a task which will always create 'winners' and 'losers' even if those involved in the process act with the best of intentions and the belief they are guided by neutral, professional expertise.[106] Restorative justice

[101] See especially Chapter 3, section 1 (on the Nuremberg IMT) and section 6.2 (on selectivity more generally).

[102] Kendall and Nouwen, 'Representational Practices at the International Criminal Court', 241.

[103] P Dixon, 'Reparations and the Politics of Recognition' in De Vos, Kendall and Stahn (eds), *Contested Justice*, 344.

[104] Ibid.

[105] Ibid, 336-8.

[106] Ibid, 326 ('The provision of international criminal reparations is an inherently political act through which the ICC will necessarily become a player in local power relations.')

programs may, for example, be provided only in respect of certain harms. That is, while victims themselves may prefer wider programs of economic or social reconstruction,[107] restorative justice projects funded by the Trust Fund may be more concerned with trauma counselling or the provision of prosthetic limbs.[108]

There is also the potential for unintended consequences in the targeting of reparations. For example, if a restorative justice program is directed at child soldiers, it may not reach all of the intended victims:

> Many [children associated with armed forces], for instance, do not self-identify as 'child soldiers'; many are no longer children; many were not abducted, but volunteer themselves up or were volunteered by their families; and females, especially, may avoid the label because they are more often harmed by sexual violence and the resulting stigma than males.[109]

Further, former child soldiers may, as a direct result of having been involved with a party to the conflict, be materially better off after the conflict than the general population.[110] Indeed, this may have been the point of their enlisting in the first place. Should such 'winners' from the conflict be eligible for reparations as 'victims'? As indicated above, targeting reparation programs at victims of sexual violence may also risk further stigmatising them. Not only may such victims be unwilling to access programs which require self-identification as having been raped, but receiving assistance which others do not may be a cause of jealousy within one's local community.[111]

15.5 Conclusions

[107] Fletcher, 'Refracted Justice', 321.

[108] See section 15.2.5.

[109] Dixon, 'Reparations and the Politics of Recognition', 339.

[110] Ibid.

[111] Ibid, 341.

Overall, it is not clear that there is a strong alignment between what victims often report that they want and what the ICC and the Trust Fund for Victims are able to deliver.[112] This leads to some unsettling possibilities. The first is that it becomes possible for those professionals working in international criminal justice to claim that they 'speak in the name of victims' without ever 'particularly interact[ing] with them'.[113] Indeed, there is the risk that those involved in international criminal law can claim legitimacy for the project in general or the ICC in particular through claiming to represent victims, and to do so without the consent of actual victims – or with consent which is merely presumed or imagined.[114] Indeed, at a practical level even the representation of victims in Court proceedings by legal representatives may not truly 'give victims a voice' as the 'serious logistic difficulties' for lawyers in The Hague representing, reporting to, and taking instructions from

> victims residing in other parts of the world could raise doubts as to whether the legal representation, and therefore the participation of victims, is effective and meaningful, or merely symbolic.[115]

Despite the supposed 'restorative turn' in the International criminal justice, it is clear that in the structure of the ICC restorative justice mechanisms are additional to and not an intrinsic part of the Court's statute.[116] There is thus a distinct risk that those involved in international criminal law may have as their first priority its development and perpetuation as a system of law and set of institutions, rather than advancing the interests of victims of atrocity crimes in any particular context.[117] Indeed, there is an established criticism that international criminal law has come to colonise the entire field of transitional or post-conflict justice. While the prosecution of offenders may be one thing victims want in a post-conflict society, it is very seldom the only thing. Despite this, international criminal law

[112] K Clarke, '"We ask for justice, you give us law"', 272-7; S Nouwen, 'Justifying Justice' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 332-4; Dixon, 'Reparations and the Politics of Recognition', 321.

[113] Mégret, 'In Whose Name?', 25.

[114] Ibid, 24-5.

[115] Catani, 'Victims at the International Criminal Court', 919.

[116] Fletcher, 'Refracted Justice', 322; Kendall, 'Beyond the Restorative Turn', 370.

[117] Dixon, 'Reparations and the Politics of Recognition', 350-1.

often acts as if it can deliver justice to victims solely through adjudication.[118] The point is particularly driven home in the criticism of some victims and civil society groups: 'we ask for justice, you give us law.'[119]

It is obvious that if the ICC is to deliver meaningful justice to victims, much more will need to be done at the level of local affected communities. This may require restorative justice projects to draw upon 'on the experience of community-driven reconstruction' involving a 'participatory and consultative approach to the entire reparations process'.[120] It may also require significantly more resources being put into 'outreach' activities explaining the mandate and limitations of the Court itself to affected communities. However, historically outreach has been 'underdeveloped (and frequently underfunded) area of operations' of international criminal justice and has never been a mandated function of *any* international criminal tribunal under its statute (thought it has recently been added to the ICC's Regulations of the Registry).[121]

Useful further reading

L Catani, 'Victims at the International Criminal Court: Some Lessons Learned from the *Lubanga* Case' (2012) 10 Journal of International Criminal Justice 905
This article provides a concise and accessible account of the ICC law in relation to victims and significant practical insight into the conduct of the *Lubanga* trial.

C De Vos, S Kendall and C Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge 2015).
An excellent collection of essays on the ICC, with many touching on issues relevant to victims. Chapter 1 by Frédéric Mégret discusses the various constituencies the ICC seeks to serve. Kamari Clarke gives an excellent account of the workings of the Trust Fund for Victims and the challenges of restorative justice in Chapter 11. Laurel Fletcher considers how we 'imagine' victims in international criminal law.

[118] Clarke, '"We ask for justice, you give us law"', 274.

[119] Ibid, 272.

[120] Dixon, 'Reparations and the Politics of Recognition', 348.

[121] M Hellman, 'Challenges and Limitations of Outreach: From the ICTY to the ICC' in De Vos, Kendall and Stahn (eds), *Contested Justice*, 251; see also sections 3.5.3 and 4.5.3.

Peter Dixon discusses reparations and the politics of being recognised as a victim in Chapter 13. Sarah Kendall provides an incisive account of the 'humanitarian turn' in international criminal law and its limits.

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

As discussed in Chapter 5, section 2.4 this article considers the possibility that international justice may appropriate the identity of victims, rendering them the abstract 'sovereign' of international criminal law (an idea capable of justifying the system and anything it does without *real* victims' permission or consent).

M Kelly, 'The Status of Victims under the Rome Statute of the International Criminal Court' in T Bonacker and C Safferling (eds) Victims of International Crimes: An Interdisciplinary Discourse (Asser Press 2013).

A usefully clear and concise account of the ICC framework and a good starting point for further study.

S Nouwen, 'Justifying Justice' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012), Chapter 15.

An extraordinary essay providing both academic and personal insight into the justifications of international criminal law and the lived experience of international criminal lawyers.

S Vasiliev, 'Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Nijhoff 2009), Chapter 33.

A very useful and highly detailed account of the technical law governing victims' participation in ICC proceedings and the system of reparations.