# The local impact of a global court : assessing the impact of the International Criminal Court in situation countries

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## Chapter 5: Reparative Effect: From Rights to Remedies?

> *Justice will not be served until those who are unaffected are as outraged as those who are*. — Benjamin Franklin
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> *The victims have no time. They are waiting to be rescued; they are calling to stop the rapes and the killings now*. – Luis Moreno Ocampo, Review Conference, Kampala, 31 May 2010

### I. Introduction

Reparative effect refers to the Court's impact on victims. The Court is meant to provide access to justice, as well as remedies, for the victims or the world's worst crimes. This raises questions about how victims participate in the process; how they are empowered; and ultimately, how they are "repaired."

Some commentators referred to the ICC's effects on victims as restorative justice. Restorative justice is defined in the English Oxford Dictionary as "a system of criminal justice which focuses on the rehabilitation of offenders through reconciliation with victims and the community at large." Restorative justice is a horizontal form of justice, which exists in different criminal systems. However, restorative justice is not a dominant feature of the ICC.[1054] Instead, it is more accurate to refer to "reparative" justice in the context of the Rome Statute and ICC. The Rome Statute is heralded as the first international criminal forum that actualizes both retributive and reparative justice. The Rome Statute was inspired by the fact that at the domestic level, many legal systems allow for the direct participation of victims in criminal trials through the *partie civiles* system, and it has sought to reproduce this system on the international level. The Rome Statute drew on other developments such as the Basic Principles and Guidelines to a Remedy and Reparation for Victims of Gross Violations.[1055] In 2009,the Court formulated a Strategy in Relation to Victims, which was updated in 2012.[1056]

The Court's mandate of holding perpetrators accountable and providing for reparations is broadly supported by victims, who often perceive their own systems as biased, corrupted, or favoring impunity.[1057] At the same time, the existence of the

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[1054] While in the *Lubanga* Trial Chamber argued that the reparations function of the Court promotes reconciliation between victim and offender, this seems highly tentative. *Prosecutor versus Thomas Lubanga Dyilo,* Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, 7 August 2012, ICC_01/04-01/06 para. 179.

**[1055]** Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[1056] Report of the Court on the Strategy in Relation to Victims, ICC- ASP/8/45, 10 Nov. 2009.

[1057] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. Africa Portal research paper (September 2013) p. 20.

Court raises significant expectations among victim communities. In the words of the FIDH: "Victims and local communities … place their hopes in the activities of the Court. They want justice, to tell their stories, and eventually, to obtain reparations."[1058] The Court's ability to serve victims is supremely important in assessing its overall impact or success, as acknowledged by the Registrar:

> The success of the Court will depend not only on its judgements and sentences for individuals who have committed the gravest crimes of concern to the international community as whole. Rather, the success of the Court will also – if not even to a greater extent – depend on giving the victims voice and adequate reparation and assistance in re-building their lives.[1059]

Reparative justice in the Rome Statute takes the forms of participation in the legal process; followed by reparations for victims and in some cases, assistance through the Trust Fund for Victims. This legal framework will be discussed in Section II. But an analysis of whether the form*s* of reparative justice (participation, reparations) are being respected often becomes a quantitative analysis, which does not necessarily provide insight into whether the Court has reparative effect. It is rather more difficult to measure unquantifiable issues, such as the acknowledgement that victims may obtain from being included in Court proceedings. At a bare minimum, under the "do no harm" principle, victims deserve protection when they come into contact with the ICC.

As part of its universal values legitimacy, the Court is based on the notion of one shared identity, shared amongst all of humanity.[1060] The term "victims" before the ICC is often used as an abstraction, whereas little is known about their individual circumstances, or their needs and desires. Those who commit the violations are "enemies of mankind", or *hostis humanis*. As Kendall and Nouwen have commented: "The moral currency of victimhood is thus appropriated to shore up the legitimacy of the ICC's actions."[1061] But how does the Court's "universal values" legitimacy affect individual victims? Should it override the wishes of victims in specific situations? This also raises methodological questions about how to assess the views of victims and who represents them.

The cases of Uganda and Kenya raise difficult questions about whether victims can realistically expect to see meaningful participation, followed by reparations. What is

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[1058] FIDH, *Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court*, November 2013.
[1059] Registrar's Remarks at Coalition for the ICC Launch Forum Commemorating the 20th Anniversary of the Adoption of the Rome Statute, 15 Jan. 2018.
[1060] Koller, David. *The Faith of the International Criminal Lawyer*. International Law and Politics, Vol. 40 (2008) 1019 p. 1050.
[1061] Kendall, Sara and Sarah Nouwen, *Representational Practices at the ICC: The Gap Between Juridified and Abstract Victimhood*, University of Cambridge Faculty of Law, Research paper No. 24 (2013).

the expressive value of the Court vis-à-vis victims? These questions will be discussed in the following Chapter.

## II. Legal Framework

### A. "Meaningful" Participation?

Victims are defined in Rule 85 as "any natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Victim participation, guaranteed in Art. 68(3), is at the core of the Rome Statute's promise of justice for victims. Victims have the right to participate in various stages of the proceedings in a variety of ways, although the extent of this right is subject to the discretion of the judges. The Appeals Chamber decided that the right to participate in the "proceedings" does not include investigations, even though that is arguably a very important stage of the process for victims.[1062] At the same time, the victims can and do participate directly in the Prosecution case, through the submission of evidence. In some cases victims presented their own evidence independent of the prosecutor or defence, as was the case in *Katanga*. The discussion below leaves aside the multitude of complications that the Court has experienced with intermediaries.

Converting the ideal of victim participation into reality was left to the judges of the ICC, and it constitutes an enormous challenge, which is freely admitted by the judges. It is also apparent from the inconsistencies in the Court's jurisprudence in this regard. Measures for victim participation are considered onerous and bureaucratic by all involved, and are applied inconsistently across different Chambers of the Court.[1063] The length and complexity of the victim participation forms, and the requirements for supporting evidence have been criticized by both

[1062]Situation in the Democratic Republic of the Congo, ICC-01-04-556, Judgment on Victim Participation in the Investigative Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, 19 Dec. 2008 at para. 56. Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 478.

[1063] FIDH, En*hancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court*, November 2013 pp. 14-15. See also Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at paras 28-37.

proponents and critics of victim participation.[1064] The Court has published the following figures on participation:[1065]

| Number of victims participating | Pre Trial | Trial | Appeal |
|---|---|---|---|
| Lubanga | 7 | 129 | 151 |
| Katanga | 57 | 364 | 0 |
| Ntaganda | 1120 | 2137 | N/A |
| Bemba | 54 | 5229 | In process |
| Gbagbo and Blé Goudé | N/A | 726 | N/A |
| Ongwen | 2026 | In process | N/A |
| Al-Mahdi | 0 | 8 | N/A |

Four cases are currently in the reparations phase: *Lubanga, Katanga, Bemba* and *Al-Mahdi.*

The administrative burden of victim participation is immense. The decision in *Lubanga* that victims were to participate on an individual basis,[1066] as to be decided by the judges, has led to an enormous burden on the Registry, which has to assist victims in preparing their supporting documentation. Moreover, at each new stage of the proceedings, the victim has to re-qualify.[1067] As the number of victims who wanted to participate increased into the thousands, particularly in the cases of *Bemba* and *Gbagbo*, new solutions had to be found. This led to the recognition of a simplified, collective application process in the *Gbagbo* case.[1068] In the Kenya cases, only victims who wish to appear before the Trial Chamber were required to fill out an application form. Those who wish to participate in proceedings without appearing can register through the common legal representative. However, victims are not always adequately consulted in the process of appointing a common legal

[1064] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge,* 44 Case Western Res. J. Int'l L. (2011) p. 481. See also War Crimes Research Office (2009), *Victim Participation at the Case Stage of Proceedings*, Washington: Washington College of Law, American University (2009). Tenove, Chris. *The International Criminal Court: Challenges of Victim Assistance, Participation, and Reparations*, Africaportal backgrounder, No. 52 January 2013. Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* "International Journal of Transitional Justice Vol. 7 (2013) p. 527.
[1065] Second Court's report on the development of performance indicators for the International Criminal Court, 11 Nov. 2016, at p. 63.
[1066] *Prosecutor versus Thomas Lubanga Dyilo*, Decision on Victims' Participation, ICC-01/04-01/06-1119, 18 January 2008. In each case the Chamber must assess whether the victim qualifies as a victim under Rule 85.
[1067] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge,* 44 Case Western Res. J. Int'l L. (2011) p. 482.
[1068] *Prosecutor versus Laurent Gbagbo*, Second Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11-86, 5 April 2012. Interview with, Head of VPRS, May 2014.

representative, neither are there sufficient funds for legal representatives to conduct their field investigations.[1069]

The result is that currently, the modalities for victim participation are applied inconsistently across different Chambers of the Court.[1070] In 2016, a simplified individual approach for participation was laid out in the Court's Practice Manual.[1071]

The lack of a unified vision on participation is apparent from the positions of the judges of the ICC, and their varying viewpoints. Judge van den Wyngaert reflected that "a huge amount of time is spent on victim-related issues" in ICC trials.[1072] Judge Fulford remarked that "the involvement of victims has not greatly added to the length of the case" and "their submissions and questioning have been focused, succinct and seemingly relevant."[1073] Financial and efficiency considerations are increasingly featuring in the debate concerning victims' rights, as remarked by NGOs at the Assembly of States Parties.[1074]

As victims are lumped into ever-larger categories, this presumes homogeneity of their interests in situations where the reality is that their interests may be diverse and fractured and some are more vulnerable than others. On the other hand, if all categories of victims address the Court separately, it will create an unbearable administrative burden. The common legal representative is intended to resolve this problem,[1075] but the challenge of scope is inherent. The result is described by Kendall and Nouwen: "Of the millions of victims in the word, then, only thousands

[1069] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3, 1 July 2017, Pages 567–591. In 2017, the Court presented a new legal aid system to the ASP, which would allow for field budgets to be calculated on a case-by-case basis.

[1070] FIDH, *Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court (*November 2013) pp. 14-15. See also Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at paras 28-37.

[1071] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3, 1 July 2017, Pages 567–591.

[1072] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 494.

[1073] Fulford, Judge Sir Adrian, *Reflections of a Trial Judge*, Criminal Law Forum 22 (2011) p. 222.

[1074] FIDH, *Enhancing Victims' Rights Before the ICC: A View From Situation Countries on Victims' Rights at the International Criminal Court* (November 2013) p.5: "Discussions at the Court and within different bodies of the ASP have a propensity to address victims' challenges solely as a matter of budgetary concerns, portraying victims' participation as a "cost driver" or an administrative burden."

[1075] In fact some research has indicated that the role of common legal representatives is quite positively perceived: Tenove, Chris, International *Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper, (September 2013) p. 29.

have managed to reach the top of the pyramid of juridified victimhood and have been granted provisional recognition as victims before the ICC. "[1076]

Underlying these tensions is a lack of consensus on what is the fundamental purpose of victim participation i.e. what makes it meaningful.[1077] The goals of victim participation suffer from as much controversy and confusion as the goals of the ICC more broadly. NGOs strongly argue that victim participation is essential, because victims "provide judges with contextual information, ensure a connection with the field and a degree of local ownership of ICC proceedings, thereby advancing the legitimacy of the ICC mandate."[1078] They argue that victim participation can "empower victims and contribute to their healing" while "establishing a strong connection between the Court and victims, with victims providing important factual and cultural context to proceedings, which can also contribute to establishing the truth."[1079] Some go even further, to suggest that the victim participation function is what connects the process of the ICC with the local context: "Regularly, only a few of those involved in the proceedings are thoroughly familiar with the local context and customs that are relevant to understanding the manner and impact of the commission of the crimes and to interpreting the evidence."[1080] Proponents argue that the victim participation function fills that gap.[1081] An argument is also made that the interests of victims in the trial go beyond the punishment of the accused, to include public acknowledgement of what happened and the establishment of a historical record.[1082] Any suggestion to delimit victim participation is vehemently opposed by NGOs:

[1076] Kendall, Sara and Sarah Nouwen, *Representational Practices at the ICC: The Gap Between Juridified and Abstract Victimhood,* University of Cambridge Faculty of Law, Research paper No. 24 (2013).
[1077] Wemmers,Jo-Anne. *Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Rights to Participate*, Leiden Journal of International Law 23 (2010) 629 p. 637. In her research she indicates that officials inside the Court had different ideas on what were the goals of victim participation, whether it is providing information or a form of expression.
[1078] FIDH, *Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court,* (November 2013) p. 4.
[1079] Redress, I*ndependent Panel of Experts report on victim participation at the International Criminal Court,* July 2013.
[1080] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. 524.
[1081] This was also stated by the Court in the *Katanga and Ngudjolo* case, in the Decision on the Set of Procedural Rights Attached to the Procedural Status of Victims at the Pre-Trial Stage of a Case, Doc. No. ICC-01/04-01/07-474 (13 May 2008) paras. 31-36: victims can assist the judges to "better understand the contentious issues of the case in light of their local knowledge and socio-cultural background."
[1082] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. p. 525

> A narrow interpretation and application of the rights of victims by the Court may be inconsistent with the requirements of the Statute and undermine the credibility of the Court.[1083]

But this standpoint ignores the challenge that victims "have not been an important consideration in the judges' decision making in determining outcomes such as truth, justice and reparations."[1084] The role that victim participation currently plays in truth telling and acknowledgement, as a matter of practice in Court proceedings, is doubtful.

The Bureau of the ASP stated "participation must be meaningful for victims but also for the purposes of the proceedings, in other words, to provide sufficient relevant information for the Judges, the parties and participants."[1085] All this has prompted debate on what constitutes "meaningful participation." Judge van den Wyngaert has said:

> There is an enormous distance – both in the literal and the cultural sense- that often separates the reality of victims' lies from the proceedings in The Hague. Victims generally do not personally attend the hearings. Considering their numbers, this would simply be impossible. In general, therefore, victims are represented by counsel, and most of them never make it to The Hague … In those circumstances, can legal representation be anything more than symbolic?[1086]

Perhaps victim participation ought to be re-conceptualized as requiring more interaction, in the form of communication and consultation (although in one study less than 10 percent of the Court staff associated victim participation with consultation).[1087] The Special Rapporteur on truth, justice, reparations and guarantees of non-repetition pleads for "meaningful participation in processes of law-making through which they (victims) can give content to the notion of justice (not limited to their own redress)."[1088] Research indicates that until now, victims

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[1083] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3, 1 July 2017, Pages 567–591.
[1084] Moffett, Luke. *Realising Justice for Victims Before the International Criminal Court*. International Crimes Database (September 2014) p. 8.
[1085] Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries, Twelfth Session, The Hague 20-28 November 2013, ICC-ASP/12/38 at para. 10.
[1086] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 489.
[1087] Wemmers, Jo-Anne. *Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Rights to Participate,* Leiden Journal of International Law 23 (2010) 629 p. 637.
[1088] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, Human Rights Council 21st session, 9 August 2012 at A/HRC/21/46.

often perceive of the Court as engaging in one-way rather than two-way communication, and that meetings did not lead to feedback or action.[1089]

The presumption however that participation as currently implemented serves to build local ownership in the Court deserves to be put to question.[1090] Observers have argued the Court is increasingly inclined to take decisions without involving victims.[1091] This includes for instance the appointment of a common legal representative, or in Kenya, on the decision whether to hold *in situ* confirmation hearings.[1092] The Kenyan victims were consulted, but not by the Court.[1093] It may be that consultation, albeit more informal than participation, is more meaningful for victims.

In any case, in the current model, legal representatives and Court staff consume many of the resources reserved for victim participation. Indeed, the gap between the promise of the Court and its delivery in practice is becoming more apparent as time goes on. As stated rather brusquely by the Bureau of Assembly of States Parties in 2013:

> [T]here is a need to close the gap between expectations, right and resources. In other words, while stakeholders should bear in mind that victims' rights are a cornerstone of the Statute and therefore, the debate on victims cannot be reduced to a cost-driver, they should be aware that the world is still facing a financial crisis that has consequences in terms of the allocation of resources. As a result, finding that balance is a matter of priority.[1094]

Until now, only one major study was carried out on the views of victims participating in ICC proceedings, by Berkeley University.[1095] The study concludes that most victims have insufficient knowledge to make informed decisions about whether to participate in ICC cases. In terms of expectations, victims want convictions and reparations: in fact the latter was the main motivator for

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[1089] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 27.
[1090] Some argue that the victims' participation function should constitute consultation: Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. 531.
[1091] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. 532. Carayon, Gaelle and Jonothan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3 (1 July 2017) pp. 567–591.
[1092] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013), p. 534.
[1093] Interview with ICC staff, Nairobi, 4 Feb. 2014.
[1094] Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries, Twelfth Session, The Hague 20-28 November 2013, ICC-ASP/12/38.
[1095] Human Rights Center, UC Berkeley, *The Victims Court? A Study of 622 Victim Participants at the ICC: Uganda, DRC, Kenya, Cote d'Ivoire* (2015).

participation in Uganda and DRC. Few however want to participate directly in trial proceedings, whereas they do appreciate filling out individualized applications. At the same time, victims expressed frustration at the length of trials, and their satisfaction depended largely on their personal interactions with ICC staff or their legal representatives, which tended to be very few. Victims in some situations, including in particular Kenya, feared reprisals for their involvement in ICC proceedings.[1096]

The findings of this study are also reflected in some smaller-scale studies. For instance, one study based on focus groups indicated that many victims want to be heard by the ICC, and recommended that the ICC should "listen attentively to the experiences of individual victims."[1097] All of this should give rise to further contemplation about the victim participation function of the Court. For instance, meaningful participation could perhaps be enhanced by more creative use of the outreach function of the Court, or participation could be limited to crucial stages of the proceeding where it is most impactful.

B. Who is Eligible for Reparations?

One of the main purposes of victim participation is so that victims can claim reparations.. Many victims participate with this goal in mind. Reparations proceedings are governed by Article 75 of the Statute.

At the national level, reparations are a crucial form of acknowledgement that the State violated the rights of victims. De Greiff argues that reparations should lead to "recognition, civic trust and social solidarity."[1098] At the international level, such acknowledgement is less central but may still play a role. The big challenge facing reparations is that the numbers that may be eligible for reparations will be far larger than the resources available. Convicted persons themselves will often either be indigent or it may very difficult to access their resources. This means that most orders for reparations would need to be financed from the Trust Fund for Victims, which continues to relatively humble in scope.

The Court currently approaches reparations on a case-by-case basis. The Trial Chamber in *Lubanga* laid down principles and procedures for reparations for that case as provided for in Article 75 (1).[1099] In doing so, the Trial Chamber sketched out an expansive vision of reparations. It held that the reparations function had several important goals, including to require those responsible to repair the harm

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[1096] Ibid.

[1097] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 31.

[1098] Pablo de Greiff, *Justice & Reparations,* in The Handbook of Reparations (ed. Pablo de Greiff), Oxford University Press, 2006 at p. 451.

[1099] *Prosecutor versus Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, ICC_01/04-01/06,7 August 2012.

they caused, and to alleviate the suffering of individuals and communities, thereby affording justice, deterring future violations, and contributing to reconciliation. Particularly significant is that the Trial Chamber put proportionality at the center of its approach to reparation. For instance, the Trial Chamber held that compensation can be granted if there is economic quantifiable harm, if such an award is appropriate and proportionate, and if there are available means to make this approach feasible.[1100] The harm to be compensated is also given a broad definition, including for instance lost opportunities. The Trial Chamber held that "awards ought to be proportionate to the harm, injury, loss and damage."[1101] On the other hand, the scope of reparations could be individual or collective: a collective approach may be appropriate to reach unidentified victims.[1102]

This judgement sets a certain "gold standard" or proportionality, which may be impossible to meet in practice. At the same time, the Trial Chamber took the view that reparations should reflect local cultural and customary practices, if appropriate, and should support programs that are self-sustaining.[1103]

The Appeals Chamber later clarified a number of issues from the Trial Chamber decision.[1104] The Appeals Chamber took a judicial approach to reparations, which closely links the individual criminal responsibility of the perpetrator with the rights of the victim. Nonetheless, the Appeals Chamber urged the TFV to continue "assistance" means to victims who fall outside of the exclusionary categories that it laid out.[1105] As Dixon has argued, this gives prominence to the concept of assistance within the functions of the TFV, as will be elaborated below. On 15 December 2017, the Trial Chambers set the amount of Lubanga's liability for collective reparations at 10 million USD.

Following the Appeals Chamber Decision, in the *Katanga* case,[1106] the Trial Chamber issued individual symbolic compensation of USD 250 per victim, intended to provide "meaningful relief" to the victims. It also ordered collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support. The Chamber assessed the extent of damage in the case to a monetary value of USD 3,752,620 and, observing proportionality, assessed Katanga's liability at USD 1 million. The Appeals Chamber later held that the Trial

[1100] Ibid., para. 226.
[1101] Ibid., para. 243.
[1102] Ibid, para. 217, 219.
[1103] Ibid, para. 245-246.
[1104] *Prosecutor versus Thomas Lubanga Dyilo*, Appeals Chamber Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129, 3 March 2015.
[1105] Ibid. at para. 215. Dixon, Peter. *Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo*. International Journal of Transitional Justice, (2016) 10 at p. 88-107.
[1106] *Prosecutor v. Germain Katanga,* ICC-01/04-01/07-3728, Ordonnance de reparation en ertu de l'article 75 du Statut, 24 March 2017.

Chamber's assessment of each application and setting out all the findings caused unnecessary delays, and that its role should mainly be to define the harm and determine the appropriate modalities for repaying the harm.[1107]

Another decision on reparations was issued in the *Al-Mahdi* case.[1108] Al-Mahdi was held to owe 2.7 million in expenses for individual and collective reparations for the community of Timbuktu, after his conviction for directing attacks against the religious and historic buildings in that city. Al-Mahdi is indigent, and the TFV is currently working on a draft implementation plan. The Trial Chamber stressed the potential of the award to contribute to deterrence and to reconciliation. The Trial Chamber also ordered individual reparations for those whose livelihoods depended on the attacked sites and whose ancestral burial places were damaged in the attack. On 8 March 2018, the Appeals Chamber ruled that the identities of the victims did not need to be disclosed to Al-Mahdi, but only to the Trust Fund for Victims.[1109]

Many uncertainties remain in reparations proceedings. This lack of clarity is a source of frustration to victims, as has become apparent in the *Ongwen* case.[1110] Moreover, Judge van den Wyngaert has predicted: "if the extent of the harm suffered and the causal link with the crimes has to proved on an individual bases, there is a good chance that the length of the reparations proceedings could exceed the duration of the criminal trial itself."[1111] To be realistic, if Court proceedings are a matter of decades, in countries such as Uganda or Afghanistan, where the life expectancy is significantly lower than in the West, this raises significant doubts whether victims can expect to see reparations in their lifetimes.

But an even bigger challenge is that the TFV will never be able to pay reparations to all the victims that are eligible in any manner proportionate to the offence, or even to provide meaningful relief. At the same time, often victims continue to expect individual reparations, although this may vary according to the context.[1112] Even collective reparations, which in principle are to be welcomed, would severely strain

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[1107] *Prosecutor v. Germain Katanga,* ICC-01/04-01/07 A3 A4 A5, Judgement on the appeals against the order of Trial Chamber II of 24 March entitled ''Order for Reparation Pursuant to Article 75 of the Statute'', 8 March 2018.
[1108] *Prosecutor vs. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-236, Reparations Order, 17 August 2017.
[1109] *Prosecutor vs. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-A, Appeals Chamber, Public Redacted Judgement on the Appeal of Victims Against the "Reparations Order", 8 March 2018.
[1110] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3 (1 July 2017) pp. 567–591.
[1111] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 487.
[1112] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 21: Discussants in Kenya believed that victims of post-election violence need individualized compensation and livelihood assistance. By contrast, respondents in Uganda were much more open to community-level reparations for the whole northern region. Participants also tended to agree on who ought to be prioritized, including the vulnerable (e.g. families without breadwinners, disabled). Ugandans tended to express more interest than Kenyans in symbolic reparations.

the resources of the TFV, which currently would not be sufficient to build even a single school or hospital in any affected community.

This should be contrasted with the expenditure currently going into victim participation, estimated at 7 million in 2012.[1113] The fact that victim participation function costs the Court three times what the TFV initially had available to it annually leaves room for pause as to whether this is the right balance.[1114] According to Judge van den Wyngaert, "a question the Court will have to ask itself is whether the participation system set in place is "meaningful" enough to justify the amount of resources and time invested in it or whether it would be better to spend those resources directly on reparations."[1115]

In contrast, the Colombian Victims and Land Restitution Law (1448) from 2011, which combines assistance and reparations, has registered almost 16 percent of Colombia's population as official victims of the conflict, including many victims of internal displacement.[1116] In 2016, the Colombian government had paid reparations payments to 473,257 victims and assistance payments to 1,184,418.[1117] While elements of the system have also been criticized, it appears to be able to do more for victims than the ICC. As Pablo de Greiff and I wrote in 2005: "it is important to both temper expectations of what the Fund can actually do for victims, especially by way of compensation, and that the struggle for reparations for victims must continue in other *fora*, including the national arena.[1118]

C. The Trust Fund for Victims: Centerpiece or Sideshow?

According to Article 79 of the Rome Statute, the TFV has a two-fold mandate (1) to administer reparations ordered by the ICC against convicted persons; and (2) to use other resources for the assistance of victims. So far, the TFV's activities have centered mainly on the latter part of the mandate, the granting of assistance. The resources for the assistance function of the Court come from voluntary contributions, some of which are earmarked, such as for SGBV.[1119]

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[1113] Van den Wyngaert, Christine. *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case Western Res. J. Int'l L. (2011) p. 492.
[1114]Ibid. p. 492.
[1115] Ibid.p. 495.
[1116] Dixon, Peter. *Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo*. International Journal of Transitional Justice (2016) 10 p. 93.
[1117] Ibid. p. 94.
[1118] De Greiff, Pablo and Marieke Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints,* in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, ed. K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens, Intersentia (2005) p. 225-226.
[1119] Both the UK and Japan both made significant contributions earmarked for SGBV, of 800,000 and 600,000 Euros respectively.

The TFV currently functions as a donor to a range of humanitarian projects in ICC-situations, including Uganda, DRC and CAR (although the latter had to be halted due to security). Its annual reports are filled with facts and figures on the performance of projects. In 2016, its projects had 70,667 direct beneficiaries and 230,641 indirect beneficiaries.[1120] Recently, the TFV has started to develop a plan with goals and indicators, in order to measure its own impact.

However, the TFV must also implement the reparations orders of the Court. Some donors have earmarked their donations to be used for reparations. The TFV is currently playing a role in helping to design the reparations approach in *Lubanga* and in *Al-Mahdi*.[1121]

In this respect, the TFV creates both an opportunity and a liability as "[t]he flexible procedures that the TFV may apply make it more suitable to design approaches to reparations for mass crimes than the Court itself."[1122] Dixon argues that the distinction between reparations and assistance exposes tensions "between inclusive and exclusive approaches to reparative justice; between the legal strictures of redress and the complex realities of violence; and ultimately between the supposed symbolic power of reparative justice and victims' actual experience of reparations in practice."[1123]

Efforts of the Assembly of States Parties to secure funding for the TFV are focusing increasingly on fines and forfeitures. As many accused are indigent, it is not clear whether this will result in a sufficient yield to make a substantial difference to what victims can be offered in terms of reparations.[1124] Having said that, annual donations from governments for the TFV have steadily risen. A significant part of donations in recent years are earmarked for victims of sexual and gender-based violence. Also encouraging is the fact that the donor base of the TFV is very broad, with many states participating. The TFV employs a staff member dedicated to fundraising.[1125] At the same time, from 2002-2014 the total contribution to the TFV, both restricted and unrestricted, was 22 million Euros, less than 3 million Euros a year. In 2016, the TFV had 12.7 million available to it, with 5 million reserved for

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[1120]Second Court's report on the development of performance indicators for the International Criminal Court, 11 Nov. 2016, at p.65.
[1121] Interview with TFV Director, 7 May 2014.
[1122] De Greiff, Pablo and Marieke Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, ed. K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens, Intersentia (2005) p. 243.
[1123] Dixon, Peter. *Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo.* International Journal of Transitional Justice (2016) 10 p. 89.
[1124] Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries, Twelfth Session, The Hague 20-28 November 2013, ICC-ASP/12/38.
[1125] Interview with TFV Director, 7 May 2014.

reparations.[1126] This is a relatively small amount when compared to what many donor countries spend on humanitarian assistance or development projects. The TFV remains chronically underfunded. The cause of paying for the crimes of others seems not to attract significant donor support. While there may be a need for the TFV to explore other sources of funding, such as private donations, all in all it is unrealistic to expect that this amount will increase a great deal over time. With its low income, the TFV remains a "side show" to the ICC project.

In sum, the Court's practices in dealing with victims are showing many shortfalls. As argued by Carayon and O'Donohue:

> To gain victims' confidence, empower them to claim their rights, and ensure that they benefit from (and are not frustrated by) the process, it is essential that the Court is accessible; respectful in its interactions; honest in what it can and cannot achieve; predictable in its processes; and transparent, consistent and fair in its decision-making. Only then can victims make informed choices throughout the process.[1127]

The authors criticize the ICC for not laying out a sufficient strategy on victims; not defining clear indicators for progress, with too much focus on quantitative rather than qualitative indicators in the Courts Strategic Plan, and for not subjecting this area of work to adequate evaluation. But the challenge remains that even if the Court would make those amendments in its planning, whether the plight of victims of the worlds worst crimes is simply too large in scale for this single institution to redress satisfactorily. Even though its legitimacy has so largely hinged on the concept of serving the victims, honesty about this simple fact may help to find diversified solutions.

## III. Reparative Effect on the Ground: Country Experiences

### A. Uganda: A troubled decade of intervention

The situation in Uganda raised fundamental questions for the Court about how to take into account the views of victims, both at the time of opening an investigation and at the point of an exit strategy. Uganda was the first case to be referred to the ICC, so that it is possible to trace the impact of the Court over the longer term. Victims and affected communities were not consulted prior to the announcement of the referral. After the referral, the ostensible representatives of the victim community, i.e. Acholi local religious and traditional leaders as well as certain members from the civil society, spoke out strongly against the ICC intervention from

[1126] Second Court's report on the development of performance indicators for the International Criminal Court, 11 Nov. 2016, at pp. 65-66.
[1127] Carayon, Gaelle and Jonathan O'Dononue, *The International Criminal Court's Strategies in Relation to Victims*, Journal of International Criminal Justice, Volume 15, Issue 3 (1 July 2017) pp. 567–591.

the outset.[1128] Local leaders even visited The Hague in a bid to ask the Prosecutor to drop the arrest warrants.

The opposition of the religious and traditional leaders to the ICC was based on several factors. First, the ICC was seen to interfere with local initiatives to pacify the conflict, in particular the Amnesty Act and Acholi traditional justice; second, the ICC was seen as favoring the Government, and the fact that UPDF was not investigated contributed to the impression that this was one-sided justice; and lastly, many local leaders feared that the involvement of the ICC would prevent the LRA from ever agreeing to a peaceful settlement of the conflict.[1129] The enormity of the humanitarian crisis in Northern Uganda caused many humanitarian organizations to side with the local religious and traditional leaders in demanding "Peace First, Justice Later."[1130]

Apart from these substantive objections, the traditional leaders also had objections based on the process of the ICC intervention:

> The ideas of local civil society actors, and their decades of involvement in a war that had affected many of the personally, seemed to be effectively ignored. There was minimal consultation about accountability and justice options before the ICC made its announcement, no prior warning about the announcement, and no mechanism provided for voicing dissent in the immediate aftermath.[1131]

The Court attempted to exercise damage control through conversing with traditional and religious leaders in the North, but it was difficult to correct this perception.

### *1. Who Represents Victims?*

The situation in Northern Uganda concretely raised the difficult question of who represents victims. On the one side were the religious and local leaders and the humanitarian organizations. On the other were international actors supporting the

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[1128] Branch, Adam . *Uganda's Civil War and the Politics of ICC Intervention* 21 Ethics and International Affairs (2007) p. 179. See also Hovil, Lucy. *Challenging International Justice: The Initial years of the International Criminal Court's Intervention in Uganda*, Stability, 2 (1) (2013) pp. 1-11.
[1129] See for instance Otim, Michael and Marieke Wierda, *Justice at Juba: International Obligations and Local Demands in Northern Uganda*, in *Courting Conflict? Justice, Peace and the ICC in Africa*, ed. Nicholas Waddell and Phil Clark Royal African Society (2008) p. 21.
[1130] See Lucy Hovil and Joanna Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, Refugee Law Project Working Paper No. 17 (July 2005).
[1131] Hovil, Lucy. Challenging International Justice: The Initial years of the International Criminal Court's Intervention in Uganda, Stability, 2 (1) (2013) p 7.

ICC, who often questioned the legitimacy and integrity of these local actors,[1132] sometimes equating opposition to the ICC as opposition to justice.[1133]

Conversely, the "local actors" made a strong argument that it was the ICC intervention that lacked legitimacy. They argued that the ICC had entered at the invitation of President Museveni, himself a party to the conflict. They also argued that the ICC would be ineffective, due to its inability to enforce its arrest warrants, and that it would reinforce a military solution to the conflict. Most of all, they argued that the form of justice that the ICC would deliver was not relevant to the victim communities. As written by Hovil: "to the people of northern Uganda, justice looked like an opportunity to go home in safety and then pursue appropriate forms of justice."[1134] In the words of Branch:

> [The decision, on the one hand, to seek justice through punishment or, on the other, to forgo punishment in favor or justice through reconciliation, is a decision that must be made by the concrete community that is the victim of the crimes and that will have to live with the consequences of the decision. "Humanity" is too thin a community upon which to base a universal right to punish.[1135]

In this debate, everyone claimed to represent victims. Established with the assistance of the Victims Rights Working Group associated with the ICC, a new Coalition, composed largely of groups from Iteso and Lango, favored the ICC. Around the Review Conference in 2010, the Ugandan war Victims Fund and No Peace Without Justice organized tours of delegates to Northern Uganda and a soccer game in the honour of victims, in which both President Museveni and UN Secretary General Ban Ki-Moon played.

Prior to the Juba peace process, this debate became so polarized that the debate became mainly about whether international justice and traditional justice are complementary or not.[1136] According to Allen, the ICC involvement in Uganda entrenched the local justice movement to the extent that it became unpopular to pose questions or proffer views against it.[1137] Allen argued that Ugandans "like

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[1132] Ibid. at p. 8.
[1133] Ibid. at p. 5: "By questioning the ICC's involvement at that point in the conflict, those who criticized the intervention were not turning their backs on the promotion of justice. Rather, they were demanding more justice: justice that was robust and genuinely engaged with the context; justice that would contribute to, or at least complement, the promotion of fair and equal governance; and justice that would deliver."
[1134] Ibid. at p. 7.
[1135] Branch, Adam. *International Justice, Local Justice: The International Criminal Court in Northern Uganda.* Dissent (Summer 2004) p. 22.
[1136] Nouwen, Sara. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan.* Cambridge University Press (2013) p.152-153.
[1137] Allen, Tim. *Bitter roots: the "invention" of Acholi traditional justice*. In *The Lord's Resistance Army: Myth and Reality*. (Ed. Tim Allen and Koen Vlassenroot). Zed Books, London and New York, 2010 p. 242-243. Allen, Tim. *Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda,* in

decent people everywhere else, … require a functioning state to make the best of their lives, including conventional forms of legal protection from those who may oppress them."[1138] Nouwen observes that the promotion of local justice was a form of resistance against the international justice movement and attracted its own donor investment.[1139]

While opinion-makers in Northern Uganda insisted that the majority of the population opposed the ICC, the true picture of the views of the affected population, as studied in various surveys, was much more varied and complex. Scholars like Allen observed early on that privately, some Northern Ugandan leaders would express support for the Court:[1140] "Most of those I spoke to in the displacement camps mixed concern about the security implications of issuing warrants for the arrest of Kony and his senior commanders with a willingness to see them prosecuted or punished. Certainly there was no general rejection of international justice."[1141]

This led to what could be termed "survey wars." Numerous organizations conducted their own surveys of the views of victims in Northern Uganda, including local organizations (Refugee Law Project, Justice and Reconciliation Project); humanitarian organizations (Oxfam, Quaker Peace), the United Nations Office of the High Commissioner for Human Rights; and academic institutions. All claimed to have special insight either by virtue of context-related knowledge or through their methodology, whether quantitative or qualitative.

Berkeley and ICTJ contributed to this debate by carrying out a population-based survey on attitudes about peace and justice. These surveys were carried out in in four districts, including Gulu, Kitgum, Lira and Soroti. The respondents numbered around 2500 each time in total and lived both in camps and villages.[1142] The surveys were repeated over time, in 2005, 2007 and 2010.

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*Courting Conflict? Justice, Peace and the ICC in Africa,* Royal African Society (ed. Nicholas Waddell and Phil Clark) 2008 p. 52.

[1138] Allen, Tim. Ritual (*Ab)use? Problems with Traditional Justice in Northern Uganda*, in *Courting Conflict? Justice, Peace and the ICC in Africa,* Royal African Society (ed. Nicholas Waddell and Phil Clark) (2008) p. 52.

[1139] Nouwen, Sara. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan.* Cambridge University Press (2013) p.147-149.

[1140] Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army,* African Arguments, 2006 p. 138. For instance, Walter Ochora, the LCV chairman in Gulu in 2005 with extensive contact with the LRA, commented that there were many reasons why the LRA chose to remain in the bush, including access to power and women, and that the ICC would not negatively affect the ability to deal with the LRA.

[1141] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, African Arguments (2006) p. 160.

[1142] Sample sizes were calculated proportional to population size. The questionnaire used open-ended questions and was analyzed using Statistical Package for Social Science software.

The views expressed in the surveys varied over the years. In 2005, just after ICC arrest warrants were issued, when respondents were asked what they thought should happen to the LRA leaders who were responsible for violations. 66% said that they favored trial and imprisonment for the LRA, whereas only 22% said that they supported forgiveness (reconciliation and reintegration).[1143] In 2005, only 27% had heard of the ICC, mainly through the media. Up to 83% believed the Court could arrest the LRA, which may have contributed to their favorable opinion. The ICC and its supporters cited the results of the survey as scientific evidence of the presence of victims in Northern Uganda who favored their involvement. While this was undoubtedly the case, it did not reduce the political importance of the opposition of Acholi traditional and religious leaders to the ICC intervention in Uganda, nor did it address issues of perceptions.

In 2007, during the height of the Juba Peace Process, the survey was repeated with 2,875 respondents in Acholi Districts (Amuru, Gulu, Kitgum, Pader), Lango (Lira, Oyam), and Teso (Amuria, Soroti).[1144] By 2007, 60% had heard of the ICC. Of these, 54% still believed they could arrest the LRA (although in Acholi fewer people believed that than in Lango or Teso, due to outreach activities of the ICC). [1145] Opinions related to the ICC's impact on the Juba peace process appeared somewhat contradictory.[1146] It is worth noting that another general population survey taken in the whole of Uganda in 2008 showed more support for the ICC: 67 % of those who answered said they trusted the ICC either "somewhat" or "a lot."[1147]

A third survey was carried out in 2010, of 2,498 respondents across 154 villages in Amuru, Gulu, Pader, and Kitgum, Acholi districts only.[1148] This was long in the aftermath of the conflict, and up to 83% of respondents had now returned to living in villages. 85% considered that there was peace in Northern Uganda, although up

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[1143] Phuong Pham et al, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda*, ICTJ and Human Rights Center, University of California, Berkeley (July 2005) p. 26.

[1144]When victims were asked what they would like to see happen to the LRA leaders, the majority (54%) favored soft options including forgiveness, reconciliation, and reintegration; whereas around 41% still favored hard options for dealing with them. At the same time, 44% favored international trials, whereas 24.7% favored national trials and 31 % said they preferred no trials. Phuong Pham, Patrick Vinck, Eric Stover, Andrew Moss, Marieke Wierda, Richard Bailey, *When the War Ends: A Population-Based Survey on Attitudes About Peace, Justice and Social Reconstruction in Northern Uganda,* ICTJ, Payson Center, and Human Rights Center (December 2007) pp. 37-39.

[1145] Ibid. pp. 37-39.

[1146] Of those who had heard of the ICC, 65% now believed that the Court would contribute to achieving justice and 61% said it would attribute to achieving peace. But interestingly, 55% said that the ICC was helping rather than hindering the peace process, although when asked specifically about Juba, 51% had the opinion that the ICC could jeopardize the peace talks. Ibid. pp. 37-39.

[1147] See Voeten, Erik. *Public Opinion and the Legitimacy of International Courts*, 14 Theoretical Inquiries in Law (2013) p. 429 – 430: citing the Afrobarometer from 2008, www.afrobarometer.org/data/data-rounds-merged (2008).

[1148] Phuong Pham, Patrick Vinck. *Transitioning to peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda*, Human Rights Center (December 2010). ICTJ did not participate in this survey.

to 40% felt it may just be temporary. In 2010 respondents focused on basic needs and provision of services, including food (28%), agriculture, including access to land and seeds (19%), education (15%) and health services (13%). This shows an interesting shift in emphasis to the importance of livelihoods and basic services in the aftermath of conflict, according to Maslow's hierarchy of needs.

Another dramatic change in public opinion was the desire of 64% of respondents thought that it is important to hold the government accountable, whereas 19% mentioned the LRA leadership and 5% the LRA.[1149] Interestingly, the number of respondents who had heard of the ICC had gone down in 2010, from 70% to 59%. In 2010, many people had moved from camps to villages and it is likely that their interests had shifted, A majority of those who had heard of the ICC described their knowledge as being bad (66%), and this was confirmed by follow-up questions which revealed low knowledge on the Court.[1150] Just 3% said they had taken part in a meeting that discussed the Court, and less than 1% in a meeting organized by the ICC itself.[1151] Less than half who knew about the ICC (43%) felt it helped the situation, either through bringing peace and security (40%), forcing negotiations (35%), or bringing attention to the conflict in Northern Uganda (17%). The other 40% believed it had no effect, and 10% said that it hindered the situation.[1152] Interestingly 70% of those aware of the ICC still felt that Kony and the top commanders should be tried by the ICC, whereas only 28% said it should be the Ugandan Courts.[1153] In-depth interviews revealed that the ICC was perceived as more neutral and less corrupt than local courts.[1154]

Part of what these figures indicate is that quantitative surveys are a blunt instrument, often yielding contradictory information that do not give real insight into what respondents understand by complex concepts such as "justice". Nesiah critiques the survey methodology:

> [T]he interviewers retrofitted the responses they received into a finite set of "response options", so that they could be legible to the coding programmes. Thus, preferences could be recorded, tabulated and fed into an algorithm that made "local" voice politically intelligible. By "politically intelligible" I mean

[1149] Ibid. p.43. In results very similar to 2007, 29% said that the ICC was the appropriate mechanism to hold perpetrators accountable, whereas 28% said the Ugandan courts, 25% the Amnesty commission, and 8% traditional mechanisms. When asked what should happen to LRA members responsible for violence, 24% said that hey should be persuaded to come out of the bush, and 23% said they should be given amnesty. Only 16% said they should be put on trial and 13% said they should be captured. 73% said that they had already forgiven the LRA. 87% said it should not be possible to prosecute combatants who have received amnesty. Ibid. pp. 39-40.
[1150] Ibid. p.43.
[1151] Ibid. p.43.
[1152] Ibid. p. 43.
[1153] Ibid. p. 44.
[1154] Ibid. p. 44.

that it spoke to a choice set that was framed by the ICL milieu from which the survey emerged, and the target audience for the survey results.[1155]

In any case, the "survey wars" in Uganda contributed to "consultation fatigue" among affected populations.[1156] Nonetheless, these detailed surveys give some insight into how complex it is to try to discern the views of local populations.

### *2. Uganda and the (Pre-Ongwen) "Maintenance Strategy"*

From the first arrest warrants in 2005 until the arrest of Dominique Ongwen in 2015, the ICC remained an abstraction to many victims of the conflict. As stated by one civil society activist, "prosecuting five persons cannot respond to the needs of 3 million victims in the North."[1157] The Court's outreach in Northern Uganda was perceived as flawed from the outset because it started in non-Acholi areas such as Lira and Soroti, whereas the Acholi perceive of themselves as the primary victims of the conflict.[1158]

After the end of the conflict, victims and affected communities were left to return to land that did not contain infrastructure or that was far removed from schools and hospitals. In general, they resisted government pressure to move into "satellite camps",[1159] instead preferring to return home. However, in general government services such as teachers and medical staff were not deployed to the countryside in adequate numbers. They had to rebuild their own homes. In some cases, they were forced out of the camps.

The fact that the ICC did not succeed in arresting the LRA was a source of disappointment to victims, and once they realized this is the case, the Court became viewed as ineffective and its relevance diminished in their eyes.[1160] With the implementation of the "maintenance strategy" Ugandans also felt that they were longer a priority to the Court, and that the Court is turning its attention to situations "where it can deliver results."[1161]

In early 2014, around 1500 victims were listed as participants in proceedings before the ICC. In November 2013, the Court organized five regional meetings with all

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[1155] Nesiah, Vasuki. *Local Ownership of Global Governance*. JICJ, Vol. 14, Issue 4 (1 September 2016) pp. 985-1009.
[1156] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. AfricaPortal research paper, September 2013, p. 4.
[1157] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.
[1158] Ibid.
[1159] The President's half-brother Salim Saleh once showed me a pamphlet of his vision of these "satellite camps." It showed a camp surrounded by tanks, which he preceded to cross out. He envisaged that its inhabitants would work on communal farms that would stimulate the Ugandan economy.
[1160] Justice and Reconciliation Project, *The Dog that Barks But Doesn't Bite: Victims' Perspectives on the International Criminal Court in Uganda*, Policy Brief 6 (February 2013) p. 5.
[1161] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.

participating victims, in order to manage expectations in respect of the Court winding down its Uganda operations, and to present a report to the Pre-Trial Chamber. Victims expressed anxiety that the ICC is "abandoning" Uganda, but they also expressed frustration at the lack of outcomes and the failure to arrest.[1162] While many persons in Northern Uganda knew about the Court, interest levels had dropped.[1163] Instead, victims turned their attention to the Government's Transitional Justice policy.[1164] Objections to terming to holding a "commemorative" ceremony arose from the fact that some argued that justice has not yet been provided to the victims and the wounds have not yet healed. [1165]

It can be argued that the ICC intervention in Uganda did lead to an increased focus on the LRA conflict and an awareness of the plight of victims.[1166] But some ten years after the ICC opened its investigations, relatively little had been achieved by way of *concrete* impact to the victims of the conflict, either by the ICC or by the Government. On fact, the only concrete impact was through the TFV. As a result, victims conceive of the court as the "dog that barks but doesn't bite."[1167]

### *3. The Ongwen Trial: Resurgence of Ambivalence*

In a surprising twist of fate, on 21 January 2015 senior LRA commander Dominique Ongwen was arrested in CAR by US forces and handed over to the ICC, with the consent of Ugandan authorities. The Ugandan authorities considered that in spite of the establishment of the International Crimes Division, they lacked the capacity to conduct a case of the magnitude of Ongwen, due to his senior rank and their inability to protect witnesses. Affected populations too pointed to the perceived mismanagement of the Kwoyelo case in this regard.[1168] Ongwen's surrender to the ICC provoked a mixed reaction in Uganda, but has gone some way to revitalizing interest in the Court. The opening of his trial has been watched closely by thousands of victims as well as by a delegation of leaders and victim representatives who travelled to The Hague.

Dominic Ongwen is one of the most senior LRA commanders, allegedly responsible for many killings including the "Christmas massacre" which took place in Haut-Uele in DRC in 2008.[1169] He is accused of seven counts of war crimes and crimes against humanity under the Rome Statute. Acholi traditional and religious leaders still maintained that a local solution would in relation to Ongwen would be more appropriate, in particular in regard to his mixed perpetrator-victim status. Ongwen, born in 1980, himself was allegedly abducted when he was fourteen. Eventually he

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[1162] Interview with OHCHR local staff, 6 Feb. 2014.
[1163] Interview with ICC outreach officer, 6 Feb. 2014.
[1164] Interview with UCICC, 11 Feb. 2014.
[1165] Interview with OHCHR local staff, 6 Feb. 2014.
[1166] Interview with ICC outreach officer, 6 Feb. 2014.
[1167] Justice and Reconciliation Project, *The Dog that Barks But Doesn't Bite: Victims' Perspectives on the International Criminal Court in Uganda*, Policy Brief 6 (February 2013).
[1168] Refugee Law Project, *Ongwen's Justice Dilemma* (16 Jan. 2015).
[1169] Justice and Reconciliation Field Note 7, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen* (July 2008).

was groomed to become second-in-command in the LRA, most likely through beatings combined with witnessing a high degree of violence perpetrated against anyone who defied the LRA.[1170] New recruits are often subjected to cruelty, beatings and indoctrination, and forced to participate in killings from an early stage, often in a ritualistic manner.

While this does not in any way absolve him of the crimes he is alleged to have committed, it points to the challenges of accommodating a dual victim-perpetrator status in a formal legal framework.[1171] It is telling that the start of his trial, Ongwen said "it was the LRA who committed atrocities" and "LRA is Joseph Kony and not me."[1172] Other transitional justice models, such as truth commissions, are more able to deal with these complexities, without designating a person either as a perpetrator or as a victim. Some communities also expressed anxiety that the trial could complicate reconciliation between them, for instance between Lukodi village, home to most of the victims, and Awach, where Ongwen hails from.[1173]

Victims and intermediaries had a sense of being abandoned by the Court during the hibernation period of this case, but were re-incentivized to participate.[1174] Until now, 4107 victims have been admitted to participate in the trial, represented by 2 common representatives.[1175] However, the trial has been received with some scepticism relating to the narrowness of the case against Ongwen and its narrative of the conflict, including failure to hold the state responsible for protecting him; perceptions that he is kept in a "five star hotel" (the ICC detention center) while his victims live in poverty; how his family visits will be conducted when he has many wives (from forced marriage) and children. Some traditional leaders have expressed the view that the trial of Ongwen in The Hague will not help to restore broken relationships in the community.[1176] In addition, the Association of LRA Victims in the Central African Republic has called for Ongwen's case to be extended to crimes committed in the CAR between 2008 and 2014.[1177]

This points to the limitations of the ICC, which tends to base individual criminal responsibility on "situations" often defined by national boundaries, thereby failing to consider the cross-border nature of conflicts. As concluded by the Refugee Law Project, there is a need "to complement the ICC proceedings with domestic processes that provide acknowledgement to the multiple victims of the conflict, provide healing to survivors and the affected community, and take steps to promote national reconciliation and guarantee non-recurrence."[1178] At the same time, the

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[1170]Ibid. See also Van den Berg, Stephanie. Interview with Ledio Cakaj in the International Justice tribune, 12 January 2017.

[1171] See also, Refugee Law Project, *Ongwen's Justice Dilemma* (16 Jan. 2015).

[1172]Van den Berg, Stephanie. Interview with Ledio Cakaj in the International Justice tribune, 12 January 2017.

[1173] Information provided in an email by ICC outreach officer, 19 February 2015.

[1174] Information provided in an email by ICC outreach officer, 19 February 2015.

[1175] Case information sheet, https://www.icc-cpi.int/uganda/ongwen/documents/ongweneng.pdf.

[1176] Refugee Law Project, *Ongwen's Justice Dilemma* (16 Jan. 2015).

[1177]Hirondelle news agency, *Africa: Victims Want Ongwen to be tried for Crimes in Central African Republic,* 25 Feb 2015.

[1178] Refugee Law Project, *Ongwen's Justice Dilemma* (16 Jan. 2015).

victims of the Kwoyelo trial before the ICD have less access to outreach and legal representation than the Ongwen trial, further perpetuating a "hierarchy of victims."

### *4. The Innovative Approach of the TFV in Northern Uganda*

With reparations proceedings in Uganda still some way off, the TFV has in many respects represented the only concrete remedy for victims of the conflict. The work of the TFV in Uganda is generally viewed positively: most complaints pertain to its limited nature and a desire that the TFV could do more. An external evaluation of the TFV's activities in Uganda and DRC shows that it is generally viewed positively, by victims, beneficiaries, implementing partners and government agencies.[1179] The evaluation deemed its interventions as both highly relevant to the needs of victims as well as effective in improving their lives.[1180] Assistance by the TFV is granted within a community context rather than to individuals.

The overall amount currently allocated to the TFV in Uganda annually is modest, around 600K to 800K Euros. Annually, the TFV is expending around 2.5 million between Uganda, DRC and Central African Republic.[1181] The TFV has chosen mainly humanitarian organizations such as CARE as implementing partners, but this means it has not generally partnered organizations that carry out human rights work and that are also in direct contact with conflict-related victims.[1182] At first, CARE was reluctant to associate publicly with the TFV due to fears about potential backlash for its Sudan operations, but now its affiliation is more widely known. The TFV does not work with the same intermediaries as the OTP or else it may create the impression that they are sharing information with the OTP, which could endanger them.[1183]

A key area of TFV activity in Uganda is surgical assistance, including removal of bullets, treatment of burns, fitting of prosthetic devices, and surgical reconstruction including for victims who suffered facial disfigurement or SGBV. Funding from the TFV enabled several thousands of these surgical procedures.[1184] Psychological rehabilitation includes "individual or group-based trauma counseling; community-led healing of memories initiatives; and community sensitization around the rights of victims to promote reconciliation".[1185]

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[1179] External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions, ICRW and the TFV, November 2013.
[1180] Ibid. p. 8.
[1181] In recent years, State Parties have started to contribute more to the TFV, with an increase from around 1.5 million to 4.5 million annually.
[1182] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.
[1183] Interview with TFV Director, 7 May 2014.
[1184] Interview with TFV Head of Office, Kampala, 6 Feb. 2014.
[1185] External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions, ICRW and the TFV, November 2013 p. 12.

The "maintenance strategy" of the Court provided a particular challenges for the TFV and the sustainability of its programs. In 2013, the TFV in Uganda stopped providing material support[1186] and focused on rehabilitation, both physical and psychological. The TFV planned to carry over some of its programs to the Ministry of Health, for sustainability reasons. Other programs too, such as psychological rehabilitation ought to be taken over by the Government in due course. In this sense, the work of the TFV can link to a broader debate on state responsibility for reparations, but that link for the moment appears indirect. While a policy for transitional justice drafted by JLOS includes a section on reparations, it has not been implemented. The Governments seems to fear the financial implications of reparations, while local populations have consistently stressed their desire for acknowledgement, apologies, requests for forgiveness and memorials.[1187]

The mandate of the TFV presents many challenges in practice. For instance, burn victims must demonstrate that their injuries have a nexus to the conflict. HIV also presents a problem in terms of the mandate, because again there must be a nexus to the conflict. The limitations on the jurisdiction of the Court reflect in the TFV, and create selectivity and an element of randomness. At the same time, the TFV makes an effort to refer those who are ineligible to other humanitarian actors.

The TFV selects its partners through competitive bidding processes. The partners of the TFV select beneficiaries, but the TFV holds an annual workshop in terms of training them on how to select. Significantly, beneficiaries can include victims of UPDF crimes, even though these are not under investigation. The recent external evaluation of the TFV commends it for "working with community resources and promoting local ownership."[1188]

One of the main challenges facing the TFV in Northern Uganda is a lack of knowledge about its work.[1189] The TFV's choice to work in a low profile manner and in a way that is not directly affiliated with the Court has meant that victims may not associate it with the ICC's reparative justice.[1190] Those who know about the TFV seemed to view its efforts positively and wished it could do more.[1191] Conversely, the UN recently became more relaxed about collaboration with the TFV as the

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[1186] Material support previously provided included access to safe shelter, vocational training, reintegration programmes for former child soldiers, support for village savings and loans, education grants, and classes in accelerated literacy: Ibid. at p. 8.
[1187] OHCHR, *The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011).
[1188] External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions, ICRW and the TFV, November 2013 at p. 8.
[1189] Interview with LSE researcher, 9 Feb. 2014. She said out of the 200 rape victims that she interviewed for her doctoral thesis, none knew about the TFV.
[1190] See Tenove, Chris. *Uganda and the International Criminal Court: Debates and Developments,* Africaporal, Backgrounder No. 60 (July 2013).
[1191] Interview with TFV Head of Office, Kampala, 6 Feb. 2014.

general sensitivity in regard to the ICC has dropped. Some take the view that a closer relationship between the TFV and the ICC could have enhanced the image of the ICC in Northern Uganda by being responsive to the needs of victims.[1192] Its activities are not always associated with the Court. The approach taken by the TFV is also perceived as regional: among the Acholi that know about the TFV there is a perception that the TFV favored non-Acholi areas.[1193]

The degree of separation between the TFV and the Court meant that the TFV did not benefit from the Court's outreach program. The TFV has operated in a very low-key manner but one that has caused some to question its transparency. For a body specializing in parceling out resources, an absence of public communications led many to question how to access the fund or how decisions on beneficiaries were made. Only recently have the TFV and Court staff started appearing at joint functions, including at a round of consultations held in November 2013.

The larger debate on reparations in Uganda remains unresolved. The Ugandan government argued that the Peace, Recovery and Development Plan (PRDP) for the North ought to be viewed as reparations, [1194] even though it lacks an element of recognition of victims, and is largely funded by international donors.[1195] Victim advocates argue that the Government of Uganda should take responsibility for awarding reparations, and that the international community should encourage but not replace it in this function.[1196] As mentioned, the government of Uganda has not yet instituted a reparations policy. Instead, it engaged in *ad hoc* payments, which are perceived to be overtly political, amounting to "vote-buying."

Rehabilitation, both physical and social, also remains an urgent need among victim communities.[1197] Many victims may have experienced disfigurement or mutilation and need psychological as well as physical rehabilitation. In particular, women returnees face stigmatization and may experience great difficulty in issues of

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[1192] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.
[1193] Interview with Head of Justice and Reconciliation Project, Gulu, 9 Feb. 2014.
[1194] The PDRP also only allocates a miniscule amount of around 3% to peacebuilding: Interview with OHCHR, 10 Feb. 2014. Also, some women do not find it sufficiently engendered.
[1195] But victims have highlighted that PRDP is aimed at "prosperity for all" rather than recognition of individual harm suffered. ICTJ Briefing, *Reparations for Northern Uganda: Addressing the Needs of Victims and Affected Communities*, September 2012. Victims stressed: "justice itself is an experience and a process, and not simply an outcome." OHCHR, *The Dust Has Not Yet Settled": Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xix. Moreover, the PRDP is "spread thin" and covers 40 districts in the broader North, including many areas which were not affected by the LRA conflict. Interview with religious leader, Gulu, 9 Feb. 2014.
[1196] OHCHR, *The Dust Has Not Yet Settled: Victims' Views on the Right to Remedy and Reparation: A Report from the Greater North of Uganda* (2011) p. xxi: In regard to international donors and development partners, interviewees said that they do not "want the to "high-jack" planning processes on truth-recovery or reparations."
[1197] JRP, *The Dog That Barks But Doesn't Bite: Victims Perspectives on the International Criminal Court in Uganda,* Policy Brief No. 6 (February 2013).

marriage, land ownership and inheritance.[1198] The ICC Trust Fund has focused some of its programs on these victims.[1199] Land distribution in Acholi remains contested, and the Government is alleged to have taken advantage of displacement in Acholi areas to grab land for commercial enterprises.[1200] At the same time, the work of the TFV is making a valuable contribution in the Ugandan context.

B. Kenya: Do No Harm? The Victims of Post-Election Violence.

The former Prosecutor often cited the Kenyan case as exemplary in terms of local support for the ICC. A South Consulting poll in June 2011 recorded an 89% level of public support for the ICC cases, just after the six Kenyans originally appeared in court. [1201] In 2012, up to 68% are said to have supported the ICC, according to an Ipsos Synovate poll.[1202]

However, over time the ICC was essentially outmaneuvered in the court of public opinion, after Kenyatta and Ruto decided to join forces and run together for Presidential elections, in 2013. During their election campaign Kenyatta and Ruto mounted a media campaign against the ICC, which impacted significantly on public opinion. In a poll of 2000 Kenyans released 10 July 2013, just after the elections, an Ipsos Synovate poll showed that 39% of Kenyans still supported the ICC. This was a drop of 16% from April 2013.[1203] A South Consulting Poll of 2629 Kenyans said that 50% were still happy with the ICC prosecutions.[1204] (This poll corresponds with the ICC's own perception of its level of support, which it described as "consistent", putting it at around 50%, with some regional variability).[1205] Thirty-three percent of those posed by South Consulting said that they did not think that the ICC has the "real suspects".[1206] In 2014 it was said that up to 65% of Kenyans wanted the ICC cases to be dropped.

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[1198] ICTJ Briefing, *Reparations for Northern Uganda: Addressing the Needs of Victims and Affected Communities* (September 2012).
[1199] External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions, ICRW and the TFV, November 2013 at p. 17.
[1200] Atkinson, Ron. *Land issues in Acholi in the Transition from War to Peace.* The Examiner, Issue 4, (Dec. 2008), pp.3-9, 17-25. See also Ronald R. Atkinson & Arthur Owor. *Land Grabbing': The Ugandan Government, Madhvani, and Others versus the Community of Lakang, Amuru District.* Journal of Peace and Security Studies. Vol. 1. Special Issue: Unfolding Land Conflicts in Northern Uganda (December 2013).
[1201] Maliti, Tom. *Two Opinion Polls Show Support for the ICC Drops In Kenya*, The ICC Kenya Monitor, 31 July 2013.
[1202] Maliti, Tom. *Two Opinion Polls Show Support for the ICC Drops In Kenya,* The ICC Kenya Monitor, 31 July 2013.
[1203]Ibid.
[1204]Ibid.
[1205] Interview with ICC staff member, Nairobi, 4 Feb. 2014.
[1206] Maliti, Tom. *Two Opinion Polls Show Support for the ICC Drops In Kenya*, The ICC Kenya Monitor, 31 July 2013.

The reasons for this shift in perception are manifold. The ICC did not engage consistently after it first got involved, and ended up ceding valuable political space.[1207] The ICC invested considerably in media training to increase the knowledge base, but this approach was not effective in countering the media manipulation.[1208] While the ICC continued to receive significant support from civil society groups in Kenya, this was not sufficient to counter the media machinery from the politicians.

Prior to the discontinuance of the cases against Kenyatta and Ruto, perceptions of the former Prosecutor in Kenya were already very mixed. The perception was that the OTP did a "shoddy investigation."[1209] On one visit he diverted to an animal sanctuary to adopt a leopard cub, a move that caused one observer to dryly remark that: "He came a jurist and left a tourist."[1210] Another observed that the narrative of "witness coaching" spread by the politicians was more powerful than the narrative of "witness intimidation" of the Court.[1211]

After their election, Kenyatta and Ruto mounted a massive diplomatic offensive against the ICC.[1212] It is estimated that money spent on trying to eliminate the arrest warrants must have been formidable, including money spent on travel to lobby AU; money to pay lawyers – all at the Kenyan taxpayer's expense.[1213] The ICC became the "only game in town" and the Kenyan government was described as a "single issue government."[1214] Some blame it for distracting from, or complicating the pursuit of victims, claims for other forms of transitional justice, such as reparations, truth-seeking, or local prosecutions.

Kenya successfully rallied the African Union to make several declarations against the ICC for unfairly targeting African leaders for prosecution. The AU amended the Protocol on the African Court of Human and People's Rights to give it jurisdiction over Rome Statute crimes. In February 2016, the Kenyans sought AU backing for a proposal for African States to withdraw from the ICC. The legal nature of the proposal is not binding.[1215]

Kenya also waged war against the ICC at the Assembly of States Parties. During the 12th ASP in 2013, the Kenyan delegation lobbied for an amendment to Article 27,

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[1207] Interview with civil society activists, Nairobi, 3 Feb. 2014.
[1208] Interview with ICC staff member, Nairobi, 4 Feb. 2014.
[1209] Interview with ICC staff, Nairobi, 4 Feb. 2014.
[1210] Interview with civil society activists, Nairobi, 3 Feb. 2014.
[1211] Interview with ICC staff, Nairobi, 4 Feb. 2014.
[1212] Pilling, David, *International Justice has a problem in Africa,* Financial Times, 13 April 2016 at https://next.ft.com/content/1a33f4a2-fff7-11e5-ac98-3c15a1aa2e62.
[1213] See Institute for Security Studies, *The International Criminal Court's cases in Kenya: origin and impact*, No. 237 (August 2012) p. 15.
[1214] Interview with civil society member, Nairobi, 4 Feb. 2014...
[1215] The Guardian, *African Union members back Kenya's plan to leave the ICC*, 1 Feb. 2016, www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court.

which allows the ICC to prosecute sitting government officials, but it was averted because it was raised too late. However, amendments were made to the Rules of Procedure and Evidence to as to excuse the accused from attending trial.[1216] During the 13th ASP Kenya demanded a wide range of amendments to the Rome Statute, including to Article 63 on the presence of the accused, to Article 27 on serving heads of states, to Article 70 on offences against the court to be extended to ASP officials, to Article 112 on the Independent Oversight Mechanism and to the preamble of the Rome Statute to add regional criminal jurisdictions to the complementarity principle. None of these demands succeeded. The diplomatic offensive culminated in a push by Kenya in the 14th session of the Assembly of States Parties to prevent the application of amended Rule 68 (on the admission of prior recorded testimony from some witnesses who later recanted) in the Ruto and Sang cases. The Assembly of States Parties affirmed that in its interpretation the Rule could not be applied retroactively.[1217]

A third prong of the strategy of the Kenyan politicians to defeat the ICC was actual interference with, or intimidation of witnesses. In a motion of 19 December 2013, the Prosecutor requested an adjournment in the trial of Kenyatta.[1218] She informed the Court that one witness had to be withdrawn from the case after admitting that he had provided false evidence, and another had indicated he was no longer willing to testify. In light of this, the Prosecutor considered that it had insufficient evidence to proceed to trial.

This development raises the very difficult question of why the Prosecution chose to proceed on a thin evidentiary base in such a high profile case, one where witnesses were likely to come under severe threat or pressure. On 5 Dec. 2014, the Prosecutor announced the withdrawal of charges against Uhuru Kenyatta.[1219] On March 13, 2015, she terminated proceedings in the case altogether. On 5 April 2016, the Trial Chamber dismissed charges against Ruto and Sang, on grounds of insufficient evidence.[1220] The Prosecutor had attempted to enter prior statements of witnesses who later recanted into evidence, but this attempt was denied. A number of cases were initiated against Kenyans for contempt of court and tampering with or

[1216] These included Rules 100 (place of proceedings); Rule 68 (prior recorded testimony); and Rules 134bis (presence through the use of video technology and Rule 134ter (excusal from presence at trial), and Rule 34quarter (excusal from presence at trail due to extraordinary public duties).
[1217] See Amnesty International, *Kenya: State Parties run dangerously close to interfering with the ICC's independence*, 15 November 2015 at https://www.amnesty.org/en/latest/news/2015/11/kenya-state-parties-run-dangerously-close-to-interfering-with-the-iccs-independence/
[1218] *Prosecutor versus Uhuru Muigai Kenyatta*, Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, 19 Dec. 2013 ICC-01/09-02/11.
[1219] Marlies Simmons and Jeffrey Gettleman, *International Court Ends Case Against Kenyan President in Election Unrest: Uhuru Kenyatta Faced Allegations of Crimes Against Humanity*, International New York Times, 5 Dec. 2014.
[1220] Alistair Leathhead, *Dismissal of case against Kenya's Ruto huge blow against the ICC,* 5 April 2016 at http://www.bbc.com/news/world-africa-35974172.

intimidating witnesses. This also ended the case for reparations, although Judge Eboe-Osuji' argued that reparations should be possible.[1221]

There can be no doubt that the dismissal of the cases against Kenyatta, Ruto and others has damaged the perception of the ICC in Kenya and beyond. It has also meant that witnesses continue to be denied justice. Nonjo Mue, Chairperson of ICJ Kenya has said:

> All this has left the victims of post-election violence deeply wounded, frustrated, and desperate, not knowing where else to look for justice. Going forward, the ICC and all those who support international criminal justice must now embark on some honest soul-searching to reflect on the lessons learned from the Kenyan cases and how the Rome Statute system can be strengthened to deliver meaningful justice to victims of atrocity crimes, especially where alleged perpetrators go on to seize control of the state and to use it to shield themselves against accountability.[1222]

Years after the Post-Election Violence in Kenya, little has been done to ease the plight of victims. A 2012 report by two prominent Kenyan NGOs found that the efforts of the Kenyan government focused almost entirely on displacement and not on the other violations such as killing, infliction of permanent injury, or SGBV.[1223] The report is the result of interviews with more than 800 respondents in around 200 sites. [1224]A few victims said received medical care, but victims of SGBV reported that they did not receive psychosocial support or anti-retroviral drugs. No comprehensive program was implemented on adequate livelihood assistance or compensation. Many people continued to live in camps, in very tenuous circumstances. Programs to deal with displacement suffered from corruption.

Suggestions for reparations in Kenya under national law are relatively recent, and are conceived of mostly as compensation, which raises budgetary concerns. The TJRC report incorporated a reparations policy for victims, drafted by civil society. This reparations policy was submitted to the National Assembly but it has not yet been passed. In 2015, President Uhuru Kenyatta created a USD 110 million Restorative Justice Fund for victims of human rights violations, but it is not yet

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[1221] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, 16 June 2016 .

[1222] See https://ciccglobaljustice.wordpress.com/2016/04/07/rutosang-icc-case-thrown-out-explanation-and-reaction/.

[1223] See also Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. AfricaPortal research paper (September 2013) p. 13.

[1224] KHRC and Kenyan Section of International Commission of Jurists, *Elusive Justice: A Status Report on Victims of 2007-2008 Post-Election Violence in Kenya (*2012).

operational and has raised questions of how it will combine with the TJRC reparations policy.[1225]

The government mainly focused on giving IDPs money to buy land, but the effort was described as politicized, and there are allegations that mainly Kikuyu have benefited.[1226] The Trust Fund for Victims has not been able to deploy to Kenya, in part due to the risks posed by its association with the Court. The net result is that to date, victims are still awaiting any tangible benefits from the ICC process, and are coming under increasing threat. Victims have therefore not received any significant assistance from either their own Government or the Court.

In October 2014, the Kenyan National Assembly enacted the Victim Protection Act. This act is for all victims, not just victims of human rights violations. It gives victims certain rights to participate in trials. It also gives them rights to security and medical treatment, and a right to take part in restorative procedures. The Act sets up a Victim Protection Trust Fund, which can award compensation. However, the Act is not yet fully functional.[1227] In 2015, President Kenyatta set up a $110 million "Restorative Justice Fund" but it is not operational.

But it is not just that the victims have not been remedied. The Kenya case also showed the weaknesses in the Court's ability to protect victims and witnesses in the face of an uncooperative government. Several witnesses were killed. The ICC Prosecutor admitted: "several people who may have provided important evidence regarding Mr. Muthaura's actions, have died, while others are too afraid to testify for the Prosecution."[1228] As highlighted by the Court, "[i]n light of the two Kenya cases, the Court will face new and unprecedented challenges regarding witness protection, especially due to the large size of families requiring protection."[1229] The case against Kenyatta and Ruto both collapsed due to witnesses recanting their testimony or refusing to testify. On 6 January 2015, media sources reported that a key witness in the Ruto trial was killed.[1230] The ICC said he acted outside the instructions of the witness protection and returned home. In light of the Kenyan situation the ability of the Court to ensure effective witness protection was questioned, and had to be reviewed.

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[1225] Kenney, Emily, *What next for the victims of Kenya's post-election violence?* International Justice Monitor (26 May 2016). http://www.ijmonitor.org/2016/05/what-next-for-the-victims-of-kenyas-post-election-violence/.

[1226] Interview with civil society member, Nairobi, 5 Feb. 2014.

[1227] Hansen, Thomas Obel. *Prosecuting International Crimes in Kenyan Courts?* Paper Presented at "The Nuremberg Principles 70 Years Later: Contemporary Challenges," (21 Nov. 2015).

[1228] Statement by ICC Prosecutor on the Notice to withdraw charges against Mr Muthaura, 11 March 2013.

[1229] Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, 11 Oct. 2013, ICC-ASP/12/41 at para. 24.

[1230] BBC, Kenya *ICC defence witness in Ruto trial killed,* 6 Jan. 2015, http://www.bbc.com/news/world-africa-30703876.

For its part, the Kenyan Witness Protection Agency, formed under the Attorney General's Office pursuant to provisions found in the International Crimes Act, is underfunded and has so far failed to gain the trust of the public. The situation in Kenya in respect of witnesses remains tenuous. Kenya is currently undergoing a series of police reforms that may have impact on witness protection in the long run,[1231] but the Kenyan situation failed to meet the "do no harm" standard that should at a minimum apply in ICC interventions.

## V. Conclusion: Does the ICC Serve Victims?

The centrality of victims to the ICC project has been heralded as a milestone in international criminal law, and sets an important normative standard. The moral acknowledgement, or expressivism through the recognition of actual victim participants in trials, is significant to victims themselves, as shown in the Berkeley study. At the same time, the ICC is a first attempt to apply the rights of victims in the context of mass atrocity in order to guarantee sufficient remedies. The question is whether sufficient numbers of victims will see their rights converted to remedies. Otherwise the expressive value of victim participation and reparations risks remaining hollow, or symbolic.

Victim participation is under strain, with inconsistent approaches between Chambers and differing interpretations amongst the judges. Technical rules that exclude large numbers of potential victims in ICC cases give rise to the danger of creating new "hierarchies of victims" within situations or "juridified victimhood." The ICC remains primarily a criminal forum, which as a practical matter continues to be focused on investigating and trying alleged perpetrators in as fair a manner as possible while trying to consider the interests of victims. Whether it can guarantee "meaningful participation" is still a matter of debate.

The limited rights of victims to participate at the preliminary examination stage means that victims are often not included in strategic decisions made by the OTP, particularly in cases of Security Council or State referrals.[1232] While the Prosecutorial Strategy states that the ICC may take into account the interests of victims, and consult them in various ways, this process is informal in nature. It is often at the preliminary examination stage when crucial perceptions of the ICC are formed, as will also be seen in the next Chapter. The Court should reconsider how to incorporate the views and interests of victims into preliminary examinations in a more rigorous and structured way.

A positive development is the victim representation process carried out pursuant to Art. 15 (3) of the Rome Statute in the Afghanistan situation. In late 2017 and early

[1231] http://www.ssrresourcecentre.org/2015/10/09/police-reform-in-kenya-challenges-and-opportunities/

[1232] Article 15 of the Statute does require the interests of victims to be taken into account if a case is opened *proprio motu*.

2018, the Victims Participation and Reparations Section reached out to organizations knowledgeable on Afghanistan and gathered the views of victims and those affected by the conflict. 784 victim representations (165 individual and 534 collective) were gathered in this way, mostly through online forms or emails. Only 6 percent were attributable to women. The vast majority of victim representations (680) "overwhelmingly supported" the Prosecutor to open an investigation in Afghanistan, stating that "the current government of Afghanistan cannot overpower the warlords … and there are a lot of crimes happening, but no one can raise their voices because of fear."[1233] What victims may seek is the ability for more interaction with the Court.

What emerges from the practice of the ICC to date is the progressive exclusionary nature of the proceedings of the Court. The more advanced a prosecution before the ICC, the smaller the realm of potential victims who receive recognition under the processes of the Statute. It is not always obvious who self-identifies as victims in any given society, but categories are often much broader than those designated by the ICC. For instance, in Northern Uganda affected populations expressed the view that all IDPs should be considered victims.[1234] In Colombia, IDPs are the largest category of victims of the conflict and are eligible for reparations. This raises the question whether judicial reparations are appropriate for victims of longstanding, complex and intricate violence, a phenomenon that leaves large numbers of persons affected in its wake. Creating hierarchies of victims is by definition not inclusive, and can lead to additional horizontal grievances, which can even contribute to future conflict.[1235]

Some proponents of victim participation argue that victims should have a role in helping to define the charges, pointing to cases such as *Lubanga,* where witnesses did bring evidence about sexual violence and other crimes.[1236] The position of the OTP is that defining the charges falls within its prerogative. At the same time, the

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[1233] Final Report of the VPRS https://www.icc-cpi.int/RelatedRecords/CR2018_01452.PDF, Annex I para. 46 (f). Victims supported opening an ICC investigation for the following reasons: "investigation by an impartial and independent court; bringing the perceived perpetrators of crimes to justice, ending impunity; preventing future crimes; knowing the truth about what happened to victims of enforced disappearance; allowing for victims' voices to be heard, and protecting the freedom of speech and freedom of press in Afghanistan." Most cited reasons against an investigation (in only 15 of the representations) included security concerns and doubts as to whether perpetrators would be brought to justice. Victims want the ICC to investigate murder; attempted murder; imprisonment or other severe deprivation of liberty; torture; rape; sexual violence; persecution; enforced disappearance of persons; other inhumane attacks; attacks against civilian population; attack against protected objects; destruction of property; pillage; forced displacement; outrages upon personal dignity; and denying a fair trial. Annex I, paras. 39 and 40, 44. This is beyond the scope of the current investigations.

[1234] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. AfricaPortal research paper (September 2013) p. 11.

[1235] United Nations: World Bank. Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict (2017).

[1236] Pena, Mariana and Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?* International Journal of Transitional Justice Vol. 7 (2013) p. 529.

highly selective nature of charges brought by the ICC can be perceived as arbitrary by victims.[1237] Furthermore, focus group discussions have indicated that indifferent situations, the focus of victims and affected populations may be on political rather than legal accountability.[1238] The narrow range of perpetrators and charges within the range of the Court's purview serves as a source for considerable disappointment for many victims, who may feel that their perpetrators or the crimes they suffered are excluded.[1239] These are all limitations on the expressive value of the Court's reparative processes.

The architecture of the Court does not really allow for a ready connection or engagement to be built with victim communities. Moreover, the narrative attached to the arrest warrants produced by the Court often portray a partial, possibly one-sided view of a complex and prolonged conflict. Beyond their role in participating in the proceedings, which is increasingly carefully circumscribed, most victims of the conflicts are not a *visible* presence either at the Court or at the Assembly of States Parties. This is in spite of the fact that "those directly afflicted by the violence have a greater moral claim to the internalization of justice – certainly methodologically- than global audiences."[1240] The Court is cast into the role of "savior" in the well-known "Savages, Victims and Saviors" paradigm."[1241] Victims become a passive recipient of the Court's interventions, rather than an active participant in their own justice needs. This may contribute to "new incarnations of hegemony", a complaint against the human rights movement."[1242] Branch argues in the context of Uganda:

> The legitimacy of any specific model of justice for dealing with legacies of extreme violence will not come from any putatively absolute, unquestionable sources, whether human rights or tradition, but only through autonomous, democratic processes of deliberation, organization, and action within the community, including those who have been subject to violence themselves.[1243]

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[1237] A comparison may be made with the Special Court for Sierra Leone, which indicted 13 individuals and conducted the trials of ten individuals, including Charles Taylor, former President of Liberia. In a recent survey, in 2012, respondents overwhelmingly said they felt the SCSL had prosecuted those bearing the greatest responsibility, but that there could have been additional prosecutions further down the chain of command. The Special Court for Sierra Leone and No Peace Without Justice, *Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone and Liberia,* September 2012.

[1238] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 18.

[1239] FIDH, *Enhancing Victims' Rights Before the ICC: A View From Situation Countries on Victims' Rights at the International Criminal Court (*November 2013) p. 10.

[1240] Drumbl, Mark. *Atrocity, Punishment and International Law*, Cambridge University Press (2007) p. 132.

[1241] Makau, Matuna. *Savages, Victims, and Saviors: The Metaphor of Human Rights,* Harvard International Law Journal, Vol. 42, No. 1 Winter (2001) p. 204.

[1242] Odinkalu, Chidi Anselm. Senior Legal Officer, Interights, *International Politics, African Realities: Human Rights and Democracy in Africa* (15 February 2000).

[1243] Branch, Adam . *Uganda's Civil War and the Politics of ICC Intervention* 21 Ethics and International Affairs (2007) 179 at pp. 193-194. See also Weisburd, Mark. I*nternational Law and the Problem of*

The Court's reparative effect can be enhanced through more extensive and genuine interaction and consultation with local communities in the context of ICC interventions. This is not to suggest that will result in uniform views by victims. Donais remarks that "in any post-conflict society, there is never a single coherent set of local owners, and that post-conflict spaces, almost by definition, are characterized far more by diversity and division than by unity."[1244] Nonetheless, the strict dichotomy and competition between "universal values" legitimacy or local ownership, can at least partially be bridged through an increased knowledge of context and through consultations with victims and affected communities on the local level.

Art. 68(3) may allow for Trial Chambers to concentrate the participation of victims to particularly decisive stages of the proceedings, such as the confirmation of charges; the decision on a no-case-to-answer; the closing statements of the trial; the sentencing process; or crucial parts of the appeal insofar as they touch on the interests of victims. So far, this approach has not been taken and victims have been allowed to participate in the full length of the trial, but this is causing significant logistical strain on trials. This would also save funds that could be reallocated to the Trust Fund for Victims.

Many victims will seek to equate justice with reparations, but the Court is still relatively inexperienced with reparations proceedings. The Court itself has defined reparations with proportionality as a central tenant, one that effectively cannot be met. The Trust Fund for Victims has insufficient resources to provide for proportional reparations. It is unlikely that States will pay much more into the TFV in the future. While research indicates that many victims support the key notions behind the ICC, including accountability for crimes, impartiality, reparations or assistance for victims, and victim participation, their implementation is what victims often find unsatisfactory.[1245] It is even more difficult for victims to accept that the Court lacks enforcement powers,[1246] a fact that may render arrest warrants

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*Evil*, 34 Vanderbilt Journal of Transnational Law (March 2001) p. 279: "If we insist on the importance of the responsiveness of the institution to the affected group, implicitly we admit the importance of according primacy to local values over any which may be preferred by persons acting at the international leave. Once we make that admission, we have questioned the legitimacy of any international approach to evil other than the one that is responsive to all the states in the world and not imposed on any. At least, we are forced to question values and institutions whose claims to superiority and universality seem to rest on no more than mere assertions."

[1244] Donais, Timothy. *Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peace-building Processes,* Peace & Change, Vol. 34, No. 1 (January 2009) p. 11.

[1245] Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda.* AfricaPortal research paper (September 2013) p. 4.

[1246] FIDH, *Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims' Rights at the International Criminal Court* (November 2013) p. 11. See also Tenove, Chris. *International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda*. AfricaPortal research paper (September 2013) p. 16,

rather abstract other than their symbolic value. The Court therefore faces a large expectation gap in the countries where it works.

The fact that victims currently have to specify the harm they suffered in detail gives rise to expectations and is likely to lead to further disillusionment and disappointment in this regard when these harms are not compensated. In fact, many victims may wish the Court to do more, but this will prove impossible. This should call into question the judicial approach to reparations taken in the Rome Statute.

The TFV has the potential to avoid "hierarchies" of victims by focusing on broader categories. The TFV can also engage with victims much more directly. In addition, more emphasis should be put on the domestic level: in Colombia significant results have been achieved through a national administrative reparations program. Moffet has argued for "reparative complementarity."[1247]

In Uganda, victims and affected communities were not formally consulted about the referral and remain ambivalent about the ICC, as evident in reactions to the Ongwen trial. When victims and affected communities oppose an ICC intervention, this casts fundamental doubt on its "universal values" legitimacy. As the Court moved into its "maintenance strategy", the only concrete benefit for many victims was the operation of the TFV, which are also limited in scope. The impact of the Ongwen trial has done little to reverse the ambivalence felt in Northern Uganda about the ICC.

In Kenya, regrettably the TFV could not be activated, and national reparations have not been awarded. Finally, the Kenya case serves as a stark reminder of how the noble intentions of the Rome Statute are not enough, and how proceedings can go awry even in the face of original support from victim and affected communities. The tragedy is that victims of Post-Election Violence received no remedy, and witnesses have been killed. In this case, even the "do no harm" principle was not met.

Further satisfaction for victims may come from a more context-sensitive approach, which would require a deeper knowledge of what justice actually means to victims, from a moral, social and cultural perspective rather than just from a legal or political perspective.[1248]Transitional justice options made available to victims on the national level may be more accessible to victims, and may go further in meeting their need for interaction and their expectations. For instance, national measures for victims, including reparations or various forms of assistance, and can concretely

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[1247] Moffet, Luke. *Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the ICC,* International Journal for Human Rights, Vol. 17 Issue 3 (2013) pp. 368-390. READ

[1248]Porter, Holly, *After Rape: Justice and Social Harmony in Northern Uganda*, London School of Economics and Political Science, 2013 at http://etheses.lse.ac.uk/717/. See also Erin Baines, *Spirits and social reconstruction after mass violence: Rethinking transitional justice.* African Affairs 109/ 436 (2010) pp. 409-430. This will be further elaborated in the next chapter.

improve victims' lives within the short to immediate term. Such national options may be more durable, and may yield a more meaningful sense of acknowledgement for victims, thus leading to more expressive value within their own societies.