Chapter 14

Victims' participation in the proceedings, reparations to victims, and lessons learnt, unlearnt, and might have been learnt

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Abstract

For a long time, victims of the 'unimaginable atrocities that deeply shock the conscience of humanity' were considered at best as mere witnesses, testifying for the Prosecutor – and more rarely for the Defence. It was only with the adoption of the Rome Statute in 1998 that victims were placed at the heart of international criminal justice, recognising for the first time the possibility of their participating in proceedings before an international criminal jurisdiction and claiming reparation for the harm they suffered. But what is the reality from the victims' perspective?

Keywords: Victims, participation, reparations, International Criminal Court, Trust Fund for Victims

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When I was assigned the topic of the present article, initially to deliver a speech at the conference organised by the Central European Academy and the Ferenc Mádl Institute of Comparative Law, I was left with the daunting realisation that said topic would demand in and of itself a two-day conference, and not merely a 20-minute intervention. I am therefore grateful for the opportunity to dwell at greater length on the merits of the matter here.

The views expressed here are of course my own and not in any way those of the International Criminal Court (the "ICC" or the "Court"). They have been forged by my 20 years spent working for this institution, 19 of them at the independent Office of Public Counsel for Victims which, as you will understand from reading the present article, gave rise to strong feelings of hope but also a lot of frustrations from the victims' point of view.

In his address before the UN General Assembly to present the 2022 ICC's annual report, the President of the Court highlighted the fact that '[t]he ICC has ushered in a concept of international criminal justice that gives victims a strong role in the process'.[1] He specified that '[the Court] invests a great deal of time, energy and resources into making the victim- centred vision of justice a reality'.[2] In the same vein, a year later, in his address to the UN General Assembly to present the 2023 annual report, the President asserted that '[…] reparations to victims feature prominently in the Court's work'.[3]

But what is the reality from the victims' perspective?[4]

1. Hopes by way of lessons learnt

For a long time, victims of the 'unimaginable atrocities that deeply shock the conscience of humanity'[5] were considered at best as mere witnesses, testifying for the Prosecutor – and more rarely for the Defence.

In the aftermath of the Second World War, the International Military Tribunals of Nuremberg and Tokyo never considered the lot of victims, except through the lens of prosecuting the crimes that caused the harms they experienced. And despite the fact that the human rights conventions and the evolution of human rights in general

1 ICC, 2022, p. 3.
2 Ibid. p. 7.
3 ICC, 2023, p. 6.
4 This article is not intended to be a rebuttal of the ICC President's addresses before the UN General Assembly in 2022 and 2023. Rather, these public addresses are referred to in the present article as two examples, among many others, of commonly held views about the central role afforded to victims by the Rome Statute. It is these commonly held views that the article will explore in depth *infra*.
5 See Rome Statute, Preamble, para. 2.

progressively nudged international law towards the idea that victims are entitled to compensation for the harms they suffered, when the International Criminal Tribunals for the former Yugoslavia and Rwanda were created, victims were all but ignored. They did not have *locus standi* in court nor were they able to claim reparation for the harms they had suffered – this possibility was only available in the national sphere.

It is only with the adoption of the Rome Statute in 1998 that victims were placed at the heart of international criminal justice, recognising for the first time the possibility that they could participate in proceedings before an international criminal jurisdiction and claim reparation for the injustices inflicted upon them.

And indeed, one of the main innovations of the Statute of the International Criminal Court has been to shift the role of victims from witnesses – constituting the majority of the incriminatory or exculpatory evidence presented in the proceedings – to one of autonomous participants. Accordingly, before the ICC, victims no longer merely support the thesis developed by one of the parties, namely the Prosecution or the Defence, as traditionally understood until the ratification of the Rome Statute, but also have the ability to present 'their views and concerns' in an independent manner, benefiting from rights and obligations deriving from their status of participants in the proceedings.

From the beginning, one knew that the full recognition of these rights would not be an easy task. Suffice to remember that despite the term "victim" being used no less than 39 times in the Rome Statute adopted in 1998, the negotiators only agreed on the term's definition in the Rules of Procedure and Evidence four years later.[6] It is all the more surprising that said definition is based on articles 1 and 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations in 1985. [7]

6 See Rule 85 of the Rules of Procedure and Evidence: *'Definition of victims for the purposes of the Statute and the Rules of Procedure and Evidence:*
(a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.

7 See Articles 1 and 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations, 1985: *'1. 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.*
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization'.

In the same vein, except for providing that the victims may express their 'views and concerns',[8] and granting specific rights to victims at specific stages of the proceedings, the legal founding instruments of the Court do not offer details about the modalities of their participation in the proceedings. Pursuant to rule 89 (1) of the Rules of Procedure and Evidence, the relevant Chamber shall 'specify the proceedings and manner in which participation is considered appropriate'. Accordingly, the effectiveness of victims' participation in the proceedings depends on the interpretation of these statutory provisions by the judges of the Court, and even more so by the victims' lawyers, who are responsible for representing their interests.[9]

One might have feared that said modalities would vary a lot depending on the composition and specificities of each relevant Chamber, but for a very long time this was not the case. The first victims to be authorised to participate in trial proceedings before the Court were allowed to do so even though the presiding judge was British[10] and therefore traditionally not acquainted with the concept of victims' participation. From thereon, Chambers have repeatedly stated that the modalities of participation shall ensure a meaningful – as opposed to a symbolic – participation by victims.[11]

This notwithstanding, I do not intend to suggest that everything has been easy viewed from the victims' bench. In fact, the very essence of victims' participation has been the subject of heated controversy and debate since its introduction in the Court's founding legal texts.

The first challenge was to establish that the principle of victims' participation as such was no longer questionable and to shift the attention of detractors (including, in particular, virtually all Defence teams involved in cases before the Court) to the implementation of this principle.

8 See Article 68(3) of the Rome Statute: *'Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence'.*

9 See e.g. 'Major results of the negotiations and the evolution of international criminal law', in Benedetti, Bonneau, and Washburn, 2014, pp. 152-154.

10 See The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-1119, Trial Chamber I, Decision on victims' participation, 18 January 2008. Although, to be fair, the first decision in relation to victims participating in proceedings before the Court was issued by Pre-Trial Chamber I (presided over by a French judge), in the same case, on 17 January 2006. See Situation in the Democratic Republic of the Congo, No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006.

11 See e.g. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, No. ICC-01/04-01/07-474, Pre-Trial Chamber I, Single Judge, Decision on the set of procedural rights attached to procedural status of victim at the pre-trial stage of the case, 13 May 2008, para. 157.

The large number of victims seeking to participate, the delay induced in the proceedings by the review of the requests for participation and the subsequent participation of victims are amongst the concerns most often expressed.[12]

These concerns triggered various measures developed by the Court for the management of application forms completed by victims, pertaining to the mandate of the Victims Participation and Reparation Section (the "VPRS"). Indeed, although the participation of victims shall not be seen as a right to initiate proceedings or a "*constitution de partie civile*" in civil law, victims may participate in all stages of the proceedings provided they applied in writing, preferably before the beginning of the phase of the proceedings they wish to participate in.[13] The relevant Chamber issues a *prima facie* ruling, based on the information contained in the application for participation submitted by the victims through the VPRS. Provided that the relevant Chamber is satisfied that their personal interests are affected in conformity with article 68(3) of the Rome Statute, victims may: respond to submissions from other participants in the proceedings once they have been authorised to participate; express their views and concerns to the Chamber, orally or in writing;[14] have access to the documents contained in the record of the case; be notified of public documents filed, as well as

12 See e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-901-Corr-tEN, Defence, Corrigendum to the response to the application by victims a/0001/06, a/0002/06, a/0003/06 and a/0105/06 for authorisation to participate in the appeal proceedings relating to the 'Decision on the confirmation of charges', 16 May 2006, para. 33: *'[p]articipation by the victims will also result in delaying the proceedings insofar as the Defence will also be required to respond to the observations of the victims, which calls into question Mr Lubanga's right to an expeditious trial'*.

13 Regulation 86(1) of the Regulations of the Court: *'For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, sub-regulation 2. These standard forms shall, to the extent possible, be made available to victims, groups of victims, or intergovernmental and non-governmental organizations, which may assist in their dissemination, as widely as possible. These standard forms shall, to the extent possible, be used by victims'*. However, the decision of the Appeals Chamber of 19 December 2008 calls into question the pervasive participation of victims at the situation stage, limiting this right to "judicial procedures" only, that is "a judicial cause pending before a Chamber". See 'Situation in the Democratic Republic of the Congo', No. ICC-01/04-556, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008 and Situation in Uganda, No. ICC-02/05-177, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, 2 February 2009. See also Situation in the Republic of Kenya, No. ICC-01/09-24, Pre-Trial Chamber II, Decision on victims' participation in the proceedings in the Republic of Kenya, 3 November 2010, para. 9.

14 See e.g. The Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-2027, Trial Chamber II, Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims, 21 December 2011, para. 19.

of confidential documents;[15] present evidence;[16] challenge the admissibility and relevance of evidence submitted by the other participants;[17] question witnesses, including experts;[18] and testify as witnesses or appear in person before a Chamber.[19]

Measures were put in place by the Chambers in order to assist the Prosecution and the Defence with regard to the observations that they can file on said applications pursuant to rule 89(1) of the Rules of Procedure and Evidence. This includes measures such as the extension of deadlines by the relevant Chambers and the allocation of additional resources.[20] Lately, the generalisation of the so called "A-B-C approach" has further streamlined the process.[21]

At the same time, some of the judges' rulings that were at least partly responsible for one of the all-too-frequent criticisms against victims' participation – the fact that it is time-consuming – have been simplified.

This was the case, for instance, with respect to the practice established by the Appeals Chamber, and applied consistently until 2015, whereby victims wishing to participate in an interlocutory appeal would not have an automatic right to that

15 See e.g. The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, No. ICC-01/09-01/11-460, Trial Chamber V, Decision on victims' representation and participation, 3 October 2012, paras. 64–69.

16 See e.g. The Prosecutor v. Germain Katanga, No. ICC-01/04-01/07-2288, Appeals Chamber, Judgment on the appeal of Mr Katanga against the decision of Trial Chamber II of 22 January 2010 entitled 'Decision on the modalities of victim participation at trial', 16 July 2010, para. 37.

17 See e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-1119, Trial Chamber I, Decision on victims' participation, 18 January 2008, para. 109; and No. ICC-01/04-01/06-1432, Appeals Chamber, Judgment on the appeals of the prosecutor and the defence against Trial Chamber I's decision on victims' participation of 18 January 2008, 11 July 2008, para. 101.

18 See e.g. The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-619, Trial Chamber VI, Decision on the conduct of proceedings, 2 June 2015, para. 64.

19 See e.g. The Prosecutor v. Germain Katanga, No. ICC-01/04-01/07-2517-tENG, Trial Chamber II, Decision authorising the appearance of victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09, 9 November 2018, para. 18.

20 See e.g. The Prosecutor v. Laurent Gbagbo, No. ICC-02/11-01/11-86, Pre-Trial Chamber I, Second decision on issues related to the victims' application process, 5 April 2012; The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-67, Pre-Trial Chamber II, Decision establishing principles on the victims' application process, 28 May 2013; The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, No. ICC-01/09-01/11-17, Pre-Trial Chamber II, first decision on victims' participation in the case, 30 March 2011; The Prosecutor v. Dominic Ongwen, No. ICC-02/04-01/15-299, Pre-Trial Chamber II, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3 September 2015; and The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, No. ICC-01/09-01/11-249, Pre-Trial Chamber II, single judge, decision on victims' participation at the confirmation of charges hearing and in the related proceedings, 5 August 2011, paras. 79–80.

21 See the Chambers Practice Manual, 2023, paras. 96–97, in particular para. 96 (iii) and (iv): '(iii) In consideration of victims' applications a high degree of discretion is afforded to Chambers. (iv) In the exercise of such discretion and depending on the number of victims applications, Chambers may adopt the so called A-B-C Approach under which the Registry classifies the applicants into three categories: (i) applicants who clearly qualify as victims ('Group A'), (ii) applicants who clearly do not qualify as victims ('Group B'); and (iii) applicants for whom the Registry could not make a clear determination for any reason ('Group C') '.

effect, even if they participated in the proceedings that gave rise to the appeal.[22] As a result, victims wishing to participate in an interlocutory appeal were required to re-apply to do so. As noted by Judge Song, this approach 'leads to delays in the appellate process that are difficult to reconcile with the principle of expeditious proceedings'.[23] It has since fortunately been abandoned.[24]

In addition, the role played by victims and their lawyers in the proceedings has been the subject of controversy. Defence teams routinely claim that victims' participatory rights should be limited so as to ensure that they are not equated with "second prosecutors", which would be contrary to the rights of the defendant and a fair and impartial trial.[25]

However, the role of the victims is clearly distinct from that of the Prosecution,[26] and if their respective interests frequently converge – particularly concerning the

22 See e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-1335 OA 9 and OA 10, Appeals Chamber, Decision, *in limine*, on victim participation in the appeals of the prosecutor and the defence against Trial Chamber I's decision entitled 'decision on victims' participation', 16 May 2008.

23 See Situation in Darfur, Sudan, No. ICC-02/05-138 OA OA2 OA3, Appeals Chamber, partially dissenting opinion of Judge Song, 18 June 2008, para. 5.

24 See The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, No. ICC-02/11-01/15-172 OA6, Appeals Chamber, reasons for the decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate', 31 July 2015, para. 16.

25 See e.g. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-1711-tENG, Defence, response by the defence for Mathieu Ngudjolo Chui to the observations of the legal representatives of the victims on access to certain documents and the preparation of the examination of prosecution witnesses. Article 68(3) of the Statute, para. 10: *'[a]ccessing material in the way in which they seek to do so would result in the Legal Representatives of the Victims being elevated to the status of second Prosecutors against the accused. That would upset the judicial balance by creating a real and manifest inequality of arms; the Defence would then be faced with a team of Prosecutors attacking it on all sides'.*

26 As noted by Pre-Trial Chamber I, *'the Statute grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on several occasions, victims participating in criminal proceedings cannot be regarded as 'either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different'.* See Situation in the Democratic Republic of the Congo, No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, para. 51. This approach was reiterated by Pre-Trial Chamber II. See The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiyo and Dominic Ongwer, No. ICC-02/04-01/05-155, Pre-Trial Chamber II, single Judge, Decision on 'prosecutor's application to attend 12 February hearing', 9 February 2007, p. 4. Finally, according to Judge Song, '[t]*he victim of a crime has a particular interest that the person allegedly responsible for his or her suffering is brought to justice; this interest goes beyond the general interest that any member of society may have in seeing offenders held accountable. This interest of victims is acknowledged in the Statute and the Rules of Procedure and Evidence'.* See the Separate Opinion of Judge Song, included The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-925 OA8, Appeals Chamber, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007, 13 June 2007, para. 13. Also see Schabas, 2017, pp. 333–359, and Scomparin, 2003, pp. 335–352.

discovery of the truth and the responsibility of perpetrators – it often happens that their views and attitudes differ on both procedural and substantive issues.[27]

2. Frustrations by way of lessons that should be unlearnt

2.1. Frustrations in relation to the participation of victims

The principle of the participation of victims in international criminal proceedings is no longer in dispute but, at this juncture, one could question whether it is fully effective. And indeed, the Court does not, lately, appear to be truly victim oriented.

The fragmentation of the legal framework regarding victim participation, and the ensuing unpredictability, is an important source of complexity which limits the victims' access to justice.

For example, the diverging practice of the Court regarding applications for participation is indicative in this respect. The VPRS, mandated to inform victims of their right to apply to participate in the proceedings and/or seek reparations, also assists them by developing standard application forms.[28] However, no certainty exists in this area given the proliferation of forms adopted to date. Initially, the form included 17 pages to be completed by victims. It was laborious, difficult to understand and limited to the issue of participation in the proceedings, with a separate form to be completed for reparations.[29] Subsequently, victims were to complete a seven-page form to participate in all phases of the proceedings, including reparations.[30] Thereafter, forms have been adopted in each of the separate cases pending before the

27 See e.g. the Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia in which the Office of Public Counsel for Victims (the "OPCV") opposed the decision of the Office of the Prosecutor not to open an investigation. See the Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, No. ICC-01/13-65, OPCV, Victims' response to the application for judicial review by the Government of the Union of the Comoros, 29 March 2018. In the Gbagbo and Blé Goudé case, the victims and the Office of the Prosecutor have taken divergent positions with regard to the disclosure of certain information contained in the application forms compiled by victims. See e.g. The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, No. ICC-02/11-01/15-915-Red OA9, Appeals Chamber, Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017. In the Ntaganda case, the legal representative of the former child soldiers challenged the Prosecutor's position that the international prohibition of rape and sexual slavery against recruits only covered child soldiers and argued that it should cover all recruits regardless of their age. See The Prosecutor v. Bosco Ntaganda, OPCV, No. ICC-01/04-02/06-Corr-Red, Closing brief on behalf of the former child soldiers, 7 November 2018, paras. 90–112.

28 See Regulation 86 of the Regulations of the Court.

29 This form was initially used in the Lubanga and Katanga and Ngudjolo Chui cases.

30 This form was used in all subsequent cases until 2012 when the "partially collective" approach was introduced in the Gbagbo case.

Court – although they tend to be similar to the ones used in the Ntaganda[31] and Ongwen[32] cases: a two-page application form with, as for the latest version thereof, a section dedicated to reparations.[33]

It is therefore very difficult for the victims, or their legal representatives, to navigate this system because of the different standard forms – some similar, some not – that have been adopted by the Court. In turn, this fragmentation prevents them from applying to participate if they do not have access to the relevant information. Moreover, these forms are targeted to the specific needs assessed by each relevant Chamber, but not necessarily to the needs of legal representation. For instance, the simplified one-page-long form contains basic information allowing the relevant Chamber to rule *prima facie* on the victim status of the individual who filled out the form,[34] but does not always allow his or her lawyers, often appointed at a very late stage,[35] to best represent his or her interests.

Another important source of frustration for victims – and their lawyers for that matter – derives from the founding texts themselves in that victims cannot request leave to appeal decisions that impact their personal interests. This possibility is only provided for in relation to reparation orders.[36] It is very complicated to justify, let alone explain to the victims themselves, why they cannot appeal decisions that affect them directly, such as a decision not granting applicants the victim status that would allow them to participate in the proceedings, a decision denying authorisation to open an investigation, a decision by the Prosecutor not to open an investigation, or a decision not to grant them the status to participate in the proceedings. Not recognising these interests might result in irreparable prejudice to the victims awaiting justice. Not only would they have waited for years for the opening of an investigation into the crimes they suffered and the possible prosecution of the alleged perpetrators, but their reasonable expectation of seeking and obtaining justice would be lost, with no realistic alternative forum for redress available to them. Therefore, their only hope for redress in this instance is for the Prosecution to appeal, or seek leave to appeal, a remote possibility as the

31 See The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-67-Anx, Pre-Trial Chamber II, Annex to the decision establishing principles on the victims' application process, 28 May 2013.

32 See The Prosecutor v. Dominic Ongwen, No. ICC-02/04-01/15-205-Anx, Pre-Trial Chamber II, Annex to the decision establishing principles on the victims' application process, 4 March 2015.

33 See The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, No. ICC-01/12-01/18-37-tEN, Pre-Trial Chamber I, Decision establishing the principles applicable to victims' applications for participation, 24 May 2018; and The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision establishing the principles applicable to victims' applications for participation, 5 March 2019.

34 See The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-449, Trial Chamber VI, Decision on victim participation at trial, 6 February 2015, paras. 30, 36, and 44.

35 See *infra*.

36 See Article 82(4) of the Rome Statute.

Prosecution seems less and less inclined to do so when it concerns matters affecting the interests of victims.[37]

Most of the victims' frustrations appear to result from decisions by the different Chambers of the Court. But again, absent any possibility of appealing such rulings, the only possibility for a victims' lawyer like me is to raise awareness of these frustrations. I will just provide some examples of jurisprudence to illustrate why there are legitimate reasons to question the Court's victim-orientation.

Of course, one bears in mind some of the recent important decisions regarding the guilt or innocence of several accused persons before the Court. I am not, of course, questioning the outcomes of these proceedings which are integral to a functioning justice system and for which I personally prepare my clients from the outset of the proceedings. However, in some cases, the focus was not sufficiently placed on the needs of the victims: one naturally thinks about the acquittal on appeal, in June 2018,[38] of Mr Bemba, whereas the reparation proceedings were well underway two years after the initial conviction, and four years after closing the trial.[39] The acquittal of Messrs Gbagbo and Blé Goudé in January 2019,[40] on the other hand, was more problematic since no reasoning was issued until 16 July 2019,[41] making it impossible for the victims' lawyers to explain the verdict to their clients for over five months.

In the same vein, the initial refusal of Pre-Trial Chamber II, in April 2018, to authorise the Prosecutor to proceed with an investigation in Afghanistan as it would not serve the interests of justice at the time, despite confirming the Court's jurisdiction over the crimes allegedly committed, tends to indicate that the Court is not victim centred.

37 Just to mention a few, see the absence of any reaction whatsoever on the part of the Office of the Prosecutor when Pre-Trial Chamber II did not confirm part of the charges in the Saïd case. See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC/01/14-01/21-218-Red, Pre-Trial Chamber II, Public redacted version of decision on the confirmation of charges against Mahamat Said Abdel Kani, 9 December 2021. See also, in the same case, the absence of any reaction from the Office of the Prosecutor when Trial Chamber VI adopted an unprecedented scope of the charges restricting the possibility for victims to participate in the proceedings (The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC/01/14-01/21-472, Trial Chamber VI, Decision on the scope of the charges, 6 September 2022). See also infra.

38 See The Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-3636-Red, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's Judgment pursuant to Article 74 of the Statute, 8 June 2018.

39 See The Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-3343, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016.

40 See The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, No. ICC-02/11-01/15-T-234-ENG ET, Trial Chamber I, Transcript of the hearing held on 15 January 2019.

41 See The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, No. ICC-02/11-01/15-1263, Trial Chamber I, Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion, 16 July 2019.

In addition, decisions on victims' participation in proceedings and on common legal representation are often adopted by Chambers at a very late stage.[42] For example, the decisions concerning the participation of victims in the *Ntaganda* case were adopted between 15 January and 7 February 2014, while the hearings on the confirmation of charges started on 10 February 2014. Similarly, in the *Saïd* case, the appointment to represent the victims at the confirmation of the charges hearing was issued on 6 October 2022, six days prior to said hearing which took place from 12 to 14 October 2022. As for the trial proceedings, Trial Chamber VI appointed the victims' Common Legal Representative on 22 July 2022 for a trial starting on 26 September the same year, and the same Chamber only issued its final decision on the participation of victims more than a year after the start of the trial.[43]

As a result of these very late appointments, the victims' lawyers concerned have very little time to familiarise themselves with all the documents submitted by the Prosecution over the course of several months, as they are only able to access the case file shortly before the start of the procedural phase in which the victims are allowed to participate. The same is true of the familiarisation with the Court's system (for external legal representatives),[44] with the clients' files and even more so with their clients themselves.

Further, Chambers often set very short deadlines for submitting observations on matters that directly affect the personal interests of victims – such as requests for the release of a defendant or issues concerning the Court's jurisdiction and the admissibility of cases. This often makes it impractical for lawyers to consult with the victims they represent – who reside in remote locations and are often difficult to reach – in order to be able to present their views and concerns. The deadline to respond to

42 For instance, the decision on the common legal representation of victims in the Bemba case was adopted on 10 November 2010, less than two weeks before the opening of the trial, which took place on 22 November 2010. (see The Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-1005, Trial Chamber III, Decision on common legal representation of victims for the purpose of trial, 10 November 2010). Similarly, the decisions concerning the participation of victims in the Ntaganda case were adopted between 15 January and 7 February 2014, while the hearings on the confirmation of charges started on 10 February 2014 (see respectively The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-211, Pre-Trial Chamber II, Decision on victims' participation at the confirmation of charges hearing and in the related proceedings, 15 January 2014 and No. ICC-01/04-02/06-251, Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings, 7 February 2014). More recently, the decision on the participation of victims and their legal representation in the Saïd case was issued 6 days prior to the opening of the confirmation hearing which took place from 12 to 14 October 2021 (see The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-199, Pre-Trial Chamber II, Decision on victim applications for participation in the proceedings and on legal representation of victims, 6 October 2021).

43 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-460-Red, Trial Chamber VI, Second decision authorising victims to participate in the proceedings, 8 November 2023.

44 In addition to acclimatising to life in The Hague, outside representatives need to be familiar with the fact that the Court is an electronic court. Therefore, a large number of computer systems must be mastered. See in this sense, Behind the Scenes, The registry of the International Criminal Court, 2010, pp. 19–21.

submissions, initially set at 21 days, was reduced to 10 days,[45] but in fact the relevant Chambers often further shorten this period to only a few days.[46] It is evidently simple for Defence counsel to confer with their respective clients – who are usually detained in the Scheveningen Prison, one kilometre away from the Court – but this consultation is much more difficult when legal representatives have to contact hundreds of people living in remote areas thousands of kilometres away from the Court, in situation countries, within a very short time frame.

What is more, very restrictive approaches have been adopted by Chambers concerning the geographical and temporal scopes of the charges which clearly do not take into account the full extent of the victimisation.

Victims have routinely questioned the scope of the charges included in existing arrest warrants[47] or the limited scope of the charges.[48] As such, they have systematically argued that the charges brought against accused persons represent an infinitesimal part of the crimes committed during the periods covered by the charges.[49] This directly impacts their rights as the very limited selection by the Prosecution of crimes included in the charges that were committed during relevant periods prevents a large number of victims from participating in the relevant proceedings. And one does not need to mention the recent plain and simple withdrawal of all charges against Mr Mokom by the Prosecution on 17 October 2023.[50]

Even more worrisome is the recent jurisprudence of the Court with regard to the rights of victims to participate in proceedings,[51] and the interpretation of the rel-

45 See Regulation 34(c) of the Regulations of Court.

46 See e.g. The Prosecutor v. Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08-2030, Trial Chamber III, Decision shortening time for observations on the "*Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo*", 28 December 2011; and The Prosecutor v. Charles Blé Goudé, No. ICC-02/11-02/11-202, Trial Chamber I, Single Judge, Order reducing the time limit to file responses to ICC-02/11-02/11-201, 28 January 2015. However, most such decisions (of which there are many) are simply emailed to the parties and participants by the relevant Chambers.

47 See e.g. The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, No. ICC-02/04-01/05-420-Red2, OPCV, Views and concerns of victims in relation to the proceedings against Mr. Dominic Ongwen, 26 January 2015.

48 See e.g. The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), No. ICC-02/05-01/20-403-Red, Common legal representatives of victims, victims' submissions under Rule 121(9) of the Rules of Procedure and Evidence, 24 May 2021; and The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-336-Red, Common legal representatives of victims, *Soumissions écrites des Représentants légaux communs des Victimes en vertu de la règle 121-9 du Règlement de procédure et de preuve*, 15 October 2019.

49 See e.g. The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), No. ICC-02/05-01/20-403-Red, common legal representatives of victims, victims' submissions under Rule 121(9) of the Rules of Procedure and Evidence, 24 May 2021, paras. 27–42.

50 See The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka, No. ICC-01/14-01/22-275, Office of the Prosecutor, Notice of withdrawal of the charges against Maxime Jeoffroy Eli Mokom Gawaka, 16 October 2023.

51 See in particular Articles 67(1) and 74(2) of the Rome Statute and regulation 52 of the Regulations of the Court.

evant founding texts by all other Chambers having ruled on participation of victims in the proceedings.[52]

In September 2022, Trial Chamber VI issued a very restrictive decision on the scope of the charges in the Saïd case – limiting said scope to specific incidents confirmed by the Pre-Trial Chamber in its Confirmation Decision,[53] despite clear indication by the latter that 'the specific criminal acts listed by the Prosecution in respect of the confirmed charges must not […] be considered as definitive or exhaustive' and that 'the extent of the victimisation in connection with the confirmed charges [is] broader than the individual examples it specifically mentioned in the operative part of the Confirmation Decision'.[54] By virtue of this ruling, Trial Chamber VI ordered the Registry to proceed with reassessing all victim applications – including those of 20 victims already admitted to participate by the very same Chamber – arguing that in order to be granted participating status, victims need to demonstrate that 'events described in the victims' application forms correspond to at least one of the alleged crimes which have been confirmed'.[55]

However, in accordance with the constant jurisprudence of the Court, in order to be allowed to participate in the proceedings, victims are simply required to demonstrate *prima facie* that they are victims within the meaning of rule 85 of the Rules of Procedure and Evidence, according to the following criteria: (i) the applicant has established his/her identity as a natural person; (ii) the applicant is alleged to have suffered harm; and (iii) the personal harm reported by the applicant resulted from an incident falling within the temporal, geographic and material parameters of the case.[56] Limiting the scope of the charges to specific incidents confirmed by the Pre-

52 See e.g. The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-1391, Trial Chamber V, Fifteenth decision on victims' participation in trial proceedings (Group A), 5 May 2022, para. 1, referring to The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision establishing the principles applicable to victims' applications for participation, 5 March 2019, paras. 29-41. See also The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-211, Pre-Trial Chamber II, Decision on victims' participation at the confirmation of charges hearing and in the related proceedings, 15 January 2014, para. 25; and Situation in the Democratic Republic of the Congo, No. ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2,VPRS 3,VPRS 4,VPRS 5 and VPRS 6, 17 January 2006, para. 79.

53 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC/01/14-01/21-472, Trial Chamber VI, Decision on the scope of the charges, 6 September 2022. See also The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-218-Red, Pre-Trial Chamber II, Decision on the confirmation of charges against Mahamat Said Abdel Kani, 9 December 2021.

54 See The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), No. ICC-02/05-01/20-626, Pre-Trial Chamber II, Decision on the "Prosecution's application to amend the charges", 14 March 2022, para. 20. See also The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-218-Red, Pre-Trial Chamber II, Decision on the confirmation of charges against Mahamat Said Abdel Kani, 9 December 2021.

55 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-490, Trial Chamber VI, Order for the reassessment of victims' applications, 27 September 2022, para. 6.

56 See e.g. The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-1391, Trial Chamber V, Fifteenth decision on victims' participation in trial proceedings (Group A), 5

Trial Chamber in its Confirmation Decision means that all other victims who were detained at the *Office Central de Répression du Banditisme* (Central Office for the Repression of Banditry) between 12 April 2013 and 30 August 2013 – while Mr Saïd, a senior member of the Seleka coalition, was *de facto* the head thereof – are no longer considered to be participating victims because they cannot show a direct link with the specific incidents listed as examples in the Confirmation Decision.[57]

According to the victims participating in said case, this approach not only constitutes 'an unprecedented step backwards for the rights of victims to participate in proceedings before the ICC', but also clearly leads to an 'absurd and discriminatory situation'.[58] Indeed, victims who demonstrate a *prima facie* link to the charges as confirmed by the Pre-Trial Chamber,[59] but no *prima facie* link to one of the incidents – as per the Chamber's restrictive interpretation – are not allowed to participate in the proceedings despite having been detained during or around the same time as other victims who are allowed to participate in the proceedings because they fall within the scope of one of said incidents.[60]

This jurisprudence, in and of itself, is sufficient to cast serious doubt on whether the approach adopted by judges can be deemed victim-centred, as mandated by the

May 2022, para. 1, referring to No. ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision establishing the principles applicable to victims' applications for participation, 5 March 2019, paras. 29-41. See also The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), No. ICC-02/05-01/20-556, Trial Chamber I, First decision on the admission of victims to participate in trial proceedings, 14 January 2022, para. 4; The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, No. ICC-01/12-01/18-37-tENG, Pre-Trial Chamber I, single Judge, Decision establishing the principles applicable to victims' applications for participation, 24 May 2018, para. 48; and The Prosecutor v. Bosco Ntaganda, No. ICC-01/04-02/06-650, Trial Chamber VI, Second decision on victims' participation in trial proceedings, 16 June 2015, paras. 10 and 18.

57 In this sense, see The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-310-Red, Common legal representative of victims, victims' response to the prosecution's application to amend the charges (ICC-01/14-01/21-294-Red), 16 May 2022. See also The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-640-Red, Trial Chamber VI, Second decision authorising victims to participate in the proceedings, 8 November 2023.

58 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-512, Common legal representative of victims' response to the 'Updated registry assessment report on previously transmitted victim applications for participation in trial proceedings' (ICC-01/14-01/21-498), 24 October 2022, paras. 3, and 22-24; No. ICC-01/14-01/21-310-Red, Public redacted version of "Victims' response to the 'Prosecution's application to amend the charges' (ICC-01/14-01/21-294-Red)" No. ICC-01/14-01/21-310-Conf-Exp, dated 16 May 2022, paras. 16-19. See also The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-657-Red, Common legal representative of victims, Public redacted version of "Victims' observations on the 'Report on the status of eight incomplete victim applications for participation in trial proceedings'" (ICC-01/14-01/21-650), No. ICC-01/14-01/21-657-Conf, dated 1 December 2023, 5 December 2023, para. 17.

59 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-218-Red, Pre-Trial Chamber II, Decision on the confirmation of charges against Mahamat Said Abdel Kani, 9 December 2021.

60 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-657-Red, Common legal representative of victims, Public redacted version of "Victims' observations on the 'Report on the status of eight incomplete victim applications for participation in trial proceedings' (ICC-01/14-01/21-650) No. ICC-01/14-01/21-657-Conf, dated 1 December 2023, 5 December 2023, para. 17.

Rome Statute. Similar restrictive approaches have now been adopted with regard to the questions that victims' lawyers can pose to witnesses. For example, victims' lawyers are not allowed to ask general questions on the responsibility of the accused in the Yekatom and Ngaïsona case,[61] whereas said questions directly concern the interests of their clients. In limiting the victims' right to question witnesses, the Presiding Judge clearly stated: 'questioning by the victims' representatives should restrict itself to the harm of the victims and not act, to put it figuratively, so to speak, as a prosecution *bis*'.[62]

In the same vein, in the Saïd case, the victims' lawyer is not allowed to question insider witnesses. Indeed, while ruling on a request to question an insider witness who was present at the time of the detention of all direct victims, the Trial Chamber ruled that 'the proposed topics [for questioning] are too broadly formulated and do not specifically relate to victims she represents'[63] thereby expressly limiting the legal representative's questioning to 'matters relevant to the personal interests of the victims, such as harm the victim may have personally suffered or observed'.[64] These restrictions imposed on the questioning of witnesses demonstrate a very restrictive approach to victimisation by the judges of the Court and would appear to run against the established principle recalled *supra* that participation of victims needs to be effective, as opposed to symbolic.

These examples represent only a small portion of the dangerous trend that appears to be developing before the Court: principles are affirmed, namely that the participation of victims shall be meaningful – as opposed to symbolic – but it can be argued that, in reality, recent practice prevents victims from effectively enjoying their rights.

2.2. Frustrations in relation to reparation proceedings

As already mentioned, the right to request reparations for the harms suffered by victims constitutes the other "revolution" of the Rome Statute.

Indeed, historically, the harms suffered by victims of war were, in some cases, compensated through the payment of war indemnities to the Government of their country of origin, as the State is deemed to act on behalf of its nationals. However, despite the numerous conflicts of the second half of the 20th century, it was only in 1991 that the very first compensation system for victims of war by the State at fault

61 See The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01/14-01/18-631, Trial Chamber V, Initial directions on the conduct of proceedings, 26 August 2020, para. 19: 'Consequently, and irrespective of whether the Prosecution has elicited information on a certain point relevant to the alleged crimes, the CLRV's questioning is limited to matters relevant to the personal interests of the victims'.

62 See e.g. The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, No. ICC-01-14-01-18-T-048-Red2-ENG CT WT, Transcript, 7 July 2023, p. 6, lines 8–10.

63 See The Prosecutor v. Mahamat Saïd Abdel Kani, No. ICC-01/14-01/21-T-017-Red-ENG CT, Transcript, p. 39, lines 20–21.

64 *Idem*, p. 39, line 25, to p. 40, line 1.

was created. The Security Council, in the aftermath of the Gulf War, set up a Commission to deal with the requests arising from the occupation of Kuwait and to decide on the compensation.[65] Today, in accordance with contemporary human rights law, it is generally recognised that victims of international crimes can claim reparations for the harm they have suffered. The Basic Principles on Reparation stipulates that victims are entitled to the following forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[66] Therefore, the Rome Statute provides for the possibility to grant reparations to victims of atrocities.[67]

Article 75 of the Rome Statute, which now provides for the possibility for judges of the Court to award reparations to victims, at the request of the victims or *proprio motu* without a specific request being made in this respect, is indeed a real innovation. Until the adoption of the Rome Statute, not a single international jurisdiction had ever granted reparations to victims for harm of any kind that they have suffered. For example, the Statutes and Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and Rwanda only provided for the return of property to owners who had been defrauded,[68] while compensation for victims was expressly left to the discretion of the domestic courts.[69] Moreover, as with the *ad hoc* international tribunals, the Special Court for Serious Crimes in Timor-Leste and the Special Court for Sierra Leone do not have the power to order reparations, even though their Statutes were largely inspired by the Rome Statute.

When scrutinising the advancement of the reparation proceedings before the Court, it seems easy to congratulate ourselves for the implementation of the reparation orders in the Katanga and the Al Mahdi cases[70] which concerned a small number of victims[71] and were geographically very circumscribed,[72] and as such do not represent the normal extent of the cases pending before the Court.

65 See Resolutions 687 (1991) and 706 (1991) adopted by the Security Council respectively on 3 April 1991 and 15 August 1991.

66 See the 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 (2005).

67 See Article 75 of the Rome Statute.

68 Pursuant to Article 23(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 24(3) of the Statute of the International Tribunal for Rwanda, *'[i]n addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners'*. See also Rule 105 of the Rules of procedure and evidence of the International Criminal Tribunal for the Former Yugoslavia.

69 See common Rule 106 of the Rules of procedure and evidence of the International Criminal Tribunal for the Former Yugoslavia and of the Rules of procedure and evidence of the International Tribunal for Rwanda.

70 See the Report of the Board of Directors of the Trust Fund for Victims to the Assembly of States Parties on the activities of the Trust Fund for the period 1 July 2021 to 30 June 2022 (2022), para. 21.

71 According to the Report on the activities of the International Criminal Court (2023), 297 victims of the attack on the village of Bogoro (para. 42)

72 According to the Report on the activities of the International Criminal Court (2023), 1,450 victims solely in the city of Timbuktu (paras. 63–64).

Apart from these two cases, suffice to say that regarding the first case in which an accused was convicted that is, the Lubanga case, of 2,462 individuals deemed eligible, only 998 former child soldiers were benefiting from service-based reparations in the form of medical treatment, psychological rehabilitation and socio-economic support in 2023,[73] 20 years after the commission of the crimes they suffered when they were below 15 years of age and eight years after the Appeals Chamber instructed the Trust Fund for Victims (the "TFV") to present a draft implementation plan for collective reparations to the relevant Trial Chamber.[74] In the meantime, Mr Lubanga Dyilo was released after having served his sentence of 14 years of imprisonment on 15 March 2020, before reparations to victims were first implemented.[75]

The absence of tangible results can also be deduced from the Ongwen reparation proceedings. In said case, the first submissions by victims on reparation issues took place in December 2021[76] and two years thereafter, no Reparation Order has been issued by the relevant Chamber. It certainly gives the impression that Trial Chambers consider that their job is done once they issue their sentencing decisions. However, the reparation phase is of paramount importance for the victims and the Rome Statute revolution concerns not only their participation in the proceedings but also the possibility for them to obtain reparations.[77]

An additional important adverse impact on victims resides in the implementation by the TFV itself, which by virtue of article 75(2) of the Rome Statute is tasked with implementing reparation orders. Indeed, to date, victims have highlighted that the TFV's implementation of existing reparation orders seems somehow ineffective and insufficiently flexible to cover the evolving needs of victims throughout the years.[78] This is all the more problematic when the TFV is implementing reparation orders so long after their issuance. For example, in the Lubanga case, victims were consulted on their needs in 2012.[79] Since then, their needs have necessarily evolved and flexibility is therefore of paramount importance in designing reparation programmes.

73 See the Report of the Board of Directors of the Trust Fund for Victims to the Assembly of States Parties on the activities of the Trust Fund for the period 1 July 2022 to 30 June 2023 (2023), para. 28.

74 See The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-3129-AnxA, Appeals Chamber, Order for reparations, 3 March 2015, para. 78.

75 See The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-3524, Fifteenth progress report on the implementation of collective reparations as per Trial Chamber II's decisions of 21 October 2016, 6 April 2017 and 7 February 2019, 21 October 2021, para. 21.

76 See The Prosecutor v. Dominic Ongwen, No. ICC-02/04-01/15-1923-Red, OPCV, Common legal representative of victims' submissions on reparations, 8 December 2021 and No. ICC-02/04-01/15-1921, Legal representative of victims, Victims' preliminary submissions on reparations, 6 December 2021.

77 See Pellet, 2019, pp. 1651–1668.

78 See e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-3554-Red, OPCV, Réponse du BCPV au Vingtième rapport de progrès sur la mise en œuvre des réparations collectives déposé par le Fonds au profit des victimes le 6 mars 2023 et à l'Addendum déposé le 17 avril 2023, 6 September 2023.

79 See e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-2863, OPCV, Observations on issues concerning reparations, 18 April 2012.

Indeed, a former child soldier who was 20 at the time of the issuance of the initial Reparation Order might have expressed their willingness to be allotted school fees in order to resume their studies. Absent any implementation for ten years, now aged 30, their priority might no longer be the continuation of their education, but more probably the need to find a job or resources to support their family.

Moreover, in addition to the time elapsed, the implementing partners and the TFV have on occasions unilaterally adapted their programmes, thereby creating an additional source of frustration for victims.[80] To avoid such an issue, the victims' lawyers have insisted on the necessity to put in place clear and transparent processes for the benefit of victims' participation and involvement in the reparations programmes in order to guarantee that victims and affected communities are not confronted with any type of uncertainty when it comes to the content and methodologies of access to reparations. Communication is also an important factor in keeping beneficiaries adequately informed to avoid frustration and envy. This would hopefully allow for the avoidance of tensions and misunderstandings as to the extent of reparations measures, and the appearance, perceived or real, of discrimination amongst victims in cases where significant periods of time are required for measures to be implemented.[81]

* *

Despite naysayers of all sorts, victims have the right to participate in proceedings and to benefit from reparations. They should be able to enjoy these rights in a comprehensive and straightforward manner. Twenty-five years after the adoption of the Rome Statute, perhaps it is time for all the actors before the Court to get back to basics, namely the recognition that 'millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity', that 'the most serious crimes of concern to the international community as a whole must not go unpunished' and that the ICC was specifically established 'for the sake of present and future generations'.[82] Perhaps it is time to allow the victims to fully enjoy their rights, and even to broaden their role in the proceedings. Justice could benefit greatly from listening carefully to the voices of victims.

80 See e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-3533-Red, TFV, Seventeenth progress report on the implementation of collective reparations as per Trial Chamber II's decisions of 21 October 2016, 6 April 2017 and 7 February 2019, 4 May 2022, para. 25. See also in the same case, No. ICC-01/04-01/06-3531-Red, Legal Representatives of Victims, *Réponse commune des Représentants légaux des victimes au Seizième Rapport sur le progrès de la mise en œuvre des réparations collectives déposé par le Fonds au profit des victimes le 4 février* 2022, 17 March 2022.

81 In this sense, see e.g. The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-3554-Red, OPCV, *Réponse du BCPV au Vingtième rapport de progrès sur la mise en œuvre des réparations collectives déposé par le Fonds au profit des victimes le 6 mars 2023 et à l'Addendum déposé le 17 avril 2023*, 6 September 2023.

82 See Rome Statute, Preamble.

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